

GUILTY PLEA COLLOQUY ¹

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INTRODUCTION ²

Note: If the expected plea is the product of a plea agreement, the court may wish to place that agreement on the record before proceeding with the colloquy to make sure there is no misunderstanding and the defendant in fact wishes to plead guilty. If the court does so, then at the appropriate place in the colloquy, the court need ask the defendant only whether he understands the terms and conditions of the agreement that were placed on the record at the beginning of the proceedings.³

To Defense Counsel:

Do you have an application on behalf of your client to enter a plea of guilty [to the offenses and under the terms I have just outlined]?

To District Attorney if the plea is not to the entire indictment:

Is that plea and sentence commitment acceptable?

Or

Is that plea acceptable, subject to your sentence recommendation?

To Defendant:

Optional: Do you swear or affirm to tell the whole truth, and nothing but the truth, during this proceeding?

I must decide whether to accept the plea(s) of guilty offered by your attorney on your behalf. In order to make that decision, I must ask you some questions, and, of course, listen to and evaluate the answers. Before you answer a question, you may talk with your lawyer about the question and then answer. If you do not understand or hear a question, tell me. Do you understand?

As I said, I will be asking you questions. As a result, by answering the questions and pleading guilty, you are giving up your right to remain silent and not to incriminate yourself. Do you understand?

Have you spoken with your lawyer about your case, about pleading guilty, and about thereby waiving your right to a trial by jury?

Are you satisfied with the services of your lawyer?

FACTUAL BASIS AND PLEA ⁴

You have asked to plead guilty to (specify), a class (specify letter classification, and relevant other classification, e.g. violent felony) [under the (specify) count of the (information / superior court information / indictment)].

Under that count, it is charged that on or about (date) in the County of (specify), you (specify pertinent allegations). Is that true?

E.g., Under that count, it is in essence charged that on or about January 1, 2016, in the County of Oz, you knowingly and unlawfully entered a dwelling at 100 Main Street with the intent to commit a crime in that dwelling, the intended crime being the theft of property. Is that true?

Note: Though not necessary for a valid plea, the court may then ask Defendant what he/she did, or preferably, ask question(s) eliciting particular facts, e.g., What type of firearm was it? Where did you have the firearm? What type of narcotic drug was it? What did you receive in exchange for the drug?

In drug and weapons cases, the court may wish to have the result of a lab analysis placed on the record and have counsel acknowledge that the result is not contested.

Do you, therefore, plead guilty to _____?

WAIVED OR FORFEITED RIGHTS

Trial by Jury Waived ⁵

By pleading guilty, you waive the right to a trial by jury. Do you understand that?

At a trial by jury you are presumed to be innocent, and you are entitled to the following rights:

You have the right to be represented by your lawyer.

You have the right to confront and cross-examine witnesses presented by the government.

You have the right to remain silent and not to incriminate yourself.

You have the right, but are not required, to call witnesses, and to testify yourself.

Finally, you have the right to require the government to prove your guilt beyond a reasonable doubt to a jury of twelve people who must be unanimous in finding that you are guilty.

Do you understand each of those rights, and that by pleading guilty, you give up each of those rights?

Do you understand that by pleading guilty, you give up any defense you may have to these charges?

Do you understand that a plea of guilty is the same as a verdict of guilty rendered by a jury after a trial?

Right to Appeal Waived ⁶

Next, a defendant ordinarily retains the right to appeal even after pleading guilty. Thus, a waiver of the right to appeal is separate and distinct from the waiver of a trial and other rights by a plea of guilty. In this case, however, as a condition of the plea agreement, you are asked to waive your right to appeal. ⁷

First, what is an appeal? An appeal is a proceeding before a higher court, an appellate court. If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On an appeal, a defendant may, normally through his/her lawyer, argue that an error took place in this court which requires a modification or reversal of the conviction. A reversal would require either new proceedings in this court or a dismissal. Do you understand?

By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, [including a claimed error in the denial of your (specify, e.g., motion to suppress),] ⁸ and to consider whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?

Among the limited number of claims that will survive the waiver of the right to appeal are: the voluntariness of this plea, the validity and voluntariness of this waiver, the legality of the sentence, [and] the jurisdiction of this Court

[Add if an issue in the case:

[and] a defendant's competency to stand trial,
[and] a defendant's constitutional right to a speedy trial⁹.
Do you understand?

Have you spoken to your lawyer about waiving your right to appeal?

Are you willing to do so in return for the plea and sentence agreement?

Do you waive your right to appeal voluntarily, of your own free will and choice?

SENTENCE

Authorized Sentence or Commitment

No commitment:

Under the law, I am authorized to impose a sentence of (specify). Do you understand?

Commitment:

As a condition of your plea of guilty, I have thus far committed to (specify sentence and any other commitment).

Do you understand?

Determinate sentence:

Note: If the commitment includes a determinate sentence of imprisonment, the defendant must also be advised of the post-release supervision period (see People v Catu, 4 NY3d 242 [2005]). However, a court may, but is not required to, advise a defendant of the consequences of a violation of post-release supervision (see People v Monk, 21 NY3d 27[2013]).

That determinate sentence of imprisonment will be followed by a period of post-release supervision of (specify) years.

[Post-release supervision commences when you are released and requires that you be subject to the supervision of a parole officer and that you adhere to certain conditions. A violation of a condition of post-release supervision can result in re-incarceration for the unserved portion of your determinate sentence plus up to the balance of the remaining period of post-release supervision.]

Do you understand?

Parole Supervision Sentence (Willard)¹⁰

(Drug Treatment)

The [indeterminate/determinate] sentence of imprisonment shall be executed as a parole supervision sentence. As a result, the sentence will include a 90-day residential treatment program at a Correctional Treatment Facility, commonly referred to as Willard, to be followed by up to six months in a residential treatment program.

A failure to fulfill the conditions of the drug treatment program could result in a violation of parole, which in turn may result in you being transferred to prison for the maximum term of the sentence of imprisonment.

Do you understand?

Revocable Sentence

Note: A court may, but is not required to, advise the defendant of the terms and conditions of probation (see People v Gravino, 14 NY3d 546 [2010]).

You should be aware that a sentence of (specify: probation, conditional discharge, or intermittent imprisonment) is a revocable sentence. That means that, as part of that sentence, you will be required to adhere to certain conditions. Those conditions will be set forth in a writing and given to you at the time of sentence. If you violate one or more of those conditions, the sentence may be revoked, *i.e.*, set aside, and you may be re-sentenced, including to jail/prison? Do you understand?

[Those conditions will include:

Select, or add to, as applicable and appropriate:

- That you be subject to supervision by a probation officer.
- That you do not engage in any criminal conduct.]

For an Intermittent Sentence:

- That you meet the dates and times you are required to surrender to serve the intermittent sentence of imprisonment and that you adhere to the rules of the jail.

• Other: (specify, or if DWI conviction, proceed to next section).

Do you understand?]

Driving While Intoxicated Conditions

Note: If imprisonment is imposed for DWI pursuant to Vehicle and Traffic Law § 1192 (2), (2-a), and (3), probation or conditional discharge must also be imposed consecutive to the prison sentence and installation of an ignition interlock device.

For certain other crimes, involving alcohol, a consecutive sentence of probation or conditional discharge is not required, but if a sentence of probation or conditional discharge is imposed, the ignition interlock device must be ordered. Those crimes are: “vehicular assault” 1 and 2 (Penal Law §§ 120.03, 120.04); “aggravated vehicular assault” (Penal Law § 120.04-a); “vehicular manslaughter” 1 and 2 (Penal Law §§ 125.12, 125.13); and “aggravated vehicular homicide” (Penal Law § 125.14).

For the conviction of DWI [or (specify)], the (probation / conditional discharge) portion of the sentence will run consecutive to the sentence of imprisonment.

[Those conditions will include:

Select, or add to, as applicable and appropriate:

- That you be subject to supervision by a probation officer.
- That you do not engage in any criminal conduct.
- That you successfully complete an alcohol treatment program
- That you attend a “Victim Impact Panel.”]

*Installing an *ignition interlock device* in any vehicle that you own or operate and keeping it there for (specify period).¹¹ That device must be installed in any car you own or would be able to operate even though your license is suspended or revoked. You are not permitted to drive while your license is suspended or revoked and, in any event, without the ignition interlock device installed. [You may be exempt from the installation of that device if you sign an affidavit stating, under penalty of perjury, that you do not own a car and will not drive during the interlock restriction period.]

Those and other conditions will be set forth in a writing and given to you at the time of sentence. If you violate one or more of those conditions, the sentence may be revoked, i.e., set aside, and you may be re-sentenced, including to prison.

Do you understand?

License Revocation

For Driving While Intoxicated

At sentence, your driver's license will be: (select and specify as appropriate):

Vehicle and Traffic Law § 1192 (1) (Driving While Ability Impaired):

Suspended for 90 days; or
Six months (if the crime was committed within five years of a prior conviction of Vehicle and Traffic Law § 1192).

Vehicle and Traffic Law § 1192 (2) (Driving While Intoxicated; per se & Vehicle and Traffic Law § 1192 (3) Driving While Intoxicated:

Revoked for six months; or

One year (if the conviction is for a felony committed within 10 years of a prior conviction of Vehicle and Traffic Law 1192 [2], [3], [4], or [4-a]), or

18 months (if the conviction is for a felony committed within 10 years of a prior conviction of Vehicle and Traffic Law § 1192 [2-a]).

Vehicle and Traffic Law § 1192 (2-a) (Aggravated Driving While Intoxicated):

Revoked for one year; or

18 months (if crime committed within 10 years of a prior conviction of Vehicle and Traffic Law § 1192 [2], [2-a], [3], [4], or [4-a]).

Further, the Commissioner of Motor Vehicles will not grant you a temporary license during the period of suspension/revocation, and the Commissioner of Motor Vehicles will decide whether your license is restored and when. Do you understand?

For other Offenses

Note: People v Castellini (24 Misc 3d 66 [1st Dept, App Term, 2009]) held that if loss of a driver's license is required, the defendant must be so advised. A court must suspend or revoke a license upon conviction of the following crimes:

LEAVING THE SCENE: License must be revoked when the defendant is convicted of any violation of Vehicle and Traffic Law § 600 (2), or of a local law or ordinance making it unlawful to leave the scene of an accident without reporting (see Vehicle and Traffic Law § 510).

HOMICIDE OR ASSAULT: License must be revoked when the defendant is convicted of homicide or assault arising out of the operation of a motor vehicle or motorcycle (see Vehicle and Traffic Law § 510 [2] [a] [i]). Revocation is for at least for six months. Restoration thereafter is in the discretion of the Commissioner of Motor Vehicles (see Vehicle and Traffic Law § 510 [6]). In New York City or Buffalo, suspended for a period of not less than 30 nor greater than 180 days when the defendant is convicted of the crime of assault in the first, second or third degree, and when such offense was committed against a New York City or Buffalo traffic enforcement agent while such agent was enforcing or attempting to enforce the traffic regulations of such city (see Vehicle and Traffic Law § 510 [2] [b] [iv]).

DRUG CRIME: License must be suspended for six months when the defendant is convicted of, or adjudicated a youthful offender or juvenile offender, for any crime in Penal Law article 220 or 221, absent compelling circumstances warranting an exception. The court may order that the suspension of the license take effect 20 days after the date of sentencing. Any time actually served in custody shall be credited against the period of such suspension (see Vehicle and Traffic Law § 510 [2] [b] [v]).

FALSE BOMB / FALSE REPORT: License must be suspended for one year when the defendant is convicted of, or receives a youthful offender adjudication, for "placing a false bomb in the first degree" (Penal Law § 240.62) or "falsely reporting an incident in the first degree" pursuant to Penal Law § 240.60 (5) (see Vehicle and Traffic Law § 510 [2] [b] [xii]).

At the time of sentence, your driver's license will be (specify: suspended or revoked) for a period of (specify).

Do you understand?

ADVICE

Conditional Sentence Promise Explained

Note: The following condition applies whether stated or not. The plea court may, therefore, consider explaining the following only when there is reason to believe that the plea and sentence commitment may well be affected by information received at the time of sentence.

Under our law, a court's sentence commitment is conditional. What that means is that between now and the time of sentence, I will be provided with a pre-sentence report and perhaps additional information about you and this case. If after reviewing that material, I am prepared to impose the promised sentence, then I will do so. If I change my mind and decide not to impose the promised sentence, I will tell you that and permit you to withdraw your guilty plea and go to trial.

If, however, you violate a condition of the plea that I [have / will] set forth, I will not permit you to withdraw your plea and I will be at liberty to sentence you to [any authorized sentence or (specify)].

Do you understand?

Civil Commitment

Note: A failure to advise a defendant who pleads guilty to a sex offense that he may be subject to the Sex Offender Management and Treatment Act (SOMTA), and the consequences thereof, does not necessarily render the guilty plea involuntary (see People v Harnett, 16 NY3d 200, 203 [2011]). Where, however, the consequences can include extended confinement, a court should advise a defendant who may be subject to the act of the possible consequences (see id. at 207).

Before the conclusion of your sentence, you will be evaluated, and there may be court proceedings to determine (1) whether you suffer a “mental abnormality”¹² that predisposes you to engage in illegal sexual conduct and that results in you having serious difficulty in controlling such conduct; and (2) if you do suffer a “mental abnormality,” whether that “mental abnormality” is so serious that it makes it likely that you will be a danger to others and will again commit a sex offense and that you are therefore a “dangerous sex offender requiring confinement.”¹³

If you are found to have a “mental abnormality,” you will be subject to strict and intensive supervision.

If you are found to have a “mental abnormality,” which makes you a dangerous sex offender requiring confinement, you will be committed to a secure treatment facility until such time as you are found not to be a dangerous sex offender requiring confinement.

Do you understand?

Cooperation Agreement

There is a written cooperation agreement, which is hereby incorporated by reference.

To the Defendant:

Is this your signature on the agreement?

Did you read the agreement?

Did you discuss it with your lawyer?

Do you understand it?

Do you agree to be bound by its terms?

Do you do so voluntarily, of your own free will and choice?

While the written terms of the agreement control the understanding between the parties, the key terms of the cooperation agreement as relate to the sentence or disposition of this case, are, as I understand it, that the defendant agrees to cooperate, as required by the District Attorney.

The District Attorney will be the sole arbiter of the nature and extent of the defendant's cooperation. If the District Attorney determines that there has not been sufficient cooperation, or that the agreement has otherwise been breached, he/she will recommend a sentence of (*specify*). If the District Attorney determines that there has been sufficient cooperation, he/she will recommend a lesser sentence or other disposition as set forth in the written agreement.

Unless I determine that the interests of justice dictate otherwise, I will be prepared to accept the recommendation of the District Attorney as to the sentence or other disposition of the case.

Do you understand?

Deportation

Note: Defense counsel must give appropriate advice on a deportation consequence of a plea (see Padilla v Kentucky, 559 US 356 [2010]).

The plea court must at least advise a non-citizen defendant that he or she is subject to deportation (see CPL 220.50 [7]). But see People v. Peque, 22 N.Y.3d 168, 182-83 (2013) (“because defendant knew of his potential deportation, and thus had the ability to tell the court, if he chose, that he would not have pleaded guilty if he had known about deportation, he was required to preserve his claim regarding the involuntariness of his plea”); People v Delorbe, 2020 WL 1516458 (2020).

The Appellate Division, Second Department, has indicated that a judge should not begin the colloquy by asking the defendant whether he or she is a citizen. People v. Williams, 178 A.D.3d 1095, 1096 (2d Dept 2019).

Upon preservation of the issue, a plea court’s failure to advise requires vacatur of the plea if the defendant was prejudiced by the failure to be told, i.e., that the defendant would not have pleaded guilty had he or she known of the risk of deportation. Peque, 22 NY3d 168.

Do you understand that if you are not a United States citizen, your plea of guilty will subject you to deportation, exclusion from the United States, and denial of naturalization?

Do you understand that neither your attorney, nor I, nor anyone else can guarantee that you will not be deported, excluded from the United States, or denied naturalization?

If your deportation, exclusion from the United States or denial of naturalization is ordered, in whole or in part, because of this plea of guilty, you will not be permitted to have the plea set aside. So, if you plead guilty, it must be because you are guilty and you are receiving a benefit in the plea agreement, regardless of whether you are deported, excluded from the United States, or denied naturalization. Do you understand?

Do you, therefore, wish to plead guilty, regardless of whether the plea in whole or in part results in your deportation, exclusion from the United States or denial of naturalization?

Sex Offense Registration

Note: A court may, but is not normally required to, normally advise the defendant of the sex offense registration requirements; but, the defendant's ignorance of same may in a rare case warrant permitting withdrawal of the plea (see People v Gravino, 14 NY3d 546 [2010]).

By virtue of this conviction, you will be required to register as a sex offender, and the period of registration will be at least 20 years and, depending on what level or type of offender you are determined to be, the period may be life. Do you understand?

Waiver of Discovery

(added February 2020)

(1) Has your attorney advised you of your right to discovery?

(2) Do you understand that the right to discovery means you are entitled to all items and information that relate to the subject matter of your case that are in the possession, custody, or control of the prosecution or of the police or other persons under the prosecution's direction or control?

(3) *Note: If the defendant is accepting a plea offer which included a deadline imposed by the prosecutor or the court and the discovery has not yet been completed, add the following:*

Do you understand that if you did not plead guilty today, the discovery that you have not yet received that is now in the possession, custody or control of the prosecution would have to be given to you in not less than:

Select appropriate alternative:

three *[if the defendant is charged in a felony complaint]*

seven *[if the defendant is charged in any other accusatory instrument]*

calendar days before the expiration date of the plea offer [or the deadline imposed by the court for acceptance of the guilty plea offer].

(4) Do you understand that the prosecution did not condition this plea offer on your waiver of discovery?

(5) Do you understand that by taking this plea you will not receive any [further] discovery?

CONDITIONS OF RELEASE BEFORE SENTENCE

Note: A plea and sentence commitment may, but need not, be conditioned on the defendant fulfilling certain reasonable conditions. What follows are a number of approved conditions. Whether to impose a condition is within the sound discretion of the plea court.

There are conditions that you must comply with between now and the time of sentence.

1. You must meet with the Probation Officer assigned to prepare your pre-sentence report.
2. You must return to court when required.¹⁴
[*Optional: If you fail to return to court when required, I will be permitted to sentence you in your absence (issue a warrant for your arrest, and upon your arrest the sentence will be executed.)*]
3. You must not commit any offense [or unlawfully possess or use any drug] between now and the time of sentence. You will be in violation of this last condition if, after you are provided an opportunity to be heard, I find, based upon an accusatory instrument, or evidence before a Grand Jury, [or a drug test,] or such other evidence as I deem appropriate, that there is probable cause and otherwise a legitimate basis to believe you committed an offense [or unlawfully possessed or used a drug].¹⁵
4. Specify any special condition, e.g.:
 - (a) You must successfully complete an alcohol and/or drug treatment program.
 - (b) You must have a full-time job or be in school full time.
 - (c) You must successfully fulfill the terms of the cooperation agreement.

Do you understand each of those conditions?

If you fail to comply with any one or more of those conditions, I will not be bound by the sentence commitment, I will not permit you to withdraw your plea(s) of guilty, and I will be at liberty to sentence you to [(specify); e.g.: any authorized sentence, including a sentence of imprisonment up to and including (specify)]. Do you understand?

If it comes to pass that I impose a different sentence than the one I have committed to, your waiver of the right to appeal will apply to that sentence as well.¹⁶ Do you understand?

Note: If the alternate commitment includes a determinate sentence of imprisonment, the defendant must also be advised of the post-release supervision period (see People v Catu, 4 NY3d 242 [2005]). However, a court may, but is not required to, advise a defendant of the consequences of a violation of post-release supervision (see People v Monk, 21 NY3d 27 [2013]).

If it comes to pass that the different sentence is a determinate sentence of imprisonment, that sentence will be followed by a period of post-release supervision of (specify) years.

[Post release supervision requires that you be subject to the supervision of a parole officer and that you adhere to certain conditions. A violation of a condition of post-release supervision can result in re-incarceration up to the balance of the remaining period of post-release supervision.]

Do you understand?

VOLUNTARINESS

Other than the plea and sentence agreement, which has been placed on the record, has anyone made any other promise, commitment, or representation of any kind to you to get you to plead guilty?

Has anyone threatened you, or forced you, or pressured you to plead guilty against your will?

Have I, or your lawyer, or anyone else, said anything to you to have you plead guilty against your will?

Are you therefore pleading guilty voluntarily, of your own free will and choice?

CONCLUSION

Last question, do you understand that if you are ever convicted of another crime in the future, this conviction may be used against you to impose additional or different punishment for that new crime?

The court finds that the defendant's plea is knowing, intelligent and voluntary and, accordingly, accepts the plea and enters it upon the record.

NOTE: If the defendant is a predicate felon, or the defendant is convicted of a misdemeanor crime of domestic violence, the court may proceed to arraign the defendant accordingly, or specify that same will be deferred until the date of sentence. If deferred, a record of that deferral should be made as a reminder at sentence.

APPENDIX: ALFORD PLEA ¹⁷

Note: An Alford plea requires "strong" evidence of guilt and a demonstrated "rational choice." The defendant must be "aware of the nature and character of an Alford plea," and at the least should be asked if he wishes to plead guilty to the crime "to avoid the risk of conviction upon a trial of the more serious crime...." (People v Hill, 16 NY3d 811, 814 [2011]). Accordingly, in addition to the normal plea colloquy, the following procedure and questions substitute for the section on the "Factual Basis and Plea":

(1) Place the following information on the record:

The evidence of guilt.

The reason the defendant is not acknowledging factual guilt of the crime or an element of thereof.

The reason the defendant is nonetheless entering a plea of guilty. E.g., The defendant is entering the plea to avoid the risk of conviction upon a trial of a more serious offense and/or of an offense for which he/she could [would] receive a more severe sentence.

(2) In lieu of eliciting a factual basis for the plea, proceed as follows:

To the defendant:

You are pleading guilty to (specify), a class (specify letter classification, and relevant other classification, e.g. violent felony) [under the (specify) count of the (information / superior court information / indictment)].

Under that count, it is charged that on or about (date) in the County of (specify), you (specify pertinent allegations). Do you understand?

By your plea of guilty, you will stand convicted of that crime and face the same consequences that attach to any conviction of an offense.¹⁸ Do you understand?

Do you plead guilty to (*specify name of the offense*)?

Endnotes

1. Except for a plea of not responsible because of a mental disease or defect (see CPL 220.15), there is no statute or case law that dictates a "uniform mandatory catechism" of questions that a judge must ask a defendant who is pleading guilty (*People v Nixon*, 21 NY2d 338, 353 [1967]). But, a "full inquiry" is to be "encouraged and highly recommended" (*People v Selikoff*, 35 NY2d 227, 242 [1974]). Also, the record must show that the plea was entered knowingly, intelligently, and voluntarily, and that the defendant waived the privilege against self-incrimination, the right to a trial by jury and the right to confront witnesses (see *Boykin v Alabama*, 395 US 238, 243, and n 5 [1969]; *People v Tyrell*, 22 NY3d 359, 365 [2013]; *People v Fiumefreddo*, 82 NY2d 536, 543 [1993]).

2. The following plea colloquy expects that the court, not a prosecutor, conducts the plea colloquy. In *People v Sanders* (25 NY3d 337, n 1 [2015]), the Court noted it was "troubled" by the practice of some courts of permitting the prosecutor to conduct a plea colloquy. "As we [have noted], the conduct of the plea allocution is 'best left to the discretion of the court'" (*Id.* [internal citations omitted]).

3. The following cases rejected challenges to the instant plea colloquy: *People v Ball*, 129 AD3d 739, 739-740 (2015) ("The defendant's contentions that he did not have sufficient time to confer with his attorney, and that he did not understand the sentence he would receive as part of the plea bargain, were contradicted by the thorough plea colloquy"); *People v Linares*, 113 AD3d 796, 797 (2d Dept 2014) ("The defendant's claim that his plea was coerced by off-the-record comments by his attorney was contradicted by the thorough plea colloquy").

4. A "lesser included offense," within the meaning of statutes that permit a plea of guilty to same (see CPL 220.10 [4] and [5]), means a "lesser included offense" as that term is defined in CPL 1.20, and one which is deemed to be such pursuant to CPL 220.20. In addition, decisional law accepts: (1) a negotiated plea of guilty to a non-existent attempt to commit the crime charged; and (2) a negotiated plea of guilty to a "lesser crime technically inconsistent with the crime charged, albeit sharing common elements and involving the same victim" (*People v Johnson*, 89 NY2d 905, 908 [1996]; see *People v Adams*, 57 NY2d 1035 [1982] [plea to manslaughter, first degree, in satisfaction of a felony murder count involving the same victim, following the defendant's conviction for the underlying felony]; *People v Francis*, 38 NY2d 150, 155 [1975] [a "plea may be to a

hypothetical crime, or to a crime for which the facts alleged to underlie the original charge would not be appropriate....Only the events of time, place, and, if applicable, victim, need be the same for the crime pleaded as for the one charged" (internal citations omitted)).

5. See endnote 1.

6. In *People v. Thomas*, 2019 WL 6312521, 2019 N.Y. Slip Op. 08545, decided on November 26, 2019, the Court of Appeals reviewed three separate cases that contested the validity of a waiver of the right to appeal; a majority of the Court found one waiver valid and two invalid; three judges wrote separate opinions either concurring or dissenting with respect to each of the three cases. The majority opinion approved parts of the Model Colloquy (MC).

The Appellate Divisions had previously approved similar formulations of the MC waiver. *E.g. People v Ball*, 129 AD3d 739 [2d Dept 2015]; *People v Contreras*, 123 AD3d 1139 [2d Dept 2014]; *People v Cannon*, 123 AD3d 1138 [2d Dept 2014]; *People v Vaiana*, 119 AD3d 879 [2d Dept 2014]; *People v Persaud*, 118 AD3d 820 [2d Dept 2014]). The references in the MC to whether the defendant has conferred with counsel and understands that the conviction will normally be final were added after *People v Brown*, 122 AD3d 133 (2d Dept 2014) recommended inclusion of those references.

A review of all four opinions in *Thomas* suggests additions to the MC. First, while the opening paragraph of the MC has met the requirement of telling a defendant that a guilty plea and appeal waiver are "separate and distinct," the repeated use of that quoted term in the *Thomas* opinions suggest that a "belt and suspenders" approach would be to include the quoted phrase in the opening paragraph. Thus the second sentence of the first paragraph has been added.

Second, the collective opinions suggest that even though the record shows that the waiver is intended "to cover all aspects of the case," the better practice would be for a court to expressly set forth any major aspect of the case for which appellate review is waived, as well as those items not waived.

With respect to the waiver of a major aspect of the case, the MC had included in footnote three a suggestion that the defendant be told, for example, that he/she was waiving appellate review of a denied suppression motion. In light of *Thomas*, the language of the footnote has been moved into paragraph three. Also, as explained in the revised footnote three, other denied motions may be waived and may warrant being noted.

With respect to the aspects of the case for which appellate review is

not waived, the fourth paragraph of the MC that listed those aspects as “optional” are now recommended to be told to a defendant in every case.

7. The waiver must be made “knowingly, intelligently and voluntarily” (*People v Lopez*, 6 NY3d 248, 256 [2006]; see *People v Muniz*, 91 NY2d 570, 573 [1998]), and the defendant must understand that the waiver is independent of the waiver of rights that flow from a plea of guilty (see *People v Lopez*, *supra*).

A written waiver of the right to appeal may be utilized. However, that writing, even with the purported signature of the defendant, is normally by itself insufficient to prove that there was a knowing, intelligent and voluntary waiver of the right to appeal. It remains necessary for the court to “adequately assure[] itself that defendant understood the nature of the appeal waiver” (*People v Elmer*, 19 NY3d 501, 510 [2012] [“There was no ‘attempt by the court to ascertain on the record an acknowledgment from defendant that he had, in fact, signed the waiver or that, if he had, he was aware of its contents’” (citation omitted)]; see *People v Bradshaw*, 18 NY3d 257 [2011]; *People v Calvi*, 89 NY2d 868 [1996]; *People v Callahan [DeSimone]*, 80 NY2d 273 [1992]; cf. *People v Ramos*, 7 NY3d 737 [2006] [the defendant adequately orally acknowledged that he understood by the writing that he was waiving his right to appeal]).

8. Prior to decisional law approving a waiver of the right to appeal, a defendant could separately waive the right to appeal a determination of a suppression hearing. (see *People v Williams*, 36 NY2d 829 [1975]). Once the waiver of the right to appeal was approved and included a waiver of review of a suppression decision, a separate waiver of the right to appeal a suppression decision became unnecessary. Thus, if applicable, the court should add the words in brackets.

As of January 1, 2020, a plea of guilty will not waive appellate review of a CPL 30.30 lack of speedy trial claim. The statute, however, does not preclude a waiver of the right of appeal including a waiver of appellate review of a CPL 30.30 claim. Thus, if the court decided a CPL 30.30 motion, it may wish to include that among the claims waived.

9. See *People v Thomas*, 2019 NY Slip Op 08545; *People v. Sanders*, 25 NY3d 337 (2015); *People v Campbell*, 97 NY2d 532 (2002); *People v Callahan*, 80 NY2d 273 (1992); *People v Seaberg*, 74 NY2d 1 (1989). If the defendant is eligible for adjudication as a youthful offender and the sentencing court fails to exercise its discretion to consider whether to impose same, that failure will be reviewable on appeal even though the defendant waived the right to appeal.

10. See CPL 410.91.

11. The “ignition interlock device” is a mandatory condition of probation or conditional discharge for convictions of “operating a motor vehicle while under the influence of alcohol” pursuant to Vehicle and Traffic Law § 1192 (2), (2-a), and (3). The law requires a period of at least six months, except if the defendant is a multiple offender of Vehicle and Traffic Law § 1192 (2) or (3), the device “shall remain installed during any period of license revocation ...and, upon the termination of such revocation period, for an additional period as determined by the court” (Vehicle and Traffic Law § 1193 [1-a] [c]).

12. See Mental Hygiene Law § 10.03 (l) for the definition of “mental abnormality.”

13. See Mental Hygiene Law § 10.03 (e) for the definition of “dangerous sex offender requiring confinement.”

14. See *People v Figgins*, 87 NY2d 840, 841 (1995) (“Defendant’s failure to appear in court on the scheduled sentencing date constituted a violation of the plea agreement. Therefore, Supreme Court was no longer bound by the plea promise and could properly impose an enhanced sentence”).

15. See *People v Outley*, 80 NY2d 702 (1993).

16. See *People v Johnson*, 14 NY3d 483 (2010).

17. *North Carolina v Alford*, 400 US 25 (1970).

18. See *Matter of Silmon v Travis*, 95 NY2d 470, 477 (2000) (Parole Board may deny parole to a person convicted of a felony by an *Alford* plea on the grounds that the inmate did not accept responsibility for his criminal conduct); *People v Miller*, 91 NY2d 372, 378 (1998) (a conviction by an *Alford* plea may be used to impeach the person who took the plea); *Matter of Hopfl*, 48 NY2d 859, 860 (1979) (a conviction by an *Alford* plea may be used to disbar an attorney); *People v Geier*, 144 AD2d 1015, 1016 (4th Dept 1988) (a prior felony conviction by an *Alford* plea may serve as a predicate conviction for multiple felony offender sentence).