

APPEALS FROM TOWN & JUSTICE COURTS
Wednesday, November 3, 2010
Radisson Hotel
6:00 – 8:00 p.m.

Chair: Erin P. Gall, Esq.,
Law Clerk to the Hon. Barry M. Donalty, Oneida County Judge

Speakers: Carl Del Buono, Esq.,
Law Clerk to Hon. Michael L. Dwyer, Oneida County Judge
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Appeals from Justice Courts

In most cases, the work of a Justice Court is concluded when a judgment is entered or a sentence imposed. However, when a dissatisfied party appeals to a higher court, the local court is responsible for preparing the record on appeal. The following is a summary of the provisions governing the appeal process.

THE BASICS

The party who wishes to appeal a decision or order to a higher court is the "Appellant." The party against whom the appeal is taken is the "Respondent." The County Court hears appeals from the Town and Village Courts in the 3rd and 4th Departments and the Appellate term hears appeals from various lower courts in the 1st and 2nd Departments.

Civil appeals from cases originating in Town and Village Courts are governed by section 1704 of the Uniform Justice Court Act (UJCA) and Article 55 of the Civil Practice Law and Rules (CPLR). Criminal appeals are governed by §§460.10 and 460.70 of the Criminal Procedure Law (CPL).

An appeal is not deemed to have commenced until such time as the Notice of Appeal is filed.

CIVIL CASE PROCEDURE

An appeal must be taken within thirty days after service of a copy of the judgment or order and written notice of its entry (CPLR §5513[1]). A judgement is entered when, after it has been signed by the clerk, it is filed (CPLR §5016). The appeal is commenced by the filing of a Notice of Appeal (CPLR §5515).

The procedure associated with the next stage of the civil appeal proceeding is dependent upon whether stenographic minutes were taken. If stenographic minutes were taken, the stenographer's original transcript of minutes must be furnished to the clerk within ten days after the fees therefore have been paid. If no stenographic minutes were taken, but testimony was given, the clerk or justice shall prepare minutes of the proceedings within thirty days after the Notice of Appeal is filed, such minutes to consist of a statement sufficiently descriptive of the testimony to make possible appellate

review. (UJCA §1704(a)). The minutes should include the basic facts to which witnesses testified and should be a full enough statement to enable the Appellate Court to determine whether the judgment rendered is supported by the record.

Immediately upon receipt of the stenographer's original transcript, or upon preparation of the minutes, the clerk shall notify the appellant that the record is available for settlement. The appellant shall then serve a written notice of settlement upon the respondent and the clerk or justice, settling a date no less than three days from the date the notice is served. The clerk shall thereupon prepare a return, which shall contain the summons or notice of petition, pleadings, evidence, judgment or order, Notice of Appeal, opinion of the court, if any, and all other papers necessary for appellate review of the judgment or order appealed from. (UJCA §1704[a]). Once the clerk prepares the return, the case is ready for settlement of the record.

On the settlement date, the parties are given an opportunity to review the minutes or the statement prepared by the justice and to make objections thereto. Any disagreements they have as to the contents of the minutes or statement are usually resolved at that time, which constitutes the "settlement" of the case. If not settled, then, the justice must settle it within five days afterwards, and must make a notation (for inclusion in the record) to the effect that the record, including the transcript or statement, constitutes an accurate reflection of the proceedings. The clerk or justice then forwards the completed record to the Appellate Court.

If no testimony was taken, the return must be filed with the County Court within ten days of the filing of the Notice of Appeal with the Justice Court. The return shall consist of the same papers as set forth above. The authenticity of the papers shall be certified by the clerk (UJCA §1704[b]).

This ends the justice court's responsibilities with regards to civil appeals.

CRIMINAL CASE PROCEDURE

A defendant cannot appeal until there has been a finding of guilt by either plea or after trial and sentence has been imposed (CPL §450.10). The procedure for an appeal from a judgment of conviction depends upon whether or not the criminal proceedings were recorded by a court

stenographer.

PROCEEDINGS NOT RECORDED BY STENOGRAPHER

If there are no stenographic minutes, the appellant must file an Affidavit of Errors or a Notice of Appeal within thirty days of entry of a judgment or order, or imposition of sentence (CPL §460.10[3][a][I], [ii]). If the appellant files a Notice of Appeal, he or she must file an Affidavit of Errors within 30 days thereafter (CPL §460.10[3][a]). The Affidavit of Errors describes the errors the appellant alleges to have been made during the trial.

Within ten days after the appellant files the Affidavit of Errors, the local criminal court must file both the Affidavit of Errors and the court's return with the clerk of the Appellate Court, and deliver a copy of the return to each party. The court's return must set forth or summarize evidence facts or occurrences in or adduced at the proceedings resulting in the judgment, sentence or order, which constitute the factual foundation for the contentions alleged in the Affidavit of Errors (CPL §460.10[3][d]).

If the local criminal court does not file the return within the prescribed period, or if it files a defective return, the Appellate Court, upon application of the appellant, must order the local criminal court to file a return or an amended return, as the case may be, within a time designated by the Appellate Court (CPL §460.10[3][e]). If the Justice Court fails to comply with the Appellate Court order, the allegations of the Affidavit of Errors will be deemed admitted, and the Appellate Court may decide the appeal on the merits of the Affidavit of Errors alone.

The appellant and respondent thereafter have certain time frames within which to submit notices for arguments, briefs, etc. These matters are handled by the Appellate Court without the involvement of the local court.

PROCEEDINGS RECORDED BY STENOGRAPHER

If stenographic minutes were taken, the appellant must file the Notice of Appeal in duplicate with the Justice Court within 30 days of the entry of the judgment or order or imposition of the sentence. The appellant must also file one copy with the Appellate Court (CPL §460.10[1][a]). If the defendant is also the appellant, then he must also serve a copy of the Notice of Appeal upon the district attorney (CPL §460.10[1][b]). If the people are the

appellant, they must, within 30 day period, serve a copy of the Notice of Appeal upon the defendant or upon the attorney who last appeared for him in the court in which the order being appealed was entered (CPL §460.10[1][c]). The filing date must be endorsed on both copies of the Notice of Appeal submitted to the Justice Court and the duplicate copy forwarded to the Appellate Court (CPL §460.10[1][e]).

The stenographer prepares two copies of the transcript. If the appellant has not been granted poor person status, one copy is sent to the appellant, and the other is filed with the Justice Court. If the appellant is granted poor person status by the County Court, then both copies are filed with the Justice Court, and the County Court may direct that the Justice Court furnish one copy to the appellant (CPL §460.70[1]). Towns and villages are responsible for the cost of the trial court copy of the transcript when a non-indigent defendant appeals. However, the state is responsible for the cost of transcripts when an indigent defendant appeals (CPL §460.70).

Within ten days after the transcript is filed with the Justice Court, the clerk must file the Notice of Appeal, a transcript, a copy of the accusatory instrument, and copies of any decisions on motions with the clerk of the Appellate Court. The court must notify the appellant and the respondent when the filing is complete. (22NYCRR §200.33[a]).

DETERMINATION OF APPEAL

Upon an appeal of a criminal conviction, the Appellate Court may affirm, reverse or modify a judgment and direct corrective action (CPL §470.15[2]). Upon reversing or modifying a judgment and directing corrective action, the Appellate Court must remit the case to the criminal court in which the judgment was entered. Such criminal court must execute the direction of the Appellate Court and must, depending upon the nature of such direction, either discharge the defendant from custody, exonerate his bail or issue a securing order (CPL §470.45).

A court to which a civil appeal is taken may affirm, reverse or modify, wholly or in part, any judgment or order before it, as to any party. The Appellate Court will render a final determination or, where necessary or proper, remit to another court for further proceeding (CPLR §5522[a]).

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APPEAL OF PLEA

Note: Conviction on a plea is based on the defendant's sworn allocution, NOT on any other evidence.

"A plea of guilty, as we have repeatedly observed, generally marks the end of a criminal case, not a gateway to further litigation." (*People v. Hansen*, 95 NY 2d 227 [2000])

People v. Hansen, 95 NY 2d 227 [2000] – attempted burglary – defendant interviewed by television reporter – defendant testifies differently at GJ – prosecution shows television interview and inadvertently include reporter's lead-in remarks state that the homeowner's had thwarted an attempted break-in – defendant pleaded guilty and then appealed on basis that reporter's remarks were unsworn hearsay.

"A guilty plea will thus encompass a waiver of specific rights attached to trial, such as the right to a trial by jury and to confrontation, and it will also effect a forfeiture of the right to revive certain claims made prior to the plea."

What is the difference between the nature of rights forfeited and rights waived?

"Forfeiture occurs by operation of law as a consequence of the guilty plea, with respect to issues that do not survive the plea."

"Waiver occurs when a defendant intentionally relinquishes or abandons a known right that would otherwise survive a guilty plea."

"The critical distinction is between defects implicating the integrity of the process, which may survive a guilty plea, and less fundamental flaws, such as evidentiary or technical matters, which do not."

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1. ISSUES FORFEITED BY GUILTY PLEA

“Claims that are foreclosed by a guilty plea have, for example, included:

- pre-indictment prosecutorial misconduct (*People v Di Raffaele*, 55 NY2d 234, supra);
- selective prosecution (*People v Rodriguez*, 55 NY2d 776);
- failure to provide CPL 710.30 notice (*People v Taylor*, 65 NY2d 1, supra);
- the statutory right to a speedy trial (*People v Friscia*, 51 NY2d 845; *People v Brothers*, 50 NY2d 413);
- the denial of an application for leave to file a late motion to suppress (*People v Petgen*, 55 NY2d 529);
- transactional immunity (*People v Flihan*, 73 NY2d 729);
- the exercise of alleged discriminatory peremptory challenges (*People v Green*, 75 NY2d 902);
- an ex post facto challenge to an evidentiary rule change (*People v Latzer*, 71 NY2d 920);
- and alleged unconstitutional statutory presumptions (*People v Thomas*, 53 NY2d 338, supra).

2. ISSUED THAT MAY BE RAISED AFTER GUILTY PLEA

“A defendant may raise, after a guilty plea, certain constitutional claims such as:

- the voluntariness of a plea (*People v Seaberg*, supra, 74 NY2d, at 10);
- speedy trial claims (*People v Blakley*, 34 NY2d 311, 314);
- double jeopardy claims (*Menna v New York*, 423 US 61);
- competence to stand trial (*People v Armlin*, 37 NY2d 167, 172; *People v Francabandera*, 33 NY2d 429, 434-435);
- and the constitutionality of a statute under which the defendant was convicted (*People v Lee*, 58 NY2d 491, 494).”

“Defendant in essence seeks a review of the fact-finding process engaged in by the grand jurors with respect to the videotaped remarks. While his constitutional right to be prosecuted on a jurisdictionally valid indictment survived the guilty plea, his right to challenge this evidence did not (*see, People v Sobotker*, 61 NY2d 44, 48 [although a constitutional right may survive a guilty plea, a related statutory right is forfeited if it confers more than the Constitution requires]).” So Hansen had forfeited and his claim did not survive his plea.

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Confusion generated by having defendant allocute, waive appeal, and then be advised that he has a right to appeal. What's going on?

3. A SURVIVING ISSUE THAT HAS BEEN SPECIFICALLY WAIVED MAY BE APPEALABLE - BUT IS IT REVIEWABLE ?

People v. Callahan (80 N.Y.2d 273 [1992])

- Callahan – sentence illegal because court delegated restitution determination?
- Sutton – did waiver of appeal foreclose speedy trial claim?
- DeSimone – no mention of waiver during plea allocution

All were dismissed on first appeal because the defendant had waived appeal. The Court of Appeals remanded all three: the first two because the Appellate Division erred in not assuming jurisdiction, the third because the Appellate Division failed to consider the validity of the waiver itself. The first two cases demanded review of the merits of the appeals, the third demanded review of the character of the waiver.

“[A] defendant may ordinarily waive the right to appeal as part of a sentence or plea bargain, and, in most situations, the appellate courts should honor such waivers”.

In some circumstances, a defendant's claim may be reviewed despite a bargained-for waiver of appeal.

“Because of this societal concern [for speedy trials] and the implications for the integrity of our criminal justice system, the parties cannot be permitted to foreclose appellate review through the plea bargaining process.

Accordingly, we hold, as we held in *Seaberg*, that a bargained-for waiver of the right to appeal is ineffective to the extent it impairs the defendant's ability to obtain appellate review of a constitutional speedy trial claim.”

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4. CERTAIN CLAIMS MAY NOT BE WAIVED

“[T]he *Seaberg* opinion set forth several categories of appellate claims that may not be waived because of a larger societal interest in their correct resolution. These include the constitutionally protected right to a speedy trial (*see, People v. Blakley*, 34 N.Y.2d 311, 314-315, 357 N.Y.S.2d 459, 313 N.E.2d 763, *supra*), challenges to the legality of court-imposed sentences (*see, People v. Francabandera*, 33 N.Y.2d 429, 434, n. 2, 354 N.Y.S.2d 609, 310 N.E.2d 292), and questions as to the defendant's competency to stand trial (*see, People v. Armlin*, 37 N.Y.2d 167, 172, 371 N.Y.S.2d 691, 332 N.E.2d 870).”

5. WAIVER ITSELF MUST BE VALID

“[A] waiver of the right to appeal will not be enforced unless it was knowingly, intelligently and voluntarily made.”

“The facts in *DeSimone* provide an example of the second category of cases in which bargained-for waivers of the right to appeal are deemed ineffective. In contrast to the issues in *Callahan* and *Sutton*, the issue in *DeSimone* is not whether waiver is precluded because of the subject matter of the appeal, but rather whether the waiver itself was shown to have been obtained under constitutionally acceptable circumstances.”

6. PROPER DISPOSITION OF APPEAL WHERE THERE IS A WAIVER

The issue is *jurisdiction* not reviewability.

“Accordingly, the better view is that a bargained-for waiver of the right to appeal does not affect the appealability of a judgment that is otherwise appealable under CPL 450.10(1) and does not operate to deprive the appellate court of its jurisdiction of the appeal. Instead, it merely forecloses appellate review of all claims that might be raised on appeal, except, of course, those categories of claims that survive such waivers under our

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case law. Under this view, the proper disposition in appeals such as *Callahan*, where there is no claim that the waiver was constitutionally defective and no public policy impediment to enforcing the waiver, is an affirmance predicated on the absence of any reviewable issues that have not been superseded by the waiver.”

All three cases in *Callahan* were affirmed on remand.

7. SUMMARY

Some issues are foreclosed by the entry of a plea even in the absence of a waiver of appeal; some issues survive a plea and may be waived; some issues survive even a bargained-for waiver of appeal.

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APPEAL OF TRIAL

1. Confined to the record - Preservation
 - a. Make objections – allow court to correct the error
 - b. Trial Order of Dismissal
 - i. make at close of People’s case and renew at end of evidence
 - ii. be specific, review elements of crimes and jury charges
 - c. Be wary of off-the-record understandings – put something on the record
 - d. Repugnant verdict – make objection before jury is dismissed
2. **Anticipate opponents arguments and appellate denials** – e.g. if you recognize unpreserved error, point out why review should be granted anyway; if you anticipate a harmless error analysis, show why it would be wrong.
3. Standards of review
 - a. Discretion of trial courts and abuse of discretion
 - b. Legal sufficiency of evidence and weight of evidence
 - i. legal insufficiency must be preserved at trial, except that it may still be raised in interest of justice
 - ii. weight of evidence must be reviewed even if unpreserved
 - c. Harmless error
 - i. does not apply unless the proof is overwhelming
 - ii. constitutional error must be harmless beyond a reasonable doubt
 - iii. the right to a fair trial is never subject to harmless error analysis
 - d. Interest of justice review
 - e. Harsh and excessive sentence – factors:

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- i. defendant's age
- ii. absence of (significant) criminal record
- iii. presentence report
- iv. sentences of co-defendants
- v. expressions of remorse – character reports
- vi. relative role in planning and executing crime
- vii. family?

4. *Crawford* brief

- a. Disfavored
- b. Tension between obligation to the client and obligation to the court
- c. Must file an appropriately thorough brief

5. Court of Appeals

- a. Local court appeals DO NOT go to Appellate Division for further appeal.
Local courts and Appellate Division are both “courts of intermediate appeal”.
Both go next to the Court of Appeals.
- b. Very small percentage of cases accepted – looking for novel issues or issues with split among departments
- c. Confined to matters of law
- d. Must inform client
- e. Get something from client in writing

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MISCELLANEOUS ADVICE

Allow a cooling-off period.

Give your client an idea of the time, effort, and expense involved.

Advise your client of the risks. Appeals are not necessarily risk-free.

Know the local rules and procedure for perfecting the appeal.

Bring your client in after your initial review of the transcripts.

Get the trial file; talk to the trial attorney.

Be creative.

Handling a Criminal Case in New York
Database updated September 2010

Gary Muldoon, Esq.

Chapter
17. The Guilty Plea
II. The Effect of a Guilty Plea

[Summary](#)

§ 17:88. Effect of plea upon appeal—Issues waived by plea

West's Key Number Digest

West's Key Number Digest, [Criminal Law](#)  [273.2\(1\)](#)

As a consequence of a valid guilty plea, a number of issues are automatically waived, or forfeited, from further review. *See* [§ 18:17](#), *Waiver of right to be present at trial: Parker warnings*. These include:

- challenge to the arraignment proceeding, [People v. Meachem](#), 50 A.D.2d 953, 375 N.Y.S.2d 678 (3d Dep't 1975).
- prompt arraignment, [People v. Rook](#), 201 A.D.2d 931, 610 N.Y.S.2d 903 (4th Dep't 1994).
- failure to hold a preliminary hearing, [People v. Fagan](#), 53 A.D.3d 983, 862 N.Y.S.2d 629 (3d Dep't 2008).
- the court's inquiry of the credentials of the sign language interpreter for the defendant, [People v. Harley](#), 219 A.D.2d 850, 632 N.Y.S.2d 39 (4th Dep't 1995).
- the prosecution's failure to provide a [CPL 710.30](#) notice, [People v. Taylor](#), 65 N.Y.2d 1, 489 N.Y.S.2d 152, 478 N.E.2d 755 (1985); [People v. Jackson](#), 219 A.D.2d 803, 632 N.Y.S.2d 365 (4th Dep't 1995). *See* [§§ 8:51 et seq.](#), *CPL Article 710: statements and identifications*.
- statutory speedy trial under [CPL 30.30](#), [People v. O'Brien](#), 56 N.Y.2d 1009, 453 N.Y.S.2d 638, 439 N.E.2d 354 (1982).
- denial of application for leave to file a late motion to suppress, [People v. Petgen](#), 55 N.Y.2d 529, 450 N.Y.S.2d 299, 435 N.E.2d 669 (1982).
- claim of transactional immunity by reason of testimony given in a search warrant application, [CPL 50.10](#); [People v. Flihan](#), 73 N.Y.2d 729, 535 N.Y.S.2d 590, 532 N.E.2d 96 (1988).
- prosecutor's exercise of discriminatory peremptory challenges, [People v. Green](#), 75 N.Y.2d 902, 554 N.Y.S.2d 821, 553 N.E.2d 1331 (1990).
- challenge to racial composition of prospective jury pool, [People v. Self](#), 213 A.D.2d 998, 624 N.Y.S.2d 488 (4th Dep't 1995).
- nonpreservation of tangible evidence by police in violation of [Penal Law § 450.10](#), [People v. Williams](#), 214 A.D.2d 437, 625 N.Y.S.2d 42 (1st Dep't 1995).
- *ex post facto* challenge to an evidentiary rule change, [People v. Latzer](#), 71 N.Y.2d

[920, 528 N.Y.S.2d 533, 523 N.E.2d 820 \(1988\).](#)

- adverse rulings on *Sandoval* applications, [People v. Johnson, 141 A.D.2d 848, 530 N.Y.S.2d 189 \(2d Dep't 1988\)](#). See Ch 11, *Defendant's Decision to Testify*.
- adverse rulings on *Molineux* applications, [People v. Barrier, 7 A.D.3d 885, 776 N.Y.S.2d 374 \(3d Dep't 2004\)](#). See § 12:61, *Appeal*.
- motions dealing with discovery requests, [People v. Cusani, 153 A.D.2d 574, 544 N.Y.S.2d 499 \(2d Dep't 1989\)](#).
- prosecutor's failure to turn over *Rosario* material, [People v. West, 184 A.D.2d 743, 585 N.Y.S.2d 467 \(2d Dep't 1992\)](#).
- improper failure to file a bill of particulars, [People v. Hendricks, 31 A.D.2d 982, 297 N.Y.S.2d 838 \(3d Dep't 1969\)](#).
- motion to sever counts of indictment, [People v. Grant, 140 A.D.2d 623, 528 N.Y.S.2d 993 \(2d Dep't 1988\)](#).
- motion for a separate trial, [People v. Smith, 41 A.D.2d 893, 342 N.Y.S.2d 513 \(4th Dep't 1973\)](#).
- disqualification of prosecutor, [People v. Calvello, 70 A.D.3d 847, 894 N.Y.S.2d 518 \(2d Dep't 2010\)](#), or appointment of special prosecutor, [People v. Cooper, 226 A.D.2d 1115, 642 N.Y.S.2d 131 \(4th Dep't 1996\)](#).
- motion to dismiss in the interest of justice, [People v. Macy, 100 A.D.2d 557, 473 N.Y.S.2d 261 \(2d Dep't 1984\)](#). See § 10:47, *Appeal of denial barred by guilty plea*.
- nonegregious preindictment prosecutorial misconduct, [People v. Di Raffaele, 55 N.Y.2d 234, 448 N.Y.S.2d 448, 433 N.E.2d 513 \(1982\)](#), or nonegregious police misconduct, [People v. Alfone, 206 A.D.2d 775, 615 N.Y.S.2d 110 \(3d Dep't 1994\)](#).
- unconstitutional statutory presumption, [People v. Thomas, 53 N.Y.2d 338, 441 N.Y.S.2d 650, 424 N.E.2d 537 \(1981\)](#).
- statutory double jeopardy, [CPL 40.20, CPL 40.30; People v. Prescott, 66 N.Y.2d 216, 495 N.Y.S.2d 955, 486 N.E.2d 813 \(1985\)](#).
- selective or vindictive prosecution, [People v. Rodriguez, 55 N.Y.2d 776, 447 N.Y.S.2d 246, 431 N.E.2d 972 \(1981\)](#); [People v. Chevalier, 226 A.D.2d 925, 641 N.Y.S.2d 433 \(3d Dep't 1996\)](#); [People v. Murray, 25 A.D.3d 911, 807 N.Y.S.2d 473 \(3d Dep't 2006\)](#).
- statute of limitations, [People v. Dickson, 133 A.D.2d 492, 519 N.Y.S.2d 419 \(3d Dep't 1987\)](#); see also, [People v. Parilla, 8 N.Y.3d 654, 838 N.Y.S.2d 824, 870 N.E.2d 142 \(2007\)](#).
- right to testify before a grand jury, [People v. Brooks, 201 A.D.2d 867, 610 N.Y.S.2d 898 \(4th Dep't 1994\)](#). See Ch 6, *Grand Jury Proceedings*.
- sufficiency of grand jury instructions, [People v. Miles, 237 A.D.2d 991, 656 N.Y.S.2d 994 \(4th Dep't 1997\)](#).
- sufficiency of evidence before the grand jury, [People v. Kazmarick, 52 N.Y.2d 322, 438 N.Y.S.2d 247, 420 N.E.2d 45 \(1981\)](#).
- use of hearsay at grand jury, [People v. Hansen, 95 N.Y.2d 227, 715 N.Y.S.2d 369, 738 N.E.2d 773 \(2000\)](#), see § 6:125, *Effect of guilty plea*.
- nonjurisdictional defects in grand jury presentation, [People v. Nelson, 173 A.D.2d 205, 569 N.Y.S.2d 86 \(1st Dep't 1991\)](#).
- nonjurisdictional defects in an indictment, [People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110, 384 N.E.2d 656 \(1978\)](#), such as a missing signature of the grand jury

foreperson, [People v. Stauber](#), 307 A.D.2d 544, 763 N.Y.S.2d 854 (3d Dep't 2003), or a count that charges one crime but alleges elements of a higher offense. [People v. Jennings](#), 60 A.D.3d 694, 874 N.Y.S.2d 553 (2d Dep't 2009), leave to appeal denied, 12 N.Y.3d 916, 884 N.Y.S.2d 697, 912 N.E.2d 1078 (2009).

- deficiencies in a jurisdictionally sufficient accusatory instrument, [People v. Beattie](#), 80 N.Y.2d 840, 587 N.Y.S.2d 585, 600 N.E.2d 216 (1992) (traffic infraction); [People v. Keizer](#), 100 N.Y.2d 114, 760 N.Y.S.2d 720, 790 N.E.2d 1149 (2003); [People v. Skya](#), 43 A.D.3d 1190, 842 N.Y.S.2d 93 (2d Dep't 2007).
- interstate agreement on detainers (extradition) violation relating to timely commencement and speedy trial, [CPL 580.20](#); [People v. Gooden](#), 151 A.D.2d 773, 542 N.Y.S.2d 757 (2d Dep't 1989); [People v. Zak](#), 242 A.D.2d 895, 662 N.Y.S.2d 654 (4th Dep't 1997).
- duplicitous counts, [People v. Bracewell](#), 26 A.D.3d 812, 810 N.Y.S.2d 273 (4th Dep't 2006).
- sufficiency of foundation on the accuracy of the blood alcohol test used to test defendant's blood alcohol, [People v. Campbell](#), 73 N.Y.2d 481, 541 N.Y.S.2d 756, 539 N.E.2d 584 (1989).
- destruction of contraband, [People v. Mayo](#), 45 A.D.3d 1361, 845 N.Y.S.2d 588 (4th Dep't 2007). See § 23:144, *Loss of witnesses or evidence*.
- right to a public trial, [People v. Marathon](#), 97 A.D.2d 650, 469 N.Y.S.2d 178 (3d Dep't 1983).
- excessive sentence claim following negotiated plea agreement, [People v. Lopez](#), 6 N.Y.3d 248, 811 N.Y.S.2d 623, 844 N.E.2d 1145 (2006).
- ineffective assistance of counsel that does not infect the guilty plea. (A plea, entered on the advice of competent counsel, waives a claim of prior ineffective assistance by a prior attorney where the second attorney knows the full measure of the asserted derelictions of the first attorney but nonetheless counsels acceptance of the guilty plea). [People v. Petgen](#), 55 N.Y.2d 529, 450 N.Y.S.2d 299, 435 N.E.2d 669 (1982). See § 2:92, *Ineffectiveness claim may be waived*.
- inadequate representation at the preliminary hearing, [People v. Harvey](#), 227 A.D.2d 972, 643 N.Y.S.2d 864 (4th Dep't 1996). See § 5:27, *Right to counsel*.
- severance, [People v. Shepphard](#), 177 A.D.2d 668, 576 N.Y.S.2d 368 (2d Dep't 1991). See Ch 14, *Codefendants and Accomplices*.
- trial rulings, [People v. Dehmler](#), 188 A.D.2d 1056, 591 N.Y.S.2d 918 (4th Dep't 1992).
- an allegedly improperly conducted psychiatric interview, [People v. Reiblein](#), 200 A.D.2d 281, 613 N.Y.S.2d 789 (3d Dep't 1994).
- denial of motion to file a late notice of intent to present psychiatric evidence, [CPL 250.10](#); [People v. Di Donato](#), 87 N.Y.2d 992, 642 N.Y.S.2d 616, 665 N.E.2d 186 (1996).
- denial of an expert for the defense, [County Law § 722-c](#); [People v. Simcox](#), 219 A.D.2d 869, 631 N.Y.S.2d 956 (4th Dep't 1995). See §§ 2:30 et seq., *Investigative and expert services*.
- venue, [People v. Spears](#), 106 A.D.2d 417, 482 N.Y.S.2d 340 (2d Dep't 1984). See § 15:73, *Venue*.
- geographical jurisdiction, [People v. De Alvarez](#), 59 A.D.3d 732, 873 N.Y.S.2d 724

[\(2d Dep't 2009\)](#), leave to appeal denied, [12 N.Y.3d 852](#), [881 N.Y.S.2d 664](#), [909 N.E.2d 587 \(2009\)](#). See [§ 15:72](#), *Jurisdiction*.

Practice Tip: Because a guilty plea waives appellate review of many meritorious issues, the defense may wish to go through with trial to preserve the claimed error. Yet, holding a full-fledged trial may be disadvantageous. Defense counsel should consider whether to stipulate to the facts that constitute the elements of the crime and have a nonjury trial, allowing the trial judge to make a finding of guilt. The defense may thereupon appeal the conviction and raise on appeal those issues that would otherwise have been waived. See [§ 18:309](#), *Regarding matters of procedure*.

- the validity of an order of protection issued in an earlier action, where defendant has pleaded guilty to criminal contempt, [People v. Konieczny](#), [2 N.Y.3d 569](#), [780 N.Y.S.2d 546](#), [813 N.E.2d 626 \(2004\)](#).
- whether the court erred in not conducting an inquiry under [CPL 180.50](#) upon reduction of charges from felony to misdemeanor. [People v. Lopez](#), [5 N.Y.3d 753](#), [801 N.Y.S.2d 245](#), [834 N.E.2d 1255 \(2005\)](#).
- denial of a free copy of transcript of a pretrial hearing, [People v. Soriano](#), [39 A.D.3d 290](#), [833 N.Y.S.2d 87 \(1st Dep't 2007\)](#).
- transactional immunity, where defendant pleaded guilty and afterwards obtained immunity. See [People v. Sobotker](#), [61 N.Y.2d 44](#), [471 N.Y.S.2d 78](#), [459 N.E.2d 187 \(1984\)](#). See [§ 18:182](#), *Transactional immunity and use immunity, compared*.
- whether the sentencing court should have conducted a hearing to determine ability to pay. [People v. Lanzara](#), [59 A.D.3d 936](#), [873 N.Y.S.2d 399 \(4th Dep't 2009\)](#), leave to appeal denied, [12 N.Y.3d 855](#), [881 N.Y.S.2d 667](#), [909 N.E.2d 590 \(2009\)](#).

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Chapter
17. The Guilty Plea
II. The Effect of a Guilty Plea[Summary](#)**§ 17:89. Effect of plea upon appeal—Issues surviving guilty plea****West's Key Number Digest**West's Key Number Digest, [Criminal Law](#)  [273.2\(1\)](#)

Certain rights are preserved despite a guilty plea, absent a specific waiver. See [§ 23:4](#), *Defendant's voluntary waiver of the right to appeal*. They include:

- a final order denying a motion to suppress. [CPL 710.70\(2\)](#); [People v. Fernandez](#), 67 N.Y.2d 686, 499 N.Y.S.2d 919, 490 N.E.2d 838 (1986). However, a defendant may specifically waive the right to appeal the suppression decision. [People v. Carter](#), 191 A.D.2d 640, 595 N.Y.S.2d 219 (2d Dep't 1993). And, pleading guilty prior to the decision on a suppression motion waives the issue.
- claims that are jurisdictional in nature or relate to "fundamental" matters. [People v. Boston](#), 75 N.Y.2d 585, 555 N.Y.S.2d 27, 554 N.E.2d 64 (1990), including waiver of indictment, [People v. Banville](#), 134 A.D.2d 116, 523 N.Y.S.2d 844 (2d Dep't 1988). See [§§ 3:23 et seq.](#), *Waiver of indictment*; [§ 18:317](#), *Exceptions to preservation requirement*. A guilty plea to a crime that is an equal or greater offense and not charged in the indictment is not a valid lesser included offense and is jurisdictionally defective. [People v. Castillo](#), 8 N.Y.3d 959, 836 N.Y.S.2d 505, 868 N.E.2d 185 (2007).
- constitutional speedy trial. [People v. Blakley](#), 34 N.Y.2d 311, 357 N.Y.S.2d 459, 313 N.E.2d 763 (1974); [People v. Romeo](#), 47 A.D.3d 954, 849 N.Y.S.2d 666 (2d Dep't 2008), *aff'd*, 12 N.Y.3d 51, 876 N.Y.S.2d 666, 904 N.E.2d 802 (2009), *cert. denied*, 130 S. Ct. 63, 175 L. Ed. 2d 24 (2009).
- preindictment delay. [People v. Fuller](#), 57 N.Y.2d 152, 455 N.Y.S.2d 253, 441 N.E.2d 563 (1982).
- mental incapacity to assist in one's own defense. [People v. Armlin](#), 37 N.Y.2d 167, 371 N.Y.S.2d 691, 332 N.E.2d 870 (1975).
- unconstitutionality of statute under which defendant is convicted. [People v. Lee](#), 58 N.Y.2d 491, 462 N.Y.S.2d 417, 448 N.E.2d 1328, 39 A.L.R.4th 661 (1983). However, the

interpretation or application of a statute is waived by a guilty plea. [People v. Bennett](#), 201 A.D.2d 440, 608 N.Y.S.2d 166 (1st Dep't 1994).

- legality of the sentence. [People v. Lynn](#), 28 N.Y.2d 196, 321 N.Y.S.2d 74, 269 N.E.2d 794 (1971).
- defendant's status as a predicate felon. [People v. Kilgore](#), 199 A.D.2d 1008, 608 N.Y.S.2d 12 (4th Dep't 1993); [People v. Fumai](#), 34 A.D.3d 831, 828 N.Y.S.2d 79 (2d Dep't 2006). See § 17:57, *Predicate and persistent felony offenders*.
- failure of the accusatory instrument to adequately charge a criminal offense (*i.e.*, jurisdictionally defective instrument). [People v. Case](#), 42 N.Y.2d 98, 396 N.Y.S.2d 841, 365 N.E.2d 872, 87 A.L.R.3d 77 (1977); [People v. Dreyden](#), 15 N.Y.3d 100, 2010 WL 2360610 (2010).
- procurement of the conviction based on an indictment supported solely by false evidence. [People v. Pelchat](#), 62 N.Y.2d 97, 476 N.Y.S.2d 79, 464 N.E.2d 447 (1984).
- prosecutorial misconduct so egregious that it was "repugnant to a sense of justice." [People v. Isaacson](#), 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).
- claim that the guilty plea was not knowingly and voluntarily made, if the claim was first presented to the trial court by either a motion to withdraw the plea, [CPL 220.60\(3\)](#), or a motion to vacate the judgment of conviction. [CPL 440.10](#); [People v. Lopez](#), 71 N.Y.2d 662, 529 N.Y.S.2d 465, 525 N.E.2d 5 (1988). See § 17:72, *Application to withdraw made to trial court*.
- ineffective assistance of counsel that vitiates the plea, although generally this issue should first be presented to the trial court through a motion made pursuant to [CPL 440.10](#). [People v. Gonzalez](#), 171 A.D.2d 413, 566 N.Y.S.2d 639 (1st Dep't 1991). See §§ 22:55 *et seq.*, *Ineffective assistance of counsel*. The reason for this procedure is that ineffective assistance of counsel often is not apparent on a review of the record, and an issue cannot be raised on appeal when it depends on evidence outside the record. Therefore, a 440.10 motion, a procedural device for challenging a judgment of conviction based on matters that may not have been developed on the record, will be made to develop the facts of the ineffectiveness claim. See §§ 22:32 *et seq.*, *Coram nobis petition*.
- right to be informed of the right to appeal, provided the defendant can show an appealable issue. [People v. Lynn](#), 28 N.Y.2d 196, 321 N.Y.S.2d 74, 269 N.E.2d 794 (1971).
- prosecution's failure to turn over favorable (*Brady*) material. [People v. Ortiz](#), 127 A.D.2d 305, 515 N.Y.S.2d 317 (3d Dep't 1987); [People v. Burney](#), 169 Misc. 2d 436, 642 N.Y.S.2d 990 (Sup 1996); *see also*, [People v. Delarosa](#), 48 A.D.3d 1098, 851 N.Y.S.2d 775 (4th Dep't 2008). See § 8:25, *Waiver of Brady violation upon guilty plea*.
- resubmission of charges to a grand jury after an indictment is dismissed or reduced, outside the time period provided in [CPL 210.20\(6\)](#), without court permission. [People v. Harper](#), 243 A.D.2d 581, 663 N.Y.S.2d 619 (2d Dep't 1997).
- whether a seated juror was grossly unqualified. [People v. Condes](#), 23 A.D.3d 1149, 805 N.Y.S.2d 753 (4th Dep't 2005).
- constitutional double jeopardy, [People v. Monroig](#), 17 A.D.3d 870, 793 N.Y.S.2d 268 (3d

[Dep't 2005](#)).

- whether sentences must be concurrent, [People v. Rosario, 26 A.D.3d 271, 810 N.Y.S.2d 55 \(1st Dep't 2006\)](#).

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Chapter
23. Appellate Practice
I. The Appellate Process, Generally

[Summary](#)

§ 23:6. Waiver of rights of appeal upon guilty plea—Defendant's voluntary waiver of the right to appeal—Issues subject to waiver

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Among the issues that may be waived by the defendant with the waiver of the right to appeal are the following:

- constitutional suppression issues, [People v. Kemp](#), 94 N.Y.2d 831, 703 N.Y.S.2d 59, 724 N.E.2d 754 (1999); [People v. Hayes](#), 169 A.D.2d 999, 565 N.Y.S.2d 276 (3d Dep't 1991).
- harsh and excessive sentencing, [People v. Lopez](#), 6 N.Y.3d 248, 811 N.Y.S.2d 623, 844 N.E.2d 1145 (2006); [People v. Hidalgo](#), 91 N.Y.2d 733, 675 N.Y.S.2d 327, 698 N.E.2d 46 (1998); [People v. Clow](#), 10 A.D.3d 803, 782 N.Y.S.2d 148 (3d Dep't 2004). This includes the appellate court's interest-of-justice jurisdiction. [People v. Smith](#), 55 A.D.3d 1409, 866 N.Y.S.2d 466 (4th Dep't 2008), leave to appeal denied, [11 N.Y.3d 930](#), 874 N.Y.S.2d 15, 902 N.E.2d 449 (2009).

Example: Waiver of appeal was invalid where the judge engaged in an inadequate advisement. Additionally, the waiver was not knowing, intelligent and voluntary as to the sentence because the judge failed to advise of the possible maximum term of incarceration. See [People v. Newman](#), 21 A.D.3d 1343, 801 N.Y.S.2d 649 (4th Dep't 2005); see also, [People v. Fortner](#), 23 A.D.3d 1058, 803 N.Y.S.2d 470 (4th Dep't 2005) (increased sentence for failure to appear in court may be raised on appeal where there was no discussion of it at the time of plea).

The severity of the sentence could be raised on appeal where waiver occurred before the court advised the defendant of the potential length of the sentence. [People v. Mack](#), 38 A.D.3d 1292, 832 N.Y.S.2d 709 (4th Dep't 2007); [People v. Mingo](#), 38 A.D.3d 1270, 832 N.Y.S.2d 721 (4th Dep't 2007).

- constitutional double jeopardy, [People v. Allen](#), 86 N.Y.2d 599, 635 N.Y.S.2d 139, 658

[N.E.2d 1012 \(1995\)](#); [People v. Muniz, 91 N.Y.2d 570, 673 N.Y.S.2d 358, 696 N.E.2d 182 \(1998\)](#). See Ch 17, *The Guilty Plea*.

- Youthful offender status. See [§ 20:87](#), *Appellate discretion to grant youthful offender status*.

Practice Tip: The waiver may be limited on the record. This might allow, for example, the issue of sentence severity to be raised on appeal. [People v. Cooper, 173 A.D.2d 632, 570 N.Y.S.2d 218 \(2d Dep't 1991\)](#); see also [People v. Taveras, 155 A.D.2d 131, 553 N.Y.S.2d 305 \(1st Dep't 1990\)](#) (suppression motion).

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Chapter
23. Appellate Practice
I. The Appellate Process, Generally

[Summary](#)

§ 23:7. Waiver of rights of appeal upon guilty plea—Defendant's voluntary waiver of the right to appeal—Issues that survive a general waiver

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Even when there has been a guilty plea and an appellate waiver, the defendant may raise certain issues on direct appeal notwithstanding that waiver. These include the following:

- constitutional right to a speedy trial, [People v. Seaberg](#), 74 N.Y.2d 1, 543 N.Y.S.2d 968, 541 N.E.2d 1022 (1989). *See* § 13:89, *Speedy trial as constitutional right*.
- the legality (as opposed to the harshness) of the sentence, [People v. Holley](#), 168 A.D.2d 992, 565 N.Y.S.2d 351 (4th Dep't 1990); [People v. Pabon](#), 224 A.D.2d 721, 638 N.Y.S.2d 707 (2d Dep't 1996); [People v. Sepulveda](#), 22 A.D.3d 407, 802 N.Y.S.2d 657 (1st Dep't 2005) (DNA fee); *see* [People v. Glynn](#), 72 A.D.3d 1351, 899 N.Y.S.2d 442 (3d Dep't 2010) (predicate felony).
- whether the sentence imposed penalized defendant for exercising his right to a trial. *See* [People v. Povoski](#), 55 A.D.3d 1221, 864 N.Y.S.2d 586 (4th Dep't 2008), leave to appeal denied, 11 N.Y.3d 929, 874 N.Y.S.2d 14, 902 N.E.2d 448 (2009).
- competency to stand trial, [People v. Green](#), 75 N.Y.2d 902, 554 N.Y.S.2d 821, 553 N.E.2d 1331 (1990).
- jurisdictional issues concerning waiver of indictment, [People v. Banville](#), 134 A.D.2d 116, 523 N.Y.S.2d 844 (2d Dep't 1988); [People v. Sterling](#), 27 A.D.3d 950, 811 N.Y.S.2d 212 (3d Dep't 2006). *See* § 3:23, *Waiver of indictment*.
- whether a plea was knowingly, intelligently and voluntarily entered, [People v. Clinton](#), 179 A.D.2d 670, 579 N.Y.S.2d 895 (2d Dep't 1992).
- whether the defendant received effective assistance of counsel, *see* [People v. Polanco](#), 216 A.D.2d 957, 629 N.Y.S.2d 583 (4th Dep't 1995); *cf.* [People v. Conyers](#), 227 A.D.2d 793, 642 N.Y.S.2d 450 (3d Dep't 1996); [People v. Mingués](#), 256 A.D.2d 657, 681 N.Y.S.2d 802 (3d Dep't 1998); [People v. McCollum](#), 54 A.D.3d 690, 863 N.Y.S.2d 699 (2d Dep't 2008); [People v. Williams](#), 72 A.D.3d 1347, 899 N.Y.S.2d 438 (3d Dep't 2010).
- delay in sentencing, [People v. Campbell](#), 97 N.Y.2d 532, 743 N.Y.S.2d 396, 769 N.E.2d

[1288 \(2002\)](#), although defendant should preserve the issue by moving to dismiss the indictment or otherwise objecting to the delay. [People v. Dissottle, 68 A.D.3d 1542, 893 N.Y.S.2d 649 \(3d Dep't 2009\)](#), leave to appeal denied, [14 N.Y.3d 799, 899 N.Y.S.2d 133, 925 N.E.2d 937 \(2010\)](#).

While a defendant may waive the right to appeal an adverse ruling on a suppression motion, a general waiver, without specifying that the guilty plea is conditioned upon waiver of the statutory right to review the ruling, is invalid. [People v. Woody, 240 A.D.2d 770, 660 N.Y.S.2d 31 \(2d Dep't 1997\)](#); [People v. Dongo, 244 A.D.2d 353, 663 N.Y.S.2d 878 \(2d Dep't 1997\)](#). *See § 23:5, Certain issues survive plea.*

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