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CPL § 220.60(3): Defendant Denied Full Evidentiary Hearing on Motion to Withdraw Guilty Plea Where Court Record Contains No Indication of Unfulfilled Out-of-Court Promise

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convicted of a crime other than the one for which he was indicted.[157] The *Iannone* Court's admonition to the lower courts to safeguard defendants' rights through use of discovery and the bill of particulars does not appear to adequately resolve the above problems.[158]

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- *CPL § 220.60(3): Defendant denied full evidentiary hearing on motion to withdraw guilty plea where court record contains no indication of unfulfilled out-of-court promise*

Section 220.60(3) of the CPL provides that a criminal defendant may, in the discretion of the court, withdraw a guilty plea prior to the imposition of sentence.[159] The reluctance to exercise this dis-

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[157] *See* note 146 *supra.*

[158] 45 N.Y.2d at 599-600, 384 N.E.2d at 663, 412 N.Y.S.2d at 117. Although the defendants in *Iannone* did not assert actual prejudice, the Court noted that, where this occurs because of the paucity of information in an indictment and the defendant is actually unaware of the crime with which he is charged, a conviction might not be sustained. *Id.* In such a case, reviewability of the indictment may be necessary to ensure a fair opportunity for the defendant to prepare a defense.

[159] CPL § 220.60(3) (Supp. 1978-1979) states that:

> At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event the entire indictment, as it existed at the time of the plea of guilty, is restored.

Plea negotiations often have been categorized in two groups. In "charge bargaining" the prosecutor may offer the defendant a reduced charge, with its concomitant lesser sentence, in exchange for a plea of guilty. A variation on this method is the offer to dismiss some of the charges against the defendant or to forego additional charges which might validly be made. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Santobello v. New York, 404 U.S. 257 (1971). In contrast, "sentence bargaining" involves an agreement by the prosecutor to recommend a particular disposition to the sentencing court after the defendant has pleaded guilty to the offense as originally charged. *See* People v. Selikoff, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied,* 419 U.S. 1122 (1975); Berger, *The Case Against Plea Bargaining,* 62 A.B.A.J. 621, 621 (1976); Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure,* 69 NW. U.L. REV. 663, 664-65 (1974).

By entering a plea, a defendant waives certain constitutional guarantees, *see* Brady v. United States, 397 U.S. 742, 755 (1970); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927), including the right against self-incrimination, *see* Malloy v. Hogan, 378 U.S. 1, 3 (1964), to trial by jury, *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968), to confront and cross-examine witnesses of the state, *see* Pointer v. Texas, 380 U.S. 400, 403 (1965), to compel the presence of witnesses on his behalf, *see* Washington v. Texas, 388 U.S. 14, 18-19 (1967), to require the government to prove their case beyond a reasonable doubt, *see In re* Winship, 397 U.S. 358 (1970), and to have only constitutionally obtained evidence used as part of the prosecution's case, *see, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961). The right to plea bargain, however, is not a constitutional right, Weatherford v. Bursey, 429 U.S. 545 (1977), and not all constitutional rights

cretion[160] or grant full hearings on motions to withdraw such pleas[161] reflects the courts' desire to maintain the integrity of the plea bargaining process and bring a measure of finality to dispositions following guilty pleas.[162] Thus, agreements made off the record gener-

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are waived by a plea of guilty, Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265, 1266 (1978); *see, e.g.*, Menna v. New York, 423 U.S. 61 (1975) (per curiam) (right against double jeopardy); *cf.* People v. Jackson, 60 App. Div. 2d 893, 893, 401 N.Y.S.2d 526, 527 (2d Dep't 1978) (guilty plea waives nonjurisdictional defects but not jurisdictional ones). *See generally* Note, *The Waivability by Guilty Plea of Retroactively Endowed Constitutional Rights*, 41 ALB. L. REV. 115 (1977); Note, *The Guilty Plea As a Waiver of "Present But Unknowable" Constitutional Rights: The Aftermath of the* Brady *Trilogy*, 74 COLUM. L. REV. 1435 (1974).

[160] *See* People v. McKennion, 27 N.Y.2d 671, 261 N.E.2d 910, 313 N.Y.S.2d 876 (1970); People v. DeCrescente, 64 App. Div. 2d 746, 406 N.Y.S.2d 933 (3d Dep't 1978); People v. Hicks, 63 App. Div. 2d 1032, 407 N.Y.S.2d 439 (2d Dep't 1978); People v. Thompson, 60 App. Div. 2d 765, 400 N.Y.S.2d 957 (4th Dep't 1977). Instances where guilty pleas can be withdrawn fall within three broad and overlapping categories. Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 473 (1978). As stated by the Court of Appeals: "a guilty plea induced by [a court's or prosecutor's] unfulfilled promise either must be vacated or the promise honored." People v. Selikoff, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974), *cert denied*, 419 U.S. 1122 (1975) (citing Santobello v. New York, 404 U.S. 257 (1971)); *see, e.g.*, People v. Torres, 45 N.Y.2d 751, 380 N.E.2d 313, 408 N.Y.S.2d 487 (1978) (per curiam); Chaipis v. State Liquor Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978). A plea also may be withdrawn if it was coerced or otherwise forced so that it no longer retains the "character of a voluntary act." Machibroda v. United States, 386 U.S. 487, 493 (1962); *see* Brady v. United States, 397 U.S. 742, 748 (1970); Adelstein, *The Negotiated Guilty Plea: A Framework for Analysis*, 53 N.Y.U.L. REV. 783, 823 (1978). Finally, the waiver of the constitutional right to trial must be made intelligently and not be the product of a misunderstanding or a misconception. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 770 (1970); Brady v. United States, 397 U.S. 742, 748 (1970). Additional guidelines for deciding plea withdrawal motions appear in ABA STANDARDS, PLEAS OF GUILTY § 2.1 (1968).

[161] *See, e.g.*, People v. Friedman, 39 N.Y.2d 463, 348 N.E.2d 883, 384 N.Y.S.2d 408 (1976); People v. Francabandera, 33 N.Y.2d 429, 310 N.E.2d 292, 354 N.Y.S.2d 609 (1974); People v. Maxwell, 61 App. Div. 2d 799, 402 N.Y.S.2d 182 (2d Dep't 1978).

[162] *See, e.g.*, People v. Maney, 37 N.Y.2d 229, 234, 333 N.E.2d 174, 176-77, 371 N.Y.S.2d 901, 904 (1975); People v. Selikoff, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied*, 419 U.S. 1122 (1975); People v. Lazore, 59 App. Div. 2d 635, 636, 398 N.Y.S.2d 189, 190 (3d Dep't 1977); People v. Parra, 57 App. Div. 2d 964, 965, 394 N.Y.S.2d 828, 828 (2d Dep't 1977); People v. Dombrowski, 49 App. Div. 2d 810, 811, 373 N.Y.S.2d 251, 252 (4th Dep't 1975).

Plea bargaining, which accounts for approximately 90 percent of all criminal convictions, D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967), was sanctioned by the Supreme Court in Santobello v. New York, 404 U.S. 257 (1971). Prior to *Santobello*, plea negotiations were shrouded in secrecy. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979). It has since been accepted and generally is considered beneficial because dispositions are prompt and usually final, the public is protected from those prone to criminal activity while released on bail, it increases the possibility of rehabilitation, it allows for consideration of mitigating circumstances during negotiations and upon sentencing, it reduces overcrowded court calendars, and it benefits all parties through the exchange of information for leniency. Santobello

ally will not be accorded judicial recognition.[163] Reaffirming this principle, the Court of Appeals, in *People v. Frederick*,[164] held that a defendant is not entitled to a full evidentiary hearing on a prejudgment motion to withdraw a guilty plea where the court record is devoid of any indication of an allegedly unfulfilled out-of-court promise.[165]

The defendant in *Frederick* was charged with criminal sale and possession of dangerous drugs.[166] Since Frederick claimed to have information indicating corruption on the part of a police officer, the prosecutor agreed to permit him to plead guilty to a less serious crime and recommend a probationary sentence if the information proved useful.[167] The trial record showed that, after the plea was tendered, the judge carefully questioned the defendant to ascertain whether he clearly understood that the court had made no promises and was not obligated to follow any recommendation of the prosecutor.[168] Following several adjournments of sentencing, the defen-

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v. New York, 404 U.S. 257, 261 (1971) (citing Brady v. United States, 397 U.S. 742, 751-52 (1970)); *see* Blackledge v. Allison, 431 U.S. 63, 71 (1977); People v. Selikoff, 35 N.Y.2d 227, 232-35, 318 N.E.2d 784, 788-89, 360 N.Y.S.2d 623, 628-29 (1974), *cert. denied*, 419 U.S. 1122 (1975); ABA STANDARDS, PLEAS OF GUILTY § 1.3 (1968); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3, commentary (1975). *But see* Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621 (1976); Parnas & Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101 (1978); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). *See also* M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS 166 (1978); Griffiths, *Ideology in Criminal Procedure* or *A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 450 (1971).

[163] *See* note 162 *supra*.

[164] 45 N.Y.2d 520, 382 N.E.2d 1332, 410 N.Y.S.2d 555 (1978), *aff'g* 56 App. Div. 2d 619, 391 N.Y.S.2d 989 (1st Dep't 1977) (mem.).

[165] 45 N.Y.2d at 526, 382 N.E.2d at 1335, 410 N.Y.S.2d at 559.

[166] *Id.* at 522, 382 N.E.2d at 1333, 410 N.Y.S.2d at 556-57.

[167] *Id.* at 522-23, 382 N.E.2d at 1333-34, 410 N.Y.S.2d at 557.

[168] *Id.* at 523-24, 382 N.E.2d at 1333-34, 410 N.Y.S.2d at 557. Before the plea was entered, the following exchange took place between the court and the defendant:

> THE COURT: Now as far as I am concerned, and as far as the District Attorney is concerned, well, I will first ask you this: Has the District Attorney or your attorney indicated to you anything other than that I have the scope and I could sentence you up to fifteen years? Have any promises been made to you beyond what I have just said?
>
> DEFENDANT: No.
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> . . . .
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> THE COURT: I notice you turned to Mr. Zapp. I notice he said something to you. I don't want to mislead you. I assume he didn't say anything contrary to what I am saying . . . . [I]f you do receive a sentence up to a minimum of five years and a maximum of fifteen, you have no cause for complaint and say that you want to withdraw your plea because I will not allow it; do we understand each other?
>
> DEFENDANT: Yes.

Id.

dant's counsel allegedly requested an on-the-record assurance that he would be able to withdraw the plea in the event the court failed to follow the prosecutor's recommendation.[169] The court purportedly replied that there was no need to enter such a request on the record, since the prosecutor's recommendation was always followed.[170] Prior to sentencing, the defendant moved to withdraw the plea. The Supreme Court, New York County, denied the motion and sentenced Frederick despite the prosecutor's recommendation of probation.[171] On appeal, the Appellate Division, First Department, unanimously affirmed the conviction.[172]

The Court of Appeals unanimously affirmed.[173] Writing for the Court, Judge Jasen noted that while there are no concrete rules prescribing the extent of fact-finding for motions to withdraw pleas, evidentiary hearings are rarely granted.[174] Moreover, unless a defendant can show that the plea was unfounded,[175] judges hearing such motions may rely solely on the record in determining whether promises were made to the defendant. Thus, where a defendant's contentions are flatly contradicted by the record, "no judicial recognition of defendant's averments will be forthcoming."[176] Reaffirming its decision in *People v. Selikoff*,[177] the *Frederick* Court reasoned that the crucial factor was the need for a high degree of finality accompanying guilty pleas.[178] According to the Court, this principle must be

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[169] *Id.* at 524, 382 N.E.2d at 1334, 410 N.Y.S.2d at 557-58.

[170] *Id.* at 524, 382 N.E.2d at 1334, 410 N.Y.S.2d at 558.

[171] 80 Misc. 2d 309, 362 N.Y.S.2d 952 (Sup. Ct. N.Y. County 1974).

[172] 56 App. Div. 2d 563, 391 N.Y.S.2d 989 (1st Dep't 1977) (mem.).

[173] 45 N.Y.2d at 520, 382 N.E.2d at 1332, 410 N.Y.S.2d at 555.

[174] *Id.* at 525, 382 N.E.2d at 1334, 410 N.Y.S.2d at 558; *see* People v. Tinsley, 35 N.Y.2d 926, 927, 324 N.E.2d 544, 544, 365 N.Y.S.2d 161, 162 (1974) (per curiam). The trial-level judge is granted broad discretion in determining the extent of the fact-finding procedures. *Id.* "[O]ften, [however,] a limited interrogation by the court will suffice." *Id.*

[175] 45 N.Y.2d at 525, 382 N.E.2d at 1334, 410 N.Y.S.2d at 558. If the record shows that a defendant misapprehended the nature of the charge or consequences of his plea, an evidentiary hearing should be granted to determine whether the plea was tendered intelligently, knowingly and voluntarily. *E.g.*, People v. Beasley, 25 N.Y.2d 483, 487-88, 255 N.E.2d 239, 243, 307 N.Y.S.2d 39, 43-44 (1969); People v. Nixon, 21 N.Y.2d 338, 355, 234 N.E.2d 687, 696-97, 287 N.Y.S.2d 659, 672 (1967), *cert. denied*, 393 U.S. 1067 (1969). *See* People v. Tinsley, 35 N.Y.2d 926, 927, 324 N.E.2d 544, 544, 365 N.Y.S.2d 161, 162 (1974) (per curiam); note 160 *supra*.

[176] 45 N.Y.2d at 525, 382 N.E.2d at 1335, 410 N.Y.S.2d at 558; *see* note 160 *supra*.

[177] 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied*, 419 U.S. 1122 (1975). In *Selikoff*, the Court consolidated three appeals: People v. Davidson, 42 App. Div. 2d 957, 348 N.Y.S.2d 570 (1st Dep't 1973) (mem.), People v. Selikoff, 41 App. Div. 2d 376, 343 N.Y.S.2d 387 (2d Dep't 1973), and People v. Campbell, 78 Misc. 2d 355, 356 N.Y.S.2d 476 (N.Y.C. Crim. Ct. N.Y. County 1974).

[178] 45 N.Y.2d at 526, 382 N.E.2d at 1335, 410 N.Y.S.2d at 559.

adhered to if the benefits of the plea bargaining system are to be obtained.[179] Any agreements or understandings, therefore, should be memorialized on the record. The Court maintained this procedure is consistent with the theory underlying the plea bargaining system and will deter "indiscriminate potshots" from being taken at the validity of plea negotiations.[180]

It is submitted that the *Frederick* Court extended the reach of the per se rule enunciated in *Selikoff* by applying the rule to motions to withdraw pleas made before sentencing. Whereas one of the defendants in *Selikoff* claimed for the first time in a *corum nobis* proceeding that an off-the-record agreement was reached,[181] the motion in *Frederick* was made prior to sentencing. Thus, it appears that the Court's unwillingness to disturb a trial court's denial of an evidentiary hearing applies equally to pre-sentence and post-sentence motions.[182] When the dispute involves sentencing, however, it would seem that different rules should apply to motions to withdraw pleas and motions to vacate judgments. The necessity for "finality" in plea bargaining appears most acute when a judgment is entered as opposed to when a plea is tendered. Accordingly, a less stringent standard for granting pre-sentencing evidentiary hearings would not

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[179] *Id.; see* note 162 *supra.* As stated by the Supreme Court, the chief attributes of the plea procedure—"speed, economy, and finality"—would be emasculated if the courts were to allow indiscriminate hearings. Blackledge v. Allison, 431 U.S. 63, 71 (1977). *See generally* Erickson, *The Finality of a Plea of Guilty,* 48 NOTRE DAME LAW. 835 (1973). The *Frederick* Court also rejected the defendant's contention that *Allison* mandated a different result. 45 N.Y.2d at 527, 382 N.E.2d at 1336, 410 N.Y.S.2d at 559. In *Allison,* the defendant maintained that his guilty plea was based upon erroneous information from his attorney that he would receive only a 10-year sentence. 431 U.S. at 69. The Supreme Court remanded the case for a determination whether an evidentiary hearing was required. *Id.* at 82-83. The *Frederick* Court distinguished *Allison,* noting that the "record" consisted of a standard printed form of 13 questions which, according to the Court, shed little light on the defendant's claim of a secret agreement. 45 N.Y.2d at 527, 382 N.E.2d at 1336, 410 N.Y.S.2d at 560. *Id.* Indeed, the *Allison* Court acknowledged that if the record were clearer, the defendant's "petition would have been cast in a very different light." 431 U.S. at 79. Thus, it appears that there was nothing on the record to indicate that Allison had an opportunity to present his claim of another agreement.

[180] 45 N.Y.2d at 525, 382 N.E.2d at 1335, 410 N.Y.S.2d at 559.

[181] People v. Davidson, 42 App. Div. 2d 957, 348 N.Y.S.2d 570 (1st Dep't 1973) (mem.), *aff'd sub nom.* People v. Selikoff, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied,* 419 U.S. 1122 (1975).

[182] In criminal proceedings, judgment is entered upon sentencing. CPL 1.20(15) (1971). CPL 220.60(3) (Supp. 1978-1979) is applicable where the defendant seeks to withdraw his plea prior to sentence. *See* note 159 *supra.* Postjudgment motions may be made pursuant to CPL 440.10 (1971) (to vacate judgement) and CPL 440.20 (1971) (to set aside sentence). Additionally, a state habeas corpus writ is available to a defendant as a last-resort civil remedy within the New York judicial system and is brought in the county in which the defendant is jailed. CPLR 7001-7012 (1963).

promote an inordinate number of collateral attacks on judgments.[183] It is likely that pre-sentence motions to withdraw guilty pleas are not made merely because the defendant is dissatisfied with the sentence he expects to receive. Rather, it appears that the defendant or his attorney believes that a plea arrangement will not be fulfilled.[184] It is suggested, therefore, that trial-level courts should be more willing to accord evidentiary hearings when a defendant requests withdrawal of his guilty plea before sentencing.[185]

While the record in *Frederick* clearly indicates that the defendant was carefully questioned before he pleaded guilty, additional safeguards may be developed to ensure that a defendant is not misled into believing that an out-of-court agreement would be binding. Some jurisdictions have detailed such provisions by statute,[186] and it is suggested that New York enact similar legislation. By requiring the judge who takes the plea to impress upon the defendant that only plea arrangements placed on the record will be honored,[187] the

[183] As was emphasized by the Supreme Court in Blackledge v. Allison, 431 U.S. 63 (1977), to foster the successful operation of the plea bargaining process the tendered plea must be granted a high degree of finality to ward off baseless collateral attacks. *Id.* at 72; *see* Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). A collateral challenge to a guilty plea differs from a direct appeal in that it attacks the integrity of the judgment in a proceeding instituted independently of the action in which such judgment was rendered or was or could be appealed. Edward Thompson Co. v. Thomas, 49 F.2d 500, 500-01 (D.C. Cir. 1931).

[184] In *Frederick,* the defendant's counsel apparently sought to withdraw the plea when he realized that his expectations from the bargain he thought was struck did not coincide with those of the court. 45 N.Y.2d at 520, 382 N.E.2d at 1334, 410 N.Y.S.2d at 558; *see* Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?,* 126 U. PA. L. REV. 88, 90-94 (1977).

[185] It should be noted that even if a different standard was employed the defendant would still have the burden of proof at the evidentiary hearing. Note, *Post-Conviction Challenges to Guilty Plea Convictions: A Standard for Determining When an Evidentiary Hearing Is Required,* 16 AM. CRIM. L. REV. 163 (1978). Judge Friendly has observed that collateral recourse should be granted only where there is a "colorable" claim of innocence. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments,* 38 U. CHI. L. REV. 142, 160 (1970).

[186] *E.g.,* GEN. STATS. N.C. § 15A-1022 (1978) (statutory framework requires that certain specific questions be asked of the defendant); *see* ALA. CODE tit. 15, § 15-23 (1977); ABA STANDARDS, PLEAS OF GUILTY (1968); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE art. 350 (Tent. Draft No. 5, 1972).

[187] North Carolina's statute can serve as a model for questioning of a defendant at the time of plea submittal. A more prophylactic procedure concerning questioning can serve the twofold purpose of assuring that the defendant is cognizant of the consequences of his actions and reducing those instances where a plea withdrawal will be permitted. N.C. GEN. STAT. § 15A-1022 (1978) provides in pertinent part:

> (b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, [and] whether the parties have entered into any arrangement with respect to the

laudable goals of plea bargaining will be achieved, while preventing a defendant from entering a guilty plea under any misconceptions.

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Court of Appeals modifies Goggins standard for disclosure of informant's identity

The well-established prosecutor's privilege to withhold the identity of a confidential informant[188] often conflicts with a criminal defendant's constitutional rights of confrontation and due process.[189] In *People v. Goggins,*[190] the Court of Appeals sought to resolve this

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plea and the terms thereof . . . . The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

[188] Although the privilege is often said to belong to the informant, it "is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Roviaro v. United States, 353 U.S. 53, 59 (1957). The prosecutor's right to preserve the anonymity of informants was created by the courts in the interest of public policy, independently of any statutory or constitutional mandate. *See* Note, *Disclosure of an Informant's Identity — The Substantive and Procedural Balance Tests,* 39 ALB. L. REV. 561, 564 (1975) [hereinafter cited as *Informant's Identity*]. *See generally* Scher v. United States, 305 U.S. 251 (1938).

[189] *See* Roviaro v. United States, 353 U.S. 53, 60 (1957). *See also* United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); Cannon, *Prosecutor's Duty to Disclose,* 52 MARQ. L. REV. 517 (1969); Note, *The Prosecutor's Duty to Disclose After* United States v. Agurs, 1977 U. OF ILL. L.F. 690, 690. The *Roviaro* Court held that the informant privilege is overridden when "the dislcosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ." 353 U.S. at 60-61. This principle was to govern disclosure in hearings to determine the existence of probable cause and in proceedings to establish the defendant's guilt or innocence. *Id.*

New York cases initially indicated judicial reluctance to require disclosure of an informant's identity in probable cause cases. *See* People v. Cerrato, 24 N.Y.2d 1, 246 N.E.2d 501, 298 N.Y.S.2d 688 (1969), *cert. denied,* 397 U.S. 940 (1970); People v. Malinsky, 15 N.Y.2d 86, 209 N.E.2d 694, 262 N.Y.S.2d 65 (1965). The privilege was less consistently applied, however, where disclosure was relevant to the determination of guilt itself. *Compare* People v. Casiel, 42 App. Div. 2d 762, 346 N.Y.S.2d 349 (2d Dep't 1973) *with* People v. Jones, 76 Misc. 2d 547, 350 N.Y.S.2d 539 (Sup. Ct. N.Y. County 1973). *See generally* W. RICHARDSON, EVIDENCE § 456 (10th ed. 1973). The probable cause line of cases culminated with People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974), in which the Court of Appeals ruled that where the evidence, apart from the potential testimony of the informant, fails to establish probable cause, the judge should examine the informant in an in camera hearing and provide the defense with a "summary report" of the testimony. *Id.* at 181, 313 N.E.2d at 52, 356 N.Y.S.2d at 586. On the same day that *Darden* was decided, the Court also decided People v. Goggins, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied,* 419 U.S. 1012 (1974), in which guidelines were established to govern disclosure when the defendant's guilt or innocence is in issue. *See* note 191 *infra.* Distinguishing *Goggins* from cases involving a determination of probable cause, the Court concluded that the *ex parte,* in