GUILTY PLEA ISSUES

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I. PLEADING RESTRICTIONS

A. Pleas By Right and By Permission

A defendant has an absolute right to plead guilty to the entire indictment. C.P.L. § 220.10(2); see People v. Esajerre, 35 N.Y.2d 463 (1974). The only exception is for a capital crime; otherwise, the court must accept the plea. See People v. Moquin, 77 N.Y.2d 449, 453 n. 1 (1991).

To plead guilty to less than the entire indictment, a defendant needs the permission of the prosecutor and the court. C.P.L. § 220.10(3), (4). The People must also agree to any guilty plea that "covers" other accusatory instruments. C.P.L. § 220.30(3).

This means that, if a more lenient sentence is available for the top count than the sentence the People are offering, the court can undercut the People's offer by accepting a guilty plea to the entire indictment and agreeing to impose the more lenient sentence. If the defendant accepts such an offer, the People may or may not agree to the plea being taken to the top count, or the top count and other selected counts, rather than every single count of a lengthy indictment.

The People's and court's permission is also required for a plea of "not responsible by reason of mental disease or defect." C.P.L. §§ 220.10(6), 220.15.

B. Statutory Plea Bargaining Restrictions

The Legislature has set limits on plea bargaining to prevent the People from offering a "too lenient" plea deal. The limits are set forth in C.P.L. §§ 220.10(5) and 220.30(3). In general, they apply to indictments charging either a Class A drug felony, an "armed" felony, or a "violent" felony. CHART I in the sentencing chart pamphlet sets out these limitations in easy-to-follow form.

The guilty plea limitations may be bypassed if the parties and the court agree to do so. The prosecutor can dismiss one or more counts in furtherance of the plea bargain. See People v. Pettaway, 131 Misc.2d 20 (Sup.Ct., Kings Co. 1985). Or, provided various technicalities are satisfied (see §VIII, post), the defendant can plead guilty to a Superior Court Information (SCI) that charges only a lesser crime.

Before sentence is imposed, the court may vacate a plea that violates the plea-down restrictions if it was entered unknowingly. People v. Moquin, 77 N.Y.2d 449 (1991). But once the sentence is imposed and the defendant has started serving it, the plea cannot be vacated for this reason. Matter of Campbell v. Pesce, 60 N.Y.2d 165 (1983).

In light of the Campbell rule, on appeal, you generally need not fear that the plea will be vacated over your client's objection because it violated the plea-down restrictions. It is, however, important to know about these restrictions when you are advising a client about a plea withdrawal risk. If counts were dismissed (or not submitted to a grand jury) solely in furtherance of a plea bargain, they will be revived if the plea is withdrawn, and the People and court may well be unwilling to agree to bypass the guilty plea limitations again.

II. THE BASIC RULES

A. A Guilty Plea Must Be Knowing, Intelligent, and Voluntary

A guilty plea, which amounts to a waiver of a criminal defendant's right to a trial and related rights, is valid only if it is entered knowingly, intelligently, and voluntarily. People v. Nixon, 21 N.Y.2d 338 (1967). The basic standard for assessing the validity of a guilty plea is whether it represented "a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970); People v. Francabandera, 33 N.Y.2d 429, 434 (1974). A guilty plea must be entered "with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220, 223 (1927).

Numerous factors will enter into a determination of whether a plea was knowing, intelligent, and voluntary. Obviously, true coercion, mental incompetence, or misadvice about the defendant's choices and their consequences, can invalidate a guilty plea. How carefully the plea is taken will matter. A careful, thorough plea allocution is more likely to result in a plea being upheld, while a "casual or hurried" plea is more likely to be found wanting. People v. Nixon, 21 N.Y.2d 338, 350 (1967).

There is much language in the leading cases about the readiness with which courts should permit plea withdrawal if the plea appears to have been entered less than knowingly, intelligently, and voluntarily. For example, in Nixon, 21 N.Y.2d at 354-355, the Court of Appeals said:

> It is not tolerable for the State to punish its members over protestations of innocence if there be a doubt as to their guilt, . . . or if they have not had the opportunity to make a voluntary and rational decision with proper advice in pleading guilty.
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> * * *
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> . . . [when] interpositions by defendant on sentencing raise questions, the court should be quick to offer the defendant an opportunity to withdraw his plea and at the very least conduct a hearing.

See also People v. Flowers, 30 N.Y.2d 315, 319 (1972)("The state is not so short of grist for its criminal mill that it must absorb convictions" obtained by questionable pleas). Nevertheless, New York courts are actually very resistant to granting plea withdrawal. Seeking it is most often an uphill battle.

B. *Boykin* Rights

1. The *Boykin* Rule

In Boykin v. Alabama, 395 U.S. 238, 243 (1969), the Supreme Court noted that a defendant who pleads guilty waives "several federal constitutional rights," including the right to a jury trial, the privilege against compulsory self-incrimination, and the right to confront his accusers. It went on to say, "We cannot presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243.

2. Incomplete *Boykin* Rights

In People v. Harris, 61 N.Y.2d 9 (1983), the New York Court of Appeals interpreted Boykin as mandating not "a specific recitation of rights and multiple explicit waivers," 61 N.Y.2d at 18, but rather a guilty plea colloquy that, as a whole, establishes that the defendant "knowingly, voluntarily and intelligently relinquished [his] rights upon [his] guilty plea[]." 61 N.Y.2d at 17. It noted that, in Boykin itself, the Supreme Court had cited with approval a plea colloquy that did not include a "specific enumeration of each of the rights being waived," but in which the court did "examine[] the defendant to determine whether he understands the nature of the charges, his right to trial by jury, the elements of the offense(s) and the range of permissible sentences." 61 N.Y.2d at 18.

As the Court of Appeals recognized in Harris, however, a silent record "will not overcome the presumption against waiver by a defendant of constitutionally guaranteed protections." 61 N.Y.2d at 17. It quoted the Supreme Court:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused *** intelligently and understandingly rejected [his constitutional rights]. Anything less is not a waiver.

61 N.Y.2d at 17, quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962).

In none of the colloquies the Court of Appeals found sufficient in Harris (actually a collection of several cases) was a discussion of the "Boykin rights" completely absent: In Harris, the trial judge, inter alia, advised the defendant of his rights to a jury trial and confrontation and elicited that he was pleading guilty freely. 61 N.Y.2d at 19-20. In Lewis and Ramsey, the defendants were advised of their rights to either a jury trial or a jury trial and confrontation, and each acknowledged understanding the meaning of his guilty plea. 61 N.Y.2d at 20-21. In Alicea, the defendant acknowledged understanding the consequences of the plea and entering the plea voluntarily, and he rejected the court's offer to let him withdraw the plea and go to trial. 61 N.Y.2d at 21. And in Burgos, the defendant expressly waived his rights to a jury trial and confrontation, and affirmed that his plea was not induced by threats or promises. 61 N.Y.2d at 21-22.

In general, plea colloquies will be upheld under Harris if they include at least one or two of the Boykin rights and the plea seems otherwise unobjectionable. E.g., People v. Johnson, 60 A.D.3d 1496 (4th Dept. 2009)(failure to inform defendant of his additional right to have his guilt proven beyond a reason-able doubt did not invalidate plea); People v. Newcomb, 45 A.D.3d 899 (3d Dept. 2007)(sufficient when court informed defendant that she was giving up her rights to a speedy trial and jury trial, and she acknowledged having discussed her "constitutional rights" with counsel); People v. Davenport, 273 A.D.2d 926 (4th Dept. 2000)(failure to include right to confront accusers and requirement that verdict be unanimous did not invalidate plea); People v. Merrifield, 266 A.D.2d 1999 (4th Dept. 1999)(plea colloquy sufficient despite omission of two of three Boykin rights); People v. Hicks, 226 A.D.2d 938, 940-941 (3d Dept. 1996)(defendant said he was aware he was giving up rights to jury trial and to cross-examine witnesses); People v. Davis, 128 A.D.2d 450, 451 (1st Dept. 1987)(defendant acknowledged he was relinquishing right to "have a jury trial and have twelve people decide whether [he was] guilty or not"); People v. Mitchell, 121 A.D.2d 403 (2d Dept. 1986)(defendant was advised of right to jury trial).

The mention of only a defendant's right to a trial, however, may be insufficient. See People v. Aleman, 43 A.D.3d 756, 757 (1st Dept. 2007)(plea was now knowing and voluntary when court advised defendant, a 27-year-old with no prior criminal history, that he had the right to a jury trial if he did not want to plead guilty, but otherwise failed to inform him of any of the rights he was waiving by pleading guilty); see also Matter of Delmar C., 207 A.D.2d 1994), for a similar situation in the violation of probation plea context.

3. The Complete Absence of *Boykin* Rights

The Court of Appeals revisited Boykin in People v. Tyrell, 22 N.Y.3d 359 (2013). Tyrell entered 2 extraordinarily cursory guilty pleas in Criminal Court in exchange for time served in one case and a 10-day jail sentence in the other. In one, counsel entered the plea and Tyrell did not speak at all; in the other, Tyrell said he agreed to plead guilty and acknowledged participating in a drug sale. The Appellate Term found the Boykin issue unpreserved and the plea colloquies sufficient.

By a vote of 4 to 3, the Court of Appeals reversed, holding that, "[u]nder the particular circumstances of these cases," the defendant's Boykin claim was reviewable on direct appeal, either because the Lopez/Louree preservation exception applied, or because "the complete absence of any indication that defendant waived his Boykin rights" could be viewed as a mode of proceedings error. On the merits, it held that Tyrell was entitled to plea withdrawal because of the "complete absence" of either "discussion of any" of the Boykin rights or "any indication that defendant spoke with his attorney regarding the constitutional consequences of taking a plea."

For additional cases in which the failure to mention any of the three Boykin rights mandated plea withdrawal, see People v. Vickers, 84 A.D.3d 627 (1st Dept. 2011)(court mentioned none of the Boykin rights, and there was no record indication that the defendant was "made aware of the constitutional rights she was giving up . . . by the court or through consultation with counsel"); People v. Gibson, 54 A.D.3d 350 (2d Dept. 2008)(court "failed to apprise the defendant that he was giving up any rights upon entering the plea, such as the right to a jury trial, the right to confront his accusers, and the privilege against self-incrimination"); People v. Aleman, 43 A.D.3d 756, 757 (1st Dept. 2007)(court failed to inform defendant "of any of the rights he was waiving by his guilty plea" except the "right to a jury trial"); People v. Bracey, 24 A.D.3d 363, 364 (1st Dept. 2005)(no allocution, inter alia, "about the constitutional rights he was waiving by pleading guilty").; People v. Facey, 30 Misc.3d 138(A), 2011 WL 666055 (App. Term, 2d, 11th & 13th Jud. Distr. 2011); People v. Robles, 22 Misc.3d 140(A), 2009 WL 596558 (App. Term, 9th & 10th

Jud. Distr. 2009); People v. Artusa, 19 Misc.3d 145(A), 2008 WL 2284831 (App. Term, 2d & 11th Jud. Distr. 2008).

4. Can the Rest of the Plea Allocution Compensate?

The overall thoroughness of the plea matters to a Boykin issue. Typically, additional discussion that may be seen as helping to insure that the defendant's waiver of his constitutional rights is knowing, intelligent, and voluntary when there is a Boykin violation include:

- an acknowledgement that the plea is "voluntary" or of the defendant's "own free will" and/or not a product of threats, coercion, or force. See, e.g., People v. Hicks, 226 A.D.2d 938, 940-941 (3d Dept. 1996); People v. Davis, 128 A.D.2d 450, 451 (1st Dept. 1987); People v. Liller, 116 A.D.2d 919 (3d Dept. 1986); People v. Pacheco, 114 A.D.2d 913 (2d Dept. 1985).

- an acknowledgement that no promises have been made to the defendant, other than those appearing on the record. See, e.g., People v. Hicks, supra; People v. Liller, supra.

- advice by the court that the plea is the equivalent of, or operates like, a conviction after a jury trial. See, e.g., People v. Austin, 117 A.D.2d 835, 836 (3d Dept. 1986); People v. Brush, 99 A.D.2d 564, 565 (3d Dept. 1984).

The defendant's prior experience in the criminal justice system may also be seen as relevant to the adequacy of the court's Boykin colloquy. See, e.g., People v. Mitchell, 121 A.D.2d 403 (2d Dept. 1986) (noting that defendant was "not a novice to the criminal court system" in upholding plea when she was advised of and understood her right to jury trial, although she was not specifically advised of her other Boykin rights); People v. LaGrave, 122 A.D.2d 294, 295 (3d Dept. 1986) (noting that defendant was "no stranger to the criminal justice system" in upholding plea when court "fully informed [him] of his rights and the consequences of" the plea and ascertained that it was "knowingly, intelligently and voluntarily made").

III. COERCION

A. Coercion in General

It is a given that coercion will render a guilty plea constitutionally invalid. People v. Picciotti, 4 N.Y.2d 340, 344 (1958). See also People v. Glasper, 14 N.Y.2d 893, 894 (1964). As the Court of Appeals said in Picciotti, at 344:

> A plea of guilty is, of course, frequently the result of a "bargain," but there is no bargain if a defendant is told that, if he does not plead guilty, he would suffer consequences that would not otherwise be visited on him. 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.

It is particularly offensive to coerce a guilty plea from a man who insists he is innocent. See People v. Nixon, 21 N.Y.2d 338, 354 (1967)("It is not tolerable for the State to punish its members over protestations of innocence if there be a doubt as to their guilt").

Coercion can come from any source. It most commonly arises from a stated or implied threat of dire consequences if the defendant does not plead guilty, an unfair or inaccurate promise of relief if he does, or undue pressure on the defendant to make a quick plea decision.

B. The Threat of a Harsher Sentence

"A defendant may not be induced to plead guilty by the explicit threat of a heavier sentence should he choose to proceed to trial." People v. Hollis, 74 A.D.2d 585 (2d Dept. 1980). In People v. Rogers, 114 A.D.3d 707 (2d Dept. 2014), for example, the court repeatedly told the defendant that it would have "no problem" imposing the maximum sentence after trial, which would "be basically the end of [the defendant's] life." The Appellate Division, Second Department, found the plea to be involuntary.

Generally, however, a judge, prosecutor, or defense counsel will not be faulted for telling the defendant, even in fairly emphatic or detailed terms, what maximum sentence he will face if he is convicted after a trial. This is seen as merely apprising him of his options and their consequences, so that he can make an informed plea decision -- as being "informative, not coercive." Rogers, supra.

C. Promises Relating to Bail or Release

A threat or promise relating to the defendant's bail status may render a plea involuntary. In People v. Brown, 14 N.Y.3d 113 (2010), the defendant protested his innocence for the 2 1/2 months after his arrest and testified before the grand jury. Meanwhile, his son was shot and in a coma, but the jail refused to let him visit his son in the hospital. The court said it understood that the defendant was interested in a guilty plea and sentence of 2 to 4 years "if I were to give you a furlough for 3 weeks to allow you to see your sick child." The defendant then admitted his guilt and entered the plea. The court never asked whether he was pleading guilty voluntarily. It denied his later plea withdrawal motion because he had admitted guilt at the plea. The Court of Appeals held that a hearing was required on claim that plea was involuntary because it was premised on the furlough promise.

In People v. Grant, 61 A.D.3d 177, 183 (2d Dept. 2009), the Appellate Division, Second Department, explained that different concerns control the plea bargaining process and a defendant's bail status. The latter has:

> no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecutor is seeking. The prospect of an immediate change in bail status, therefore is an inappropriate consideration in plea negotiations.

Thus, bail status may not be used as a "bargaining chip," and a plea that results from a threat of remand "cannot be deemed voluntary" because a defendant cannot legitimately be made to "choose between, on the one hand, admitting guilt and remaining free, and, on the other, maintaining innocence and going to jail." 61 A.D.3d at 183-184. See also People v. Min, 249 A.D.2d 130 (1st Dept. 1998)(plea involuntary because of, inter alia, "court's decision to remand the defendant to custody after he refused to plead guilty" despite his perfect attendance, and to release him "[o]nly upon pleading guilty"); People v. Madsen, 31 A.D.2d 737 (4th Dept. 1968)(defendant was entitled to hearing on voluntariness of his plea when he claimed the prosecutor threatened to revoke his bail if he did not plead guilty that day).

D. Forcing a Quick Plea Decision

Insisting that a defendant make an immediate plea decision may constitute coercion. See People v. Welch, 108 A,DE,2d 1020 (3d

Dept. 1985)(error to summarily deny plea withdrawal motion when defendant alleged, inter alia, that his attorney told him he had to decide "immediately" whether to accept plea offer).

Generally, however, the court or the People may make a one-time offer and require the defendant to decide or lose the benefit of that offer. See People v. Saunders, 188 A.D.2d 624 (2d Dept. 1992)(not error to summarily deny plea withdrawal when "bald allegation" that defendant was given only 30 seconds to decide about pleading was belied by record showing he had conferred with his attorney for almost an hour and he admitted they had been discussing the plea); People v. Mauro, 158 A.D.2d 550 (2d Dept. 1990)(plea minutes revealed decision was made freely after defendant was "given a sufficient amount of time to consider his decision").

The People may withdraw a guilty plea offer at any time before the defendant accepts it and actually enters the plea. People v. Hood, 62 N.Y.2d 863 (1984). Therefore, the defendant gains extra time to think about the offer or consult with his family about it at his own risk.

E. Connected Pleas

Often, the People will insist on "connected" pleas -- offering a particular plea bargain to one co-defendant only if the other co-defendant(s) also agree to plead guilty. This practice may seem inherently coercive, especially when the co-defendant is a loved one who is eager to accept the bargain. See Bordenkircher v. Hayes, 434 U.S. 357, 364, n. 8 (1978)(noting that there may be "constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused"). It has nevertheless been upheld in New York, albeit with caveats.

In People v. Fiumefreddo, 82 N.Y.2d 536, 544 (1993), the Court held that such "connected" pleas are not *per se* illegal, but recognized that they "can present concerns which require special care, particularly where leniency in a promised sentence for a loved one is part of the bargain." Fiumefreddo, supra, 82 N.Y.2d at 545. Because the promised benefit to a codefendant "can place pressure on a defendant," "the tied-in nature of the plea" must be "carefully weighed" in making any determination of whether a guilty plea is truly voluntary. 82 N.Y.2d at 546. See also People v. Ocasio, 260 A.D.2d 254 (1st Dept. 1999)("Recognizing the special scrutiny required when a defendant's plea is connected to that of a relative"); People v. Santos, 244 A.D.2d 897 (4th Dept. 1997)("connected pleas present concerns requiring special care").

In Fiumefreddo, a woman and her elderly and ailing father were jointly indicted for hiring someone to kill her husband. The

People offered a package plea deal in which the father pled guilty to conspiracy and received 1 to 3 years, while the daughter pled to murder and received 18 years to life. In considering the voluntariness of the daughter's plea, the Court noted that her relationship to her father and concern about his welfare was "[t]he troubling aspect of the case." 82 N.Y.2d at 547. It found, however, that there was no evidence that the plea offer to her father was "improperly used . . . as a lever to put undue pressure" on her to accept the otherwise appropriate plea offer. 82 N.Y.2d at 547. It noted that any problem would have been obviated if the court had elicited during the plea colloquy:

> that she was entering the plea solely because she deemed it to be in her own best interest and without any feeling of pressure or influence because of the plea bargain offered to her father.

82 N.Y.2d at 548.

In finding that the daughter's guilty plea in Fiumefreddo was voluntary, the Court stressed several factors. First, her plea "had been the subject of negotiation for several months before it was accepted so that she had 'sufficient opportunity to weigh'" its merits. 82 N.Y.2d at 546. She and her attorney had "met for over an hour with the court, her father, his attorney . . . and the prosecutor" on the day of the plea itself, and her attorney said he had had "extensive discussions with [the defendant], with the Court, with the District Attorney, co-counsel and also with her father." 82 N.Y.2d at 541.

Second, Ms. Fiumefreddo "unequivocal[ly]" denied at the plea itself that any promise had been made to her, other than what her own sentence would be. 82 N.Y.2d at 546. Her attorney stated on the record that she was "prepared to plead with only one promise having been made by me. That promise is [a sentence of] 18 years to life." 82 N.Y.2d at 541.

Third, a "lengthy and detailed" plea colloquy had been held and it showed that Ms. Fiumefreddo "had no hesitancy about the plea she was entering." 82 N.Y.2d at 546. The colloquy "fill[ed] 18 pages of transcript," during which the court "carefully established" that she was acting "voluntarily and with full knowledge of [her] rights and of the consequences of [her] plea[]," 82 N.Y.2d at 541, and which included "no suggestion of reluctance" on her part. 82 N.Y.2d at 546.

Finally, the judge who accepted the plea had an "ample factual basis" for doing so, which included Ms. Fiumefreddo's admission to "precise facts" that were corroborated by her father's plea admissions and the other co-defendants' previous guilty pleas. 82 N.Y.2d at 546-547. The factual allocution included her admission that she "opened up [her] house door . . . and let somebody into

that house because [she] had arranged and [she] knew that that person was going to go upstairs and kill [her] husband while [she was] at work," 82 N.Y.2d at 541, and that she "arranged to have [her] father take money out of the bank so [she] could arrange to have somebody come to [her] house to kill [her] husband." 82 N.Y.2d 542.

IV. THE DEFENDANT'S MENTAL STATE

A. Incompetence

As a matter of fundamental due process, the State cannot proceed against a criminal defendant who is not competent. Pate v. Robinson, 383 U.S. 375, 386 (1966); Dusky v. United States, 362 U.S. 402 (1960); People v. Armlin, 37 N.Y.2d 167, 171 (1975); People v. Smyth, 3 N.Y.2d 184, 187 (1957). The test of competency is whether the defendant:

> has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky, 362 U.S. at 402; People v. Galandreo, 293 A.D.2d 756 (2d Dept. 2002); People v. Savona, 176 A.D.2d 362 (2d Dept. 1991); People v. Picozzi, 106 A.D.2d 413 (2d Dept. 1984).

"[S]tatements of defense counsel . . . , standing alone, may trigger the obligation to order an examination" of the defendant's competence. People v. Arnold, 113 A.D.2d 101, 103 (4th Dept. 1985).

The court also has a "duty" to order a competency examination, regardless of whether one is requested, "[i]f at any time before final judgment," it "has reasonable grounds to question the defendant's competency." People v. Smyth, 3 N.Y.2d 184, 187 (1957); Savona, supra at 362; accord Picozzi, supra at 413-414. In People v. Bangert, 22 N.Y.2d 799, 800 (1968), for example, the presentence report revealed that the defendant might presently be incompetent and might have been insane when he pled guilty. The Court of Appeals held that "the sentencing court was bound to make some inquiry into defendant's mental condition at the time of sentencing, whether or not counsel raised the issue." See also People v. Armlin, supra, 37 N.Y.2d at 172 (guilty plea does not waive competency issue). If a court fails to direct an examination when alerted to a potential competency problem at sentencing, the case will be remanded for a hearing on the defendant's mental capacity at the time of the plea (or trial) and sentencing. See

People v. Bangert, supra at 800; People v. Catapano, 73 A.D.2d 975 (2d Dept. 1980).

B. Other Mental Health Concerns

Even if a defendant is technically competent, serious cognitive or other mental health problems or medication may interfere with his ability to make a "voluntary and rational decision" about whether to plead guilty. When the court is alerted to a history of psychiatric problems or the possibility that the defendant is medicated, it should make some inquiry about the defendant's mental state before accepting his guilty plea.

In People v. Mox, 20 N.Y.3d 936 (2012), the defendant pled guilty to murder for killing his father. He had a documented history of mental illness, had been institutionalized for much of the year preceding the crime, and said during the guilty plea that he was "hearing voices," "in a psychotic state," and had not taken his medication for several days. The court asked only if he had discussed an insanity defense with his attorney and was willing to forego it. The Court of Appeals held that, in the absence of further inquiry by the plea court, Mox was entitled to plea withdrawal. But see People v. Totman, 269 A.D.2d 617 (3d Dept. 2000)(plea upheld when court "sufficiently explored the issue of whether defendant's mental health deficiencies affected his ability to understand the proceedings" and defendant indicated that "he understood the proceedings despite his mental health problems and also denied being under the influence of drugs or alcohol at the time of the plea"); People v. Cummings, 194 A.D.2d 994 (3d Dept. 1993)(plea valid when court "questioned defendant concerning the effects of his medication and was assured by defendant that he was cognizant of the proceedings and was not impaired by the medication").

Whether the court's failure to conduct such an inquiry provides a basis for plea withdrawal will obviously turn on the severity of the problem and the overall care with which the plea is taken.

C. Later Learned Psychiatric Information

Even when the court was unaware of a psychiatric problem at the time of the plea itself, a defendant may seek plea withdrawal on the basis that, because of his mental health problems or medication, he did not enter a knowing, intelligent, and voluntary plea. In People v. Jones, 227 A.D.2d 982 (4th Dept. 1996), when a 16-year-old defendant had an apparently substantial psychiatric history, the court abused its discretion in denying the defense an adjournment of sentencing to investigate the possibility that his mental state at the time of the plea had rendered it involuntary.

A plea withdrawal motion made on this basis may be denied for insufficient evidence. See People v. Coleman, 268 A.D.2d 303 (1st Dept. 2000)(plea withdrawal properly denied when assertion that defendant was impaired by mental illness and medication was "unsupported by any evidence"); People v. Sierra, 267 A.D.2d 92 (1st Dept. 1999)(same); People v. Ross, 182 A.D.2d 1022 (3d Dept. 1992) (record was "devoid of any proof of . . . mental disease or defect, improvidence or confusion").

On the other hand, a hearing may be required if the defendant adduces substantial proof to support his claim. See People v. D'Adamo, 281 A.D.2d 751 (3d Dept. 2001)(error to summarily deny plea withdrawal motion based on claim that defendant's bi-polar disorder, of which the court was unaware at the plea, impaired his cognitive abilities at the time of the plea, and that his medication for it caused confusion); cf., People v. Ramirez, 42 A.D.3d 671 (3d Dept. 2007)(in reversing on other grounds, noting that "troubling evidence regarding" the defendant's competence, "developed after" entry of the plea, might "further call into question his ability to enter a knowing and voluntary plea").

V. GUILT AND INNOCENCE

A. The Factual Allocution

Federal due process requires that a pleading defendant have a complete understanding of the charges against him. Henderson v. Morgan, 426 U.S. 637 (1976). For that reason, guilty pleas generally include an admission of guilt by the defendant.

The defendant need not, however, admit every element of the crime to which he is pleading guilty. People v. Seeber, 4 N.Y.3d 780 (2005). Indeed, the complete absence of an admission of guilt will not invalidate a guilty plea if the defendant is either ably represented and the record reveals no cause for believing that the plea is improvident or baseless, or if the plea is to a lesser crime than the top count of the indictment. People v. Moore, 81 N.Y.2d 1002 (1988). Often, the judge will simply read or paraphrase the count to which the defendant is pleading and have him admit it is "true."

When a defendant makes statements that negate an element of the crime, however, or that state a defense, the court must conduct a further inquiry to be certain the plea is valid before accepting it. In People v. Serrano, 15 N.Y.2d 304 (1965), the defendant pled guilty to intentional murder, but his recitation of the events was "more consonant" with manslaughter for "a killing in the heat of passion." 15 N.Y.2d at 307. The judge's sentencing statements revealed his awareness of the disparity between the defense and

prosecution version of events, and resolved the issue against the defendant, "instead of rejecting the . . . plea or advising the defendant that his admissions might very well not amount to the crime to which he pleaded guilty." 15 N.Y.2d at 308.

In finding the plea in Serrano invalid, the Court said:

> . . . the mere mouthing of the word "guilty" may not be relied upon to establish all the elements of th[e] crime. . . . [I]f the circumstances of the commission of the crime as related by the defendant do not clearly spell out the crime to which the plea is offered, then, the court should not proceed, without further inquiry, to accept the guilty plea as a valid one.

15 N.Y.2d at 308. It went on to advise:

> . . . before accepting a plea of guilt where the defendant's story does not square with the crime to which he is pleading, the court should take all precautions to assure that the defendant is aware of what he is doing.

15 N.Y.2d at 310.

Plea withdrawal has been granted in numerous cases because the court failed to make the requisite inquiry under such circumstances. See, e.g., People v. Robinson, 71 A.D.3d 1169 (2d Dept. 2010) (attempted first-degree assault plea at which defendant said she believed the complainant was burglarizing her home, thereby raising a possible justification defense); People v. Ponder, 34 A.D.3d 1314 (4th Dept. 2006) (first-degree assault plea at which defendant said he pulled out a gun and fired in self-defense and did not intend to shoot the victim); People v. Makas, 273 A.D.2d 510 (3d Dept. 2000) (arson plea at which defendant admitted intending to damage an unoccupied, rather than occupied, building); People v. Lawrence, 192 A.D.2d 332 (1st dept. 1993) (murder plea at which defendant could not recall stabbing victim, although he admitted it was possible); People v. Howard, 183 A.D.2d 916 (2d Dept. 1992) (intentional murder plea at which defendant said he knew accomplices intended to "rough . . . up" victim but not kill him); People v. Thomas, 159 A.D.2d 529 (2d Dept. 1990) (first-degree manslaughter plea at which defendant admitted intending to "hurt," but not seriously injure, victim, and using a knife to repel the victim's attack on him); People v. McIntosh, 140 A.D.2d 948 (4th Dept. 1988) (attempted murder plea at which defendant said gun fired accidentally); People v. Bruce B., 111 A.D.2d 754 (2d Dept. 1985) (first-degree assault plea at which allocution suggested possible justification defense as to stabbing during altercation); People v. Polanco, 96 A.D.2d 910 (2d Dept. 1983) (first-degree

manslaughter plea at which allocution raised potential justification defense).

In People v. Lopez, 71 N.Y.2d 662 (1988), the Court of Appeals held that a Serrano error is so fundamental that it entitles a defendant to plea withdrawal on direct appeal even if it was not protested before the trial court. And since the issue goes to the plea's voluntariness, it is not waived by a waiver of the right to appeal. People v. Seaberg, 74 N.Y.2d 1, 10 (1989); People v. Moore, 300 A.D.2d 1085 (4th Dept. 2002).

In People v. Toxey, 86 N.Y.2d 725 (1995), the defendant pled guilty to first-degree robbery on the theory that he or his accomplice displayed what appeared to be a gun. During the allocution, he said, "I don't carry weapons." The Court held that the court's failure to inquire further did not fall within the Lopez preservation exception because that statement was insufficient to engender "significant doubt" about the voluntariness of his plea.

The First Department has interpreted Toxey to mean that Lopez is inapplicable when the inquiry would relate to an affirmative defense. People v. Wallace, 247 A.D.2d 257 (1st Dept. 1998); but see People v. Pariante, 283 A.D.2d 345 (1st Dept. 2001)(reversing in the interest of justice when the defendant said he simulated a gun with a rolled-up newspaper). The Fourth Department has reversed as a matter of law without requiring preservation in this situation. See People v. Powell, 278 A.D.2d 848 (4th Dept. 2000)("fake gun"). The Second Department has actually distinguished between a statement that the defendant had an unloaded gun, which required preservation, and that he was unarmed, which did not. People v. Martin, 7 A.D.3d 640 (2d Dept. 2004).

B. Later Claims of Innocence

Protestations of innocence at sentencing or statements at sentencing that negate an element of the crime may also require inquiry by the court. As the Court of Appeals said in Nixon, 21 N.Y.2d at 354-355:

> . . . where initial inquiry exposes difficulties or subsequent interpositions by defendant on sentencing raise questions, the court should be quick to offer the defendant an opportunity to withdraw his plea and at the very least conduct a hearing.

See also People v. McClain, 32 N.Y.2d 697 (1973)(when defendant makes prompt plea withdrawal application and asserts innocence, opportunity to withdraw plea should be offered); People v. Hill,

204 A.D.2d 1015 (4th Dept. 1994)(plea withdrawal motion made prior to sentencing, based primarily on claim of innocence, should have been granted); People v. Derrick, 188 A.D.2d 486 (2d Dept. 1992) (motion to vacate plea should have been granted in light of, inter alia, defendant's prompt plea withdrawal request and proclamation of innocence); People v. Parces, 152 A.D.2d 977 (4th Dept. 1989)(in light of repeated claims of innocence, defendant should have been permitted to withdraw plea); People v. Lee, 90 A.D.2d 960 (4th Dept. 1982)(court should have inquired further when defendant denied intent to injure victim); People v. Jenkins, 72 A.D.2d 876 (3d Dept. 1979)(when defendant's description of events at plea to burglary left his intent unclear and he professed his innocence at sentencing, "it was the independent obligation of the trial court to deal with these ambiguities to insure that there was a proper basis for his guilty plea and a voluntary admission of criminal responsibility"); People v. Outlaw, 73 A.D.2d 677 (2d Dept. 1979)(given protests of innocence and conflicting testimony at co-defendant's trial, defendant should have been allowed to withdraw plea).

A claim of innocence that finds some support in the record will require a remand. See People v. Parizo, 78 A.D.2d 863 (2d Dept. 1980)(when defendant claimed his alcohol and drug intoxication negated his intent, police officers had testified at his suppression hearing that he was intoxicated and "not normal" minutes after the crime, he was found unfit several days later, and he told psychiatrists about his drug and alcohol ingestion, his claim was not "conclusory" and his case was remanded for a hearing).

A mere bald claim of innocence, however, has repeatedly been held to be insufficient to necessitate plea withdrawal. See, e.g., People v. Bonds, 254 A.D.2d 430 (2d Dept. 1998)("conclusory and unsubstantiated allegations of coercion and innocence" properly rejected); People v. Sears, 204 A.D.2d 578 (2d Dept. 1994) ("bare assertion of innocence" was refuted by plea record).

C. *Alford* Pleas

An admission of guilt is not a "constitutional requisite" to a valid guilty plea, in that a defendant may rationally decide that pleading guilty is a wiser course of action than going to trial and thereby risking conviction and receipt of a harsher sentence. North Carolina v. Alford, 400 U.S. 25, 37 (1970); People v. Francabandera, 11 N.Y.2d 429, 434 (1974); People v. DeJesus, 199 A.D.2d 529 (2d Dept. 1993).

A plea entered in the face of protestations of innocence, however, must be taken with special care to make certain both that the record contains "strong evidence of actual guilt," Alford, supra at 37, and that the plea itself is "the product of a free and

rational choice." Alford, supra at 31. Thus, in Alford, the Supreme Court noted both that there was "overwhelming evidence" of Alford's guilt, Alford, supra at 37, and that Alford had not "wavered in his desire to have trial court determine his guilt without a jury trial." Alford, supra at 32. See also People v. Friedman, 39 N.Y.2d 463 (1976)(record contained strong evidence of guilt, including numerous admissions by defendant, and court "fully and satisfactorily queried the defendant who stated unequivocally that it was his desire to plead guilty and that he did so voluntarily"); People v. Francabandera, supra (record included eyewitness statements and photographs, and court "went to great lengths in laying a foundation to support the voluntariness of the plea," accepting it only after asking numerous "searching questions").

In People v. Hill, 16 N.Y.3d 811 (2011), the Court of Appeals reiterated the need to follow the requirements for an Alford plea when the defendant raises questions about his guilt. Hill agreed to plead guilty to first-degree manslaughter as his murder trial for stabbing his uncle was about to begin, but his explanation of the events suggested self-defense and cast doubt on whether he intended to seriously injure the uncle. The court then essentially converted the plea to an Alford plea by asking if the defendnat understood that the jury was likely to convict him of murder and eliciting that he was agreeing to give up defenses. He unsuccessfully sought plea withdrawal at sentencing. The Court of Appeals reversed. It said Alford pleas should be "rare" and allowed only when they reflect "a voluntary and rational choice" and the record contains "strong evidence of actual guilt." Therefore, there was "no such thing as a 'limited' *Alford* colloquy or plea." Although the medical evidence provided strong evidence of guilt, the record failed to establish that Hill "was aware of the nature and character of an *Alford* plea."

Even a valid Alford plea does not seem to completely foreclose a later claim of innocence as a basis for plea withdrawal, at least under especially extenuating circumstances. See People v. DeJesus, 199 A.D.2d 529 (2d Dept. 1993)(error to deny motion to withdraw Alford plea in light of defendant's "repeated assertions of innocence," which had "arguable support" in complainant's recantation); see also People v. Matthews, 231 a.d.2D 932 (4th Dept. 1996)(Court erred in sentencing defendant without reaching claim that he was innocent and that his Alford plea was entered under duress).

V. DEFENDANTS WHO PLEAD GUILTY BECAUSE THEY ARE MISLED OR UNINFORMED

A. Misadvice as to the Defendant's Sentence Exposure

A fundamental aspect of the defendant's plea as a choice among the options available to him is his understanding of what those options are and what they mean. Often the primary factor influencing a defendant's decision whether to plead guilty is the sentencing exposure he faces if he is convicted at trial.

Misinformation that inaccurately magnifies the potential negative consequences of going to trial is particularly coercive. A defendant should not plead guilty because he mistakenly believes he will otherwise face a more serious sentence than he could actually receive.

Incorrect advice about a defendant's sentencing exposure by his attorney will not necessarily require plea withdrawal if the court corrects that advice. People v. Eschenberg, 275 A.D.2d 719 (2d Dept. 2000). Nor will plea withdrawal be required because a defendant is given a mere "inaccurate prediction" of the sentence he might receive. See United States ex rel. Hill v. Ternullo, 510 F.2d 844, 847 (2d Cir. 1975). See also People v. Garcia, 92 N.Y.2d 869 (1998)(advice based on reasonable interpretation of the sentencing law did not require plea withdrawal).

But if a defendant receives inaccurate factual information and relies on it in deciding to plead guilty, he will be entitled to plea withdrawal. See People v. Williams, 65 A.D.2d 521 (1st Dept. 1978)(error to summarily deny plea withdrawal motion based on allegation that counsel misled defendant about sentencing exposure); see also United States ex rel. Hill v. Ternullo, supra, 510 F.2d at 847 (distinguishing between inaccurate sentence prediction and a "misstatement of easily accessible fact" upon which a defendant relies); People v. Perron, 273 A.D.2d 549 (3d Dept. 2000)(defendant's claim that he was given incorrect advice about his sentencing exposure, which led him to reject plea offer, required hearing).

B. Misadvice About How Much Time the Defendant Will Serve

Plea withdrawal may also be required if the defendant pled guilty because he was affirmatively misled about the amount of time he will actually serve if he accepts the plea offer, or how his sentence will run in relationship to other sentences he has to serve. See People v. Smith, 279 A.D.2d 487 (2d Dept. 2001)(when parties and court all labored under the mistaken belief that the Division of Parole possessed the discretion to run any undischarged

sentence concurrently with the negotiated sentence in the plea case, interest of justice required granting defendant plea withdrawal); People v. Scott, 237 A.D.2d 543 (2d Dept. 1997) (same, when court promised to recommend that sentences run concurrently, when they had to run consecutively).

C. Direct and Collateral Consequences of the Plea

New York courts distinguish between "direct" and "collateral" consequences of a guilty plea: the court must inform a defendant of the plea's direct consequences, but not collateral ones. People v. Ford, 86 N.Y.2d 397 (1995).

Direct consequences are, essentially, the sentence the defendant will receive in the case to which he is pleading guilty. This includes post-release supervision. The court's failure to inform appellant of the post-release supervision component of his sentence renders the plea less than knowing, intelligent, and voluntary. People v. Catu, 4 N.Y.3d 242 (2005). This rule entitles a defendant to plea withdrawal if the court failed to inform him that post-release supervision would be part of the enhanced sentence he faced if he violated the court's conditions. People v. McAlpin, 17 N.Y.3d 936 (2011); People v. Louree, 8 N.Y.3d 541 (2007). Preservation of a Catu issue is not required; it can be raised on direct appeal even though it was not raise below. Louree.

Collateral consequences of which the court need not inform the defendant include:

- That a promised prison sentence will have to run consecutively to a previously imposed undischarged prison sentence. People v. Belliard, 20 N.Y.3d 381 (2012); but see Smith and Scott, supra (granting plea withdrawal when defendant was affirmatively misled).

- That the defendant will have to register under SORA or that its terms and the conditions of his probation could result in his being forbidden to associate with his own children. People v. Gravino, 14 N.Y.3d 546 (2010).

- Potential S.O.M.T.A. (civil confinement) consequences of a guilty plea (although a defendant could show he was unaware of S.O.M.T.A. and that the possibility that he would be subject to civil confinement was sufficiently realistic and important to him that he would have rejected the plea bargain had he known of it). People v. Harnett, 16 N.Y.3d 200 (2011).

For a further list of plea consequences considered collateral, see Ford, supra, 86 N.Y.2d at 403.

In People v. Peque, 22 N.Y.3d 168 (2013), the Court of Appeals reversed its prior ruling in Ford that deportation is a collateral plea consequence. Instead, due process requires the court to inform a defendant that, if he is not a United States citizen, his plea to a felony can result in his deportation. The Court did not give up the distinction between direct and collateral plea consequences; rather, it found deportation to be a unique consequence that defied categorization. Providing that the defendant does not appear from the record to have known of the plea's deportation consequences, this issue can be raised on direct appeal even though it was not preserved below. A Peque issue does not automatically entitle the defendant to plea withdrawal, however. The appellate court must remand for consideration of whether the defendant was prejudiced by the court's failure to provide the immigration advisory.

VII. UNFULFILLED PROMISES

A. The General Rule

If a promise is part of the "inducement or consideration" that leads a defendant to plead guilty, it "must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). Fulfillment of such a promise is required by due process because it is part and parcel of a defendant's right to basic "fairness in securing [a plea] agreement." Id. at 261; see also People v. Parker, 271 A.D.2d 63 (4th Dept. 2000)(enforcement of sentencing promise necessary to comport with due process and "defendant's entitlement to fundamental fairness"). "[I]nasmuch as the State may hold the defendant to the precise terms of the plea agreement as stated on the record, as a matter of fairness, defendant should be entitled to no less." People v. Danny G., 61 N.Y.2d 169, 174 (1984).

A court has an obligation not to tamper with a defendant's reasonable expectation as to the sentence he will receive as a result of a plea bargain. People v. Selikoff, 35 N.Y.2d 227, 238 (1974). Neither the court nor the People may make "representations" to a criminal defendant that create "reasonable expectations" on his part and then disregard them. Chaipis v. State Liquor Authority, 44 N.Y.2d 57, 62 (1978). See also People v. McConnell, 49 N.Y.2d 340, 349 (1980)("as a matter of essential fairness . . . a promise made by a State official . . . and acted upon by a defendant in a criminal matter to his detriment is not lightly to be disregarded"); People v. White, 32 N.Y.2d 393, 400 (1973)(the "use of plea bargaining presupposes" "fairness in securing agreement").

A sentence promise made on the record "must be fulfilled provided there is nothing contained in the presentence report or in

later learned facts rendering improvident the sentence promised." People v. Selikoff, 35 N.Y.2d 227, 240 (1974). Accord People v. Powers, 134 A.D.2d 736 (3d Dept. 1987)("Without new facts or information to warrant a harsher sentence, and absent fraud, a court is bound by its original sentence proposal"); People v. Pascal, 103 A.D.2d 757, 758 (2d Dept. 1984).

If new information justifies departing from the promise, the court must explain that decision on the record, so as to facilitate appellate review, and must allow the defendant to withdraw his guilty plea. People v. Selikoff, supra, 35 N.Y.2d at 240; People v. Fludd, 137 A.D.2d 764, 765 (2d Dept. 1988); People v. Pascal, 103 A.D.2d 757, 758 (2d Dept. 1984). In the absence of such new information, however, plea withdrawal is an insufficient remedy and the sentencing court must adhere to the terms of the plea. People v. Pagan, 245 A.D.2d 533 (2d Dept. 1997); People v. Carner, 142 A.D.2d 789, 790 (3d Dept. 1988); People v. Jones, 99 A.D.2d 1, 3-4 (3d Dept. 1984); People v. Spector, 85 A.D.2d 535, 538 (1st Dept. 1981)(Sullivan, J., concurring); People v. Pendleton, 73 A.D.2d 857 (1st Dept. 1980); People v. Jocabsohn, 60 A.D.2d 607 (2d Dept. 1977).

Note, however, that it is only explicit and unambiguous "on the record" promises that count. A defendant's claim that he was promised something "off the record" -- even by the court -- will not entitle him to plea withdrawal. People v. Huertas, 85 N.Y.2d 989 (1995); People v. Selikoff, supra, 35 N.Y.2d at 244.

B. Promises That Are Impossible to Fulfill

In the court promises the defendant an illegal sentence, it is not required to impose that illegal sentence, but it must allow the defendant to withdraw his guilty plea because it cannot keep its promise. People v. Selikoff, 35 N.Y.2d 227, 240 (1974); see also People v. Salgado, 282 A.D.2d 765 (2d Dept. 2001)(since court was "unable to fulfill its sentence promise," case remitted to let defendant withdraw his guilty plea); People v. Jackson, 272 A.D.2d 342 (2d Dept. 2000)("it is well settled that a plea induced by an unfulfilled promise either must be vacated or the promise honored"); People v. Smith, 246 A.D.2d 562 (2d Dept. 1998)(since court could not fulfill promise, case must be remitted to give defendant a chance to withdraw his guilty plea); People v. Keiffer, 207 A.D.2d 1022 (4th Dept. 1994)(if court cannot fulfill promise it "must entertain" plea withdrawal motion); People v. Pascal, 103 A.D.2d 757, 758 (2d Dept. 1984)("If the court cannot impose the promised sentence, the defendant must be given the opportunity to withdraw his plea"); People v. Traynor, 101 A.D.2d 898 (3d Dept. 1984)(when court promised a sentence of 2 to 6 years, and later learned the statutory minimum was 3 to 6 years, it could not simply "alter[] the plea bargain").

If the promise could be honored in some way -- for example, by adjudicating the defendnat a youthful offender -- an argument could be made that the court had an obligation to do that and keep the sentence promise, rather than only to allow the defendant to withdraw his guilty plea.

Usually, if the illegality is discovered before sentencing, the court will offer the defendant the choice of accepting the harsher, legal sentence or withdrawing his guilty plea. If he accepts the sentence in that situation, he will be found to have waived the plea withdrawal issue.

Sometimes, a court will mistakenly promise the defendant that he can appeal an issue that is automatically waived by a guilty plea and therefore cannot be appealed, such as a C.P.L. §30.30 issue. In that situation, the defendant will also be entitled to plea withdrawal. See People v. Dalton, 69 A.D.3d 1235 (3d Dept. 2010).

C. Promise of Concurrency with Another Case

Often, a defendant will plead guilty in one case because he is promised a sentence concurrent with his sentence in another case. If that promise cannot be fulfilled, he is entitled to plea withdrawal.

Most commonly, a defendant is convicted after trial, then pleads guilty to outstanding charges with the promise that he will receive concurrent time. If the trial conviction is reversed on appeal, the plea, "having been induced by the understanding that the sentence would be concurrent with the sentence imposed for his conviction, since set aside," must be vacated. People v. Fuggazzatto, 62 N.Y.2d 862, 863 (1984). Accord, People v. Taylor, 80 N.Y.2d 1, 15 (1992); People v. Cruz, 225 A.D.2d 790, 791 (2d Dept. 1996); People v. Gaskins, 171 A.D.2d 272, 281 (2d Dept. 1991)(defendant "must be given the opportunity to withdraw his guilty plea" in such a situation, because "the promise of concurrent sentences cannot now be kept"); People v. Martin, 115 A.D.2d 565, 568 (2d Dept. 1985).

The same rule applies when two pleas are taken, with a promise that concurrent sentences will be imposed. If the one plea is later vacated (or never entered), the defendant will have a right to withdraw the other. In People v. Clark, 45 N.Y.2d 432 (1978), on which the Court of Appeals relied in Fuggazzatto, 62 N.Y.2d at 863, a defendant pled guilty under two indictments. On appeal, the Court granted suppression of a statement that related to only one of the indictments, and went on to reject the People's argument that the plea to the other indictment should remain in place. Distinguishing a case in which there had been no sentence commitment at the time of a guilty plea, the Court explained:

> In this case, . . . the plea . . . was expressly conditioned on the negotiated agreement that the defendant would receive concurrent sentences on the separate counts to which he pleaded. Thus in order to give effect to the plea commitment in this case the plea should be vacated in its entirety.

45 N.Y.2d at 440. See also People v. Boston, 75 N.Y.2d 585, 589 (1990)(when one plea was vacated due to an improper S.C.I. procedure, a second plea "entered with the understanding" that the defendant would receive a concurrent sentence also had to be set aside); People v. Puckett, 270 A.D.2d 364, 365 (2d Dept. 2000); People v. Ulloa, 260 A.D.2d 212 (1st Dept. 1999).

It does not matter whether the promise of concurrent sentences cannot be fulfilled because of a reversal on appeal or action in the trial court, such as the defendant's decision not to plead guilty in one of the cases and his eventual acquittal at trial. In People v. Spence, 278 A.D.2d 96 (1st Dept. 2000), a defendant was expected to plead guilty to a charge pending in another state and receive a 20-year sentence there. He pled guilty to attempted robbery in his New York case, in exchange for the court's promise that he would receive a 5-year sentence, to run concurrently with the sentence to be imposed in the out-of-state case. The defendant ended up not pleading guilty in the out-of-state case. The People conceded, and the Appellate Division, First Department, held, that he was entitled to withdraw his New York plea.

D. Conditional Pleas and Sentence Enhancements

The basic rule is that a sentence promise must be kept or plea withdrawal granted has a major exception: if the court conditions a promise on the defendant doing something or refraining from doing something, and the defendant violates that condition, the court may generally impose a harsher sentence than the one that was promised, provided (1) the warning was clear on the plea record, and (2) the evidence establishes that the defendant failed to obey that earning.

Typically, courts condition the defendant's receipt of the promised sentence on his obeying 3 conditions -- commonly referred to as the "trilogy": (1) appearing as required in court for sentencing; (2) cooperating and/or being truthful when interviewed by the Probation Department; and (3) avoiding rearrest (or the commission of a new crime).

It is also common to condition a particular result on the defendant's successful completion of a treatment program of some kind. In some cases, a sentence promise will be conditioned on the

defendant's cooperation with the People, either as a witness against a co-defendant or as an informant.

1. The Clarity of the Court's Warning

Before a defendant's promised sentence can be enhanced because he failed to abide by one of the court's conditions, the record must clearly establish that he was properly warned about that condition and the consequences of violating it.

Plea conditions are strictly construed. Thus, the cases upholding enhanced sentences because of the breach of a condition generally rest on the "explicit," "express," "unambiguous," "clear," or "unequivocal" warning given the defendant that his promised sentence was so conditioned. See, e.g., People v. Weaver, 216 A.D.2d 341 (2d Dept. 1995)(breach of "unambiguous conditions" of plea agreement); People v. Fields, 197 A.D.2d 633 (2d Dept. 1993)(court "explicitly warned" defendant about increased sentence if he failed to appear for sentencing); People v. Thompson, 193 A.D.2d 841, 842 (3d Dept. 1993)(failure to comply with "explicit condition" of plea agreement); People v. Costa, 186 A.D.2d 299 (3d Dept. 1992)(failure to fulfill "explicit condition of the sentencing agreement"); People v. Foss, 188 A.D.2d 940 (3d Dept. 1992)(failure to comply with "explicit condition" of plea bargain); People v. Gorham, 171 A.D.2d 676 (2d Dept. 1991)(court "expressly warned" defendant that failure to appear "would result in a harsher sentence"); People v. Patker, 172 A.D.2d 697 (2d Dept. 1991)("express conditions of the plea agreement"); People v. Ascensio, 143 A.D.2d 917 (2d Dept. 1988)(court "clearly and unequivocally conditioned the promised sentence on the defendant's appearance"); People v. McDaniels, 111 A.D.2d 876 (2d Dept. 1985)("explicit condition").

Thus, for example, if the defendant was not clearly informed when he pled guilty that his sentence could be increased if he failed to appear for sentencing, it is error to impose an enhanced sentence because of that failure. In People v. Outlaw, 157 A.D.2d 677 (2d Dept. 1990), the only conditions imposed as to the promised sentence were that the defendant stay out of trouble and not challenge his predicate felony statement. The defendant complied with these conditions, but failed to appear for sentencing. Since the promised sentence was not conditioned on his appearing, the Court found his enhanced sentence improper and reduced it to the term originally promised him. See also People v. McKinney, 215 A.D.2d 407 (2d Dept. 1995); People v. Hodge, 207 A.D.2d 845 (2d Dept. 1994); People v. Reid,186 A.D.2d 1033 (4th Dept. 1992); People v. Rosenberg, 148 A.D.2d 346 (1st Dept. 1989); People v. Sumner, 137 A.D.2d 891 (3d Dept. 1988); People v. Green, 121 A.D.2d 858 (1st Dept. 1986); People v. Annunziata, 105 A.D.2d 709 (2d Dept. 1984).

In Innes v. Dalsheim, 864 F.2d 974 (2d Cir. 1988), the Second Circuit Court of Appeals considered a case in which the defendant entered a guilty plea to 4 counts of first-degree robbery in exchange for a promise of concurrent sentences of 4 1/2 to 9 years. The court allowed him to remain at liberty pending sentencing, but conditioned his doing so on his adherence to certain conditions. As to the consequences of violating those conditions, the court told him:

> If you violate any of the conditions outlined by the Court, do you understand that you are facing the possibility of consecutive sentence totalling thirty to sixty years which would be the maximum sentence to be imposed on you under each one of these indictments . . . yes, it would be thirty to sixty years, you could face seven and a half to fifteen years consecutive on each one of these.

Innes said he understood. 864 F.2d at 975. After he was arrested for several additional robberies, the court imposed sentences aggregating 15 to 30 years and denied his plea withdrawal motion. 864 F.2d at 976.

The Second Circuit held that the court's actions denied Innes due process because its explanation of the consequences of violating its conditions in terms of what Innes "could face" did not "straightforwardly tell the defendant that his guilty plea could not be withdrawn." 864 F.2d at 976. The court never told Innes that his plea would stand, or that it "could and would unilaterally impose an enhanced sentence." Its "ambiguous" explanation could have led Innes to conclude that, if he breached the court's conditions, he would face a trial that would expose him to a longer sentence. 864 F.2d at 979. Since the "consensual character" of the plea and whether Innes was "fairly appraised of its consequences" had been "brought into question," and since any ambiguity in that regard had to be resolved in the defendant's favor, the court's denial of his plea withdrawal motion violated due process. 864 F.2d at 979-980. See also People v. Elliot, 204 A.D.2d 565 (2d Dept. 1994)(when Elliot pled guilty, he was not informed on the record that "he would be subject to an enhanced sentence and would not be permitted to withdraw his pleas in the event that he failed to cooperate" in a co-defendant's prosecution; citing Innes, the Appellate Division held that "the court could not impose an enhanced sentence for a violation of this condition without first affording the defendant an opportunity to withdraw his pleas and stand trial").

2. Proof of the Violation

There must also be satisfactory proof that the defendant actually violated the condition the court set. In People v.

Marrero, 250 A.D.2d 624 (2d Dept. 1998), for example, the sentence promise was conditioned on the defendant's appearing for sentencing. The People thereafter informed the court that they had received information that he was planning to flee. The court issued a bench warrant and the defendnat was returned on it and appeared as scheduled for sentencing. The People presented photos they had taken of his apartment, showing various items piled in the middle of a room, as proof of his intent to flee. Without deciding whether the "mere intent" to breach a condition is sufficient to allow imposition of an enhanced sentence, the Appellate Division found the evidence that he intended to flee inadequate and reduced his sentence to the one he had bargained for.

In Torres v. Berbary, 340 F.3d 63 (2d Cir. 2003), the Second Circuit Court of Appeals held that, when a TASC defendant faces treatment program termination and sentencing to prison based on contested allegations of wrongdoing within the program, the "minimum requirements of due process" include a hearing akin to that provided those facing probation or parole revocation. The defendant must have the opportunity to testify and present evidence; to confront and cross-examine adverse witnesses, unless the court finds good cause for not allowing confrontation; to have the accusation proven by a preponderance of the evidence; and to a resolution of the relevant facts by the court.

Several strands of due process law come into play when a question arises as to whether a defendant has actually breached the curt's conditions: (1) the defendant's entitlement to fulfillment of a promise that induced his guilty plea unless he has, in fact, breached a plea condition; People v. Selikoff, 35 N.Y.2d 227, 238 (1974); Santobello v. New York, 404 U.S. 257, 262 (1971); (2) the protection of his liberty interest whenever a court decides between continuing his conditional liberty and sending him to prison; Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973); Morrissey v. Brewer, 408 U.S. 471, 481-482 (1972); and (3) and the proscription against a sentencing decision based on unreliable or inaccurate information. Mempa v. Rhay, 389 U.S. 128, 133 (1967); Townsend v. Burke, 334 U.S. 736, 741 (1948); People v. Valencia, 3 N.Y.3d 714, 715 (2004); People v. Naranjo, 89 N.Y.2d 1047, 1048 (1997).

In People v. Fiammegta, 14 N.Y.3d 90 (2010), the Court of Appeals declined to adopt Torres, but it did hold that the due process right to be sentenced only on reliable information mandated an inquiry in the Torres situation. Daytop Village had ejected Fiammegta because it concluded, based on hearsay and conjecture, that he was guilty of stealing money from a school the program used. He denied it, but the court refused to hold a hearing based on its view that it had no power to do anything even if it found Fiammegta had not committed the theft. The Court of Appeals held that, in this situation, the court:

> must carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate

> basis for the program's decision, and must explain, on the record, the nature of its inquiry, its conclusions, and the basis for them.

It need not hold an evidentiary hearing or make a finding of guilt by a preponderance of the evidence, but it should have considered the defendant's argument and allowed him to submit letters and testimony he had sought to adduce. It remitted for further proceedings. See also C.P.L. §216.05(9)(b)("In determining whether a defendant violated a condition of his or her release under the judicial diversion program, the court may conduct a summary hearing consistent with due process and sufficient to satisfy the court that the defendant has, in fact, violated the condition").

3. No Arrest Conditions

Sometimes, a court will condition a sentence promise on the defendant not committing another crime, in which case, there must be evidence that he, in fact, committed a new crime before his sentence can be enhanced.

More often, the court will condition its sentence promise on the defendant not being "arrested." In People v. Outley, 80 N.Y.2d 702 (1993), the Court of Appeals held that, in that situation, before an enhanced sentence is imposed, the People need not show that the defendant is actually guilty of the new crime. They must show, however, more than the mere arrest, since an arrest might be "malicious or baseless." Outley at 713. Due process, it held, requires an inquiry into the legitimacy of the arrest. Outley at 712. The Court allowed for flexibility in how that inquiry is made:

> The nature and extent of the inquiry--whether through a summary hearing pursuant to CPL 400.10 or some other fair means--is within the court's discretion []. The inquiry must be of sufficient depth, however, so that the court can be satisfied--not of defendant's guilt of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge.

Outley at 713.

If the defendant has been indicted in the new case, that constitutes a sufficient showing that the arrest is not baseless. See People v. Yancey, 247 A.D.2d 561 (2d Dept. 1998). Sworn statements by police may suffice. See People v. French, 72 A.D.3d 1397 (3d Dept. 2010)(enhancement upheld when based on record that included sworn statement of threatened correction officer, as well as court's own observation of defendant approaching a probation

officer in a threatening manner); People v. Lighthall, 6 A.D.3d 1170, 1171 (4th Dept. 2004)(same, when prosecutor informed court that named police officers saw Lighthall breaking into a building and arrested him inside, and that he had interviewed the officers and reviewed their reports). A sworn affidavit by a civilian may also suffice under some circumstances. Outley, 80 N.Y.2d at 708-709 (court properly relied on wife's sworn affidavit attesting to allegations in the complaint).

A defendant's acceptance of an adjournment in contemplation of dismissal may, under some circumstances, suggest a legitimate basis for an arrest. See People v. Jackson, 225 A.D.2d 793 (2d Dept. 1996). Also, even if a defendant denies committing the new crime, his related admissions may suffice. See People v. Smith, 300 A.D.2d 1038 (4th Dept. 2002)(affirming enhanced sentence when defendant denied drug sale for which he was arrested, but admitted possessing drugs, contending he was "in temporary innocent possession" of them); People v. Capuano, 252 A.D.2d 560 (2d Dept. 1998)(defendant admitted presence in vehicle in which contraband was found); People v. Littlejohn, 209 A.D.2d 441 (2d Dept. 1994)(defendant admitted presence during theft and plan to share in proceeds).

If the defendant denies guilt, however, the defendant will be entitled to relief if the court enhanced his sentence without an adequate inquiry or evidence to support a finding that the arrest was legitimate. See, e.g., People v. Taylor, 88 A.D.3d 821, 823 (2 Dept. 2011)(sentencing based on new arrest was improper when there was no "evidence or a finding that [the defendant] committed misconduct after he pleaded guilty"); People v. Smalls, 85 A.D.3d 1450 (3d Dept. 2011)(same, when court made no further inquiry after defendant's denial of charge underlying new arrest); People v. Jenkins, 29 A.D.3d 1177 (3d Dept. 2006)(same, when defendant claimed one arrest was malicious and that he was not present at the time and location of the offense underlying the other arrest); People v. McClemore, 276 A.D.2d 32 (4th Dept. 2000)(when defendant denied committing new offense, court's reliance on prosecutor's unsupported assertions that she had read the arrest report and spoken to the victim and its "summary disregard of defendant's explanation for the arrest violated due process"); People v. McGirt, 198 A.D.2d 101, 102 (1st Dept. 1993)(challenge to validity of arrest "should have prompted an in-depth inquiry"); People v. Banks, 161 A.D.2d 957, 958 (3d Dept. 1990)(sentencing court should not have "summarily reject[ed defense counsel's] plausible, exculpatory explanation" for the arrest; cited in Outley, 80 N.Y.2d at 713).

4. Cooperation with Probation

Sentence promises are typically conditioned on the defendant "cooperating with" or "being truthful with" the Probation Department when it interviews him in connection with preparation of the

pre-sentence report. If the defendant refuses to speak with Probation, obviously he breaches a "cooperate" condition. See People v. Patterson, 106 A.D.3d 757 (2d Dept. 2013). The trickier question arises if he denies or partly denies his guilt to the Probation interviewer.

In People v. Hicks, 98 N.Y.2d 185 (2002), the defendant who pled guilty to rape, admitted that he had lied when he denied to Probation that he had ever had intercourse or touched the child victims sexually. The Court held that his sentence could be enhanced based on the plea condition that he "truthfully answer" questions Probation posed to him.

In People v. Becker, 80 A.D.3d 795 (3d Dept. 2011), the Third Department held that a sentence was improperly enhanced for violation of a "cooperate with [Probation] fully" condition based on the People's claim that he lied. The Court noted that the court had never expressly conditioned its sentence promise on the defendant giving Probation answers that conformed with his plea allocution; that he had complied with the "cooperate" condition by showing up on time with all the required documents and answering all Probation's questions; and that Probation asking him to be "truthful as to what [his] side of the story [was]" was "not necessarily the same as requesting that he provide a 'truthful' and objective statement of fact."

Even if there is an "answer truthfully" condition, moreover, a careful inquiry is required when the defendant denies lying to Probation before the court can conclude that he actually told an untruth and therefore violated its condition. See People v. Zobe, 82 A.D.3d 1017 (2d Dept. 2011).

5. Treatment-Based Pleas

In recent years, deferred sentencing arrangements in which a defendant pleads guilty, is placed in treatment, and is promised a favorable outcome if he successfully completes treatment have become increasingly common. Several issues may arise when a prison alternative sentence is imposed based on the defendant's program failure.

One issue is what constitutes successful completion of a treatment program under the plea agreement. In People v. Nosek, 236 A.D.2d 892 (4th Dept. 1997), the Court held it improper to enhance a defendant's sentence when he was directed to participate in "an inpatient program in an alcohol rehabilitation center," and he successfully completed the in-patient program but failed in its out-patient after-care component. The Second Department had consistently held otherwise, however, on the theory that successfully completing an in-patient program necessarily encompasses successfully completing its outpatient component as well. See, e.g., People v. Rooney, 299 A.D.2d 565 (2d Dept. 2002). For most

treatment-based pleas, courts now spell out that there are both residential and out-patient components the defendant must complete.

Another issue is whether the defendant obtained the fair opportunity to overcome his addiction that the court implicitly promised him when it accepted his guilty plea. The Appellate Division, Second Department, recognized in People v. Rodriguez, 289 A.D.2d 512 (2d Dept. 2001):

> It is implicit to a promise of drug treatment as an alternative to imprisonment that the defendant will have . . . a reasonable opportunity to deal with the addiction and to satisfactorily complete a program designed to that end.

289 A.D.2d at 513. Thus, it held that a TASC defendant who claimed he had been placed in a dysfunctional and drug-infested program was entitled to a hearing as to whether he had truly received the benefit of his plea agreement. See also People v. Jackson, 272 A.D.2d 342 (2d Dept. 2000) (when defendant was placed in a program that would not permit him to take Prozac he needed for his pre-existing psychiatric condition, he "did not truly receive the benefit of his plea agreement"). Other things might also interfere with the defendant obtaining a fair chance in treatment, such as an ICE detainer or belatedly-discovered out-of-state arrest warrant, or the defendant's placement in a program that cannot cope with his medical or psychiatric problems or other special needs.

It is also possible to argue in some cases that the court abused its discretion in failing to give the defendant another chance in treatment. Even the worst recidivists regularly get numerous chances, especially if they are in drug treatment court. People v. Valencia, 3 N.Y.3d 714 (2004) (defendant had been placed in four different treatment programs). If the judge pulled the plug after the first or second treatment failure, consider arguing that it abused its discretion and citing "Recommended Practices for New York State Adult Treatment Courts," N.Y.S. Office of Court Drug Treatment Programs, p. 36 ("Relapse and other forms of non-compliance are a normal part of the recovery process. Sanctions should be designed to motivate, not discourage, participants"); Id., p. 45 ("the drug court will want to offer as many opportunities for success as local treatment resources permit"); C.P.L. §216.05(9)(c) (if court determines that a defendant has violated a condition, it is not required to terminate treatment and impose sentence, but may modify the conditions).

For question of whether the defendant actually breached his treatment conditions, see the discussion of Fiammegta in §VII(D)(2), ante.

F. Promises by the Prosecutor

Like the court, the prosecutor has an obligation to fulfill promises he made on which the defendant relied in agreeing to plead guilty. In Santobello v. New York, 404 U.S. 257 (1971), a defendant pled guilty relying, in part, on the prosecutor's "off the record" promise not to make a sentence recommendation. A delay ensued. A different prosecutor appeared at sentencing and, unaware of the "off the record" promise, recommended a one-year sentence. Defense counsel objected on the basis of the promise, and the prosecutor responded that there was nothing in the record to support the defense claim that the promise had been made. The court, saying it was not influenced by that recommendation, imposed a one-year sentence. 404 U.S. at 258-260. The People later conceded the promise had been made. 404 U.S. at 262.

The Supreme Court noted that all of the considerations that favor plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor." 404 U.S. at 261. Therefore, the plea process "must be attended by safeguards to insure the defendant what is reasonably due" him. 404 U.S. at 262. Although circumstances will vary, one factor is "constant":

> when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262. Therefore, regardless of whether the judge would have imposed a different sentence "had he known" of the prosecutor's promise, "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty" required relief: either specific performance at a resentencing before a different judge or plea withdrawal. 404 U.S. at 262-263.

The same holds true if the prosecutor promises not to make a recommendation as to whether the court should adjudicate the defendant a youthful offender and then argues at sentencing that it should not. People v. Lodge, 54 A.D.3d 875 (2d Dept. 2008).

VIII. PLEAS TO SUPERIOR COURT INFORMATIONS

Use of a Superior Court Information ("SCI") may be to the defendant's benefit because it provides a way to avoid statutory plea-down limitations. Nevertheless, the right to an indictment is considered very important in New York and therefore the use of an SCI is carefully circumscribed.

In New York, an accused has a constitutional right, embodied in Article I, § 6 of the State Constitution, to be prosecuted for a felony (an "infamous offense") only by means of an indictment voted by a Grand Jury. This right has "been recognized as not merely a personal privilege of the defendant but a 'public fundamental right,' which is the basis of jurisdiction to try and punish an individual." People v. Boston, 75 N.Y.2d 585, 587 (1990); see also People v. Menchetti, 76 N.Y.2d 473, 476 (1990). Indeed, it is considered so important a right that, until a state constitutional amendment in 1973, it could not be waived at all. People v. Trueluck, 88 N.Y.2d 546, 548 (1996); People v. Boston, supra at 587-588. The 1973 amendment created an exception to the rule that the right to an indictment was not waivable, but that exception is "carefully circumscribed," since it represents a "departure from the constitutional safeguard and procedural *sine qua non*," People v. Trueluck, supra at 548-549, which embodies "protections built on history and fair-minded principles that have withstood the test of time and experience." Id. at 550.

An invalid waiver of the right to be prosecuted by Grand Jury indictment is jurisdictional, affecting "the organization of the court or the mode of proceedings prescribed by law." People v. Boston, supra at 589, fn. 2. Therefore, consideration of whether the waiver was valid is not foreclosed by a guilty plea, the failure to preserve the issue, or even a waiver of the right to appeal. People v. Zanghi, 79 N.Y.2d 815, 817 (1991); People v. Harris, 267 A.D.2d 1008, 1009 (4th Dept. 1999); People v. Verrone, 266 A.D.2d 16, 18 (1st Dept. 1999); People v. Libby, 246 A.D.2d 669, 670 (2d Dept. 1998).

A. When an SCI Can Be Used

An SCI can be used only when the defendant has been "held for the action of the Grand Jury." If he has not yet been "held" for grand jury action, an SCI cannot be used. It can be used after an indictment has been voted, People v. Mills, 154 A.D.2d 405 (2d Dept. 1989), but not after one has been filed. People v. Boston, supra.

B. The Charges an SCI May Contain

The Constitutional provision that a defendant may waive indictment and consent to be prosecuted by an information only as to offenses for which he has been "held for the action of a grand jury" means that the information may contain crimes charged in the complaint and their lesser included offenses. People v. Menchetti, supra, 76 N.Y.2d at 477. It may not, however, charge a crime that is greater than that in the complaint or contains additional elements. People v. Zanghi, supra, 79 N.Y.2d 815.

In Zanghi, the complaint charged the defendant with fourth-degree criminal possession of stolen property and third-degree unauthorized use of a vehicle. He waived indictment and pled guilty to an information charging him with third-degree criminal possession of stolen property. The Court of Appeals held that, because the stolen property charge in the information was greater than that in the complaint, the information was "unauthorized and could not serve as a proper jurisdictional predicate for his guilty plea." 79 N.Y.2d at 816-817. While the crime charged in the complaint may be deemed to include lesser included offenses, it "cannot also be deemed to include *greater* offenses, which have additional aggravating elements." 79 N.Y.2d at 817. The Court specifically rejected the People's contention that the factual portion of the complaint contained sworn allegations that supported the additional element needed for the charge in the information, terming it "mere surplusage," the sufficiency of which "need never have been considered by the arraigning court." 79 N.Y.2d at 818.

The Court in Zanghi also rejected the argument, based on C.P.L. §195.20, that it was sufficient that the crime charged in the information was "properly joinable" with the "offense for which the defendant was held." 79 N.Y.2d at 818. It held:

> The language of CPL 195.20 makes clear that where "joinable" offenses are included, the information must, at a minimum, also include at least one offense that was contained in the felony complaint.

79 N.Y.2d at 818. See People v. Kohl, 19 A.D.3d 1155 (4th Dept. 2005)(improper SCI plea when complaint charged second-degree burglary and fourth-degree grand larceny, but plea was to fourth-degree criminal possession of stolen property, since it was not a lesser included offense); People v. Quarcini, 4 A.D.3d 864 (4th Dept. 2004)(same, when complaint charged third-degree criminal possession of stolen property, and defendant pled guilty to fourth-degree criminal possession of stolen property, because fourth-degree possession added "a unique element, i.e., the property stolen must consist of a motor vehicle"); See also People v. Colon, 16 A.D.3d 433 (2d Dept. 2005); People v. Roe, 191 A.D.2d 844 (3d Dept. 1993)(although one may plead guilty to a hypothetical crime, information charging attempted depraved indifference murder was defective both because the accusatory instrument itself cannot charge a non-existent crime and because it charged a crime for which the defendant had not been held for grand jury action).

C. The Waiver of Grand Jury Rights

Assuming the SCI itself is proper, C.P.L. § 195.20 requires the defendant waive his Grand Jury-related rights in a specific manner. He must sign a "written waiver" that contains a very

specific recitation of the rights he is waiving "in open court in the presence of his attorney." C.P.L. § 195.20. An oral waiver alone is insufficient.

Additionally, as with any waiver of fundamental rights, there must be an oral waiver colloquy in addition to the written waiver. In the absence of an oral waiver, or if the oral waiver is clearly inadequate, the defendant will have a plea withdrawal issue. Cf., People v. Weinberg, 34 N.Y.2d 429 (1974)(for consent to prosecution on misdemeanor complaint to be knowing and intelligent, defendant must be informed of his right to insist on prosecution by information).

IX. VIOLATION OF PROBATION PLEAS

Violation of probation proceedings and pleas have their own set of rules.

A. Timing

Under C.P.L. §410.30, the court may file a written declaration of delinquency "at any time during the period of a sentence of probation" if there is reasonable cause to believe the defendant has violated a probation condition. People v. Johnson, 159 A.D.2d 725 (2d Dept. 1990); People v. Rodriquez, 156 A.D.2d 491 (2d Dept. 1989). If the declaration of delinquency is filed after the probation period ends, the court lacks power to proceed upon it and find the defendant to be in violation of his probationary sentence. People v. Antwine, 299 A.D.2d 151 (1st Dept. 2002); People v. Montgomery, 115 A.D.2d 102 (3d Dept. 1985). It is therefore important to know when the probationary period ends.

Probationary sentences usually run from the date of sentencing. But if the defendant receives a "split" sentence of, for example, 6 months in jail and 5 years of probation, the jail and probation terms must run concurrently. Therefore, if the defendant has already served all or part of his jail term before the sentencing date, as a practical matter, that time will be subtracted from his probationary term, meaning his 5-year term of probation may expire as early as 4 1/2 years after his sentencing date. People v. Zephrin, 14 N.Y.3d 296 (2010).

The Probation Department need not seek a declaration of delinquency immediately upon the probationer's breach of a condition because it may be appropriate to assess the cumulative effect of several potential probation violations before doing so. People v. Harris, 145 A.D.2d 435 (2d Dept. 1988).

Once a declaration of delinquency is signed by the court, however, C.P.L. §410.30 mandates that the court take reasonably prompt action to bring the defendant to court and proceed on the violation. An unreasonable delay in doing so may require that the VOP proceeding be dismissed. People v. Horvath, 37 A.D.3d 33 (2d Dept. 2006).

B. VOP Pleas

A defendant charged with violating probation is not entitled to a jury trial, but due process applies to probation revocation hearings. Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973). It generally requires notice and a hearing at which the defendant can confront accusers (absent good cause otherwise) and be heard. 411 U.S. at 786. In New York, these due process dictates are incorporated in C.P.L. §410.70, governing the revocation of probation or a conditional discharge. That section provides, inter alia, for a statement setting forth "a reasonable description of the time, place and manner in which the violation occurred," §410.70(2); the defendant's right to cross-examine witnesses and present evidence, §410.70(3); and that a finding of violation "must be based upon a preponderance of the evidence." §410.70(3).

Therefore, when a defendant pleads guilty to violating probation, he must be informed at the very least that, by doing so, he is giving up his right to a hearing. In other words, there must be a modified Boykin-like waiver of his rights. As a practical matter, fairly bare-bones hearing waivers are commonly accepted. But see Matter of Delmar C., 207 A.D.2d 998 (4th Dept. 1994)(court failed to conduct adequate inquiry as to juvenile probationer's waiver of a fact-finding hearing when it told the him of his right to put the presenting agency to its proof, but not that he had a right to cross-examine the agency's witnesses and put in a defense). If there is little or no waiver colloquy, or if there is some other basis for attacking his VOP plea as not knowing, intelligent, and voluntary, the defendant may be entitled to withdraw his VOP plea.

X. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Before and at the Guilty Plea

A defendant is entitled to the effective assistance of counsel in deciding whether or not to plead guilty. Hill v. Lockhart, 474 U.S. 52, 56-57 (1985). Therefore, in general, the same types of coercion, misrepresentation of a defendant's sentencing exposure, misadvice about what the sentence means or about the collateral or immigration consequences of a guilty plea, or promises that cannot

be fulfilled discussed in the preceding sections may entitle a defendant to plea withdrawal if they stem from defense counsel rather than the court. If they occur on the record, an ineffective assistance argument can be made on direct appeal. If not, it must be raised in a C.P.L. §440.10 motion.

In particular, defense counsel must not only accurately convey all plea offers to the client, see People v. Roy, 122 A.D.2d 482 (3d Dept. 1986)(counsel ineffective for communicating "crux of bargain" differently to defendant than it was laid out on record), but must also provide the client with an "informed opinion as to what plea should be entered." Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); Boria v. Keane, 99 F.3d 492, 496-497 (2d Cir. 1996), cert. denied, 521 U.S. 1118 (1997). Therefore, a defense attorney "has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable." Model Code of Professional Responsibility, EC 7-7 (1992). Counsel "must give the client the benefit of counsel's professional advice on this crucial decision." Boria v. Keane, supra, 99 F.3d at 497 (quoting Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases*).

Counsel provides ineffective assistance by failing to convey adequate, accurate information to the defendant regarding the advisability of pleading guilty, whether that failure stems from counsel's inadequate investigation of the law and the facts, People v. Reed, 152 A.D.2d 481 (1st Dept. 1989), a conflict of interest, People v. Dell, 60 A.D.2d 18 (4th Dept. 1977), or some other reason. Boria v. Keane, supra, 83 F.3d 48 (assumption defendant would not be willing to plead guilty).

Because an attorney must advise his client fully and accurately about his sentencing exposure if he rejects a plea offer, and may also have to make reasonable predictions about what sentence a defendant is likely to receive, clients often complain that their attorney coerced them into pleading guilty. Such claims are routinely rejected if the advice was accurate and any prediction reasonable. Indeed, Boria suggests that part of counsel's job may be to urge acceptance of a favorable guilty plea rather forcefully.

Counsel will be ineffective, however, if, instead of providing merely an "inaccurate prediction," he makes a "misstatement of easily accessible fact" upon which a defendant relies. See United States ex rel. Hill v. Ternullo, 510 F.2d 844, 847 (2d Cir. 1975); People v. Williams, 65 A.D.2d 521 (1st Dept. 1978)(error to summarily deny plea withdrawal motion based on allegation that counsel misled defendant about sentencing exposure). A defendant may be misled by his attorney's incorrect advice even though he is "not a novice in criminal proceedings." United States ex rel. Oliver v. Vincent, 498 F.2d 340, 345 (2d Cir. 1974).

To withdraw a guilty plea, however, claims of ineffective assistance must relate to the plea decision itself. Generalized claims of failure to investigate, provide the defendant with

paperwork, communicate with him more often, and so forth, will not leads to plea withdrawal.

B. When the Client Seeks Plea Withdrawal

When a defendant moves to withdraw his guilty plea, his right to the effective assistance of counsel requires that his attorney not take a position adverse to him, or effectively become a witness against him, on the plea withdrawal issue. People v. Rozzell, 20 N.Y.2d 712 (1967); People v. Santana, 156 A.D.2d 736 (2d Dept. 1989).

Santana is typical. When the defendant sought plea withdrawal, the court asked defense counsel about the adequacy of his opportunity to discuss the matter with his client. Defense counsel "embarked on a lengthy dissertation regarding all that he had done on the defendant's behalf" and disparaged the plea withdrawal motion as a "time-honored tactic" stemming from a "change of heart." The Court held, "The defendant's right to counsel was adversely affected when his attorney, either voluntarily or at the court's urging, became a witness against him." It went on to say that, "once counsel took a position adverse to the defendant, the court should not have proceeded to determine the motion without first assigning the defendant new counsel."

In numerous cases since, the Second Department has reiterated the holding of Santana and ordered new plea withdrawal determinations when assigned counsel commented adversely on his or her client's plea withdrawal application. E.g., People v. Rivera, 71 A.D.3d 701 (2d Dept. 2010); People v. Dixon, 63 A.D.3d 957 (2d Dept. 2009); People v. Bedoya, 53 A.D.3d 621 (2d Dept. 2008); People v. Armstead, 35 A.D.3d 624, 625-626 (2d Dept. 2006); People v. Bryant, 22 A.D.3d 676 (2d Dept. 2005); People v. Earp, 7 A.D.3d 538 (2d Dept. 2004); People v. Kooy, 5 A.D.3d 794 (2d Dept. 2004); People v. Caccavale, 305 A.D.2d 695; People v. Elting, 2 A.D.3d 455 (2d Dept. 2003); People v. Haynes, 248 A.D.2d 402 (2d Dept. 1998); People v. Bernard, 242 A.D.2d 387 (2d Dept. 1997); People v. Cruz, 244 A.D.2d 564 (2d Dept. 1997). Accord, People v. Stephens, 291 A.D.2d 841 (4th Dept. 2002); People v. Lewis, 286 A.D.2d 934 (4th Dept. 2001); People v. Pittman, 270 A.D.2d 883 (4th Dept. 2000).

XI. APPEAL WAIVERS

In People v. Seaberg, 74 N.Y.2d 1, 9 (1989), the Court held that a defendant may waive his right to appeal as part of a plea or sentence bargain. Since that decision, appeal waivers have become virtually universal in guilty plea cases in the Second Department. It is therefore important to know what a valid appeal waiver does

and does not encompass and when the validity of an appeal waiver is assailable.

A. Issues Encompassed by a Valid Appeal Waiver

A valid guilty plea, in and of itself, waives numerous issues that could otherwise be raised on appeal. See separate list.

A valid waiver of the right to appeal waives additional issues, the most important being excessiveness of sentence and suppression issues.

A valid waiver does not encompass:

- constitutional speedy trial,
- competency claims,
- voluntariness of the guilty plea,
- legality of sentence (including sentencing as a predicate felon and imposition of illegal consecutive terms),
- the court's failure to consider youthful offender treatment, or
- issues that turn on whether the defendant was treated fairly in light of post-plea events (a somewhat amorphous category that covers some sentence enhancement issues, the failure to sentence someone within a reasonable time frame, etc.).

These issues are immune to waiver because, beyond being "a matter of fairness to the accused," they "also embrace the reality of fairness in the process itself" and therefore "implicate society's interest in the integrity of the criminal process."

The law as to what a valid waiver encompasses can change over time, so if applying a waiver to your situation seems unfair, it makes sense to consider raising the issue and trying to get leave on it even if the Appellate Division law is against you.

B. The Waiver's Validity

To be enforceable even as to waivable issues, an appeal waiver must be knowing, intelligent, and voluntary. People v. Seaberg, supra, 74 N.Y.2d at 11. Both the trial and appellate courts must "oversee the process to ensure that the defendant's waiver of the right to appeal reflects a knowing and voluntary choice." People v. Callahan, 80 N.Y.2d 273, 280 (1992). The trial court must consider not only the fairness of the plea and waiver bargain, but also its effect on "the integrity of the criminal justice process," before accepting it. People v. Holman, 89 N.Y.2d 876, 878 (1996); People v. Seaberg, supra, 74 N.Y.2d at 11. The defendant's

background is relevant to a determination of whether the explanation of a waiver of the right to appeal was sufficient to ensure that it was knowing and voluntary. See People v. Seaberg, supra, 74 N.Y.2d at 11.

Numerous lines of attack have prevailed in invalidating an appeal waiver. The following are typical:

1. Written Waivers.

Written waivers alone are insufficient, even if they are perfectly clear and signed by the defendant and his attorney. While no "particular litany" is required, there must be a sufficient waiver colloquy on the record so that an appellate court can determine whether the waiver was knowing and voluntary; "a knowing and voluntary waiver cannot be inferred from a silent record." People v. Callahan, supra, 80 N.Y.2d at 283.

The use of a written waiver may add to an argument that the waiver was valid, but, in general, if you can argue that the waiver colloquy was inadequate or misleading, you should not be deterred by the existence of a signed written waiver.

In Brooklyn, for many years, a written waiver form was used that inaccurately informed the defendant that he had no right to argue excessiveness of his sentence on appeal, thereby suggesting that he was not giving up that right by signing the waiver. The Appellate Division routinely invalidated waivers where that form was used, and it no longer appears to be in use. But it makes sense to read the written waiver carefully.

A written waiver may give you additional fuel for an argument that the waiver is invalid if (1) the defendant signs a waiver form in English when he is not English-speaking or needs an interpreter in court; (2) he signs a waiver when there is a question as to his ability to read; or (3) defense counsel does not sign the waiver form (Legal Aid Society attorneys typically have a policy against signing).

2. Explanations that Confuse the Right to Appeal with the Trial-Related Rights Automatically Forfeited by Pleading Guilty

In People v. Lopez, 6 N.Y.3d 248, 256 (2006), the Court of Appeals held that an appeal waiver may not be treated as a "perfunctory step." Trial courts must "ensure that defendants understand what they are surrendering when they waive the right to appeal." Id. at 256. Because there is a critical difference between rights automatically forfeited by a guilty plea and the right to appeal, which a defendant must affirmatively waive:

> When a trial court inaccurately employs the language of forfeiture in a situation of waiver, it has mischaracterized the nature of the right a defendant was being asked to cede.

Id. at 257. Under such circumstances, an appeal waiver will not be considered knowing, intelligent, and voluntary. Id. at 256.

Several judges in the Second Department nevertheless still discuss a waiver in terms that could be confused with forfeiture. For example:

- "by pleading guilty" or "by entering this plea and answering my questions," or "by this guilty plea and the sentence you are promised," you are waiving your right to appeal
- "if you went to trial and were convicted," you would have a right to appeal.
- listing the Boykin rights forfeited by the plea and listing the right to appeal as if it is just one more of such rights ("another right you are waiving is...).
- "If you understand the rights you've waived by pleading guilty, if you recognize that the plea is final and if you are satisfied with the proceedings, you are going to need to sign a waiver of your right to appeal."

3. Waivers that Are Explained as Precluding Plea Withdrawal, or Appeals of Procedural Errors or Non-Constitutional Issues

The involuntariness of a guilty plea survives a waiver of the right to appeal, but some judges discuss a waiver in terms that suggest it is primarily a way of cementing in the plea itself, saying, for example:

> Once you are sentenced, you cannot appeal. You can't challenge any ruling in the case up to this point. You can't get this plea back and say you were confused; you didn't commit the crime; the lawyer didn't show you enough of the paperwork; you were threatened with what would happen if you had went through to a jury verdict; you were under pressure; under medication; your mind wasn't clear or any other excuse. You are not going to get this plea back. This case is over with. Once you are sentenced, you can't appeal.

Also, although a defendant is entitled to raise excessiveness of sentence on appeal unless he waives the right to appeal, some judges explain the waiver in terms that suggest only "errors" or, worse yet, only "procedural errors" can be raised on appeal.

Such explanations are inherently confusing, because they suggest that the defendant's appeal and waiver relate only to plea withdrawal or procedural errors and fail to inform him that he is giving up his right to appeal his sentence and other issues.

Similarly, some judges tell defendants that the waiver means they are giving up the right to appeal, "except for illegal sentence or some constitutional issues." Obviously, most defendants have no idea what sentences are illegal or what issues are constitutional, so this is inherently confusing or misleading as well.

4. Waivers of the Right to Appeal the "Conviction"

In People v. Maracle, 19 N.Y.3d 925 (2012), the defendant pled guilty with the understanding that she would be sentenced to probation if she paid a substantial amount of restitution by the date of her sentencing. She was told that, if she failed to do so, there would be no sentence promise and she would not be able to withdraw her guilty plea. She waived the right to appeal her "conviction," but she "never expressly waived her right to appeal" the harshness of her sentence. When she failed to meet the restitution condition of her plea, the court sentenced her to prison.

The Court of Appeals held that Maracle's "plea colloquy fail[ed] to establish that defendant knowingly and intelligently waived her right to appeal the severity of her sentence." 19 M.Y.3d at 927. It distinguished between a "conviction," which was defined as, inter alia, the entry of a guilty plea, and "sentence," and noted that the plea colloquy contained "no mention of [her] not being able to appeal the harshness of her sentence." The "most critical error," moreover, was the court's failure to:

> explain that the appeal waiver would bar defendant from not only challenging the sentence she hoped to receive, . . . but also any sentence that the court would impose in the event defendant failed to meet the court's [restitution] condition.

19 N.Y.3d at 928.

5. Waivers When the Defendant is Not Informed of the Maximum Sentence he Faces

A waiver of a defendant's right to appeal encompasses an appeal of his sentence as excessive only if he was specifically informed of the maximum sentence the court could impose on her. People v. Lococo, 92 N.Y.2d 825 (1998)("Since defendants knew the maximum exposure they could face upon pleading guilty, the waiver of their right to challenge the sentence in each case was knowing and intelligent"). See also People v. Hidalgo, 91 N.Y.2d 733 (1998). When a defendant is not advised of the maximum possible sentence, an appeal waiver will not "encompass his challenge to the severity of the sentence." People v. Cormack, 269 A.D.2d 815 (4th Dept. 2000). The same rule applies when a defendant is not informed of the fact that he will face a period of post-release supervision. People v. Thomas, 272 A.D.2d 985 (4th Dept. 2000)(waiver invalid since defendant had not been advised by the court of "the potential periods of incarceration, including the potential period of post-release supervision").

A waiver also cannot encompass the excessiveness of an enhanced sentence the defendant receives if he was not informed at the plea of the maximum term, or post-release period, such an enhanced sentence would involve.

The Fourth Department has held that a waiver is also invalid to foreclose an excessive sentence argument if the court failed to spell out the full terms of the plea agreement, including the maximum possible sentence, before eliciting the defendant's agreement to waive his right to appeal. See People v. Adams, 94 A.D.3d 1428 (4th Dept. 2012); People v. Anderson, 90 A.D.3d 1475 (4th Dept. 2011).

6. Failure to Explain the Right to Appeal

The court has an obligation to make sure a defendant understands the appeal waiver's import, and thus to make sure he understands the right to appeal. If nothing else, you can usually argue that the court failed to adequately explain the right to appeal so that the defendant understood what he was giving up.

Sometimes, the court will rely on defense counsel to explain the waiver, but that is insufficient since many defense attorneys are clueless as to what the waiver means.

Finally, some courts taking SCI pleas lump the appeal and grand jury waivers together, explaining only the latter. "I have before me a Superior Court Information and also a waiver of right to appeal, these two documents here, did you just sign these documents here before me in open court with your lawyer by your side," followed by an explanation of the defendant's grand jury-related rights is insufficient to apprise him of his entirely separate right to appeal.