

# CENTER FOR APPELLATE LITIGATION

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## ISSUES TO DEVELOP AT TRIAL

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*Your client's predicate status can affect plea bargaining, and, of course, sentencing. But not all prior offenses qualify as predicate offenses to enhance your client's status and sentence. Out-of-state and federal convictions must qualify as felonies in New York. See Penal Law § 70.06(b)(i). Where the prosecution seeks adjudication of your client as a violent predicate offender, the out-of-state conviction must qualify as a violent New York felony. See Penal Law § 70.04(b)(i).*

*This month's issue provides you with a resource that we hope will help when your client has a prior conviction from another state (or a prior federal conviction). Attached to this newsletter is a "cheat sheet" listing federal and out-of-state predicates (from nine commonly-seen states) that New York appellate courts have already determined do not qualify as New York felony or violent felony equivalents. **However, please read the following before consulting the chart for some important background and caveats.***

### A very brief refresher

Remember that, for the out-of-state (or federal) offense to qualify as a predicate in New York, the foreign conviction must be a felony in the foreign jurisdiction ("a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized") and must criminalize acts that in New York would be a felony. An out-of-state felony conviction qualifies as a predicate under New York's sentencing statutes only if it is for a crime "whose elements are equivalent to those of a New York felony." "[T]he court must examine the elements of the foreign statute and compare them to an analogous Penal Law felony." People v. Gonzalez, 61 N.Y.2d 586, 589 (1984).

As a general rule, the court's inquiry "is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes" People v. Muniz, 74 N.Y.2d 464, 467–468, (1989), citing People v. Olah, 300 N.Y. 96, 98, 89 N.E.2d 329 (1949). **When a statute-to-statute comparison reveals differences in the elements such that it is possible to violate the foreign statute without engaging in conduct that is a felony in New York, the foreign statute may not serve as a predicate.** See Muniz, 74 N.Y.2d at 469–470. Ordinarily, recitals in the foreign indictment/accusatory instrument beyond what was provided in the foreign statute are "immaterial and surplusage." Olah, 300 N.Y. at 102. In other words, what the defendant actually did is ordinarily irrelevant. It is the elements that matter.

It is the prosecution's burden to establish that a foreign conviction qualifies. It has to explain which New York felony the foreign conviction is equivalent to and get any underlying records.

However, you should be forearmed with the information to challenge its claim.

How to use the chart:

- Our cheat sheet covers federal offenses and offenses from nine of the states we more commonly see (Connecticut, D.C., Florida, Massachusetts, New Jersey, North Carolina, Pennsylvania, South Carolina, Virginia). We hope to expand the list in future issues. It is organized by jurisdiction (federal, and then alphabetically by the states covered in this issue). We provide the foreign statute that was under review, some brief reasoning, and the supporting caselaw. Miscellaneous considerations, where pertinent, are found in the “Notes” section.
- Consult the chart early in the case. If your’s client’s prior conviction is on the chart, pull the supporting cases and familiarize yourself with the reasoning for use during plea negotiations and at sentencing.

A couple of caveats:

- Our hard-working summer interns conducted exhaustive research to find any New York appellate case that disqualified a conviction from the targeted foreign jurisdiction, but that does not mean you should rely exclusively on this chart. **If you don’t find your client’s federal or out-of-state conviction (from one of the targeted states) on the chart, don’t assume the predicate qualifies.** The issue might never have come up before, the challenge might have been won at the trial level so there’s no published authority, or there might be cases decided that evaded our research or that were decided even since we prepared our chart.
- Therefore, if your client has an out-of-state prior offense not listed on the chart, plug the state into your legal research search engine to confirm whether any New York court has addressed it and then do your own analysis: Go to the statute yourself and analyze the elements. The chart should give you some ideas for typical areas of fruitful challenge.
- Note that a court is sometimes entitled to refer to the foreign accusatory instrument to determine what exactly the defendant did and whether it would be a New York felony. “[A] sentencing court [may] go beyond the statute and scrutinize the accusatory instrument in the foreign jurisdiction [because] the statute renders criminal not one act but several acts which, if committed in New York, would in some cases be felonies and in others would constitute only misdemeanors.” Gonzalez, 61 N.Y.2d at 590. The statutes in our chart are those where no recourse to the accusatory instrument would be permitted.

If you successfully challenge a client’s foreign conviction that’s not listed on our sheet, we’d love to know! Contact us at [info@cfal.org](mailto:info@cfal.org).

Jurisdiction	Citation	Crime (Foreign Jurisdiction)	Reasoning	Case Support	Notes
Federal	7 USC 2023 (renumbered as 7 USC 2024(b)(1))	Illegal possession of food stamps	Most analogous crime is criminal possession of stolen property in the second degree, but that requires a \$250 value. The federal statute requires the value of the food stamps be in excess of \$100	People v. Gipson, 109 A.D.2d 1101 (4th Dept. 1985)	POST 1986: Per 2024(b)(1), the minimum amount required to qualify as a felony is still \$100, but the penalty increases if it exceeds \$5,000. The degree of corresponding CPSP will depend on the underlying amount (CPSP 5 requires no dollar amount and is a misdemeanor; all other CPSP require some dollar value)
Federal	18 USC 371	Conspiracy to commit offense or defraud United States	"[T]he underlying substantive crime involved in the Federal prosecution would not constitute a class A, B, or C felony in New York." No further explanation given	People v. Donnelly, 89 A.D.2d 872 (2d Dept. 1982)	
Federal	18 USC 641	Public Money, Property or Records	Federal statute proscribes broader conduct than its New York counterpart (PL 155.30)	People v. Marrero, 2 A.D.3d 107 (1st Dept. 2003), aff'd 3 N.Y.3d 762 (2004).	
Federal	18 USC 659 (pre-1996)	Theft from an interstate shipment	Federal statute only requires value of property to exceed \$100 to qualify as a felony; the NY statute requires \$250 or more (PL 155.30 or 165.45)	People v. Rodgers, 128 A.D.2d 418 (1st Dept 1987); People v. Martin, 81 A.D.2d 765 (1st Dept 1981)	PRE-1996 ONLY: 1996 Amendment to federal statute increased value to \$1,000. Since 1986, the corresponding New York laws (PL 155.30, Grand Larceny in the 4th; PL 165.45, Crim poss stolen prop in the 4th) have also required \$1,000.
Federal	18 USC 922(a)(6)	Making a false statement to a firearms dealer to acquire a firearm	"[A]s distinct from the New York statute, it is possible to violate the federal statute without (1) a written instrument; (2) an offering of the false statement to a public office or public servant; (3) the filing of the false statement with such public office or public servant; or (4) the intent to defraud the state or any political subdivision thereof." at 737	People v. Behrman, 141 A.D.2d 372 (1st Dept 1988); People v. Lawrence, 17 A.D.3d 697 (2d Dept. 2005); People v. Campbell, 256 A.D.2d 1112 (4th Dept. 1998)	
Federal	18 USC 922 (g)(1)	Felon in possession of a firearm	Federal crime does not require as one of its elements that the firearm be loaded, whereas possession of an unloaded firearm pursuant to Penal Law 265.01(1).	People v. Lawrence, 17 A.D.3d 697 (2d Dept 2005)	But see, effective March 16, 2013, Penal Law 265.01-b makes criminal possession of a firearm, even if unloaded, a class E felony
Federal	18 USC 922(g)(8)	Unlawful for a person subject to certain court orders to ship or transport in interstate or foreign commerce firearms or ammunition, or receive firearms or ammunition that has been shipped in interstate or foreign commerce	No equivalent in state law	People v. Wimberly, 86 A.D.3d 651 (3d Dept 2011)	
Federal	18 USC 922(h)	Unlawful for an employee of a person described in subsection (g) to receive, possess, or transport a firearm or ammunition in or affecting interstate or foreign commerce, or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce	The closest analogous statute (NY PL 265.02(1), now renumbered as 265.01(7)) does not authorize conviction for possession or receipt of ammunition, except bullets "containing an explosive substance designed to detonate upon impact."	People v. Falcone, 107 A.D.2d 587 (1st Dept. 1985)	PL 265.01(7) is a misdemeanor (CPW 4) and cannot be used as a basis for a CPW 3 bump-up
Federal	18 USC 1014	Making false statements to influence a Federal credit union	The most comparable NY felony is PL 175.35, which requires an intent to defraud. The Federal statute only requires an intent to influence, not to defraud, and is thus broader	People v. Robinson, 115 A.D.2d 1012 (4th Dept 1985)	
Federal	18 USC 1341	Mail fraud	"No felony equivalent in state law"	People v. Marino, 81 A.D.3d 426 (1st Dept 2011)	

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Federal	18 USC 1708	Illegal possession of stolen mail	Most analogous crime is criminal possession of stolen property in the second degree, but that requires a \$250 value. The federal statute does not require any particular value	People v. Gipson, 109 A.D.2d 1101 (4th Dept. 1985)	POST 1986: The corresponding law, PL 165.40 (Crim poss stolen prop in the fifth) is a class A misdemeanor. All other degrees of crim poss stolen prop require some dollar value
Federal	18 USC 1709	Theft of mail matter	Federal statute prohibits theft of any mail matter, regardless of value. In NY, felonies are determined based on the value of the object stolen (PL 155.30, PL 155.35)	People v. Love, 111 A.D.2d 134 (1st Dept. 1985)	
Federal	18 USC 2113	Bank robbery	The federal bank robbery statute satisfies the elements of NY's robbery in the third degree. However, the Federal law does not contain the aggravating elements present in the NY code that raise robbery in the third degree to the violent crimes of robbery in the second and first	People v. Manino, 81 A.D.2d 896 (2d Dept. 1981); People v. Sellers, 168 A.D.2d 583 (2d Dept. 1990); People v. Smith, 129 A.D.2d 517 (1st Dept. 1987); People v. Cosme, 99 A.D.3d 940 (2d Dept. 2012); People v. Mitchell, 134 A.D.3d 961 (2d Dept. 2015); People v. Grate, 122 A.D.2d 853 (2d Dept. 1986); People v. Horvath, 81 A.D.3d 850 (2d Dept. 2011)	Can be considered a predicate but not a violent predicate
Federal	21 USC 846	Drug conspiracy (generally)	Federal drug conspiracy convictions may not serve as predicates in New York because New York has an overt act requirement, unlike the federal law	People v. Ramos, 19 N.Y.3d 417 (2012); People v. Sumter, 157 A.D.3d 1125 (3d Dept. 2018); People v. Robinson, 148 A.D.3d 1639 (4th Dept. 2017); People v. Hall, 149 A.D.3d 1610 (4th Dept. 2017); People v. Hamm, 158 A.D.3d 1272 (4th Dept. 2018)	
Connecticut	Conn. Gen. Stat. 29-38	Weapons in a vehicle	The most analogous crime is crim poss of a weapon in the fourth degree, a class A misdemeanor (PL 265.01)	People v. Sasso, 176 A.D.2d 410 (3d Dept. 1991)	
Connecticut	Conn. Gen. Stat. 53a-70(a)(1)	Sexual Assault, 1st degree	The New York counterparts (PL 130.35(1), 130.50(1), 130.65(1)) prohibit sexual acts by forcible compulsion, including threats of immediate death, physical injury, or immediate kidnapping. The Connecticut statute is broader as it contains no requirement that the threat must be of immediate harm. Additionally, the Connecticut statute is general intent statute, so accessorial liability could attach without any specific intent to facilitate an attack by a third person. New York PL 20.00 requires specific intent to aid another to cause the crime to establish accessorial liability.	People v. Davis, 137 A.D.3d 509 (1st Dept. 2016)	
Connecticut	Conn. Gen. Stat 53a-71(a)(4)	Sexual Assault, 2d degree	The Conn. statute criminalizes sex with a person under eighteen where "the actor is such a person's guardian or otherwise responsible for the general supervision of such person's welfare." at 976. No such equivalent exists in New York's Penal Code.	People v. Iliff, 96 A.D.3d 974 (2d Dept. 2012)	

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Connecticut	Conn. Gen. Stat. 53a-103	Burglary, 3rd degree	"As the People correctly concede, the out-of-state crime for which the defendant was convicted would not constitute a felony in New York for the purposes of enhanced sentencing." at 932. No further explanation given	People v. Ballinger, 99 A.D.3d 931 (2d Dept. 2012)	
Connecticut	Conn. Gen. Stat. 54-197	Conspiracy	The most analogous crime conspiracy in the sixth degree, a class B misdemeanor (PL 105.00)	People v. Sasso, 176 A.D.2d 410 (3d Dept. 1991)	
D.C.	D.C. Code 22-2801	Robbery; Attempt to commit robbery	The D.C. statute includes robbery by "sudden or stealthy seizure or snatching," which in New York, would include misdemeanor pickpocketing	People v. Jurgins, 26 N.Y.3d 607 (2015)	Includes discussion about whether the statute is divisible or indivisible, and the Court decides indivisible. Uses strict equivalency
Florida	Fla. Stat. Ann. 810.02	Burglary	The burglary statute in FL proscribes entering a location with the intent to commit an "offense," while the NY burglary definition is entering a location with the intent to commit a "crime." There are offenses under FL law that would not qualify as crimes under NY law; the intent element is therefore broader in FL.	People v. Boston, 79 A.D.3d 1140 (2d Dept. 2010); People v. Fermin, 231 A.D.2d 436 (1st Dept. 1996); People v. Vasquez, 173 A.D.3d 1073 (2d Dept. 2019); People v. Fletcher, 98 A.D.3d 899 (1st Dept. 2012)	The FL burglary statute has been amended and will go into effect in October 2019. The "offense" language appears to remain unchanged
Florida	Fla. Stat. Ann. 812.014	Grand theft in the third degree	FL statute criminalizes temporary deprivations of another's property, while the NY statute does not contain language regarding temporary deprivations	People v. Parker, 121 A.D.3d 1190 (3d Dept. 2014)	The distinction would appear to apply to all levels of theft - see 812.014(1)
Florida	Fla .Stat. Ann. 831.02	Uttering forged instruments	The corresponding NY statute (PL 170.25) only considers instruments forged if they are falsely made; genuinely made instruments that contain false information do not qualify under the statute. The FL statute can be violated by uttering or publishing an instrument that merely contains false information	People v. Catmon, 140 A.D.3d 661 (1st Dept 2016)	
Florida	Fla. Stat. Ann. 893.13(1)(a)	Selling, manufacturing or delivering, or possessing with intent to sell, manufacture, or deliver, a controlled substance	"[U]nlike New York law," Fla. Stat. 893.13(1)(a) "contains no element of knowledge that the item at issue, was, in fact, the controlled substance the defendant is charged with selling or possessing."	People v. Ramos, 145 A.D.3d 432 (1st Dept. 2016); People v. Muhammad, 168 A.D.3d 549 (1st Dept. 2019)	Florida's clarifying statutes passed in 2002 (893.101) expressly states that guilty knowledge is not an element of drug offenses
Massachusetts	Mass.Gen.Laws Ann. ch. 265, § 17	Armed robbery	MA law requires defendant be armed with instrument with the "apparent ability to inflict harm"; NY law (PL 160.15) requires a firearm, deadly weapon, or a dangerous instrument-- which requires the weapon be capable of death or serious injury (PL 10.00[13]), not just one that appears dangerous.	People v. Rodriguez, 141 A.D.2d 427 (1st Dept. 1988)	
New Jersey	N.J.Stat.Annot. § 2C:5-2(a)	Conspiracy	N.J. statute is broader because it includes conspiracy to commit a felony or misdemeanor, while N.Y. requires at least a class C. felony (P.L. 105.10)	People v. Nelson, 128 A.D.3d 498 (1st Dept. 2015)	

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New Jersey	N.J.Stat.Annot. § 2C:12-1(b)(2)	Aggravated assault	NJ defines bodily injury and deadly weapon more broadly than NY.	People v. Rawls, 65 A.D.3d 978 (1st Dept. 2009)	*Court does not give any information beyond that the People conceded non-equivalence, so I got the info about the citation and reasoning from the State's brief
New Jersey	N.J.Stat.Annot. § 2C:13(b), 215-1, 239-4(a)	Kidnapping 1, Robbery 1, Possession of a Weapon for an Unlawful purpose	"the New Jersey statutes under which he was previously convicted were broader than the applicable New York statutes, and the lack of equivalency is plain without the need for examination of accusatory instruments." No further explanation given	People v. Umstead, 134 A.D.3d 522 (1st Dept. 2015)	
New Jersey	N.J.Stat.Annot. § 2C:15-1a(1), (2)	Robbery	NJ statute is broader because it punishes the knowing use of force in the course of committing a theft or in the immediate flight from the attempt or the commission of the theft (or the attempt); NY punishes only the use of force that is for the purpose of preventing resistance to the taking or retention of property or compelling the owner to deliver up the property	People v. Thomas, 103 A.D.3d 923 (2d Dept. 2013); People v. Rawls, 65 A.D.3d 978 (1st Dept. 2009)	
New Jersey	N.J.Stat.Annot. § 2C:18-2	Burglary 3	NJ requires intent to commit "offense"; NY requires entry with intent to commit a "crime;" NJ accusatory instrument could not be considered in determining predicate status	People v. Muniz, 74 N.Y.2d 464 (1989); People v. Williams, 49 A.D.3d 1183 (4th Dept. 2008); People v. Nieves-Rojas, 126 A.D.3d 1373 (4th Dept. 2015); People v. Rovinsky, 135 A.D.3d 969 (2d Dept. 2016) People v. Casey, 82 A.D.3d 1005 (2d Dept. 2011)	All degrees of NJ burglary would appear to have this disqualifier
New Jersey	N.J.Stat.Annot. § 2C:20-2	Theft "from the person of the victim"	Analogous N.Y. felony, PL 155.30[5], requires a taking from a person, while N.J. is satisfied by theft of property "within immediate custody and control of the victim"	People v. Cheatham, 168 A.D.2d 258 (1st Dept. 1990)	
New Jersey	N.J.Stat.Annot. § 2C:21-1(a)	Forgery/uttering a false instrument	N.J. statute punishes a broader range of mental states than New York.	People v. Allison, 167 A.D.3d 171 (1st Dept. 2018); People v. Nelson, 128 A.D.3d 498 (1st Dept. 2015)	
New Jersey	N.J.Stat.Annot. § 2C:39-5(b)	Possession of a weapon 3d	N.J. statute elements are equivalent to P.L. 265.01(1), which is a misdemeanor, not a felony	People v. Gadson, 143 A.D.2d 360 (2d Dept. 1988)	
New Jersey	N.J.Stat.Annot. § 2C:39-7	"Certain Persons Not to Have Weapons"	N.Y.'s P.L. 265.00(3) defines firearm more narrowly than N.J., which includes any rifle or shotgun.	People v. Maglione, 305 A.D.2d 426 (2d Dept. 2003)	Statute is now 2C:39-7
North Carolina	N.C. Gen. Stat. § 14-87 [a]	Robbery with firearms or dangerous weapon	Numerous differences between NC robbery and NY robbery and grand larceny: e.g., "intent to steal" in NC need not arise until after force was used; taking need not be from the person of another (as in NY), but can occur merely where a person is present.	People v. Yusuf, 22 Misc.3d 1127 (A), aff'd as modified, 19 N.Y.3d 314 (2012) (holding indictment cannot be consulted); People v. Durant, 121 A.D.3d 709 (2d Dept. 2014)	

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North Carolina	N.C. Gen. Stat. § 14-177	Crime against nature	N.C. statute applies to cover anal and oral sexual contact with animals, while the N.Y. statute (Sexual Misconduct, PL 130.20(3)) has only been applied to oral sexual conduct or sexual intercourse with an animal: the crime at issue involved anal sexual conduct with an animal, and thus is not covered by the N.Y. "Sexual Misconduct" statute.	In re Parker, 11 Misc.3d 252 (N.Y. Sup. Ct. 2005)	
Pennsylvania	18 Pa.C.S.A. § 3502	Burglary of a Residence	"[A]s conceded by the People, there is no element in the Pennsylvania statute comparable to the element in the analogous New York statute that an intruder 'knowingly' enter or remain unlawfully in the premises [P.L.140.20] . . . The absence of this scienter requirement from the Pennsylvania burglary statute renders improper the use of these Pennsylvania burglary convictions as the basis of defendant's predicate felony adjudication."	People v. Schaner, 133 A.D.2d 582 (1st Dept. 1987); People v. Funk, 166 A.D.3d 1487 (4th Dept. 2018); People v. Flores, 143 A.D.3d 840 (2d Dept. 2016)	
Pennsylvania	18 Pa.C.S.A. § 4101	Credit Card Fraud/Forgery	In New York, P.L. 170.10 requires intent to defraud, deceive, or injure. PA statute requires only knowledge by the defendant that he is facilitating fraud or injury, which is different from intent. Additionally, PA statute criminalizes unauthorized use of a credit card, which is analogous to misdemeanor in NY.	People v. Rota, 245 A.D.2d 133 (1st Dept. 1997)	
South Carolina	S.C.C.A. 16-11-312(A)	Burglary	SC statute does not require that someone knowingly enter or remain in a dwelling, which is required under N.Y. PL 140.25[2].	People v. Tyler, 144 A.D.3d 557 (1st Dept. 2016)	
Virginia	Va. Code Ann. 18.2-195	Credit card fraud	Virginia statute criminalizes using a stolen or expired credit card or credit card number, while in N.Y., felony is limited to the taking of the physical card.	People v. Poullard, 159 A.D.3d 924 (2d Dept. 2018)	