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People v. Thomas: The Conditional Guilty Plea

I. Introduction

The traditional guilty plea finally disposes of the case in that it waives a defendant's right to appeal any issue except those issues relating to the validity of the plea itself, or to the jurisdiction of the court.[1] New York State's Criminal Procedure Law section 710.70(2)[2] has modified the traditional guilty plea by giving a defendant the right to appeal a denial of a motion to suppress evidence. The conditional guilty plea, by contrast, is the result of an agreement between the prosecutor, the trial judge, and the defendant whereby the plea is conditioned upon the defendant's ability to appeal certain issues of law.[3] In *People v. Thomas,*[4] the New York Court of Appeals refused to recognize a conditional guilty plea attempting to preserve for appeal issues outside the scope of section 710.70(2), at least where "[t]he legal sufficiency of a conceded set of facts" to support the guilty plea was challenged.[5]

In *Thomas,* the defendant pleaded conditionally guilty to

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1. The traditional guilty plea is discussed more fully in Part II of this note *infra*. *See infra* notes 14-38 and accompanying text.

2. NEW YORK CRIM. PROC. LAW § 710.70 (2) (McKinney 1971). Section 710.70(2) allows appeals from denials of motions to suppress evidence which is the fruit of an illegal search and seizure, eavesdropping, involuntary statement, or identification, N.Y. CRIM. PROC. LAW § 710.20(1), (3) & (5) (McKinney Supp. 1980). N.Y. CRIM. PROC. LAW § 710.70(2) provides:

> An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

3. *But cf.* United States v. Moskow, 588 F.2d 882 (3d Cir. 1978) (recognizing the plea over the government's objection). The defendant would be permitted to withdraw his plea should his appeal succeed. *See generally* J.E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 7.22(2) (1978). The conditional guilty plea differs from section 710.70(2) in that the defendant's right to appeal under section 710.70(2) is unilateral; it requires neither the consent of the district attorney nor of the trial judge.

4. 53 N.Y.2d 338, 424 N.E.2d 537, 441 N.Y.S.2d 650 (1981).

5. *Id.* at 340, 424 N.E.2d at 538, 441 N.Y.S.2d at 651.

reckless endangerment in the first degree,[6] and criminal possession of a weapon in the third[7] and fourth degrees.[8] The plea allocution, agreed to by the prosecutor and acquiesced to by the trial judge, was offered on the condition that the defendant would be able to appeal two specific claims. First, Thomas claimed that the facts, as a matter of law, did not constitute reckless endangerment.[9] Second, he contended that the use of New York's statutory presumption of possession of weapons found in a motor vehicle was unconstitutional.[10]

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6. N.Y. PENAL LAW § 120.25 (McKinney 1975).

7. N.Y. PENAL LAW § 265.02 (McKinney 1980).

8. N.Y. PENAL LAW § 265.01 (McKinney 1980).

9. The stipulated facts in Thomas's plea allocution provided the record upon which the appellate courts were to rule. Both parties agreed that Thomas was driving his vehicle through Brooklyn on June 10, 1977 at 2:30 a.m. when a police vehicle pursued him. Thomas reached speeds of over 60 m.p.h. and "ran" five traffic lights during the twenty-five block chase. He admitted to passing at least four moving cars and a number of parked cars, but claimed to have seen no pedestrians on the street. For this reason Thomas argued that these facts could not, as a matter of law, establish that he acted "under circumstances evincing a depraved indifference to human life . . . recklessly engage[d] in conduct which create[d] a grave risk of death to another person," as required by the statute. N.Y. PENAL LAW § 120.25. Essentially, Thomas asked the reviewing court to treat his conviction of this charge as if it were the result of a jury trial rather than a plea of guilty, and to rule that the above facts, as a matter of law, did not evidence the requisite state of mind to constitute the felony of reckless endangerment. He offered his plea of guilty to this charge only because he believed that the district attorney could establish these facts at trial, and that a jury, on the basis of these facts, would convict him. *See* Defendant's Allocution, Brief for Defendant-Appellant, People v. Thomas, 74 A.D.2d 317, 428 N.Y.S.2d 20 (2d Dep't 1980).

10. N.Y. PENAL LAW § 265.15(3) (McKinney 1980) provides in relevant part:

> The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag or slingshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found. . . .

Thomas originally claimed that this presumption statute, which the district attorney conceded would be necessary to gain a conviction at trial on the weapon charges, was unconstitutional.

The trial court denied his motion to dismiss the charges. The stipulated facts revealed that the weapons were found beneath the rear seat of the car Thomas was driving, and that there were two passengers in the car. At the time of defendant's allocution the Second Circuit held the presumption statute unconstitutional on its face. Allen v. County Court, 568 F.2d 998 (2d Cir. 1977). However, in the interim, the Supreme Court reversed in County Court of Ulster City v. Allen, 442 U.S. 140 (1979). This decision effectively blocked any potential federal habeas corpus claim Thomas may have had. Consequently, Thomas could only assert before the appellate courts that the statute was unconstitutional as applied to the facts. *Cf.* County Court of Ulster City v. Allen, 442

The court affirmed the Appellate Division, Second Department,[11] and agreed that preservation of such legal issues for appellate review was logically inconsistent with the plea itself.[12] *Thomas* correctly prohibited the use of a procedural device designed to circumvent the finality of the traditional guilty plea and of the plea bargaining process. Acceptance of a conditional guilty plea would impermissibly extend the plea bargaining process by not only allowing pleas to reduced charges, but by also permitting adverse pre-trial rulings to survive for appellate review. The court, however, left "for another day consideration of other permutations of the problem,"[13] and limited its holding to the facts of the instant case.

Part II of this note discusses the legal consequences of a guilty plea and examines the development of the conditional guilty plea. Part III outlines the reasoning of both the appellate division and the court of appeals in rejecting this procedure. Part IV agrees with the results, but carries the analysis further by refuting arguments often asserted by proponents of the conditional guilty plea. This note concludes that *Thomas* represents an appropriate limitation to plea bargaining.

II. Background

A. *The Legal Consequences of the Traditional Guilty Plea*

The finality of the common law traditional guilty plea has been extensively developed in a series of Supreme Court cases which have become known as the *Brady Trilogy*.[14] The tradi-

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U.S. 140 (1979) (statute held constitutional as applied to convict four occupants of a vehicle of possession of two large caliber handguns found in an open bag on either the front floor or front seat on the passenger side).

11. People v. Thomas, 74 A.D.2d 317, 428 N.Y.S.2d 20 (2d Dep't 1980). Because Thomas's guilty plea was offered only on the condition that his claim be heard on appeal, the appellate division, in fairness to him, remanded to allow him an opportunity to plead anew. *Id.* at 326, 428 N.Y.S.2d at 27. Since Thomas's plea was vacated by the appellate division, he was not the aggrieved party on the appeal to the New York Court of Appeals. Therefore, it was the district attorney who sought leave to appeal. The court was thus in the unusual position of listening to both adversarial parties argue for the conditional guilty plea.

12. People v. Thomas, 53 N.Y.2d at 344, 424 N.E.2d at 540, 441 N.Y.S.2d at 653.

13. *Id.*

14. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970) [hereinafter referred to as the

tional guilty plea preserves for appeal only those issues relating to the jurisdiction of the court,[15] or to the validity of the plea itself.[16] Appeals of nonjurisdictional claims are foreclosed,[17] and

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Brady Trilogy]. Tollet v. Henderson, 411 U.S. 258 (1973), is an extension of this line of cases. As *Tollet* summarized:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offenses with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not "within the range of competence demanded of attorneys in criminal cases."

Id. at 267 (citation omitted).

15. Jurisdictional defects void a conviction even if factual guilt is admitted. Thus, a guilty plea would not waive the following: a double jeopardy claim, Menna v. New York, 423 U.S. 61, 62 (1975); a claim that the sentencing court lacks jurisdiction, Blackledge v. Perry, 417 U.S. 21, 30 (1974); or a claim that the statute under which the prosecution is brought is unconstitutional, Haynes v. United States, 390 U.S. 85, 87 n.2 (1968).

In New York, the leading cases are: People v. Case, 42 N.Y.2d 98, 365 N.E.2d 872, 396 N.Y.S.2d 841 (1977) (guilty plea does not waive a claim that the indictment is defective and does not effectively charge the defendant with the commission of a crime); People v. Armlin, 37 N.Y.2d 167, 332 N.E.2d 870, 371 N.Y.S.2d 691 (1975) (guilty plea does not waive a claim that the defendant is incompetent to stand trial); People v. Blakely, 34 N.Y.2d 311, 313 N.E.2d 763, 357 N.Y.S.2d 459 (1974) (claims based upon the constitutional right to a speedy trial survive a plea of guilty); People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 50 N.Y.S.2d 1031 (1979) (failure to timely raise a double jeopardy claim does not waive that claim).

16. Guilty pleas have been invalidated when made in the face of a federal statute providing for the death penalty only after a jury conviction, United States v. Jackson, 390 U.S. 570 (1968); when taken without the assistance of counsel, Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); when the prosecutor conditioned an offer to recommend a reduced plea on defendant's promise to withdraw his claim that his right to a speedy trial had been violated, People v. Blakely, 34 N.Y.2d 311, 313 N.E.2d 763, 357 N.Y.S.2d 459 (1974); when tainted by uncontradicted evidence that it was motivated by prison abuses directly involving the defendant, People v. Flowers, 30 N.Y.2d 315, 284 N.E.2d 557, 333 N.Y.S.2d 393 (1973); when evidence of inadequate representation of counsel existed, People v. Nixon, 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967), *cert. denied*, 393 U.S. 1067 (1969); when the trial judge erroneously accepted a plea of guilty, without further inquiry, to a charge of second degree murder when defendant's version of the incident indicated that he may not have acted with the requisite legal intent to kill, People v. Serrano, 15 N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965); when the court accepted a plea of guilty to a felony charge where the underlying facts did not support more than a misdemeanor charge, People v. Englese, 7 N.Y.2d 83, 163 N.E.2d 869, 195 N.Y.S.2d 641 (1959); and when the plea was based upon unkept promises by the state, Santobello v. New York, 404 U.S. 257 (1971); 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).

17. A valid plea of guilty waives any nonjurisdictional pre-trial or trial objections, whether or not of a constitutional nature. *See, e.g.*, People v. Iannone, 45 N.Y.2d 589,

federal courts will not adjudicate these claims following a valid plea of guilty whether on direct review from the lower federal courts,[18] the state courts,[19] or in federal habeas corpus proceedings.[20] A valid plea of guilty finally disposes the nonjurisdictional issues in the case; "nothing remains but to give judgment and determine punishment."[21] This is because, as the Supreme Court stated in *Menna v. New York*,[22] "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment."[23]

Serious legal consequences for the defendant flow from a valid plea of guilty. One court has described the guilty plea as "the most devastating waiver possible under our Constitution."[24] When a defendant pleads guilty he is surrendering an array of constitutional rights; foremost among them are the fifth amendment right against self-incrimination,[25] and the sixth amendment rights to a jury trial[26] and to confront one's accusers.[27]

A criminal defendant may not unilaterally tender or withdraw his plea of guilty.[28] Constitutionally, a judge cannot accept

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384 N.E.2d 656, 412 N.Y.S.2d 110 (1978); People v. Gilliam, 65 A.D.2d 533, 409 N.Y.S.2d 400 (3d Dep't 1977); People v. O'Neil, 44 A.D.2d 830, 355 N.Y.S.2d 21 (3d Dep't 1974); People v. Smith, 41 A.D.2d 893, 342 N.Y.S.2d 513 (3d Dep't 1973); People v. Hendricks, 31 A.D.2d 982, 297 N.Y.S.2d 838 (3d Dep't 1969). *See also* Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Pointer v. Texas, 380 U.S. 400 (1964).

18. *See* Brady v. United States, 397 U.S. 742 (1970).

19. *See* Parker v. North Carolina, 397 U.S. 790, 795 (1970).

20. *See* Tollet v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970).

21. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

22. 423 U.S. 61 (1975).

23. *Id.* at 62 n.2 (emphasis added).

24. State v. Barnett, 240 S.E.2d 540 (W. Va. 1977). In *Brady*, the Supreme Court described the guilty plea as "a grave and solemn act to be accepted only with care and discernment." Brady v. United States, 397 U.S. at 748.

25. *In re* D., 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704, *cert. denied sub nom.* D. v. County of Onondaga, 403 U.S. 926 (1971).

26. Duncan v. Louisiana, 391 U.S. 145 (1968).

27. Pointer v. Texas, 380 U.S. 400 (1965).

28. In New York, prior to sentencing, the court, in its discretion, may permit a defendant to withdraw his plea of guilty. N.Y. CRIM. PROC. LAW § 220.60(3) (McKinney 1980).

After sentencing, a guilty plea can be set aside by a motion to vacate the judgment.

a guilty plea unless the record discloses that the plea is offered knowingly, intelligently, and voluntarily.[29] A guilty plea, however, is not an express admission of factual guilt, nor is such an admission constitutionally required before the plea can be accepted.[30] Thus, "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[31]

Despite the significant and almost irreversible impact the guilty plea has upon a defendant's rights, the vast majority of criminal cases are disposed of through guilty pleas.[32] These pleas are typically "bargained"[33] in that the defendant agrees to forego his right to trial in return for more lenient treatment by

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If the defendant maintains his innocence to the crime, the trial judge must inquire into the claim. *See* People v. Nixon, 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967), *cert. denied*, 393 U.S. 1067 (1968). A plea of guilty to a jurisdictionally defective indictment must be vacated, *see* People v. Englese, 7 N.Y.2d 83, 163 N.E.2d 869, 195 N.Y.S.2d 64 (1959), as must a coerced plea of guilty, *see* People v. Farina, 2 N.Y.2d 454, 141 N.E.2d 589, 161 N.Y.S.2d 88 (1957). *See generally* R.M. PITLER, N.Y. CRIMINAL PRACTICE UNDER THE CPL (1972).

29. *See* Boykin v. Alabama, 395 U.S. 238, 244 (1969).

This voluntary, knowing, and intelligent standard is tantamount to the one used by the Supreme Court to test the validity of a defendant's waiver of his right to counsel under the sixth amendment. *See* Carnley v. Cochran, 369 U.S. 506 (1962). In order to demonstrate that the plea was validly offered and accepted, a federal judge must make a record of the proceedings for appellate review. FED. R. CRIM. P. 11(g). The record must also support a factual basis for the plea. FED. R. CRIM. P. 11(f).

By contrast, a New York court need not inquire into the factual basis for the plea if the defendant was actively represented by counsel and was clearly aware of his rights. *E.g.*, People v. Nixon, 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967), *cert. denied*, 393 U.S. 1067 (1968). If the defendant waived his right to counsel, it is then incumbent upon the court to inquire into the underlying factual basis for the plea. *Id.* *See* R.M. PITLER, *supra* note 28.

30. *See* North Carolina v. Alford, 400 U.S. 25 (1970).

31. *Id.* at 37.

32. In New York State, for the years 1973 to 1974, the guilty plea rate was 93.5%. D. JONES, CRIMES WITHOUT PUNISHMENT 44 (1979). In New York County Criminal Court in 1980, only 386 of the 67,365 cases filed resulted in a trial, less than one out of every 175 cases. Hochberger, *Morgenthau Hits Shortage of City Judges*, N.Y.L.J., Nov. 12, 1981, at 1.

33. *See* Jung v. State, 32 Wis.2d 541, 145 N.W.2d 684 (1966), summarizing the various forms a plea bargain can take:

> These so-called deals may take the form of: (1) Pleading guilty to a reduced charge, (2) pleading guilty to the charge upon the promise or expectation of a recommendation for leniency, (3) concurrent sentences, and (4) dropped charges.

Id. at 546, 145 N.W.2d at 689.

the state.[34] Plea bargaining is generally welcomed by prosecutors and judges because it is structured to avoid trials and clear crowded court calendars without sacrificing convictions.[35] Many courts and prosecutors try to induce guilty pleas, and do so by promising to dismiss certain charges or not impose the maximum sentence.[36]

Whatever the defendant decides is not without consequence. If he refuses to plead guilty he risks answering to more severe charges at trial and faces harsher punishment if convicted; if he does plead guilty he forfeits his right to appeal any nonjurisdictional defects that may have occurred.[37] Critics have argued for the conditional guilty plea to solve this dilemma.[38]

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34. It is the mutuality of advantage that perhaps explains the fact that at present well over three-quarters of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

Brady v. United States, 397 U.S. at 752.

35. Plea bargaining survived constitutional attack in Brady v. United States, *id.*

36. Guilty plea rates indicate the frequency at which defendants are convicted of criminal charges without trial. As the guilty plea rate for a jurisdiction approaches 100%, doubt is cast on the readiness, willingness, or ability of either prosecutors or defense counsel to take even a marginal case to trial. Indeed . . . it is doubtful that courts possess the capacity to conduct more than a few "token" criminal trials, even if counsel demanded them. . . .

D. JONES, *supra* note 32, at 46.

37. The defendant who has meritorious claims or defenses is confronted with a "Catch-22." Nevertheless, that a defendant may have made a tactical error in accepting a plea bargain is not enough to vitiate the finality of the plea; the defendant must show that his counsel lacked the competence demanded of criminal attorneys. *See e.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970). In Brady v. United States, 397 U.S. at 757, the Court declared:

> A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been asserted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.

Conversely, the defendant may obtain specific performance of the bargain, or at least have his prior plea vacated if the state fails to keep its part of the bargain. *See, e.g.*, Santobello v. New York, 404 U.S. 257 (1971). A New York defendant is entitled to enforcement of his bargain only if he has lived up to his part of the bargain and placed himself in a no-return position by exposing himself to considerable risk or sacrifice. Otherwise, the plea is invalidated and the defendant is given an opportunity to plea anew. *E.g.*, People v. McConnell, 49 N.Y.2d 340, 402 N.E.2d 113, 425 N.Y.S.2d 794 (1980); Matter of Chapis v. State Liq. Auth., 44 N.Y.2d 57, 375 N.E.2d 32, 404 N.Y.S.2d 76 (1978). *See* Comment, *Specific Enforcement to Ensure Due Process in Plea Bargaining*, 21 WM. & MARY L. REV. 521 (1979).

38. *See generally* UNIF. R. OF CRIM. PROC. 444 (d) (1978) (allowing post-guilty plea

B. *Development of the Conditional Guilty Plea*

1. *Federal Courts*

The Supreme Court has not specifically addressed the acceptability of the conditional guilty plea in the federal court system. In *Lefkowitz v. Newsome*,[39] however, the Court did recognize New York's statutory procedure of allowing an appeal of a denial of a suppression motion to survive a guilty plea.[40] *Newsome* held that appeals pursuant to this statutory scheme were cognizable in a federal habeas corpus proceeding despite a prior valid guilty plea.[41] The Court distinguished the *Brady Trilogy*,[42] which held that a defendant may not, after a plea of guilty, challenge constitutional deprivations collateral to the plea itself, by concluding that the district attorney had no expection of finality in a guilty plea when the state gives the defendant a statutory right to appeal certain issues.[43]

The federal circuits, which have addressed the conditional guilty plea, are divided as to its acceptability.[44] The Third Circuit has widely endorsed the plea even over the government's

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appeals of orders denying suppression and other pre-trial motions, which if granted, would be dispositive of the case); Uviller, *Pleading Guilty: A Critique Of Four Models*, 41 LAW & CONTEMP. PROBS. 102 (1977); 3 W. LAFAVE, SEARCH AND SEIZURE § II.I(d) (1978); Comment, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564 (1980) [hereinafter cited as *Conditional Guilty Pleas*]; Comment, *Conditioned Guilty Pleas: Post Guilty Plea Appeal of Nonjurisdictional Issues*, 26 U.C.L.A. L. REV. 360 (1978) [hereinafter cited as *Post Guilty Plea*]; Comment, *Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty*, 9 HOUS. L. REV. 305 (1971).

39. 420 U.S. 283 (1975).

40. N.Y. CRIM. PROC. LAW § 710.70(2). *See supra* note 2.

41. *But cf.* Stone v. Powell, 428 U.S. 465 (1976) holding that where the state has provided an opportunity for a full and fair litigation of a fourth amendment claim federal habeas corpus relief may not be granted.

42. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). *See supra* note 14.

43. Lefkowitz v. Newsome, 420 U.S. at 289-90. The Court described New York's statutory scheme as follows:

> The guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid. The plea is entered with the clear understanding and expectation by the State, the defendant, and the courts, that it will not foreclose judicial review of the merits of the alleged constitutional violations.

Id.

44. *See* United States v. Depoli, 628 F.2d 779, 781 n.1 (2d Cir. 1980).

objections,[45] and has expressly relied on *Newsome*. In analogizing the conditional plea to New York's statutory procedure, the Third Circuit stated that the United States Attorney had no legitimate expectation of finality in the plea. It distinguished the *Brady Trilogy* by reasoning that, unlike the traditional guilty plea, a conditional plea does not bar appellate review, but guarantees it.[46]

According to the Third Circuit, the conditional guilty plea would prevent "undue delays in the administration of justice produced by unnecessary trials, and would also ease the crushing financial burdens placed on the taxpayers who ultimately pay the expenses of federal criminal legislation."[47] The plea, in its opinion, would help clear criminal trial calendars and reduce appellate dockets by limiting and narrowing the appealable issues.[48]

Other circuits approving the conditional guilty plea include the Second[49] and D.C. Circuit,[50] which will hear the conditional plea when agreed to by the government and the court. The First Circuit has also expressed some support for the plea,[51] while the Eighth Circuit[52] has been reluctant to adopt it in the absence of express legislative or Supreme Court authority.

The Ninth Circuit, in juxtaposition, has adamantly rejected

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45. *See* United States v. Moskow, 588 F.2d 882 (3d Cir. 1978). *See also* United States v. Demanett, 629 F.2d 862, 864 n.1 (3d Cir. 1980); United States v. Velasquez, 626 F.2d 314 (3d Cir. 1980); United States v. Schmidt, 604 F.2d 236 (3d Cir. 1979); United States v. Morrison, 602 F.2d 529 (3d Cir. 1979); United States v. Zudick, 523 F.2d 848 (3d Cir. 1975).

46. United States v. Zudick, 523 F.2d 848 (3d Cir. 1975). The Third Circuit stated that the conditional guilty plea is not a constitutional right, but its approval is within the district court's broad exercise of discretion in accepting pleas under Rule 11 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 11. *See* United States v. Moskow, 588 F.2d at 887.

47. United States v. Moskow, 588 F.2d at 888.

48. *Id.*

49. *See, e.g.*, United States v. Depoli, 628 F.2d 779 (2d Cir. 1980); United States v. Price, 599 F.2d 494 (2d Cir. 1979); United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

50. *See, e.g.*, Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973) (dictum).

51. *See, e.g.*, United States v. Weber, 664 F.2d 841, 852 n.9 (1st Cir.) (dictum), *reh'g denied*, 668 F.2d 552 (1981); United States v. Decosta, 435 F.2d 630, 632 (1st Cir. 1970) (dictum). *See also* United States v. Warwar, 478 F.2d 1183 (1st Cir. 1973) (dictum).

52. *See, e.g.*, United States v. Clark, 459 F.2d 977, 978-79 (8th Cir.) (dictum), *cert. denied*, 429 U.S. 880 (1972).

the conditional plea.[53] Relying on the *Brady Trilogy*,[54] and its progeny, *Tollet v. Henderson*,[55] the Ninth Circuit observed that "a voluntary and intelligent plea of guilty forecloses inquiry into alleged antecedent constitutional deprivations."[56] It noted that the conditional plea would crowd appellate dockets with frivolous claims, destroy the finality of the guilty plea, and unduly benefit admittedly guilty defendants.[57] The Ninth Circuit rejected the notion that the prosecutor and the defendant can contractually confer a right which the Supreme Court has said does not exist.[58] "Thus, while a plea bargain permits a defendant to waive that to which he does have a right [i.e., a jury trial] . . . it does not permit him to arrogate that to which he is clearly not entitled."[59]

The Fourth, Fifth and Sixth Circuits also expressly prohibit the use of the conditional plea,[60] and the Tenth Circuit appears not to favor it.[61] The Seventh Circuit disapproves the plea as a matter of policy,[62] but will honor it if the district court judge gives the defendant reason to believe that the plea was conditioned.[63]

2. *New York*

Criminal defendants in New York have a statutory right to appeal denials of suppression motions following a guilty plea.[64]

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53. *See, e.g.*, Mitchell v. Superior Court, 632 F.2d 767, 772-73 (9th Cir. 1980); United States v. Benson, 579 F.2d 508, 511 (9th Cir. 1978).

54. *See supra* note 14.

55. 411 U.S. 258 (1973). *See supra* note 14.

56. United States v. Benson, 579 F.2d at 510 (citing Tollet v. Henderson, 411 U.S. at 266-67).

57. United States v. Benson, 579 F.2d at 510. *See also* United States v. Cox, 464 F.2d 937 (6th Cir. 1972).

58. United States v. Benson, 579 F.2d at 511.

59. *Id.*

60. *See, e.g.*, United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973); United States v. Lewis, 621 F.2d 1382 (5th Cir. 1980); United States v. Sepe, 486 F.2d 1044 (5th Cir. 1973) (en banc) (per curiam); United States v. Cox, 464 F.2d 937, 944 (6th Cir. 1972) ("The defendants clearly want to have their cake while preserving their right to eat it at some future date").

61. *See, e.g.*, United States v. Nooner, 565 F.2d 633 (10th Cir. 1977) (dictum).

62. *See* United States v. Brown, 499 F.2d 829 (7th Cir. 1974).

63. *See* United States v. Michigan Carton Co., 552 F.2d 198, 202 (7th Cir. 1977).

64. N.Y. CRIM. PROC. LAW § 710.70 (2). *See supra* note 2. Similar statutes exist in California, 51 CAL. PENAL CODE §§ 1237.5, 1538.5 (M) (West Supp. 1981); Florida, FLA.

The acceptability of the conditional guilty plea encompassing issues outside this statutory scheme had not been directly addressed by the New York courts prior to *Thomas*.[65]

Several recent decisions, however, have concerned the finality of the traditional guilty plea. In *People v. Brothers*,[66] involving an appeal from a valid plea of guilty, the defendant claimed that his statutory right to a speedy trial had been violated.[67] The court of appeals, in dicta, indicated that a *statutory* speedy trial challenge[68] might be waived by a plea of guilty, "short possibly of a court sanctioned agreement for preservation," even though a

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STAT. ANN. § 924.06(3) (West Supp. 1981); Vermont, 13 VT. STAT. ANN. § 7401 (1974), and Wisconsin, WIS. STAT. ANN. § 971.31(10) (1971).

Other states have recognized the conditional guilty plea by judicial decision. *See, e.g.*, Nickels v. State, 545 P.2d 163 (Alaska 1976); Cooksey v. State, 524 P.2d 1251 (Alaska 1974); State v. Mendoza, 376 So. 2d 139 (La. 1979); State v. Lain, 347 So. 2d 167 (La. 1977); State v. Crosby, 338 So. 2d 584 (La. 1976); State v. Lothenback, 296 N.W.2d 854 (Minn. 1980); Dorsey v. Cupp., 12 Or. App. 604, 508 P.2d 445 (Ct. App. 1973). *Cf.* Brown v. State, 376 So. 2d 382 (Fla. 1979) (Florida will hear a conditional plea of *nolo contendere* when the legal issue reserved for appeal is dispositive of the case).

Several other states have disapproved this procedure. *See, e.g.*, State v. Arnsberg, 27 Ariz. App. 205, 553 P.2d 238 (Ct. App. 1976); Hurt v. Commonwealth, 333 S.W.2d 951 (Ky. 1960); State v. Dorr, 184 N.W.2d 673 (Iowa 1971); State v. Turcotte, 164 Mont. 426, 524 P.2d 787 (1974); Killebrew v. State, 464 S.W.2d 838 (Tex. Crim. App. 1971).

65. Several appellate division cases have indirectly concerned the conditional guilty plea. *See, e.g.*, People v. Argentine, 67 A.D. 2d 180, 414 N.Y.S. 2d 732 (1979), *after remand*, 73 A.D. 2d 649, 422 N.Y.S. 2d 736 (1979) (ostensibly concerning a defendant's reservation of a right to appeal following a plea of guilty where the defendant specifically reserved his right to challenge the denial of his motion to dismiss the indictment. The challenge, however, concerned the state's breach of its original promise to drop a felony charge to a misdemeanor in return for a guilty plea. Thus, the appeal was based upon the validity of the plea itself, and not upon a nonjurisdictional claim); People v. Gilliam, 65 A.D.2d 533, 409 N.Y.S.2d 400 (1st Dep't 1978) (in dicta, noting that not even a conditional plea would allow the defendant, after a plea of guilty, to claim on appeal that his potential rights to cross-examine witnesses as to their prior convictions and arrests under People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974), were violated by an incorrect trial ruling. The court stated that "the right to appeal in criminal cases is statutory, and no statute provides for a review of a *Sandoval* ruling after a plea of guilty, [thus], even an express reservation of a claimed right to appeal at the time of taking the plea would be ineffective." People v. Gilliam, 65 A.D.2d at 533, 409 N.Y.S.2d at 401. *But see* People v. Maxim, 58 A.D.2d 674, 395 N.Y.S.2d 738 (3d Dep't 1976) and People v. Poole, 52 A.D.2d 1010, 383 N.Y.S.2d 688 (3d Dep't 1975) (where the Third Department, without expressly discussing the waiver issue, considered the merits of *Sandoval* rulings following guilty pleas)).

66. 50 N.Y.2d 413, 407 N.E.2d 405, 429 N.Y.S.2d 558 (1980).

67. *See also* People v. Lomax, 50 N.Y.2d 351, 354 n.1, 406 N.E.2d 793, 794 n.1, 428 N.Y.S.2d 937, 938 n.1 (1980).

68. N.Y. CRIM. PROC. LAW § 30.30 (McKinney Supp. 1980).

constitutional speedy trial claim would not be waived.[69] The court of appeals has made a similar distinction between statutory and constitutional double jeopardy claims.[70] Thus, the court of appeals appears to be strengthening the finality of the traditional guilty plea by suggesting that speedy trial[71] and double jeopardy challenges[72]—two jurisdictional exceptions to the finality of the traditional guilty plea—might require a conditional guilty plea to survive for appellate review when statutorily, rather than constitutionally, based.[73]

In *People v. Mack*,[74] the court of appeals continued to augment the finality of the traditional guilty plea by holding that "a defendant cannot by a *unilateral* recital of an intention or desire to preserve a legal contention evade what would otherwise be the consequence of his guilty plea."[75] *Thomas* carries *Mack* a step further by addressing the situation where the plea has been consented to by the prosecutor and sanctioned by the trial court.

III. Decision of the Court

A. *Appellate Division*

The appellate division, after analyzing the evolution of the conditional guilty plea and the competing policy arguments,

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69. People v. Brothers, 50 N.Y.2d at 418, 407 N.E.2d at 409, 429 N.Y.S.2d at 561. The court declined to so rule because the prosecutor did not raise the claim. *Id.*

70. People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979).

71. The New York courts have held that the constitutional right to a speedy trial survives a guilty plea and may be raised on appeal. *See, e.g.*, People v. Blakely, 34 N.Y.2d 311, 313 N.E.2d 763, 357 N.Y.S.2d 459 (1974); People v. Wallace, 26 N.Y.2d 371, 258 N.E.2d 904, 310 N.Y.S.2d 484 (1970); People v. Chirieleison, 3 N.Y.2d 170, 143 N.E.2d 914, 164 N.Y.S.2d 726 (1957). Other jurisdictions, however, have held that a speedy trial claim is a nonjurisdictional challenge and can be waived by a plea of guilty. *See, e.g.*, Speed v. United States, 518 F.2d 75 (8th Cir.), *cert. denied sub nom.* Camp v. United States, 423 U.S. 998 (1975); United States v. Lee, 500 F.2d 586 (8th Cir.), *cert. denied*, 419 U.S. 1003 (1974).

72. Double jeopardy challenges have uniformly been held to be jurisdictional claims. *See, e.g.*, Menna v. New York, 473 U.S. 61 (1975); People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979).

73. The distinction between statutory and constitutional jurisdictional challenges created by the New York Court of Appeals remains an unsettled area of the law. The First Department, however, has recently held that an appeal from a denial of a statutory double jeopardy claim followed by a plea of guilty was proper. People v. Lieberman, 79 A.D.2d 175, 436 N.Y.S.2d 12 (1st Dep't 1981).

74. 53 N.Y.2d 803, 422 N.E.2d 572, 439 N.Y.S.2d 912 (1981).

75. *Id.* at 806, 422 N.E.2d at 573, 439 N.Y.S.2d at 913 (emphasis added).

held that "the procedure by which the defendant pleaded guilty to the charges against him, but reserved certain rights for appeal," was procedurally improper.[76]

Judge Lazer, speaking for a unanimous court, viewed the *Brady Trilogy*[77] in light of *Menna v. New York*[78] and concluded that "[a] guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established."[79]

This construction was premised on the fact that jurisdictional objections going to the right of the state to conduct a trial, and not to the question of factual guilt, are not waived by a valid guilty plea.[80] Thomas, the court asserted, was seeking a review of factual guilt following an admission of factual guilt, an appeal "not logically or legally consistent with the plea."[81]

The court noted that section 710.70(2) reinforced its conviction that the guilty plea waives issues "which assume irrelevance once guilt has been admitted."[82] Guilty pleas, the court observed, result primarily from an agreement to reduce the charges or punishment. Thus, the court concluded that "the hearing of appeals based upon conditional pleas by those who have obtained the benefits of this bargaining process is incompatible

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76. People v. Thomas, 74 A.D.2d 317, 428 N.Y.S.2d 20 (2d Dep't 1980).

77. *See supra* note 14.

78. 423 U.S. 61 (1975).

79. *Id.* at 63 n.2. *See supra* notes 22-23 and accompanying text.

80. People v. Thomas, 74 A.D.2d at 325, 428 N.Y.S.2d at 26.

81. *Id.* at 325, 428 N.Y.S.2d at 27.

82. *Id.* at 325, 428 N.Y.S.2d at 26.

The Second Department has previously expressed discontent with New York's statutory right to appeal suppression motions following guilty pleas:

> In view of the many cases now coming before our appellate courts in which defendants plead guilty (usually after a negotiated plea) and then, as here, take an appeal upon a claim of improper denial of their motions to suppress evidence, perhaps the time has come for the Legislature to consider the advisability of amending the statute so as to preclude appeals under such circumstances. Is it too much to say to a defendant that if he wants to attack the invalidity of the suppression order he may only do so after standing trial? We do not believe there would be any constitutional impediment to the enactment of such a statute. Our suggestion is limited to suppression motions and not, for example, to speedy trial motions.

People v. Navarro, 61 A.D.2d 534, 536, 403 N.Y.S.2d 80, 81 (2d Dep't 1978).

with principles of the sound administration of justice."[83] Because of this analysis, the court, in discussing whether or not the conditional guilty plea would promote or jeopardize judicial economy, merely recognized the competing claims, but did not engage in the debate.[84]

B. *The Court of Appeals*

The court of appeals unanimously affirmed the appellate division's decision.[85] Judge Meyers defined the policy question as involving "the forfeiture of the right to appellate review, as distinct from preservation or express waiver,"[86] and found that where permitted, "most such pleas involve the reservation of search and seizure issues."[87] Since New York, by section 710.70(2) adequately protects a defendant's rights under the exclusionary rule,[88] the court reasoned that "the major ameliorative purpose of the conditional plea device has . . . already been achieved."[89] Because of this statutory right to appeal suppression motions following a guilty plea, and because the defendant was merely challenging "the sufficiency of conceded facts to support a judgment of conviction entered upon a plea of guilty,"[90] the court found it unnecessary to consider "the competing policy considerations with respect to all of the possible issues that

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83. People v. Thomas, 74 A.D.2d at 325, 428 N.Y.S.2d at 26.

84. For example, the court alluded to the Ninth Circuit's fear that the plea could lead to the overcrowding of appellate dockets, *see supra* text accompanying note 58, and also recognized United States v. Moskow, 588 F.2d 882, 888 (3d Cir. 1978) where the Third Circuit argued that the procedure would aid judicial economy. *See supra* notes 47-48 and accompanying text.

85. People v. Thomas, 53 N.Y.2d 338, 424 N.E.2d 538, 441 N.Y.S.2d 650 (1981).

86. *Id.* at 342 n.2, 424 N.E.2d at 539 n.2, 441 N.Y.S.2d at 652 n.2. The court explained that "preservation concerns whether an issue had been properly brought to the attention of the Trial Judge and opposing attorneys," and express waiver "results from 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1937)). Forfeiture, by contrast, "occurs by operation of law as a consequence of a guilty plea, with respect to issues which as a matter of policy the law does not permit to survive such a plea." The conditional guilty plea, by definition, renders irrelevant the issues of preservation or express waiver since the defendant has expressly preserved, not waived, his right to appeal. People v. Thomas, 53 N.Y.2d at 342 n.2, 424 N.E.2d at 539 n.2, 441 N.Y.S.2d at 652 n.2.

87. People v. Thomas, 53 N.Y.2d at 344, 424 N.E.2d at 540, 441 N.Y.S.2d at 653.

88. *Id.*

89. *Id.*

90. *Id.*

could be the subject of a conditional plea."[91]

The court agreed with the Second Department that policy militated against recognizing Thomas's appeal "because of the logical inconsistency involved in permitting a defendant to enter a plea of guilty and, at the same time, with the consent of the prosecutor and the approval of the court, obtain appellate review of the legal sufficiency of evidence that would hypothetically have been adduced at trial to support conviction of the crime. . . ."[92] The court limited its holding to appeals seeking review of the conceded facts to justify the admitted crime, and left for "another day consideration of other permutations of the problem."[93]

IV. Analysis

Both the appellate division and the court of appeals were correct in rejecting the conditional guilty plea. Nevertheless, because neither court sufficiently analyzed the competing policy considerations, and because the court of appeals limited its holding to the facts, it is necessary to examine the ramifications of, and the competing policy considerations surrounding, the conditional guilty plea.

A. *The Logical Inconsistency*

The conditional guilty plea has been primarily sanctioned in the context of fourth amendment search and seizure claims.[94] As to these claims, the argument for the conditional plea is more persuasive. Fourth amendment claims, in this regard similar to jurisdictional challenges, are not concerned with guilt, but with

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91. *Id.*

92. *Id.* at 344, 424 N.E.2d at 540, 441 N.Y.S.2d at 653.

93. *Id.* The court affirmed the appellate division's remand to permit Thomas to plead anew. *See supra* note 11. *But see* United States v. Cox, 464 F.2d 937 (6th Cir. 1972) (disapproving the conditional guilty plea, but willing to entertain the particular appeal before it in recognition of the bargain agreed to by the parties).

94. *E.g.*, People v. Thomas, 53 N.Y.2d at 344, 424 N.E.2d at 540, 441 N.Y.S.2d at 653; *see, e.g.*, United States v. Price, 599 F.2d 494 (2d Cir. 1979); United States v. Schmidt, 604 F.2d 236 (3d Cir. 1979); United States v. Moskow, 588 F.2d 882 (3d Cir. 1978); State v. Mendoza, 376 So.2d 139 (La. 1977); State v. Lain, 347 So.2d 187 (La. 1977); State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980); *but see, e.g.*, United States v. Zudick, 523 F.2d 848 (3d Cir. 1979).

the legality of the contested search or seizure.[95] In fact, in possessory crimes the defendant must at least concede a "privacy interest" in the contested evidence to have standing to raise the claim.[96] Thus, the admission of factual guilt does not render the ancillary challenge under the exclusionary rule irrelevant since the courts, in ruling on a suppression motion, are concerned with the legal admissibility of evidence, and not with the defendant's factual guilt.

After a denial of a suppression motion, a defendant who believes that he will be convicted will often plead guilty.[97] Section 710.70(2) allows for appellate review of these claims and, therefore, adequately prevents needless trials.[98] It is a reasoned decision by the legislature consistent with the exclusionary rule and with the aim towards alleviating the crowded criminal courts. Judicially extending this legislative scheme to claims not authorized by statute would encourage appellate review of issues irrelevant once factual guilt has been admitted. *Thomas* correctly states that issues which become irrelevant once factual guilt has been admitted should not be heard on appeal.[99]

1. *Thomas's Claims*

Thomas illustrates the flaws of the conditional guilty plea. Thomas asked the court to review whether the provable facts were sufficient to constitute the crime of reckless endangerment.[100] Specifically, he claimed that the stipulated facts did not support a finding that he acted with "a depraved indifference to

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95. Generally, items seized illegally cannot be used as evidence against the defendant at the criminal trial. Its admissibility must be decided by the judge outside the presence of the jury. *See* Jackson v. Denno, 378 U.S. 368 (1968). Justifications for the exclusionary rule center on maintaining judicial integrity and on deterring illegal police conduct. *See* Mapp v. Ohio, 367 U.S. 643 (1961). These ideals, not the factual guilt of the defendant, are the primary concern.

96. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980).

97. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975).

98. *See supra* note 2. In *Newsome*, the Supreme Court recognized this statutory procedure only to the extent that it allowed the federal courts to hear these claims in a federal habeas corpus proceeding, *see supra* note 39 and accompanying text. *Newsome* did not authorize the conditional guilty plea since Newsome's right to appeal arose by statute, not by a negotiated plea.

99. People v. Thomas, 53 N.Y.2d at 344, 424 N.E.2d at 540, 441 N.Y.S.2d at 653.

100. *See supra* note 9.

human life."[101] This contention, however, did not come from a man who steadfastly maintained that he lacked the necessary state of mind.[102] A criminal defendant should not be allowed to admit to the crime in his allocution and later contend that a necessary element of the crime was lacking.[103] The accused's state of mind is a question of fact, and he or she should not be able to circumvent the fact finding process because of a fear that on the basis of conceded provable facts a jury would convict.[104] To hold otherwise would allow a defendant to admit to murder on the condition that he be allowed to argue the fine degrees of intent before the appellate courts, an absurdity further exaggerated since the record would consist only of the undeveloped facts in the plea allocution. These stipulated facts, "negotiated" by the parties, would reflect *their* subjective versions of the truth. The fact-finding process would be conducted first at the "bargaining table," and then before the appellate courts.

Thomas also claimed that the presumption of possession of weapons statute was unconstitutional as applied, and that his plea of guilty to the weapon charges was the result of this statutory presumption of possession.[105] It was Thomas's admission to the weapon charges that resulted in his conviction, however, not

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101. N.Y. PENAL LAW § 120.25 (McKinney 1975). Thomas's basic contention was that driving recklessly down an empty street at 2:30 a.m. did not evince a depraved indifference to human life because he saw no pedestrians. *See supra* note 9. Thomas, however, by admitting to the crime necessarily admitted to acting with a depraved mind. After receiving the benefits of a plea bargain, he asked the appellate courts to rule on his defense to the crime, a defense which he forfeited by pleading guilty.

102. *See supra* note 101. If this were the case, the trial court could not have accepted the plea without inquiring into the defendant's claim of innocence. People v. Nixon, 21 N.Y.2d 338, 234 N.E.2d 687, 287 N.Y.S.2d 659 (1967), *cert. denied,* 393 U.S. 1067 (1968); *see* North Carolina v. Alford, 400 U.S. 25, 32 (1976). *See supra* note 29 and accompanying text.

103. It was never alleged that Thomas did not know that a "depraved mind" was a necessary element of reckless endangerment. *Cf.* Henderson v. Morgan, 426 U.S. 637 (1976) (the court may not accept a plea of guilty to a charge of second degree murder when the defendant is not informed that intent to cause death is an element of that offense). Rather, the circumstances surrounding the plea conclusively demonstrated the contrary since it was the requisite state of mind which Thomas challenged at the time of his plea allocution. *See supra* note 9.

104. In effect, Thomas conceded "round one" of the judicial process (the trial), and jumped to "round two" (the appeal) in the hope that the appellate court would more favorably review the facts.

105. *See supra* note 10.

the presumption statute. No presumption was necessary. It is illogical to pretermit the issue of guilt to reach the constitutionality of a presumption statute that need not even be invoked by the prosecutor. Thomas's objection went to the *prospect* that the presumption statute that need not even be invoked by the prosecutor. Thomas's objection went to the *prospect* that the presumption statute would be used at trial. Essentially, the conditional plea was a disguised interlocutory appeal requesting the appellate court to order that the use of the presumption statute at Thomas's trial would be unconstitutional as applied to the facts. Such a procedure threatens both the speedy dispositon of criminal trials and the finality of the plea bargaining process.[106]

B. *Policy Considerations*

Despite the legal contradictions the conditional plea would foster, proponents sanction the procedure because: (1) It is necessary to cure the dilemma that plea bargaining imposes upon criminal defendants; and (2) the conditional plea is necessary to achieve manageable court dockets.[107] The conditional plea, how-

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106. To ensure the speedy disposition of criminal cases and the finality of the plea bargaining process, proponents of the conditional guilty plea assert that the plea is proper when the issue to be resolved is dispositive of the case. *See generally,* Comment, *Post Guilty Pleas, supra* note 38, at 367 ("[a]cceptance of a conditional plea is generally proper only when the issue reserved is determinative of the government's ability to convict the defendant"); UNIF. R. OF CRIM. PROC. 444(d), *supra* note 38. Thomas's claims are ostensibly of this nature since the district attorney agreed to drop the charges if Thomas's appeal proved successful. This case, however, demonstrates that such appeals would often result in a remand to further develop the record and, thus, appellate resolution of the issues would not always obviate the need for further proceedings before the trial court. For instance, the appellate division determined that they could not rule on the weapon charges on the basis of the stipulated facts. People v. Thomas, 74 A.D.2d at 326, 428 N.Y.S.2d at 27. For example, the court needed to know whether the weapons could have slid from under the driver's side to under the rear seat where they were found, and whether it was possible for Thomas to retrieve the weapons from the driver's seat. *Id.* at 325-26, 428 N.Y.S.2d at 27.

The reckless endangerment charge also appears to warrant further factual development beyond those facts agreed to in the record. For example, Thomas's familiarity with the streets and the likelihood that pedestrians would appear at 2:30 a.m. on these streets need amplification and bear on the issue of his intent. *See supra* note 9.

Therefore, whether the issue to be resolved is dispositive of the case should not justify the conditional plea. In fact, in fourth amendment claims where the plea makes the most sense, reversals may be accompanied by remands to determine if the state can still prove its case.

107. *See* Comment, *Conditional Guilty Pleas, supra* note 38; Comment, *Post Guilty*

ever, would do neither.

1. *The Dilemma*

Plea bargaining, whether viewed favorably or not, has become an integral part of our criminal justice system.[108] The Supreme Court, in *Santobello v. New York*,[109] stated that

> [t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a fullscale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.[110]

In order to alleviate overcrowded criminal calendars, which result from an increased crime rate, society, through plea bargaining, must treat criminal defendants more leniently than they could otherwise if jury convictions could be obtained.[111] Proponents of the conditional plea, nevertheless, assert that defendants suffer from a dilemma of constitutional proportions: Either plead not guilty and risk harsher punishment, but preserve rights to appeal, or plead guilty and benefit from a bargain, but forfeit appellate rights.

Although defendants who are convicted after trials generally receive harsher punishment than those who plead guilty,[112] once plea bargaining is recognized as vital to the timely disposition of criminal cases, the possibility of harsher punishment after a trial

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Plea, supra note 38. *See* note 37 and accompanying text.

108. *See* supra notes 33 to 36 and accompanying text.

109. 404 U.S. 257 (1971).

110. *Id.* at 260.

111. *See* Comment, *Post Guilty Plea, supra* note 38.

> Defendants convicted after trial generally receive longer sentences than those who plead guilty. One study has determined that the extent to which the punishment diminishes for a defendant pleading guilty varies from 10% to 95% of the punishment that would ordinarily be given after a trial resulting in a conviction.

Id. at 365 n.23 (citing Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206-07 (1956)).

112. *See supra* note 111. Ironically, the conditional guilty plea discourages the need to accept pleas to reduced charges since the prosecutor could offer the right to appeal instead. Thus, if the claim is denied, the defendant could conceivably be punished more severely than if the conditional guilty plea did not exist.

becomes a necessary element.[113] A prosecutor does not violate a defendant's legal rights by pressing for the maximum legal sentence or by bringing charges which have a basis in law.[114] Therefore, that the defendant may have pleaded guilty out of fear of receiving harsher treatment if convicted after trial is inapposite. Criminal defendants should not be given both the benefits of a plea bargain and the right to appeal as if innocence had been maintained.

2. *Judicial Economy*

Neither the court of appeals nor the Second Department expressly rejected the conditional guilty plea because of a fear that such pleas would flood appellate dockets. Judicial economy, however, was also at stake. Supporters of the conditional plea argue that this procedure would help clear trial calendars and reduce appellate dockets by limiting and narrowing the issues for review. This argument, however, misconceives the plea bargaining process.

As already stated, the vast majority of criminal cases in New York are disposed of through pleas of guilty.[115] These pleas are tendered only after a counseled defendant has surveyed his options. It is a strategic act designed to make the best of a serious personal predicament. Assuming that the conditional plea is recognized, a significant number of defendants who would have pleaded guilty unconditionally would now plead guilty conditionally. Thus, a certain number of cases which would have been finally disposed of would now present appealable issues. Unfor-

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113. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978) stating:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas."

Id. at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

114. *See* Bordenkircher v. Hayes, 434 U.S. 357, stating:

> In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Id. at 364. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1979).

115. *See supra* note 32.

tunately, it is not unlikely that the prosecutor and trial judge would allow superfluous issues to survive for appellate review if necessary to avoid a trial.[116] Further, the small percentage of defendants who go to trial do so because: (1) They are innocent, have valid defenses, or the evidence against them is perceived as weak; or (2) they are offenders of serious crimes and are unable to negotiate an acceptable bargain.[117] A conditional guilty plea would not significantly discourage this class of litigants from going to trial.

More importantly, appellate resolution of issues in favor of the defendant would rarely, if ever, be held to be harmless error. For instance, in no case involving an appeal from a plea of guilty pursuant to section 710.70(2) has an appellate court relied on the harmless error rule to affirm a conviction.[118] In *People v. Grant*,[119] the court of appeals stated that "[w]hen the conviction is based on a plea—instead of a verdict—[the standard] must at least be . . . whether there is a reasonable possibility that the error contributed to the plea."[120] Therefore, an appeal from a conviction pursuant to either section 710.70(2) or a conditional guilty plea could not be saved by the harmless error rule since almost any adverse ruling would contribute to a defendant's decision to plead guilty.[121] A procedural device which can lead to

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116. The conditional guilty plea would be frequently offered during plea negotiations as an incentive for the defendant to plead guilty and forego trial. That district attorneys may favor this procedure is evidenced by the fact that it was the state, not Thomas, that appealed the appellate division's refusal to recognize the conditional guilty plea. *See supra* note 11.

117. *See* D. JONES, *supra* note 32.

118. *See* People v. Grant, 45 N.Y.2d 366, 377, 380 N.E.2d 257, 263-64, 408 N.Y.S.2d 429, 435 (1978).

119. *Id.*

120. *Id.* at 378, 380 N.E.2d at 264, 408 N.Y.S.2d at 436. *Accord* Jones v. Wisconsin, 562 F.2d 440, 445-46 (7th Cir. 1977); People v. Hill, 12 Cal.3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974); State v. Monahan, 76 Wis.2d 387, 251 N.W.2d 421 (1977). *Cf.* United States v. Weber, 664 F.2d 841, 852 (1st Cir.), *reh'g denied*, 668 F.2d 552 (1981) (agreed that a court cannot speculate that a defendant's reasons for pleading guilty would have been the same absent the "harmless" evidence, and applied this reasoning to a defendant's decision to waive a jury trial and stipulate to the facts). *See infra* notes 123-26 and accompanying text.

121. The court in *People v. Grant* concluded that:

> In sum, when a conviction is based on a plea of guilty, an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he

reversal despite harmless error hardly promotes judicial economy.[122]

To appeal the defendant need only refrain from pleading guilty. If a defendant desires an expeditious resolution of his case and a degree of official leniency, he can waive his right to a jury trial and re-assert his denied contentions on appeal.[123] The trial judge, in his discretion, can also allow the parties to stipulate to the facts.[124] Stipulation, however, can create a set of facts more closely reflecting the parties' relative bargaining power than a detached, objective finding.[125] Thus, the court should be hesitant to allow stipulation, and when allowed, should hold an evidentiary hearing to develop any additional necessary facts not encompassed by the stipulation.[126]

C. *Other Permutations of the Problem.*

The court of appeals expressly reserved for another day "other permutations of the problem"[127] by limiting its holding to a situation where the sufficiency of the conceded facts is challenged to constitute the admitted crime.[128] The New York

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states or reveals his reason for pleading guilty.

People v. Grant, 45 N.Y.2d at 379-80, 380 N.E.2d at 265, 408 N.Y.S.2d at 437.

122. *Accord* United States v. Cox, 464 F.2d 937, 945 (6th Cir. 1972) (rejecting the conditional guilty plea since it could lead to reversal despite harmless error).

123. It may be argued that this procedure of waiving a jury trial still encourages needless trials, but it would allow a defendant to obtain a degree of leniency, *see, e.g.*, J.E. BOND, *supra* note 3, at § 2.06(1) (sentencing reflects the amount of trouble an obviously guilty individual has caused officials in insisting upon his trial rights), and more importantly, the appeal would not be from an admittedly guilty defendant. Certainty in the plea bargaining process would be preserved. *See* United States v. Mizell, 488 F.2d 97 (5th Cir. 1973).

124. If the trial court would allow the parties in *Thomas* to stipulate to the facts for the purposes of a conditional guilty plea, it could also permit it for the defendant who goes to trial seeking a speedy disposition of the matter before exercising his appellate rights. Judicial time would be saved on the theory that the trial court would give "the matter more than pro forma approval." United States v. Weber, 664 F.2d 841, 852 n.9 (1st Cir.), *reh'g denied*, 668 F.2d 552 (1981).

125. *See supra* notes 100-06 and accompanying text. *Thomas* demonstrates that a record formed by stipulation might be an inadequate basis for the appellate courts to rule. *See supra* note 106. Stipulation to the facts can also be disadvantageous to the defendant in that appealable trial errors are not likely to occur.

126. *Cf.* United States v. Weber, 664 F.2d at 843.

127. People v. Thomas, 53 N.Y.2d at 344, 424 N.E.2d at 540, 441 N.Y.S.2d at 653.

128. *Id.* at 340, 424 N.E.2d at 538, 441 N.Y.S.2d at 651.

courts, as a matter of policy and deference to the legislature, should be hesitant to recognize the plea in the myriad of other potential situations in which it can arise.

Section 710.70(2) allows certain claims to survive a plea of guilty that are not inconsistent with the defendant's admission of factual guilt.[129] The legislature, in enacting section 710.70(2), has proven innovative in providing for appellate rights in certain instances despite a valid plea of guilty.[130] As to other pre-trial or trial rulings outside the statute, the courts should defer to this legislative judgment.[131]

V. Conclusion

The New York Court of Appeals correctly refrained from creating a form of pleading not authorized by statute.[132] A criminal defendant should not be given both the benefits of a negotiated plea and the right to appeal as if factual guilt had been denied. The conditional guilty plea would destroy the finality of the guilty plea by allowing a guilty defendant to obtain the leni-

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129. *See supra* note 2, and notes 97-99 and accompanying text. Issues concerning an illegal search and seizure, eavesdropping, illegally obtained statement, or identification testimony, all within section 710.70(2), are less concerned with guilt than with prohibiting the use of illegally obtained evidence in court. Other situations, such as motions to obtain an advance ruling on the permissible scope of cross examination as to prior criminal activity should the defendant decide to take the stand, *see* People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974); *supra* note 65, implicate both the desire to prohibit impermissible evidence *and* the need to protect an allegedly innocent defendant. A plea of guilty coupled with a subsequent claim that a legal right primarily designed to protect an allegedly innocent defendant has been violated is patently inconsistent with the plea itself. *Cf.* People v. Gilliam, 65 A.D.2d 533, 409 N.Y.S.2d 400 (1st Dep't 1978), *supra* note 65. In any event, these factors are for the legislature to balance and section 710.70(2) represents their judgment.

130. Only four other states have legislated a similar procedure, *see supra* note 64.

131. *See supra* note 129. This analysis does not prevent the courts from resolving the issue left open in People v. Brothers, 50 N.Y.2d 413, 407 N.E.2d 405, 429 N.Y.S.2d 558 (1980), and People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979), *see supra* notes 66-73 and accompanying text, in favor of requiring a conditional guilty plea to allow a statutory speedy trial or double jeopardy challenge to survive for appellate review since these claims are of a jurisdictional nature, and therefore, not within the statutory exception to the nonappealability of nonjurisdictional challenges.

132. N.Y. CRIM. PROC. LAW § 220.10 (McKinney 1971) authorizes only pleas of "not guilty" and "guilty."

ent treatment of a plea bargain *and* by affording him the opportunity to challenge his admitted guilt on appeal.

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