

CPL § 220.10: The People May Not Withdraw Consent to a Negotiated Plea Subsequent to Modification of a Material Term by the Appellate Division

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but, alternatively, upon the reasoning that dismissals were warranted in the furtherance of justice under section 170.30(1)(g) of the CPL. Indeed, the *Douglass* Court noted that such a dismissal is warranted when a court, upon consideration of enumerated statutory factors, concludes that continued prosecution would prove unjust.⁶⁷ It is therefore suggested that in circumstances demonstrating failure to prosecute, section 170.30(1)(g) of the CPL may be invoked by trial courts as a viable ground for dismissal.⁶⁸

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CRIMINAL PROCEDURE LAW

CPL § 220.10: The People may not withdraw consent to a negoti-

⁶⁷ 60 N.Y.2d at 206, 456 N.E.2d at 1185, 469 N.Y.S.2d at 62.

⁶⁸ See *People v. Wingard*, 33 N.Y.2d 192, 196, 306 N.E.2d 402, 404, 351 N.Y.S.2d 385, 387-88 (1973); *People v. Kitt*, 93 App. Div. 2d 77, 78, 460 N.Y.S.2d 799, 800 (1st Dep't 1983); *People v. Fagg*, 86 Misc. 2d 1046, 1047, 385 N.Y.S.2d 743, 744 (Ontario County Ct. 1976). In *Wingard*, the Court, in noting that the power to dismiss an information pursuant to CPL § 170.40 lies within the discretion of the trial judge, held that the failure of the prosecutor to appear in court on the date set for trial caused an unexcusable imposition on both court time and on the defendants. 33 N.Y.2d at 196, 306 N.E.2d at 404, 351 N.Y.S.2d at 387-88. In that such behavior was "inconsistent with an intention on the part of the People to diligently prosecute the defendants," the Court affirmed the trial judge's dismissal of the informations in the furtherance of justice pursuant to CPL § 170.40. *Id.* at 196, 306 N.E.2d at 404, 351 N.Y.S.2d at 388. In a similar vein, the court in *Kitt* concluded that although "failure to prosecute" is not an enumerated ground for dismissal under the Criminal Procedure Law, it nevertheless constitutes a cause for seeking dismissals and therefore should be governed by the Criminal Procedure Law. 93 App. Div. 2d at 78, 460 N.Y.S.2d at 800. Moreover, in *Fagg*, the court remarked that "[a]n example of a dismissal in the interests of justice is when a court dismisses for failure of the district attorney in timely prosecuting a charge, although that failure does not amount to a denial of a speedy trial." 86 Misc. 2d at 1047, 385 N.Y.S.2d at 744 (quoting R. PFTLER, *supra* note 50, § 8.13, at 403).

Further support for the view that dismissals in the "furtherance of justice" may be based upon failure of prosecution is found in a decision by the Court of Appeals. In *People v. Singer*, 44 N.Y.2d 241, 376 N.E.2d 179, 405 N.Y.S.2d 17 (1978), the Court stated that "unreasonable delay in prosecuting a defendant constitutes a denial of due process of law," and that "the [s]tate due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute." *Id.* at 253, 376 N.E.2d at 186, 405 N.Y.S.2d at 25 (quoting *People v. Staley*, 41 N.Y.2d 789, 791, 364 N.E.2d 1111, 1113, 396 N.Y.S.2d 339, 341 (1977)). It is submitted that the *Singer* decision incorporates a recognition that circumstances exist that will justify dismissals for want of prosecution even though the time constraints of the speedy trial statute have not been violated.

ated plea subsequent to modification of a material term by the Appellate Division

The disposition of criminal indictments by consensus between the People and the defendant is an essential tool in the efficient administration of criminal justice.⁶⁹ Section 220.10 of the CPL, which governs the use of plea bargaining⁷⁰ in New York, requires the consent of both the court and the prosecution to any negotiated plea of guilty that has the effect of reducing the charges against a defendant.⁷¹ Courts have construed this measure to af-

⁶⁹ Notwithstanding early reluctance to use the negotiated guilty plea, *see, e.g.*, *People v. Gowasky*, 219 App. Div. 19, 24, 219 N.Y.S. 373, 379 (1st Dep't 1926); *see also* Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 20 (1979), nearly 90% of convictions currently are obtained without resort to trial, *see* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.2 at 1-2 (2d ed. 1983); Comment, *Plea Bargains: What to Do When the Prosecutor Says No*, 6 U. DAYTON L. REV. 95, 95 (1981). Indeed, it is generally accepted that plea bargaining is a bureaucratic necessity. *See Santobello v. New York*, 404 U.S. 257, 260 (1971); *Brady v. United States*, 397 U.S. 742, 751-53 (1970). *See generally* Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME LAW. 835, 835 (1973) (judicial infrastructure presently insufficient to afford every defendant a complete trial). Yet, despite its wide acceptance, neither the prosecutor nor the defendant has a constitutional right or duty to execute a plea bargain. *See, e.g.*, *Weatherford v. Bursey*, 429 U.S. 545, 560-61 (1977) (prosecutor under no constitutional duty to plea bargain); *People v. Venable*, 46 App. Div. 2d 73, 81, 361 N.Y.S.2d 398, 407 (3d Dep't 1974) (not improper to classify offenders differently based on availability of plea bargaining).

⁷⁰ Plea bargaining is the process whereby a criminal defendant promises to enter a certain plea in exchange for a concession from the prosecution. Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 774 (1973) [hereinafter cited as *Broken Promises*]. Typically, the defendant offers a guilty plea in exchange for a lesser sentence and the opportunity to begin serving that sentence almost immediately. *See Brady v. United States*, 397 U.S. 742, 752 (1970). The prosecutor thereby is afforded an opportunity to obtain a quick and certain conviction without subjecting his case to the uncertainties and expense of a trial. *See Corbett, Plea Bargaining*, 26 BROOKLYN BARRISTER 99, 103 (1975); Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 865-66 (1964); *infra* notes 97-101 and accompanying text. The judicial system may be seen as a third-party beneficiary to such an agreement, since the successful plea bargain reduces docket congestion and facilitates individualized justice by allowing tailored application of the penal code. *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 249 (1949).

⁷¹ CPL § 220.10 provides in pertinent part:

3. [W]here the indictment charges but one crime, the defendant may, with both the permission of the court and the consent of the people, enter a plea of guilty of a lesser included offense.

4. [W]here the indictment charges two or more offenses in separate counts, the defendant may, with both the permission of the court and the consent of the people, enter a plea of:

• • •

(b) Guilty of a lesser included offense with respect to any or all of the offenses charged.

ford the prosecution an opportunity to withdraw its consent to a plea when the trial judge modifies a sentence in contravention of the original bargain.⁷² The statutory scheme also provides that the Appellate Division has the discretionary power to modify an "unduly harsh" sentence pursuant to section 470.15 of the CPL.⁷³ Re-

CPL § 220.10(3), (4)(b) (1983). The statute was intended to prevent collusive bargains between the defendant and the prosecutor. See *People v. Selikoff*, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 635 (1974), *cert. denied*, 419 U.S. 1122 (1975). A guilty plea entered pursuant to a plea agreement operates as a conviction, see *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), and an effective waiver of fundamental rights, see, e.g., *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (privilege against self-incrimination and trial by jury); *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (right to jury trial); *Pointer v. Texas*, 380 U.S. 400, 402 (1965) (right to confront one's accusers). See generally Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R.-C.L. L. REV. 29, 30 (1974) (discussing constitutional rights waived by entrance of guilty plea).

⁷² See, e.g., *People v. Farrar*, 52 N.Y.2d 302, 307, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981); *People v. Ciccone*, 91 App. Div. 2d 688, 688-89, 457 N.Y.S.2d 328, 330 (2d Dep't 1982); *People v. Biagini*, 87 App. Div. 2d 634, 634-35, 448 N.Y.S.2d 222, 223 (2d Dep't 1982). In *Farrar*, the defendant was indicted for felony and intentional murder, attempted murder, robbery, burglary, and criminal possession of a weapon. 52 N.Y.2d at 304, 419 N.E.2d at 864, 437 N.Y.S.2d at 961. Pretrial negotiations involving the prosecutor, the defendant, and the trial court produced a bargain whereby the defendant agreed to plead guilty to first degree manslaughter in complete fulfillment of the original indictment. *Id.* The prosecutor accepted the bargain with the understanding that the "defendant was to be sentenced to a term of 8½ to 25 years unless she was adjudicated a second felony offender." *Id.* After sentencing, the defendant appealed to the Appellate Division, which vacated the sentence and remitted the case to the trial court for discretionary imposition of sentence. *Id.* at 305, 419 N.E.2d at 865, 437 N.Y.S.2d at 962. The Court of Appeals held that the legislative policy embodied in CPL § 220.10 necessitated that the People be given the right, absent special circumstances, to withdraw their consent. *Id.* at 307, 419 N.E.2d at 866, 437 N.Y.S.2d at 963. The *Farrar* decision established the People's right to have the plea vacated and to proceed on the basis of the original indictment. See *People v. Powell*, 108 Misc. 2d 610, 614, 438 N.Y.S.2d 220, 223 (N.Y.C. Crim. Ct. N.Y. County 1981).

Although the reach of the *Farrar* decision was originally unclear, 108 Misc. 2d. at 612, 438 N.Y.S.2d at 222, subsequent decisions clarified the holding. For example, the presence of special circumstances, notably those involving manifest injustice to the defendant, will preclude the People from asserting the right to withdraw consent to the plea. See, e.g., *People v. Singletary*, 112 Misc. 2d 1088, 1092-93, 448 N.Y.S.2d 394, 397 (Syracuse City Ct. 1982) (denial of withdrawal proper when disparity of sentences is de minimus and defendant has already begun serving sentence).

⁷³ See CPL § 470.15(6)(b) (1983). The Appellate Division is authorized to review sentences on appeal. *Id.* § 450.10(2). The scope of review is quite broad, encompassing sentences deemed "invalid as a matter of law," *id.* § 470.15(c), as well as those considered "unduly harsh or severe," *id.* § 470.15(6)(b). See, e.g., *People v. Robinson*, 36 N.Y.2d 224, 228, 326 N.E.2d 784, 786, 367 N.Y.S.2d 208, 211 (1975) (power extends to error of both law and fact).

The applicability of *People v. Farrar*, 52 N.Y.2d 302, 419 N.E.2d 864, 437 N.Y.S.2d 961 (1981), to sentence modification by the Appellate Division was considered by the First Department in *People v. Miles*, 93 App. Div. 2d 776, 776-78, 461 N.Y.S.2d 985, 986-87 (1st Dep't 1983). In *Miles*, two justices wrote concurring opinions, another concurred in the re-

cently, in *People v. Thompson*,⁷⁴ the Court of Appeals held that the People do not have a right to withdraw their consent to a negotiated plea when the Appellate Division, rather than the trial court, modifies the previously agreed-upon sentence.⁷⁵

In *Thompson*, a 17-year-old was indicted for murder in the second degree and for possession of a weapon in the first degree.⁷⁶ Before trial, the defendant and the prosecutor agreed to a plea of guilty to manslaughter in the first degree.⁷⁷ The trial court adopted the negotiated plea and sentenced the defendant to a term of eight and one-third to twenty-five years imprisonment.⁷⁸ On appeal by the defendant, the Appellate Division found the sentence to be unduly harsh and reduced it to a term of three and one-third to ten years.⁷⁹ The case was then remitted to the trial court to afford the prosecution an opportunity to withdraw its consent to the original agreement.⁸⁰

On appeal by both the defendant and the prosecutor, the Court of Appeals affirmed the sentence imposed by the Appellate Division.⁸¹ Writing for the majority,⁸² Judge Wachtler emphasized

sult only, and two wrote dissenting opinions. Justice Milonas considered the ruling in *Farrar* to be "applicable to an appellate court." 93 App. Div. 2d at 778, 461 N.Y.S.2d at 987 (Milonas, J. concurring). Justice Carro, on the other hand, argued that *Farrar* only applied at the trial level. *Id.* at 779, 461 N.Y.S.2d at 988 (Carro, J., dissenting). Justice Bloom, focusing on CPL § 470.15, argued that *Farrar* was binding on the intermediate appellate courts. 93 App. Div. 2d at 779-80, 461 N.Y.S.2d at 989 (Bloom, J., dissenting).

⁷⁴ 60 N.Y.2d 513, 458 N.E.2d 1228, 470 N.Y.S.2d 551 (1983).

⁷⁵ *Id.* at 521, 458 N.E.2d at 1231, 470 N.Y.S.2d at 554.

⁷⁶ *Id.* at 516-17, 458 N.E.2d at 1229, 470 N.Y.S.2d at 552. The defendant, Bentley Thompson, shot and killed another youth in Brooklyn in 1978 after the victim accused him of stealing a bicycle. *Id.* at 516, 458 N.E.2d at 1229, 470 N.Y.S.2d at 552. Although he originally denied the shooting, the defendant later claimed he had acted in self defense. *Id.* at 516-17, 458 N.E.2d at 1229, 470 N.Y.S.2d at 552. The trial court refused the defendant youthful offender treatment. *Id.* at 517, 458 N.E.2d at 1229, 470 N.Y.S.2d at 552.

⁷⁷ *Id.* During the plea negotiations, the judge advised the defendant that he would receive a term of 8½ to 25 years. *People v. Thompson*, 91 App. Div. 2d 672, 672, 457 N.Y.S.2d 321, 322 (2d Dep't 1982). The People expressly conditioned their consent to the guilty plea on judicial acquiescence to this imprisonment term. 60 N.Y.2d at 517, 458 N.E.2d at 1229, 470 N.Y.S.2d at 552.

⁷⁸ *People v. Thompson*, 88 App. Div. 2d 939, 939, 450 N.Y.S.2d 1019, 1019 (2d Dep't 1982).

⁷⁹ *People v. Thompson*, 91 App. Div. 2d at 673, 457 N.Y.S.2d at 323.

⁸⁰ *Id.* at 673, 457 N.Y.S.2d at 322. The Appellate Division stated that the People enjoy the "right to withdraw their consent to the plea in the event that the sentence sought to be imposed is less than that originally negotiated by the parties." *Id.* (citing *People v. Farrar*, 52 N.Y.2d 302, 302, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981)).

⁸¹ 60 N.Y.2d at 522, 458 N.E.2d at 1232, 470 N.Y.S.2d at 555.

⁸² Judge Wachtler was joined in the majority opinion by Chief Judge Cooke and Judges

that the judiciary has sole power over sentencing.⁸³ The Court, citing *People v. Farrar*,⁸⁴ recognized that section 220.10 of the CPL requires the trial court to allow the People to withdraw their consent upon sentence modification, but concluded that the section did not apply at the appellate level.⁸⁵ The distinction was based on a strict reading of section 470.15,⁸⁶ which makes no reference to any obligation on the part of the Appellate Division to present the People with an option to withdraw their consent.⁸⁷

Judge Jasen, dissenting in part and concurring in part, characterized the sentence modification as a material, nonconsensual reformation of the negotiated bargain.⁸⁸ The dissent conceded that the Appellate Division has the statutory power to modify an unduly harsh sentence, but refused to accept that the exercise of that power could preclude the prosecutor from withdrawing his consent to the plea bargain.⁸⁹ Judge Jasen argued that the policies underlying the decision to permit the People to withdraw their consent are equally, if not more, applicable at the appellate level.⁹⁰

Jones, Meyer, Simons, and Kaye. Judge Jasen filed a separate opinion in which he dissented in part and concurred in part.

⁸³ *Id.* at 520, 458 N.E.2d at 1230, 470 N.Y.S.2d at 553.

⁸⁴ 52 N.Y.2d 302, 419 N.E.2d 864, 437 N.Y.S.2d 961 (1981). See generally *supra* note 72 (discussion of *Farrar*).

⁸⁵ 60 N.Y.2d at 520, 458 N.E.2d at 1230-31, 470 N.Y.S.2d at 553. The *Thompson* Court interpreted CPL § 220.10 to apply "only to prosecutions of indictments at the trial court level." *Id.* at 519, 458 N.E.2d at 1230, 470 N.Y.S.2d at 553. The Court noted that the express, broad grant of power to the Appellate Division to review sentences precludes application of CPL § 220.10, which was intended to apply only to the superior courts. *Id.* at 520, 458 N.E.2d at 1231, 470 N.Y.S.2d at 553.

⁸⁶ *Id.* at 519, 458 N.E.2d at 1231, 470 N.Y.S.2d at 554. Upon sentence modification, the Court noted that an intermediate court "must itself impose some legally authorized lesser sentence" pursuant to CPL § 470.20(6). *Id.* The majority interpreted this delegation of authority as the exclusive course of conduct open to the Appellate Division. *Id.*

⁸⁷ See CPL § 470.15 (1983).

⁸⁸ 60 N.Y.2d at 522, 458 N.E.2d at 1234, 470 N.Y.S.2d at 557 (Jasen, J., dissenting in part and concurring in part).

⁸⁹ *Id.* at 522, 458 N.E.2d at 1232-33, 470 N.Y.S.2d at 555 (Jasen, J., dissenting in part and concurring in part).

⁹⁰ *Id.* at 523, 458 N.E.2d at 1233-34, 470 N.Y.S.2d at 556-57 (Jasen, J., dissenting in part and concurring in part). Judge Jasen noted that there was a need to prevent the abuse of a court's sentencing power and to preserve the independent rule and special interests of the prosecutor. *Id.* at 523-25, 458 N.E.2d at 1233-34, 470 N.Y.S.2d at 556-57 (Jasen, J., dissenting in part and concurring in part) (citing *People v. Farrar*, 52 N.Y.2d 302, 307-08, 419 N.E.2d 864, 866, 437 N.Y.S.2d 961, 963 (1981)). The dissent found these factors equally motivating in the case of an alteration at the appellate level, 60 N.Y.2d at 523-25, 458 N.E.2d at 1233-34, 470 N.Y.S.2d at 556-57 (Jasen, J., dissenting in part and concurring in part), and noted that the Appellate Division is not as well equipped as the trial court to rule on sentencing since it possesses only a "sterile" record to evaluate, *id.* at 524, 458 N.E.2d at

Traditionally, courts have been reluctant to bind participants in plea negotiations in accordance with the strictures of classical contract law.⁹¹ Nevertheless, accepted principles of commercial contract law frequently have been used to resolve disputes in this area.⁹² Although a plea bargain should not be viewed as a "contract" for *all* purposes, it is submitted that contract law provides a useful framework within which to analyze certain conflicts in the plea bargaining process. This is particularly true in cases like *Thompson*, where the prosecutor has performed his obligations and the defendant's due process rights are no longer endangered.⁹³

1233, 470 N.Y.S.2d at 556 (Jasen, J., dissenting in part and concurring in part).

⁹¹ See *People v. Selikoff*, 35 N.Y.2d 227, 238, 318 N.E.2d 784, 791-92, 360 N.Y.S.2d 623, 633 (1974), *cert. denied*, 419 U.S. 1122 (1975). The *Selikoff* Court stated that the "application to plea negotiations of contract law is incongruous." *Id.* The Court referred to the societal goals of rehabilitation and deterrence arising from plea bargaining and convictions which, it was argued, take the negotiated bargain out of the realm of traditional contract analysis. *Id.* at 238, 318 N.E.2d at 791-92, 360 N.Y.S.2d at 633-34; see also *United States v. Hughes*, 223 F. Supp. 477, 480 (S.D.N.Y. 1963), *aff'd*, 325 F.2d 789 (2d Cir. 1964) (plea bargaining not governed by technical concepts of promise); *People v. Forrest*, 111 Misc. 2d 800, 801-02, 445 N.Y.S.2d 387, 389 (N.Y.C. Crim. Ct. Queens County 1981) (contract principles will not be applied as the sentence promised is implicitly conditioned on its appropriateness).

⁹² See, e.g., *Santobello v. New York*, 404 U.S. 257, 262-63 (1971) (plea agreement resting on inducement and consideration will be enforced); *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (noting mutuality of advantage to defendant and the prosecutor); *Brady v. United States*, 397 U.S. 742, 747 (1970) (plea agreement is enforceable if made without duress). Most disputes over the finality of a plea of guilty concern whether or not the defendant entered it voluntarily and with full knowledge of the consequences. See Note, *Post-Conviction Relief from Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182, 193 (1971); see also Comment, *Plea Bargaining Mishaps—The Possibility of Collaterally Attacking the Resultant Plea of Guilty*, 65 J. CRIM. L. & CRIMINOLOGY 170, 174 (1974) (negotiation, promise inducement, expectation, consideration, reliance, benefit of the bargain, and substantial performance are concepts of contract law commonly applied to plea negotiations); *infra* note 93 (application of contract principles in fixing remedies for broken plea agreements).

⁹³ Most courts that have rejected contract analysis have done so in order to benefit a defendant whose due process rights allegedly have been violated. See, e.g., *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.), *cert. denied*, 451 U.S. 1018 (1981); *Cooper v. United States*, 594 F.2d 12, 17 & n.6 (4th Cir. 1979). These courts have based their decisions on the fact that the prosecutor's constitutional duty to fulfill his promise adds a dimension to the plea bargain that removes it from the realm of general commercial contract law. See, e.g., *Cooper*, 594 F.2d at 16. It is suggested, however, that when a defendant's due process rights are not at issue, the use of contract principles is appropriate. See *id.* at 17 (refusal to adopt contract analysis in due process situation is not a rejection of its use in other circumstances). Moreover, once the prosecutor has performed his promise, the defendant's due process rights are no longer endangered. Cf. *Johnson v. Mabry*, 707 F.2d 323, 327 (8th Cir. 1983) (contract analogy works well in usual plea bargain circumstances but fails when the plea agreement is not yet finalized); *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980) (although related to the criminal justice system, the plea bargain is to be viewed from

A negotiated plea bargain is finalized upon adoption by the trial court.⁹⁴ Material alteration of the terms of a plea bargain after finalization frustrates the parties' expectations and, thus, undermines a central premise of the bargain itself.⁹⁵ Such a result can be prevented if the People are afforded an appropriate contractual remedy and are not burdened by a new bargain with terms that have been neither negotiated nor accepted.⁹⁶

In addition, it is submitted that the *Thompson* holding will have an adverse impact on the plea negotiation process.⁹⁷ Traditionally, the prosecutor is afforded broad discretion to promote efficiency in plea bargaining.⁹⁸ By attempting to reinforce the posi-

a contractual posture); *United States v. McIntosh*, 612 F.2d 835, 837 (4th Cir. 1979) (traditional contract analysis is appropriate when the content of the plea agreement is in dispute).

⁹⁴ See *People v. McCasland*, 55 App. Div. 2d 991, 992, 391 N.Y.S.2d 31, 32 (3d Dep't 1977). The final judgment as to whether a plea bargain will be accepted often, in practice, rests with the trial judge. See *Akron v. Ragsdale*, 61 Ohio App. 2d 107, 112, 399 N.E.2d 119, 121 (1978); J. BOND, *supra* note 69, § 6.17(b), at 642.

⁹⁵ See *Thompson*, 60 N.Y.2d at 525, 458 N.E.2d at 1234, 470 N.Y.S.2d at 557 (Jasen, J., dissenting in part and concurring in part). Judge Jasen argued that when the prosecutor's consent is conditioned on a particular sentence, the nonfulfillment of that condition invalidates the entire negotiated agreement. *Id.*; see also *Gallagher*, *supra* note 71, at 33 (sentence is a material provision of the negotiated bargain); cf. *People v. Pena*, 50 N.Y.2d 400, 412, 406 N.E.2d 1347, 1352, 429 N.Y.S.2d 410, 416 (1980) (sentence moderation is essential to the bargaining process); *People v. Suitte*, 90 App. Div. 2d 80, 85, 455 N.Y.S.2d 675, 679 (2d Dep't 1982) (plea bargain concerned most with fixing the degree of sentence and the offense charged). It should be noted, moreover, that alteration of a term of the bargain would not entail an automatic right of withdrawal of consent by the prosecutor. See *State v. Rivest*, 106 Wis. 2d 406, 411, 316 N.W.2d 395, 399 (1982).

⁹⁶ Remedies for broken plea agreements have often been fashioned in accordance with traditional contractual remedies. See, e.g., *People v. Flynn*, 42 App. Div. 2d 919, 920, 348 N.Y.S.2d 256, 257 (4th Dep't 1973) (return to status quo ante or specific performance are most common remedies). See generally *Comment*, *supra* note 69, at 110-13 (specific performance and rescission are proper forms of relief for the broken plea agreement). The Supreme Court of the United States has sanctioned either withdrawal of the plea or an order of specific performance. See *Santobello v. New York*, 404 U.S. 257, 263 (1971). Instances in which New York courts have allowed withdrawal illustrate how contract law is used to fashion remedies. Compare *People v. McConnell*, 49 N.Y.2d 340, 347, 402 N.E.2d 133, 135, 425 N.Y.S.2d 794, 797 (1980) (defendant who has testified to his detriment and cannot be restored to the status quo should be granted specific performance) with *People v. Fernandez*, 45 App. Div. 2d 953, 953, 359 N.Y.S.2d 314, 316 (1st Dep't 1974) (nonperformance of material condition of bargain mandates withdrawal of plea) and *People v. Taylor*, 64 App. Div. 2d 998, 999, 408 N.Y.S.2d 835, 837 (3d Dep't 1978) (withdrawal desirable when prosecutor does not fulfill his promise to refrain from making sentence recommendation to judge).

⁹⁷ See 60 N.Y.2d at 525, 458 N.E.2d at 1233-34, 470 N.Y.S.2d at 557 (Jasen, J., dissenting in part and concurring in part).

⁹⁸ See *Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980). The *Scotland* court enumerated the essential functions of the prosecutor:

(1) to act as an administrator and dispose of cases in the fastest, most efficient

tion of the court as the final arbiter of sentencing,⁹⁹ it appears that the Court of Appeals has diluted the certainty of the plea bargain and thereby has lessened its effectiveness as a prosecutorial bargaining tool.¹⁰⁰ Indeed, it is submitted that the Court of Appeals has restored the very uncertainties and risks that a negotiated sentence was intended to circumvent by rendering irrevocable the prosecutor's consent to a bargain that is subsequently materially altered.¹⁰¹ By determining when the prosecutor's consent is needed to modify a plea bargain on the basis of whether the Appellate Division or the trial court is making the modification, it appears that the majority has denied the prosecutor basic fairness and has im-

manner; (2) to act as an advocate for the state to maximize convictions and severity of sentences; (3) to judge the individual's social circumstances and ensure fairness; (4) to act as a quasi-legislator, granting concessions because the law is too harsh.

Id. at 364 (footnote omitted); see J. BOND, *supra* note 69, § 5.4, at 5-8; see also Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 486 (1978) (prosecutor may be vested with "final authority within the jurisdiction to establish prosecutorial policy").

⁹⁹ See *supra* note 83 and accompanying text.

¹⁰⁰ See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968). The severity of sentence is an important factor affecting the prosecutor's choice of concessions since "the prosecutor must estimate the sentence that seems likely after a conviction at trial, discount this sentence by the possibility of acquittal, and balance the 'discounted trial sentence' against the sentence he can insure through a plea agreement." *Id.*; see also Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS., Winter 1977, at 102, 109 (the sentence is an instrument of barter between adversaries); Note, *The Role of Plea Negotiations in Modern Criminal Law*, 46 CHI.-KENT L. REV. 116, 117 (1969) (sentence concessions by the prosecutor are prime tools of inducement toward the defendant's guilty plea). Thus, denying the prosecutor the right to withdraw consent to a plea bargain where the sentence terms have subsequently been modified diminishes the ability of the prosecutor to perform his discretionary functions. See *Virgin Islands v. Scotland*, 614 F.2d 360, 364 (3d Cir. 1980).

¹⁰¹ See *Broken Promises*, *supra* note 70, at 773 (entrance into plea bargain motivated by desire to avoid unfavorable trial results); Note, *supra*, note 70 at 868 (weak evidence and unreliability of witnesses often prompt prosecutors to plea bargain); accord Corbett, *supra* note 70, at 101; see also Westen & Westin, *supra* note 98, at 492 (plea bargaining enables the prosecutor to avoid risk of acquittal at trial); cf. *People v. McConnell*, 49 N.Y.2d 340, 346, 402 N.E.2d 133, 135, 425 N.Y.S.2d 794, 797 (1980) (substantial performance of plea bargain by defendant necessitates specific performance to ensure certainty); Uviller, *supra* note 100, at 109 (defendant seeks a higher level of certainty by entrance into negotiated bargain).

paired the effectiveness of the plea bargain in the criminal justice system.

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CRIMINAL PROCEDURE LAW

CPL § 400.21: The defendant has the burden of proving the unconstitutionality of a predicate conviction asserted by the People

Section 400.21 of the Criminal Procedure Law governs the procedure for sentencing a defendant as a second felony offender.¹⁰² Pursuant to this section, the prosecution must prove the existence of any predicate felony conviction it intends to use to enhance the defendant's sentence.¹⁰³ The defendant, however, is

¹⁰² See CPL § 400.21 (1983). A second felony offender is defined as "a person, other than a second violent felony offender . . . who stands convicted of a felony . . . other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions." N.Y. PENAL LAW § 70.06(1)(a) (McKinney Supp. 1983-1984).

CPL § 400.21 contains provisions substantially identical to three other enhancement statutes. See CPL § 400.15 (1983) (procedure for determining whether defendant is a second violent felony offender); CPL § 400.16 (1983) (procedure for determining whether defendant is a persistent violent felony offender); CPL § 400.20 (1983) (procedure for determining whether defendant should be sentenced as a persistent felony offender). These sections generally are applied in a similar manner, see *People v. Leston*, 117 Misc. 2d 712, 714, 459 N.Y.S.2d 364, 366 (Sup. Ct. N.Y. County 1983); *People v. Graham*, 111 Misc. 2d 666, 669-70, 444 N.Y.S.2d 988, 990 (Sup. Ct. N.Y. County 1981); CPL § 400.15, commentary at 218-19 (1983), and, therefore, for the purposes of this survey, will be referred to interchangeably.

Recidivist statutes, such as CPL § 400.21, are designed to subject repeat offenders to punishment of a more severe nature. See CPL § 400.21, commentary at 235 (1983). Recidivist statutes have survived a wide range of constitutional attacks. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980) (cruel and unusual punishment); *Oyler v. Boles*, 368 U.S. 448, 451-54 (1962) (notice and opportunity to be heard); *Graham v. West Virginia*, 224 U.S. 616, 625, 629-30 (1912) (due process and equal protection); *Leston*, 117 Misc. 2d at 713, 459 N.Y.S.2d at 365 (ex post facto challenge). See generally Note, *Recidivist Procedures: Prejudice and Due Process*, 53 CORNELL L. REV. 337, 337 & n.1 (1968) (discussion of the continued stability of recidivist statutes despite numerous constitutional attacks).

¹⁰³ CPL § 400.21(7)(a) (1983). In addition to proving the existence of a predicate conviction, the prosecution must prove that the defendant to be sentenced was in fact the person convicted of the prior felony. *Id.* Section 400.21(2) of the CPL requires that the prosecutor file a statement before sentence is imposed. *Id.* § 400.21(2). The statement must set forth the specifics of the date and place of each alleged predicate felony conviction the People intend to use for enhancement purposes. *Id.*; see *People v. Towns*, 94 App. Div. 2d 973, 973, 464 N.Y.S.2d 100, 100 (4th Dep't 1983); *People v. Brown*, 54 App. Div. 2d 719, 719,