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. 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.

Steven G. Yudin

Criminal Procedure Law

CPL § 220.10: The People may not withdraw consent to a negoti-
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. Section 220.10 of the CPL, which governs the use of plea bargaining 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. Courts have construed this measure to af-

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68 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. 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. Re-
cently, in *People v. Thompson*, 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.

In *Thompson*, a 17-year-old was indicted for murder in the second degree and for possession of a weapon in the first degree. Before trial, the defendant and the prosecutor agreed to a plea of guilty to manslaughter in the first degree. The trial court adopted the negotiated plea and sentenced the defendant to a term of eight and one-third to twenty-five years imprisonment. 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. The case was then remitted to the trial court to afford the prosecution an opportunity to withdraw its consent to the original agreement.

On appeal by both the defendant and the prosecutor, the Court of Appeals affirmed the sentence imposed by the Appellate Division. Writing for the majority, Judge Wachtler emphasized
that the judiciary has sole power over sentencing. The Court, citing People v. Farrar, 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. The distinction was based on a strict reading of section 470.15, 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. Judge Jasen, dissenting in part and concurring in part, characterized the sentence modification as a material, nonconsensual reformation of the negotiated bargain. 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. 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.

Traditionally, courts have been reluctant to bind participants in plea negotiations in accordance with the strictures of classical contract law. Nevertheless, accepted principles of commercial contract law frequently have been used to resolve disputes in this area. 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.

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 social 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.Crim. Ct. Queens County 1981) (contract principles will not be applied as the sentence promised is implicitly conditioned on its appropriateness).


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. 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. 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.

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

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, 267 (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).

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).

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, 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. 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. 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 888 (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. 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. 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 § 70.08(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.


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,