

# NEW YORK APPELLATE DIGEST, LLC

A Succinct Compilation of the Salient Issues Raised in the Decisions Addressing Criminal Law Released by Our New York State Appellate Courts and Summarized on the New York Appellate Digest Website in September 2021. Right Click on the Citations to Keep Your Place in the Pamphlet.  
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**APPEALS, SORA RULING.**

**THE RECORD WAS NOT SUFFICIENT FOR THE APPEAL OF THE SORA RISK LEVEL CLASSIFICATION; MATTER REMITTED (THIRD DEPT).**

*People v Kwiatkowski, 2021 NY Slip Op 04934, Third Dept 9-2-21*

Practice Point: A court's SORA risk level assessment must be supported by findings of fact and conclusions of law in the order appealed from. If it isn't the appellate court cannot consider the appeal and will remit the matter to the SORA court.

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**APPEALS, YOUTHFUL OFFENDERS, JUDGES, ATTORNEYS.**

**APPELLATE COUNSEL SHOULD HAVE ARGUED THAT COUNTY COURT FAILED TO CONSIDER A YOUTHFUL OFFENDER ADJUDICATION; WRIT OF ERROR CORAM NOBIS GRANTED AND MATTER REMITTED (SECOND DEPT).**

*People v Slide, 2021 NY Slip Op 04982, Second Dept 9-15-21*

Practice Point: If appellate counsel does not argue the sentencing judge failed to determine a defendant's youthful offender status, the defendant has not been afforded effective assistance of counsel on appeal and a writ of coram nobis will be granted on that ground.

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**ATTORNEYS, RIGHT TO COUNSEL, JUDGES.**

**EVEN THOUGH DEFENDANT WAS A DISBARRED ATTORNEY, THE TRIAL JUDGE SHOULD HAVE CONDUCTED AN INQUIRY TO MAKE SURE THE DEFENDANT UNDERSTOOD THE RISKS OF REPRESENTING HIMSELF; CONVICTIONS REVERSED (SECOND DEPT).**

*People v Crispino, 2021 NY Slip Op 04918, Second Dept 9-1-21*

Practice Point: Even where the defendant was an attorney, the trial judge must ensure the defendant understands the risks of proceeding without an attorney and the failure to do so is reversible error.

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**ATTORNEYS, RIGHT TO COUNSEL.**

**A PSYCHIATRIC EXAM IS A CRITICAL STAGE OF A PROSECUTION AT WHICH DEFENDANT HAS THE RIGHT TO COUNSEL; THE EXCLUSION OF DEFENSE COUNSEL FROM THE EXAM WAS NOT HARMLESS ERROR; CONVICTION REVERSED (CT APP).**

*People v Guevara, 2021 NY Slip Op 04955, CtApp 9-9-21*

Practice Point: The Court of Appeals has made it clear that a psychiatric exam is a critical stage of a criminal proceeding at which defendant has the right to counsel. On appeal the admission of testimony based on an uncounseled psychiatric examination is subject to a harmless error analysis requiring the People to demonstrate there was no reasonable possibility the testimony affected the jury's verdict.

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**GUILTY PLEA, MOTION TO WITHDRAW, APPEALS.**

**DEFENDANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS GUILTY PLEA; THE WAIVER OF APPEAL DID NOT PRECLUDE AN APPEAL ALLEGING THE GUILTY PLEA WAS INVALID (SECOND DEPT).**

*People v Gerald, 2021 NY Slip Op 05130, Second Dept 9-29-21*

Practice Point: A waiver of appeal does not preclude an appellate court from considering the validity of a guilty plea.

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**JUSTIFICATION DEFENSE.**

**ALTHOUGH THE COMPLAINANT WAS USING ONLY HIS FISTS FIGHTING THE MUCH SMALLER DEFENDANT, THE DEFENDANT WAS ENTITLED TO THE DEADLY-FORCE-JUSTIFICATION-DEFENSE JURY INSTRUCTION (SECOND DEPT).**

*People v Singh, 2021 NY Slip Op 05134, Second Dept 9-29-21*

Practice Point: Although the complainant used only his fists, the fact that the complainant was much taller and heavier than the defendant, and was able to knock the defendant unconscious with a single punch, was sufficient to demonstrate defendant was entitled to the deadly-force-justification-defense jury instruction.

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**SECURITY GUARDS, EXERCISE OF POLICE POWERS.**

**DEFENDANT WAS ENTITLED TO A HEARING TO DETERMINE WHETHER THE SECURITY GUARD WHO RECOVERED STOLEN PROPERTY FROM HIM WAS LICENSED TO EXERCISE POLICE POWERS OR WAS ACTING AS AN AGENT OF THE POLICE (FIRST DEPT).**

*People v Sneed, 2021 NY Slip Op 05095, First Dept 9-28-21*

Practice Point: If a security guard is a private person, detention and search by the guard does not raise suppression issues. But if the security guard is licensed to exercise police powers or acts as an agent of the police, detention and search by the guard raises suppression issues. Therefore a defendant who was detained and searched by a security guard is entitled to discovery to determine the nature of the guard's employment.

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**SENTENCING, LESS THAN STATUTORILY REQUIRED.**

**THE SENTENCE AGREED TO IN THE PLEA BARGAIN AND IMPOSED BY THE COURT WAS ILLEGAL BECAUSE IT WAS LESS THAN STATUTORILY REQUIRED; THE SENTENCE WAS VACATED AND THE MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO WITHDRAW THE PLEA (THIRD DEPT).**

*People v Gary, 2021 NY Slip Op 05052, Third Dept 9-23-21*

Practice Point: A sentence which is less than statutorily required is illegal and will not withstand scrutiny by an appellate court.

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**SUPPRESSION HEARING, PEOPLE’S BURDEN OF PROOF.**

**THE PEOPLE DID NOT DEMONSTRATE PROBABLE CAUSE FOR THE TRAFFIC STOP; THE 911 CALL WAS NOT PUT IN EVIDENCE AND THE RELIABILITY OF THE CALLER AND THE BASIS FOR THE CALLER’S KNOWLEDGE WERE NOT DEMONSTRATED; THE FACT THAT THE RELEVANT EVIDENCE WAS PRESENTED AT TRIAL WAS IRRELEVANT (CT APP).**

[People v Walls, 2021 NY Slip Op 04949, CtApp 9-2-21](#)

Practice Point: The Court of Appeals held that the People did not meet their burden of proof at the suppression hearing. The police stopped the defendant’s vehicle based solely upon a 911 call. But the People did not introduce a recording of the call, did not indicate whether the caller was an identified citizen informant or an anonymous tipster, and did not present any evidence of the basis of the caller’s knowledge---the traditional evidence required by the Aguilar-Spinelli test was not introduced.

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**SUPPRESSION HEARING, RELIANCE ON HEARSAY.**

**THE PEOPLE PROPERLY RELIED ON HEARSAY TO DEMONSTRATE PROBABLE CAUSE AT THE SUPPRESSION HEARING; THE DEFENDANT DID NOT PRESENT ANY EVIDENCE TO CALL THE RELIABILITY OF THE HEARSAY INTO QUESTION (FIRST DEPT).**

[People v Gerard, 2021 NY Slip Op 05089, First Dept 9-28-21](#)

Practice Point: At a suppression hearing, the People may rely entirely on hearsay as long as it meets the Aguilar-Spinelli tests. The suppression court’s ruling will be upheld on appeal if the defendant, at the hearing, does not present any evidence or elicit any testimony on cross which calls into question the veracity of the hearsay.

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**VACATE CONVICTION, MOTION TO, ATTORNEYS.**

**GENERAL CRITERIA FOR DENYING, WITHOUT HOLDING A HEARING, A MOTION TO VACATE A CONVICTION ON INEFFECTIVE-ASSISTANCE GROUNDS (CT APP).**

[People v Dogan, 2021 NY Slip Op 04956, CtApp 9-14-21](#)

Practice Point: Although the Court of Appeals did not describe the facts of the case, the court laid out the general criteria for granting a hearing on a motion to vacate a conviction. To warrant a hearing, a defendant must demonstrate a “reasonable probability” he or she would not have pled guilty and would have insisted on going to trial absent defense counsel’s errors.

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**YOUTHFUL OFFENDERS, VACATE CONVICTION, MOTION TO.**

**THE 2012 SENTENCE IMPOSED WITHOUT CONSIDERING WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS WAS NOT ILLEGAL OR UNAUTHORIZED UNDER THE LAW IN EFFECT AT THE TIME; THEREFORE A MOTION TO VACATE THE SENTENCE ON THAT GROUND IS NOT AVAILABLE (THIRD DEPT).**

[People v Vanderhorst, 2021 NY Slip Op 05141, Third Dept 9-30-21](#)

Practice Point: The failure to consider a defendant’s youthful offender status is a ground for appeal if the defendant’s sentence was not final when the law was changed by the Court of Appeals in *People v Rudolph* (2013). But it is not a ground for a motion to vacate a conviction after the sentence becomes final.

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