



2023 Annual Conference

Syracuse, New York

Pleas & Sentencing

Date: Monday, October 2, 2023

Instructor:

Michael Curti, Esq.

Hon. Barbara Seelbach

MCLE: 1.0 Skills

This program has been approved for credit in
New York State for all attorneys
including those who are Newly Admitted
(less than 24 months) and administered by
the Onondaga County Bar Association

Presenters

Michael V. Curti is a member of Harris Beach PLLC. He is a 2001 graduate of Binghamton University (SUNY) and 2004 graduate of St. John's University School of Law. From 2012-2018, Michael was the Corporation Counsel of the City of Yonkers, New York. Michael has also served as a Westchester County Assistant District Attorney and principal law secretary to a New York State Supreme Court Justice. Admitted in 2005 in the States of New York and Connecticut (retired), he is now serving his second term as Associate Village Justice of the Village of Scarsdale, New York.

Barbara Seelbach has served as town justice in the Town of Clinton for 17 years. She is currently employed as the Confidential Secretary to the Hon. Christi J. Acker, Supreme Court Justice, Dutchess County. She has served as Secretary, Vice President and President of the Dutchess County Magistrates Association. She was also the recipient of the DCMA Magistrate of the Year Award. In September of 2015, she was elected as a Director with the New York State Magistrates Association and has been a long standing member of their Training and Education Committee. She has been responsible for developing and implementing CJE training programs for the annual NYSMA conferences for the several years. She has also taught several continuing judicial education courses in small claims, summary proceedings and other topics for the New York State Magistrates Association. She is a graduate of the University of Arizona.

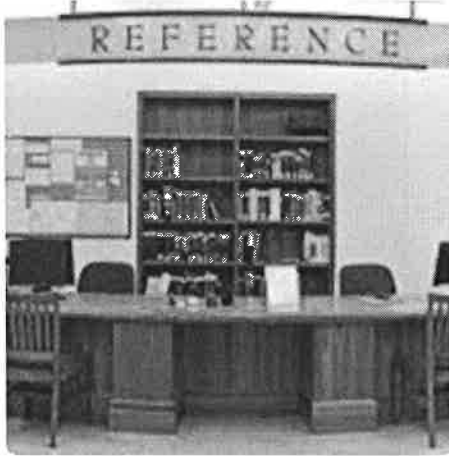


Pleas & Sentencing

Michael Curti, Associate Village Justice, Village of Scarsdale
&
Barbara Seelbach, Town Justice, Town of Clinton


Course Roadmap

- Taking a Plea
- Sentence Basics
- Pro-Tips or Hints from Heloise



Reference Desk-Pleas

- www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml
- Office of Justice Court Support
- Trial Judge Bench Book
- Syracuse Law Review-Criminal Law Survey



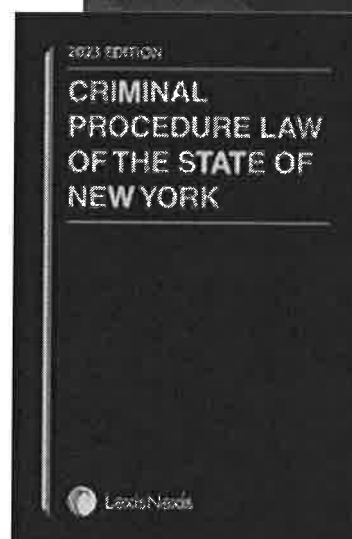
Plea Basics

- Not Guilty
- Alford Plea
- Guilty Plea
- Plea of Not Responsible By Reason of Mental Disease or Defect
 - Defendant may plead with permission of Court and consent of the People. CPL 220.15.
 - People must orally state on the record, or in a writing filed with the Court, that the People consent to entry of the plea and that they are satisfied that defendant would provide, by a preponderance of the evidence, the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. CPL 220.15 (1).
 - Certain Defense and Court Obligations connected to such a plea. See Trial Judge Bench Book for details.
 - Check out: <https://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml>

Check out your CPL

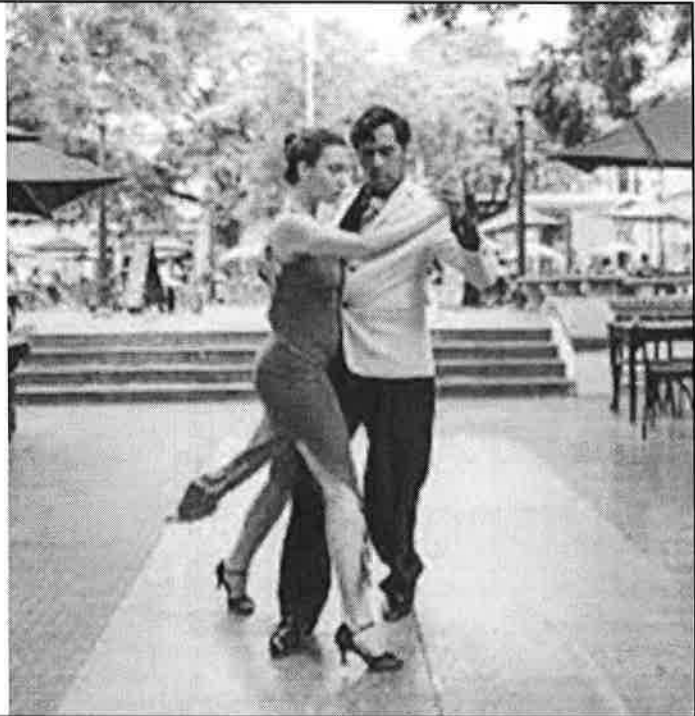
NY Criminal Procedure Law (CPL), Article 340

- CPL 340.20
 - Like many parts of the CPL, there are cross references to the superior court provisions (CPL 220) and the incorporation of those provisions to misdemeanor and non-criminal violations.
 - Non-corporation pleas: Entered orally by the defendant unless Court permits entry by counsel to enter a plea on behalf of the defendant.
 - If a traffic infraction, see VTL 1805, 1806, 1807.
 - Corporation pleas: Must be entered into by counsel.
 - When there is a plea of guilty, the Court or the prosecutor must orally, on the record, or in writing (filed with the court), state the sentence agreed upon as a condition of the plea.



Plea Bargain- It takes 3 to tango...

- In Federal Court, clear prohibition on judicial participation. FRCP 11
- Not so in New York State. CPL 220.50
- The plea is an agreement between the District Attorney and the defendant, by and through counsel, and presented to the Court for approval.



The Benefits of Plea Bargains

- *People v Selikoff*, 35 NY2d 227, 232-235 (1974)
 - Part of American jurisprudence since 1804.
 - Avoids “inevitable risks and uncertainties of trial
 - Telescopes process and expedites rehabilitation.
 - Creates exchange of leniency for information.
 - Tailored, individualized sentences—considers mitigating factors.

Anatomy of the Guilty Plea Disposition

Colloquy

Allocution

Guilty Plea

Acceptance of Plea

Sample Colloquy- Misdemeanor Case

- Place the defendant under oath before plea is taken. *People v Robertson*, 2 AD3d 756 (2d Dep't 2003).
- Sample Questions:
 - Have you spoken with your lawyer about your case, about pleading guilty and its consequences?
 - Are you satisfied with the services of your lawyer?
 - The allegations of (name of crime) are (specify). Is that true?
 - Do you plead guilty to (specify name of offense, and if so, and not already on the record, the court may add: "which is in satisfaction of (specify the more serious charge)?



Sample Colloquy- Misdemeanor Case (cont.)

- Do you understand that the sentence will be: (specify)?
- Do you understand that by pleading guilty, you waive your right to a trial [by jury] where you would have the right to confront and cross-examine witnesses and to remain silent and not to incriminate yourself? 2
- As applicable: (If you are not a citizen of the United States) [D]o you wish to plead guilty, regardless of whether the plea in whole or in part results in your deportation, exclusion from the United States or denial of naturalization?
- Are you pleading guilty voluntarily, of your own free will and choice?
- The plea is acceptable to the Court.
- *People v Louree*: There is no script or catechism to recite, but what you say has to be understandable to the defendant. 8 NY3d 542, 544-545 (2007).



Sample Colloquy- Petty Offense

- Place defendant under oath.
- Are the People moving to **add** (Disorderly Conduct/Harassment in the Second Degree) to the **docket**?
- Counsel, do you enter a plea to the added and reduced charge and waive prosecution by information?
- Mr./Ms./Mx. _____, your lawyer has told me that **you** want to enter a plea of guilty to _____, a violation and not a crime. Is that what you want to do.
- Are you pleading guilty freely and voluntarily?
- Is anyone forcing you to plead guilty?
- In this case you have a right to trial, where you could present witnesses, have your lawyer question the DA's witnesses, you could testify yourself or remain silent. But today, you are giving up those rights to plead guilty. Is that what you want to do?
- Is there anything you wish to say before sentence is imposed.
- The sentence of this Court is a \$___ fine/1 year conditional discharge to lead a law abiding life. Sign up, complete and show proof that you have successfully completed 3 days of community service, and \$___ court surcharge (or civil judgment is entered on the surcharge).
- You will come back at _____ to the Clerk for payment.



Why Do We Ask These Questions?

- “In *Boykin v Alabama*...the United States Supreme Court held that a defendant who enters a guilty plea must voluntarily and intelligently waive several federal constitutional rights, namely the right to a trial by jury, the right to confront one’s accusers and the privilege against self-incrimination.”
 - *People v Tyrell*, 22 NY3d 359, 361 (2013)

That Thing You Do!

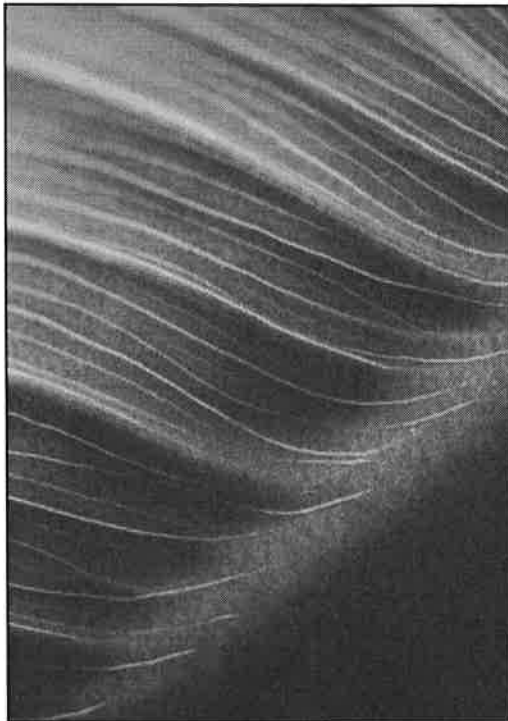
- Boss “VIK” Koss
- A Plea MUST Be:
 - Voluntary
 - Intelligent
 - Knowingly entered.





Hints from Heloise

- **Make a Record:** Absence of discussion of pertinent constitutional rights or any indication that defendant spoke with an attorney regarding constitutional consequences of taking a plea=finding that plea was not voluntary, intelligent, knowingly entered. *People v Tyrell*, 22 NY3d 359 (2013).
- **Disclose:** Advise of the terms and conditions of a sentence promise in order for the plea to be knowingly and voluntarily entered. CPL 220.50; *People v Irizarry*, 203 AD3d 1471 (3d Dep't 2022).
- **Don't pressure:** The Court must not coerce a plea of guilty by advising the defendant that the maximum sentence will be imposed after trial. *People v Collins*, 298 AD2d 715 (3d Dep't 2002).



Direct Consequences v Collateral Consequences

What are direct consequences?

- Direct consequences have a "definite, immediate and largely automatic effect on defendant's punishment."

What are collateral consequences?

- Collateral consequences are "peculiar to the individual personal circumstances and not within the control of the Court system."

People v Ford, 86 NY2d 397, 403 (1995)

When Must the Court Advise?

The Court must advise defendants of direct consequences every time:

- Prison/Jail Terms
- Conditional Discharge:
 - In *People v Bush* (38 NY2d 66 [2022]), the defendant was sentenced to 20 days of community service, but then the court imposed the community service in addition to a one-year conditional discharge.
 - Despite the clear change, Court of Appeals ruled that an objection or a motion to withdraw the plea was required to preserve the claim of involuntariness.
 - Judge Rivera wrote a very vigorous dissent indicating that there is a “discordance between the plea agreement and the sentence imposed” and the defendant was given little opportunity to object.
 - Hint from Heloise: Where there is a difference, may be worthwhile to engage in brief colloquy/offer defendant an opportunity to withdraw plea.
- Post Release Supervision
 - *People v Catu*, 4 NY3d 242 (2005).

Court must advise defendants of certain collateral consequences:

- In the case of a felony, loss of voting rights during period of incarceration. CPL 220.50 (8)
- Immigration consequences
 - *People v Peque*, 22 NY3d 168 (2013) (Plea colloquy must include disclosure of the potential ramification to immigration status if they agree to felony disposition).

Collateral Consequences

- loss of right to travel abroad
- loss of civil service employment
- loss of a driver's license
- loss of the right to possess firearms
- an undesirable discharge from the Armed Services



Does *Peque* apply to misdemeanors?



- Signs point to: Yes
 - *People v Artwell*, 73 Misc3d 32, 34 (Appellate Term, 2d Dep't 2021)
 - "Assuming without deciding that *Peque* applies to misdemeanors..." followed by a string cite to a number of Appellate Term 1st and 2nd Dep't cases...
 - Makes sense, since certain misdemeanors are considered crimes of moral turpitude which could impact immigration status.

Best Practices-Immigration Consequences



- Can't go wrong with tracking the language of the statute.
 - If you (defendant) are not a citizen of the United States, your (defendant's) plea of guilty and the Court's acceptance thereof may result in your (defendant's) deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. CPL 220.50 (7).
- As part of the allocution the defendant, prior to pleading guilty speak with their lawyer about potential immigration matters.
 - *Padilla v Kentucky*, 559 US 356 (2010): Defense counsel has a duty to advise a defendant of the consequences of pleading guilty when deportation is mandated.
 - District Attorney's involved in the *Peque* line of cases argued that the Court of Appeals shouldn't expand the *Padilla* requirement to the trial courts.
- Court should not delve into questions concerning specific affects of immigration law in the case before you.
- Rather, the Court should grant an adjournment so defense counsel can research any consequences.

Allocution Basics

- **Court/DA lead:** A defendant is not required to recite the facts underlying the crime---in practice, the Court or the DA allocute the facts establishing guilt. *People v Crampton*, 201 AD3d 1020 (3d Dep't 2022).
- **When in doubt, throw it out:**
- A plea where a defendant does the following, without inquiry or clarification, lacks integrity:
 - makes statements casting doubt on guilt
 - negates criminal elements
 - openly questions voluntariness of plea
 - *People v. Scarborough*, 205 AD3d 1220 (3d Dep't 2009)
- A defendant may plead guilty to a non-existent crime in satisfaction of all charges involving a crime of a greater penalty. *People v Johnson*, 23 NY3d 973 (2014).

Allocution Basics (cont.)

- However, defendant who pleads guilty to a non-existing crime based on a jurisdictional defect will have the conviction reversed. *People v Nieves*, 73 AD3d 1087 (2d Dep't 2010).
 - In *Nieves*, defendant plead guilty to Attempted Assault in the Second Degree.
 - An attempt requires intent.
 - The subsection of Assault in the Second Degree at issue involved no intent, only a culpable mental state of recklessness.
 - One cannot be found guilty of attempted assault by reckless conduct.
 - Must be a lesser included offense of a charge in the accusatory pending against them. CPL 220.10 (4).
- A plea to a crime which is not a lesser included offense of a charge in the pending accusatory is a non-waivable jurisdictional defect. *People v Castillo*, 8 NY3d 959 (2007).

Alford Pleas

- A defendant may enter a guilty plea without admitting culpability.
- There is no factual allocution in an *Alford* plea.
- The Court MUST establish the defendant made a VOLUNTARY and RATIONAL choice to plead guilty without admitting culpability.
- The record before the Court MUST contain strong evidence of actual guilt.
- A defendant can enter a plea to all charges pending before it as of right, but the DA's consent is needed to enter an *Alford* plea to a lesser charge or one count in full satisfaction.
- The Court is NOT obligated to accept an *Alford* plea.
- An *Alford* plea conviction may be used in a subsequent proceeding for impeachment purposes.

The Guilty Plea



- Defendant or defense counsel (remember slide 3?) must actually say guilty.
- Defendant has a statutory right to plea guilty to all charges without consent of prosecution or court. CPL 340.20 (1); 220.10 (2).
- However, the Court may not accept a plea to less than all charges pending without the prosecutor's consent. CPL 340.20 (1); 220.10 (3) and (4).

Accepting the Guilty Plea

- State the Court accepts the guilty plea
- Remember to say VIK (voluntary, intelligent, and knowingly entered)
- Make sure the Waiver of Appeal is VIK



Waiver of Right to Appeal

- Only effective when the record demonstrates that it was made VIK. *People v Calvi*, 89 NY2d 868 (1996).
- Waiver is valid only where the record shows the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty. *People v Thomas*, 34 NY3d 545 (2019).
- The Second, Third and Fourth Departments have endorsed the model colloquy. *People v Williams*, 203 AD3d 1398 (3d Dep't 2022); *People v Stevens*, 203 AD3d 958 (2d Dep't 2022); *People v Dragone*, 192 AD3d 1487 (4th Dep't 2021).
- <https://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml>
- **Hint from Heloise:** Court should conduct oral colloquy and obtain written waiver of the right to appeal. *People v Brown*, 122 AD3d 133 (2d Dep't 2014)



Sample Waiver of Appeal Colloquy



- Next, a defendant ordinarily retains the right to appeal even after pleading guilty. Thus, a waiver of the right to appeal is separate and distinct from the waiver of a trial and other rights by a plea of guilty. In this case, however, as a condition of the plea agreement, you are asked to waive your right to appeal. First, what is an appeal? An appeal is a proceeding before a higher court, an appellate court. If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On an appeal, a defendant may, normally through his/her lawyer, argue that an error took place in this court which requires a modification or reversal of the conviction. A reversal would require either new proceedings in this court or a dismissal.
- Do you understand?
- By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, [including a claimed error in the denial of your (specify, e.g., motion to suppress), and to consider whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final.
- Do you understand?

Sample Waiver of Appeal Colloquy (cont.)



- Among the limited number of claims that will survive the waiver of the right to appeal are: the voluntariness of this plea, the validity and voluntariness of this waiver, the legality of the sentence, [and] the jurisdiction of this Court Add if an issue in the case:
 - [and] a defendant's competency to stand trial,
 - [and] a defendant's constitutional right to a speedy trial
- Do you understand?
- Have you spoken to your lawyer about waiving your right to appeal?
- Are you willing to do so in return for the plea and sentence agreement?
- Do you waive your right to appeal voluntarily, of your own free will and choice?

Sentencing- Resource Desk

Magill's Penal Law Manual
for Local Courts

Bench Book for Trial Judges

CPL Article 380, 410, 420,
and 430

Office of Justice Court
Support



Imposition of Sentence

- The Court must pronounce sentence in every case where a conviction is entered.
- Example: The accusatory instrument contains more than one count and if there are multiple convictions, the court must pronounce sentence on each count. CPL 380.20.
- Sentence must be pronounced without unreasonably delay (CPL 380.30 (1)) and the Court must, upon entering a conviction:
 - Fix a date to pronounce sentence. CPL 380.30 (2) (a);
 - Fix a date for the pre-sentence proceedings set forth in CPL 400. CPL 380.30 (2)(c); or
 - Pronounce sentence on the date of conviction in accordance with CPL 380.30 (1).
 - Imposing sentence on the date of conviction is only permissible when there is no Pre-Sentence Investigation Report (PSR) or if such a report is required, has been received by the Court. CPL 380.30 (2) (d).

Must the Defendant Be Present At Sentencing?

- The defendant must be present at sentencing. CPL 380.40 (1).
- HOWEVER:
 - Defendant may waive the right to be present so long as they do so VIK. *People v Rossborough*, 27 NY3d 485 (2016).
 - Defendant may also forfeit the right to be present if their behavior is such that they must be removed from Courtroom or if they fail to appear after being advised that sentence will be pronounced in his/her absence (Remember that aspect of Parker warnings...) or if they are willfully absent in an effort to frustrate proceedings.
 - Defendant being sentenced on a misdemeanor or petty offense may submit a motion requesting waiver of defendant's presence.



Must the Defendant Be Present At Sentencing? (cont.)

- Motion must include a written waiver signed and acknowledged by defendant.
 - Waiver must recite maximum sentence that may be imposed.
 - Waiver must state defendant waives right to be personally present when sentence is pronounced.
 - Sole discretion of Court to grant this application. CPL 380.40 (2).



Pre-Sentence Report

- CPL 390.30 described form and content of the PSR.
- Statement of Defendant not required to be included. *People v Galunas*, 107 AD3d 1034 (3d Dep't 2013).
- In cases where PSR is required, a Court must receive a fingerprint report from DCJS or a PD report regarding defendant's arrest record before sentence is pronounced. CPL 390.10.
- PSR is Confidential—cannot be disclosed to anyone except as permitted by statute or the Court. CPL 390.50 (1).
- PSR must be current and must be received no less than one business day before sentencing by all parties, unless time is waived by the parties.

Pre-Sentence Report (cont.)

- Court, in its discretion, may redact from the PSR certain information, but must disclose on the record the reasons for doing so. *People v. Minemier*, 29 NY3d 414 (2017).
- In misdemeanor cases, Court is not required to order a PSR, but the Court cannot sentence a defendant to a term of imprisonment of excess of 180 days or to consecutive sentences of imprisonment with terms aggregating more than 90 days, or to probation without ordering and receiving a PSR first. CPL 390.20 (2).
 - However, with the consent of the parties and the Court, a PSR may be waived when the sentence to be imposed has been agreed to by the parties and will be probation, a conditional discharge, or satisfied by time already served.
- New Arrests and Violation of Probation Cases: No PSR needed if one has been prepared in last 12 months or where probationary sentence is being revoked. CPL 390.20 (4).

Rights of the People, Defendant, and Victim

- If PSR includes information defendant claims is untrue, the Court must give the defendant an opportunity to refute the information prior to sentence. *People v Perry*, 36 NY2d 114 (1975).
- Defendant and People have the option to file their own pre-sentence memorandum. CPL 390.40 (2).
- During sentencing, the Court must afford both the People and the defense counsel with an opportunity to make a statement relevant to the question of sentence. CPL 380.50 (1).
- PLUS, the Court must afford the defendant the right to make a statement prior to imposing sentence. CPL 380.50 (1).
 - Failure to do so=mandatory vacatur of sentence, however, a valid waiver of the defendant's right to appeal will preclude appellate review of any claim relating to defendant's right to make a statement was violated by the Court. *People v Brown*, 37 NY3d 940 (2021).

Rights of the People, Defendant, and Victim (cont.)

- The victim, or a family member or legal guardian, has the right to speak at sentencing. CPL 380.50.(2) (a).
- However, the Court has the right to decline a DA's request to offer more than one victim impact statement if the number or length of such statements will be unhelpful, repetitive, inflammatory, or otherwise inappropriate. *People v Hemmings*, 2 NY3d 1 (2004).
- When the victim or victim's representative speaks at sentencing, it must precede any statement by defense counsel or defendant so they have an opportunity to address or rebut the statement. CPL 380.50 (2)(c).

HIV Testing

- Where defendant is convicted of Penal Law 130.20 (misdemeanor) where an act of sexual intercourse or oral sexual conduct is an essential element of the commission of such offense, and the victim requests defendant submit to HIV testing, such request must be made in writing to the Court and the defendant or defendant's attorney.
- Victim must file request prior to or within 10 days of conviction, but Court may expand the time with good cause shows.
- All proceedings are held in camera.
- Test results are disclosed to victim and defendant, unless defendant waives receipt. Court does not receive a copy.

Thank You!

