



Appeals from Guilty Pleas Issue Spotting Outline

This outline is a starting point to determine what arguments can be raised in an appeal from a judgment of conviction resulting from a guilty plea. The list of potential issues is not exhaustive. Additional research is necessary to determine whether an issue is relevant in any given case. In many cases, the reversal of a guilty plea could expose the client to a potentially longer sentence on remand. Before challenging a guilty plea on appeal, counsel must determine what risks exist, and whether the client wishes to accept those risks.¹

PRE-PLEA PROCEEDINGS

Jurisdictional Issues:

- Jurisdictional challenges to accusatory instruments need not be preserved and are not precluded by guilty pleas or valid waiver of appeals (*see People v Pierce*, 14 NY3d 564, 570 n 2 [2010]; *People v Hansen*, 95 NY2d 227 [2000]).
- Grand jury defects, including improper resubmission of case to a second grand jury (*see People v Wilkins*, 68 NY2d 269, 277 n7 [1986]); serious prosecutorial misconduct before the grand jury (*see People v Huston*, 88 NY2d 400 [1986]); and an indictment procured through perjured testimony (*see People v Pelchat*, 62 NY2d 97, 108 [1984]).
- Indictments:
 - The indictment fails to charge an actual crime by failing to allege every material element (*see People v D'Angelo*, 98 NY2d 733 [2002]; *People v Bloome*, 205 AD3d 1045 [2d Dept 2023]); alleging acts that do not constitute a crime; charging a nonexistent crime (*see People v Lopez*, 45 AD3d 493 [1st Dept 2007] [dismissing attempted depraved indifference murder charge]); or charging a crime under a statute recognized as unconstitutional (*see People v Lee*, 58 NY2d 491 [1983]).
 - Applies to dates of birth where age is an element of the offense (*see People v Solomon*, 203 AD3d 1468 [3d Dept 2022]).
 - Note: a failure to charge or state an offense may not be cured by amendment (*see CPL 200.70 [2] [a], [b]; People v Bloome*, 205 AD3d 1045 [2d Dept 2022]; *People v Solomon*, 203 AD3d 1468 [3d Dept 2022]).

¹ See ILS Appellate Standards and Best Practices, Standard 10:

“Counsel must advise the client about potential risks involved in pursuing the direct appeal or collateral litigation and attempt to minimize such risks as the appeal progresses.” This standard is most applicable when counseling clients appealing a judgment following a guilty plea.

- Superior Court Informations (SCIs):
 - The SCI fails to charge a crime by failing to allege every material element; alleging acts that do not constitute a crime; and/or charging a nonexistent crime (*see People v Jones*, 162 AD3d 902 [2d Dept 2018] [dismissing attempted second-degree assault charge as legal impossibility]).
 - The SCI is defective if a waiver of indictment is not: 1) signed by the appellant; 2) in open court (*see People v Rickman*, 208 AD3d 1389 [3d Dept 2022]; *People v Eulo*, 156 AD3d 720 [2d Dept 2017]).
 - The SCI charges an offense of a higher class than was charged in felony complaints filed in lower court (*see People v Pierce*, 14 NY3d 564 [2010]).
 - There is disagreement over whether this holds true even if the greater offense charged in the SCI is joinable with the lesser offenses charged in the lower court (*compare People v Coss*, 178 AD3d 25 [3d Dept 2019]), *with People v Guerrero*, 158 AD3d 548 [1st Dept 2018]).
 - The SCI charges an offense for which the appellant was not held for grand jury action, i.e. an offense not charged in a felony complaint or that is not a lesser included of an offense charged in a felony complaint.
 - The SCI charges a class A felony punishable by life imprisonment (*see CPL 195.10 [1] [b]; People v Trueluck*, 88 NY2d 546 [1996]).
 - The waiver of indictment is invalid if it was signed after indictment (*see People v Solomon*, 39 NY3d 1114 [2023]; *People v Boston*, 75 NY2d 585 [1990]; *People v Michalski*, 206 AD3d 1443 [3d Dept 2022]).

CPL 30.30:

- As of January 1, 2020, the denial of a 30.30 motion can be reviewed on appeal, even if the appellant pled guilty (*see CPL 30.30 [6]*), if there is a final order (either written or oral) denying the motion prior to the guilty plea—otherwise the claim is forfeited (*see People v Swails*, 172 AD3d 579 [1st Dept 2019]; *People v Elmer*, 19 NY3d 501 [2012]).
- As of January 1, 2020, the prosecution cannot validly announce readiness until they file a Certificate of Compliance (COC) with discovery requirements (*see CPL 30.30 [5]; CPL 245.50*).
- Note: both statutory and constitutional speedy trial issues are subject to preservation requirements (*see People v Alexander*, 19 NY3d 203 [2012]). But a failure to raise a potentially meritorious 30.30 issue in the trial court can be argued as ineffective assistance on appeal (*see e.g. People v O'Day*, 200 AD3d 1495 [3d Dept 2021]).

Suppression:

- Denial of a suppression motion may be challenged on appeal from a judgment resulting from a guilty plea, so long as the trial court reached a decision on the motion prior to the plea being entered (see CPL 710.70 [2]).
- The suppression claim is reviewable if the evidence that was the subject of the suppression motion related to the crime the appellant pled guilty to OR to a charge satisfied by the plea (see *People v Holz*, 35 NY 3d 55 [2020]).

Right to Counsel:

- Denial of right to counsel of choice (see *People v Griffin*, 20 NY3d 626, 630 [2013] [“the right to counsel is so deeply intertwined with the integrity of the process . . . that [a] guilty plea is no bar to appellate review”]).
- Invalid waiver of the right to counsel (see *People v Wells*, 130 AD3d 457 [1st Dept 2015] [court failed to evaluate the appellant’s competency and warn of risks inherent in proceeding pro se]).

GUILTY PLEA ALLOCUTIONS: One of the most fruitful areas to find appealable issues in a guilty plea case is the allocution itself.

GROUND TO CHALLENGE VOLUNTARINESS OF PLEA

- *Boykin* error - waiver of constitutional, trial-related rights (see *Boykin v Alabama*, 395 US 238 [1969]).²
 - *Boykin* rights are: 1) the privilege against compulsory self-incrimination; 2) the right to a jury trial; and 3) the right to confront/challenge the prosecution’s proof and witnesses (see *id.* at 243). Trial courts must ensure that the person pleading guilty understands these rights, had the opportunity to discuss the consequence of waiving these rights with counsel, and wishes to voluntarily waive these rights to accept the plea bargain.
 - *Boykin* errors require preservation by moving to withdraw the guilty plea, unless an exception to the preservation requirement applies (see *People v Conceicao*, 26 NY3d 375 [2015]).
 - “Absent an affirmative showing that [the appellant] fully understood and voluntarily waived his trial-related constitutional rights, the plea was invalid and must be vacated” (*People v Oliver*, 185 AD3d 1099, 1101 [3d Dept 2020]; see *People v Tyrell*, 22 NY3d 359 [2013]).

² *Boykin* errors also apply to violation of probation cases (see *People v Mones*, 130 AD3d 1244 [3d Dept 2015]).

- Statements during plea allocution that cast significant doubt on guilt, indicate actual innocence, or negate an element of the crime.
 - If trial court fails to inquire into such statements and accepts the plea, PRESERVATION BY MOTION MAY NOT BE REQUIRED (*see People v Lopez*, 71 NY2d 662 [1998] [if factual recitation negates an essential element of the crime pleaded to, the trial court must further inquire to ensure understanding of the nature of the charge and that the plea is being intelligently entered]; *see People v Bovio*, 206 AD3d 1568 [4th Dept 2022]; *People v McEaddy*, 20 AD3d 585 [3d Dept 2005]).
 - Note: The First Department recently applied the *Lopez* exception to the preservation requirement and vacated a plea based on statements made at sentencing (*see People v Dozier*, 227 AD3d 482 [1st Dept 2024]).
- Lack of understanding of terms and consequences of plea:
 - Plea involuntary where court inaccurately told appellant that he would retain right to appeal from all of its orders—some appellate claims are automatically forfeited (*see People v Mothersell*, 204 AD3d 1403 [4th Dept 2022]).
 - Insufficient information about sentencing exposure (*see People v Renvill*, 153 AD3d 420 [1st Dept 2017]).
- No express waiver of potential defenses if allocution (or other record evidence of which the judge is aware) indicates a defense may exist (*see People v Mox*, 20 NY3d 936 [2012]; *People v Wolcott*, 27 AD3d 774 [3d Dept 2006]; *People v McEaddy*, 20 AD3d 585 [3d Dept 2005]; *People v Adams*, 15 AD3d 987 [4th Dept 2005]).
- Inaccurate information about sentencing exposure (*see People v Joseph*, 191 AD3d 148, 150 [1st Dept 2020] [“While it is true that misinformation or incorrect advice about the maximum sentence is not necessarily dispositive, it would be a factor for the court to consider in whether a plea was entered voluntarily, knowingly, and intelligently”]; *People v Keller*, 168 AD3d 1098 [2d Dept 2019]).
 - Generally requires preservation, unless there was no actual or practical ability to object (*compare People v Buchanan*, 194 AD3d 655 [1st Dept 2021], and *People v Joseph*, 191 AD3d 148 [1st Dept 2020]; *with People v Melendez*, 201 AD3d 444 [1st Dept 2022] [narrow exception to preservation requirement did not apply]).
- Inaccurate information about predicate status (*see People v Melendez*, 201 AD3d 444 [1st Dept 2022]; *People v Bennett*, 60 AD3d 478 [1st Dept 2009]).
- *Alford* plea defects – trial court must ensure that the appellant understood the nature and consequence of *Alford* plea and that it was a knowing and voluntary choice to plead guilty instead of risk trial.
 - The record must also contain strong proof of guilt (*see People v Johnson*, 167 AD3d 1512 [4th Dept 2018]).

- Ineffective assistance of counsel:
 - Defense counsel took a position adverse to the client when conducting plea allocution (*see People v Robbins*, 33 AD3d 1127 [3d Dept 2006]).
 - Defense counsel filed CPL 440 motion instead of motion to withdraw the plea as the client requested (*see People v Williams*, 211 AD3d 1337 [3d Dept 2022]).
 - Failure to pursue a potentially meritorious *Dunaway*/suppression claim where counsel prepared a suppression motion but failed to file it, and pretrial *Huntley/Wade* hearings were held (*see People v Roots*, 210 AD3d 1532 [4th Dept 2022]).
 - Failure to challenge an improperly enhanced sentence (*see People v Hunter*, 173 AD3d 1249, 1250 [3d Dept 2019]).
 - Allowing a client to accept a plea bargain including additional prison time after case was reversed on appeal, even though the client had already served the maximum time permitted for the offense and double jeopardy prohibited any additional time (*see People v Jones*, 171 AD3d 1249 [3d Dept 2019]).
 - *Padilla v Kentucky*, 559 US 356 (2010): Ineffective assistance of counsel if attorney does not advise a non-citizen client that entering a guilty plea carries risk of deportation.
 - But an ineffectiveness claim will be forfeited by guilty plea unless the deficient performance affected the plea (*People v Soria*, 99 AD3d 1027 [2d Dept 2012]; *People v Dailey*, 139 AD3d 1375 [4th Dept 2016]).
- Mental Incompetence:
 - If the trial court suspects an individual is not competent to enter a plea, it must ensure that the person understands the consequences of pleading guilty and waiving the right to appeal. The court may be required to order a CPL 730 competency exam (*see People v Patillo*, 185 AD3d 46 [1st Dept 2020]; *see also People v Tortorici*, 92 NY2d 757 [1999]).
 - Challenge to competence is not waived by entering guilty plea (*see People v Armlin*, 37 NY2d 167, 171 [1975]).
- Coercion:
 - Court stated it would impose the maximum sentence after trial and that the predicate felony could be challenged as unconstitutional at sentencing, and then denied opportunity to challenge it (*see People v Stevens*, 298 AD2d 267 [1st Dept 2002]; *see also People v Kelley*, 114 AD3d 1229 [4th Dept 2014]).
 - Denial of right to consult with counsel before pleading guilty (*see People v Hollmond*, 191 AD3d 120 [2d Dept 2020]).
- Fraud:
 - The appellant pleaded guilty to an indictment obtained using evidence the prosecutor knew was false (*see People v Pelchat*, 62 NY2d 97 [1984]; *see*

also *People v Pilotti*, 127 AD2d 23 [1st Dept 1987] [weapon possession plea vacated where prosecution withheld ballistic report linking subject gun to a related homicide—misleading defense about consequences of pleading guilty to gun possession]).

- Unfulfilled promise: an appellant must be given the chance to withdraw a plea induced by a promise that cannot be fulfilled (see *People v Monroe*, 21 NY3d 875 [2013]).
 - Illegally low sentence:
 - If an illegal sentence was part of a broader plea bargain, the entire bargain must be vacated (see *People v Collier*, 79 AD3d 1162 [3d Dept 2010] [entire plea bargain vacated because it contemplated illegal sentence running consecutively to other sentence]).
 - Promise of impermissible jail time credit required remittal to allow chance to withdraw the plea (see *People v Tchiyuka*, 169 AD3d 1398 [4th Dept 2019]).
 - Promise that an issue will be reviewable on appeal when appellate review was forfeited by pleading guilty (see *People v Mothersell*, 204 AD3d 1403 [4th Dept 2022]).
 - A plea premised on the promise of a concurrent sentence must be vacated if the other sentence is later vacated (see *People v Fuggazzatto*, 62 NY2d 862, 863 [1984]).
 - Promise of court-ordered shock incarceration program when the person was not eligible (see *People v Regan*, 199 AD3d 1067 [3d Dept 2021]); *People v Golden*, 170 AD3d 528 [1st Dept 2019]).
- Failure to advise of direct consequences of plea (see *People v Ford*, 86 NY2d 397 [1995]).³
 - Immigration: *People v Peque*, 22 NY3d 168 [2013] – overruled *People v Ford* to the extent of holding that the trial court must advise a non-citizen that they may be deported upon a guilty plea.
 - But to warrant vacatur the appellant must also establish a reasonable probability that they would not have pleaded guilty if the court had warned them about the possibility of deportation.
 - Post Release Supervision (PRS): *People v Catu*, 4 NY3d 242 [2005] – the court must ensure that the appellant is aware of PRS component when pleading guilty.
 - Fines: The imposition of a fine is a direct consequence (see *People v Jones*, 118 AD3d 1360 [4th Dept 2014]).

³ This error also pertains to violation of probation admissions (see *People v Bryant*, 262 AD2d 791 [3d Dept 1999]).

- *Padilla v Kentucky*, 559 US 356 (2010):⁴ Ineffective assistance of counsel if attorney does not advise a non-citizen client that entering a guilty plea carries risk of deportation.
- Inaccurate information about collateral consequences (see *People v Harnett*, 16 NY3d 200 [2011] [recognizing that collateral consequences could render plea involuntary if lack of knowledge renders the plea unknowing and plea would not have been entered if consequences known]; *People v Balcererek*, 161 AD3d 764 [2d Dept 2018] [plea involuntary due to failure to advise of Sex Offender Management Treatment (SOMTA) possibility]).
- Improperly enhanced sentence: if the court imposed an enhanced sentence without having warned of the specific conditions that must be obeyed to avoid enhancement and without giving a chance to withdraw the plea, the case must be remitted to allow plea withdrawal (see *People v Figgins*, 87 NY2d 840 [1995]; *People v Tole*, 119 AD3d 982 [3d Dept 2014]).
 - If a dispute exists about whether the plea terms were violated, the court must inquire or conduct a hearing to address the contested factual issues (see *People v Outley*, 80 NY2d 702 [1993]).
- Incorrect information about right to a jury trial (possibly):
 - If a charged crime carries the potential penalty of deportation, the accused is entitled to a jury trial – even if the person would otherwise only have a right to a bench trial. Incorrectly advising that there is no right to a jury trial may render plea involuntary (see *People v Udeke*, 34 NY3d 1118 [2019, Rivera, J., dissenting]; *People v Suazo*, 32 NY3d 491, 493 [2018]).
- Plea to a lesser included charge: Where a negotiated plea is to a lesser offense, the accused can plead guilty without putting the factual basis for the lesser charge on the record (see *People v Clairborne*, 29 NY2d 950 [1972]). However, where the court or counsel decides to place on the record the facts that support the elements of the lesser crime, they must do so accurately (see *People v Johnson*, 23 NY3d 973 [2014]; *People v Worden*, 22 NY3d 982 [2013]).
 - Though a court is not required to engage in a factual recitation to establish the elements of a lesser included offense to which the defendant is pleading guilty (*People v Johnson*, 23 NY3d 973, 975 [2014]), where the court does, and the allocution casts significant doubt about guilt of the lesser crime, the court is obligated to conduct an inquiry to make sure the plea is knowing, intelligent, and voluntary (*People v Banks*, 137 AD3d 1458, 1459 [3d Dept 2016]).

⁴ For resources on *Padilla* litigation, visit [Immigrant Defense Project's Padilla Support Center](#).

PLEA WITHDRAWAL

- When the client seeks to withdraw the plea before sentencing, the court must undertake a minimal inquiry before denying the motion (*People v McClain*, 32 NY2d 697 [1973]; *People v Gerald*, 197 AD3d 1324 [2d Dept 2021]).
- Counsel cannot take an adverse position to the client's plea withdrawal motion (*People v Mitchell*, 21 NY3d 964 [2013]).

SENTENCE

While a complete review of sentencing issues is beyond the scope of this outline, certain issues arise frequently in the context of guilty pleas and should be considered.

- Sentence invalid as a matter of law because it does not fall within the limits set by statute (see Penal Law §§ 70.00-70.35). The accused cannot rely on a promise of an illegal sentence (see *People v Bullard*, 84 AD2d 845 [2d Dept 1981]).
- Excessive sentence:⁵ Even where the sentence is bargained for, it can be challenged as excessive in the absence of a valid waiver of appeal (see *People v Jurgins*, 107 AD3d 595 [1st Dept 2013]), including the imposition of fees and surcharges on youthful offenders (see CPL 420.35; *People v Chirinos*, 190 AD3d 434 [1st Dept 2021]; *People v Dyshawn B.*, 196 AD3d 638 [2d Dept 2021]).
- Failure to follow required sentencing procedures.
 - Failure to order an updated presentencing investigation report (PSI) pursuant to CPL 390.20 (1) (see *People v. Bellis* 115 AD2d 237[4th Dept 1985], but see *People v Kuey*, 83 NY2d 278 [1994] [decision to order pre-sentencing report is discretionary at resentencing]).
 - Noncompliance with predicate felony statutes (CPL 400.15-400.21).
 - Check to make sure prior crime qualifies as a predicate felony, particularly if it is an out-of-state conviction.
 - Check the timing of the prior conviction. If it is more than 10 years old, excluding prior periods of incarceration, it does not qualify as a predicate.
 - Predicate felonies must be “sequential.” Clients must have been sentenced on the prior offense before committing the present offense (Penal Law §§ 70.04 [1] [b] [ii]; 70.06 [1] [b] [ii]).
 - Argue the statute is unconstitutional under *Erlinger v United States* (144 S Ct 1840 [2024]), because factual determinations such as tolling must be made by a jury under the Fifth, Sixth, and Fourteenth Amendments.
 - Check to see if there were admissions to being the person named in the predicate felony statement and the constitutionality of the prior conviction (CPL 400.40).

⁵ For a [Statement of Law on Harsh or Excessive Sentence](#), visit [ILS's Appellate Resources](#).

- Failure to consider eligibility and qualification for youthful offender status (see *People v Rudolph*, 21 NY3d 497 [2013]), including cases involving armed felonies (*People v Middlebrooks*, 25 NY3d 516 [2015]).
- Statement not permitted at sentencing (CPL 380.50 [1]; *People v Brown*, 37 NY3d 940 [2021]).

APPEAL WAIVERS – a plea bargain often includes a waiver of the right to appeal.

- Waiver is invalid if the trial court:⁶
 - Lumped appellate rights together with the rights forfeited by pleading guilty (see *People v Lopez*, 6 NY3d 248 [2006]);
 - Characterized waiver as an absolute bar to appellate or postconviction review (see *People v Bisono*, 36 NY3d 1013 [2020]);
 - Otherwise failed to ensure understanding of the scope and nature of the rights being waived (*People v Lopez*, 6 NY3d 248 [2006]);
 - Did not address waiver until after admission of guilt (see *People v Eduardo S.*, 186 AD3d 1265 [2d Dept 2020]); and/or
 - Advised that the appellant was waiving the right to appeal the conviction without mentioning sentence (see *People v Slade*, 180 AD3d 1073 [2d Dept 2020]).
 - Insisted on the appeal waiver itself without the prosecution requiring it (see *People v Sutton*, 184 AD3d 236 [2d Dept 2020]; but see *People v Dilworth*, 189 AD3d 636 [1st Dept 2020]).
- Claims waived by valid waiver of the right to appeal:
 - Harsh and excessive sentence;
 - Challenge to suppression determination (see *People v Sanders*, 25 NY3d 337 [2015]; *People v Nack*, 200 AD3d 1197 [3d Dept 2021]);
 - Ineffective assistance of counsel, unless it impacted the voluntariness of the plea (see *People v Rodriguez*, 217 AD3d 1012 [3d Dept 2023]);
 - Judicial bias (see *People v Nack*, 200 AD3d 1197 [3d Dept 2021]);
 - **Statutory** (but not constitutional) speedy trial determination (see *People v Votaw*, 190 AD3d 1162 [3d Dept 2021]; *People v Person*, 184 AD3d 447 [1st Dept 2020]).
 - Double jeopardy (see *People v Muniz*, 91 NY2d 570 [1998]).

⁶ For a [Statement of Law on Waiver of the Right to Appeal](#), visit [ILS's Appellate Resources](#).

PRESERVATION OF PLEA ISSUES

- Many issues must be preserved by filing a motion to withdraw the plea before sentencing. The motion must specify the reasons withdrawal is sought. Reasons not included in the motion are not preserved for review (*see People v Williams*, 27 NY3d 212 [2016]; *People v Washburn*, 192 AD3d 1267 [3d Dept 2021]).
 - Exception – if the plea and sentencing take place in the same proceeding, and there is no practical ability to file a motion to withdraw the plea, the issue is reviewable on appeal (*see People v Conceicao*, 26 NY3d 375 [2015]; *People v Pace*, 192 AD3d 1274 [3d Dept 2021]).
- If a client wants to withdraw plea and defense counsel takes a position adverse to the client's, the court must assign new counsel to assist in preparing a plea withdrawal motion (*see People v Mitchell*, 21 NY3d 964 [2013]).

APPELLATE ISSUES FORFEITED BY A GUILTY PLEA (list not exhaustive):

- Prosecutorial vindictiveness (*see People v Nack*, 200 AD3d 1197 [3d Dept 2021]);
- Suppression issues – but only if plea entered prior to suppression ruling (*see People v Elmer*, 19 NY3d 501 [2012]);
- Preclusion / late CPL 710.30 (*see People v Taylor*, 65 NY2d 1 [1985]);
- Sufficiency of evidence presented to the grand jury (*see People v Hansen*, 95 NY2d 227 [2000]);
- Right to testify before the grand jury (*see People v Rose*, 162 AD2d 240 [1st Dept 1990]);
- Review of denial of motion to dismiss in the interest of justice pursuant to CPL 210.40 (*see People v LaPierre*, 189 AD3d 1813 [3d Dept 2020]; *People v Tavares*, 273 AD2d 707 [3d Dept 2000]);
- Violation of CPL 160.50 sealing requirements (*see People v Nack*, 200 AD3d 1197 [3d Dept 2021]; *People v Hines*, 82 AD3d 1694 [4th Dept 2011]);
- Challenge to geographical jurisdiction of trial court (*see People v Armstead*, 122 AD3d 640 [2d Dept 2014]);
- Sandoval errors (*see People v Hutchings*, 263 AD3d 965 [4th Dept 1999]; *People v Ortiz*, 127 AD2d 305 [3d Dept 1987]; *People v Zangrillow*, 105 AD2d 822 [2d Dept 1984]);
- Severance (*see People v Marinelli*, 148 AD2d 550 [2d Dept 1989]);
- Batson issues (*see People v Green*, 75 NY2d 902 [1990]);
- Statute of limitations defense (*see People v Parilla*, 8 NY3d 654, 659 [2007]);
- Statutory double jeopardy claims (*see People v Prescott*, 66 NY2d 216, 219 [1985]; *see also People v Kornieczny*, 2 NY3d 569 [2004]).

DISCLAIMER: The ILS Statewide Appellate Support Center (“SASC”) provides outlines, templates, and other resources. While every effort has been made to ensure that such materials are up-to-date, accurate, and complete, they are provided on an “as is” basis, with no express or implied guarantees of accuracy or completeness. Use of SASC resources does not create an attorney-client relationship between the user and the SASC.