

4.32. Evidence of Plea and Ancillary Statements

(1) When a plea of guilty is withdrawn or vacated, evidence of that plea and any statement made in the course of entering that plea:

(a) is not admissible in a criminal proceeding against the person who entered the plea;

(b) is admissible in a civil proceeding against the person who entered the plea, provided that the vacatur was not based upon a violation of due process.

(2) A defendant's statement made on advice of counsel to a prosecutor for the purpose of obtaining a beneficial disposition of the defendant's case is, in the absence of the agreed upon disposition, admissible against the defendant in a subsequent trial, provided the trial is not the consequence of the prosecutor's improper breach of the agreement and provided the parties did not otherwise expressly agree.

Note

Subdivision (1). Subdivision (1) (a) is derived from *People v Spitaleri* (9 NY2d 168 [1961]). In *Spitaleri*, the Court of Appeals held a withdrawn guilty plea is “out of the case forever and for all purposes.” (*Id.* at 173.) Thus, once a guilty plea is withdrawn, neither the fact of the plea nor the contents of the plea may be subsequently used at a trial by the prosecuting authority as evidence in chief or to impeach a defendant who testifies. (*People v Moore*, 66 NY2d 1028, 1030 [1985].) As acknowledged by the Court of Appeals, the *Spitaleri* rule is not constitutionally or statutorily compelled and rests upon the principle that “it would be unfair to allow a defendant to withdraw a plea of guilty and then permit its use against him [or her] at trial.” (*People v Evans*, 58 NY2d 14, 22 [1982].)

Subdivision (1) (b), as derived from *Cohens v Hess* (92 NY2d 511 [1998]), recognizes that the *Spitaleri* rule does not apply in civil proceedings. Thus, when the vacatur of a defendant's plea is not based upon any violation of due process in the taking of the guilty plea, it is admissible in a civil proceeding. (*Cohens v Hess*, 92 NY2d at 515.)

For the purposes of this rule, a plea of guilty includes an *Alford* plea; that is, a plea entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Id.* at 472, 475.) The Supreme Court held such a plea is not constitutionally proscribed, and “may generally be used for the same purposes as any other conviction.” (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (*See Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000].)

Subdivision (2). Subdivision (2) is derived from *People v Evans* (58 NY2d 14 [1982]) and *People v Curdgel* (83 NY2d 862 [1994]). In both cases, the defendant, in pursuit of a favorable plea agreement and upon the advice and in the presence of counsel, voluntarily furnished the prosecutor with an incriminating statement. In *Evans* the defendant agreed to testify in two trials against an accomplice, and in *Curdgel* the defendant agreed to testify in the grand jury against his accomplices. Before testifying in the grand jury, Curdgel signed a waiver of immunity.

Although for different reasons, each defendant ultimately went to trial—*Evans*, because his conviction upon his plea was reversed for unrelated reasons; and *Curdgel*, because he breached the plea agreement by publicly contradicting his testimony. At *Evans*’s trial, the People were permitted to use against him his statements to the prosecutor and his testimony at the accomplice’s trials; at *Curdgel*’s trial, the People were permitted to use his grand jury testimony against him.

The plea agreements in *Evans* and *Curdgel* did not include a condition that the statements or testimony would not be admissible at a subsequent trial of the defendant. (*See Curdgel*, 83 NY2d at 864-865 [“As in (Curdgel’s) case, the *Evans* defendant . . . set no conditions on the subsequent use of his testimony”].)

In *Evans*, the Court noted that because the defendant entered into an agreement for the exchange of statements or testimony for a beneficial plea that did not include a condition limiting the use of the statements or testimony “when it would have been a simple task to include such a limiting condition as part of that plea, [the defendant] assumed the risk that the challenged evidence might be used against him if he succeeded on his appeal.” (*Evans*, 58 NY2d at 23.) In *Curdgel*, the Court noted that “the People bargained for use of defendant’s testimony in the prosecution of his accomplices.” (*Curdgel*, 83 NY2d at 865.) After the defendant’s breach of that agreement, the People were permitted to use the defendant’s grand jury testimony at his trial, given in exchange for a beneficial plea offer, “as this was a counseled, foreseeable use of his testimony.” (*Id.*)

The statement or testimony in *Evans* and *Curdgel* was bargained for by the People in return for a beneficial plea offer; therefore, when, through no fault of the People, a guilty plea did not result, the People were not precluded from using what they had bargained for against each defendant as this was a “foreseeable” consequence of the plea agreement. (See *People v Melo*, 160 AD2d 600, 600–601 [1st Dept 1990] [“The defendant could have sought as a condition for the negotiations an agreement from the prosecutor not to use his statements against him, but he did not. Absent such agreement with the District Attorney, prepleading admissions made in the presence of the defendant’s attorney are admissible” (citation omitted)]; *but cf. People v Thompson*, 108 AD3d 732 [2d Dept 2013].)