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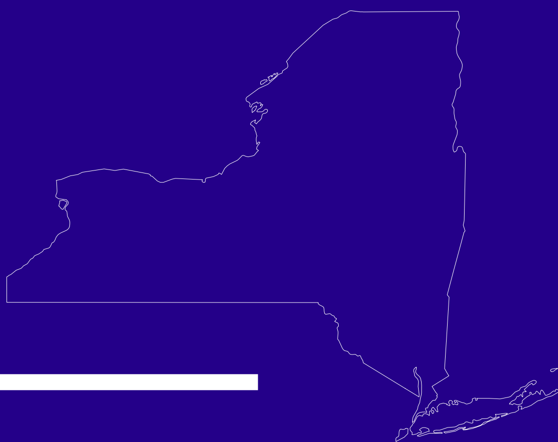

THE RULEBOOK

The Definitive Quick Reference Guide for New York Criminal Law Practitioners

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The Rulebook

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2020 Edition

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Contents

Preface vii
Declaration of Principles ix
Rules 1
Index 335

Preface

A lawyer's core mission is to read the law, tell people what the law is, and let them act upon it. It follows that the most effective lawyers usually are those who help the court by providing the tools with which to reach the correct result. Frequently, if not always, those "tools" include a clear, concise, and accurate statement of the relevant law.

This book is a collection of brief statements of common principles of law accumulated and curated during years of appellate practice. The collection serves four basic purposes.

First, there is an instant gratification element to the collection. It was not intended to be and should not be used a substitute for independent legal research. But it is a practical and useful quick reference guide for well over 1,000 common points in New York criminal law.

Second, although it is not intended to be a *substitute* for legal research, it is an excellent *starting point* for study. The pandemic during which this book was conceived saw efficiency in the practice of law become more important than ever. And nothing helps efficiency like a tool that shortcuts much of the time-consuming inefficiency in determining where and how to begin to refine understanding of even common concepts in the law.

Third, and more consistent with the circumstances from which it arose, the collection is a helpful and, arguably, essential tool for the legal writer. Methods now vary, but most practitioners and courts tend to use a variant of the "IRAC" method—issue, rule, analysis, and conclusion—in briefs and opinions. Reinventing the "wheel" with respect to a common rule of law is a wasteful and unnecessary practice. This book collects and categorizes those rules for repeated and consistent use. Entires such as those for *Brady* (page 30), Evidence (page 92), Harmless Error (pages 127), Ineffective Assistance of Counsel (page 142), Legal Sufficiency of the Evidence (page 182), *Molineux* (page 198), and Weight of the Evidence (page 329) have been used repeatedly and effectively in briefs and opinions to articulate the legal rule that governs a particular issue.

Fourth, most generally but perhaps most importantly, the collection is intended to help lawyers satisfy one of the most important axioms in the practice of law: if you make it easy for the court, the court makes it easy for you.

Buffalo, New York
December 2020

Declaration of Principles

This publication is current through December 2020 and is designed to provide accurate and authoritative information with regard to the subject matters covered. It has been prepared and circulated with the caveat that neither the author nor the publisher is engaged in rendering legal or other professional services. If legal advice or other professional assistance is required, then the services of a competent professional person should be sought.

The Rulebook

A

▶**ABORTION:** *See* Penal Law former §§ 125.40, 125.45, 125.50, 125.55, and 125.60. All crimes related to abortion were repealed in 2018 (*see* L 2018, ch 1, § 5).

▶**ACCESSORIAL LIABILITY:** "'Accessorial liability requires only that [the] defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense'" (*People v Trinidad*, 107 AD3d 1432, 1433 [4th Dept 2013], *lv denied* 21 NY3d 1046 [2013]; *see* Penal Law § 20.00).

▶**ACCOMPLICE:** "'An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated [either] in … [t]he offense charged[] or [in] [a]n offense based upon the same or some of the same facts or conduct [that] constitute the offense charged' (CPL 60.22 [2] [a], [b]; *see People v Berger*, 52 NY2d 214, 219 [1981]). 'If the undisputed evidence establishes that a witness is an accomplice, [then] the jury must be so instructed but, if different inferences may reasonably be drawn from the proof regarding complicity, according to the statutory definition, the question should be left to the jury for its determination' (*People v Basch*, 36 NY2d 154, 157 [1975])" (*People v Kaminski*, 90 AD3d 1692, 1692 [4th Dept 2011], *lv denied* 20 NY3d 1100 [2013]; *see People v McPherson*, 70 AD3d 1353, 1354 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010]).

Generally: "An accomplice is 'a witness in a criminal action who, according to the evidence adduced in such action, may reasonably be considered to have participated in: (a) [t]he offense charged; or (b) [a]n offense based upon the same or some of the same facts or conduct which constitute the offense charged' (CPL 60.22 [2]). Under [this state's] criminal law, '[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense' (CPL 60.22 [1]). Testimony of such a witness, marked by obvious self-interest, carries the potential for falsification to avoid prosecution (*People v Sweet*, 78 NY2d 263, 267 [1991] ['The law recognizes that accomplice testimony is inherently untrustworthy because those charged with a crime often seek to escape the consequences and curry favor with officials by implicating others']; *People v Berger*, 52 NY2d 214, 219 [1981] ['Courts have thus exercised the utmost caution in dealing

with accomplice testimony, especially when the testimony is exchanged for immunity or other favorable prosecutorial consideration']; *People v Cona*, 49 NY2d 26, 35-36 [1979] ['The accomplice corroboration rule is premised upon a legislative determination that the testimony of individuals who may themselves be criminally liable is inherently suspect. This is deemed to be true because such individuals may be subject to pressures impelling them to color testimony in order to protect themselves by belittling the actual extent of their involvement in the criminal enterprise at the expense of others']). Indeed, '[t]he common law traditionally has viewed criminal accomplice testimony with a "suspicious eye"' (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, CPL 60.22)" (*People v Sage*, 23 NY3d 16, 23-24 [2014]).

Jury Instruction: "Where the court determines on the evidence that a witness comes within the meaning of CPL 60.22 (2), the witness is an accomplice as a matter of law, and the court must instruct the jury that the witness is an accomplice and subject to the statutory corroboration requirement (*see Sweet*, 78 NY2d at 268; *People v Minarich*, 46 NY2d 970, 971 [1979]; *People v Beaudet*, 32 NY2d 371, 378 [1973]; *People v Jenner*, 29 NY2d 695 [1971]; *see also* CJI2d [NY] Accomplice As A Matter of Law [rev January 2011], available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Accomplice_law.pdf ['Under (this state's) law, (the witness) is an accomplice because there is evidence that he/she participated in (and was convicted of) a crime based upon conduct involved in the allegations here against the defendant']). In a case where the court concludes that a factual dispute exists as to whether the witness is an accomplice under the statute, the factual question is left for the jury to resolve (*see People v Vataj*, 69 NY2d 985, 987 [1987]; *People v Dorler*, 53 NY2d 831, 833 [1981]; *People v Arce*, 42 NY2d 179, 186 [1977]; *People v Basch*, 36 NY2d 154, 157 [1975]; *People v Wheatman*, 31 NY2d 12, 23 [1972]; *cf. People v Jones*, 73 NY2d 902, 903 [1989] [holding that no accomplice-in-fact instruction was warranted because there was no evidence from which it could be reasonably inferred that the alleged accomplice had participated in the planning or execution of the crimes]). The court must instruct the jury to apply the corroboration requirement only if the jury makes a factual finding that the witness is an accomplice in fact (*see* CJI2d[NY] Accomplice As A Question of Fact [rev January 2011], available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Accomplice_Fact.pdf, *see also* CPL 60.22)" (*People v Sage*, 23 NY3d 16, 23-24 [2014]).

Matter of Fact/Matter of Law: An accomplice as a matter of law is one with respect to whom a jury could reach no other conclusion but that he participated in the offense (*see People v Caban*, 5 NY3d 143, 153 [2005]), while the question whether one is an accomplice as a matter of fact is submitted to the jury when there are conflicting inferences as to whether that witness was an accomplice (*see People v Kaminski*, 90 AD3d 1692, 1692 [4th Dept 2011], *lv denied* 20 NY3d 1100 [2013]).

Matter of Law; Factual Findings: The Court of Appeals has determined that "a witness is an accomplice as a matter of law where ... the witness pleads

guilty to aiding the defendant in the commission of the crime (*Sweet*, 78 NY2d at 268), or otherwise confirms participation or assisting in the charged crime (*Minarich*, 46 NY2d at 971; *Beaudet*, 32 NY2d at 377-378; *Jenner*, 29 NY2d at 696)" (*People v Sage*, 23 NY3d 16, 23-24 [2014]).

▸**ACCOMPLICE IN FACT:** A "witness may be found to be an accomplice in fact where there are factual disputes as to the witness's participation or intent, such that 'different inferences may reasonably be drawn' from the evidence as to the witness's role as an accomplice (*Basch*, 36 NY2d at 157; *cf. Jones*, 73 NY2d at 903). The factfinder must choose which of the competing inferences to accept. For example, [the Court of Appeals has] held that whether a witness is an accomplice is an issue of fact where direct proof [is] lacking as to the witness's participation in the crime (*Basch*, 36 NY2d at 158). This fact-sensitive determination depends on the evidence presented at trial as to the crime charged (*see e.g. id.* at 157-159; *see also Vataj*, 69 NY2d at 987). The defendant bears the burden of establishing that [a] witness is an accomplice (*see e.g. Basch*, 36 NY2d at 159; *see also People v Rossi*, 11 NY2d 379, 383 [1962])" (*People v Sage*, 23 NY3d 16, 23-24 [2014]).

▸**ACCOMPLICE LIABILITY:** "Penal Law § 20.00 provides that when a principal commits a crime, the principal's accomplice may be held liable where the accomplice[,] 'acting with the mental culpability required for the commission [of the crime] ... solicits, requests, commands, importunes, or intentionally aids [the principal] to engage in [the commission of the crime].' In *People v La Belle* (18 NY2d 405 [1966]), [the Court of Appeals] held that to be liable under an acting in concert theory, the accomplice and principal must share a 'community of purpose' (*id.* at 412)" (*People v Scott*, 25 NY3d 1107, 1109-1110 [2015]).

▸**ACCOMPLICE TESTIMONY:** Pursuant to CPL 60.22 (1), "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of the crime." The threshold that must be met for proof to constitute "corroborative evidence" is not high; it is settled that "'"[t]he corroborative evidence need not show the commission of the crime ... It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth"' (*People v Reome*, 15 NY3d 188, 192-193 [2010], quoting *People v Dixon*, 231 NY 111, 116 [1921]). '[E]vidence that [the] defendant was present at the scene of the crime or was with the accomplices shortly before or after the crime can, under certain circumstances, provide the necessary corroboration of the accomplices' testimony' (*People v Bolden*, 161 AD2d 1126, 1126-1127 [4th Dept 1990], *lv denied* 76 NY2d 853 [1990])" (*People v Highsmith*, 124 AD3d 1363, 1363 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

▸**ACCUSATORY INSTRUMENT:** *See* CPL 1.20 (1), which defines an "accusatory instrument" as "an indictment, an indictment ordered reduced pursuant to [CPL 210.20 (1-a)], an information, a simplified information, a prosecutor's

information, a superior court information, a misdemeanor complaint or a felony complaint." "Every accusatory instrument, regardless of the person designated therein as accuser, constitutes an accusation on behalf of the state as plaintiff and must be entitled 'the people of the state of New York' against a designated person, known as the defendant" (CPL 210.20 [1-a]). *See* entries for FELONY COMPLAINT, INDICTMENT, INFORMATION, MISDEMEANOR COMPLAINT, MISDEMEANOR INFORMATION, SIMPLIFIED TRAFFIC INFORMATION, and SUPERIOR COURT INFORMATION.

Adequacy of Misdemeanor Complaint: "A misdemeanor complaint is adequate if it provides the defendant 'with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy' (*Dreyden*, 15 NY3d at 103, citing *Kalin*, 12 NY3d at 231-232; *Casey*, 95 NY2d at 366). As [the Court of Appeals has] said, the instrument's factual allegations must establish '"reasonable cause"' to believe that [the defendant] committed the charged offense (*Kalin*, 12 NY3d at 228)" (*People v Dumay*, 23 NY3d 518, 522 [2014]).

Jurisdictional Predicate: "'A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' (*People v Dreyden*, 15 NY3d 100, 103 [2010], citing *People v Case*, 42 NY2d 98, 99 [1977]; *People v Hansen*, 95 NY2d 227, 230 [2000])" (*People v Dumay*, 23 NY3d 518, 522 [2014]).

Misdemeanor Accusatory Instrument: "Under the CPL, a court must use one of two instruments to take jurisdiction over a defendant accused of a misdemeanor: a misdemeanor complaint or a misdemeanor information. A misdemeanor complaint authorizes jurisdiction over an accused, and can commence a criminal action and allow the state to jail the defendant for up to five days, but it cannot serve as a basis for prosecution, unless the defendant waives prosecution by information (*see* CPL 100.10 [4]; 120.20 [1] [a]; 170.65 [1], [3]; 170.70; *People v Kalin*, 12 NY3d 225, 228 [2009]). Concomitantly, unless waived, a valid information is a jurisdictional requirement for a misdemeanor prosecution (*see* CPL 100.10 [4]; *Kalin*, 12 NY3d at 228).

"A misdemeanor information must set forth 'nonhearsay allegations which, if true, establish every element of the offense charged and the defendant's commission thereof' (*Kalin*, 12 NY3d at 228-229, citing *People v Henderson*, 92 NY2d 677, 679 [1999]; CPL 100.40 [1] [c]). [The Court of Appeals has] called this 'the prima facie case requirement' (*Kalin*, 12 NY3d at 229). An information serves the same role in a misdemeanor prosecution as a grand jury indictment does in a felony case: it ensures that a legally sufficient case can be made against the defendant (*see People v Alejandro*, 70 NY2d 133, 138-139 [1987]). A misdemeanor complaint, in comparison, need only set forth facts that establish reasonable cause to believe that the defendant committed the charged offense (*see Kalin*, 12 NY3d at 228)" (*People v Dumay*, 23 NY3d 518, 522 [2014]).

Misdemeanor Accusatory Instrument; Facial Sufficiency: "'"A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a

criminal prosecution"' (*People v Dreyden*, 15 NY3d 100, 103 [2010], quoting *People v Case*, 42 NY2d 98, 99 [1977]). To meet the jurisdictional standard for facial sufficiency, a misdemeanor complaint 'need only set forth facts that establish reasonable cause to believe that the defendant committed the charged offense' (*People v Dumay*, 23 NY3d 518, 522 [2014]; *see People v Kalin*, 12 NY3d 225, 228 [2009]; *People v Dumas*, 68 NY2d 729, 731 [1986]). 'In addition to [satisfying] the reasonable cause requirement, an information,' unlike a complaint, 'must also set forth "non-hearsay allegations which, if true, establish every element of the offense charged and the defendant's commission thereof"' (*Kalin*, 12 NY3d at 228-229, quoting *People v Henderson*, 92 NY2d 677, 679 [1999]; *see also* CPL 100.15 [3]; CPL 100.40 [1] [c]; CPL 100.40 [4] [b])" (*People v Smalls*, 26 NY3d 1064, 1066 [2015]; *see People v Ocasio*, 28 NY3d 178, 180 [2016]).

Misdemeanor Accusatory Instrument; Validity and Sufficiency: "'A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' (*People v Case*, 42 NY2d 98, 99 [1977]). [Where a] [d]efendant waive[s] prosecution by information . . . , the sufficiency of the accusatory instrument is assessed under the standard applicable to a misdemeanor complaint. Under that standard, the complaint must allege 'facts of an evidentiary character supporting or tending to support the charges' (CPL 100.15 [3]), and the factual allegations must 'provide reasonable cause to believe that the defendant committed the offense charged' (CPL 100.40 [4] [b]; *see People v Dumay*, 23 NY3d 518, 522 [2014])" (*People v Afilal*, 26 NY3d 1050, 1051-1052 [2015]).

Misdemeanor Accusatory Instrument; Waiver of Information: "A defendant may knowingly and intelligently waive prosecution by misdemeanor information, as demonstrated by an affirmative act (*see People v Casey*, 95 NY2d 354, 359 [2000]; *People v Weinberg*, 34 NY2d 429, 431 [1974]). When the defendant waives prosecution by information, he or she declines the protection of the statute, and the accusatory instrument must only satisfy the reasonable cause requirement (*see* CPL 170.65 [1], [3]; *Kalin*, 12 NY3d at 228)" (*People v Dumay*, 23 NY3d 518, 522 [2014]).

▶**ACTING IN CONCERT:** "'To establish an acting-in-concert theory . . . , the People must prove not only that the defendant shared the requisite mens rea for the underlying crime but also that [the] defendant, in furtherance of the crime, solicited, requested, commanded, importuned or intentionally aided the principal in the commission of the crime . . . The key to [such an] analysis is whether a defendant intentionally and directly assisted in achieving the ultimate goal of the enterprise . . .' (*People v Bello*, 92 NY2d 523, 526 [1998]; *see* Penal Law § 20.00)" (*People v Davila*, 124 AD3d 1233, 1234 [4th Dept 2015]).

▶**ACTUS REUS:** "The actus reus of the crime is '"[t]he wrongful deed that comprises the physical components of a crime"' (*People v Rosas*, 8 NY3d 493, 496 n 2 [2007], quoting Black's Law Dictionary 39 [8th ed 2004])" (*People v Couser*, 28 NY3d 368, 376 n 3 [2016]).

▶ADJOURNMENT:

Discretion: "Whether to grant an adjournment is within [the trial court's] discretion (*see Matter of Antony M.*, 63 NY2d 270, 283-284 [1984]; *People v Singleton*, 41 NY2d 402, 405 [1977])" (*People v Spears*, 24 NY3d 1057, 1059 [2014]).

Discretion: The "granting of an adjournment for any purpose is a matter of discretion for the trial court" (*People v Singleton*, 41 NY2d 402, 405 [1977]; *see People v Spears*, 64 NY2d 698, 699-700 [1984]; *People v Green*, 74 AD3d 1899, 1900-1901 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]). A "'court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice'" (*People v Aikey*, 94 AD3d 1485, 1486 [4th Dept 2012], *lv denied* 19 NY3d 956 [2012]). But, "in particular situations, when the protection of fundamental rights has been involved in requests for adjournments, that discretionary power has been more narrowly construed" (*Spears*, 64 NY2d at 700).

Eve of Trial: The "granting of an adjournment for any purpose is a matter of discretion for the trial court" (*People v Singleton*, 41 NY2d 402, 405 [1977]; *see People v Spears*, 64 NY2d 698, 699-700 [1984]; *Matter of Anthony M.*, 63 NY2d 270, 283 [1984]; *People v Green*, 74 AD3d 1899, 1900-1901 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]), and a "'court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice'" (*People v Aikey*, 94 AD3d 1485, 1486 [4th Dept 2012], *lv denied* 19 NY3d 956 [2012]). A request for an adjournment on the eve of trial is subject to strong "public policy considerations against delay . . . , and [under such circumstances] it is incumbent upon the defendant to demonstrate that the requested adjournment has been necessitated by forces beyond his [or her] control and is not simply a dilatory tactic" (*People v Arroyave*, 49 NY2d 264, 271-272 [1980]).

▶ADOPTIVE ADMISSION: "[A]ccusatory statements, not denied, may be admitted against the one accused, as admissions, but only when the accusation was 'fully known and fully understood' by defendant . . . , and when defendant was '"at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent"' (*People v Allen,* 300 NY 222, 225 [1949], quoting *Koerner,* 154 NY at 374 and *People v Conrow,* 200 NY 356, 367 [1911]; *see People v Campney,* 94 NY2d 307, 311-312 [1999]).

"The circumstances must be 'such as would properly or naturally call for some action or reply from [persons] similarly situated' (*Koerner,* 154 NY at 374). Silence is not assent 'unless the statements were such as to properly call for a response' (*id.*). Application of the rule in criminal cases 'is to be applied with careful discrimination' as '"[r]eally it is [the] most dangerous evidence"' (*id.*). As the [Court of Appeals] explained more than a century ago, this evidence 'should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some assertion made to a party with respect to [the party's] rights, in which, by silence, [the party] acquiesces' (*id.* at 374-375). Where the circumstances are such that an inference of acquiescence cannot be

drawn, as in where the evidence belies just such inference, the statements do not fall within the rule and their admission is error (*Conrow,* 200 NY at 367, citing *People v Kennedy*, 164 NY 449 [1900], *People v Smith*, 172 NY 210 [1902], and *People v Cascone,* 185 NY 317 [1906])" (*People v Vining*, 28 NY3d 686, 695-696 [2017] [Rivera, J., dissenting]). *See* entry for EVIDENCE (Hearsay Rule; Exceptions).

▶**ADVERSE INFERENCE CHARGE:** "An adverse inference charge mitigates the harm done to defendant by the loss of the evidence, without terminating the prosecution" (*People v Handy*, 20 NY3d 663, 669 [2013]). In *Handy* (20 NY3d 663), the Court of Appeals "first held [an adverse inference] a charge to be mandatory upon request 'when a defendant in a criminal case, acting with due diligence, demand[ed] evidence ... reasonably likely to be of material importance, and that evidence ha[d] been destroyed by the State'" (*People v Blake*, 24 NY3d 78, 82 [2014], quoting *Handy*, 20 NY3d at 665; *see People v Viruet*, 29 NY3d 527 [2017]). *See* entry for JURY INSTRUCTIONS (Adverse Inference Instruction; Generally).

▶**ADVOCATE-WITNESS RULE:** "Pursuant to [the advocate-witness] rule, a lawyer must withdraw from representation when it becomes apparent that she must testify on behalf of her own client (former Code of Professional Responsibility DR 5-102 [a] [22 NYCRR 1200.21 (a)]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [a] [current, similar provision]; *see also People v Berroa*, 99 NY2d 134, 140 [2002] [an attorney 'should not continue to serve as an advocate when it is obvious that the lawyer will be called as a witness on behalf of the client']). The rule seeks to avoid 'the unseemly circumstance of placing an attorney in a position in which he must argue the credibility of his own testimony' (*Ellis v Broome Cnty*, 183 AD2d 861, 862 [3d Dept 1984]), which may 'confuse the fact-finder and impair the fairness of the trial' (*People v Townsley*, 20 NY3d 294, 299 [2012])" (*People v Ortiz*, 26 NY3d 430, 437-438 [2015]).

Generally: "The advocate-witness rule ... generally requires the lawyer to withdraw from employment when it appears that he or [she or] a member of his [or her] firm will be called to testify regarding a disputed issue of fact.... Thus, once representation is undertaken, the lawyer must withdraw as advocate if ... it appears that he [or she] will be called as a witness to testify for the adverse party, where his [or her] testimony may be prejudicial to the client he [or she] is representing. These proscriptions also apply to the prosecuting attorney. If the prosecutor will be called as a witness for the People, to testify to a disputed material issue, [then] he [or she] should be disqualified from trying the case. Similarly, if it appears that the court will allow the defense to call the prosecutor as a witness, and that the prosecutor will testify adversely to the People, [then] the prosecutor should be disqualified" (*People v Paperno*, 54 NY2d 294, 299-300 [1981]).

▶**AFFIDAVIT OF ERRORS:** In a criminal proceeding, "CPL 460.10 requires a defendant who was convicted in a local court, which is not designated by law as a court of record and did not have a court stenographer present during the proceedings, to submit an affidavit of errors in order to take an appeal to the intermediate appellate court" (*People v Smith*, 27 NY3d 643, 645-646 [2016]).

▶**AFFIRMATIVE DEFENSE:** *See* Penal Law article 40 (establishing duress, entrapment, renunciation, and mental disease or defect as affirmative defenses).

Burden of Proof: Penal Law § 25.00 (2) provides that, "[w]hen a defense declared by statute to be an 'affirmative defense' is raised at trial, the defendant has the burden of establishing such defense by a preponderance of the evidence." *See* entry for PREPONDERANCE OF THE EVIDENCE. *Compare* entry for DEFENSE.

Jury Instruction: "In judging whether to accede to a defendant's request to charge an affirmative defense, a court is bound to view the evidence in the light most favorable to the defendant (*People v Butts*, 72 NY2d 746, 750 [1988]), an exercise understood to be incompatible with weighing the evidence to resolve competing inferences (*see id.*). The charge must be given if there is evidence reasonably supportive of the defense, even if there is other evidence which, if credited, would negate it (*id.*)" (*People v McKenzie*, 19 NY3d 463, 466 [2012]).

▶**AGENCY DEFENSE:** "The 'agency' doctrine [is] premised on the concept that a 'person who acts solely as the agent of a buyer in procuring drugs for the buyer is not guilty of selling the drug to the buyer, or of possessing it with intent to sell it to the buyer' (William C. Donnino, Practice Commentary, McKinney's Cons. Laws of NY, Book 39, Penal Law § 220.00 at 33)" (*People v Watson*, 20 NY3d 182, 185-186 [2012]; *see People v Lam Lek Chong*, 45 NY2d 64, 73-74 [1978], *cert denied* 439 US 935). *See* entry for CRIMINAL SALE OF A CONTROLLED SUBSTANCE (Sale; Agency Defense) for a comprehensive explanation of this defense.

Criminal Facilitation: An agency defense may not be advanced as a defense to a charge of criminal facilitation (*see People v Watson*, 20 NY3d 182, 189 [2012]).

Jury Instruction: "A defendant is entitled to a jury charge on the agency defense where 'there is some reasonable view of the evidence that the defendant acted as a mere instrumentality of the buyer'" (*People v Echevarria*, 21 NY3d 1, 20 [2013], quoting *People v Roche*, 45 NY2d 78, 86 [1978] [internal quotation marks omitted]; *see People v Valentin*, 29 NY3d 150, 156 [2017]; *People v Williams*, 21 NY3d 932, 934 [2013]).

▶***ALFINITO* HEARING:** Such a hearing determines whether an affiant in a search warrant application spoke truthfully (*People v Alfinito*, 16 NY2d 181 [1965]). The burden rests with the defendant, and the preponderance of the evidence standard applies (*see People v Solimine*, 18 NY2d 477, 479 [1966]; *Franks v Delaware*, 438 US 154 [1978]). *See* entry for PREPONDERANCE OF THE EVIDENCE.

▶***ALFORD* PLEA:** *See* entries for PLEA (*Alford* Plea).

▶**ALIBI:** An alibi is "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time" (Black's Law Dictionary 78 [8th ed 2004]). CPL 250.20 contains notice requirements with respect to an alibi defense. "While not an affirmative

defense, neither is alibi expressly included in the Penal Law as a 'defense' which the People must disprove beyond a reasonable doubt (*see People v O'Neill,* 79 AD2d 429, 431*;* Penal Law, § 25.00, subd 1; Fisch, New York Evidence [2d ed], § 239). Rather, it is simply evidence that will require an acquittal, if, when all the evidence is considered, a reasonable doubt is raised as to defendant's guilt (*see People v Elmore,* 277 NY 397, 405-406; *People v Barbato,* 254 NY 170, 178-179)" (*People v Victor*, 62 NY2d 374, 377 [1984]).

▶***ALLEN*** **CHARGE:** Refers to *Allen v United States* (164 US 492 [1896]), which is the touchstone for modern jurisprudence with respect to a court's instructions in attempting to break a deadlock within a deliberating jury. *See* entries for DYNAMITE INSTRUCTION and JURY INSTRUCTIONS (Deadlock Instruction).

▶***ALLEYNE*****:** Through *Alleyne v United States* (133 S Ct 2151 [2013]), the United States Supreme Court applied the *Apprendi* rule (*Apprendi v New Jersey*, 530 US 466 [2000]) to instances in which a prior conviction increases the *minimum* sentence to which the defendant is subject with respect to an instant conviction (*see People v Prindle*, 29 NY3d 463 [2017]). *See also* entries for *APPRENDI* and SENTENCE (Predicate Felony Offender; Enhancement).

▶***ANTOMMARCHI*** **RIGHT:** "[A] defendant has a fundamental right to be present during any material stage of the trial" (*People v Antommarchi*, 80 NY2d 247, 250 [1992]; *see* CPL 260.20).

Voir Dire; Early Stage: "[A] trial court's consideration of a prospective juror's request to be excused, which is made before the commencement of formal voir dire, is not a material stage of the trial proceedings and the defendant's presence is therefore not required (*see People v Velasco*, 77 NY2d 469, 473 [1991])" (*People v King*, 27 NY3d 147, 156 [2016]).

Waiver: The Court of Appeals has "repeatedly held that a lawyer may waive the *Antommarchi* right of his or her client (*People v Velasquez*, 1 NY3d 44, 47-50 [2003]; *People v Keen*, 94 NY2d 533, 538-539 [2000]; *see also People v Vargas*, 88 NY2d 363, 376 [because sidebar presence is a statutory, not a constitutional right, 'th(e) Court has been more flexible regarding the acceptable form of voluntary waivers by defendants and their lawyers'])" (*People v Flinn*, 22 NY3d 599, 602 [2014]).

▶***APONTE*** **HEARING:** Such a hearing determines whether a defendant confined to a mental institution is competent to bring a posttrial motion (*People v Aponte*, 28 NY2d 343 [1971]).

▶**APPEAL AND ERROR:**

Appealability: "'"[N]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute"' (*People v Lovett*, 25 NY3d 1088, 1090 [2015], quoting *People v Pagan*, 19 NY3d 368, 370 [2012]; *see* NY Const, art VI, § 3 [b]; *People v Bautista,* 7 NY3d 838, 838-839 [2006]; *People v Hernandez,* 98 NY2d 8, 10 [2002]; *People v De Jesus,* 54 NY2d 447, 449 [1981]; *People v Zerillo,* 200 NY 443, 446 [1911])" (*Matter of 38 Warrants Directed to*

Facebook, Inc., 29 NY3d 231, 242 [2017]). *See* CPL articles 450, 460, and 470). *See also* entry for APPELLATE PROCEDURE (Statutory Rights).

Appealability; Order Denying Motion to Quash Search Warrant: "No provision of the Criminal Procedure Law articles that govern appeals—which are among '"the most highly structured and highly particularized articles of procedure"' (*Hernandez*, 98 NY2d at 10, quoting *People v Laing*, 79 NY2d 166, 171 [1992])—authorizes an appeal to either an intermediate appellate court or to [the Court of Appeals] from an order denying a motion to quash or vacate a search warrant (*see* CPL art 450; CPL 470.60). Moreover, no civil appeal may be brought from an order entered in a criminal action or proceeding (*see* NY Const, art VI, § 3[b]; CPLR 5601; CPL 450.90).

"Consequently, [it has been] held for decades that 'no appeal lies from [an] order denying ... [an] application to vacate a search warrant ... as this is an order in a criminal [case], [and] an appeal from [such an order] is not provided for' by statute (*Matter of Police Benevolent Assn. of N.Y. State Police v Gagliardi*, 9 NY2d 803, 803-804 [1961] [emphasis added]; *see also Matter of Abe A.*, 56 NY2d 288, 293 [1982])" (*Matter of 381 Search Warrants Directed to Facebook, Inc.*, 29 NY3d 231, 242-243[2017]).

Appealability; Order Denying Motion to Quash Subpoena: Dissimilar to an order denying an application to vacate a search warrant, "a motion to quash a *subpoena* issued prior to the commencement of a criminal action, even if related to a criminal investigation, 'is civil by nature' (*Matter of Abrams [John Anonymous],* 62 NY2d 183, 192 [1984]; *see Matter of Newsday, Inc.,* 3 NY3d 651, 652 [2004]; *People v Santos,* 64 NY2d 702, 704 [1984]). Thus, an order resolving a motion to quash such a subpoena is a final and appealable order in a special proceeding that is 'not subject to the rule restricting direct appellate review of orders in criminal proceedings' (*Matter of Abrams,* 62 NY2d at 192; *see Matter of Newsday,* 3 NY3d at 651)" (*Matter of 381 Search Warrants Directed to Facebook, Inc.*, 29 NY3d 231, 243 [2017] [footnote omitted]).

Appeal Waiver: *See* entries for APPEAL AND ERROR (Waiver).

Change in Law: "'[C]ases on direct appeal are generally decided in accordance with the law as it exists at the time the appellate decision is made' (*People v Jean-Baptiste*, 11 NY3d 539, 542 [2008] [citation omitted])" (*People v Lewis*, 23 NY3d 179, 189 [2014]; *see People v Varenga*, 26 NY3d 529, 535 [2015]).

Denial of Leave; Precedential Value: Denial of a motion for leave to appeal is not equivalent to an affirmance and has no precedential value (*see Matter of Marchant v Mead-Morrison Mfg. Co.*, 252 NY 284, 297-298 [1929]).

Harmless Error: *See* entries for HARMLESS ERROR.

Late Notice of Appeal: "Most of the common-law, coram nobis types of relief were abrogated when the Criminal Procedure Law was enacted (*see People v Corso*, 40 NY2d 578, 580 [1976], citing CPL 440.10). A modified form of *Montgomery*

relief[, that is, a writ of error coram nobis based on the loss of the right to an appeal caused by deficient legal performance (*see People v Montgomery*, 24 NY2d 130, 133-134 [1969]),] was codified in CPL 460.30 to permit a defendant to seek permission to file a late notice of direct appeal in certain circumstances. The motion 'must be made with due diligence after the time for the taking of such appeal has expired, and in any case not more than one year thereafter' (CPL 460.30 [1]). The one-year grace period is strictly enforced (*see People v Corso*, 40 NY2d at 581) 'since the time limits within which appeals must be taken are jurisdictional in nature and courts lack inherent power to modify or extend them' (*People v Thomas*, 47 NY2d 37, 43 [1979]). But the enactment of the Criminal Procedure Law 'did not expressly abolish the common-law writ of coram nobis or necessarily embrace all of its prior or unanticipated functions' (*People v Bachert*, 69 NY2d at 599). As a result, [the Court of Appeals has] authorized a limited exception to the one-year rule if diligent and good-faith efforts to comply with the requirement were deliberately thwarted by the People (*see People v Johnson*, 69 NY2d 339, 341-342 [1987]; *People v Thomas*, 47 NY2d at 43)" (*People v Adams*, 23 NY3d 605, 611 [2014]).

Lost Exhibit: Where an exhibit is lost, "[a]n appellate court must first determine whether the exhibit has 'substantial importance' to the issues in the case or is essentially collateral. If the information contained within the exhibit is needed to resolve the issues raised on appeal, [then] the appellate court must … determine whether the record otherwise reflects that information. If the information in the missing exhibit can be gleaned from the record and there is no dispute as to its accuracy, [then] the loss of the exhibit itself would not prevent proper appellate review. On the other hand, if the information in the exhibit is important, but otherwise not contained in the record, the appellate court should order a reconstruction hearing unless the defendant establishes that such a hearing would be futile" (*People v Yavru-Sakuk*, 98 NY2d 56, 60 [2002]; *see People v Jackson*, 98 NY2d 555, 560 [2002]).

Preservation; Challenge to Guilty Plea: "Generally, in order to preserve a claim that a guilty plea is invalid, a defendant must move to withdraw the plea on the same grounds subsequently alleged on appeal or else file a motion to vacate the judgment of conviction pursuant to CPL 440.10 (*see* CPL 220.60 [3]; 440.10; *People v Clarke*, 93 NY2d 904, 906 [1999]; *People v Toxey*, 86 NY2d 725, 726 [1995]; *People v Lopez*, 71 NY2d 662, 665 [1988]). Under certain circumstances, this preservation requirement extends to challenges to the voluntariness of a guilty plea (*see People v Murray*, 15 NY3d 725, 726 [2010]; *Toxey*, 86 NY2d at 726)" (*People v Peque*, 22 NY3d 168, 182 [2013]).

Preservation; Challenge to Guilty Plea; Exception: "[U]nder *People v Lopez*, where a deficiency in the plea allocution is so clear from the record that the court's attention should have been instantly drawn to the problem, the defendant does not have to preserve a claim that the plea was involuntary because 'the salutary purpose of the preservation rule is arguably not jeopardized' (71 NY2d at 665-666)" (*People v Peque*, 22 NY3d 168, 182 [2013]).

Preservation; Challenge to Guilty Plea; Exception; Inability to Object: "[W]here a defendant has no practical ability to object to an error in a plea allocution which is clear from the face of the record, preservation is not required" (*People v Peque*, 22 NY3d 168, 182 [2013]).

Preservation; Challenge to Guilty Plea; Exception; Postrelease Supervision: "[I]n *People v Louree* (8 NY3d 541 [2007]) [the Court of Appeals] concluded that a defendant need not move to withdraw a guilty plea in order to obtain appellate review of a claim that the trial court's failure to inform the defendant of the postrelease supervision component of the defendant's sentence rendered the plea involuntary (*see id.* at 545-547)" (*People v Peque*, 22 NY3d 168, 182 [2013]).

Preservation; Generally: *See* entries for PRESERVATION.

Record; Insufficiency: An appellate court cannot review an issue with respect to which the record is insufficient (*cf. People v Milton*, 21 NY3d 133, 137 [2013]; *see generally People v Kinchen*, 60 NY2d 772, 774 [1983]).

Reversal as to Jointly Tried Counts: "'Whether an error in the proceedings relating to one count requires reversal of convictions on other jointly tried counts is a question that can only be resolved on a case-by-case basis' (*People v Baghai-Kermani*, 84 NY2d 525, 532 [1994]). [An appellate court] must evaluate 'the individual facts of the case, the nature of the error and its potential for prejudicial impact on the over-all outcome' (*People v Concepcion*, 17 NY3d 192, 196-197 [2011] [internal quotation marks and citation omitted]; *see also People v Doshi*, 93 NY2d 499, 505 [1999]). Reversal is required if 'there is a reasonable possibility that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a meaningful way' (*Doshi*, 93 NY2d at 505, [internal quotation marks and citation omitted]; *see also People v Daly*, 14 NY3d 848, 849 [2010])" (*People v Morales*, 20 NY3d 240, 250 [2012]). *See* entry for APPEAL AND ERROR (Spillover Error).

Right to Appeal: "'[A] defendant's right to appeal within the criminal procedure universe is purely statutory' (*People v Stevens*, 91 NY2d 270, 278 [1998])" (*People v Smith*, 27 NY3d 643, 647 [2016]). *See* entry for APPEAL AND ERROR (Appealability).

Spillover Error: "In *People v Baghai-Kermani* (84 NY2d 525 [1994]), [the Court of Appeals] articulated the factors to be considered in review of so-called 'spillover errors.' In that case, [the Court] noted: 'Whether an error in the proceedings relating to one count requires reversal of convictions on other jointly tried counts is a question that can only be resolved on a case-by-case basis, with due regard for the individual facts of the case, the nature of the error and its potential for prejudicial impact on the over-all outcome'" (*People v Doshi*, 93 NY2d 499, 504-505 [1999], quoting *Baghai-Kermani*, 84 NY2d at 532).

Baghai-Kermani also saw the Court of Appeals note that "the paramount consideration in assessing potential spillover error is whether there is a 'reasonable possibility' that the jury's decision to convict on the tainted counts influenced its

guilty verdict on the remaining counts in a 'meaningful way' (*id.* at 532-533). If so, then the spillover effect of the tainted counts requires reversal on the remaining charges. By contrast, where the jury's decision to convict on the tainted counts had only a 'tangential effect' on its decision to convict on the remaining counts, no reversal is warranted" (*Doshi*, 93 NY2d at 505, quoting *Baghai-Kermani*, 84 NY2d at 532; *see People v Walston*, 23 NY3d 986 [2014]; *People v Concepcion*, 17 NY3d 192, 196-197 [2011]).

Statutory Authority: "'[N]o appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute,' and courts 'may not resort to interpretative contrivances to broaden the scope and application of statutes' governing the availability of an appeal (*People v Pagan*, 19 NY3d 368, 370 [2012] [internal quotation marks omitted])" (*People v Lovett*, 25 NY3d 1088, 1090 [2015]). *See* entry for APPEAL AND ERROR (Appealability).

Timeliness; Appeal by the People: "CPL 460.10 (1) (a) ... 'require[s] prevailing party service'—not just the handing out of an order by the court—'to commence the time for filing of notice of appeal' (*People v Washington*, 86 NY2d 853, 854 [1995])" (*People v Jones*, 22 NY3d 53, 57 [2013]).

Validity of Notice of Appeal: An intermediate appellate court has the power—through an exercise of interest of justice jurisdiction—to treat as valid a notice of appeal that targets the wrong judgment (*see* CPL 460.10 [6]; *People v Lerario*, 50 AD3d 1396 [3d Dept 2008], *lv denied* 10 NY3d 961 [2008]; *cf.* CPLR 5520 [c]).

Waiver: A defendant may waive the right to appeal as a condition of a plea bargain or negotiated sentence (*see People v Seaberg*, 74 NY2d 1, 8-10 [1989]). "A waiver of the right to appeal is effective only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily ..., [a]nd though a trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned, it must make certain that a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*People v Lopez*, 6 NY3d 248, 256 [2006] [internal citations omitted]).

Waiver: "'[A] waiver of the right to appeal is effective only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily' (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see also People v Calvi*, 89 NY2d 868, 871 [1996]; *People v Callahan*, 80 NY2d 273, 280 [1992]). An appellate waiver meets this standard when a defendant has 'a full appreciation of the consequences' of such waiver (*Seaberg*, 74 NY2d at 11). To that end, a defendant must comprehend that an appeal waiver 'is separate and distinct from those rights automatically forfeited upon a plea of guilty' (*Lopez*, 6 NY3d at 256)....

"In addition, 'though [it] need not engage in any particular litany' or catechism in satisfying itself that a defendant has entered a knowing, intelligent and voluntary appeal waiver, a trial court 'must make certain that a defendant's understanding' of

the waiver, along with the other 'terms and conditions of a plea agreement is evident on the face of the record' (*Lopez*, 6 NY3d at 256; *see also Callahan*, 80 NY2d at 283 [a valid appeal waiver 'cannot be inferred from a silent record'])" (*People v Bradshaw*, 18 NY3d 257, 264-265 [2011]).

Waiver; Adequacy of Colloquy; Criteria: The court generally will be deemed to have "'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice'" (*People v James*, 71 AD3d 1465, 1465 [4th Dept 2010]; *cf. People v Adger*, 83 AD3d 1590, 1590 [4th Dept 2011], *lv denied* 17 NY3d 857) where

(1) the court informed [the] defendant that his or her waiver of the right to appeal was a condition of the plea bargain (*cf. People v Williams*, 49 AD3d 1281, 1282 [4th Dept 2008], *lv denied* 10 NY3d 940) **and**

(2) "the record establishes that **[a]** [the] defendant indicated that he or she had spoken with defense counsel and **[b]** [the defendant] understood that he [or she] was waiving his [or her] right to appeal as a condition of the plea" (*People v Dunham*, 83 AD3d 1423, 1424 [4th Dept 2011], *lv denied* 17 NY3d 794 [emphases added]) **and where the**

(3) defendant further affirmed that he or she understood that his or her waiver of the right to appeal meant that "this case will be over and that it will go no further" and where the record reflects that the

(4) defendant also "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bradshaw*, 18 NY3d 257, 264 [2011]).

Waiver; Brief Colloquy and Written Waiver: Where, despite a brief examination by the court, the "defendant signed a detailed written waiver of the right to appeal . . . , and . . . acknowledged to the court that he understood that he was foregoing the right to appeal" (*People v Bridenbaker*, 112 AD3d 1379, 1380 [4th Dept 2013]), an appellate court will treat the defendant's waiver of the right to appeal as valid (*see People v Ramos*, 7 NY3d 737, 738 [2006]; *cf. People v Frysinger*, 111 AD3d 1397, 1397-1398 [4th Dept 2013] [appeal waiver invalid because although the defendant signed a written waiver, there was no mention of the appeal waiver during the oral colloquy]; *People v Martinez*, 105 AD3d 1458, 1458 [4th Dept 2013], *lv denied* 22 NY3d 1042 [2013] [appeal waiver invalid because "(a)lthough the prosecutor engaged in a colloquy with defendant regarding the waiver of the right to appeal, County Court failed to address the waiver with defendant"]).

Waiver; Conflation of Rights: An appeal waiver is invalid where, during the plea colloquy, the prosecutor "'conflate[s] the appeal waiver with the rights automatically waived by the guilty plea,'" thereby producing a record that "'fail[s] to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty'" (*People v Sanborn*, 107 AD3d 1457, 1458 [4th Dept 2013]).

Waiver; Court Confusion: Court confusion during sentencing will not vitiate a knowing, voluntary, and intelligent appeal waiver (*see People v People v Moissett*, 76 NY2d 909, 910-912 [1990]; *People v Rumsey*, 105 AD3d 1448, 1449 [4th Dept 2013], *lv denied* 21 NY3d 1019 [2013]).

Wavier; Defendant's Own Words: "[A] 'waiver of the right to appeal [is] not rendered invalid based on the court's failure to require [the] defendant to articulate the waiver in his [or her] own words'" (*People v Ripley*, 94 AD3d 1554, 1554 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see People v Thompson*, 70 AD3d 1319, 1320 [4th Dept 2010], *lv denied* 14 NY3d 845 [2010], *reconsideration denied* 15 NY3d 810 [2010]; *People v McGrath*, 67 AD3d 1475, 1475 [4th Dept 2009], *lv denied* 14 NY3d 803 [2010]; *People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]; *People v Ludlow*, 42 AD3d 941, 942 [4th Dept 2007]).*

Waiver; Factual Sufficiency of Plea Allocution: A valid waiver of the right to appeal encompasses a defendant's challenge to the factual sufficiency of the plea allocution (*see People v Arney*, 120 AD3d 949, 949 [4th Dept 2014], citing *People v Zimmerman*, 100 AD3d 1360, 1361 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]).

Waiver; Generally: "'A waiver of the right to appeal is effective only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily' (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see also People v Calvi*, 89 NY2d 868, 871 [1996]; *People v Callahan*, 80 NY2d273 [1992]). An appellate waiver meets this standard when a defendant has 'a full appreciation of the consequences' of such waiver (*People v Seaberg*, 74 NY2d 1, 11 [1989]). To that end, a defendant must comprehend that an appeal waiver 'is separate and distinct from those rights automatically forfeited upon a plea of guilty' (*Lopez*, 6 NY3d at 256)" (*People v Bradshaw*, 18 NY3d 257, 264 [2011]). Where the plea allocution demonstrates that the defendant knowingly, voluntarily, and intelligently entered a guilty plea and waived the right to appeal, "the waiver should be enforced and the defendant held to the bargain" made (*People v Muniz*, 91 NY2d 570, 574 [1998]).

Waiver; Generally: "In *People v Seaberg*, [the Court of Appeals] recognized for the first time that a defendant may waive his or her statutory right to an initial appeal, provided that the waiver is 'not only ... voluntary but also knowing and intelligent' (74 NY2d 1, 11 [1989]). [The Court of Appeals] explained that a trial court must review the waiver and 'determine[] [whether] it meets those requirements by considering all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused' (*id.*; *see People v Calvi*, 89 NY2d 868, 871

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* The better practice, of course, is for a defendant to waive his or her right to appeal through both a colloquy that refers to the criteria referenced in the entry APPEAL AND ERROR (Waiver; Adequacy of Colloquy; Criteria) and a written waiver that refers to that criteria and that is countersigned by counsel. *See* entry for APPEAL AND ERROR (Waiver; Preferred Method).

[1996]; *People v Callahan*, 80 NY2d 273, 280, 283 [1992]). The trial court must also ensure that defendant's 'full appreciation of the consequences' and understanding of the terms and conditions of the plea, including a waiver of the right to appeal, are apparent on the face of the record (*Seaberg*, 74 NY2d at 11; *Callahan*, 80 NY2d at 280). In that regard, [the *Seaberg* Court] emphasized ... that the trial 'court should have required [the defendant] to state his understanding and acceptance' of the details of the plea bargain on the record (74 NY2d at 11)" (*People v Sanders*, 25 NY3d 337, 340-341 [2015]; *see People v Thomas*, 34 NY3d 545 [2019]).

Waiver; Minimum Standard: The Court of Appeals "has not ... set forth the absolute minimum that must be conveyed to a pleading defendant in the plea colloquy in order for the right to appeal to be validly waived. [Indeed, the Court has] long rejected that approach on the ground that 'a sound discretion exercised in cases on an individual basis is best rather than to mandate a uniform procedure which, like as not, would become a purely ritualistic device ... [that] eliminate[s] thinking'" (*People v Sanders*, 25 NY3d 337, 341 [2015], quoting *People v Nixon*, 21 NY2d 338, 355 [1967]).

Waiver; Motion to Withdraw Plea: A contention that the court erred in denying a defendant's motion to set aside his or her plea "'survives [the defendant's] waiver of the right to appeal to the extent that [such] contention implicates the voluntariness of the plea'" (*People v Dash*, 74 AD3d 1859, 1860 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]; *see People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 20 NY3d 1084 [2013]; *People v Wright*, 66 AD3d 1334, 1334 [4th Dept 2009], *lv denied* 13 NY3d 912 [2010]; *People v Dille*, 21 AD3d 1298, 1298 [4th Dept 2005], *lv denied* 5 NY3d 882 [2005]).

Waiver; Preferred Method: The preferred method of confirming an appeal waiver is to secure a written waiver of appeal (*see People v Lopez*, 6 NY3d 248, 257 [2006] [suggesting that the best practice is to establish a knowing, voluntary, and intelligent waiver through a colloquy and then to secure from the defendant a written waiver explaining "the panoply of trial rights automatically forfeited upon pleading guilty"]; *see People v Bradshaw*, 18 NY3d 257, 264 [2011]).

Waiver; Relevant Factors: In assessing the validity of a waiver of the right to appeal, the Court of Appeals has "continued to require assessment of all of the relevant factors surrounding the waiver, including the experience and background of the accused (*see People v Bradshaw*, 18 NY3d 257, 264-265 [2011]). Moreover, [the Court has] never abandoned [its] oft-stated instruction that 'a trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned' (*Lopez*, 6 NY3d at 256; *see Bradshaw*, 18 NY3d at 265; *People v Kemp*, 94 NY2d 831, 833 [1999]; *Callahan*, 80 NY2d at 283)" (*People v Sanders*, 25 NY3d 337, 341 [2015]).

Waiver; Restitution: A valid appeal waiver that specifies "the exact amount of restitution was included in the plea agreement" (*People v Thomas*, 77 AD3d 1325,

1326 [4th Dept 2010], *lv denied* 16 NY3d 800 [2011]) encompasses a defendant's contention that the court erred in ordering him or her to pay restitution.

Waiver; Rights Foreclosed: "A defendant may . . . waive the right to appeal as a condition of a plea bargain (*see Seaberg*, 74 NY2d at 5). '[G]enerally, an appeal waiver will encompass any issue that does not involve a right of constitutional dimension going to "the very heart of the process"' (*People v Lopez*, 6 NY3d 248, 255 [2006], quoting *Hansen*, 95 NY2d at 230). [The Court of Appeals] has recognized that the right to a speedy trial, challenges to the legality of a court-imposed sentence, questions about a defendant's competency to stand trial, and whether the waiver was obtained in a constitutionally acceptable manner cannot be foreclosed from appellate review (*see People v Callahan*, 80 NY2d 273, 280 [1992])" (*People v Pacherille*, 25 NY3d 1021, 1023 [2015]).

Waiver; Separate From Rights Forfeited by Guilty Plea: The waiver of the right to appeal is "'separate and distinct from those rights automatically forfeited upon a plea of guilty'" (*People v Lopez*, 6 NY3d 248, 256 [2006]).

Waiver; Separation of Trial/Appellate Rights: An appeal waiver is valid where "[t]he record establishes that [the] defendant waived his [or her] right to appeal in order to secure a sentencing commitment, and [the court] properly '"describ[ed] the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty"'" (*People v McClain*, 112 AD3d 1334, 1335 [4th Dept 2013], *lv denied* 23 NY3d 965 [2014]).

Waiver; Severity of Sentence: A valid appeal waiver forecloses any challenge by defendant to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Waiver; Single Reference: It has been held that a "single reference to defendant's right to appeal is insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice'" (*People v Brown*, 296 AD2d 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see e.g. People v Adger*, 83 AD3d 1590, 1591 [4th Dept 2011], *lv denied* 17 NY3d 857 [2011]; *People v Allen*, 64 AD3d 1190, 1191 [4th Dept 2009], *lv denied* 13 NY3d 794 [2009]; *People v Walters*, 52 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008]; *People v Thousand*, 41 AD3d 1272, 1273 [4th Dept 2007], *lv denied* 9 NY3d 927 [2007]; *People v Harris*, 4 AD3d 767, 767 [4th Dept 2004]).

Waiver; Speedy Trial: A "defendant's constitutional speedy trial argument survive[s] [his or her] guilty plea and appeal waiver (*see People v Blakley*, 34 NY2d 311, 314 [1974])" (*People v Guerrero*, 28 NY3d 110, 117-118 [2016]). *Compare* entry for SPEEDY TRIAL.

Waiver; Voluntariness of Plea: A defendant always retains the right to challenge the voluntariness of the plea (*see People v Seaberg*, 74 NY2d 1, 10 [1989], citing *People v Francabandera*, 33 NY2d 429, 434 n 2 [1974]).

Waiver; Written Only: Where, despite the defendant's signing "of a waiver of the right to appeal, the plea colloquy does not contain any reference to defendant's waiving that right," an appellate court will not "conclude that the waiver was knowing and voluntary" (*People v Khan*, 291 AD2d 898, 898 [4th Dept 2002] [internal quotation marks omitted]; *see People v Farrow*, 59 AD3d 935, 935-936 [4th Dept 2009], *lv denied* 12 NY3d 816 [2009]).

Waiver; Youthful Offender Adjudication: Where "[n]o mention of youthful offender status [is] made before [the] defendant waive[s] his [or her] right to appeal during the plea colloquy," it has been held that an appellate court must "conclude that [the] defendant did not knowingly waive his [or her] right to appeal with respect to [the court's] denial of [his or her] request ... for youthful offender status at sentencing" (*People v Anderson*, 90 AD3d 1475, 1476 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]; *see People v Jones*, 107 AD3d 1611, 1611 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013], *reconsideration denied* 22 NY3d 956 [2013]).*

Waiver of Objection: "[W]aiver and preservation are separate concepts ..., although they are often inextricably intertwined" (*People v Ahmed*, 66 NY2d 307, 311 [1985] [internal quotation marks omitted]). By consenting to a procedure employed by the court, a defendant will waive appellate review of that action. A common example of a waiver is a defendant's consent to the discharge of a sworn juror (*see People v Davis*, 83 AD3d 860, 861 [2d Dept 2011] [the defendant waived appellate review of his contention that the court erred in discharging a seated juror]; *People v Barner*, 30 AD3d 1091, 1092 [4th Dept 2006] [the defendant waived his contention that the court erred in discharging a sworn juror inasmuch as he consented to the discharge], *lv denied* 7 NY3d 809 [2006]; *see also People v Pennisi*, 217 AD2d 562, 563 [2d Dept 1995] [defense counsel waived the right to be present during the court's questioning and discharge of a sworn juror by requesting and acquiescing to the court's procedure], *lv denied* 86 NY2d 800 [1995]; *People v O'Keefe*, 281 App Div 409, 416 [3d Dept 1953] [the defendants waived their challenge to the court's questioning of a sworn juror in the absence of defense counsel], *affd* 306 NY 619 [1953], *rearg denied* 306 NY 744 [1953]; *cf. People v Noguel*, 93 AD3d 1319 [4th Dept 2012]; *see generally People v Colon*, 90 NY2d 824, 825-826 [1997] [the defendant waived his challenge to a procedure by which the court permitted defense counsel to withdraw a peremptory challenge and seat a juror previously challenged by defendant]).

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* In *People v Rudolph* (21 NY3d 497 [2013]), the Court of Appeals noted that CPL 720.20 [1]) provides that "'[u]pon conviction of an eligible youth, ... the court *must* determine whether or not the eligible youth is a youthful offender'" (21 NY3d at 501 [emphasis in original], quoting CPL 720.20 [1]). Specifically, the *Rudolph* Court concluded that "'the legislature's use of the word "must" ... reflect a policy choice that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain'" (21 NY3d at 501). In doing so, the Court overruled *People v McGowan* (42 NY2d 905 [1977]).

▶**APPELLATE PROCEDURE:**

Constitutional Rights: "Defendants … have a constitutional right to a fair appellate procedure that provides them 'with the minimal safeguards necessary to make an adequate and effective appeal' (*People v West*, 100 NY2d 23, 28 [2003]). That right includes a right to 'receive the careful advocacy needed "to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over"' (*id.*, quoting *Penson v Ohio*, 488 US 75, 85 [1988])—i.e., a right to counsel" (*People v Perez*, 23 NY3d 89, 99 [2014]).

Entitlement to Appeal; Effective Assistance of Counsel: "Although there is no constitutional entitlement to an appeal (*see e.g. Halbert v Michigan*, 545 US 605, 610 [2005]; *McKane v Durston*, 153 US 684, 687 [1894]), it has long been recognized that a statutory right to a direct appeal triggers a guarantee of effective legal assistance (*see Evitts v Lucey*, 469 US 387, 393-394 [1985]; *Douglas v California*, 372 US 353, 357 [1963]). A lawyer who disregards a timely request to file a notice of appeal 'acts in a manner that is professionally unreasonable' (*Roe v Flores-Ortega*, 528 US 470, 477 [2000]). A corresponding loss of appellate rights results in a deprivation of due process of law (*see Evitts*, 469 US at 396-397; *Roe*, 528 US at 477)" (*People v Andrews*, 23 NY3d 605, 610 [2014]). *Compare* entry for APPEAL AND ERROR (Appealability).

Record; Burden of Preparation: "[T]he burden of making a record sufficient to permit appellate review is on the party seeking it (*see People v McLean*, 15 NY3d 117, 121 [2010])" (*People v Milton*, 21 NY3d 133, 137 [2013]).

Statutory Rights: "The appellate process is a statutory creation in New York (*see e.g. People v Romero*, 7 NY3d 633, 636-637 [2006]; *People v West*, 100 NY2d 23, 26 [2003], *cert denied* 540 US 1019 [2003]). The review of a criminal conviction is authorized by article 450 of the Criminal Procedure Law. There is a right to a first-tier, direct appeal to an intermediate appellate court (*see* CPL 450.10 [1]), whereas secondary review is more commonly discretionary (*compare* CPL 450.90, *with* CPL 450.70 *and* CPL 450.80). An appeal is initiated by filing a notice of appeal, usually within 30 days after sentence is imposed (*see* CPL 460.10 [1] [a])" (*People v Andrews*, 23 NY3d 605, 610 [2014]). *See* entry for APPEAL AND ERROR (Appealability).

▶***APPRENDI*:** *See Apprendi v New Jersey* (530 US 466 [2000]), wherein "the United States Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, a defendant's sentence may not be enhanced beyond what would otherwise be its maximum term on the basis of facts that are not found by a jury beyond a reasonable doubt. One exception has been recognized: under *Almendarez-Torres v United States* (523 US 224 [1998]), a case left undisturbed by *Apprendi* (530 US at 489-490) and never subsequently overruled, 'the fact of a prior conviction' may be found by a judge (*Apprendi,* 530 US at 490)" (*People v Giles*, 24 NY3d 1066, 1068-1069 [2014] [Smith, R.S., J., concurring]). As relevant in New York State, "[i]n *People v Rosen* (96 NY2d 329, 335

[2001]) [the Court of Appeals] interpreted New York's persistent felony offender statute … to make prior convictions 'the sole determinate' of whether a defendant is eligible for enhanced sentencing. [The Court] reaffirmed and explained the holding of *Rosen* in *People v Rivera* (5 NY3d 61 [2005]) and *People v Quinones* (12 NY3d 116, 122-131 [2009]) (*see also People v Battles*, 16 NY3d 54, 59 [2010]; *People v Bell*, 15 NY3d 935, 936 [2010])" (*Giles*, 24 NY3d at 1069 [Smith, R.S., J., concurring]).

Said another way, "[u]nder the … *Apprendi* rule, '[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt' (*United States v Booker*, 543 US 220, 244 [2005]; *see Apprendi*, 530 US at 490). Therefore, where a sentencing statute places a defendant in an entirely different sentencing range based on certain facts, those facts, other than the existence of a prior conviction, must be found by the jury rather than the judge (*see Cunningham v California*, 549 US 270, 275 [2007]; *Booker*, 543 US at 234-244). But once the jury has found the facts that place the defendant within a particular statutory sentencing range, the court may exercise its traditional discretion to fashion a particular sentence within the range based on a variety of factual considerations related to the defendant's background and crimes (*see Southern Union Co. v United States*, 132 S Ct 2344, 2353 [2012]; *Cunningham*, 549 US at 288-293)" (*Giles*, 24 NY3d at 1073 [Abdus-Salaam, J., concurring]). *See* entries for *ALLEYNE* and SENTENCE (Predicate Felony Offender; Enhancement).

Application: "[T]he United States Supreme Court has applied the *Apprendi* rule in cases involving capital punishment (*Hurst v Florida*, 136 S Ct 616 [2016]; *Ring v Arizona*, 536 US 584 [2002]), broad judicial discretion to find aggravating factors (*Cunningham v California*, 549 US 270 [2007]; *Blakely v Washington*, 542 US 296 [2004]), the federal sentencing guidelines (*United States v Booker*, 543 US 220 [2005]), and mandatory minimum sentences (*Alleyne v United States*, 133 S Ct 2151, 2155 [2013])" (*People v Prindle*, 29 NY3d 463, 466 [2017]). *See* entries for *ALLEYNE* and SENTENCE (Predicate Felony Offender; Enhancement).

▶***ARGENTINE* HEARING:** Such a hearing determines whether a defendant who has been promised leniency in exchange for cooperation met his or her "end" of the plea bargain, even if the cooperation is unhelpful (*People v Argentine*, 67 AD2d 180, 184 [2d Dept 1979]).

▶**ARRAIGNMENT:** The Criminal Procedure Law defines "arraignment" as "the occasion upon which a defendant against whom an accusatory instrument has been filed appears before the court in which the criminal action is pending for the purpose of having such court acquire and exercise control over the person with respect to such accusatory instrument and of seeking the course of further proceedings in the action" (CPL 1.20 [9]). Procedure after an arrest based on a warrant, which includes a timely arraignment, is set forth in CPL articles 120 and 180.

Promptness: "'The sole function of a warrant of arrest is to achieve a defendant's court appearance in a criminal action for the purpose of arraignment upon the accusatory instrument by which such action was commenced'" (*People v Samuels*, 49 NY2d 218, 222 [1980], quoting CPL 120.10 [1]). Pursuant to CPL 120.90 (1), "[u]pon arresting a defendant for any offense pursuant to a warrant of arrest in the county in which the warrant is returnable or in any adjoining county, or upon so arresting him for a felony in any other county, a police officer, if he be one to whom the warrant is addressed, must *without unnecessary delay* bring the defendant before the local criminal court in which such warrant is returnable (emphasis added)."

Promptness: The requirement to arraign a defendant called to answer a felony charge in court as one that must be satisfied "promptly ... so that [the defendant] may be informed of the pending charge and given an opportunity to consult counsel, assigned if necessary, without delay" (*People v Samuels*, 49 NY2d 218, 223 [1980]). That requirement is based at least in part on the principle that "'[o]nce a matter is the subject of a legal controversy any discussions relating thereto should be conducted by counsel[because] at that point the parties are in position to safeguard their rights'" (*id.* at 222-223, quoting *People v Settles*, 46 NY2d 154, 163-164 [1978]).

Unreasonable Delay: In *People v Small* (26 NY3d 253 [2015]), the Court of Appeals concluded that "the People did not violate [CPL] 120.90 by failing to arraign defendant between Friday and Monday" (*id.* at 258). "'No specific time span is universally considered reasonable or per se unreasonable' in bringing a defendant before the local criminal court (Peter Preiser, Practice Commentaries, McKinney's Cons. Laws of NY, Book 11A, CPL 120.90 at 522 [2004]). Because [the] defendant was already detained on another charge, and his arrest was authorized by a warrant, any prearraignment delay did not implicate defendant's constitutional rights (*see id.* [distinguishing prearraignment delay following a warrantless arrest from prearraignment delay following an arrest authorized by a warrant, noting that the latter has already been subject to a judicial 'determination of reasonable cause by a neutral, detached official']; *cf. People ex rel. Maxian v Brown*, 77 NY2d 422, 427 [1991] [finding 24-hour delay unreasonable when it followed a warrantless arrest])" (*Small*, 26 NY3d at 258-259).

▶**ARREST:** An arrest generally refers to the taking or keeping of a person in custody pursuant to a criminal charge. An arrest may be accomplished pursuant to a warrant, based on a police officer's reasonable cause to believe that such person has committed an offense, or by a person other than a police officer or a peace officer for an offense.

With respect to an arrest upon a warrant, the Criminal Procedure Law refers to a "warrant of arrest" as "a process of a local criminal court ... directing a police officer to arrest a defendant and to bring him before such court for the purpose of arraignment upon an accusatory instrument filed there with by which a criminal action against him has been commenced" (CPL 1.20 [28]).

With respect to a warrantless arrest, CPL 140.10 (1) (a) provides that "a police offer may arrest a person for any for . . . [a]ny offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence . . . ." CPL 140.10 (1) (b) confers upon a police officer to arrest a person for a crime when the officer has reasonable cause to believe that such person has committed such crime, whether in the officer's presence or otherwise. Those provisions are subject to the geographic limitations imposed by CPL 140.10 (2), and to be interpreted in accordance with the points that the term "crime" encompasses felonies and misdemeanors, and that violations and traffic infractions are embraced by the phrase "petty offense."

CPL 140.30, in turn, refers to a warrantless arrest accomplished by a person other than a "police officer" or a "peace officer," as those phrases are defined in the Criminal Procedure Law (*see*, respectively, CPL 1.20 [34] [defining "police officer"] and CPL 1.20 [33] and CPL 2.10 [defining "peace officer"]). That procedure, which typically is referred to as a "citizen's arrest," permits arrest by any person where the arrestee has (1) committed a felony (*see* CPL 140.30 [1] [a]); or (2) committed an offense in the presence of the arrestor (*see* CPL 140.30 [1] [b]). Such an arrest, if for a felony, may be made anywhere in the state. Such an arrest, if for an offense other than a felony, may be made only in a county in which such offense was committed (*see* CPL 140.30 [2]).

Authorization; Probable Cause: "An arrest is 'authorized' if, but only if, it 'was premised on probable cause' (*People v Jensen*, 86 NY2d 248, 253 [1995]; *see People v Peacock*, 68 NY2d 675, 676-677 [1986])" (*People v Finch*, 23 NY3d 408, 416 [2014]). *See* entry for PROBABLE CAUSE.

Authorization; Probable Cause; Officer's Burden: "An officer need not 'conduct a mini-trial' before making an arrest (*Brodnicki v City of Omaha*, 75 F3d 1261, 1264 [8th Cir 1996])" (*People v Finch*, 23 NY3d 408, 416 [2014]).

Family Court Act § 305.2 (2): Family Court Act § 305.2 (2) provides that "[a]n officer may take a child under the age of [16] into custody without a warrant in cases in which he may arrest a person for a crime . . . ." Crime, as defined by Penal Law § 10.00 (6), "means a misdemeanor or felony."

Vehicle; Towing; Caretaking Function: A police officer's decision to tow a vehicle following the arrest of its operator typically is deemed "consistent with a community caretaking function (*see United States v Vladeff*, 630 Fed Appx 998, 1000-1001 [11th Cir 2015]; *United States v Moskovyan*, 618 Fed Appx 331, 331 [9th Cir 2015] ['Police acting in a community caretaking capacity may impound an arrestee's vehicle when the vehicle, if left unattended, risks being vandalized or stolen']; *United States v Arrocha*, 713 F3d 1159, 1163 [8th Cir 2013]; *United States v Ramos-Morales*, 981 F2d 625, 626-627 [1st Cir 1992]; *United States v Staller*, 616 F2d 1284, 1289-1290 [5th Cir 1980])" (*People v Tardi*, 28 NY3d 1077, 1078 [2016]).

Vehicle; Towing; Officer's Discretion: The determination whether to tow a vehicle following the arrest of its operator rests with the discretion of the police,

and the exercise of such discretion typically will be deemed reasonable and lawful where it is done in accordance with departmental policy (*see People v Tardi*, 28 NY3d 1077, 1078 [2016]).

Warrantless Arrest; Probable Cause: An arrest made without a warrant must be supported by probable cause (*see Dunaway v New York*, 442 US 200, 217 [1979]). *See also* entries for HEARING (*Dunaway* Hearing) and PROBABLE CAUSE.

▶**ARSON:** *See* Penal Law article 150.

▶***ASHWAL*:** In *People v Ashwal* (39 NY2d 105, 109 [1976]), the Court of Appeals established the rule that "[i]t is ... the right of counsel during summation to comment upon every pertinent matter of fact bearing upon the questions the jury have to decide" (*People v Ashwal*, 39 NY2d 105, 109 [1976] [internal quotation marks omitted]). *See* entry for SUMMATION.

▶**ASSAULT:** *See* Penal Law article 120.

▶**ATTEMPT:** "Under the Penal Law, '[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he [or she] engages in conduct which tends to effect the commission of such crime'" (*People v Aponte*, 16 NY3d 106, 109 [2011], quoting Penal Law § 110.00). The Court of Appeals has "construed [that] provision as requiring proof that defendant engaged in conduct that came 'dangerously near' commission of the completed crime" (*People v Kassebaum*, 95 NY2d 611, 618 [2001], *cert denied* 532 US 1069 [2001], *rearg denied* 96 NY2d 854 [2001]; *see People v Stoby*, 4 AD3d 766, 766-767 [4th Dept 2004], *lv denied* 2 NY3d 807 [2004]). "To prove an attempt, the People must show that the defendant acted for a particular criminal purpose, i.e., with intent to commit a specific crime" (*Aponte*, 16 NY3d at 109). *See* Penal Law article 110. *See also* Penal Law § 110.05 for an explanation of the classifications of an attempt to commit a crime.

Dangerously Near Commission: The Court of Appeals "has held that for a defendant to be guilty of an attempted crime, the defendant 'must have engaged in conduct that came dangerously near commission of the completed crime' (*People v Naradzay*, 11 NY3d 460, 466 [2008] [internal quotation marks omitted], *rearg dismissed* 17 NY3d 840 [2011]). The defendant's conduct 'must have passed the stage of mere intent or mere preparation to commit a crime,' but the defendant need not have taken 'the final step necessary' to accomplish the crime in order to be guilty of an attempted crime (*People v Mahboubian*, 74 NY2d 174, 189-190 [1989]; *see Naradzay*, 11 NY3d at 466)" (*People v Denson*, 26 NY3d 179, 189 [2015]).

Dangerously Near Commission; Focus of Analysis: The Court of Appeals' "analysis with respect to whether a defendant has come dangerously near to completing a crime ... has focused primarily on the conduct of the defendant, not his or her intended victim (*see e.g. People v Clyde*, 18 NY3d 145, 155 [2011], *cert denied* 566 US 944 [2012]; *People v Cano*, 12 NY3d 876, 877 [2009], *rearg denied* 13 NY3d 766 [2009]; *Naradzay*, 11 NY3d at 467-468; *Mahboubian*, 74 NY2d at 191-192)" (*People v Denson*, 26 NY3d 179, 190-191 [2015]).

Generally: "'Essentially . . . , an attempt is an act done with an intent to commit some other crime' (*People v Bracey*, 41 NY2d 296, 299 [1977], citing *People v Moran*, 123 NY 254, 257 [1890])" (*People v Lamont*, 25 NY3d 315, 319 [2015]).

▸**ATTORNEY-CLIENT RELATIONSHIP:** "To establish an attorney-client relationship there must be an explicit undertaking to perform a specific task" (*Terio v Spodek*, 63 AD3d 719, 721 [3d Dept 2009]). "[A]n attorney-client relationship may exist in the absence of a formal retainer agreement" (*id.*) and, in such circumstances, "a court must look to the actions of the parties to ascertain the existence of such a relationship" (*Tropp v Lumer*, 23 AD3d 550, 551 [2d Dept 2005]).

Authority: "[A] defendant, 'having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as 'whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' (*People v White*, 73 NY2d 468, 478; *see Jones v Barnes*, 463 US 745, 751). With respect to strategic and tactical decisions concerning the conduct of trials, by contrast, defendants are deemed to repose decision-making authority in their lawyers" (*People v Colon*, 90 NY2d 824, 826 [1997] [emphasis added]). *See* entry for ATTORNEY-CLIENT RELATIONSHIP (Decision Making).

Conflict; Motion for New Counsel: "Although an attorney is not obligated to comment on a client's pro se motions or arguments, he may address allegations of ineffectiveness 'when asked to by the court' and 'should be afforded the opportunity to explain his performance' (*People v Mitchell*, 21 NY3d 964, 967 [2013]; *Nelson*, 7 NY3d at 884). The Court of Appeals has held that counsel takes a position adverse to his client when stating that the defendant's motion lacks merit (*Mitchell*, 21 NY3d at 966), or that the defendant, who is challenging the voluntariness of his guilty plea, 'made a knowing plea . . . [that] was in his best interest' (*People v Deliser*, 21 NY3d 964, 966 [2013] [decided with *Mitchell*]). Conversely, [the Court of Appeals has] held that counsel does *not* create an actual conflict merely by 'outlining his efforts on his client's behalf' (*People v Nelson*, 27 AD3d 287, 287 [1st Dept 2006], *affd Nelson*, 7 NY3d 883) and 'defending his performance' (*Nelson*, 7 NY3d at 884)" (*People v Washington*, 25 NY3d 1091, 1095 [2015]; *see People v Nelson*, 7 NY3d 883, 884 [2006]).

Conflict of Interest; Actual Conflict: "An actual conflict exists if an attorney simultaneously represents clients whose interests are opposed (*see People v Prescott*, 21 NY3d 925, 927-928 [2013]; *People v Solomon*, 20 NY3d at 97) and, in such situations, reversal is required if the defendant does not waive the actual conflict (*see People v Solomon*, 20 NY3d at 96)" (*People v Sanchez*, 21 NY3d 216, 223 [2013]; *see Solomon*, 20 NY3d at 97 ["Our cases, and the United States Supreme Court's, make clear that, where such an actual conflict exists and is not waived, the defendant has been deprived of the effective assistance of counsel"]).

Conflict of Interest; Defendant's Waiver: "[A] defendant in a criminal case may waive an attorney's conflict, but only after an inquiry has shown that the defendant 'has an awareness of the potential risks involved in that course and has

knowingly chosen it' (*People v Gomberg*, 38 NY2d 307, 313-314 [1975]; *see also People v Macerola*, 47 NY2d 257, 263 [1979]; *People v Wandell*, 75 NY2d 951, 952-953 [1990])" (*People v Solomon*, 20 NY3d 91, 95 [2012]). *See* entries for *GOMBERG* INQUIRY and HEARING (*Gomberg* Hearing).

Conflict of Interest; Generally: "'A lawyer simultaneously representing two clients whose interests actually conflict cannot give either client undivided loyalty' (*People v Ortiz*, 76 NY2d 652, 656 [1990]). [The Court of Appeals has] distinguished between actual and potential conflicts of interest, observing that reversal of a defendant's conviction would be required where there is even a significant possibility of an actual conflict (*see People v Solomon*, 20 NY3d 91, 95-96 [2012]). '"'[A] defendant is denied the right to effective assistance of counsel guaranteed by the Sixth Amendment when, absent inquiry by the court and the informed consent of defendant, defense counsel represents interests which are actually in conflict with those of defendant'"' (*Solomon*, 20 NY3d at 97, quoting *People v McDonald*, 68 NY2d 1, 8 [1986]).

"By contrast, where there is a potential conflict of interest that has not been waived, the defendant must show that the conflict operated on the defense (*see Solomon*, 20 NY3d at 97-98). A potential conflict may exist where the conflicting representations are successive, rather than simultaneous. 'Even though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets' (*Ortiz*, 76 NY2d at 656)" (*People v Wright*, 27 NY3d 516, 520-521 [2016]).

Conflict of Interest; Potential Conflict: "[A] potential conflict that is not waived by the accused requires reversal only if it 'operates' on or 'affects' the defense (*see People v Abar*, 99 NY2d 406, 409 [2003])—i.e., the nature of the attorney-client relationship or underlying circumstances bear a '"substantial relation to the conduct of the defense"' (*People v Ennis*, 11 NY3d 403, 410 [2008], quoting *People v Berroa*, 99 NY2d 134, 142 [2002]). The 'requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense—three formulations of the same principle—is not a requirement that [the] defendant show specific prejudice' (*People v Ortiz*, 76 NY2d 652, 657 [1990]). Nevertheless, it is the defendant's 'heavy burden' (*People v Jordan*, 83 NY2d 785, 787 [1994]) to show that a potential conflict actually operated on the defense (*see People v Ennis*, 11NY3d at 411; *People v Harris*, 99 NY2d 202, 211 [2002])" (*People v Sanchez*, 21 NY3d 216, 223 [2013]).

Conflict of Interest; Potential Conflict: A potential conflict may arise from a defense counsel's prior representation of the People. That is, a potential conflict may arise from the attorney's successive of the People and defendant. Where such "a . . . conflict . . . is not waived by the accused[, reversal is] require[] . . . only if [the conflict] 'operates' on or 'affects' the defense (*see People v Abar*, 99 NY2d 406, 409 [2003])—i.e., the nature of the attorney-client relationship or underlying circumstances bear a '"substantial relation to the conduct of the defense"' (*People v Ennis*, 11 NY3d 403, 410 [2008], quoting *People v Berroa*, 99 NY2d 134, 142 [2002]).

The 'requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense—three formulations of the same principle—is not a requirement that [the] defendant show specific prejudice' (*People v Ortiz*, 76 NY2d 652, 657 [1990]). Nevertheless, it is the defendant's 'heavy burden' (*People v Jordan*, 83 NY2d 785, 787 [1994]) to show that a potential conflict actually operated on the defense (*see People v Ennis*, 11 NY3d at 411; *People v Harris*, 99 NY2d 202, 211 [2002])" (*People v Sanchez*, 21 NY3d 216, 223 [2013]).

Conflict of Interest; Simultaneous Representation: "[W]here the interests of codefendants actually conflict, multiple representation will taint a conviction unless the conflict is waived" (*People v Solomon*, 20 NY3d 91, 96 [2012]).

Conflict of Interest; Simultaneous Representation; Ineffective Assistance: The Court of Appeals' "cases, and the United States Supreme Court's, make clear that, where ... an actual conflict exists and is not waived, the defendant has been deprived of the effective assistance of counsel" (*People v Solomon*, 20 NY3d 91, 97 [2012]).

Decision Making: "'[A] defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' (*People v Colon*, 90 NY2d 824, 825 [1997] [internal quotation marks and citation omitted]; *see People v Colville*, 20 NY3d 20, 28 [2012]; *People v Ferguson*, 67 NY2d 383, 390 [1986]). Fundamental decisions belonging to a defendant are those 'such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' (*Colon*, 90 NY2d at 825-826 [internal quotation marks and citation omitted]). In contrast, strategic decisions regarding the conduct of trial, which remain in the purview of counsel, include those such as whether to seek a jury charge on lesser-included offenses (*see Colville*, 20 NY3d at 32), the selection of particular jurors (*see Colon*, 90 NY2d at 826), and whether to consent to a mistrial (*see Ferguson*, 67 NY2d at 390). If defense counsel solely defers to a defendant, without exercising his or her professional judgment, on a decision that is 'for the attorney, not the accused, to make' because it is not fundamental, the defendant is deprived of 'the expert judgment of counsel to which the Sixth Amendment entitles him' or her (*Colville*, 20 NY3d at 32)" (*People v Hogan*, 26 NY3d 779, 786 [2016]). *See* entry for ATTORNEY-CLIENT RELATIONSHIP (Authority).

▶**AUTHENTICATION OF EVIDENCE:** *See* entry for EVIDENCE (Authenticity).