BASIC COURSE FOR PROSECUTORS XII

VOLUME I

DIVISION OF CRIMINAL JUSTICE SERVICES
NEW YORK STATE

Albany
August 10-14

New York City
August 17-21

1987

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GOVERNOR

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August 10, 1987

Dear Participant:

On behalf of Lawrence T. Kurlander, Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services, welcome to the eleventh annual Basic Course for Prosecutors, conducted by the Bureau of Prosecution Services.

The Basic Course is designed to provide you with the theoretical and practical background required for your important duties. This Basic Course Manual has been revised and updated to compliment the presentations you will attend during the course and to serve as an important reference tool thereafter.

The Basic Course for Prosecutors is among the Bureau's most important functions, and your participation is appreciated. We are glad to have the opportunity to assist you in serving the citizens of your community honorably and with excellence.

Mr. Kurlander and all of us at the Bureau of Prosecution Services extend to you our best wishes for success in your new profession.

Very truly yours,

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BASIC COURSE FOR PROSECUTORS XII

VOLUME I

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EXPERIENCE:

Chief, Sex Crimes Prosecution Unit, New York City Law Department, Family Court Division, 1984-Present
Assistant Director, Court Referrals, Bureau of Client Fraud Investigation, Human Resources Administration, 1983-1984
Assistant District Attorney, Bronx County. Worked in Criminal Court, Grand Jury, Investigations, Major Offenses, and Supreme Court Bureaus, 1975-1982
Civil Litigation Firms: Lowenberger & Gitter, Leahey & Johnson
Chairperson, Criminal Justice Committee, New York City Task Force Against Sexual Assault

LECTURER:

New York City Police Department
Sex Crimes Investigation Course
Division of Criminal Justice Services
Delinquency Prosecutors Program

PUBLICATION:

The ABC's of Family Court: Children's Guide (1987)

CHRISTOPHER J. BELLING

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B.A., (magna cum laude), State University of New York at Buffalo, 1971
J.D., State Univeristy of New York at Buffalo, 1974

EXPERIENCE:

Assistant District Attorney, Erie County District Attorney's Office,
1975-present
Deputy Bureau Chief, 1979-1981
Chief, Major Offense/Career Criminal Bureau, 1981-1986
Chief, Felony Trial Bureau III, 1986-present

LECTURER:

Erie County Central Police Services Training Academy
Niagara Frontier Transportation Authority
Police Officer Training Program
Cheektowaga Police Department
Erie County Sheriff's Department
State University of New York
Public Safety Officers Training Program
Erie County District Attorney's Office
State University of New York at Buffalo
School of Dentistry
National College of District Attorneys
Erie County Bar Association and State University of New York at Buffalo
Law School Convocation
Erie Community College
Erie County Captain's and Lieutenant's Association
Cheektowaga Captain's and Lieutenant's Association
Cheektowaga Police Benevolent Association

MEMBER:

New York State Bar Association, Criminal Law Section
Erie County Bar Association, Criminal Law Committee
New York State District Attorney's Association
National District Attorney's Association

PUBLICATION:

"Use of Maps, Charts and Floor Plans in Criminal Trials", Practical
Prosecutor, Volume 1985, No.1

STEPHEN J. BOGACZ

EDUCATION:

B.A., Fordham College, 1970
O.C.M.A., Fordham Graduate School, 1971
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EXPERIENCE:

New York City Law Department, Borough Chief, Queens Family Court, January 1984-Present
New York City Law Department, Deputy Borough Chief, Bronx Family Court, May 1983-January 1984
New York City Law Department, Assistant Corporation Counsel, Bronx Family Court, 1977-May 1983
Private practice of law, 1976-1977
Secretary, Arnone for State Senate Committee, 1976

MEMBER:

New York State Bar Association
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B.A., University of Alabama, 1962
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First Assistant Special State Prosecutor for the New York City Criminal Justice System, 1985-present
Chief Law Assistant, Supreme Court of the State of New York, Appellate Division, Second Judicial Department, 1982-1985
Deputy Criminal Justice Coordinator for the City of New York, 1980-1982
Assistant District Attorney, Kings County, 1969-1980
Chief, Appeals Bureau, 1975-1980
Deputy Chief Appeals Bureau, 1971-1975
Captain, United States Air Force, Assistant Staff Judge Advocate, 1965-1968

LECTURER:

National Governor's Conference
Brooklyn Bar Association
Cardozo Law School

PUBLICATION:

Author: "Ethics in Context", Journal of Criminal Justice Ethics, Vol. II, No. 1, December, 1983

MARK COHEN

EDUCATION:

B.A., Columbia College, 1972
J.D., Hofstra Law School, 1975
Hofstra Law Review

EXPERIENCE:

Chief Law Assistant, Chief of the Appeals Bureau for the Suffolk County District Attorney's Office, 1976-present

Law Clerk to Judge in Massachusetts Appeals Court, 1975-1976

D. BRUCE CREW, III

EDUCATION:

B.A., Colgate University, 1959
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EXPERIENCE:

Supreme Court Justice, State of New York, 1983-present
District Administrative Judge Sixth Judicial District, 1987-present
District Attorney, Chemung County, 1973-1983
Assistant District Attorney, Chemung County, 1968-1971
Partner, Donovan, Graner, Davidson & Burns, 1965-1973
Associate, Sayles, Evans, Brayton, Palmer & Tifft, 1964-1965
Confidential Clerk to Supreme Court
Justice Harold E. Simpson, 1962 - 1964
Elmira College, Department of Criminal Justice Faculty Member,
1974-present

LECTURER:

Judicial Seminar Buffalo Law School
Practicing Law Institute
Bureau of Criminal Prosecution and Defense Services, New York State
Division of Criminal Justice Services
Corning Community College

MEMBER:

New York State District Attorneys Association Executive Committee,
1973-1983
President, New York State District Attorney's Association, 1976-1977
Governor's Task Force on Criminal Justice Standards and Goals, 1977
Criminal Procedure Law, Advisory Committee to the New York State Office
of Court Administration, Committee on Criminal Discovery,
1980-present
New York State Bar Association, Criminal Justice Section, 1978-present
New York State Bar Association
Chemung County Bar Association

PUBLICATIONS:

Criminal Discovery in New York State -- Selected Issues, August 1974
Revised: July 1985
Albany Law Review, 1962

SAMUEL DAWSON

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Brooklyn College, 1962
St. John's Law School, 1965

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Partner in Law firm - Gallop, Dawson and Claimon, 1978-present
Assistant, U.S. Attorney's Office, Eastern District of New York, 1974-1978
Legal Aid Society, Criminal Defense Division (New York City), 1965-1973

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B.A., Siena College
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Chief Assistant District Attorney, Albany County, 1975 - present
Private Practice, 1974
Felony Trial Bureau Chief, Albany County District Attorney's Office, 1969-1973

LECTURER:

National District Attorney's Association
Author, Lecturer and Chairman - various seminars for New York State Bar Association
Lectured for EnCon
New York State Police
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Lectured Arson New York State Fire Academy
Adjunct Professor, Albany Law School, Trial Tactics and Criminal Procedure, 1972 - present
Legal Advisor, Albany County Control Plan Advisory Group, 1980

MEMBER:

New York State Bar Association, Albany County
District Attorney's Association
Trial Lawyers, Criminal Justice Section
Albany Trial Lawyer's Association

PUBLICATIONS:

Author:
"Special Evidentiary Problems", New York State Bar Publication, 1978. Supplemental 1980, 1981, 1982
"Pitfalls of the Prosecution", New York State Criminal Justice Section, Fall, 1980
New York State Bar Publication, "Discovery Materials and Hearings: Suppression Hearings in Criminal Cases", 1982

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EDUCATION:

B.A., Catholic University of America, 1963
LL.B., Cornell University Law School, 1966

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Private Practice, Clinton, New York, 1982-present
District Attorney, Oneida County, 1971-1982
Assistant District Attorney, Oneida County, 1967-1971
Law Clerk to Chief Judge Wilson Cowen, United States Court of Claims, 1966-1967

LECTURER:

First National Forensic Science Conference, Aspen, Colorado, 1979
Instructor, Mohawk Valley Community College
Instructor, Utica College
Instructor, Utica-Rome College of Technology

MEMBER:

New York State Crime Laboratory Advisory Committee, 1977-present
Director, Oneida County Victim-Witness Assistance Unit, 1977-present
Former Trustee, National Forensic Science Foundation
American Trial Lawyer's Association
New York State Bar Association
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HERALD PRICE FAHRINGER

EDUCATION:

B.A., Pennsylvania State University, 1950
M.A., Pennsylvania State University, 1951
LL.B., University of Buffalo Law School, 1956
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EXPERIENCE:

Partner in the Law Firm of Lipsitz, Green, Fahringer, Roll, Schuller and James, New York and Buffalo

LECTURER:

Lectured at various legal seminars in 25 states covering the following topics: Preparing for trial, Pretrial motions, Raising constitutional issues in a criminal case, Representing a witness before a grand jury, Jury selection, Opening statements, Cross-examination of prosecution witness, Summation, Sentencing, How to write an appellate brief, The law of obscenity, The use of demonstrative evidence.
Instructor at the National Institute of Trial Advocacy, Boulder, Colorado, 1972-1973
National College of Advocacy, Harvard University sponsored by the Association of Trial Lawyers of America, 1974-1978
Adjunct Professor, New York Law School, course in Appellate Advocacy, 1977-1978.
Guest Lecturer at the Honorable Charles S. Desmond's Seminar on Appellate Practice, State University of New York at Buffalo Law School, 1968-1975

MEMBER:

American College of Trial Lawyers
International Society of Barristers
American Board of Criminal Lawyers
General Counsel, First Amendment Lawyer's Association
American Bar Association
New York State Bar Association
Erie County Bar Association

PUBLICATIONS:

"Navigating Corporate Crime Probes", National Law Journal, July 1980
"Obscenity Law: Who Will Guard the Guards?", 16 Trial 8, August 1980
"Cameras In The Courtroom", 17 Trial 1, January 1981
"Working With Words", New York State Bar Journal, Vol. 54, No. 3, April 1982
"Sentencing", Trial Magazine, Summer 1983

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B.A., State University of New York, Albany
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District Attorney of Albany County, 1975-present

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District Attorney, Chemung County, 1983-present
Chief Assistant District Attorney and Director of Career Criminal Prosecutions, 1978-1983
Assistant District Attorney, Chemung County, 1976-1978
Legislative Committee, New York State District Attorneys Association

LECTURER:

Basic Course for Prosecutors
Elmira College
Corning Community College
Police Training Seminars

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New York State District Attorney's Association
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New York State Bar Association
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Senior Trial Counsel, New York County, 1984-Present
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Executive Assistant District Attorney, Office of the Special Narcotics Prosecutor, 1977-1980;
Assistant District Attorney, New York County, 1972-Present

LECTURER:
Adjunct Associate Professor of Criminal Justice, St. John's University, 1976-present
Emory Law School Trial Techniques Seminar, 1982
National College of District Attorney's Seminars: Career Prosecutors Course (1984, 1985); Trial of Narcotics Cases (1976-1979); Organized Crime (1980); Trial Techniques (1981); Western Pacific Military Law Seminars in Hawaii, Okinawa, Philippines, Korea (1982); Investigation (1985)
National Institute of Trial Advocacy, Northeast Region Program, 1979-present
National Judicial College Seminar for Hawaii Judicial Institute, 1982
New England Narcotic Enforcement Officer's Association Annual Spring Conference, 1980
New York City Police Department Organized Crime Control Bureau Criminal Investigator's Course, 1974-Present
New York State Bar Association Seminar on Trial of a Criminal Case, Buffalo, New York, 1980
New York State Bureau of Prosecution and Defense Services, Seminars, 1978-1984
New York State Trial Lawyer's Association, Seminar on Handling Narcotics Cases, 1984
State of Arizona Prosecuting Attorney's Advisory Council, Seminar on Prosecuting Drug Cases, 1979
State of Montana County Attorney's Association, Seminar on Prosecution of of Narcotics Cases, 1978
State of North Dakota Prosecutor's Association Training Seminar, 1985
State of Oklahoma District Attorney's Association, Seminar, 1980
Tulsa County (Oklahoma) District Attorney's Office Videotape Seminar, 1981

MEMBER:
The Association of the Bar of the City of New York, Judiciary Committee, 1982-1985
New York State District Attorney's Association, Legislative Committee, 1982-present

PUBLICATIONS:
"Anonymous Tips and the Fourth Amendment", Search and Seizure Law Report, June 1982
"Taking Statements From Defendants", The Practical Prosecutor, June 1984
Contributing Editor to the National College of District Attorneys Series Entitled Roles and Functions of the Prosecutor

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District Attorney, Onondaga County, 1977-Present
Assistant District Attorney, Onondaga County, 1971-1976
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Claims Attorney & Manager, Fidelity and Deposit Co. of Maryland
Private Practice

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New York State Bar Association
New York State District Attorney's Association, President, 1983-1984
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EXPERIENCE:

Partner in the Law Firm of Hoffinger, Friedland, Dobrish, Bernfeld & Hasen, New York City
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Columbia Law School, 1978-1979
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Hearing Officer, Grievance Committee, Association of the Bar of the City of New York, 1966-1967
Associate Chairman, Criminal Justice Coordinating Council and Executive Committee, 1970-1974

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Board of Directors,
New York Criminal Bar Association, 1976-Present
Victim's Services Agency, 1978-Present
Chairman, Advisory Board, New York University School of Law, Center for Research in Crime and Justice, 1983-present
The Association of the Bar of the City of New York, Committees on:
Family Court, 1959-1962;
Criminal Courts, 1966-1969, 1973-1976;
Grievance, 1967-1969, 1971-1972;
Penology, 1970-1974;
Professional Responsibility, 1978-1986
Committee on Criminal Law
National Association of Criminal Defense Lawyers

PUBLICATIONS:

"Jury Voir Dire" in 15th Annual Defending Criminal Cases, Practising Law Institute, 1977
"Right to Counsel vs. Conflict of Interest" in The Constitution and the Criminal Lawyer, Practising Law Institute, 1979
"Some Thoughts About Cross-Examination" in Advanced Criminal Trial Tactics for Prosecution and Defense 1980, Practising Law Institute, 1980
"Cross-Examination Techniques and Motions During Trial" in Criminal Trial Advocacy, Office of Projects Development (Appellate Division, 1st Dept.), Copyright 1980
"Fair Trial - Free Press" in Ethical Society, December 1980
"Role of Defense Attorney Prior to Indictment" in Economic Crime, Vol. I, Bureau of Prosecution and Defense Services, State of N.Y., Executive Dept. 1981
"Asserting the Fifth Amendment: Protection or Peril?" in Defending the Professional, Practising Law Institute, 1982

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Professor, Albany Law School, 1972-present
Private Practice, 1976-present
Instructor, Trial Tactics and Methods, 1986-present
Executive Director, New York State Law Revision Commission, 1979-1984

LECTURER:

Living Under the Proposed Code of Evidence, DRI, 1980
Prosecutors and the Proposed Code of Evidence, Annual Meeting of DA Association, 1982
Impeachment, Judicial Seminar, 1982
Evidentiary Trends, Academy of Matrimonial Lawyers, 1983
Law of Privileges, NYSBA, 1984

MEMBER:

American Bar Association
Litigation Section, Member, Business Torts Litigation Committee (Chairman, 1981-1984), Patent, Trademark and Copyright Section, Member, Trade Secrets Committee, Antitrust Section
New York State Bar Association
Antitrust Section, Trial Lawyer's Section
Albany County Bar Association
Board of Directors, 1986-present
American Law Institute
Member, Advisory Committee for Restatement of Unfair Competition

PUBLICATIONS:

Hutter, Monopolies and Mergers: Cases and Materials (1981)
Editor in Chief, Model Jury Charges in Business Tort Cases (ABA 1981)
"Business Torts" in Actions and Remedies (1985)
Contributing Author, Weinstein, Korn and Miller, New York Civil Practice
Numerous articles concerning various aspects of the law of unfair trade practice

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District Attorney, Ulster County, 1978-present
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Assistant District Attorney, New York County, 1970-1974
Chief Trial Assistant, Major Offense Bureau, 1973-1974
Trial Assistant, Supreme Court Bureau, 1972-1973
Trial Assistant, Criminal Courts Bureau, 1971-1972
Assistant, Indictment Bureau, 1970-1971
Active Duty, U.S. Army 1968-1970
Associate, Munley & Meade, P.C. Great Neck, New York, 1968

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Associate Professor, State University College (SUNY), New Paltz, New York, 1982-1984
Basic Course for Prosecutors, 1979-present
Guest Lecturer, New York State Bar Association, Albany, New York ("The Prosecution, Defense and Judicial View of a Felony Case.")

MEMBER:

New York State District Attorney's Association, 1974-present.
Executive Committee, 1980-1985
National District Attorney's Association, 1978-present
Ulster County District Association, 1974-present

PUBLICATION:

"Cross Examination - A Prosecutor's Perspective", a Paper published by the New York State Bar Association, May 1983.

JUDY HARRIS KLUGER

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New York University, 1973
St. John's University Law School, 1977

EXPERIENCE:

Chief of Criminal Court Bureau, Kings County District Attorney's Office, 1983-present
Chief of Sex Crimes Bureau, Kings County District Attorney's Office, 1982-1983
Deputy Chief of Sex Crimes Bureau, Kings County District Attorney's Office, 1980-1982
Assistant District Attorney, Kings County District Attorney's Office, 1977-present

LECTURER:

Seminar on Sex Crimes, New York City Police Department
Conference on Battered Women, New York State Bar Association, 1982
Basic Course for Prosecutors XI, 1986

MEMBER:

Bar Association of the City of New York
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New York State Women's Bar Association

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Nassau County Attorney's Office, Family Court Bureau, Deputy Bureau Chief, 1987-present
Nassau County Attorney's Office, Deputy County Attorney in charge of Juvenile Delinquency Prosecution, 1981-1987
Nassau County Attorney's Office, Family Court Bureau, Deputy County Attorney, 1978-1981
Nassau County Sheriff's Department, Legal Consultant, 1977

MEMBER:

State of New York Police Juvenile Officer's Association, Counsel
New York State District Attorney's Association Legislative Committee
New York State Division of Criminal Justice's Advisory Committee on Missing and Exploited Children
New York State Division of Criminal Justice's Advisory Committee on Child Victims
New York State County Attorney's Association Legislative Committee
Nassau County Bar Association Criminal Law Subcommittee.

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County Judge, Broome County, 1982-present
District Attorney, Broome County, 1970-1981
Chief Assistant District Attorney, Broome County, 1969-1970
Special City Judge, City of Binghamton, 1968-1969
Town Attorney, Town of Binghamton, 1966-1969
Assistant District Attorney, Broome County, 1963-1965, 1969
Private Practice: 1960-1969

LECTURER:

New York State Judicial Seminar
New York State Town and Village Justice Training Program
State University at Binghamton
Broome Community College
Broome County Law Enforcement Academy
Various courses, conferences and seminary

MEMBER:

New York State and Broome County Bar Associations
New York State District Attorney's Association, President, 1979
New York State County Judge's Association
New York State Advisory Commission on Criminal Sanctions, 1982

WILLIAM L. MURPHY

EDUCATION:

B.A., Fordham University, 1966
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EXPERIENCE:

District Attorney, Richmond County, 1983-present
Chief Assistant District Attorney, Richmond County, 1976-1983
Assistant District Attorney in charge of Indictment Bureau, New York County, 1974-1975
Deputy Chief, Indictment Bureau, New York County, 1973-1974
Assistant District Attorney, New York County, 1969-1975

MEMBER:

President-Elect, New York State District Attorney's Association
Co-Chair, New York State Bar Association, Criminal Justice Section Committee on Prosecution

JAMES A. PAYNE

EDUCATION:

B.A., Bernard M. Baruch College, 1973
J.D., New York University School of Law, 1976

EXPERIENCE:

Commissioner, New York City Department of Probation, April 1987-present
Chief of the Family Court Division, Office of the Corporation Counsel
New York City, 1982-1987
Assistant District Attorney, New York County, 1976-1982

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EXPERIENCE:

Monroe County Law Department, Senior Deputy County Attorney, 1982-present
Monroe County Law Department, Deputy County Attorney, 1973-1982
Monroe County Department of Social Services, Counsel to Department, 1971-1973
Partner in Law Firm, Pilato & Pilato, Rochester, New York, 1970-1985
Williams & Sprague, Attorneys, Cuba, New York, 1968-1968

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B.S., New York University, School of Commerce, Accounts and Finance.
LL.B., New York University, School of Law, cum laude.

EXPERIENCE:

Professor of Law, Albany Law School of Union University, 1977-present
Legislative Counsel, Senate Standing Committee on Crime and Correction
Director, Senate Task Force on Court Reorganization, 1982-1984
Senate Judiciary Committee
Associate Counsel, New York Assembly Minority, 1977-1981
Private practice, 1977-present
Deputy State Administrator New York Court System, June 1975-1977
Commissioner of Correctional Services, State of New York, 1973-1975
State Director of Probation, State of New York, 1971-1973

MEMBER:

American Law Institute, Elected 1979.
New York Judicial Conference Advisory Committee on Criminal Law and Procedure, Appointed 1979.
Bar Associations: New York State; New York County.
Chief Consultant and Staff Director, New York State Select Committee on Correctional Institutions and Programs, 1971-1973
Consultant to the Office of late Governor Nelson A. Rockefeller, 1969-1971
Executive Director, New York State Crime Control Council 1967-1969
Director, New York State Office of Crime Control Planning, 1967-1969
Executive Director, New York State Governor's Special Committee on Criminal Offenders, 1966-1968
Associate Counsel, New York Commission on Revision of Penal Law and Criminal Code, 1962-1970
Assistant District Attorney, New York County (Office of Late Frank S. Hogan), 1958-1959

PUBLICATIONS:

"Confrontations Initiated by the Police on Less than Probable Cause" Albany Law Review, Fall 1980 Vol. 45, p. 57. Also published By Matthew Bender in Criminal Defense Techniques.
Practice Commentaries for the New York Criminal Procedure Law in McKinney's Consolidated Laws of New York commencing with the 1985-1986 cumulative supplement.
Additional publications are incidental to work for the committees and commissions listed above. Copies available upon request.

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B.S., State University of New York at Albany, 1977, cum laude
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EXPERIENCE:

New York City Law Department, Office of the Corporation Counsel, Staff Attorney, 1980-1982
New York City Law Department, Office of the Corporation Counsel, Family Court Division, New York County, Borough Chief, 1982-1985
New York City Law Department, Office of the Corporation Counsel, Family Court Division, Deputy Division Chief, 1985-1987
New York City Law Department, Office of the Corporation Counsel, Family Court Division, Division Chief, 1987-present
New York City Law Department, Office of the Corporation Counsel, Family Court Division, Director of Training, 1982-present

MEMBER:

Association of the Bar of the City of New York
Juvenile Justice Committee and Subcommittee on Records
New York County Lawyer's Association
Family Court Committee, Chairman of Legislative Subcommittee
Chairman of Special Committee on Criminal Justice Legislation
Queens County Bar Association
Great Neck Lawyer's Association
District Attorney's Association
Co-Chair, Subcommittee on Juvenile Justice Legislation
American Bar Association
Section on Family Law

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Partner in the law firm of LaRossa, Mitchell & Ross
Assistant United States Attorney, Southern District of New York, Criminal Division; May, 1978-November 1981
Assistant District Attorney, Kings County; August 1974-May 1978
Adjunct Professor, Benjamin Cardozo Law School, 1979-present
Executive Director, Benjamin N. Cardozo Law School two week Intensive Trial Advocacy Program, 1984-1987
Instructor at National Institute of Trial Advocacy, 1981-1987
Instructor, St. John's Law School, New York Law School, Hofstra Law School and John Jay College of Criminal Justice; 1981-1987

LECTURER:

Criminal Trial Advocacy Course, sponsored by Appellate Division, First Department and New York County Lawyers' Association, 1982-1987
Legal Aid Society Criminal Defense Division Trial Advocacy Program, 1987
Criminal Law Institute, St. John's Law School, 1986
Nassau Academy of Law White Collar Crime Program, 1986
Testified as an expert witness before The House of Representatves Committee on the Judiciary in Connection with Amendments to the Federal Law Governing Grand Jury Practice, June 1987

MEMBER:

Advocacy 1984-present
Committee on Criminal Justice Operations and Budget 1981-1983
American Bar Association, Grand Jury Committee 1986-present
Vice-Chairperson, New York City Bar Association Committee on Criminal Advocacy

PUBLICATIONS:

Article, "The Forfeiture Of Attorney Fees in Criminal Caes: A Call For Immediate Remedial Action," The Record of the Association of the Bar of the City of New York, Vol. 41, No. 4, pp. 469-525 (May, 1986).
Monograph, Issuance of Subpoenas Upon Lawyers in Criminal Cases: A Defense Attorney's Perspective (March, 1985)
Monograph, Special Considerations in the Utilization of Title III Electronic Surveillance in Official Corruption and Fraud Cases (April, 1982)
Monograph, Constitutional and Statutory Privileges Before Federal Grand Juries (April, 1982)
Article, "Robbins v. California And the Standards for Searching and Seizing Packages," Search and Seizure Law Report, Vol. 8, No. 9 (September, 1981)

THOMAS RUSSO

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B.A., Queens College, City University of New York, 1968
J.D., Fordham University School of Law, 1975

EXPERIENCE:

Executive Assistant District Attorney, 1984-present
Assistant District Attorney, Queens County 1975-present
- Bureau Chief, Homicide Bureau, 1981-1984
- Bureau Chief, Rackets/Organized Crime, 1981-1982
- Supreme Court Trials Bureau, 1977-1980
- Appeals Bureau, 1977
- Criminal Court Bureau, 1976
- Major Offense Bureau, 1975

LECTURER:

Seminar in Trial Advocacy, Hofstra University School of Law
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EXPERIENCE:

Presently, Special Assistant Attorney General, Rochester Regional Director of the Office of the Deputy Attorney General for Medicaid Fraud Control
Chief, Justice Courts Bureau, 1985-1987
Assistant Chief, Career Criminal/Major Offense Prosecution Bureau, 1980-1985
Senior Assistant District Attorney, Violent Felony Bureau, 1980-1985
Assistant District Attorney, Narcotics Bureau, 1975-1978
Assistant District Attorney, City Court Bureau, 1974-1975

LECTURER:

Erie County Central Police Services Academy
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B.A., Johnson C. Smith University, Charlotte, North Carolina, cum laude, 1966
University of South Carolina at Spartanburg, Special Education, Masters Degree Program, 1966-1967
District of Columbia Teachers College School of Education, Masters Degree Program, 1967-1968
J.D., Syracuse University College of Law, 1976

EXPERIENCE:

Onondaga District Attorney's Office:
Domestic Violance Unit, Director, 1986-present
Chief Assistant District Attorney, 1986
Career Criminal Unit, Director, 1985-1986
Career Criminal Unit, 1983-1986
Senior Assistant District Attorney, 1983
Felony Trial Unit, 1980-1983
Grand Jury Unit, 1978-1979
Fraud and Child Support Unit, 1977-1978
Criminal Law Associate, 1977
Law Clerk, 1976-1977

LECTURER:

Syracuse University College of Law
Adjunct Professor of Law, Spring Semester, 1987
Onondaga Community College
Town and Village Court Justices Training Seminar, May 1987
Onondaga County Bar Association
Continuing Education Program, 1984-present
Syracuse University College of Law, 1980-present
Syracuse University, School of Education
Speaker, Project Legal, 1986-present
Speaker, various institutions and neighborhood groups, give lectures and seminars to groups such as Neighborhood Watch, on the subjects of Criminal Procedure, Vehicle and Traffic Law, DWI offenses, Drug use, Shoplifting, and the Effects of violent crimes, 1985-present

MEMBER:

Onondaga County Bar Association
New York State District Attorney's Association
Onondaga County District Attorney's Advisory Council

ERIC J. WARNER

EDUCATION:
B.A., Hobart College, 1966
J.D., Albany Law School, 1970
L.L.M., New York University School of Law, 1982

EXPERIENCE:
Bronx District Attorney's Office, September 1970-present
Juvenile Offense/Domestic Violence/Child Abuse Bureau Chief, 1977-present
Trials and Appeals Bureau, 1970-1977

LECTURER:
National College of District Attorneys
Trial Advocacy Course, "Special Problems in the Prosecution of Child Abuse and Exploitation Cases", New Orleans, LA., 1987
National College of District Attorneys
Child Abuse and Exploitation Course, "Special Problems in the Prosecution of Child Abuse and Exploitation Cases", Reno, Nevada, 1987
Appellate Division, First Judicial Department, New York County Lawyer's Association, Criminal Trial Advocacy Course, "Violent Felony Offender Statute and Juvenile Offenses", 1979-1987
National Council of Juvenile and Family Court Judges, National District Attorney's Association, Twelfth National Conference on Juvenile Justice, "Prosecutorial Approaches to the Serious Juvenile Offender", Philadelphia, PA., 1985
American Bar Association
First National Institute on Juvenile Delinquency: Trial Practice Techniques, "Proceeding from the Arrest through Fact-Finding Hearing", 1984
Appellate Division, First Judicial Department, New York County Lawyer's Association, Family Court Trial Advocacy Course, "Proceeding from the Arrest through Fact-Finding Hearing", 1983-1984
The Women's City Club of New York
Mock Trial of a Juvenile in Family Court, 1983

PUBLICATIONS:
Report of The Bronx County Grand Jury Inquiring into Child Maltreatment in the City of New York, "The New York City Experience with Child Abuse: A Lesson For The Nation", Principle Draftsman, May 1985
Bar Association Of The City Of New York Committee on Juvenile Justice, "The Juvenile Offender Law Of New York--The Minority Report", May 1983
Criminal Law Bulletin, "Sex Typing of Dried Blood: Science in the Courtroom?", July-August 1980
New York Law Journal, "Juvenile Plea Bargaining", (two parts) July 23-24, 1980
New York Law Journal, Update on Criminal Law (New York State Bar Association), "Analysis of Changes in the Juvenile Offender Law", August 1979
New York Law Journal, "The New Law on Juvenile Offenders", (two parts) September 5-6, 1978
Journal of Criminal Law and Criminology, Northwestern University School of Law, "Federal, State and Local Governments: Partners in the Fight Against Crime", 1982, written with Bronx District Attorney Mario Merola, and Mr. Peter Coddington

THE PROSECUTION FUNCTION

by

Hon. Thomas R. Sullivan

THE PROSECUTION FUNCTION

(Lecture Outline)

By: Hon. Thomas R. Sullivan
District Attorney of
Richmond County

I. The changing role of the Prosecutor

A. An historical perspective:

1. The DA is a uniquely American position. In Europe prosecutions are conducted by civil service functionaries who are part of the judiciary. In England prosecutions are conducted by barristers who are retained on a case by case basis.

2. DA's are the successors to colonial Attorney General.

B. Constitutional and statutory authority:

1. DA is a constitutional officer. (New York State Constitution, Art. XIII, Sec. 13).

2. "It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed." County Law Section 700.

C. The role and duties of the DA today:

1. Advocate;

2. Investigator;

3. Legal Scholar;

4. Advisor to police agencies;

5. Chief law enforcement officer,

a. Coordinator of criminal justice agencies,

b. Aid in improving criminal justice legislation;

6. Administrator.

D. Apparent paradoxes:

1. Advocate - "Minister of Justice";

2. Attorney - but no client;

3. Politically - apolitical in operations.

II. Prosecutorial Discretion

A. General - The power to prosecute crime and control the prosecution after formal accusation has been made reposes in the District Attorney. McDonald v. Sobel, 272 App. Div. 455, 72 N.Y.S.2d 4 (2d Dept. 1947), aff'd, 297 N.Y. 679, 77 N.E.2d 3 (1947).

Just because a crime has been committed, it does not follow that there must necessarily be a prosecution, for it lies with the District Attorney to determine whether acts, which may fall within the literal letter of the law, should as a matter of public policy not be prosecuted. Matter of Hassan v. Magistrates Court, 20 Misc.2d 509, 514; 191 N.Y.S.2d 238 (Sup. Ct. Queens Co. 1959), app. dism'd, 10 A.D.2d 980, 202 N.Y.S.2d 1002 (2d Dept. 1960), lv. to app. denied, 8 N.Y.2d 750, 201 N.Y.S.2d 765, 168 N.E.2d 102 (1960), cert. denied, 364 U.S. 844 (1960). Some judges have finally recognized that duly elected District Attorneys exercise their discretion with restraint and a sense of justice. In the Matter of Additional January 1979 Grand Jury of the Albany County Supreme Court, 50

N.Y.2d 14, 427 N.Y.S.2d 950, 405 N.E.2d 194 (1980) (dissent of Fuchsberg, J.).

B. Courts will not review the exercise of DA's discretion:

1. Doctrines of separation of powers and judicial restraint prohibit judicial review of discretionary acts. Matter of Hassan v. Magistrates Court, supra; Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

2. Specific Discretionary acts not reviewable;

a. To initiate an investigation: People v. Mackell, 47 A.D.2d 209, 366 N.Y.S.2d 173 (2d Dept. 1975), aff'd, 40 N.Y.2d 59, 386 N.Y.S.2d 37 (1976).

b. To initiate prosecution: Matter of Hassan v. Magistrates Court, supra; Inmates of Attica Correctional Facility v. Rockefeller, supra.

c. To determine crime to be charged: People v. Jontef, Cal. No. 81-33 (App. Term 2d and 11th Dist. Nov. 25, 1981), lv. to appeal denied, Jan. 7, 1982.

d. To submit a case to grand jury: People v. DiFalco, 44 N.Y.2d 482, 406 N.Y.S.2d 279, 377 N.E.2d 732 (1978).

e. To determine specific charges to be submitted: People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950).

f. To resubmit a case to grand jury: Kerstanski v. Shapiro, 84 Misc.2d 1049, 376 N.Y.S.2d 844 (Sup. Ct. Orange Co. 1975).

g. To bring a case to trial: People v. Brady, 257 App. Div. 1000, 13 N.Y.S.2d 789 (2d Dept. 1939).

h. To bring a case for retrial: People v. Harding, 44 A.D.2d 800, 355 N.Y.S.2d 394 (1st Dept. 1974); cf. People v. Pope, 53 A.D.2d 651, 384 N.Y.S.2d 209 (2d Dept. 1976); People v. Shanis, 84 Misc.2d 690, 374 N.Y.S.2d 912 (Sup. Ct. Queens Co. 1975), aff'd, 53 A.D.2d 810 (2d Dept. 1976); see also CPL §210.40(2).

C. DA not subject to prosecution for valid exercise of discretion:

1. Official misconduct (Penal Law §195.00); Hindering prosecution (Penal Law §205.55); Criminal facilitation (Penal Law §115.00); Tampering with physical evidence (Penal Law §215.40); Conspiracy (Penal Law §105.05); People v. Muka, 72 A.D.2d 649, 421 N.Y.S.2d 438 (3d Dept. 1979); People v. Mackell, supra.

2. For injunction under Federal Civil Rights Act (42 U.S.C.A. §1987); Inmates of Attica Correctional Facility v. Rockefeller, supra.

D. Plea bargaining:

1. Lesser plea cannot be accepted without the consent of the DA. McDonald v. Sobel, 272 App. Div. 455, 72 N.Y.S.2d 4 (2d Dept. 1947), aff'd, 297 N.Y. 679, 77 N.E.2d 3 (1947); CPL §220.30

2. Similarly situated defendants should be treated similarly. Complaint of Rook, 276 Or. 695, 556 P2d 1351 (Sup. Ct. Or. 1976).

3. Legislative Controls:

a. Drug Law;

b. Predicate felony law;

c. Violent felony law.

E. Dismissals - Practically without control by court.

F. Voluntary control standardization through use of policy manuals.

III. Ethical responsibilities and considerations:

A. Dealings with witnesses:

1. Don't give "the lecture";

2. Responsibility to correct material misstatements.

B. Dealings with lawyers:

1. Professional manner;

2. Scrupulously honest;

3. Avoiding appearance of impropriety.

C. Dealings with the court:

1. Respectful but not fawning;

2. Cooperative but not subservient.

D. Dealing with the media:

1. Fair press-free trial guidelines.

E. Forensic Impropriety:

1. Appeals to prejudice;

2. Characterization of defendant;

3. Misrepresenting or misstating facts;

4. Ad hominem attacks on defense counsel.

F. What are the causes of ethical impropriety:

1. Ignorance

2. "They do it too.";

3. "White hat" syndrome.

G. Problems of part time DA's.

IV. Civil Liability:

A. The limited scope of absolute immunity for quasi-judicial activities. Imbler v. Pachtman, 96 S.Ct. 984, 424 U.S. 409, 47 L.Ed.2d 128 (1976).

B. DA, while functioning as an investigator, is entitled only to limited immunity. Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974).

C. Attempts to remove absolute immunity by means of Congressional legislation.

Prosecution Function

ABA Standards

*The Prosecution Function**

*Approved by the ABA House of Delegates, February 1971. For publication history, see Appendix F, *infra*.

1.2 Conflicts of interest.

A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

For a related standard under another title, see The Defense Function 3.5.

1.3 Public statements.

(a) The prosecutor should not exploit his office by means of personal publicity connected with a case before trial, during trial and thereafter.

(b) The prosecutor should comply with the ABA Standards on Fair Trial and Free Press. In some instances, as defined in the Code of Professional Responsibility, his failure to do so will constitute unprofessional conduct.

For a related standard under another title not mentioned above, see The Defense Function 1.3.

1.4 Duty to improve the law.

It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to his attention, he should stimulate efforts for remedial action.

PART II. ORGANIZATION OF THE PROSECUTION FUNCTION

2.1 Prosecution authority should be vested in a public official.

The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline.

2.2 Inter-relationship of prosecution offices within state.

(a) Local authority and responsibility for prosecution is properly vested in a district, county or city attorney. Wherever possible, a unit of prosecution should be designed on the basis of population, caseload and other relevant factors sufficient to warrant at least one

Standards

PART I. GENERAL STANDARDS

1.1 The function of the prosecutor

(a) The office of prosecutor, as the chief law enforcement official of his jurisdiction, is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

(b) The prosecutor is both an administrator of justice and an advocate; he must exercise sound discretion in the performance of his functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, and in this report. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in ABA Standards, The Defense Function, section 1.3.

(e) In this report the term "unprofessional conduct" denotes conduct which is or should be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are not intended as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

For related standards under another title, see The Defense Function 1.1, 1.4.

full-time prosecutor and the supporting staff necessary to effective prosecution.

(b) In some states conditions such as geographical area and population may make it appropriate to create a statewide system of prosecution in which the state attorney general is the chief prosecutor and the local prosecutors are his deputies.

(c) In all states there should be coordination of the prosecution policies of local prosecution offices to improve the administration of justice and assure the maximum practicable uniformity in the enforcement of the criminal law throughout the state. A state council of prosecutors should be established in each state.

(d) In cases where questions of law of statewide interest or concern arise which may create important precedents, the prosecutor should consult and advise with the attorney general of the state.

(e) A central pool of supporting resources and manpower, including laboratories, investigators, accountants, special counsel and other experts, to the extent needed should be maintained by the state government and should be available to all local prosecutors.

2.3 Assuring high standards of professional skill.

(a) The function of public prosecution requires highly developed professional skills. This objective can best be achieved by promoting continuity of service and broad experience in all phases of the prosecution function.

(b) Wherever feasible, the offices of chief prosecutor and his staff should be fulltime occupations.

(c) Professional competence should be the only basis for selection for prosecutorial office. Prosecutors should select their staffs on the basis of professional competence without regard to partisan political influence.

(d) In order to achieve the objective of professionalism and to encourage competent lawyers to accept such offices, compensation for prosecutors and their staffs should be commensurate with the high responsibilities of the office and comparable to the compensation of their peers in the private sector.

2.4 Special assistants, investigative resources, experts.

(a) Funds should be provided to enable a prosecutor to appoint special assistants from among the trial bar experienced in criminal cases, as needed for the prosecution of a particular case or to assist generally.

(b) Funds should be provided to the prosecutor for the employment of a regular staff of professional investigative personnel and other necessary supporting personnel, under his direct control, to the extent warranted by the responsibilities and scope of his office; he should also be provided with funds for the employment of qualified experts as needed for particular cases.

2.5 Prosecutor's handbook; policy guidelines and procedures.

(a) Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient and effective enforcement of the criminal law.

(b) In the interest of continuity and clarity, such statement of policies and procedures should be maintained in a handbook of internal policies of the office.

2.6 Training programs.

Training programs should be established within the prosecutor's office for new personnel and for continuing education of his staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.

2.7 Relations with the police.

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.

(b) The prosecutor should cooperate with police in providing the services of his staff to aid in training police in the performance of their function in accordance with law.

For related standards under another title, see The Urban Police Function 7.12, 7.13, 7.14.

2.8 Relations with the courts and the bar.

(a) It is unprofessional conduct for a prosecutor intentionally to misrepresent matters of fact or law to the court.

(b) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of his jurisdiction. In such contacts he should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and canons require between advocates and judges.

(c) It is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before him.

(d) In his necessarily frequent contacts with other members of the bar, the prosecutor should strive to avoid the appearance as well as the reality of any relationship which would tend to cast doubt on the independence and integrity of his office.

For a related standard under another title, see The Defense Function 1.1.

2.9 Prompt disposition of criminal charges.

(a) A prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis.

(b) The prosecution function should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly. The prosecutor should be punctual in attendance in court and in the submission of all motions, briefs and other papers. He should emphasize to all witnesses the importance of punctuality in attendance in court.

(c) It is unprofessional conduct intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.

For related standards under other titles, see Speedy Trial 1.3; The Defense Function 1.2

2.10 Supersession and substitution of prosecutor.

(a) Procedures should be established by appropriate legislation to the end that the governor or other elected state official is empowered

by law to suspend and supersede a local prosecutor upon making a public finding, after reasonable notice and hearing, that he is incapable of fulfilling the duties of his office.

(b) The governor or other elected state official should be empowered by law to substitute special counsel in the place of the local prosecutor in a particular case, or category of cases, upon making a public finding that this is required for the protection of the public interest.

PART III. INVESTIGATION FOR PROSECUTION DECISION

3.1 Investigative function of prosecutor.

(a) A prosecutor, as the chief law enforcement official of his jurisdiction, ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but he has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.

(b) It is unprofessional conduct for a prosecutor knowingly to use illegal means to obtain evidence or to employ or instruct or encourage others to use such means.

(c) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which he has the right to give.

(d) It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless he is authorized by law to do so.

(e) It is unprofessional conduct for a prosecutor to promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative and enforcement program.

(f) Whenever feasible, the prosecutor should avoid interviewing a

prospective witness except in the presence of a third person unless the prosecutor is prepared to forego impeachment of the witness by the prosecutor's own testimony as to what the witness stated in the interview or to seek leave to withdraw from the case in order to present his impeaching testimony.

For related standards under other titles, see Discovery and Procedure Before Trial 2.1, 4.1; The Defense Function 4.1, 4.2.

3.2 Relations with prospective witnesses.

(a) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, including transportation and loss of income, provided there is no attempt to conceal the fact of reimbursement.

(b) In interviewing a prospective witness it is proper but not mandatory for the prosecutor or his investigator to caution the witness concerning possible self-incrimination and his possible need for counsel.

For a related standard under another title, see The Defense Function 4.3.

3.3 Relations with expert witnesses.

(a) A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the prosecutor should explain to the expert his role in the trial as an impartial expert called to aid the fact-finders and the manner in which the examination of witnesses is conducted.

(b) It is unprofessional conduct for a prosecutor to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony he will give or the result in the case.

For a related standard under another title, see The Defense Function 4.4.

3.4 Decision to charge.

(a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor.

(b) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.

(c) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present his complaint for prior approval to the prosecutor and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury.

3.5 Relations with grand jury.

(a) Where the prosecutor is authorized to act as legal adviser to the grand jury he may appropriately explain the law and express his opinion on the legal significance of the evidence but he should give due deference to its status as an independent legal body.

(b) The prosecutor should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.

(c) The prosecutor's communications and presentations to the grand jury should be on the record.

3.6 Quality and scope of evidence before grand jury.

(a) A prosecutor should present to the grand jury only evidence which he believes would be admissible at trial. However, in appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial.

(b) The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt.

(c) A prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law.

(d) If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

(e) The prosecutor should not compel the appearance of a witness

before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to the law.

3.7 Quality and scope of evidence for information.

Where the prosecutor is empowered to charge by information, his decisions should be governed by the principles embodied in section 3.6, *supra.*

3.8 Discretion as to non-criminal disposition.

(a) The prosecutor should explore the availability of non-criminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges; especially in the case of a first offender, the nature of the offense may warrant non-criminal disposition.

(b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

3.9 Discretion in the charging decision.

(a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) reluctance of the victim to testify;

(vi) cooperation of the accused in the apprehension or conviction of others;

(vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

3.10 Role in first appearance and preliminary hearing.

(a) If the prosecutor is present at the first appearance (however denominated) of the accused before a judicial officer, he should cooperate in obtaining counsel for the accused. He should cooperate in good faith in arrangements for release under the prevailing system for pretrial release.

(b) The prosecutor should not encourage an uncounselled accused to waive preliminary hearing.

(c) The prosecutor should not seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment.

(d) Except for good cause, the prosecutor should not seek delay in the preliminary hearing after an arrest has been made if the accused is in custody.

(e) The prosecutor should ordinarily be present at a preliminary hearing where such hearing is required by law.

3.11 Disclosure of evidence by the prosecutor.

(a) It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known

to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.

(b) The prosecutor should comply in good faith with discovery procedures under the applicable law.

(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused.

For related standards under other titles, see Discovery and Procedure Before Trial, 1.4, Parts II, IV; Sentencing Alternatives and Procedures 5.3; The Defense Function 4.5.

PART IV. PLEA DISCUSSIONS

4.1 Availability for plea discussions.

(a) The prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea.

(b) It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval. If the accused refuses to be represented by counsel, the prosecutor may properly discuss disposition of the charges directly with the accused; the prosecutor would be well advised, however, to request that a lawyer be designated by the court or some appropriate central agency, such as a legal aid or defender office or bar association, to be present at such discussions.

(c) It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions with defense counsel or the accused.

For related standards under other titles, see Discovery and Procedure Before Trial 1.3, 1.4; Pleas of Guilty 2.1, 3.1; The Defense Function 6.1, 6.2; The Function of the Trial Judge 4.1.

4.2 Plea disposition when accused maintains innocence.

A prosecutor may not properly participate in a disposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court.

For a related standard under another title, see The Defense Function 5.3

4.3 Fulfillment of plea discussions.

(a) It is unprofessional conduct for a prosecutor to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of sentence; he may properly advise the defense what position he will take concerning disposition.

(b) A prosecutor should avoid implying a greater power to influence the disposition of a case than he possesses.

(c) If the prosecutor finds he is unable to fulfill an understanding previously agreed upon in plea discussions, he should give notice promptly to the defendant and cooperate in securing leave of the court for the defendant to withdraw any plea and take other steps appropriate to restore the defendant to the position he was in before the understanding was reached or plea made.

For related standards under other titles, see Discovery and Procedure Before Trial 1.3, 1.4; Pleas of Guilty 2.1, 3.1; The Defense Function 6.1, 6.2; The Function of the Trial Judge 4.1. See also *Santobello* v. *New York*, 404 U.S. 257 (1971).

4.4 Record of reasons for nolle prosequi disposition.

Whenever felony criminal charges are dismissed by way of nolle prosequi (or its equivalent), the prosecutor should make a record of the reasons for the action.

PART V. THE TRIAL

5.1 Calendar control.

Control over the trial calendar should be vested in the court. The prosecuting attorney should be required to file with the court as a public record periodic reports setting forth the reasons for delay as to each case for which he has not requested trial within a prescribed time following charging. The prosecuting attorney should also advise the court of facts relevant in determining the order of cases on the calendar.

For related standards under other titles, see Pretrial Release 5.9; Speedy Trial 1.2; The Function of the Trial Judge 3.2, 3.8.

5.2 Courtroom decorum.

(a) The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom.

(b) When court is in session the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

(c) It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel.

(d) A prosecutor should comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judicial conduct which he considers prejudicial. He has a right to make respectful requests for reconsideration of adverse rulings.

(e) A prosecutor should be punctual in all court appearances.

(f) Prosecutors should take leadership in developing, with the cooperation of the courts and the bar, a code of decorum and professional etiquette for courtroom conduct.

For related standards under other titles, see The Defense Function 7.1; The Function of the Trial Judge 5.7.

5.3 Selection of jurors.

(a) The prosecutor should prepare himself prior to trial to discharge effectively his function in the selection of the jury and the exercise of challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors the prosecutor should restrict himself to investigatory methods which will not harass or unduly embarrass potential jurors or invade their privacy and, whenever possible, he should restrict his investigation to records and sources of information already in existence.

(c) In jurisdictions where lawyers are permitted to personally question jurors on voir dire, the opportunity to question jurors should

be used solely to obtain information for the intelligent exercise of challenges. A prosecutor should not intentionally use the voir dire to present factual matter which he knows will not be admissible at trial or to argue his case to the jury.

For related standards under other titles, see Discovery and Procedure Before Trial 5.4; Fair Trial and Free Press 3.2, 3.4; The Defense Function 7.2; The Function of the Trial Judge 5.1; Trial by Jury, Part II.

5.4 Relations with jury.

(a) It is unprofessional conduct for the prosecutor to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The prosecutor should avoid the reality or appearance of any such improper communications.

(b) The prosecutor should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After verdict, the prosecutor should not make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.

For a related standard under another title, see The Defense Function 7.3.

5.5 Opening statement.

In his opening statement the prosecutor should confine his remarks to evidence he intends to offer which he believes in good faith will be available and admissible and a brief statement of the issues in the case. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

For a related standard under another title, see The Defense Function 7.4.

5.6 Presentation of evidence.

(a) It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

(b) It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

(c) It is unprofessional conduct for a prosecutor to permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.

(d) It is unprofessional conduct to tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any doubt about the admissibility of such evidence it should be by an offer of proof and a ruling obtained.

For a related standard under another title, see The Defense Function 7.5.

5.7 Examination of witnesses.

(a) The interrogation of all witnesses should be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum.

(b) The prosecutor's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeachment to discredit or undermine a witness if he knows the witness is testifying truthfully.

(c) A prosecutor should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct.

(d) It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence.

For related standards under other titles, see The Defense Function 7.6; The Function of the Trial Judge 5.4, 5.5.

5.8 Argument to the jury.

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.

For related standards under other titles, see The Defense Function 7.8; The Function of the Trial Judge 5.10.

5.9 Facts outside the record.

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

For related standards under other titles, see The Defense Function 7.9, 8.4; The Function of the Trial Judge 5.10.

5.10 Comments by prosecutor after verdict.

The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.

PART VI. SENTENCING

6.1 Role in sentencing.

(a) The prosecutor should not make the severity of sentences the index of his effectiveness. To the extent that he becomes involved in the sentencing process, he should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

(b) Where sentence is fixed by the judge without jury participation, the prosecutor ordinarily should not make any specific recommendation as to the appropriate sentence, unless his recommendation is requested by the court or he has agreed to make a recommendation as the result of plea discussions.

(c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but he should avoid introducing evidence bearing on sentence which will prejudice the jury's determination of the issue of guilt.

For related standards under other titles, see Sentencing Alternatives and Procedures 5.3; Trial by Jury 4.4.

6.2 Information relevant to sentencing.

(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. He should disclose to the court any information in his files relevant to the sentence. If incompleteness or inaccurateness in the presentence report comes to his attention, he should take steps to present the complete and correct information to the court and to defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in his files which is relevant to the sentencing issue.

For related standards under other titles, see Sentencing Alternatives and Procedures 5.3; The Defense Function 8.1.

VICTIMS RIGHTS AND THE ROLE OF THE PROSECUTOR

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I. BACKGROUND

A System Out of Balance

Until recently the Criminal Justice System in general has viewed the crime victim as nothing more than a witness to a crime--someone whose testimony is necessary at the prosecution and not someone who has an interest in the prosecution and a right to participate in the processes of justice.

With the passage of the Fair Treatment Standards of Crime Victims (Article 23 of the Executive Law) in 1984, the State of New York legislatively recognized the imbalance of the Criminal Justice System which causes bitterness and frustration among victims which manifests itself in a failure to report crime or cooperate in the prosecution of crime.

Daniel S. Dwyer, Chief Assistant District Attorney of Albany County while speaking at the annual Crime Victims Board conference in 1986 pointed out the shame of having to legislate what prosecutor's should have been doing routinely as a part of their duties--treating the crime victim with consideration, dignity and respect.

The following outline reviews the rights of the victim that you as prosecutors are responsible to uphold.

II. Victim Assistance Education and Training

Effective January 1, 1987 victim assistance education and training, with special consideration to be given to victims of domestic violence, sex offense victims, elderly victims, child victims, and the families of homicide victims, shall be given to persons taking courses at state law enforcement training facilities and by district attorneys so that victims may be promptly, properly and completely assisted. (Exec. L. §642(5))

> Such training shall include, but not be limited to, instruction in: crime victim compensation laws and procedures; laws regarding victim and witness tampering and intimidation; restitution laws and procedures; assessment of emergency needs of victims' assistance; the Fair Treatment Standards for Crime Victims; as well as any other relevant training. (9NYCRR 6170.5(b))

III. General Prosecutor's Responsibilities

A. Protection of victims/witnesses from intimidation, harassment.

1. Notification - Prosecutors should ensure routine notification of a victim/witness as to steps available to provide protection from intimidation. (Exec. L. §641(2); 9NYCRR 6170.4(c)(1)) This notification may be provided

through a prominently displayed poster. (9NYCRR 6170.4(c)(1), Exec. L. §625-a.)

2. Affirmative Prosecution - Prosecutors should charge and prosecute defendants and their cohorts who intimidate, harass or otherwise interfere with victim/witnesses to the fullest extent of the law. When a prosecutor becomes aware of circumstances reasonably indicating that a crime victim or witness has been or may be subjected to tampering, physical injury or threats thereof or other intimidation, as a result of his or her cooperation in the criminal investigation or prosecution, the agency shall notify the victim or witness of appropriate protective measures which are available in the jurisdiction, including but not limited to: change in telephone number, transportation to and from court, relocation and moving assistance, judicial protective orders, protective services, local programs providing protective services, and the arrest and prosecution of the offender. (9NYCRR 6170.4(c)(2) (See P.L. §215.15 - 215.17 for intimidation crimes; See P.L. §240.25 - 240.31 for harassment crimes; See P.L. 215.10 - 215.13 for tampering crimes.)

3. Protective Orders - Prosecutors should assist victims/witnesses in obtaining protective orders where appropriate. (9NYCRR 6170.4(3))

(See Protection for Victims of Family Offenses C.P.L. §530.12; See Protection of Victims of Crimes Other Than Family Offenses C.P.L. §530.13.)

B. Employment and Creditor Intervention - The victim or witness who so requests shall be assisted by prosecutors in informing employers that the need for victim and witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work. In addition, a victim or witness who, as a direct result of a crime or of cooperation with law enforcement agencies or the district attorney in the investigation or prosecution of a crime is unable to meet obligations to a creditor, creditors or others should be assisted by the district attorney in providing to such creditor, creditors or others accurate information about the circumstances of the crime, including the nature of any loss or injury suffered by the victim, or about the victim's or witness' cooperation, where appropriate. (Exec. Law §642(4); 9NYCRR 6170.4(h)) (See P.L. §215.14 - Employer Unlawfully Penalizing Witness)

C. Prompt Property Return - Unless there are compelling reasons for retaining property relating to proof or trial prosecutors should insure prompt property return.

1. Property of any victim or witness which is held for evidentiary purposes should be maintained in good condition. If the property is not to be returned expeditiously, criminal justice agencies shall make reasonable efforts to notify the victim or witness of the retention of the property, and shall explain to the victim or witness the property's significance in the criminal prosecution and how and when the property may be returned.

2. A compelling law enforcement reason shall mean that retention of the property itself is, or is reasonably likely to be, material to the successful conduct of an investigation or prosecution.

3. The criminal justice agency in possession of the property shall consult with all other agencies which may become involved in the case before disposing of the property, and shall make reasonable efforts to identify the rightful owner of the property.

4. Property shall not include unlicensed weapons or those used to commit crimes, marihuana, controlled substances, contraband, or items the ownership or legality of possession of which is disputed. (Exec. L. §642(3) and 9NYCRR 6170.4(g)) See P.L. Article 450 - Disposition of Stolen Property)

D. Information and Referral - Prosecutors shall routinely provide the following information to crime victims whether orally or written:

1. availability of crime victim compensation; (Exec. L. §641(1)(a)

2. availability of appropriate public or private programs that provide counseling, treatment or support for crime victims, including but not limited to the following: rape crisis centers, victim/witness assistance programs, elderly victim services, victim assistance hotlines and domestic violence shelters; (Exec. L. §641(1)(b)

Pursuant to 9NYCRR 6170.3(b) and (c) Prosecutor's Office should keep a list of programs in their jurisdiction which provide such services to crime victims. The list shall include the location and telephone number of the program, the services provided by each program and the hours of operation. Prosecutors shall disseminate necessary information and otherwise assist crime victims in obtaining information on the availability of appropriate public or private programs that provide counseling, treatment or support for crime victims, including but not limited to the following: rape crisis centers,

victim/witness assistance programs, elderly victim services, victim assistance hotlines and domestic violence shelters.

Prosecutor's office shall maintain an address and telephone number for the nearest office of the crime victims board and shall advise each eligible victim that compensation may be available through said board, and of the procedures to apply for compensation. Application blanks required to initiate such a request for compensation to the board shall be available. This information on the possibility of compensation may be disseminated by means of a prominently displayed poster.

IV. Specific Prosecutorial Responsibilities - The prosecutor's office has primary responsibility to insure that the rights, needs and interests of crime victims and witnesses are met once the accused has been arraigned. (Article 23 of the Executive Law and other applicable statutes)

A. Arraignment

1. The prosecutor must ensure notification of victims, witnesses, relatives of those victims and witnesses who are minors, and relatives of homicide victims, if such per-

sons provide the appropriate official with a current address and telephone number, either by phone or by mail, if possible, of judicial proceedings relating to their case, including:

1. the arrest of an accused;

2. the initial appearance of an accused before a judicial officer;

3. the release of the accused pending judicial proceedings.

(Exec. L. §641(3); 9NYCRR 6170.4(d))

2. Prosecutors shall provide crime victims with information explaining the victim's role in the criminal justice process. Crime victims shall be informed, as indicated below, of the stages of the criminal justice process of significance to them and the manner in which information about such stages can be obtained.

   a. Prosecutors as the process goes forward, shall be responsible for informing the crime victim of that office's particular responsibilities in the criminal justice process and how the crime victim will

be asked to assist the prosecutor in discharging these responsibilities. Where appropriate, this explanation shall include specific information regarding the conduct of proceedings at which the victim may be asked to assist, including but not limited to identification procedures, testimony and sentencing.

b. Prosecutors shall also inform crime victims of the general procedures that may follow in the investigation and prosecution of the criminal case.

c. This information may be provided orally or in writing, such as through the use of pamphlets. Whenever possible, information under this section should be communicated in person to the victim. This may necessitate follow-up contact with unconscious or otherwise disabled or disoriented victims.

d. The stages of a criminal proceeding about which the crime victim may be informed; where appropriate and of significance to that victim, include, but are not limited to: the arrest of an

accused; identification proceedings; the initial appearance of an accused before a judicial officer; the release of an accused pending judicial proceedings; mediation; preliminary hearing; grand jury proceedings; pre-trial hearings; disposition, including trial, dismissal, entry of a plea of guilty; and sentencing, including restitution.

(Exec. L. §641(1)(c)and(d) 9NYCRR 6170.4(b))

B. Grand Jury and Other Pre-trial Proceedings - At this stage of the prosecution a crime victim and/or other persons may be needed as prosecution witnesses. The prosecutor should inform all subpoenaed witnesses that they are entitled to witness fees (CPL §610.50). Prosecutors should also inform witnesses that if they qualify as an eligible crime victim they may be entitled to reimbursement from the Crime Victims Board for the cost of transportation to and from courts (Exec. L. §631(10)). As a matter of courtesy witnesses should be notified of cancelled proceedings. When requesting adjournments or consenting to a defense request for same, any adverse impact on crime victim should be considered.

Additionally, crime victims and witnesses shall, where possible, be provided with a secure area, for awaiting court appearances, that is separate from all other witnesses.

(1) A secure waiting area shall be an area removed from, out of sight and earshot of, and protected from entry by, the defendant, his friends and family, defense witnesses and other unauthorized persons.

(2) The agency prosecuting the crime shall make all reasonable efforts to see that a secure waiting area is made available to crime victims and prosecution witnesses who are awaiting court appearances. Other criminal justice agencies having appropriate and available facilities shall cooperate with the agency to provide such waiting areas where possible. The agency shall also seek the assistance of any other public or private agencies, such as the Office of Court Administration, having appropriate and available facilities. (Exec. Law §642(2) and 9NYCRR 6170.4(f)(1-2))

In dealing with a child victim as a witness specialized treatment is required due to the vulnerability of the witness. Prosecutors should comply with the following in their treatment of child victim as witnesses:

1. To minimize the number of times a child victim is called upon to recite the events of the case and to foster a feeling of trust and confidence in the child victim, whenever practicable, a multi-disciplinary team involving a

prosecutor, law enforcement agency personnel, and social services agency personnel should be used for the investigation and prosecution of child abuse cases.

2. Whenever practicable, the same prosecutor should handle all aspects of a case involving an alleged child victim.

3. To minimize the time during which a child victim must endure the stress of his involvement in the proceedings, the court should take appropriate action to ensure a speedy trial in all proceedings involving an alleged child victim. In ruling on any motion or request for a delay or continuance of a proceeding involving an alleged child victim, the court should consider and give weight to any potential adverse impact the delay or continuance may have on the well-being of the child.

4. The judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying.

5. In accordance with the provisions of article sixty-five of the criminal procedure law, when appropriate, a child witness as defined in subdivision one of section 65.00 of such law, should be permitted to testify via live, two-way closed-circuit television.

6. Section 190.32 of the criminal procedure law, permits a person supportive of the "child witness" or "special witness" as defined in such section to be present and accessible to a child witness at all times during his testimony, although the person supportive of the child witness should not be permitted to influence the child's testimony.

7. A child witness should be permitted in the discretion of the court to use anatomically correct dolls and drawings during his testimony. (Exec. L. §642-a)

Under §50-b of the Civil Rights Law, victims of sex offenses under the age of 18 have the right to have their identity kept confidential. Therefore prosecutors must insure that no portion of any police report, court file or other document which tends to identify such a victim is disclosed.

Section 190.32 of the Criminal Procedure Law authorizes the use of video taped testimony in lieu of a personal appearance at a grand jury proceeding of a child witness or an individual whom the court has declared as being a special witness. Prosecutors should take advantage of these statutory provisions when dealing with these vulnerable witnesses.

C. Disposition - Prosecutors have an obligation to bring the views of violent crime victims to the attention of the court.

Pursuant to Section 642(1) of the Executive Law, the victim of a violent felony offense, a felony involving physical injury to the victim, a felony involving property loss or damage in excess of two hundred fifty dollars, a felony involving attempted or threatened physical injury or property loss or damage in excess of two hundred fifty dollars or a felony involving larceny against the person should be consulted by the district attorney in order to obtain the views of the victim regarding disposition of the criminal case by dismissal, plea of guilty or trial. In such a case in which the victim is a minor child, or in the case of a homicide, the district attorney should consult for such purpose with the family of the victim. In addition, the district attorney should consult and obtain the views of the victim or family of the victim, as appropriate, concerning the release of the defendant in the victim's case pending judicial proceedings upon an indictment, and concerning the availability of sentencing alternatives such as community supervision and restitution from the defendant. The failure of the district attorney to so obtain the views of the victim or family of the victim shall not be cause for delaying the proceedings against the defendant nor shall it affect the validity of a conviction judgment or order.

Prosecutors also have the obligation to provide notice to crime victims and/or witnesses concerning proceedings in the prosecution of the accused including entry of a plea of guilty, trial, sentencing, and where a term of imprisonment is imposed, specific information shall be provided regarding maximum and minimum terms of such imprisonment. [(Exec. L. §641(3)(d); 9NYCRR 6170.4 d(2)(iv)]

LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS

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LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS

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LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS

A. Introduction

The requirement in Criminal Procedure Law §100.05 that every prosecution must commence with the filing of an accusatory instrument is not a mere technicality. The filing of a legally sufficient accusatory instrument confers jurisdiction on a court in a criminal case; such an instrument is an essential element of due process, since it informs the defendant of the offense or offenses with which he is charged. "A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution." People v. Harper, 37 N.Y.2d 96, 99, 371 N.Y.S.2d 467, 469 (1975) (emphasis added). See People v. Camilloni, 92 A.D.2d 745, 461 N.Y.S.2d 80 (4th Dept. 1983). The statement in the accusatory instrument must be sufficiently detailed to identify the particular occurrence or transaction which constitutes the offense or offenses with which the defendant is charged. A person may be placed in jeopardy only once for a particular offense.

B. Categories of Local Criminal Court Accusatory Instruments

[1] Information

> It is a fundamental and nonwaivable jurisdictional prerequisite that an information state the crime with which the defendant is charged and the particular facts constituting that crime [citations omitted].
> In order for an information to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must be alleged [citations omitted]. People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 56, 57 (1979).

An information is an accusatory instrument which serves as the basis

for the commencement of a prosecution for one or more non-felony offenses. CPL §100.10(1). The purposes of an information are to (1) apprise the defendant of the nature of the charge against him and (2) satisfy the magistrate that there is sufficient legal evidence to furnish reasonable ground for believing that the crime was committed by the defendant. This is necessary to prevent a person from being detained unless there is reasonable cause to believe that such person has committed a crime. "Reasonable cause" must be based on at least some evidence, observations or records of a legal nature. See People v. Harrison, 58 Misc.2d 636, 639, 296 N.Y.S.2d 684, 688 (Dist. Ct. Nassau Co. 1968). See also People v. Crisofulli, 91 Misc.2d 424, 398 N.Y.S.2d 120 (Crim. Ct. N.Y. Co. 1977) (an information, unlike a felony complaint, must demonstrate both reasonable cause to believe that the defendant committed the offense charged and a legally sufficient case against the defendant).

Pursuant to CPL §100.15(1), the information must specify the name of the court with which it is filed and the title of the action, and must be subscribed and verified by a person known as the "complainant." The complainant may be any person having knowledge, whether personal or based upon information and belief, of the commission of the offense or offenses charged. Each information must contain an accusatory part and a factual part. The complainant's verification of the information is deemed to apply only to the factual part and not to the accusatory part.

Pursuant to CPL §100.30(2), the information may be verified in any one of the following ways specified in CPL §100.30(1), unless a court in a particular case directs that it must be verified in a specific manner authorized in CPL §100.30(1):

(1) It may be sworn to before the court with which it is filed.

(2) It may be sworn to before a desk officer in charge at a police station or police headquarters or any of his superior officers.

(3) Where the information is filed by any public servant following service of an appearance ticket,* and where by express provision of law another designated public servant is authorized to administer the oath with respect to the information, it may be sworn to before the public servant.

(4) It may bear a form notice that false statements made therein are punishable as a Class A misdemeanor pursuant to Penal Law §210.45; the form notice and the subscription of the deponent constitute a verification of the information.

(5) It may be sworn to before a notary public.

CPL §100.15(2) provides that the accusatory part of the information must designate the offense or offenses charged. As in the case of an indictment, and subject to the rules of joinder applicable to indict-

*CPL §150.10 provides that an appearance ticket is a written notice issued and subscribed by a police officer or other public servant authorized by law to issue one directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense. A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title.

ments*, two or more offenses may be charged in separate counts. Also as in the case of an indictment, the information may charge two or more defendants, provided that all such defendants are jointly charged with every offense alleged therein. For example, in People v. Valle, 70 A.D.2d 544, 416 N.Y.S.2d 600 (1st Dept. 1979), a conviction of the defendant for criminal possession of drugs and weapons was reversed because the indictment joined his charges with those of another defendant who was charged with the manufacture of the drugs. The court found that prejudicial error resulted from the jury's exposure to evidence concerning the manufacture of the drug which the defendant was charged with possessing.

CPL §100.15(3) provides that the factual part of the information must contain a statement by the complainant alleging facts of an evidentiary character to support the charges. See People v. Miles, 64 N.Y.2d 731, 485 N.Y.S.2d 747 (1984) [information which alleged defendant knew of his insufficient funds and intended or believed payment would be refused constituted sufficient evidentiary facts to support charge of issuing a bad check in violation of Penal Law §190.05(1)]. Where more than one offense is charged, the factual part should consist of a single factual account applicable to all the counts of the accusatory part. The factual allegations may be based either upon personal knowledge of the complainant or upon information and belief. The dichotomy between the factual

*CPL §200.40(1) provides that two or more defendants may be jointly charged in one indictment provided that all are jointly charged with every offense alleged in the indictment. However, the court may, for good cause shown, order separate trials upon motion made by the defendant or the People. CPL §200.40(2) provides that separate indictments may be consolidated where they charge the same offense or offenses and even where in addition they charge different offenses, they may nevertheless be consolidated for the limited purpose of trying the defendants jointly on the offenses common to all.

and accusatory parts of the accusatory instrument should be maintained. For example, in People v. Penn Cent. RR Co., 95 Misc.2d 748, 417 N.Y.S.2d 822 (Crim. Ct. Kings Co. 1978), an accusatory instrument was found to be defective because it did not contain separate accusatory and factual sections and because conclusory statements of the prosecution were not supported by evidentiary facts in the factual section; moreover, the conclusions were not separately set forth in the accusatory portion. CPL §100.40 provides three criteria which an information must meet to be sufficient on its face:

> (1) it must substantially conform to the requirements prescribed in CPL §100.15; and
>
> (2) the allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, must provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and
>
> (3) non-hearsay allegations of the factual part of the information and/or of any supporting depositions must establish, if true, every element of the offense charged and the defendant's commission thereof.

The information may serve as a basis for a warrant of arrest. CPL §120.20(1).

[2] Simplified Information

The simplified information is a written accusation by a police

officer or an authorized public servant charging a defendant with a violation of the Vehicle and Traffic Law, the Parks and Recreation Law, the Navigation Law, or the Environmental Conservation Law. See CPL §100.10(2). It must conform to models prescribed by the respective State commissioners but need not contain any factual allegations of an evidentiary nature. CPL §100.40(2). Factual allegations of an evidentiary nature must be contained in an attached supporting deposition if the defendant requests one. CPL §100.25 sets forth statutory time limits within which a request must be filed and a copy of the supporting deposition served upon defendant. The amendment assures that such prosecutions are timely and expeditiously completed. A defendant arraigned upon a simplified information, upon a timely request, is entitled as a matter of right to have filed with the court and served upon him, or if he is represented by an attorney, upon his attorney, a supporting deposition of the complainant police officer or public servant, containing allegations of fact, based either upon personal knowledge or upon information and belief*, providing reasonable cause to believe that the defendant committed the offense or offenses charged. Such a request must be made before entry of a plea of guilty to the charge specified and before commencement of a trial thereon, but not later than thirty days after (a) entry of the defendant's plea of not guilty when he has been arraigned in person, or (b) written notice to the defendant of his right to receive a supporting deposition when he has submitted a plea by mail of not guilty. Upon such a request, the court

* A simplified traffic information may be issued even if the offense does not occur in the police officer's presence. Farkas v. State, 96 Misc.2d 784, 409 N.Y.S.2d 696 (Ct. Cl. 1978).

must order the complainant police officer or public servant to serve a copy of such supporting deposition upon the defendant or his attorney, within thirty days of the date such request is received by the court, or at least five days before trial, whichever is earlier, and to file such supporting deposition with the court together with proof of service thereof. CPL §100.25(2).* See People v. DiGiola, 95 Misc.2d 359, 413 N.Y.S.2d 825 (App. T. 9th and 10th Jud. Dists. 1978). The failure of the police officer or public servant to comply with the order within the time limit provided by subdivision two of §100.25 renders the simplified information insufficient on its face. CPL §100.40(2). See also People v. Baron, 107 Misc.2d 59, 438 N.Y.S.2d 425 (App. T. 9th and 10th Jud. Dists. 1980). The form required for supporting depositions is discussed in Section B(6), infra.

The simplified information does not have to be verified, although the supporting deposition does [see Section B(6), infra].

The simplified information serves as a basis for commencement of the action and may serve as a basis for prosecution of the charges. CPL §100.10(2). However, it may not serve as a basis for a warrant of arrest. CPL §120.20(1); People v. Samsel, 59 Misc.2d 833, 300 N.Y.S.2d 777 (Batavia City Ct. Genesee Co. 1969).

CPL §100.25 requires a supporting deposition by a police officer complainant to commence a prosecution under that section. This statute does not conflict with CPL §120.20, which requires a supporting deposition by a person "other than the complainant." The former deals with traffic infractions witnessed by a police officer and the latter deals

* CPL §100.25 as amended, effective November 1, 1986.

with traffic infractions witnessed by a person other than a police officer. People v. Quinn, 100 Misc.2d 582, 419 N.Y.S.2d 811 (Police Ct. City of Cohoes, Albany Co. 1979).

[3] Prosecutor's Information

CPL §100.10(3) provides for a prosecutor's information -- a written accusation by a district attorney -- filed with a local criminal court, in any of the following three ways:

(1) at the direction of the grand jury under CPL §190.70, where there is legally sufficient evidence before the grand jury to establish an offense other than a felony, except in the case of submitted misdemeanors pursuant to CPL §170.25*, where the court orders the district attorney to prosecute by indictment in a superior court;

(2) at the direction of the local criminal court if the local criminal court reduces the charges to a non-felony offense before or after a hearing; or

(3) at the district attorney's own instance pursuant to CPL §100.50(2), which governs the filing of a superseding prosecutor's information.

The prosecutor's information may serve as the basis for the prosecu-

*A submitted misdemeanor is a misdemeanor presented to the grand jury upon the defendant's motion, to be prosecuted by indictment in a superior court in the interests of justice. See CPL §170.25(1).

tion of a criminal action, but it commences an action only where it results from a grand jury's direction issued in a case not previously commenced in a local criminal court. CPL §100.10(3). The prosecutor's information may be used only in non-felony cases. Id.

To be sufficient on its face, a prosecutor's information must comply with CPL §100.35. The law provides that a prosecutor's information must contain the name of the local criminal court with which it is filed and the title of the action, and must be subscribed by the filing district attorney. It should be in the form prescribed for an indictment, pursuant to CPL §200.50 and must, in one or more counts, allege the offense or offenses charged and a plain and concise statement of the conduct constituting each such offense. The rules prescribed in CPL §200.20 and §200.40 governing joinder of different offenses and defendants in a single indictment are also applicable to a prosecutor's information. Briefly, two offenses are joinable if:

(1) they are based upon the same act or criminal transaction; or

(2) proof of either would be material and admissible as evidence in chief in a prosecution for the other; or

(3) they are similar in law; or

(4) each is joinable for any of the above reasons with a third offense charged in the indictment. See CPL §200.20(2).

Indictments charging different offenses which are joinable may be consolidated at the discretion of the court. In addition, the court must order consolidation where the offenses are joinable because the offenses

are based on the same act or criminal transaction, unless good cause to the contrary is shown. See CPL §200.20(3), (4) and (5) [CPL §200.20(3) was amended in 1984 to specifically designate two situations which constitute good cause to permit severence of offenses; first, where there is substantially more proof on one or more joinable offenses than on others, and there is a substantial likelihood that a jury would be unable to consider separately the proof as it relates to each offense; and second, where there is a convincing showing that a defendant has important testimony to give concerning one count and a genuine need to refrain from testifying on the other which satisfies the court that the risk of prejudice is substantial. Note, however, the court is still allowed to consider other grounds for severence]. See generally People v. Lane, 56 N.Y.2d 1, 451 N.Y.S.2d 6 (1982). If two offenses are charged in the same indictment and are joinable pursuant to CPL §200.20(2)(b), discretionary severance provided by CPL §200.20(3) is inappropriate. People v. Andrews, 109 A.D.2d 939, 486 N.Y.S.2d 428 (3rd Dept. 1985).

Two or more defendants may be jointly charged in a single indictment when all defendants are jointly charged with each offense, or when all the offenses are based upon a common scheme or plan or based upon the same criminal transaction, although for good cause shown the court may order a severance. See CPL §200.40(1). Consolidation may also be ordered and the charges be heard in a single trial where the defendants are charged in separate indictments with an offense or offenses but could have been so charged in a single indictment under CPL §200.40(1). See CPL §200.40(2). See generally People v. Cruz, 66 N.Y.2d 61, 495 N.Y.S.2d 14 (1985).

At trial, an application for consolidation of joinable offenses may

be made by the defendant pursuant to CPL §200.20(4). An improper denial of such an application bars the subsequent prosecution of charges contained in the other accusatory instrument. CPL §40.40(3). An application for consolidation is an absolute prerequisite to invoke the provisions of CPL §40.40(3). People v. Green, 89 Misc.2d 639, 392 N.Y.S.2d 804 (Dist. Ct. Nassau Co. 1977).

Unlike an information, a prosecutor's information does not require sworn allegations of evidentiary facts. As in an indictment, the offenses charged are described in conclusory language without reference to the sources of or the support for the facts alleged. People v. Ingram, 69 A.D.2d 893, 415 N.Y.S.2d 875 (2nd Dept. 1979). See also People v. Grosunor, 109 Misc.2d 663, 440 N.Y.S.2d 996 (Crim. Ct. Bronx Co. 1981) (failure to file a non-hearsay corroborating affidavit affected only the form of the prosecutor's information and the defendant was precluded from attacking the sufficiency of that information by virtue of a curative amendment filed by the prosecution).

The prosecutor's information may serve as the basis for the issuance of an arrest warrant. CPL §120.20(1).

[4] Misdemeanor Complaint

CPL §100.10(4) provides for a "misdemeanor complaint," a verified written accusation by a person, filed with a local criminal court, charging one or more persons with the commission of one or more offenses, at least one of which is a misdemeanor and none of which is a felony. It serves as a basis for the commencement of a criminal action, but it may serve as a basis for prosecution thereof only where a defendant has waived prosecution by information pursuant to CPL §170.65(3), when he must enter a plea to the misdemeanor complaint either on the date of the

waiver or subsequent thereto. See People v. Colon, 110 Misc.2d 917, 443 N.Y.S.2d 305 (Crim. Ct. N.Y. Co. 1981), rev'd, 112 Misc.2d 790, 450 N.Y.S.2d 136 (Sup. Ct. App. T. 1st Dept. 1982), rev'd, 59 N.Y.2d 921, 466 N.Y.S.2d 319 (1983). Any waiver of the right to be prosecuted by an information must be conscious and knowing. People v. Gittens, 103 Misc.2d 309, 425 N.Y.S.2d 771 (Crim. Ct. Bronx Co. 1980). A defendant has the right to refuse to be tried on a misdemeanor complaint, in which case the district attorney has the option to file supporting depositions containing non-hearsay factual allegations to support the charges or to file an information. See People v. Pinto, 88 Misc.2d 303, 387 N.Y.S.2d 385 (Mt. Vernon City Ct. Westchester Co. 1976). Where the district attorney failed to file supporting depositions and trial commenced, the misdemeanor complaint was dismissed as a jurisdictionally defective accusatory instrument. People v. Redding, 109 Misc.2d 487, 440 N.Y.S.2d 512 (Crim. Ct. N.Y. Co. 1981). Absent defendant's waiver, the misdemeanor complaint must be replaced by an information within a reasonable time after arraignment. People v. Smith, 103 Misc.2d 640, 426 N.Y.S.2d 952 (Crim. Ct. Kings Co. 1980); see also People v. Callender, 112 Misc.2d 28, 448 N.Y.S.2d 92 (Sup. Ct. App. T. 1st Dept. 1981).

A misdemeanor complaint must be dismissed where prosecution has commenced and the defendant was not advised of his right to be prosecuted on an information. People v. Conoscenti, 83 Misc.2d 842, 373 N.Y.S.2d 443 (Dist. Ct. Suffolk Co. 1975). A conviction on a misdemeanor complaint where the defendant has not been advised of his right to be prosecuted on an information is a nullity. People v. Weinberg, 34 N.Y.2d 429, 358 N.Y.S.2d 357 (1974). A waiver of consent to prosecution by a

misdemeanor complaint will never be presumed where the court fails to advise the defendant of his right to be prosecuted on an information as required by CPL §170.10(4). Id. However, where a defendant represented by counsel has expressly waived the reading of his rights pursuant to CPL §170.10(4), including the reading of his right under CPL §170.65(1) and (3) to be prosecuted upon an information, and thereafter proceeds through preparation for trial and trial on a misdemeanor complaint without raising any objection, he may be deemed to have waived prosecution by information and consented to prosecution on the misdemeanor complaint. People v. Connor, 63 N.Y.2d 11, 479 N.Y.S.2d 197 (1984).

The standards governing sufficiency of a misdemeanor complaint are much less stringent than those governing sufficiency of an information. For example, it has been held that a complaint charging disorderly conduct need not state the charge with the precision required of an indictment. See People v. Zongone, 102 Misc.2d 265, 423 N.Y.S.2d 400 (Yonkers City Ct. Westchester Co. 1979). However, the failure to designate the proper statutory section and offense designation has been held to be fatal, not a mere irregularity, in light of CPL §100.45. People v. Law, 106 Misc.2d 351, 431 N.Y.S.2d 648 (Crim.Ct., N.Y.Co. 1980). The misdemeanor complaint need not contain non-hearsay allegations of fact which establish, if true, every element of the offense charged. People v. Boyer, 105 Misc.2d 877, 430 N.Y.S.2d 936, rev'd, 116 Misc.2d 931, 459 N.Y.S.2d 344, rev'd sub. nom. People v. Rickert, 58 N.Y.2d 122, 459 N.Y.S.2d 734 (1983). A misdemeanor complaint is sufficient if:

(1) it substantially conforms to the requirements

prescribed in CPL §100.15, discussed in Section B[1], supra; and

(2) the allegations of the factual part of the instrument and/or any supporting depositions which accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the instrument. CPL §100.40(4).

The misdemeanor complaint must allege the source of the information and belief. People v. Pleva, 96 Misc.2d 1020, 410 N.Y.S.2d 261 (Dist. Ct. Suffolk Co. 1978). In People v. Dumas, 68 N.Y.2d 729, 506 N.Y.S.2d 319 (1986) it was held that misdemeanor complaints alleging the crimnal sale and/or possession of marihuana were facially insufficient where they contained a conclusion that the defendant sold marihuana but were not supported by evidentuary facts showing the basis for the conclusion that the substance sold was actually marihuana; such as an allegation that the police officer was an expert in identifying marihauna or that the defendant represented the substance as being marihuana. Id. at 731, 506 N.Y.S.2d 319-20. Following Dumas, a misdemeanor complaint charging defendant with possessing cocaine was held to be facially sufficient when based soley upon a police officer's sworn statement that his "training and experience" led him to conclude that what defendant possessed was cocaine. People v. Paul, 133 Misc.2d 234, 235, 506 N.Y.S.2d 834 (Crim. Ct. N.Y. Co. 1986). But see People v. Fasanaro, 134 Misc.2d 141, 509 N.Y.S.2d 713 (Crim. Ct. N.Y. Co. 1986).

A misdemeanor complaint is basically a form used to charge a misdemeanor where the People do not yet have sufficient evidence for an infor-

mation. It is a stop-gap measure used, for example, when the prosecutor wishes to charge unauthorized use of a vehicle and has not as yet been able to obtain a statement from the owner of the vehicle. However, if the misdemeanor complaint is supplemented by a supporting deposition and both together satisfy the requirements for a valid information, the misdemeanor complaint is deemed to have been converted to an information. CPL §170.65. See also People v. Ranieri, 127 Misc.2d 132, 485 N.Y.S.2d 495 (N.Y.C. Crim. Ct. N.Y. Co. 1985) (a misdemeanor narcotics complaint requires the support of a laboratory report confirming the presence of the narcotic substance charged for conversion to a verified allegation). See People v. Harvin, 126 Misc.2d 775, 483 N.Y.S.2d 913 (Crim. Ct. Bronx Co. 1984) (in gun possession cases the ballistics report establishing proof of operability takes on the character of a supporting deposition which when filed converts a jurisdictionally insufficient complaint to an information). In People v. Rodriquez, 94 Misc.2d 645, 405 N.Y.S.2d 218 (Crim. Ct. Bronx Co. 1978), a misdemeanor complaint was deemed converted to an information because complainant had given sworn non-hearsay testimony at a preliminary hearing which would have established, if true, every allegation of the offense charged. The court held that the testimony was the equivalent of a sufficient supporting deposition. Similarly, an instrument labeled "misdemeanor complaint" will be treated as a valid information if it contains non-hearsay allegations establishing, if true, every element of the offense charged. People v. Gittens, 103 Misc.2d 309, 425 N.Y.S.2d 771 (Crim. Ct. Bronx Co. 1980); People v. Vlasto, 78 Misc.2d 419, 355 N.Y.S.2d 983 (Crim. Ct. N.Y. Co. 1974); People v. Niosi, 73 Misc.2d 604, 342 N.Y.S.2d 864 (Dist. Ct. Suffolk Co. 1973).

The misdemeanor complaint may serve as a basis for the issuance of an arrest warrant. CPL §120.20(1).

Note: CPL §170.70 provides for the release of a defendant on his own recognizance, if he has been detained for more than five days and the People have failed to replace a misdemeanor complaint with an information. See People v. Bresalier, 97 Misc.2d 157, 411 N.Y.S.2d 110 (Crim. Ct. Kings Co. 1978). However, the court noted "that a defendant may in unusually burdensome circumstances be able to show that he is being subjected to a significant pre-trial restraint of liberty, notwithstanding the fact that he is not incarcerated pending trial -- immediate loss of job, suspension of license, or stigma with resulting diminished reputation in the community [citations ommitted]." In such cases the court may conduct an inquiry at arraignment to determine if there is probable cause to believe that the defendant has committed the crime. Id. at 160, 411 N.Y.S.2d at 112.

In People ex re Hunter v. Phillips, 131 Misc.2d 529, 500 N.Y.S.2d 975 (Orange Co. Ct. 1986), it was held that where a defendant was held in jail for four days on a felony complaint before the charges were reduced by converting the same to a misdemeanor complaint, with the same hearsay allegations forming the basis of the reduced charge, the defendant could not be held for a second five day period. Note: A defendant does not have the absolute right to plead guilty to a misdemeanor complaint in a local criminal court. In People v. Barkin, 49 N.Y.2d 901, 428 N.Y.S.2d 192 (1980), the Court held that a trial court could reject the guilty plea where the prosecution concurrently requested an adjournment for the purpose of presenting the charges against defendant before the grand jury. In so ruling, the Court noted that CPL §220.10(2) was not designed

nor ever intended to allow a defendant not yet indicted:

> to interrupt the accusatory process before it has been completed, to take advantage of a fortuitous circumstance which resulted from an inadequate initial assessment, on the part of law enforcement officials, of the extent of defendant's wrongdoing. Id. at 902-3, 428 N.Y.S.2d at 193.

See also People v. Phillips, 66 A.D.2d 696, 411 N.Y.S.2d 259 (1st Dept. 1978), aff'd, 48 N.Y.2d 1011, 425 N.Y.S.2d 558 (1980).

[5] Felony Complaint

The felony complaint is a verified instrument charging an individual with one or more felonies and is filed with a local criminal court. CPL §100.10(5). It operates only to commence an action; it does not serve as a basis for prosecution. Id. Prosecution must be based upon a subsequent indictment or, if the charge is reduced to a non-felony offense, upon an information or a prosecutor's information. CPL §180.50(3). See People v. Franco, 109 Misc.2d 695, 440 N.Y.S.2d 961, (Crim. Ct. Bronx Co. 1981).

The standards governing sufficiency of a felony complaint are less stringent than those governing sufficiency of an information, since the felony complaint need not contain non-hearsay allegations of fact establishing, if true, the commission of the offense charged. The filing of a felony complaint merely indicates that there is probable cause to believe that the defendant has committed a crime, whereas an indictment states that the People have legally sufficient evidence of the defendant's guilt. People v. Torres, 63 A.D.2d 1033, 406 N.Y.S.2d 500, aff'd, 53 N.Y.2d 213, 440 N.Y.S.2d 889 (1981), cert. denied, 454 U.S. 967 (1981), and 454 U.S. 1162 (1982). A felony complaint is sufficient on

its face when:

(1) it substantially conforms to the requirements prescribed for an information in CPL §100.15, discussed in Section B(1), supra, and

(2) the allegations of the factual part of the accusatory instrument and/or any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offenses charged in the accusatory part of the instrument. CPL §100.40(4).

The felony complaint may serve as the basis for the issuance of an arrest warrant. CPL §120.20(1).

Note: Criminal Procedure Law §1.20(17) provides that a criminal action is deemed to commence with the filing of an accusatory instrument. Contrary to prior law, and in view of the above-mentioned statutory provision, the filing of a felony complaint and subsequent arrest pursuant to warrant is now considered a critical stage of the criminal proceeding. Consequently, in this situation, or any time where an accusatory instrument is filed and the right to counsel is inherent therein, interrogation may not proceed without the presence of counsel or a valid waiver of counsel made in the presence of counsel. See People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892 (1980); People v. Settles, 46 N.Y.2d 154, 412 N.Y.S.2d 874 (1978). See People v. Lane, 64 N.Y.2d 1047, 489 N.Y.S.2d 704 (1985), where the Court held that when an accusatory instrument has been signed but had not been filed in court, criminal

action has not commenced and the defendant's right to counsel has not attached at the time of the questioning. See also People v. Ridgeway, 64 N.Y.2d 952, 488 N.Y.S.2d 641 (1985), where the filing of a complaint and issuance of an arrest warrant in Federal court did not trigger the indelible right to counsel under New York Law.

[6] Supporting Deposition

A supporting deposition is a written instrument accompanying or filed in connection with an information, a simplified information, a misdemeanor complaint or a felony complaint, subscribed and verified by a person other than the complainant of such accusatory instrument, and containing factual allegations of an evidentiary character, based either upon personal knowledge or upon information and belief, which supplement those of the accusatory instrument and support the charge or charges contained therein. CPL §100.20.

In People v. Hohmeyer, No. 160, slip op. (New York Court of Appeals, June 4, 1987), the Court held that a pre-printed supporting deposition form was sufficient to meet the requirements of CPL §100.20. The factual statements in the deposition are communicated by check marks made in boxes next to the applicable conditions and observations signifying the complainant's allegations.

C. Grounds for Motion to Dismiss Accusatory Instrument

The defendant is entitled to a copy of the accusatory instrument at arraignment. CPL §170.10(2). The various grounds upon which defense counsel may move to dismiss the accusatory instrument are set forth in CPL §170.35 and are discussed below.

[1] Defects under CPL §170.35

[a] Accusatory Instrument Defective on its Face

Defense counsel may move to dismiss the accusatory instrument on the

ground that it is defective on its face within the meaning of CPL §170.30(1)(a). An accusatory instrument is defective on its face when it fails to allege the necessary non-hearsay allegations which would establish, "if true, every element of the offense charged and the defendant's commission there of" (CPL §100.40[1][c], §100.15[3]). Facial insufficiency of an information is a nonwaivable jurisdictional defect. People v. Alejandro, No. 142, slip op. (New York Court of Appeals, June 11, 1987). See also People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977), People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 523 (1979). However, the instrument may not be dismissed as defective but must be amended where the defect or irregularity is of a kind that may be cured by amendment and the People move to so amend. For a discussion of the amendment of the accusatory instrument, see Section D, infra.

[i] Information

The prosecutor should be sure that the information sets forth in its factual part non-hearsay allegations which establish, if true, every element of the offense charged as required by CPL §100.40(1)(c). An information charging a violation of a zoning ordinance was dismissed, since it merely alleged that the defendants had added structures to their buildings and did not allege how these additions violated the ordinance. People v. Fletcher Gravel Co., 82 Misc.2d 22, 368 N.Y.S.2d 392 (Onondaga Co. Ct. 1975). An information charging custodial interference was dismissed where it simply stated that the defendant grandfather had enticed his granddaughter away from the home of her lawful custodian, her mother, but did not state how he had enticed her. People v. Page, 77 Misc.2d 277, 353 N.Y.S.2d 358 (Amherst Town Ct. Erie Co. 1974). An information charging endangering the welfare of a child was

dismissed where it charged only that the defendant had failed to exercise reasonable diligence in preventing his son from becoming an abused or neglected child or a person in need of supervision or a juvenile delinquent. People v. Dailey, 67 Misc.2d 107, 323 N.Y.S.2d 523 (Yates Co. Ct. 1971). An information charging a defendant, who was a representative of the Department of Social Services, as an aider and abettor in violating an ordinance prohibiting the use of cellars as habitable space, was dismissed where it merely alleged that the defendant "caused and permitted a family to use a boiler room for sleeping purposes." People v. Brickel, 67 Misc.2d 848, 325 N.Y.S.2d 28, (Justice Ct. Spring Valley Rockland Co. 1971). The information was insufficient since it did not describe how the defendant aided and abetted a landlord in permitting a family to inhabit a boiler room. The prosecutor should ensure that the information does not simply parrot the language of the statute.

An information is sufficient if it alleges specific acts constituting the offense or offenses charged. An information charging obstructing governmental administration was factually sufficient where it alleged that the defendants encircled a police officer who was attempting to place someone under arrest, thereby enabling that person to flee. People v. Shea, 68 Misc.2d 271, 326 N.Y.S.2d 70 (Yonkers Ct. of Spec. Sess. Westchester Co. 1971). An information charging obstruction of governmental administration was sufficient where it alleged that the defendant had blocked the doorway to his bar and thus physically prevented a police officer from inspecting the bar as required by the Alcoholic Beverages Control Law. People v. DeMartino, 67 Misc.2d 11, 323 N.Y.S.2d 297 (Dist. Ct. Suffolk Co. 1971). An information charging harassment was

deemed insufficient in People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 56 (1979), when it failed to specify that the act was done with intent to harass, annoy or alarm. Accord People v. Maksymenko, 109 Misc.2d 191, 442 N.Y.S.2d 699 (App. T. 2d and 11th Jud. Dists. 1981), aff'g, 105 Misc.2d 368, 432 N.Y.S.2d 328 (Crim. Ct. Queens Co. 1980) (information which failed to contain essential "intent" elements to support harassment and resisting arrest charges was insufficient). See People v. Young, 123 Misc.2d 486, 473 N.Y.S.2d 715 (Crim. Ct. Bronx Co. 1984) (omission of intent is a jurisdictional defect which renders an information invalid).

The requirement that an information contain non-hearsay allegations of fact, establishing, if true, every element of the offense charged and the defendant's commission thereof precludes only objectionable hearsay as a basis for the factual allegations. The allegations in the information may be based on admissible hearsay. Accordingly, one court denied a motion to dismiss an information charging unauthorized use of a vehicle on the ground that the only allegation of lack of consent of the owner was a police teletype report, stating that the car was stolen, since the teletype report as a business record would have qualified as an exception to the prohibition against hearsay People v. Fields, 74 Misc.2d 109, 344 N.Y.S.2d 413 (Dist. Ct. Nassau Co. 1973), aff'd on other grounds, sub. nom. People v. Shipp, 79 Misc.2d 68, 359 N.Y.S.2d 1010 (App. T. 9th and 10th Jud. Dists. 1973).

An information is defective if it replaces a misdemeanor complaint pursuant to CPL §170.65 but does not contain at least one count charging the defendant with an offense based upon conduct which was the subject of the misdemeanor complaint. CPL §170.35(2).

[ii] Simplified Information and Supporting Deposition

Under the former Code of Criminal Procedure, the Court of Appeals held that the statute permitting the allegations in a simplified traffic information to be based solely on information and belief was not unconstitutional since the simplified traffic information was used only as a pleading. People v. Boback, 23 N.Y.2d 189, 295 N.Y.S.2d 912 (1968). Consequently, CPL §100.25, which states that the allegations in simplified informations may be based on information and belief, is constitutional.

A simplified traffic information is not required to contain any factual allegations of an evidentiary nature, since the defendant is entitled to a statement of facts only when he requests a supporting deposition. See CPL §100.25; Vehicle and Traffic Law §207. It should be noted that in a simplified traffic information, proof of a violation of any subdivision of Vehicle and Traffic Law §1192 will support a conviction for that offense even if a violation of another subdivision of that section is charged. People v. Farmer, 36 N.Y.2d 386, 369 N.Y.S.2d 44 (1975); People v. Evans, 75 Misc.2d 726, 348 N.Y.S.2d 826 (Justice Ct. Spring Valley Rockland Co. 1973), aff'd without opinion, 79 Misc.2d 130, 362 N.Y.S.2d 440 (App. T. 9th and 10th Jud. Dists. 1974).

If a supporting deposition to a simplified information is requested but not filed in advance of trial, the simplified information must be dismissed. People v. Baron, 107 Misc.2d 59, 438 N.Y.S.2d 425 (2d Dept. 1981); People v. DeFeo, 77 Misc.2d 523, 355 N.Y.S.2d 905 (App. T. 2d Dept. 1974); People v. Zagorsky, 73 Misc.2d 420, 341 N.Y.S.2d 791 (Broome Co. Ct. 1973). The defendant has no obligation to accept an adjournment to allow the People to furnish the supporting deposition. DeFeo, supra.

See People v. Hartmann, 123 Misc.2d 553, 473 N.Y.S.2d 935 (Westchester City Ct. 1984) (the People are not entitled to adjournment in order to make timely service of copy of supporting deposition). However, if the defendant fails to request the supporting deposition, he cannot move to dismiss the simplified information on the ground that no supporting deposition was filed. Furthermore, if a defendant receives an inadequate supporting deposition in advance of trial, but waits until jeopardy attaches before moving to dismiss the simplified information, he is deemed to have waived the defense of double jeopardy and the People may refile and serve the simplified information with an adequate supporting deposition. People v. Key,* 87 Misc.2d 262, 391 N.Y.S.2d 781 (App. T. 9th and 10th Jud. Dists. 1976), aff'd, 45 N.Y.2d 111, 408 N.Y.S.2d 16 (1978). If the supporting deposition is inadequate, defense counsel should make a motion to dismiss in writing, upon reasonable notice to the People. People v. Fattizzi, 98 Misc.2d 288, 413 N.Y.S.2d 804 (App. T. 9th and 10th Jud. Dists. 1978). The motion should generally be made before commencement of trial, but in no event can the court entertain the motion after the sentence has been imposed. Id. at 289, 413 N.Y.S.2d at 806. Furthermore, under Key, a simplified traffic information dismissed upon the ground of inadequacy does not preclude the district attorney from filing a subsequent adequate instrument.

While a simplified information is not defective if the deponent signs the supporting deposition above the verification instead of subscribing below as directed by CPL §100.20 [People v. Coldiron, 79 Misc.2d 338, 360 N.Y.S.2d 788 (App. T. 9th and 10th Jud. Dists. 1974)], a supporting deposition to a simplified traffic information was dismissed with leave to resubmit where deponent signed above the verification. See

* Also reported in 383 N.Y.S.2d 953.

People v. Lennox, 94 Misc.2d 730, 405 N.Y.S.2d 581 (Justice Ct. Town of Greenburgh Westchester Co. 1978). Note that at least one court has held that there is no requirement of a verified information in a traffic infraction prosecution commenced by a simplified information. See Tipon v. Appeals Board of Administrative Adjudication Bureau, 82 Misc.2d 657, 372 N.Y.S.2d 131 (Sup. Ct. Monroe Co. 1975), aff'd, 52 A.D.2d 1065, 384 N.Y.S.2d 324 (4th Dept. 1976).

[iii] Felony Complaint

A felony complaint which does not state whether the allegations therein are based on personal knowledge or on information and belief is not defective since such statement is not mandated by the CPL. People v. Ferro, 77 Misc.2d 226, 353 N.Y.S.2d 854 (Dist. Ct. Nassau Co. 1974).

[b] Jurisdictional Defect

An accusatory instrument must be dismissed where the allegations demonstrate that the court does not have jurisdiction of the offense charged. CPL §170.35(1)(b). Lack of jurisdiction is a nonwaivable defect which may be raised on appeal. People v. Patterson, 39 N.Y.2d 288, 383 N.Y.S.2d 573 (1976).

[c] Invalid Statute

An accusatory instrument must be dismissed where the statute defining the offense charged is unconstitutional or otherwise invalid. CPL §170.35(1)(c). A claim that a statute is unconstitutional is waivable and may not be raised on appeal. People v. Thomas, 50 N.Y.2d 467, 429 N.Y.S.2d 584 (1980), People v. Iannelli, 69 N.Y.2d 684, 512 N.Y.S.2d 150, (1986).

[d] Defective Prosecutor's Information

A prosecutor's information is defective when it is filed at the direction of a grand jury pursuant to CPL §190.70 and the offense or

offenses charged are not among those authorized by such grand jury direction. CPL §170.35(3)(a). A prosecutor's information is also defective when it is filed by the district attorney at his own instance pursuant to CPL §100.50(2) and the factual allegations of the original information underlying it and any supporting depositions are not legally sufficient to support the charge in the prosecutor's information. CPL §170.35(3)(b). See People v. Malausky, 127 Misc.2d 84, 485 N.Y.S.2d 925 (Rochester City Ct. 1985).

[2] Defendant Has Received Immunity

Pursuant to CPL §170.30(1)(b), an accusatory instrument must be dismissed where the defendant has received immunity from prosecution for the offense charged as a condition precedent to an order to testify in any legal proceeding under CPL §§50.20, 190.40. See also People v. Wilson, 108 Misc.2d 417, 437 N.Y.S.2d 839 (Allegany Co. Ct. 1981), aff'd 96 A.D.2d 741, 465 N.Y.S.2d 496 (4th Dept. 1983).

[3] Prosecution Barred by Reason of Previous Prosecution

Pursuant to CPL §170.30(1)(c), an accusatory instrument must be dismissed where the prosecution is barred by reason of a previous prosecution under CPL §40.20, which provides that a person may not be prosecuted twice for the same offense nor separately for two offenses based upon the same act or criminal transaction unless:

> (a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or
>
> (b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or

(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof; or

(d) One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or

(e) Each offense involves death, injury, loss or other consequence to a different victim; or

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state; or

(g) The present prosecution is for a consummated result offense, whereby a specific consequence is an element of an offense and the occurrence of such consequence constitutes the result of such offense, which occurred in this state and the offense was the result of a conspiracy, facilitation or solicitation prosecuted in another state. CPL §40.20(2).

CPL §40.30 provides that a person "is prosecuted" within the meaning of CPL §40.20 when the case against him has been resolved by conviction upon a guilty plea or the case has proceeded to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness has been sworn. CPL §40.30 further provides that notwithstanding these occurrences, a person is deemed not to have been prosecuted if:

(1) The court lacked jurisdiction.

(2) The defendant procured prosecution for a lesser

offense to avoid prosecution for a greater one, without the knowledge of the appropriate prosecutor.

(3) A court order restores the action to its pre-planning status or directs a new trial of the same accusatory instrument.

(4) A court dismisses the accusatory instrument but authorizes the issuance of another accusatory instrument.

Reprosecution was not barred where the initial prosecution was dismissed after trial due to a jurisdictional defect, pursuant to a defense motion, notwithstanding the court's conviction of the defendant on the merits. People v. Redding, 109 Misc.2d 487, 440 N.Y.S.2d 512 (Crim. Ct. N.Y. Co. 1981).

Conviction for possession of obscene material with intent to promote on September 26, 1976, does not bar prosecution for possession of obscene material with intent to promote it on October 2, 1976. Braunstein v. Frawley, 64 A.D.2d 772, 407 N.Y.S.2d 250 (3rd Dept. 1978). However, the court in Frawley found that petitioner could be charged in a single information for having committed only one such crime on October 2, even though the prosecution was based on his possession of six different allegedly obscene films with intent to promote them on that date. The court stated:

> The possession with intent to promote of numerous items of obscene material in a retail store comes within the definition of a "criminal transaction" under CPL §40.10(2) so as to constitute a "single criminal venture." Id. at 773, 407 N.Y.S.2d at 253.

It should be noted that the New York Court of Appeals in People v. Brown, 40 N.Y.2d 381, 386 N.Y.S.2d 848 (1976), cert. denied, 433 U.S. 913 (1977), held that the double jeopardy clauses of the United States and New York State Constitutions preclude the People from appealing a trial order of dismissal where a reversal would result in a retrial. Therefore, CPL §450.20(2), which authorized such appeals, was unconstitutional. The subdivision has been amended to provide that an order setting aside a verdict is appealable. (Amended by Subd.2, L.1983, c. 170 §3). A "trial order of dismissal" is now defined as including a reserved decision on a motion to dismiss until after a verdict has been rendered. CPL §290.10(1), as amended by L. 1983, c. 170 §1. See also People v. Allini, 60 A.D.2d 886, 401 N.Y.S.2d 520 (2nd Dept. 1978).

[4] Untimely Prosecution

An accusatory instrument must be dismissed if it is not filed within the prescribed statutory period of limitation set forth in CPL §30.10. That statute provides that:

(1) a prosecution for a class A felony may be commenced at any time:

(2) a prosecution for any other felony must be commenced within five years after its commission;

(3) a prosecution for a misdemeanor must be commenced within two years after its commission;

(4) a prosecution for a petty offense must be commenced within one year after its commission;

CPL §30.10 further provides that notwithstanding these periods of limitation, the period of limitation may be extended in certain instances. A prosecution for larceny committed by a person in violation

of a fiduciary duty may be commenced within one year after the facts constituting such offense are discovered or, in the exercise of reasonable diligence, should have been discovered by the aggrieved party or by a person under a legal duty to represent him who is not himself implicated in the commission of the offense. A prosecution for any offense involving misconduct in public office by a public servant may be commenced at any time during the defendant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under CPL §30.10.

A prosecution for violations of Section 27-0914 of the Environmental Conservation Law may be commenced within four years after the facts constituting such crime are discovered or, in the exercise of reasonable diligence, should have been discovered by a public servant who has the responsibility to enforce the the Environmental Conservation Law. A prosecution for any misdemeanor set forth in the Tax Law or chapter forty-six of the Administrative Code of the City of New York must be commenced within three years after the commission thereof. CPL 30.10(3)(d).

In addition, CPL §30.10(4)(a) provides that any period following the commission of the offense, during which the defendant was continuously outside New York State or the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence, shall not be calculated within the period of limitation. However, in no event shall the period of limitation in such a case be extended by more than five years beyond the period otherwise applicable.

CPL §30.10(4)(b) further provides that when a prosecution for an offense is lawfully commenced within the prescribed period of limitation, and when an accusatory instrument upon which such prosecution is based is subsequently dismissed by an authorized court under directions or circumstances permitting the lodging of another charge for the same conduct, the period extending from the commencement of the defeated prosecution to the dismissal of the accusatory instrument does not constitute a part of the period of limitation applicable to the commencement of prosecution by a new charge.

[5] Denial of Right to Speedy Trial

The accusatory instrument must be dismissd if the defendant was denied his right to a speedy trial, guaranteed by CPL §§30.20, 30.30 and the Sixth Amendment to the United States Constitution [made binding on the States through the due process clause of the Fourteenth Amendment, Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967)]. CPL §30.30(1) provides that an accusatory instrument must be dismissed unless the prosecution is ready for trial within the specified time period prescribed in that statute, which varies according to the charge(s) in the accusatory instrument, subject only to two exceptions set forth in CPL §30.30(3).

(1) The defendant is accused of criminally negligent homicide (proscribed in Penal Law §125.10), second degree manslaughter (proscribed in Penal Law §125.15), first degree manslaughter (proscribed in Penal Law §125.20), murder in the second degree (proscribed in Penal Law §125.25) and murder in the first degree (proscribed in Penal Law

§125.27).

(2) The People are not ready for trial but:

(a) the People were ready for trial prior to the expiration of the specified period; and

(b) their present unreadiness is due to some exceptional fact or circumstance, including, but not limited to, the sudden unavailability of evidence material to the People's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period.

Under CPL §30.30(1), the People must be ready for trial within:

(a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;

(b) ninety days of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of more than three months and none of which is a felony;

(c) sixty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which

is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months;

(d) thirty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a violation and none of which is a crime.

However, CPL §30.30(4), provides for exclusion of certain periods in computing the time within which the People must be ready for trial. The excludable periods are:

(a) a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: proceedings for the determination of competency and the period during which defendant is incompetent to stand trial; demand to produce; request for a bill of particulars, pre-trial motions; appeals; trial of other charges; and the period during which such matters are under consideration by the court; or

(b) delay resulting from a continuance granted by the court in the interests of justice at the request of, or with the consent of, the defendant or his counsel. Note that a defendant without counsel is not deemed to have

consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent; or

(c) delay resulting from the absence or unavailability of the defendant or, where the defendant is absent or unavailable and has either escaped from custody or has previously been released on bail or on his own recognizance, the period extending from the day the court issues a bench warrant pursuant to CPL section 530.70 because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court pursuant to a bench warrant or voluntarily or otherwise. A defendant must be considered absent whenever his location is unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence; or

(d) a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial pursuant to the

statute has not run and good cause is not shown for granting a severance; or

(e) delay resulting from detention of the defendant in another jurisdiction, provided the district attorney is aware of such detention and has diligently made efforts to obtain the defendant for trial; or

(f) the period during which the defendant is without counsel through no fault of the court; except when the defendant is proceeding as his own attorney with the permission of the court; or

(g) other periods of delay occasioned by exceptional circumstances, including but not limited to, the delay resulting from a continuance granted at the request of a district attorney if;

(i) the continuance is granted because of the unavailability of evidence material to the People's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period; or

(ii) the continuance is granted to allow the district attorney additional time to

prepare the People's case, justified by exceptional circumstances.

(h) the period during which an action has been adjourned in contemplation of dismissal pursuant to sections 170.55, 170.56, and 215.10.

CPL §30.30(5) provides criteria to determine when a criminal action commences:

(a) where the defendant is to be tried following withdrawal of a guilty plea or is to be retried following a mistrial, an order for a new trial or an appeal or collateral attack, the criminal action and the commitment to the custody of the sheriff, if any, must be deemed to have commenced on the date the withdrawal of the plea of guilty or the date the order occasioning a retrial becomes final;

(b) where a defendant has been served with an appearance ticket, the criminal action must be deemed to have commenced on the date the defendant first appears in a local criminal court in response to the ticket;

(c) where a criminal action is commenced by the filing of a felony complaint, and thereafter, in the course of the same criminal action either the felony complaint is replaced with

or converted to an information, prosecutor's information or misdemeanor complaint, or a prosecutor's information is filed, the period during which the defendant must be tried is the period applicable to the charges in the new accusatory instrument; provided however, that when the aggregate of such period and the period of time (not counting excludable periods) already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months, the period applicable to the charges in the felony complaint must remain applicable and continue as if the new accusatory instrument had not been filed;

(d) where a criminal action is commenced by the filing of a felony complaint, and thereafter, in the course of the same criminal action, either the felony complaint is replaced with or converted to an information, prosecutor's information or misdemeanor complaint, or a prosecutor's information is filed, the period applicable for the purposes of determining the period during which defendant may be incarcerated pending trial is the period applicable to the charges in the new accusatory instrument, calculated from the date of

> the filing of such new accusatory instrument, provided, however, that when the aggregate of such period and the period of time (not counting excludable periods) already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds ninety days, the period applicable to the charges in the felony complaint must remain applicable and continue as if the new accusatory instrument had not been filed.

When determining whether a defendant's statutory or constitutional right to a speedy trial has been violated, the date of the first filing of an accusatory instrument determines the measuring point. CPL §1.20(17). As interpreted by the Court of Appeals in People v. Lomax, 50 N.Y.2d 351, 428 N.Y.S.2d 937 (1980):

> [t]here can be only one criminal action for each set of criminal charges brought against a particular defendant, notwithstanding that the original accusatory instrument may be replaced or superseded during the course of the action. This is so even in cases such as this where the original accusatory instrument was dismissed outright and the defendant was subsequently haled into court under an entirely new indictment. Indeed, the notion that the continuity of a criminal action remains intact, even through the issuance of successive indictments, is supported by the provisions of CPL 210.20 (subd. 4), which permits the District Attorney to seek a new indictment after the first indictment has been dismissed, but only upon the direction of the trial court (cf. CPL 190.75, subd. 3). Id. at 356, 428 N.Y.S.2d at 939.

In People v. Coleman, 104 Misc.2d 748, 429 N.Y.S.2d 142 (Rockland

Co. Ct. 1980), defendant obtained a dimissal of the accusatory instrument pending against him. Defendant was held for the action of a grand jury after a preliminary hearing in local criminal court. In dismissing the charges, the court noted that more than six months had passed in violation of CPL §30.30. It rejected the People's argument that it lacked jurisdiction to grant such an order, noting that the State had the right to make an application with respect to the identical subject matter pursuant to CPL §180.40 and found that the denial of a similar forum to defendant would be denial of fundamental fairness and justice as well as due process. Coleman, supra, 104 Misc.2d at 749, 429 N.Y.S.2d at 143. See also People v. Mitchell, 84 A.D.2d 822, 444 N.Y.S.2d 118 (2nd Dept. 1981), where the Appellate Division reversed the trial court's granting of defendant's motion to dismiss the indictment for failure to prosecute, holding that a hearing was required to first determine whether the police had exercised due diligence in their efforts to locate the defendant. The court noted that if the defendant could not be located despite diligent efforts by police, there would be good cause for the prosecution's delay in obtaining an indictment. See also People v. Colon, 59 N.Y.2d 921, 466 N.Y.S.2d 319 (1983) (defendant obtained a dismissal of the accusatory instruments filed against him where the People were not ready for trial within the statutory period and defendant's absence was not the cause of the delay); People v. Reid, 110 Misc.2d 1083, 443 N.Y.S.2d 600 (Crim. Ct. N.Y. Co. 1981) (when the People reduced the charge from a felony to a class A misdemeanor, the prosecution's failure to be ready for trial within the shorter period of either ninety days of the reduction of the charge or six months of the filing of the original complaint, resulted in a dismissal of the informa-

tion). But see People v. McBride, 126 Misc.2d 272, 482 N.Y.S.2d 203 (City Ct. 1984) (time excludable in determining when a defendant must be brought to trial is chargeable to all charges against the defendant, whether made under original accusatory instrument or under any superseding information, including any added charges under a superseding information). See also People v. Arturo, 122 Misc.2d 1058, 472 N.Y.S.2d 998 (Crim. Ct. N.Y. Co. 1984) (none of the exclusions of CPL §30.30(4) apply until conversion of a misdemeanor complaint into a jurisdictionally sufficient information is completed). When the district attorney announces his readiness for trial on the record, it does not mean that no delay on the part of the People occurring afterwards is to be counted against them in determining whether the readiness requirements of CPL §30.30 have been met. The Court of Appeals in People v. Anderson, 66 N.Y.2d 529, 498 N.Y.S.2d 119 (1985) stated:

> "...it is a misinterpretation of the subdivision [CPL §30.30(3)(b)] to read good faith into it for its reference to 'exceptional fact or circumstance' evidences that more than good faith is required. Postreadiness delay is not excused because inadvertent, no matter how pure the intention; also, on a postreadiness motion, only delay by the People is to be considered, except where that delay directly 'results from' actions taken by the defendant within the meaning of CPL §30.30(4)(a), (b), (c) or (e), or is occasioned by exceptional circumstances arising out of defendant's action within the meaning of subdivision 4(g). Even as to postreadiness failure, however, the criminal action should not be dismissed if the failure, although it affected defendant's ability to proceed with trial, had no bearings on the People's readiness, or if a lesser corrective action, such as preclusion or continuance, would have been available had the People's postreadiness default occurred during trial."

People v. Sanchez, 131 Misc.26 362, 500 N.Y.S.2d 612 (1st Dept. 1986), held that the guideline set by the Anderson court applied retroactively. "There is no requirement that the People demonstrate that the defendant's motions actually caused the People's lack of readiness before such periods are excluded pursuant to CPL §30.30(4)(a)." People v. Worley, 66 N.Y.2d 523, 498 N.Y.S.2d 116 (1985); People v. Heller, 120 A.D.2d 612, 502 N.Y.S.2d 498 (2nd Dept. 1986).

[6] Other Impediment

An accusatory instrument must be dismissed if there exists some other jurisdictional defect or legal impediment to the conviction of the defendant for the offense charged. CPL §170.30[1][f].

[7] Interests of Justice

An accusatory instrument must be dismissed in the furtherance of justice if such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration, or circumstance clearly demonstrating that the conviction or prosecution of the defendant upon the accusatory instrument would constitute or result in an injustice. CPL §170.40. This discretionary power is not absolute, and should be utilized as "'sparingly as garlic' [citations omitted]." People v. Boyer, 105 Misc.2d 877, 891; 430 N.Y.S.2d 936, 946 (Syracuse City Ct. Onondaga Co. 1980), rev'd, 116 Misc.2d 931, 459 N.Y.S.2d 344 (Onondaga Co. Ct. 1981), rev'd sub. nom. People v. Rickert, 58 N.Y.2d 122, 459 N.Y.S.2d 734 (1983). Essentially, a court must balance between safeguarding interests of the public and those of each defendant. See People v. Clayton, 41 A.D.2d 204, 208, 342 N.Y.S.2d 106, 110 (2nd Dept. 1973). Among the factors to be considered by the court to determine whether there should be a dismissal in the interests of justice are:

(1) the nature of the crime;

(2) the available evidence of guilt;

(3) the prior record of the defendant;

(4) the purpose and effect of further punishment;

(5) any prejudice resulting to the defendant by the passage of time; and

(6) the impact on the public interest of a dismissal of the charge. Clayton, supra.

See also People v. Izsak, 99 Misc.2d 543, 547, 416 N.Y.S.2d 1004, 1007 (Crim. Ct. N.Y. Co. 1979). A hearing is required prior to dismissal in the interests of justice unless the People concede that the sworn allegations of fact essential to support the motion or the allegations are conclusively substantiated by unquestionable documentary proof. People v. Clayton, supra.

In People v. Belge, 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976), the New York Court of Appeals cited the Clayton criteria with approval. However, the Court in Belge concluded that it had no power to review that dismissal in the interests of justice because the trial court's alleged abuse of discretion did not amount to an error of law. Subsequent to Belge, CPL §170.40 and §210.40 were amended to codify the Clayton criteria (N.Y. Laws of 1979, Ch. 216, §2).

In People v. James, supra, the trial court, applying the Clayton criteria, dismissed in the interests of justice two informations charging two female defendants with the Class B misdemeanor of prostitution, despite the district attorney's office policy of refusing to offer an adjournment in contemplation of dismissal or a plea to a violation in prostitution cases. The court in dismissing, noted that defendants were first offenders and stated that no valid societal purpose would be served

by their conviction and incarceration. In People v. Zongone, 102 Misc.2d 265, 423 N.Y.S.2d 400 (Yonkers City Ct. Westchester Co. 1979), the court denied the defendant's motion to dismiss the information in the interests of justice because it was "devoid of facts which would manifest why it should be granted." Id. at 267, 423 N.Y.S.2d at 402. The court did not dismiss the People's charge of disorderly conduct because defendants' motion merely raised questions of fact to be resolved at trial and did not show a "compelling factor" within the meaning of CPL §170.40 warranting dismissal in the interests of justice. But see People v. Insignares, 109 A.D.2d 221, 491 N.Y.S.2d 166 (1st Dept. 1985), where the Appellate Division held that the trial court had abused its discretion by setting aside the verdict and dismissing the indictment. The court noted that a trial court's discretion to dismiss in the interest of justice should be exercised sparingly and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations, and those standards have not been met. The court found this standard was not met since despite alleged postconviction misconduct by correction officers in failing to protect defendant against an alleged rape by fellow inmates in a holding pen, the evidence against defendant was overwhelming. Defendant's proper remedy was to institute a Civil Rights action against correction officers or to request that he be placed in administrative segregation or in a special prison unit for victim-prone inmates.

D. Amendment of the Accusatory Instrument

A court will permit the amendment of a defective accusatory instrument, since CPL §170.35(1)(a) provides that an accusatory instrument which is insufficient on its face may not be dismissed as defective but

must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment and where the People move to so amend. See also People v. Grosunor, 109 Misc.2d 663, 440 N.Y.S.2d 996 (Crim. Ct. Bronx Co. 1981); People v. Penn. Cent. RR. Co., 95 Misc.2d 748, 417 N.Y.S.2d 822 (Crim. Ct. Kings Co. 1978).

An information may be amended to change an erroneous name or date. People v. Wiesmann, 71 Misc.2d 566, 336 N.Y.S.2d 547 (Dist. Ct. Suffolk Co. 1972); Tipon v. Appeals Bureau of Administrative Adjudication Bureau, 82 Misc.2d 657, 372 N.Y.S.2d 131, aff'd, 52 A.D.2d 1065, 384 N.Y.S.2d 324 (4th Dept. 1976). This kind of amendment may be made at the trial since permitting such an amendment at that time does not prejudice the defendant. Id.

Factual allegations in a supporting deposition to a simplified traffic information may be amended subsequent to the defendant's motion to dismiss provided that the defect is of a kind that may be cured by amendment and the People move to so amend. CPL §170.35(1)(a). However, an inadequate supporting deposition which fails to allege facts which establish reasonable cause to believe that the defendant committed the offense charged may not be amended at the trial. People v. Hust, 74 Misc.2d 887, 346 N.Y.S.2d 303 (Broome Co. Ct. 1973).

Pursuant to CPL §100.45(3), the amendment of an accusatory instrument to add any additional charge supported by the factual allegations which is not a lesser included offense must be made before the commencement of the trial or entry of a plea of guilty, and the defendant must be accorded any reasonable adjournment necessitated by the amendment. People v. Harper, 37 N.Y.2d 96, 371 N.Y.S.2d 467 (1975); People v. Davis, 82 Misc.2d 41, 370 N.Y.S.2d 328 (App. T. 2nd and 11th Jud. Dists. 1975).

Such an amendment not made in accordance with this statute invalidates the accusatory instrument. Id. For example, in People v. Lamour, 133 Misc.2d 865,866, 508 N.Y.S.2d 867 (Dist. Ct. Nassau Co. 1986), it was held that the People may not make an amendment to the information by annexing an alleged statement of defendant to their affirmation in opposition to defendant's motion to dismiss the information.

In People v. Poll, 94 Misc.2d 905, 405 N.Y.S.2d 943 (Dist. Ct. Suffolk Co. 1978), the court held that the requirement that an offense charged be supported by non-hearsay allegations merely affects the form of the accusatory instrument and was not substantive in nature. Therefore, the court found that such defect in the information was effectively waived by the defendant, who "waives all defects" when the instrument is amended and no jurisdictional barrier bars the prosecution. Prior decisions, holding that a valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution, were concerned with the substantive sufficiency of the information, not its form. See People v. Grosunor, supra; People v. Case, 42 N.Y.2d 98, 99, 396 N.Y.S.2d 841, 842 (1977); People v. Scott, 3 N.Y.2d 148, 152, 164 N.Y.S.2d 707, 710 (1957).

If the amendment of the accusatory instrument is more substantial than a mere change of a name or a date, the prosecutor should request the court to rearraign the defendant on the amended accusatory instrument or obtain a waiver of rearraignment from the defendant on the record. If the prosecutor fails to take this precaution, the defendant may raise as an issue on appeal the fact that he was arraigned on a defective accusatory instrument.

[1] Amendment of Prosecutor's Information

CPL §100.45(2) provides that the provisions of CPL §200.70 governing amendment of indictments apply to prosecutor's informations. CPL §200.70 provides:

> 1. At any time before or during trial, the court may upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits. Where the accusatory instrument is a superior court information, such an amendment may be made when it does not tend to prejudice the defendant on the merits. Upon permitting such an amendment, the court must, upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense.
>
> (2) An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it; nor may an indictment or superior court information be amended for the purpose of curing:
>
> (a) A failure thereof to charge or state an offense; or
> (b) Legal insufficiency of the factual allegations; or
> (c) A misjoinder of offenses; or
> (d) A misjoinder of defendants.

In People v. Doe, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (Nassau Co. Ct. 1973), the court held that an indictment charging possession and sale of dangerous drugs, which did not describe the physical traits or last known address of the unnamed "John Doe" defendant, was fatally defective and

could not be cured by amendment. An indictment, and therefore a prosecutor's information, must allege every element of the crime. If it does not, it is fatally defective and the district attorney's only remedy is resubmission. See People v. Tripp, 79 Misc.2d 583, 360 N.Y.S.2d 752 (Delaware Co. Ct. 1974), aff'd, 46 A.D.2d 743, 360 N.Y.S.2d 1015 (3rd Dept. 1974), where the court held that an indictment charging criminal possession of marijuana, which failed to allege that the possession was "knowing and unlawful" was fatally defective and that the only remedy was resubmission. Furthermore, an indictment which does not contain a factual statement apprising the defendant of the alleged conduct which is the basis for the charge cannot be cured by amendment; the People's only remedy is resubmission. See People v. Gibson, 77 Misc.2d 49, 354 N.Y.S.2d 273 (Sup. Ct. Bronx Co. 1972), modified on other grounds, 40 A.D.2d 818, 338 N.Y.S.2d 478 (1st Dept. 1972), aff'd, 34 N.Y.2d 575, 354 N.Y.S.2d 945 (1974) (an indictment's charge of official misconduct was defective since it only used the language of the statute and did not specify any facts which would support the charge). However, the Court of Appeals has since held that an indictment which specifically refers to the applicable statute, incorporates by reference, all the elements of the crime charged. The Court noted that although the prosecution failed to allege the element of "wilfullness" in the ten count indictment charging tax evasion, the People's intention to prove wilfullness was clear. People v. Cohen, 52 N.Y.2d 584, 439 N.Y.S.2d 321 (1981). Similarly, in People v. Wright, 67 N.Y.2d 749, 500 N.Y.S.2d 98 (1986), the Court of Appeals reversed the Appellate Division which reversed defendant's conviction for burglary and dismissed the indictment, because the indictment omitted the word "unlawfully" from the charge. The Court of Appeals

concluded that since the indictment charged defendant with burglary in violation of Penal Law §140.20, it sufficiently incorporated the statutory elements, including "unlawfulness." An indictment which alleged that "on or about and between May 1978 and April 1979," defendant, who was 21 years or older, engaged in sexual intercourse with a female who was less than 17 years old, did not sufficiently designate dates of the offense for which defendant was being charged and should have been dismissed as defective. Moreover, the court noted that the People's bill of particulars, subsequently offered to set forth specific dates, was an insufficient means by which to cure a defective indictment. People v. Pries, 81 A.D.2d 1039, 440 N.Y.S.2d 116 (4th Dept. 1981). But see People v. Morris, 61 N.Y.2d 290, 473 N.Y.S.2d 769 (1984) (wherein the time period "on or about and between Friday, November 7, 1980 and Saturday, November 30, 1980" was held to be sufficiently precise). See also People v. Willette, 109 A.D.2d 112, 490 N.Y.S.2d 290 (3rd Dept. 1985) (indictment's reference to a specific month for each count along with the narrowing of the time of day provided by the bill of particulars was held sufficient). And see People v. McKenzie, 67 N.Y.2d 695, 499 N.Y.S.2d 923 (1986), where the court held that "counts nine and ten of the indictment were sufficient as they met the standards set in People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978)" (indictment should charge each and every element of the crime, allege that defendant committed the acts which constituted that crime at a specified place during a specified period) and, "if additional information was significant to the preparation of the defense, defendant should have requested a bill of particulars. Having failed to do so, he cannot now complain that the charges lacked specificity." Id. at 696, 499 N.Y.S.2d at 923.

An indictment may be amended if it does not change the theory of the prosecution. CPL §200.70(1). Accordingly, in People v. Salley, 72 Misc.2d 521, 339 N.Y.S.2d 702 (Nassau Co. Ct. 1972), the People were permitted, at the pre-trial suppression hearing, to amend an indictment charging attempted bribery, where the amendment consisted of a statement that the purpose of the alleged bribery attempt was to obtain the release of the already arrested defendant and the indictment had originally stated that the alleged bribe attempt had been made to avoid arrest. The People were permitted to amend a robbery indictment to charge that defendant had stolen drugs rather than jewelry and money since the nature of the property alleged to have been stolen is not a material element of robbery. People v. Spann, 56 N.Y.2d 469, 452 N.Y.S.2d 869 (1982). Accord People v. Barnes, 119 A.D.2d 828, 501 N.Y.S.2d 545 (2nd Dept. 1986). Informations filed in supplement to the prosecutors' informations and charging additional crimes arising from the same incident are not valid "amendments" within the meaning of CPL §200.70. People v. Salley, 133 Misc.2d 447,450, 507 N.Y.S.2d 345, 347 (Dist. Ct. Nassau Co. 1986). In People v. Reddy, 73 A.D.2d 977, 424 N.Y.S.2d 238 (2d Dept. 1980), the court found that an amendment of an indictment to delete a co-defendant's name, who had previously been acquitted of the instant charges, did not alter the theory of the People's case. Conversely, as the district attorney conceded in People v. Taylor, 43 A.D.2d 519, 349 N.Y.S.2d 74 (1st Dept. 1973), it was reversible error to amend an indictment charging burglary, which alleged that the crime the defendant intended to commit during his unlawful entry into a building was larceny, to state that the intended crime was assault, since this amendment changed the theory of the prosecution. The court in Taylor so held despite the fact that there

the indictment was endorsed to indicate that the defendant's consent to the amendment had been obtained. See also People v. Jenkins, 85 A.D.2d 265, 447 N.Y.S.2d 490 (1st Dept. 1982) (defendant could not be retried for offenses which the trial court had reduced from first degree robbery to second degree robbery until the People had first obtained a new indictment specifying those reduced charges); People v. Smoot, 112 Misc.2d 877, 447 N.Y.S.2d 575 (N.Y. Sup. Ct. Kings Co. 1981), aff'd, 86 A.D.2d 880, 450 N.Y.S.2d 397 (2nd Dept. 1982) (dismissal of indictment was mandated where purported indictment served on defendant was not indictment voted against him by grand jury). Also, in People v. Hill, 102 Misc.2d 814, 424 N.Y.S.2d 655 (Sup. Ct. Bronx Co. 1980), the court held that while the term "acting in concert" was not an essential element of the crimes of attempted robbery and assault, deletion of such an element constituted prejudicial error in that it changed the theory of the prosecution's case on the eve of the trial. The court in Hill so held despite the fact that the charges against the co-defendant in the original indictment had been dismissed. But see People v. Johnson, 87 A.D.2d 829, 448 N.Y.S.2d 754 (1st Dept. 1982).

The requirement that any such amendment may be made at any time prior to trial is strictly construed. In People v. Law, 106 Misc.2d 351, 431 N.Y.S.2d 648, 649 (N.Y.C. Crim. Ct. N.Y. Co. 1980), the court refused to grant the People's motion to amend the information's charge to conform to the factual allegations, because both the People and defendant had rested, citing CPL §100.15, which requires that the factual allegations of the information support the charge(s).

E. Superseding Accusatory Instruments

At any time before entry of a plea of guilty or commencement of a trial, the People may file a second information or a second prosecutor's information with the same local criminal court charging the defendant with an offense charged in the first instrument. CPL §100.50(1). Upon the defendant's arraignment on the second instrument, the count of the first instrument charging such offense must be dismissed, but the first instrument is not superseded with respect to any count contained therein which charges an offense not charged in the second instrument. Ibid. However, if a prosecutor's information is followed by additional informations containing different charges, such informations are not deemed to be valid superseding informations under CPL §100.50. People v. Salley, 133 Misc.2d at 450-451, 507 N.Y.S.2d at 347-8 (Dist. Ct. Nassau Co. 1986).

At any time before a trial of or the entry of a plea of guilty to an information, the prosecutor may file a prosecutor's information charging any offenses based upon the factual allegations in a legally sufficient information and/or any supporting depositions accompanying that information. CPL §100.50(2). In such a case, the original information is superseded by the prosecutor's information, and the original information is deemed dismissed upon the defendant's arraignment on the prosecutor's information. Ibid.

A misdemeanor complaint must be superseded by an information, unless the defendant waives prosecution by information and consents to be prosecuted on the misdemeanor complaint. CPL §100.50(3); CPL §170.65(3). Conversely, in the absence of a valid waiver of prosecution by information, a defendant need not plead to a misdemeanor complaint. People v. Ryff, 100 Misc.2d 505, 419 N.Y.S.2d 845 (Crim Ct. Bronx Co. 1979).

CPL §100.50(3) provides that the superseding information must comply with CPL §170.65(2) which provides that an information replacing a misdemeanor complaint need not charge the same offense or offenses, but at least one count thereof must charge the commission by the defendant of an offense based upon the conduct which was the subject of the misdemeanor complaint. In addition, the information may, subject to the rules of joinder, charge any other offense for which the factual allegations or any supporting depositions accompanying it are legally sufficient to support, even though such offense is not based upon conduct which was the subject of the misdemeanor complaint. A superseding information may not be used to consolidate cases. People v. Cunningham, 74 Misc.2d 631, 345 N.Y.S.2d 903 (Crim. Ct. N.Y. Co. 1973).

F. Motion to Dismiss Accusatory Instrument

A motion to dismiss the accusatory instrument must be made within forty-five days after arraignment and before commencement of trial unless the court in its discretion upon application of the defendant extends the time period. CPL §255.20(1). If the defendant is not represented by counsel and has requested an adjournment to obtain counsel or to have counsel assigned, such forty-five day period commences on the date counsel initially appears on the defendant's behalf. Ibid. If a prosecutor's information does not conform to the grand jury direction, the motion to dismiss the information may be made in the local court, but the motion to dismiss the grand jury direction must be made in the superior court, as the superior court empanels the grand jury. People v. CAI Adjusters, 84 Misc.2d 221, 375 N.Y.S.2d 554 (Crim. Ct. Bronx Co. 1975). See also People v. Senise, 111 Misc.2d 477, 444 N.Y.S.2d 535 (Crim. Ct. Queens Co. 1981), where defendant's motion for an order

dismissing the information on speedy trial grounds was denied by the local criminal court because defendant was initially charged with a felony, and the felony complaint was never reduced to a misdemeanor complaint. The court held that it had no jurisdiction to grant defendant's motion since the plenary jurisdiction of the criminal court extends only to misdemeanors or lesser offenses.

G. Refiling of Accusatory Instrument After Dismissal

Where an accusatory instrument has been dismissed as defective on its face, the prosecution may file an adequate superseding information. See People v. Bock, 77 Misc.2d 350, 353 N.Y.S.2d 647 (Broome Co. Ct. 1974), where an information is dismissed, and the dismissal was not premised on constitutional grounds, a subsequent felony prosecution stemming from the same acts is permissible. People v. Morning, 102 Misc.2d 750, 424 N.Y.S.2d 610 (Suffolk Co. Ct. 1979). Where a felony complaint is dismissed in the criminal court the filing of a subsequent indictment constitutes the commencement of a new criminal action for purposes of computing the running of the time period within which the trial must be brought under the constitutional guarantee of a speedy trial. People v. Cullen, 99 Misc.2d 646, 416 N.Y.S.2d 1011 (Sup. Ct. Kings Co. 1979); People v. Boykin, 102 Misc.2d 381, 423 N.Y.S.2d 366 (Sup. Ct. N.Y. Co. 1979).

PRELIMINARY HEARING

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PRELIMINARY HEARING

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PRELIMINARY HEARING

A. Purpose and Conduct of Preliminary Hearing

A defendant arraigned on a felony complaint in a local criminal court "has a right to a prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of the grand jury, but he may waive such right." CPL §180.10(2). The defendant must be held for the action of the grand jury only "[i]f there is reasonable cause to believe that the defendant committed a felony." CPL §180.70(1). If there is reasonable cause to believe that he committed an offense other than a felony, the court may reduce the charge to a non-felony offense in accordance with the procedures prescribed in CPL §180.50(3) and CPL §180.70(2), discussed in Section C, infra. If there is reasonable cause to believe that the defendant committed both a felony and a non-felony offense, the court may reduce the charges pursuant to CPL §180.50(3) provided that:

(1) it is satisfied that such reduction is in the interest of justice; and

(2) the district attorney consents thereto. CPL §180.70(3).

"If there is not reasonable cause to believe that the defendant committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or, if he is at liberty on bail, it must exonerate the bail." CPL §180.70(4).

The purpose of a preliminary hearing was summarized by one court:

> A preliminary hearing before a magistrate is, basically, a first screening of the charge; its function is not to try the defendant, nor does it require the same degree of proof or quality of evidence as is necessary for an indictment or for conviction at a trial. The

> objective is to determine "[if there is reasonable cause to believe that the defendant committed a felony." Criminal Procedure Law section 180.70.
>
> Mattioli v. Brown, 71 Misc.2d 99, 100; 335 N.Y.S.2d 613, 615 (Sup. Ct. Fulton Co. 1972).

See, People v. Galak, 114 Misc.2d 719, 722, 452 N.Y.S.2d 795 (Sup. Ct. Queens Co. 1982) where the court stated that the primary function of a preliminary hearing is to determine whether there is reasonable cause to believe that the defendant committed a felony and if, so, to hold the defendant for the action of the grand jury. See also People v. Martinez, 80 Misc.2d 735, 736, 364 N.Y.S.2d 338, 341 (Crim. Ct. N.Y. Co. 1975), where the court stated:

> The felony hearing is basically a first screening of the charge. Its function is neither to accuse nor to try the defendant; those steps come later.

But see People v. Brooks, 105 A.D.2d 977, 978, 481 N.Y.S.2d 914, 916 (3d Dept. 1984) where the court concluded that the defendant was not entitled to a preliminary hearing because he was incarcerated as a parole violator prior to his indictment.

(1) Sufficiency of Evidence

CPL §70.10(2) provides that "'[r]easonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it... Since the quantum of evidence required to hold a person for the grand jury is less than that required for an indictment*, the judge at

the preliminary hearing may be required to hold a defendant without regard to the probability of a successful prosecution." People v. Anderson, 74 Misc.2d 415, 418; 344 N.Y.S.2d 15, 18 (Crim. Ct. Bronx Co. 1973). See also People v. Soto, 76 Misc.2d 491, 495, 352 N.Y.S.2d 144, 149 (Crim. Ct. Bronx Co. 1974) where the court stated that at a preliminary hearing, "the people ae not required to present a prima facie case under the provisions of the Criminal Procedure Law. The mere fact that one or more elements of an offense is not established to the degree required at trial or in the grand jury does not require dismissal of the complaint at this juncture."

Note that a local criminal court may dismiss a case at a preliminary hearing if it is one where the law requires corroboration of a witness and such corroboration is absent. See People v. Smith, 45 Misc.2d 265, 256 N.Y.S.2d 422 (New Rochelle City Ct. Westchester Co. 1965), where the trial court dismissed a charge of rape because there was no corroboration of the complainant's testimony at the preliminary hearing (required under the law then in effect). The court in Smith ruled that the proof at a preliminary hearing, while it need not be sufficient to obtain a convic-

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* A grand jury may indict a person for an offense when
(a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and;
(b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense. See CPL §190.65.

"'Legally sufficient evidence' means competent evidence, which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent." CPL §70.10(1).

tion, must be of such sufficiency that a trial court would not be bound to acquit the defendant as a matter of law. But see People v. Martinez, 80 Misc.2d 735, 364 N.Y.S.2d 338 (Crim. Ct. N.Y. Co. 1975) (defendant held for grand jury after preliminary hearing despite lack of corroboration of accomplice witness); see also People v. Jackson, 69 Misc.2d 793, 331 N.Y.S.2d 216 (Crim. Ct. N.Y. Co. 1972); People v. Scarposi, 69 Misc.2d 264, 329 N.Y.S.2d 850 (Crim. Ct. N.Y. Co. 1972); see also discussion in Section C., infra.

In People v. Gurney, 129 Misc.2d 712, 713, 493 N.Y.S.2d 957 (Crim. Ct. N.Y. Co. 1985) the court stated that while under CPL §60.50 a person may not be convicted of an offense based solely on a confession, a confession alone can provide reasonable cause to believe that a defendant committed a crime for purposes of a preliminary hearing. Id. at 714, 493 N.Y.S.2d at 958.

Testimony at a preliminary hearing concerning allegedly involuntary statements made by a defendant is proper. The question of voluntariness must be raised at a Huntley hearing. Mattioli v. Brown, 71 Misc.2d 99, 335 N.Y.S.2d 613 (Sup. Ct. Fulton Co. 1972).

> [Q]uestions concerning the ultimate admissibility of evidence, such as the lawfulness of a search of the defendant or his premises, or of any confession he might have made, are not germane to the purposes of the [preliminary] hearing. While the circumstances surrounding the obtaining of such evidence may eventually be tested, and may lead to their exclusion from the trial, those circumstances do not affect the reliability of the evidence as it relates to guilt [citation omitted] and are thus irrelevant to a determination that it is 'reasonably likely' that the defendant committed a felony. The same is true of

> the question whether the "seizure" of the defendant was a lawful one. People ex rel. Pierce v. Thomas, 70 Misc.2d 629, 630; 334 N.Y.S.2d 666, 669 (Sup. Ct. Bronx Co. 1972).

A question of the propriety of an in-court identification at the preliminary hearing presents a close question. Id. Where the impropriety is thought to have affected the reliability of the identification, the in-court identification, standing alone, might be insufficient to meet even the "reasonably likely" standard. An offer of proof could be made establishing such a situation. Id. But see, People v. Robinson, 117 A.D.2d 826, 499 N.Y.S.2d 758 (2d Dept. 1986) (no preliminary hearing is required on the accuracy of defendant's identification where no identification procedure was conducted by the police).

(2) Conduct of Hearing

CPL §180.60 governs the conduct of the preliminary hearing on a felony complaint. The district attorney must conduct such a hearing on behalf of the People [subdivision (1)], call and examine witnesses and offer evidence in support of the charge [subdivision (5)]. The defendant may as a matter of right be present at such hearing [subdivision (2)] and testify in his own behalf [subdivision (6)]. But see, People v. Ludwigsen, ___ A.D.2d ___, 513 N.Y.S.2d 513 (2d Dept. 1987) (defendant can waive his presence at a preliminary hearing). Furthermore, upon the defendant's request, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his own behalf [subdivision (7)]. The court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading [subdivision (3)]. Each witness, whether called by the People or by the defendant, must testify under oath, unless he would

be authorized to give unsworn evidence at a trial [subdivision (4)]. Each witness, including any defendant testifying in his own behalf, may be cross- examined. See CPL §180.60(1)-(7).

(3) Defendant's Right to Counsel at Preliminary Hearing

In People v. Hodge, 53 N.Y.2d 313, 441 N.Y.S.2d 231 (1981), the Court of Appeals reversed the defendant's conviction for escape in the first degree and ordered a new trial on the grounds of ineffective assistance of counsel where the trial court proceeded with the preliminary hearing despite the absence of defendant's retained counsel. Hodge's case had been adjourned for one week prior to the preliminary hearing in order to enable him to retain an attorney. On the date of the scheduled preliminary hearing defendant appeared without counsel but informed the Court he had retained counsel whose name he gave to the court and for whose absence he was unable to account. Defendant objected to proceeding without his lawyer's presence; nevertheless, the court insisted and would not grant a postponement. During the course of the preliminary hearing the defendant, when offered an opportunity to examine documents and cross-examine witnesses, continually claimed his inability to proceed without the assistance of counsel.

Even though the State may bypass the preliminary hearing stage entirely by immediately submitting the case to the Grand Jury, the error in failing to afford defendant the right to counsel at the preliminary hearing was held to be not cured by the fact that defendant was subsequently indicted by the Grand Jury on the same charges which were the subject of the preliminary hearing. The Court of Appeals found the error in Hodge reversible but noted that in some cases the denial of the right to counsel at the preliminary hearing may be only harmless error. The

test determinative of harmless error was held to be... "not what the hearing did not produce, but what it might have produced if the defendant's right to counsel had not been ignored (citations omitted)." Hodge, supra at 321, 441 N.Y.S.2d at 235.

The Court of Appeals found the appropriate corrective action was to remit the case to the County Court for a new trial, thereby placing the defendant in a position comparable to the one he would have occupied had he been afforded his right to counsel at the preliminary hearing.

The Court pointed out that ordinarily a defect in the preliminary hearing should not vitiate a subsequent indictment and in most instances an adequate and appropriate remedy would be to reopen the preliminary hearing though subsequent to indictment. Such was not the case in Hodge where there had already been a full trial following indictment.

(4) Counsel's Right to Cross-Examine

In light of the ruling in People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975), a prosecutor most probably should not object to extensive cross-examination by defense counsel if it appears likely that the prosecution witness, due to age, illness or foreign residency, will not appear at the trial. The New York Court of Appeals held in Simmons that when a People's witness does not appear at the trial, the transcript of his testimony at the preliminary hearing is not admissible at the trial unless the defense was afforded the right to cross-examine the witness adequately at the hearing. That right would be violated by the admission of the testimony since cross-examination on the correctness of the identification, the extent of the lighting at the scene of the crime, the description of the defendant's clothing and facial features, and the witness' visual acuity had not been permitted. See, e.g., People v.

Reed, 98 Misc.2d 488, 414 N.Y.S.2d 89 (Sup. Ct. Kings Co. 1979), where the prosecution was precluded from using the minutes of the preliminary hearing at the trial, which was held after the victim's death from chronic alcoholism, because defense counsel, unaware that the victim was an alcoholic, had no opportunity to cross-examine on that question to impeach the victim's credibility and accuracy of recollection.

But in People v. Arroyo, 54 N.Y.2d 567, 446 N.Y.S.2d 910 (1982), cert. den., 456 U.S. 979 (1981), the admission at trial of the preliminary hearing testimony of an unavailable witness who was both the victim of the assault and the sole identifying witness was not in violation of defendant's right of confrontation. The Court found first that due diligence had been employed by the People to locate the witness, defendant's estranged "common law" wife, and therefore unavailability was established.

In addition, the Court held that the unavailable witness' hearing testimony was reliable. In support of its finding of reliability of the former testimony the Court noted the "solemnity" of the hearing itself, the fact that the hearing was "a virtual minitrial of the prima facie case" which explored substantially the same subject matter as did the trial on which it was later to be used, and that the defense counsel's cross-examination of the witness at the preliminary hearing was not unduly restricted.

The court rejected defense counsel's assertion that she should have been entitled to withdraw her preliminary hearing cross-examination of the witness in its entirety. Testimony, once uttered, is not the property of either party and once introduced, fairness would have permitted the adversary to qualify it by introducing all or part of the rest.

Arroyo also held that there was legally sufficient evidence to support the conviction even though the only evidence establishing the defendant's commission of the assault was the unavailable witness' preliminary hearing testimony and furthermore, such prior testimony does not require corroboration.

See also People v. Corley, 77 A.D.2d 835, 431 N.Y.S.2d 21 (1st Dept. 1980), app. dism'd, 52 N.Y.2d 783, 436 N.Y.S.2d 621 (1980) (upon ground that defendant was not presently available), where the First Department held that testimony elicited from a prosecution witness at a preliminary hearing who was subsequently unavailable to testify at trial, was properly admissible at trial since defense counsel had been given an adequate opportunity to cross-examine the witness at the preliminary hearing. In Corley, the complainant could not be produced at trial as he had apparently been paid to hide and not testify. The Corley court stated that the unavailable witness situation was a recognized exception to a defendant's constitutional right to confront adverse witnesses. See California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970).

Of course, cases have held that the preliminary hearing is not primarily an occasion for defense discovery and the scope of cross-examination is within the discretion of the court. See, e.g., People ex rel. Pierce v. Thomas, 70 Misc.2d 629, 334 N.Y.S.2d 666 (Sup. Ct. Bronx Ct. 1972); People v. Staton, 94 Misc.2d 1002, 406 N.Y.S.2d 242 (Crim. Ct. Bronx Co. 1978); People v. Campbell, 92 Misc.2d 732, 401 N.Y.S.2d 152 (Crim. Ct. Kings Co. 1978)

(5) Right to Rosario* Material

CPL §240.44 provides that subject to a protective order, Rosario material must be made available by each party at any pretrial hearing held in a criminal court. Prior to the enactment of CPL §240.44 in 1982, the production of Rosario material was not mandatory, the issue being decided on an ad hoc basis. See Bellacosa, Practice Commentary N.Y. Criminal Procedure Law 180.60 p. 140 (McKinney 1982); see also People v. Landers, 97 Misc.2d 274, 411 N.Y.S.2d 173 (Crim. Ct. Bronx Co. 1978) where the court required production of Rosario material at the preliminary hearing; compare People v. Dash, 95 Misc.2d 1005, 409 N.Y.S.2d 181 (Crim. Ct. N.Y. Co. 1978) where the court held Rosario material need not be produced.

(6) Preliminary Hearing and Discovery

Although discovery rights do not statutorily attach at a preliminary hearing, discovery is an outcome of the procedure. See Coleman v. Alabama, 399 U.S. 1, 9, 90 S. Ct. 1999 (1970); see also People v. Galak supra. Defense counsel might use the subpoena duces tecum as a method of discovering the case against the defendant. Not all courts will be receptive to this procedure at the preliminary hearing stage, however. For example, at a preliminary hearing where prosecution experts testified that the victim's death was the result of a homicide, not suicide, and based their opinions in part on certain x-rays, one court ruled that defense counsel did not have the right to have those x-rays produced. See People v. Mono, 95 Misc.2d 632, 408 N.Y.S.2d 283 (Jefferson Co. Ct.

* People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), held that the prosecution must turn over to the defense before trial all prior statements of its witnesses (Rosario material).

1978).

(7) Nature and Admissibility of Evidence

At a preliminary hearing, only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that the defendant committed a felony; however, reports of experts and technicians in professional and scientific fields and sworn statements of the kind specified in CPL §190.30(2) and (3) are admissible to the same extent as in a grand jury proceeding, unless the court determines, upon application of the defendant, that such hearsay evidence is, under the particular circumstances of the case, not sufficiently reliable. CPL §180.60(8). In the latter situation, the court shall require that the witness testify in person and be subject to cross-examination. Ibid. CPL §190.30(2) provides that a report or a copy of a report made by a public servant or by a person employed by a public servant or agency who is a physicist, chemist, coroner or medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison, or test performed by him in connection with a case which is the subject of a grand jury proceeding, when certified by such person as a report made by him or as a true copy thereof, may be received in such grand jury proceeding as evidence of the facts stated therein. CPL §190.30(3) provides that a written or oral statement, under oath, by a person attesting to one or more of the following matters, may be received in such grand jury proceeding as evidence of the facts stated therein:

(a) that person's ownership of or lawful custody of, or license occupy, premises as defined in section 140.00* of the penal law, and of the defendant's lack of license or privilege to enter or remain thereupon;
(b) that person's ownership of, or possessory right in, property, the nature and monetary amount of any damage thereto and the defendant's lack of right to damage or tamper with the property;
(c) that person's ownership or lawful custody of, or license to possess property, as defined in section 155.00 of the penal law,** including an automobile or other vehicle, its value and the defendant's lack of superior or equal right to possession thereof;
(d) that person's ownership of a vehicle and the absence of his consent to the defendant's taking, operating, exercising control over or using it;
(e) that person's qualifications as a dealer or other expert in appraising or evaluating a particular type of property, his expert opinion as to the value of a certain item or items of property of that type, and the basis for his opinion;
(f) that person's identity as an ostensible maker, drafter, drawer, endorser or other signator of a written instrument and its falsity within the meaning of Penal Law §170.00.***

Although use of such sworn affidavits at a preliminary hearing does not violate the defendant's Sixth Amendment right to confront the witnesses against him, the complainant's testimony rather than an affidavit may be required if the complainant is already present at the preliminary hearing. See People v. Staton, 94 Misc.2d 1002, 406 N.Y.S.2d 242 (Crim. Ct. Bronx Co. 1978); People v. Campbell, supra. CPL

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* "'Premises' includes the term 'building' as defined below, and any real property." Penal Law §140.00(1). "'Building' in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer...." Penal Law §140.00(2).

** "'Property' means any money, personal property, real property, thing in action, evidence of debt or contract, or any article, substance, or thing of value, including any gas, steam, water or electricity, which is provided for a charge or compensation." Penal Law §155.00(1).

*** Penal Law §170.00 Forgery. The definitions are set forth in Penal Law §170.00 (4), (5), and (6).

§190.30(2) should be strictly construed to limit it to its intended application.

Department of Social Services case workers are not experts or technicians as defined in CPL §190.30(2). People v. Bonilla, 74 Misc.2d 971, 347 N.Y.S.2d 130 (Crim. Ct. Bronx Co. 1973). Consequently, caseworkers' reports and an oral summary of their contents by an employee of the Department of Social Services, who had no personal knowledge of the material contained in the reports, are insufficient alone to establish reasonable cause.

In People v. Torres, 99 Misc.2d 767, 417 N.Y.S.2d 575 (Crim. Ct. Bronx Co. 1978), the court stated that CPL §180.60(8) does not prohibit the use at a preliminary hearing of a defendant's confession or admission, albeit hearsay, for the purpose of determining whether "the People have met their burden of demonstrating reasonable cause to believe that a felony for which the defendants are criminally responsible was committed by them." Torres, 99 Misc.2d at 769, 417 N.Y.S.2d at 578.

(8) Closure of Hearing

At the preliminary hearing, the court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings. CPL §180.60(9). In Gannett Co. v. Weidman, 102 Misc.2d 888, 424 N.Y.S.2d 972 (Sup. Ct. Livingston Co. 1980), the court held that a preliminary hearing judge has authority to exclude the press and public from the hearing if there is a "strong likelihood of public disclosure of prejudicial information." Weidman, 102 Misc.2d at 898, 424 N.Y.S.2d at 978. The Weidman court applied two standards, one substantive and one procedural, which seek to safeguard a defendant's right to a trial untainted by prejudicial publicity, while

concomitantly providing the press and public with information concerning the hearing which does not pose a threat of prejudice. The standards applied by the Weidman court were formulated in two cases: Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756 (1977), aff'd, 433 U.S. 368 (1979); and Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 423 N.Y.S.2d 630 (1979).

The Weidman court, in applying the procedural safeguard formulated in Leggett, supra, stated that when closure of a preliminary hearing is sought: (1) counsel seeking closure must make a motion in open court; (2) there must be a showing that a strong likelihood of prejudice exists; and (3) the court must make a record of its reasons for closure. Weidman, 102 Misc.2d at 894, 424 N.Y.S.2d at 976.

The second safeguard adopted by the Weidman court was formulated in De Pasquale, supra. This standard requires that if a preliminary hearing judge finds that there is sufficient cause to close the proceeding to the press and public, the court should allow access to a redacted transcript of the hearing and should permit access to an unredacted transcript when the defendant is no longer in jeopardy. Weidman, 102 Misc.2d at 899-900, 424 N.Y.S.2d at 979. See also Gannett Co. v. De Pasquale, 43 N.Y.2d at 381, 401 N.Y.S.2d at 762.

Although the De Pasquale and Leggett decisions considered the issue of closure of a suppression hearing and a competency hearing, respectively, the opinion of Weidman stated that the same standards respecting closure apply to preliminary hearings because:

> information elicited at a preliminary hearing is potentially more damaging than that brought out at a suppression hearing, inasmuch as the focus of a preliminary hearing is on the acts of

> defendant, while a suppression hearing is primarily concerned with the conduct of police in gathering evidence... [T]he court [at a preliminary hearing] has a particular responsibility to guard against premature public disclosure of prejudicial evidence at the inquisitorial stage. To do so, it must have at hand, at a minimum, the means allowed the courts in De Pasquale [sic] and Leggett.
>
> Weidman, 102 Misc.2d at 897-898, 424 N.Y.S.2d at 978.

See also Reilly v. McKnight, 80 A.D.2d 333, 439 N.Y.S.2d 727 (3d Dept. 1981), aff'd, 54 N.Y.2d 1002, 446 N.Y.S.2d 45 (1982), where the Appellate Division held that the closure of the preliminary hearing by the Town Justice upon the motion of defense counsel was a proper exercise of the Court's discretion where the defendant's prosecution had become a much publicized and sensationalized news event.

The petitioners who brought the Article 78 proceeding were entitled to a transcript and copies of exhibits only after the defendant was no longer in jeopardy. In reversing the order of the Special Term, which had granted petitioner a motion for an order compelling the Town Justice to provide them with a transcript of the hearing and a copy of the exhibits, the Appellate Division noted that Special Term, in granting the motion, had failed to consider the fact that the charge of murder in the second degree was still pending against the defendant and that it was the ordering full disclosure of a preliminary hearing that contained a statement allegedly made by the defendant when such statement was not yet subject to a ruling by the trial court as to its ultimate admissibility at trial, citing Gannett Co. v. Weidman 102 Misc.2d 888, 897; 424 N.Y.S.2d 972, 977 (Sup. Ct. Livingston Co. 1980). Under the circum-

stances it was held such disclosure would hopelessly jeopardize the defendant's right to a fair trial, citing Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 440; 423 N.Y.S.2d 630, 639 (1979). The Appellate Division also pointed out that the Special Term had failed to strike a balance between the right of the defendant to a fair trial and the interest of the public in granting the press access to the transcript of the preliminary hearing.

In Johnson Newspaper Corp. v. Parker, 101 A.D.2d 708, 709, 475 N.Y.S.2d 951, 952 (4th Dept. 1984), appeal dismissed 63 N.Y.2d 673, 479 N.Y.S.2d 526 (1984) over the petitioner's objection, the court excluded the press and the public from the defendant's preliminary hearing. The Appellate Division held that it was unreasonable for the court to deny petitioner's request for an open courtroom without first considering opposing counsel's argument either over the telephone or granting a short recess for the attorney to appear. Id. See also In the Matter of the Application of the Associated Press v. Howard E. Bell, ___ A.D.2d ___, 515 N.Y.S.2d 432, 433 (1st Dept. 1987), affirmed, No. 210, slip op. (Ct. of Appeals, 1987), where the Court held that a preliminary hearing may be closed upon motion by the defendant when there is a showing that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, "when reasonable alternatives to closure cannot adequately protect the defendant's pretrial rights".

(9) Right to Adjournment

The preliminary hearing should be completed at one session. In the interests of justice, however, it may be adjourned by the court but, in the absence of a showing of good cause, no such adjournment may be for

more than one day. CPL §180.60(10). For example, a reasonable adjournment may be obtained after a preliminary hearing has commenced to obtain a chemical analysis of allegedly dangerous drugs. People ex rel. Fox v. Sherwood, 73 Misc.2d 101, 341 N.Y.S.2d 161 (Sup. Ct. Orange Co. 1973).

(10) Reopening Hearing

A preliminary hearing may be reopened for good cause. People v. Rosario, 85 Misc.2d 35, 380 N.Y.S.2d 218 (Crim. Ct. Bronx Co. 1976). Accordingly, a preliminary hearing on a charge of driving while intoxicated was reopened after the defendant's motion to dismiss on the date set for decision, so that the People could present the testimony of an alleged eyewitness, whose presence at the scene of the accident had not previously been known to the People. Id.

In granting the motion to reopen the hearing, the court stated:

> It is noted that were the court to dismiss on the basis that its discretion would be improperly exercised if it were to reopen the hearing, the District Attorney could, nonetheless, bring the matter before the Grand Jury. The result, if the presentation warranted, would be a direction by the Grand Jury to the District Attorney to file a prosecutor's information, which would, perforce, return the matter to the jurisdiction of the Criminal Court. Failure to allow reopening of the preliminary hearing would initiate a circuitous time consuming procedure that would hardly advance the cause of speedy justice to say nothing of the concomitant burdening of our courts (and specifically the Grand Jury) with proceedings of a misdemeanor nature.

> It is further noted that the adjournment of this case was not at the behest of either party but for the court's convenience to allow consideration of the law. The court concludes that the rights of the defendant are best preserved and the interests of justice best served by allowing further testimony to be presented upon reopening of the hearing.
> Rosario, 85 Misc.2d at 37, 380 N.Y.S.2d at 219-220.

B. Nature of Defendant's Right to a Speedy Preliminary Hearing

CPL §180.80 provides:

> Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than one hundred twenty hours, or in the event that a Saturday, Sunday or legal holiday occurs during such custody, one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance unless:
>
> (1) The failure to dispose of the felony complaint or to commence a hearing thereon during such period of confinement was due to the defendant's request, action or condition, or occurred with his consent; or
>
> (2) Prior to the application:
> (a) The district attorney files with the court a written certification that an indictment has been voted; or
> (b) An indictment or a direction to file a prosecutor's information charging an offense based upon conduct alleged in the felony complaint was filed by a grand jury; or

> (3) The court is satisfied that the people have shown good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded disposition of the felony complaint within the prescribed period or rendered such action against the interest of justice.

CPL §180.80 as amended in 1982 expands the time within which a preliminary hearing must be commenced from 72 hours to 120 hours from the time of arrest. Where a Saturday, Sunday, or legal holiday intervenes the time is increased to 144 hours. A defendant must be released on his own recognizance if he is in custody, or, if he is on bail, he must be released and bail must be exonerated, where the People fail to hold a preliminary hearing within 72 hours from the time a defendant's bail is set or within 120 hours from the time of arrest unless one of the above statutory exceptions applies. People ex rel. Fox v. Sherwood, 73 Misc.2d 101, 341 N.Y.S.2d 161 (Sup. Ct. Orange Co. 1973) (defendant was in custody): People v. Cummings, 70 Misc.2d 1016, 333 N.Y.S.2d 625 (Batavia City Ct. Genesee Co. 1972) (defendant was at liberty on bail). See also People ex rel. Suddith v. Sheriff of Ulster County, 93 A.D.2d 954, 463 N.Y.S.2d 276 (3d Dept. 1983), lv. to app. den., 60 N.Y.2d 551 (1983); People v. Davis, 118 Misc.2d 122, 460 N.Y.S.2d 260 (Justice Ct. Westchester Co. 1983).

Note: Even though CPL 530.20(2)(a) precludes a city, town, or village court from releasing a defendant on bail or his own recognizance if he has two prior felony convictions, such court must release a defendant held more than the permissible time period without a felony hearing, even with two prior felony convictions. People v. Porter, 90 Misc.2d 791, 396 N.Y.S.2d 133 (Onondaga Co. Ct. 1977).

"Good cause" was held not to have been established by the People's proof that they were unable to obtain a report of the laboratory analysis of allegedly dangerous drugs due to inadequate State Police laboratory facilities. People ex rel. Fox v. Sherwood, supra.

The relief available to a defendant denied his preliminary hearing within the requisite time period is release on his own recognizance, not dismissal of the indictment or a new trial. See People v. Aaron, 55 A.D.2d 653, 390 N.Y.S.2d 157 (2d Dept. 1976), rev'g People v. Solywoda, 84 Misc.2d 588, 377 N.Y.S.2d 859 (Dutchess Co. Ct. 1975); People v. Scoralick, 134 Misc.2d 532, 511 N.Y.S.2d 537 (Dutchess Co. Ct. 1987); See also People v. McDonnell, 83 Misc.2d 907, 373 N.Y.S.2d 971 (Sup. Ct. Queens Co. 1975). But see People v. Heredia, 81 Misc.2d 777, 785, 367 N.Y.S.2d 925, 934 (Dist. Ct. Suffolk Co. 1st Jud. Dist. 1975), where the court stated:

> The District Attorney cannot adopt a program of delay which would in effect deny the accused his statutory right.

Accordingly, in Heredia, the court ordered the district attorney to conduct a preliminary hearing and further ordered that if the hearing were not held, the district attorney would be directed to show cause why he should not be held in contempt. Decisions have held that a defendant is not denied due process if the district attorney refuses to conduct the preliminary hearing since a defendant has no constitutional or statutory right to have such a hearing; a defendant's only remedy is to be released on his own recognizance if the hearing is not conducted within the time period mandated by CPL §180.80. People v. Tornetto, 16 N.Y.2d 902, 264 N.Y.S.2d 557 (1965), cert. denied, 383 U.S. 952 (1966); People v. Lohman, 49 A.D.2d 75, 371 N.Y.S.2d 170 (3rd Dept. 1975);

People ex rel. Hunter v. Patterson, 55 A.D.2d 693, 388 N.Y.S.2d 724 (3d Dept. 1976); People v. Anderson, 45 A.D.2d 561, 360 N.Y.S.2d 712 (3d Dept. 1974); People v. Hutson, 28 A.D.2d 571, 280 N.Y.S.2d 478 (3d Dept. 1967); People v. McDaniel, 86 Misc.2d 1077, 383 N.Y.S.2d 998 (City Ct. of Long Beach, Nassau Co. 1976); People v. Carter, 73 Misc.2d 1040, 343 N.Y.S.2d 431 (Sup. Ct. Spec. Narc. Ct. N.Y. Co. 1973); People v. Galak, supra. For example, in People v. Lohman, supra, the Appellate Division reversed a lower court judgment in an Article 78 proceeding in which that court had ordered the district attorney to conduct a preliminary hearing and prohibited the presentment of the charge to the grand jury on the ground that the defendant had been in custody for eight days without a preliminary hearing. The Appellate Division held that while the defendant could obtain his release under CPL §180.10(2) on the ground that no hearing had been held within 72 hours from the time he was taken into custody, the district attorney's failure to hold the hearing affected neither his power to present evidence to the grand jury nor the authority of the grand jury to consider such evidence. See also People ex rel. Hunter v. Patterson, supra; People v. Floyd, 133 Misc.2d 1034, 509 N.Y.S.2d 265 (Utica City Ct. 1986) (the court can dismiss the case in the interest of justice, in light of the people's failure to indict the defendant, or afford him the opportunity of a felony hearing).

The authority of the grand jury to indict felons is in no way dependent upon the existence of a prior felony hearing. See also People v. Phillips, 88 A.D.2d 672, 450 N.Y.S.2d 925 (3d Dept. 1982); People v. Bensching 105 A.D.2d 1054, 482 N.Y.S.2d 385 rem'd for hrg, 117 A.D.2d 971, 499 N.Y.S.2d 522 (4th Dept. 1986). Once the grand jury has acted, the determination as to whether there exists reasonable cause to hold and

prosecute a defendant has been made by the grand jury itself, and the need for the preliminary hearing is obviated. Matter of Vega v. Bell, 47 N.Y.2d 543, 419 N.Y.S.2d 454 (1979). See also People v. McDaniel, 86 Misc.2d 1077, 383 N.Y.S.2d 998 (Long Beach City Ct. Nassau Co. 1976) (court refused to cite district attorney for contempt for failure to hold preliminary hearing, despite the fact that it had directed him to hold hearing or state why he could not on the record); Friess v. Morgenthau, 86 Misc.2d 852, 383 N.Y.S.2d 784 (Sup. Ct. N.Y. Co. 1975) (court in Article 78 proceeding refused either to compel district attorney to conduct hearing or to prohibit him from presenting evidence to the grand jury until after the hearing). See also People v. Galak, supra at 723, 452 N.Y.S.2d at 798, where the court stated:

> [A] defendant cannot bring an Article 78 proceeding either (1) in the nature of a mandamus to direct the District Attorney to conduct a preliminary hearing with respect to the crimes charged against the defendant - petitioner; or (2) in the nature of prohibition to stay the District Attorney from presenting evidence against the defendant-petitioner to the Grand Jury until aftr a preliminary hearing is held.

Note: Notwithstanding the repeal of the statutory right to a preliminary hearing on misdemeanors in the New York City Criminal Court, effective September 1, 1978, if a felony and misdemeanor arise out of the same transaction, a defendant must have a hearing on the misdemeanor at his felony hearing. People v. Barclift, 97 Misc.2d 994, 412 N.Y.S.2d 991 (Crim. Ct. Queens Co. 1979).

To apply the repeal of the statutory right to a preliminary hearing in misdemeanor cases to arrests arising before the repeal of the statute constitutes a violation of the ex post facto clause of the Federal Constitution. People v. Tyler, 99 Misc.2d 400, 416 N.Y.S.2d 197 (Crim. Ct. Bronx Co. 1979).

(1) Role of the Prosecutor

The American Bar Association Project on Standards for Criminal Justice has promulgated standards governing the prosecutor's role in the preliminary hearing. See ABA Standards for Criminal Justice 3-3.10 (2d ed. 1980). Section 3-3.10 of the standard provides in relevant part, that:

> (c) The prosecutor should not encourage an uncounseled accused to waive preliminary hearing.
>
> (d) The prosecutor should not seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment.
>
> (e) Except for good cause, the prosecutor should not seek delay in the preliminary hearing after an arrest has been made if the accused is in custody.
>
> (f) The prosecutor should ordinarily be present at a preliminary hearing where such hearing is required by law.

The Commentary on standard 3-3.10, states:

> In some jurisdictions a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Moreover, prosecutors sometimes seek postponement of the preliminary hearing in order to bring the case before the grand jury to obtain an indictment that renders the preliminary hearing moot. Although an adversary preliminary hearing is not a constitutional necessity, these practices may deprive the defendant of valuable information without serving any important public interest. However, some situations may arise in which considerations of valid public policy exist for a continuance at the prosecutor's request; for example, there may be a genuine need to protect an undercover agent or the life or safety of a material witness.
>
> Since the function of the preliminary examination is determine whether there is probable cause to hold the accused for charge by indictment or otherwise, the prosecutor should avoid delay that would cause a person to be kept in custody pending a determination that there is probable cause to hold such person. Postponement of such hearing should be sought only for good cause and never for the sole purpose of mooting the preliminary hearing by securing an indictment.
>
> ABA Standards for Criminal Justice 3-3.10, Commentary (2d.ed.1980).

(2) Defendant's Waiver

§CPL 180.10(2) provides:

> The defendant has a right to a prompt hearing upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of the grand jury, but he may waive such right [emphasis added].

The court must inform the defendant of his right to a preliminary hearing, afford him an opportunity to exercise that right, and take such affirmative action as is necessary to effectuate that right. CPL §180.10(4). See People v. Scoralick, supra (since the defendant has a right to a preliminary hearing he does not have to specifically request it). A waiver of a preliminary hearing must be "knowingly, intelligently, and understandingly given with full knowledge of the consequences." People ex rel. Pulver v. Pavlak, 71 Misc.2d 95, 98-99, 335 N.Y.S.2d 721, 726 (Greene Co. Ct. 1972). See also People v. Heredia, supra; People v. Meierdiercks, et. al., 68 N.Y.2d 613, 505 N.Y.S.2d 51 (1986) (defendant must expressly waive any objections to delay of his preliminary hearing). Consequently, a waiver of a preliminary hearing by a 17-year-old defendant who had waived counsel was invalid since "his waiver of a preliminary hearing was without foundation in law in that it was not knowingly, intelligently and understandingly given with full knowledge of the consequences." Pavlak, 71 Misc.2d at 99, 335 N.Y.S.2d at 726. Similarly, in People v. Delfs, 31 Misc.2d 665, 220 N.Y.S.2d 535 (Dist. Ct. Nassau Co. 1st Jud. Dist. 1961), decided under the former Code of Criminal Procedure, the court held that the waiver of a preliminary hearing in 1940 by an insane defendant was invalid and would be striken. Consequently, the court rescinded defendant's commitment to a facility for the criminally insane, ordered by the county court after the waiver, and

dismissed the information, since the district attorney conceded that the defendant was insane at the time he committed the murder.

A waiver of a preliminary hearing "will not be lightly implied." People v. Lupo, 74 Misc.2d 679, 681; 345 N.Y.S.2d 348, 352 (Crim. Ct. N.Y. Co. 1973). In Lupo, the defendant was originally charged at arraignment with the class E felony of bail jumping in the first degree, held for the grand jury after the local criminal court judge refused to give him a hearing and he failed to object, and then charged by the grand jury with the class A misdemeanor of bail jumping in the second degree. The court, finding defendant's alleged "waiver" of the felony hearing invalid, dismissed the indictment because no trial had been held within 90 days from the commencement of the criminal action, holding that as the "waiver" was invalid, there were no exceptional circumstances tolling the CPL 90-day speedy trial rule. The court in so holding stated:

> A preliminary hearing is a critical stage in the prosecution [Coleman v. Alabama, 399 U.S. 1 (1970)] and a waiver of that right requires affirmative action by the defendant.
> Lupo, 74 Misc.2d at 682, 345 N.Y.S.2d at 352.

Note: Since a preliminary hearing is a critical stage in the prosecution, once the defendant has been assigned counsel at his request, he may not waive his right to a preliminary hearing in the absence of counsel. People v. Simmons, 95 Misc.2d 497, 408 N.Y.S.2d 204 (Crim. Ct. N.Y. Co. 1978).

People v. Carter, supra, held that if a defendant waives his right to a preliminary hearing in reliance on a district attorney's promise to reduce the charge(s) to a misdemeanor, he cannot withdraw his waiver after he is indicted for a felony on the ground that the district attorney broke his promise. The court in Carter stated that the defendant had

not been prejudiced by relying on the district attorney's promise, since a preliminary hearing been held and the charges against the defendant had been dismissed, the grand jury would still have had the power to indict him if it found that there was legally sufficient evidence.

In People v. Chambliss, 106 Misc.2d 342, 431 N.Y.S.2d 771 (Westchester Co. Ct. 1980), aff'd, 110 A.D.2d 707, 488 N.Y.S.2d 194 (2d Dept. 1985), the court held that any violation of a defendant's right to waive personal presence at a preliminary hearing would render an identification of defendant at the hearing inadmissible at trial. See also People v. Lyde, 104 A.D.2d 957, 958, 480 N.Y.S.2d 734 (2d Dept. 1984) where the court held that defendant had the right to waive his presence at the preliminary hearing where he was subsequently identified by a witness. Having been denied that right, the defendant was entitled to seek suppression of the identification at a Wade hearing and it was error to deny such suppression. Id.

C. Disposition of Felony Complaint after Preliminary Hearing or Waiver

(1) Disposition of Felony Complaint after Hearing

CPL §180.70 provides:

> At the conclusion of a hearing, the court must dispose of the felony complaint as follows:
>
> 1. If there is reasonable cause to believe that the defendant committed a felony, the court must, except as provided in subdivision three, order that the defendant be held for the action of a grand jury of the appropriate superior court, and it must promptly transmit to such superior court the order, the felony complaint, the supporting depositions and all other pertinent documents. Until such papers are received by the superior court, the action is deemed to be still pending in the local criminal court.

2. If there is not reasonable cause to believe that the defendant committed a felony but there is reasonable cause to believe that he committed an offense other than a felony, the court may, by means of procedures prescribed in subdivision three of section 180.50, reduce the charge to one for such non-felony offense.

3. If there is reasonable cause to believe that the defendant committed a felony in addition to a non-felony offense, the court may, instead of ordering the defendant held for the action of a grand jury as provided in subdivision one, reduce the charge to one for such non-felony offense as provided in subdivision two, if

   (a) it is satisfied that such reduction is in the interest of justice, and

   (b) the district attorney consents thereto; provided, however, that the court may not order such reduction where there is reasonable cause to believe the defendant committed a class A felony, other than those defined in article two hundred twenty of the penal law, or any armed felony as defined in subdivision forty-one of section 1.20.

4. If there is not reasonable cause to believe that the defendant committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or, if he is at liberty on bail, it must exonerate the bail.

CPL §70.10(2) provides:

> Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.

Under this standard, a defendant may be held for the action of the grand jury even if the preliminary hearing does not establish the legally sufficient evidence required for the issuance of an indictment [CPL §§ 190.65(1), and 70.10(1)] or the proof beyond a reasonable doubt required for conviction after trial [CPL §70.20]. Therefore, unlike legally sufficient evidence, which must include corroborative evidence where such is required by law for conviction, reasonable cause can be established by uncorroborated accomplice testimony [People v. Martinez 80 Misc.2d 735, 364 N.Y.S.2d 338 (Crim. Ct. N.Y. Co. 1975)] or the uncorroborated testimony of the complainant in the type of sex offense case where corroboration is still required [People v. Scarposi, 69 Misc.2d 264, 329 N.Y.S.2d 850 (Crim. Ct. N.Y. Co. 1972) (a prosecution for first degree sexual abuse, prior to the elimination of the requirement of corroboration in forcible sex offense prosecutions)].

But see People v. Smith, 45 Misc.2d 265, 256 N.Y.S.2d 422 (New Rochelle City Ct. Westchester Co. 1965), discussed in Section A, supra

where the trial court dismissed a charge of forcible rape after a preliminary hearing because there was no corroboration of the complainant testimony, as required by the law in effect at that time.

Note: CPL §180.75 deals specifically with juvenile offender proceedings at the preliminary hearing stage.

A charge will be dismissed after a preliminary hearing if the evidence is insufficient as a matter of law. For example, in People v. Reid, 95 Misc.2d 777, 408 N.Y.S.2d 301 (Crim. Ct. Bronx Co. 1978), a defendant was charged with extortion based on allegations that she had tried to obtain $10,000 from complainant in return for dropping a rape complaint against complainant's common-law husband. However, Penal Law §155.05(2)(e) (extortion) requires that fear be instilled in the victim and here, the complainant's testimony unequivocally establishes that she had not been afraid. Similarly, a gun possession charge was dismissed after a preliminary hearing where the evidence established only that defendant admitted possessing a gun but the evidence did not establish his actual or constructive possession. People v. Barclift, 97 Misc.2d 994, 412 N.Y.S.2d 991 (Crim. Ct. Queens Co. 1979).

Note: In larceny prosecutions, at both the preliminary hearing and trial, it is not essential that the actual stolen goods be introduced into evidence to obtain a conviction. See People v. Campbell, 69 Misc.2d 808, 331 N.Y.S.2d 199 (Crim. Ct. N.Y. Co. 1972); People v. Scott 90 Misc.2d 341, 393 N.Y.S.2d 294 (Crim. Ct. N.Y. Co. 1977).

It is established that if the evidence establishes reasonable cause to believe that the defendant has committed any felony, even if that

felony were not charged in the accusatory instrument, he can be held for the action of the grand jury. Mattioli v. Brown, 71 Misc.2d 99, 335 N.Y.S.2d 613 (Sup. Ct. Fulton Co. 1972). Accordingly, where the evidence at the preliminary hearing established reasonable cause to believe that the defendant had committed felony murder during the perpetration of forcible rape, he could be held for the action of the grand jury though the felony complaint charged him with felony murder committed during the perpetration of forcible sodomy. Ibid.

Note: Since a judge of coordinate jurisdiction may not modify a ruling made by a judge of equal rank in the same case, a defendant held on a misdemeanor after a felony hearing may not apply to another local criminal court judge for a new hearing. People v. Solomon, 91 Misc.2d 760, 398 N.Y.S.2d 643 (Crim. Ct. N.Y. Co. 1977).

(2) Reduction to Non-Felony Offense

CPL §180.50(3) provides the following procedure for reducing a felony to a non-felony offense after the hearing has established that there is no reasonable cause to believe that the defendant committed a felony but there is reasonable cause to believe that he committed a non-felony offense:

> A charge is "reduced" from a felony to a non-felony offense, within the meaning of this section, by replacing the felony complaint with, or converting it to, another local criminal court accusatory instrument, as follows:
>
> (a) If the factual allegations of the felony complaint and/or any supporting depositions are legally sufficient to support the charge that the defendant committed the non-felony offense in question, the court may:

(i) Direct the district attorney to file with the court a prosecutor's information charging the defendant with such non-felony offense; or

(ii) Request the complainant of the felony complaint to file with the court an information charging the defendant with such non-felony offense. If such an information is filed, any supporting deposition supporting or accompanying the felony complaint is deemed also to support or accompany [sic] the replacing information; or

(iii) Convert the felony complaint, or a copy thereof, into an information by notations upon or attached thereto which make the necessary and appropriate changes in the title of the instrument and in the names of the offense or offenses charged. In case of such conversion, any supporting deposition supporting or accompanying the felony complaint is deemed also to support or accompany the information to which it has been converted;

(b) If the non-felony offense in question is a misdemeanor, and if the factual allegations of the felony complaint together with those of any supporting depositions, though providing reasonable cause to believe that the defendant committed such misdemeanor are not legally sufficient to support such misdemeanor charge, the court may cause such felony complaint to be replaced by or converted to a misdemeanor complaint charging the misdemeanor in question, in the

manner prescribed in subparagraphs two and three of paragraph (a) of this subdivision.

(c) An information, a prosecutor's information or a misdemeanor complaint filed pursuant to this section may, pursuant to the ordinary rules of joinder, charge two or more offenses, and it may jointly charge with each offense any two or more defendants originally so charged in the felony complaint;

(d) Upon the filing of an information, a prosecutor's information or a misdemeanor complaint pursuant to this section, the court must dismiss the felony complaint from which such accusatory instrument is derived. It must then arraign the defendant upon the new accusatory instrument and inform him of his rights in connection therewith in the manner provided in section 170.10.

Summarizing the provisions of CPL §180.50, the court in People v. Ortiz, 99 Misc.2d 1069, 1074; 418 N.Y.S.2d 517, 521 (Crim. Ct. Bronx Co. 1979) stated:

> CPL §180.50 authorizes the criminal court, upon the consent of the district attorney, to inquire whether a felony charge should be reduced. If after making such inquiry the court is satisfied that there is reasonable cause to believe that the defendant committed an offense other than a felony but did not commit a felony, the court may order a reduction as of right. CPL §180.50(2)(a). If there is reasonable cause to believe that a defendant committed a felony, the court may still order a reduction of the felony charges following its inquiry, if it is in the interests of justice to do so and the district attorney consents. CPL §180.50(2)(b).

Note: A preliminary hearing is not appropriate when felony charges have been reduced to misdemeanor charges after inquiry has been made. People v. Ortiz, supra. This conclusion is buttressed by the fact that CPL §170.75, which granted a preliminary hearing upon misdemeanor charges in New York City, was repealed in 1979. Once there has been a reduction pursuant to CPL §180.50, there is no longer a right to a preliminary hearing. People v. Ortiz, supra.

(3) Action to be Taken Upon Waiver of Preliminary Hearing

CPL §180.30 provides:

> If the defendant waives a hearing upon the felony complaint, the court must either:
>
> 1. Order that the defendant be held for the action of a grand jury of the appropriate superior court with respect to the charge or charges contained in the felony complaint. In such case, the court must promptly transmit to such superior court the order, the felony complaint, the supporting depositions and all other pertinent documents. Until such papers are received by the superior court, the action is deemed to be still pending in the local criminal court; or
>
> 2. Make inquiry, pursuant to section 180.50, for the purpose of determining whether the felony complaint should be dismissed and an information, a prosecutor's information or a misdemeanor complaint filed with the court in lieu thereof.

(4) Application in Superior Court Following Hearing Or Waiver Of Hearing

"Where the local criminal court has held a defendant for the action of a grand jury, the district attorney may, at any time before such matter is submitted to the grand jury, apply, ex parte, to the appropriate superior court for an order directing that the felony complaint and other papers transmitted to such court pursuant to subdivision one of section 180.30 be returned to the local criminal court for reconsideration of the action to be taken. The superior court may issue such an order if it is satisfied that the felony complaint is defective or that such action is required in the interest of justice." CPL §180.40.

Note: The defendant might also apply for such an order as this statute, unlike its predecessor Code of Criminal Procedure, §190a, does not require consent or the motion of the district attorney as a condition precedent.

(5) Constitutional Consideration Involved in Reduction and Reconsideration

CPL §180.40 is not unconstitutional. Corr v. Clavin, 96 Misc.2d 185, 409 N.Y.S.2d 334 (Sup. Ct. Nassau Co. 1978) (Article 78 proceeding). Therefore, a judge may not, on this ground, rescind his earlier order granting the district attorney's motion to reduce a charge of burglary to criminal trespass after the defendant had waived a felony hearing. Id.

GRAND JURY PROCEDURE

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District Attorney of
Richmond County

Most recently assisted by Nancy Walker-Johnson, BPDS Law Student Intern (1985) and Richmond County DA's Office Law Student Interns Ronald J. Prague and Francine M. Cocoran (1986) and Assistant District Attorney Yolanda L. Rudich (1987).

GRAND JURY PROCEDURE

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D. Such reports become public records unless:

1. The court finds the report scandalous or prejudicial;

2. The court finds that the report is not supported by the preponderance of the credible and legally admissible evidence;

3. The court finds that one or more of the public servants accused of misconduct was not afforded an opportunity to testify before the Grand Jury;

4. The court finds that the filing of such a report would prejudice fair consideration of a pending criminal matter; and

5. The subject of such a report is sealed for one or more of the foregoing reasons.

E. If the court determines that the report should not be made a public record, the court must seal the report.

No authority for appeal by DA from lower court order sealing type (c) reports proposing legislative, executive or administrative action; appeal dismissed. Matter of Grand Jury, 110 A.D.2d 44 (3rd Dept. 1985).

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County Court erroneously sealed type (c) report on grounds that it criticized the conduct of several individuals who, while not identified by name, were identifiable by job titles. App. Div. noted that some degree of criticism is inherent in any type (c) report and that mere references to title or position are permissible so long as the report is not tantamount to a type (a) report. 2nd Dept. redacted name of town and ordered deletion of certain matter it deemed irrelevant and then ordered the report be accepted for filing as a public record. Matter of Report of Aug.-Sept. 1983 Grand Jury, 103 A.D.2d 176 (2nd Dept. 1984).

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VII. Negative Action: Dismissals

A. Automatic: If the Grand Jury fails to take affirmative action by the procedure listed in Section B below, the Grand Jury is deemed to have dismissed the case put before it.

B. When Mandated: If the Grand Jury finds a failure of proof as detailed in Section IX below, the Grand Jury must file a finding of dismissal. CPL §190.75(1).

C. Resubmission: Permissible only with leave of the Court which has "discretion" to authorize or direct the re-presentation of the evidence. If there is a second dismissal, the matter may not be re-presented.

Prosecutor's withdrawal of a case from the Grand Jury after presentation of evidence is equivalent of a dismissal by the first Grand Jury, and prosecution may only resubmit the charges with consent of the court. Key factor is extent to which Grand Jury considered evidence and charge - here, all evidence was heard, only awaiting charge. People v. Wilkins, 68 N.Y.2d 269 (1986)

There are no statutory guidelines on the judge's discretion, but decisional law indicates that there must be a showing of: (1) "additional evidence" [see People v. Ruthazer, 3 A.D.2d 137, 138, 158 N.Y.S.2d 803 (1st Dept. 1957)], which "must have been discovered since the trial and could not have been discovered

before by the exercise of due diligence" [see People v. Martin, 97 Misc.2d 441, 446, 411 N.Y.S.2d 822, 826 (Sup. Ct. Kings Co. 1978), rev'd, 71 A.D.2d 928, 419 N.Y.S.2d 724 (2d Dept. 1979).

However this standard has been questioned in People v. Ladsen, 111 Misc.2d 374, 444, N.Y.S.2d 362 (Sup. Ct. N.Y. Co. 1981)]; or where the original investigation was not "complete and impartial" [see People v. Dziegial, 140 Misc. 145, 146, 250 N.Y.S. 743 (Sup Ct. Oswego Co. 1931)]; or (2) "additional testimony" [see People v. Karlovsky, 147 Misc. 56, 263 N.Y.S. 293 (Ct. Gen. Sess. N.Y. Co. 1933)]. CPL §190.75(3).

VIII. Removal to Family Court

A juvenile may be indicted and prosecuted criminally if he is thirteen or older and charged with second degree murder or if he is fourteen or older and charged with either second degree murder or one of the felonies specified in CPL §1.20(42). Such a juvenile offender may not be indicted and brought to trial without first being afforded a hearing in a local criminal court on the issue of whether the interests of justice require removal of the action to Family Court. CPL §180.75(4); Vega v. Bell, 47 N.Y.2d 543, 419 N.Y.S.2d 454 (1979). However, a Grand Jury may vote to file a request to remove a charge to the Family Court if it finds that a

person thirteen, fourteen, or fifteen years old did an act which if done by a person over sixteen would constitute a crime provided that:

(1) such act is one for which it may not indict; and,

(2) it does not indict such person for a crime; and

(3) the evidence before it is legally sufficient to establish that such person did such act, and competent and admissible evidence before it provides reasonable cause to believe that such person did such act. [CPL §190.71(b)]. Upon voting to remove a charge to the Family Court under CPL §190.71(b), the Grand Jury must, through its foreman or acting foreman, file with the court by which it is impaneled its request to transfer such charge to the Family Court. The request must:

(1) allege that the person named therein did an act which, if done by a person sixteen years of age or older constitutes a crime; and,

(2) specify the act and the time and place of its commission; and,

(3) be signed by the foreman or the acting foreman. [CPL §190.71(c); see also CPL §190.60(3)]. The court must approve the Grand Jury request after it is filed, unless it is improper and insufficient on its face, and order the charge removed to the Family Court in accordance with CPL §725 [CPL §190.71(c)].

IX. Powers of The Grand Jury

A grand jury has a statutory right to investigate all offenses, even on its own instance, whether felonies or misdemeanors, and regardless of whether a preliminary hearing has been held before a magistrate. People v. Edwards, 19 Misc.2d 412, 414, 189 N.Y.S.2d 39, 42 (1959).

A. The grand jury's power supersedes that of the local criminal court and therefore, a grand jury indictment will supersede any prior proceedings in the lower court. People v. Hobbs, 50 Misc.2d 561, 565, 270 N.Y.S.2d 732, 738 (1966).

1. The grand jury acts within its own accord and does not derive its powers from any action taken by the judiciary. People ex rel. Hirshberg v. Close, 1 N.Y.2d 258, 152 N.Y.S.2d 1 (1956).

2. Where a local criminal court judge directs that a case be removed to the Family Court, for example, this does not divest the grand jury of its power and duty to indict for felonious criminal activity. Absent a clear and explicit constitutional or legislative proscription, the power and duty of the grand jury to indict for criminal activity cannot be curtailed. People v. Rodriguez, 97 Misc.2d 379, 411 N.Y.S.2d 526 (Sup. Ct. Kings Co. 1978).

" A Grand Jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the court of the county, and concerning any misconduct, nonfeasance or neglect in the public office by a public servant, whether criminal or otherwise." CPL §190.55(1).

A. A grand jury may indict a person for an offense when (a) the evidence is legally sufficient to establish that such a person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required as a matter of law, to sustain a conviction for such offense is absent and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense. CPL §190.65, as amended L. 1983, c.28 §1, eff. April 5, 1983.

B. The offense or offenses for which a grand jury may indict a person in any particular case are not limited to that or those which may have been designated at the commencement of the grand jury proceeding to be the subject of inquiry. CPL §190.65(2).

C. Both the People and the defendant have the right to have the local court divested of jurisdiction by means of adjournment, pursuant to §§170.20(2) and 170.25(3) of the CPL, where the defendant has been charged with a misdemeanor and such charge is pending before the local criminal court. The District Attorney (pursuant to CPL §170.25(3)], or the defendant (pursuant to C.P.L. §170.25(3)] before the entry of a plea of guilty to or commencement of a trial in the local criminal court on that misdeameanor charge, may apply for an adjournment of the proceedings in the local criminal court. The District Attorney would apply on the grounds that he intends to present the charge in question to the grand jury. The defendant needs to assert interest of justice grounds. The provisions of the CPL do not limit the power of the grand jury to findings in accordance with the local criminal court.

D. CPL Section 190.65(2) specificially incorporates within its intended scope of application CPL §170.25. Thus it is clear that where a case has been removed to Superior Court at defendant's instance, in light of §190.65(2), the grand jury may indict the defendant for a felony.

E. CPL §190.65(2) is equally applicable where a case has been removed to Superior Court at the District Attorney's instance. CPL §170.20(2).

(1) "The proper reading of 170.20 is that the District Attorney may present a misdemeanor charge to a grand jury and obtain a felony indictment if the evidence so warrants. Defendant's narrow interpretation of the language 'prosecuting it' in Section 170.20 so as to forbid the handing down of a felony charge is not consistent or in harmony with the clear unambiguous language contained in §190.65(2) concerning the grand jury's powers." People v. Nolan and Whithead, Scheinman, J., Sullivan COunty Ct., Feb. 2, 1982.

(2) Where an indictment has been filed by the grand jury prior to defendant's attempt to plead guilty in the criminal court, the criminal court was divested of jurisdiction. The Supreme Court could therefore impose a more severe sentence than that provided for in the criminal court plea negotations. People v. Phillips, 66 A.D.2d 696, 411 N.Y.S.2d 259 (1st Dept. 1978), aff'd on opinion below, 48 N.Y.2d 1011, 425 N.Y.S.2d 558 (1980).

(3) Where there is a misdemeanor charge pending in local criminal court, the District Attorney may present the matter to the grand jury and procure a felony indictment. People v. Anderson, 45 A.D.2d 561, 360 N.Y.S.2d 712 (3d Dept. 1974).

X. Proceedings

A. Composition: At least 16 and no more than 23 persons (CPL §190.05), drawn from the citizens as provided in the Judiciary Law [CPL §190.20(1)] and by the rules of the Appellate Division (CPL §190.10), sworn by the court which picks a foreman and acting foreman [CPL §190.20(3)], who selects a secretary from its own membership [CPL §190.20(3)] to keep the Grand Jury's official records or proceedings.

Challenge to Grand Jury panel because racial/ethnic composition of Grand Jurors empanelled did not approximate that of county at large rebuked where no showing of "systematic exclusion." People v. Guzman, 60 N.Y.2d 403 (1983).

Defendant's motion to remove Grand Jury proceedings to another county denied because CPL §230.20 does not authorize change of venue prior to filing of indictment. People v. Jordan. 104 A.D.2d 507 (3rd Dept. 1984).

B. Proceedings: To hear evidence or take affirmative actions at least 16 of the Grand Jury's members must be present; to take affirmative actions at least 12 members, who, having heard "all essential and critical evidence", must concur. CPL §190.25(1); People v. Brinkman, 309 N.Y. 974 (1956).

1. Any grand juror may, but usually it is the foreman, who administers the oath to all witnesses giving sworn testimony.

2. During deliberations and voting only Grand Jurors may be present in the room. The presence of any other person invalidates any action taken upon such voting or deliberation.

3. During any other proceedings, primarily the giving of evidence, the only persons permitted in the Grand Jury room are:

a. The legal advisor (District Attorney or Attorney General who must be admitted to practice law in the state);

b. The warden or clerk whose function is similar to that of the court clerk and bailiff;

c. The official stenographer;

d. A qualified interpreter, where appropriate;

e. a guard;

f. The individual witness giving testimony;

g. An attorney representing a witness pursuant to CPL §190.52 while that witness is present;

h. A video tape operator; and

i. A social worker, rape crisis counselor, psychologist, or other professional providing emotional support to a child witness twelve years old or younger.

C. Secrecy: The proceedings of the Grand Jury are conducted in secret and no one may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any Grand Jury testimony or any decision, result or other matter attending a Grand Jury proceeding. CPL §190.25(4)(a). The requirement of secrecy, however, does not permit the prosecutor to keep from the defendant exculpatory testimony given to the Grand

Jury by a witness produced before the Grand Jury at defendant's request. People v. Mitchell, 99 Misc.2d 332, 416 N.Y.S.2d 166 (Sup. Ct. Erie Co. 1979). Evidence of child abuse obtained during Grand Jury proceeding must be reported as set forth in C.P.L. §190.25 (4)(b). Unauthorized disclosure by any of the persons permitted to be present during Grand Jury proceedings or by other public servants having duties relating to grand juries or other public officers or employees, and including grand jurors themselves, is a Class "E" felony. Penal Law §215.70. Witnesses who appear are not similarly bound. The customary reasons for requiring secrecy (and therefore, the pertinent considerations for a court in exercising its discretion to release or not release) are set forth in People v. DiNapoli, 27 N.Y.2d 229, 235, 316 N.Y.S.2d 622, 625 (1970).

As for limitations on disclosure and use of grand jury minutes by civil litigants see, e.g., Matter of District Attorney of Suffolk County, 58 N.Y.2d 436 (1983) and Ruggiero v. Fahey, 103 A.D.2d 65 (2nd Dept 1984).

D. Evidence:

1. Generally the rules of evidence for the Grand Jury are the same as the rules with respect to criminal proceedings in general, as provided in CPL §60.20 et. seq.; CPL §190.30(1).

2. EXCEPTION

a. Scientific reports by public servants or agencies, certified by the expert or technician making the analysis, are admissible in chief. CPL § 190.30(2). Examples: medical records of public hospital, blood, urinalysis and spermatozoa tests conducted in public laboratory, police department ballistics, tests, medical examiner reports.

b. Pro forma; e.g. lack of permission or authority.

c. Videotaped testimony in lieu of live testimony of certain witnesses. Under CPL §190.32 the district attorney has the unilateral discretion to cause a "child witness" to be videotaped; however, in the case of the "special witness", the district attorney must make an ex parte application to the court, in writing, containing sworn allegations of fact, for an order to videotape the special witness's testimony.

A "child witness" is defined as a person 12 years of age or less whom the people intend to call as a witness before the grand jury to give evidence concerning crimes defined in Penal Law Articles 130 or 225.25 of which the person was a victim.

A "special witness" is one whom the people intend to call before the grand jury (involving any crime) but is unable to attend because of physical incapacitation.

A "special witness" could also be one 12 years of age and would likely suffer very severe emotional or mental stress if required to testify in person involving any crime defined in Article 130 and §225.25 of the Penal Law to which the person was a witness or a victim.

The statute also sets out the procedures for the videotaping and its custody thereafter.

d. Incompetent evidence: It appears that the admission of evidence, that is incompetent as hearsay (in violation of the Best Evidence Rules), without sufficient foundation, is not grounds for dismissal of the indictment if the competent evidence establishes a legally sufficient case as discussed below. Statutory and case law, however, are not clear on this point and the best rule is to exclude such evidence, or at least minimize it.

XI. Burden of Proof: CPL §70.10 Standards of Proof; Definitions of Terms

The following definitions are applicable to this chapter:

1. "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent. CPL §70.10(1).

2. "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay. CPL §70.10(2).

A. Legal Sufficiency: The statute, its commentary and the Court of Appeals [People v. Peetz, 7 N.Y.2d 147, 196 N.Y.S.2 83 (1959); People v. Haney, 30 N.Y.2d 328, 335-336, 333 N.Y.S.2d 403, 409 (1972)], make clear that a prima facie case must have been presented to support a charge by the Grand Jury in an indictment or order to file a prosecutor's information. The classical definitions of a prima facie case would make it appear that in a criminal matter the evidence must be such that if believed and uncontradicted by exculpatory evidence it would establish the guilt of the accused beyond a reasonable doubt. The evidence that amounts to this quantum must be competent evidence. The former language concerning the standard of legal sufficiency embraced in CPL §190.65(1): "...legally sufficient to establish that such person committed such offense..." was clarified by an amendment, effective April 5, 1983. The statute now continues to read, "provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent,...". While

this language had consistently appeared in CPL §70.10(1), it is now perfectly clear that in presenting to the grand jury cases that require corroboration, that corroborative evidence must be introduced before the grand jury for an indictment to be authorized. CPL §190.65(1), as amended L. 1983, c.28, §1, eff. April 5, 1983.

B. Believability: Under the same CPL §190.65, the Grand Jury, after determining the legal sufficiency of the evidence - a determination that should be made by the legal advisor (see commentary) - must then make a second determination: that "competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense," or, as the Grand Jury might be instructed: that the defendant is probably guilty of this crime. Note that this burden is one for the Grand Jury, not the legal advisor, to make. The Grand Jury is to make this finding after discounting whatever evidence the Grand Jury finds unworthy of belief, by the same subjective, inarticulable weighing and screening that a petit jury uses in making its determination of guilt by the higher standard of "beyond a reasonable doubt;"

in doing so, it must use experience and common sense to deduce whether there is "evidence or information which appears reliable (and that) disclosed facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that such offense was committed and that such person committed it." CPL §70.10(2). The grand jurors are fact finders, and consider the weight, probative value, and credibility of the testimony.

C. Circumstantial Evidence: The process of decision by which the court or jury may reason from circumstances known or proved to establish, by inference, the principal fact. People v. Taddio, 292 N.Y. 488 (1944). Often, and in the view of some noted commentators (see Pat Wall, Eyewitness Identification), circumstantial evidence is superior to direct evidence. The concept involves complicated and sophisticated reasoning; it is not a term covering a case where an observer realizes the defendant is probably guilty but in which there is a fundamental lack of proof on one or more elements.

The standard of legal sufficiency in cases based on circumstantial evidence is that "for a conviction based exclusively upon circumstantial evidence to stand the hypothesis of guilt should flow naturally from the facts proved, and be consistent with them, and that the facts proved must exclude to a moral certainty every reasonable hypothesis of innocence." People v. Lagana, 36 N.Y.2d 71, 365 N.Y.S.2d 147 (1975), cert. denied, 424 U.S. 942 (1976). See also People v. Finley, 104 A.D.2d 450, 479 N.Y.S.2d 63 (2d Dept. 1984), adhered to, 107 A.D.2d 709, 484 N.Y.S.2d 63 (2d Dept. 1985).

Each and every case involves some proof by circumstantial evidence, i.e., there is one or more elements that are proved by inference. Each and every case involves proof of the defendant's mental state and mental state must be proven by inferences from a defendant's statements or acts.

Certain types of crimes require proof of complex mental states. By definition, these states must be proven by circumstantial evidence.

XII. Relationship of the Grand Jury to its Legal Advisor

A. District Attorney Submits Evidence: The District Attorney presents the witnesses and elicits the testimony, questions, and cross-examines the witnesses and carries out Grand Jury requests for additional evidence or witnesses to be subpoenaed before it. CPL §§190.50; 190.55.

1. Mandatory Situations: When a defendant in a local criminal court has been held for the action of a Grand Jury on a felony charge, the District Attorney must present the evidence on that charge. When the superior court has ordered prosecution of a misdemeanor by indictment pursuant to CPL §170.25, the District Attorney must present the evidence. CPL §180.40 gives authority for the District Attorney to make ex parte application to return the matter that has been held for action by the Grand Jury to the local criminal court for reconsideration of the decision to hold the matter for Grand Jury action.

The defendant may waive, with the District Attorney's consent, felony prosecution by indictment and proceed on prosecution by information. CPL §195.10.

2. All other situations are discretionary with the District Attorney, including presentation of evidence with a view to a Grand Jury report, alleged crimes for which the defendant has not been arrested, investigations into possible criminal conduct, presentation of cases dismissed in the criminal court or in the superior court if otherwise authorized.

B. District Attorney Acts in Lieu of the Judge on Questions of Admissibility of Evidence: CPL §190.30(6) and Instructions: CPL §190.25(6) In all situations where a Judge would make rulings on admissibility of evidence under Article 60 of the CPL, the District Attorney so acts in the Grand Jury; in all situations where a charge on the law would be appropriate or required by the Judge in a trial court before a petit jury, the District Attorney should so act before the Grand Jury. This section takes on added significance in view of CPL §190.52, which allows counsel for those who waive immunity to be present in the Grand Jury. See Section XII E. below.

Grand Jury Instructions

People v. Valles, 62 N.Y.2d 36 (1984) - prosecutor's failure to charge Grand Jury as to affirmative defense of extreme emotional disturbance does not require dismissal of murder indictment even though such defense adequately suggested by the evidence before Grand Jury. Mitigating defenses, unlike exculpatory defenses, need not be charged. Note: DA did give justification charge.

People v. Sepulveda, 122 A.D.2d 175 (2d Dept. 1986) - rev'g trial court's dismissal of indictment. DA not obligated to inform Grand Jury of alibi testimony of defendant and his witnesses which were adduced at prior trial.

People v. Shapiro, 117 A.D.2d 688, 498 N.Y.S.2d 428 (2nd Dept. 1986). D.A. not obliged to present to Grand Jury information regarding CW's less than ideal background or character.

People v. Lancaster, 114 A.D.2d 92 (4th Dept. 1986) - rev'g trial court's dismissal of indictment. DA did not err in not instructing Grand Jury as to "insanity defense"; such is properly left for trial jury's resolution. No impediment to presenting case to Grand Jury posed by fact that defendant was not legally competent at the time; CPL §730.40(3) clearly contemplates that Grand Jury presentment be made during defendant's incapacity.

People v. Lopez, 113 A.D.2d 475 (2nd Dept. 1985) - DA not required to advise Grand Jury that it is People's burden to disprove justification defense beyond a reasonable doubt; such burden arises only at trial. Note: Grand Jury was charged with respect to pertinent parts of CPL Art. 35 re: justification.

People v. Smalls, 111 A.D.2d 38 (1st Dept. 1985) - reinstating indictment dismissed by trial court on grounds that DA did not submit defendant's post-arrest statement to Grand Jury and give a charge as to justification. App. Div. held defendant could have testified before the Grand Jury herself.

People v. Hackett, 110 A.D.2d 1055 (4th Dept. 1985) - trial court properly dismissed indictment because Grand Jury not adequately instructed as to temporary/lawful possession of a weapon.

People v. Kennedy, 127 Misc.2d 712 (Monroe Co. Ct. 1985) - indictment dismissed because blanket instructions to Grand Jury at outset of presentment of multiple drug cases inadequate guidance where instructions not given with respect to each individual case and instant indictment was returned on 6th day of Grand Jury proceedings.

People v. LoBianco, 126 Misc.2d 519 (Bronx Sup. Ct. 1984) - motion to dismiss indictment for failure to instruct Grand Jury as to entrapment denied.

People v. Delaney, 125 Misc.2d 928 (Suffolk Co. Ct. 1984) - Grand Jury need not be specially instructed as to evaluation of/ weight to be given expert witnesses' testimony.

People v. Loizides, 125 Misc.2d 537 (Suffolk Co. Ct. 1984) appropriate for DA to twice interrupt defendant's testimony before Grand Jury with polite admonishments, but indictment dismissed because Grand Jury not cautioned that DA's impeachment of defendant by his prior bad acts was for limited purpose re: credibility & could not be used as evidence of criminal propensity.

People v. Mayer, 122 Misc.2d 1036 (Nassau Co. Ct. 1984) - DA's failure to give alibi charge to Grand Jury is no basis for dismissal of indictment. Citing differing functions of grand jury and trial jury, court pointed out that Grand Jury can properly refuse to even hear alibi witnesses.

C. The District Attorney Is an Advisor Only: There is no authority in the CPL for the District Attorney to recommend a particular course of action except in the following two situations:

1. Where the evidence does not amount to a legally sufficient case on one or more charges against one or more defendants the District Attorney should recommend a dismissal as to that charge or charges or defendant or defendants. See Commentary, CPL §190.65.

2. Where the evidence supports charges of misdemeanors or violations only, the District Attorney normally recommends that any prosecution should be commenced by a prosecutor's information in the criminal court. It is generally the policy of the District Attorneys' Offices not to otherwise recommend to the Grand Jury the appropriate action; specifically, assistants are not to recommend that the Grand Jury indict any defendant for any crime and not to recommend that the Grand Jury dismiss a charge unless the evidence is insufficient.

D. The District Attorney Presents Evidence Honestly, Without Bias: Since the defendant is not present in the Grand Jury room and since his counsel cannot test the validity of the evidence offered against him, and since there is no Judge present to

safeguard the defendant's rights, and since the fact of indictment alone is a serious and perhaps calamitous event in an individual's life, the District Attorney stands in a position of vouching for the truth of the evidence he presents. He has an obligation to cross-examine witnesses and scrutinize evidence to ensure a just and honest presentation of the evidence. See The Prosecution Function 3-3.6, American Bar Association Project on Standards for Criminal Justice, Approved, 1979, Little, Brown & Co., 1980.

Prosecutorial Misconduct

People v. Lerman, 116 A.D.2d 665, 497 N.Y.S.2d 733 (2nd Dept. 1986). Indictment properly dismissed where defendant was deprived of fair and uninterrupted opportunity to give Grand Jury his version of events; defendant was able to give only a brief statement before being interrupted and cross-examined at length by DA.

People v. Grafton, 115 A.D.2d 952 (4th Dept. 1985). Prosecutor's "deplorable tactics" in introducing irrelevant but prejudicial evidence, deliberately confusing witnesses and grand jurors alike, etc. warranted dismissal of indictment under CPL §210.20(1)(c); leave to represent granted.

People v. Isla, 96 A.D.2d 789 (1st Dept. 1983). DA should not have limited police officer's testimony to "he [defendant] said he had shot a man, the manager, during an argument", leaving out end of statement "in self-defense."

People v. Abbatiello, 129 Misc.2d 831 (Bronx Sup. Ct. 1985) codefendant/driver's statement, "Why are you taking Godfrey [defendant]? They're [the guns] are mine," was so materially exculpatory that it should have been put before the Grand Jury since only evidence against Godfrey was statutory presumption of P.L. §265.15(3).

People v. Monroe, 125 Misc.2d 550 (Bronx Sup. Ct. 1984) (ADA repeatedly asked defendant before Grand Jury if People's witnesses were liars and asked misleading questions suggesting facts never in evidence; Grand Jury also never apprised as to complainant's highly equivocal ID at line-up).

People v. Santirocco, NYLJ 2/9/87, p. 14 col. 6 (Sup.Ct., N.Y. Co.) - Indictment dismissed with leave to represent where DA failed to inform Grand Jury that the two complainants could not identify defendant in a photo array one day after crime.

E. Since the role of the District Attorney is that of legal advisor and since all legal advice must be on the record [CPL §190.25(6)], there can be no off-the-record conversations or remarks. The District Attorney is the legal advisor to the Grand Jury as a whole, not to its members individually. There should be no private or limited members discussions of Grand Jury business.

XIII. Rights of Defendant Vis-a-Vis Grand Juries

A. The Defendant has a Qualified Right to Appear Before a Grand Jury: If the defendant serves written notice on the District Attorney at the time of or prior to a Grand Jury presentation of a case against the defendant, he must be accorded an opportunity to testify on the matter after waiving immunity pursuant to §190.45 of the CPL (discussed below).

People v. Leggio, 133 Misc.2d 320 (Sup.Ct. N.Y.Co. 1986) - Defendant's request to testify must be unqualified and specific; letter stating defendant "reserves" his right to testify does not activate District Attorney's obligation to notify defendant to appear.

People v. Luna, ___ A.D.2d ___, 514 N.Y.S.2d 806 (2d Dept. 1987) - Once defendant has timely served notice of desire to testify, District Attorney must notify defendant of proceeding even if underlying felony complaint has already been dismissed.

The District Attorney is bound by the rules of evidence, including constitutionally derived limits on cross-examination of defendants, whenever a person accused of a crime testifies. The defendant must answer all proper questions put to him by the District Attorney or the Grand Jury.

1. Right to Counsel: CPL §190.52(1) provides that any person who appears as a witness and has signed a waiver of immunity has a right to retain, or, if he is indigent, be assigned, counsel who may be present

with him in the Grand Jury room. This attorney may advise the witness, but may not otherwise take part in the proceedings.

The superior court which empaneled the Grand Jury has the same power to remove an attorney from the Grand Jury room as that court has to remove an attorney from a courtroom. See CPL §190.52(3).

B. When the defendant has been arraigned on a felony charge in the criminal court and that complaint is undisposed of and is the subject of a Grand Jury proceeding, the District Attorney must give the defendant notice of such proceeding and give the defendant an opportunity to testify. CPL §190.50(5)(a).

People v. Jones, 126 Misc.2d 104, 481 N.Y.S.2d 595 (Sup.Ct., Kings Co. 1984) - Indictment dismissed where defendant not notified of pending Grand Jury presentment nor permitted to testify until after indictment had been voted.

People v. Davis, 133 Misc.2d 1031 (Sup.Ct. Qns. Co. 1986) - Notice of right to testify defective where not sent to defendant, but sent to Legal Aid Society, whose representation was limited to arraignment only.

C. The defendant may request the Grand Jury to call as a witness a person designated by the defendant. The Grand Jury has discretion to call such a witness if

it believes the witness has relevant information and knowledge on a particular case. Such an act requires concurrence of 12 jurors. The District Attorney has the right to have any such person waive immunity pursuant to CPL §190.45 prior to testifying.

D. The defendant may challenge an indictment and move the superior court to dismiss the indictment after inspecting the minutes. Such a motion to dismiss may be made on the following grounds:

1. lack of legally sufficient evidence;
2. indictment or count is defective due to defects in its content;
3. proceeding itself was defective;
4. defendant is immune from prosecution either because of having received immunity or because of double jeopardy;
5. prosecution is untimely;
6. jurisdictional or legal impediment; or
7. dismissal is required in the interest of justice.

CPL §§ 210.20, 210.25, 210.35, 50.20, 190.40, 210.40, 30.10

E. Attorney in Grand Jury

1. Those who waive immunity are entitled to:

   a. presence; and

   b. advice.

2. DO NOT ASSUME BAD FAITH OF ATTORNEYS, BUT BE CAUTIOUS!

This is a virtually untested area of the law. Any problems, real or perceived. should be handled at as low a level as possible. Escalation means delay and interruption of the proceeding and that should be avoided. See United States v. Dionisio, 410 U.S. 1 (1973)

3. Instructions to Grand Jury:

   a. At the beginning of the term the District Attorney should give elaborate instructions including some related to this situation. Care must be taken to avoid conveying prejudice.

   b. Provide the foreman with the script to address problems. I suggest reliance on the Grand Jury itself for initial "encounters." It will demonstrate to the attorney that the Grand Jury is acting independently, that it will not tolerate interruptions, and that it is not intimidated by the presence of the attorney.

c. If the District Attorney has a suggestion for the Grand Jury on how to handle a situation, it should be discussed with the Grand Jury, on the record, but with witness and counsel excused.

4. Problems:

a. What may rise - how to respond

(1) attorney addresses Grand Jury:

(a) make a record (instruct stenographer to record all that transpires);

(b) have foreman admonish attorney that his behavior appears to go beyond his function of giving advice to his client.

(2) attorney speaks advice in voice audible to members of the Grand Jury:

(a) make a record (instruct stenographer to record all that transpires);

(b) have foreman admonish attorney to speak only to client.

(3) attorney gives witness' answers:

(a) make a record;

(b) have foreman admonish attorney that Grand Jury is interested in hearing what the witness has to say.

b. DON'T

(1) engage attorney in colloquy;

(2) argue or debate with attorney;

(3) make ad hominem remarks in either presence or absence of attorney;

(4) let the attorney's busy schedule interrupt smooth processing of cases (but do extend reasonable professional courtesy).

XIV. Immunity

A WITNESS WHO GIVES EVIDENCE IN A GRAND JURY PROCEEDING RECEIVES IMMUNITY UNLESS- (A) HE HAS EFFECTIVELY WAIVED SUCH IMMUNITY PURSUANT TO CPL §190.45 OR (B) SUCH EVIDENCE IS NOT RESPONSIVE TO ANY INQUIRY AND IS GRATUITOUSLY GIVEN OR VOLUNTEERED BY THE WITNESS WITH KNOWLEDGE THAT IT IS NOT RESPONSIVE.

A. Automatic: If the District Attorney does not affirmatively obtain the witness waiver of immunity (and the District Attorney has the right to make waiver of immunity a condition of any prospective witness' testifying) the witness receives immunity.

But defendant who pleads guilty and then gives testimony before a Grand Jury concerning the same offense before being sentenced cannot then claim

immunity for crime to which he pleaded. People v. Sobotker, 61 N.Y.2d 44 (1984) (Note: Court of Appeals declined to say whether it would reach same result where defendant was convicted at trial, rather than by guilty plea).

B. Scope: New York has transactional immunity. This means that a person who gives evidence before a Grand Jury under immunity receives immunity as to each and every transaction on which he responsively testifies.

People v. Dittus, 114 A.D.2d 277 (3rd Dept. 1986). Defendant's robbery indictment dismissed. Although her testimony before the Grand Jury which indicted her accomplice did not mention robbery for which she was later indicted, she did place herself in the area where, and at time when, robbery occurred and ID'd her accomplice. "All that is required to obtain the benefit of the immunity statute is that testimony given, along with proof supplied by others, will tend to prove some part of crime charged."

1. denials of committing various offenses may give an individual immunity from prosecuting those offenses.
2. Questions put to a witness about prior bad acts for the purpose of impeaching the witness give the witness immunity from prosecution for those bad acts.

Matter of Rush v. Mordue, 68 N.Y.2d 348 (1986) - Where petitioner's statements before Grand Jury investigating a homicide that he lied to police were in direct response to prosecutor's questions concerning veracity of the prior sworn statement petitioner had given police, petitioner received full transactional immunity from perjury prosecution based upon that prior statement.

3. Offenses not inquired into, but falling within the same general transaction as events inquired into normally become barred from prosecution.

4. Grant of "use" immunity to defendant by Federal authorities does not automatically confer broader transactional immunity for New York State prosecution. People v. Johnson, 133 Misc.2d 721 (Sup.Ct. N.Y.Co. 1986).

C. Responsiveness: Gratuitous, non-responsive answers to questions clearly not calling for the answer do not confer immunity (e.g., "On the night of January 1st 1974, where were you?" Answer: "O.K., I murdered my wife last June, and I'm sorry").

D. Waiver:

1. Written instrument.

2. Subscribed (signed) by the witness.

3. Stipulating that the subscriber waives his privilege against self-incrimination and waives immunity that would otherwise be conferred by CPL §190.40.

4. Enumerating the subject or subjects of the proceeding.

5. Sworn to by the witness before the Grand Jury.

6. Executed only after the witness has been informed of his right to confer with counsel.

If properly executed, the waiver of immunity acts to strip such a witness of his privilege against self-incrimination and immunity; if improperly executed, it is invalid and immunity attaches. CPL §190.45.

People v. Higley, ___ N.Y.2d ___ No. 155 [decided 5/28/87]. Where Grand Jury informed that defendant's attorney had provided prosecutor with a waiver of immunity signed by defendant and notarized, but defendant did not swear before Grand Jury that he had executed the waiver or waived immunity, waiver was ineffective and transactional immunity inhered.

People v. Chapman, 69 N.Y.2d 497 (1987). Waiver of immunity obtained in violation of witness' right to counsel is not effective and indictment will be dismissed with prejudice.

Note: DA cannot require defendant to execute general waiver of immunity as to any and all crimes when defendant only wanted to testify before Grand Jury as to 1st -- but not 2nd -- crime for which he had been arrested. People v. Scott, 124 Misc.2d 357 (Suffolk Co. Ct. 1984).

XV. Problems

A. Identification: Absence of defendant during Grand Jury presentation requires some other mode of identification of the defendant as the person who committed the crime. The usual way this is done is to ask a witness whether the witness saw the individual who committed the crime at a subsequent time and if at that time the suspect was in the custody of the police officer. The police officer is then asked if there came a time when the defendant was in the officer's custody and the witness had an occasion to see the defendant in his presence. On occasion there has been no such corporal identification of the defendant by the witness. In such situations a lineup is usually the appropriate procedure. The standards of fairness of such a lineup are set down with reasonable specificity in the Wade-Gilbert-Stovall line of cases.* In addition to ensuring a fair and honest identification of an individual as the individual who committed a particular crime, such an identification procedure becomes an acceptable, in

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* See Section on Wade-Huntley in this manual, infra.

fact the preferable, means of establishing identification in the Grand Jury. It also will if conducted fairly, be admissible as evidence in chief at trial, whether or not the witness can make an in-court identification.

Because of the absence of the defendant and the apparent consequence of the issue of identification, Grand Jury assistants should pay particular attention to identification and inquire of witnesses the basis of such identification. Often a witness will have told a police officer that the defendant committed the crime at issue on the street, but will tell the assistant, when pressed, that the identification was based on factors that made the identification less than certain.

Indeed, instances occur where only a photographic identification has been made prior to the grand jury proceeding. Most recently, the Appellate Division, Second Department, in People v. Brewster, 100 A.D.2d 134, 473 N.Y.S.2d 984 (2d Dept. 1984), aff'd, 63 N.Y.2d 419, 482 N.Y.S.2d 724 (1984), reinstated an indictment that had been dismissed by the lower court because the sole

evidence of identity before the grand jury as predicated upon prior photographic identification; and the grand jurors were unaware of this fact. The witnesses before the grand jury were simply asked if they had identified the person who committed the crime; and they responded in the affirmative. The court, in refusing to extend the rule that precludes the use of photographic identification evidence at trial to the grand jury proceedings, found the evidence competent and admissible within CPL §190.65. It is suggested that the current state of the law in this area be reviewed before a presentation involving this issue.

B. The Record: It is general policy that all exchanges between the District Attorney and the witness or the District Attorney and the Grand Jury be conducted on the official record.

C. Questions of Grand Jurors.

D. Familiarity with defendant, witness, case, place.

XVI. How to Vote

A. Charges.

B. Move a bill....

XVII. Subpoenas

A. Not for appearances in District Attorney's Office.

B. Not to be used to prepare case for trial. Matter of Hynes v. Lerner, 44 N.Y.2d 329, 405 N.Y.S.2d 649 (1978), appeal dism'd 439 U.S. 888 (1978).

C. Material obtained pursuant to subpoena

1. Production of books and records does not entitle producer to immunity. CPL §190.40(2)(c).

2. May be retained and examined by District Attorney and staff or other investigators to assist Grand Jury in its investigation. Contents may not be disclosed. NOTE - this retention provision is not part of the rules of evidence section, but part of the secrecy section. CPL §190.25(4).

3. Matter of Cabasso v. Holtzman, 122 A.D.2d 944 (2d Dept. 1986) - Grand Jury subpoena duces tecum will not be quashed on basis that compliance with subpoena would violate individual petitioner's privilege against self-incrimination where subpoena is not directed to petitioner personally, but, rather is directed to him only in his capacity as employee of petitioner-corporation.

D. United States v. Dionisio. 410 U.S. 1 (1973), held that the Fourth Amendment does not apply to Grand Jury subpoenas to compel voice exemplars, nor does

the compelled production of voice exemplars before the Grand Jury violate the Fifth Amendnment. Accord, In the Matter of the Special Prosecutor (Onondaga County), Petitioner v. G.W. (Anonymous), Respondent, 95 Misc.2d 298, 407 N.Y.S.2d 112 (Sup. Ct. Onondaga Co. 1978) but see People v. Perri, 72 A.D.2d 106, 423 N.Y.S.2d 674 (2d Dept. 1980), aff'd, 53 N.Y.2d 957, 441 N.Y.S.2d 444 (1981) (defendant from whom handwriting exemplar was compelled by a subpoena ad testificandum, rather than a subpoena duces tecum or a court order, received immunity). See also Matter of District Attorney of Kings County v. Angelo G., 48 A.D.2d 576, 582, 371 N.Y.S.2d 127, 133 (2d Dept. 1978), appeal dism'd 38 N.Y.2d 923, 382 N.Y.S.2d 980 (1976).

E. Matter of Eco's Food Co., Inc. v. Kuriansky, 100 A.D.2d 878, 474 N.Y.S.2d 136 (2nd Dept. 1984) - Motion to quash GJ subpoena duces tecum should be denied where witness produces no concrete evidence that subpoenaed documents have no conceivable relevance to GJ investigation - GJ subpoenas presumptively valid.

Matter of Application of Doe, 121 Misc.2d 93, 467 N.Y.S.2d 326 (Sup. Ct., Bronx C. 1983) - DA's application to amend subpoena duces tecum, which mistakenly did not specify two year time period for which business records were sought, granted; motion made in timely fashion and court found no evidence of bad faith or violation of any substantial rights.

LAW GOVERNING INDICTMENTS AND BILLS OF PARTICULARS

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LAW GOVERNING INDICTMENT AND BILLS OF PARTICULARS

Table of Contents

I. LAW GOVERNING INDICTMENTS

Introduction

This chapter will treat the law governing indictments, specifically CPL Articles 200 and 210, the form, content, and sufficiency of an indictment and the procedure and law governing a motion to dismiss an indictment.

A. Definition

An indictment is a written accusation by a grand jury, filed with a superior court, charging a person, or two or more persons jointly, with the commission of a crime, or with the commission of two or more offenses at least one of which is a crime. CPL §200.10. Except as used in Article 190, the term indictment includes a superior court information. Id.

A superior court information is a written accusation by a district attorney filed in a superior court pursuant to Article 195, charging a person, or two or more persons jointly, with the commission of a crime, or with the commission of two or more offenses, at least one of which is a crime. A superior court information may include any offense for which the defendant was held for the action of the grand jury and any offense or offenses properly joinable therewith pursuant to CPL §§200.20 and 200.40, but does not include an offense not named in the written waiver of indictment executed pursuant to §195.20. A superior court information has the same force and effect as an indictment and all procedures and provisions of law applicable to indictments are also applicable to superior court informations, except where otherwise expressly provided. CPL §200.15.

B. Nature, Purpose and History

The right to be charged by an indictment from a grand jury before being tried for an infamous crime is explicitly guaranteed by Section 6 of Article I of the New York State Constitution. An "infamous" crime is one where punishment might be for more than one year in prison. People v. Bellinger, 269 N.Y. 265 (1935); People v. Van Dusen, 56 Misc.2d 107, 287 N.Y.S.2d 741 (Ontario Co. Ct. 1967). This is exclusive of misdemeanors. People v. Mannett, 154 App. Div. 540, 139 N.Y.S. 614 (1st Dept. 1913); Corr v. Clavin, 96 Misc.2d 185, 409 N.Y.S.2d 334 (Sup. Ct. Nassau Co. 1978).

The right to a grand jury indictment is dependent solely upon the State Constitution since it has been held that the grand jury provision embodied in the Fifth Amendment to the Federal Constitution is not applicable to the States. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111 (1884). However, New York cases continue to construe the right as a fundamental one and a matter of substantive due process. See generally People v. Mackey, 82 Misc.2d 766, 371 N.Y.S.2d 559 (Suffolk Co. Ct. 1975).

The fundamental nature of the right to an indictment by a grand jury completely precluded any possibility of waiver of that right by a defendant prior to 1974. Simonson v. Carin, 27 N.Y.2d 1, 313 N.Y.S.2d 246 (1970). However, Article I, Section 6, has been amended to permit waiver of the indictment requirement by a defendant, with the consent of the district attorney, except for crimes punishable by death or life imprisonment. Upon waiver, the defendant is prosecuted on an information filed by the district attorney.

Historically, the requirement of an indictment as a basis for prosecuting infamous crimes was said to be based on the need to protect

people from potentially oppressive acts by the government in the exercise of its prosecutorial function. Thus, before an individual may be publicly accused of an infamous crime, the state must convince a grand jury composed of the accused's peers that there exists reasonable cause to believe that the accused is guilty of criminal action.

In more specific terms, an indictment has been considered to be a necessary method of providing the defendant with fair notice of the accusations against him, so that he will be able to prepare a defense. See generally People v. Armlin, 6 N.Y.2d 231, 189 N.Y.S.2d 179 (1959). This function is founded upon the notice requirement of Article I, Section 6, and to achieve this purpose, the indictment has historically been required to charge all the legally material elements of the crime or crimes of which the defendant is accused, and state that the defendant, in fact, committed the acts which comprised these elements. See also People v. Smoot, 112 Misc.2d 877, 447 N.Y.S.2d 575 (Sup. Ct. Kings Co. 1981), aff'd, 86 A.D.2d 880, 450 N.Y.S.2d 397 (2d Dept. 1982) (where defendant never had any reason to believe, either from the indictment or bill of particulars, that at trial he would have to defend against the charge that he possessed a weapon at the time of arrest, the indictment was dismissed). By contrast, see People v. Natoli, 112 Misc.2d 1069, 448 N.Y.S.2d 124 (Sup. Ct. Kings Co. 1982) where the court rejected defendant's argument that he did not know the precise charges against him. The prosecutor's submission to the grand jury of some, but not all of those charges listed in the felony complaint does not warrant the indictment's dismissal when the defendant was on notice at all times of the seriousness of the charges before him. However, the court noted a contrary result would be required where an indictment charges a defendant

with more serious offenses than any listed in the felony complaint and where the prosecutor knew at all times that the more serious charges would be presented to the grand jury. Similarly, in People v. Sterling, 113 Misc.2d 552, 449 N.Y.S.2d 574 (Nassau Co. Ct. 1982), the court found that the defendants had adequate constitutional notice of the nature of the charges against them. The defendants had, through pretrial hearings on the wiretaps in this case, obtained adequate notice prior to trial; see also People v. Craft, 87 A.D.2d 662, 448 N.Y.S.2d 847 (3d Dept. 1982) (where the court rejected the defendant's argument that indictment was defective for not alleging essential elements of the crime charged).

A second function of the indictment has traditionally been to provide some means of ensuring that the crime for which the defendant is brought to trial is, in fact, the one for which he was charged, rather than some alternative seized upon by the prosecution in light of new evidence, see People v. Branch, 73 A.D.2d 230, 426 N.Y.S.2d 291 (2d Dept. 1980).

Finally, the indictment has traditionally been viewed as the proper means of indicating the specific crime or crimes for which the defendant has been tried, in order to avoid subsequent attempts to retry him for the same charge or charges. This function is based upon the constitutional prohibition against double jeopardy. (see People v. Branch, supra.)

The historical development of the form of indictment presently used in New York illustrates a continuing attempt by the legislature to implement a more realistic approach to the basic requirements of a valid indictment. Under the common law, the indictment was an intricate work of art which all too often served to confuse rather than to inform the

defendant and his counsel. Utter perfection of form was essential to the validity of the common law indictment.

With the enactment of the Code of Criminal Procedure (C.C.P.) in 1881, the legislature provided an alternate and considerably less complex form of indictment, designed to prevent dismissals for mere technical defects, while ensuring that the accused would be adequately informed of the charges against him. Thus, under C.C.P. §275, an indictment was required to contain a plain and concise statement of facts constituting the crime.

Though considerably less complex than the common-law indictment, the section 275 indictment became known as the "long-form" indictment following the authorization by the legislature in 1929 of the "simplified" indictment, which merely required a statement of the crime charged. C.C.P. §295-b. Presumably, then, the "simplified" indictment was complete by merely citing the section of the law which the defendant was accused of violating. Because of the defendant's right to a bill of particulars on demand under C.C.P. §295-b, this type of indictment usually passed judicial scrutiny. See generally People v. Bogdanoff, 254 N.Y. 16 (1930). Today, the simplified indictment may no longer be used in New York, as it was not retained when the Criminal Procedure Law (CPL) was enacted to replace the Code in 1971. One reason for this change was that the simplified indictment, as a practical matter, often told the defendant little about the nature of the crime he was accused of committing.

The development of modern discovery rules in criminal cases has diminished the significance of the indictment as a provider of information. See CPL §240 et seq. For example, the need to use an indictment

as a means of protecting the accused from double jeopardy has been considerably reduced by the modern practice of maintaining full records of criminal proceedings which may be considered by subsequent courts. Similarly, the function of the indictment as a means of assuring that the defendant is tried for the same crime of which he has been accused is of less significance, as a result of permissive examination of grand jury minutes and stenographic notes when a challenge is made on those grounds. CPL §210.30.

Careful consideration of modern criminal procedure in New York leads to the conclusion that the essential function of a grand jury indictment is simply to notify the defendant of the crime of which he has been charged. This purpose is reflected by the present statutory provisions controlling the form of the indictment (CPL §200.50) which are essentially quite similar to the former "long-form" indictment used under the Code of Criminal Procedure.

C. Form and Content of Indictment

CPL §200.50 sets forth the required form and content of an indictment. Under this section the indictment must contain the name of the superior court in which the action is to be filed. CPL §200.50.

(1) Title

The indictment must also contain the title of the action and, where the defendant is a juvenile offender, a statement in the title that the defendant is charged as a juvenile offender. The title should contain the name of the parties, specifically, "The People of the State of New York" as plaintiff and the name of the defendant, and in addition, any aliases that the defendant is known to use. If the true name is not known, a fictitious one, such as "John Doe" may be used along with a

sufficient description of the subject of the indictment. See People v. Doe, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (Nassau Co. Ct. 1973); CPL §200.50(2).

(2) Charging Counts

The indictment must contain a separate accusation or count addressed to each offense charged, if there is more than one. CPL §200.50(3); see also People v. Armlin, 6 N.Y.2d 231, 189 N.Y.S.2d 179 (1959). It must also contain a statement in each count that the grand jury, or where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense. CPL §200.50(4).

(3) Name of County

By case law, the indictment must contain a designation of the county in which the indictable offense occurred. The courts have found that this is necessary to establish the "[s]ufficiency of the indictment and the power of the court to try the defendants." People v. Fien, 292 N.Y. 10 (1944); People v. Bradford, 206 N.Y.S.2d 343 (Ct. of Gen. Sessions, N.Y. Co. 1960). However, the designation of the criminal act occurring within the county is not an absolute jurisdictional prerequisite.

(4) Date the Offense Was Committed

The date that the indictable offense was allegedly committed should be stated as accurately as possible. Unless the element of time is material to the crime charged, the courts will not require complete exactness. People v. Player, 80 Misc.2d 177, 362 N.Y.S.2d 773 (Suffolk Co. Ct. 1974). The date is required to ensure that the defendant has sufficient information to aid in the preparation of his defense. How-

ever, under modern practices, more specific information may be obtained by a motion for a bill of particulars.

The adequacy of the time period designated by the People was the subject of a recent Court of Appeals decision in People v. Morris, 61 N.Y.2d 290, 473 N.Y.S.2d 769 (1984). Although the indictment alleged that the crimes took place during the month of November, the People's bill of particulars narrowed the time period to the last 24 days of the month. The Court determined that under the circumstances of this case the time period asserted was a sufficient reasonable approximation. The Court noted that CPL §200.50(6) does not require an exact date and time, but only a statement that the crime occurred "on or on or about a designated date or during a designated period of time." People v. Morris, 61 N.Y.2d at 294. See Bellacosa, Supplementary Practice Commentary (1984) CPL §200.50. See also People v. Willette, 109 A.D.2d 112, 490 N.Y.S.2d 290 (3d Dept. 1985); People v. Cassiliano, 103 A.D.2d 806, 477 N.Y.S.2d 435 (2d Dept. 1984), cert. denied, 105 S.Ct. 1176 (1985); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dept. 1984).

(5) Signatures of the Foreman of the Grand Jury and the District Attorney

In the absence of the foreman, the acting foreman may sign. If the accusatory instrument is a superior court information, this signature is not required. As to the signature of the district attorney, it is a clear directive of the statute that the instrument contain the signature. This requirement is deemed satisfied if the signature of the assistant district attorney is affixed to the instrument. Whether the absence of this signature is fatal is an open question, but, case law suggests that it is not, the signature being deemed directory, not mandatory. People

v. Rupp, 75 Misc.2d 683, 348 N.Y.S.2d 649 (Sup. Ct. Sullivan Co. 1973).

(6) Designation of Offense Charged

Each offense charged must be stated. This is designed to aid the defendant in the preparation of his defense and to avoid future double jeopardy issues. People v. Armlin, 6 N.Y.2d 231, 189 N.Y.S.2d 179 (1959). It is sufficient to name the offense and cite the appropriate statutory section.

(7) Factual Allegations

The indictment must contain in each count a plain and concise factual statement which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to apprise clearly the defendant or defendants of the conduct which is the subject of the accusation. CPL §200.50(7)(a). Where the indictment charges an armed felony offense as defined in CPL §1.20(41), the indictment must state that such offense is an armed felony and must specify the particular implement the defendant or defendants possessed, were armed with, used or displayed or, in the case of an implement displayed, must specify what the implement appeared to be. CPL §200.50(7)(b). The determination of whether the factual allegations in an indictment are sufficient is made on a motion to dismiss the indictment as defective. This area is discussed in Section I (1), infra.

D. Joinder and Severance of Offenses

(1) Generally

Joinder is the uniting of several distinct offenses into the same indictment. Although only one offense can be charged in each count of an indictment [People v. Brannon, 58 A.D.2d 34, 394 N.Y.S.2d 974 (4th Dept.

1977)], a variety of offenses may be charged in an indictment containing several counts. The rules governing joinder are stated in CPL §200.20(2), which delineates four separate permissible joinder situations:

(1) Joinder is permitted when the multiple offenses are based upon the same act or criminal transaction. CPL §§200.20(2)(a), 40.10(a).

(2) Although not based upon the same act or criminal transaction, offenses may be joined when proof of one offense would be material and admissible as evidence in chief upon a trial of the other. CPL §200.20 (2)(b).

(3) Two or more offenses are joinable to each other if they are defined by the same or similar statutes and, consequently, are "the same or similar in law." CPL §200.20(2)(c).

(4) Any two offenses are joinable to each other, although not joinable under paragraphs (1) to (3) above, if they each are independently joinable with another offense charged under paragraphs (1) to (3). Any other offense joinable with any of these three initial offenses may also be included in the indictment. CPL §200.20(2)(d).

Indictments must charge at least one crime and, unlike the former law as set forth in the Code of Criminal Procedure, an indictment may charge a petty offense (i.e., a violation) provided it also charges at least one crime. CPL §200.20(1).

Each count of an indictment is separate, distinct, and independent of the other. [People v. Young, 29 A.D.2d 618, 285 N.Y.S.2d 730 (4th Dept. 1967), rev'd on other grounds, 22 N.Y.2d 785, 292 N.Y.S.2d 696 (1968)], and each count is to be regarded as a separate indictment. [People v. Delorio, 33 A.D.2d 350, 308 N.Y.S.2d 131 (3d Dept. 1970);

People v. Johnson, 46 A.D.2d 123, 361 N.Y.S.2d 921 (1st Dept. 1974), rev'd on other grounds, 39 N.Y.2d 364, 384 N.Y.S.2d 108 (1976)].

(2) Joinder of Offenses Based upon the Same Act or Criminal Transaction: CPL §200.20(2)(a)

CPL §200.20(2)(a) provides that offenses are joinable when they arise from the same act or "criminal transaction," as that term is defined in CPL §40.10(2).

CPL §40.10(2) states that a criminal transaction is "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either

(1) so closely related and connected in point of time and circumstances of commission as to constitute a single criminal incident, or

(2) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture."

Thus, when CPL §200.20(2)(a) is read in conjunction with its statutory forerunner, Code of Criminal Procedure §279, and CPL §40.10(2), it appears that the legislative policy of New York is to permit joinder of charges into one indictment in at least two distinct situations:

(1) when more than one offense is committed by a single act, or

(2) when several acts, closely related in time or circumstances so as to constitute a single incident, result in the commission of two or more offenses.

See Waxner, New York Criminal Practice, §9.4(1) (1977). See also People v. Kacee, 113 Misc.2d 338, 448 N.Y.S.2d 1002 (Sup. Ct. N.Y. Co. 1982), where the court held that although the two counts of the indictment

charging the defendant with attempted extortion and solicitation of a bribe were legally inconsistent, CPL §200.20(2)(a) allows joinder of offenses based upon the same act or same transaction. Thus, the court rejected the defendant's argument that the two counts could not be based on the same facts.

Although these points are adapted from the language of C.C.P. §279 and are not in effect today, New York cases have incorporated these notions into the present statutory scheme embodied in §200.20(2)(a) of the CPL. These cases are analyzed in the sections below.

(3) Joinder of Multiple Offenses Committed by a Single Act

In People v. Lasko, 43 Misc.2d 693, 252 N.Y.S.2d 209 (Rensselaer Co. Ct. 1964), the defendant's scuffle with an arresting officer resulted in a two-count indictment which charged the felony of assault in the second degree and the misdemeanor of resisting arrest. The court sustained the validity of the indictment by stating:

> [w]hen there are several charges for the same act or transaction, constituting different crimes...the whole may be joined in one indictment...in separate counts.
>
> Lasko, 252 N.Y.S.2d at 212.

Similarly, in People v. Hayner, 198 Misc.2d 101, 97 N.Y.S.2d 64 (Sup. Ct. Broome Co. 1950), joinder of charges of rape and incest, based on the same act of sexual intercourse between defendant and his daughter, was permitted, and in People v. Rudd, 41 A.D.2d 875, 343 N.Y.S.2d 17 (3d Dept. 1973), the court held that the joinder of counts of driving with a blood alcohol content of more than .15% and of driving while intoxicated, although arising out of a single transaction, did not constitute double jeopardy. But cf. People v. Serrano, 119 Misc.2d 321, 462 N.Y.S. 989

(Sup. Ct. Kings Co. 1983) (where the court held that because separate statutory provisions were violated, separate prosecutions were permissible.)

(4) Joinder of Multiple Offenses Linked by Time or Circumstances

In People v. Morgan, 34 Misc.2d 804, 229 N.Y.S.2d 128 (Westchester Co. Ct. 1962) the court held that charges of burglary and larceny committed on the same day on the same premises, and a charge of felonious possession of a loaded firearm on the same occasion, were properly joined in one indictment to withstand a demurrer. The court particularly noted the defense counsel's failure to affirmatively establish that the several crimes were not in fact connected together.

In People v. Colligan, 9 N.Y.2d 900, 216 N.Y.S.2d 708 (1961), the defendant and another were indicted in a three count indictment which charged that on the same day, the defendants committed three separate crimes in different locations in a four-story residential building in New York City. The charges stemmed from a robbery on the third floor, a robbery on the fourth floor, and a homicide in the basement. The defendants were convicted despite the fact that, as stated in People v. Gibbs, 36 Misc.2d 768, 233 N.Y.S.2d 904 (Oneida Co. Ct. 1962):

> [T]he only items of similarity between the crimes were a common defendant, a common day, and a basic intent to rob. In all other respects, the counts differed as to location, time and victim. Gibbs, 233 N.Y.S.2d at 908.

In People v. 80 Main Street Theater, 88 Misc.2d 471, 388 N.Y.S.2d 543 (Nassau Co. Ct. 1976), the defense contested the validity of an indictment in an obscenity prosecution by arguing that joinder was impermissible because the exhibition of one film is an act in itself and

the act is complete when the film's exhibition concludes. The court rejected this contention, however, and held that joinder was proper because both films were shown as a single performance on the dates specified in the indictment and, therefore, they were sufficiently related and connected in point of time and circumstance of commission to warrant joinder. See also, People v. Grate, 122 A.D.2d 853, 505 N.Y.S.2d 720 (2d Dept. 1986).

However, joinder of two crimes in one indictment was prejudicial to the defendant in People v. Pepin, 6 A.D.2d 992, 176 N.Y.S.2d 15 (4th Dept. 1958). There, the conviction of the defendant was reversed because the indictment charged him in one count as being a co-perpetrator of a robbery on July 18, 1956, and in a separate count, the sole perpetrator of a robbery on August 8, 1956. The court concluded that both crimes were wholly unrelated. On the other hand, in People v. Ranellucci, 50 A.D.2d 105, 377 N.Y.S.2d 218 (3d Dept. 1975), the appellate court refused to declare invalid an indictment which charged a grand larceny in April, a grand larceny in June, and a grand larceny in July. The prosecution offered the testimony of an accomplice who said that he and the defendant had acted together in carrying out the three thefts. Moreover, the court noted that the defendant was not prejudiced by the indictment in view of the fact that the jury acquitted him on two of the three charges.

(5) Joinder of Offenses Where Proof of One Would Be Material on Proof of Another: CPL §200.20(2)(b)

Even when based on two different criminal transactions and thereby not joinable under CPL §200.20(2)(a), two offenses are joinable under CPL §200.20(2)(b) when proof of one offense would be material and admissible

as evidence in chief upon a trial of a second. See generally People v. DeVyver, 89 A.D.2d 745, 453 N.Y.S.2d 915 (3d Dept. 1982). People v. Bongarzone , 69 N.Y.2d 842, ___ N.Y.S.2d ___ (1987); People v. Diaz, 122 A.D.2d 279, 504 N.Y.S.2d 778 (2d Dept. 1986).

Subsection (2)(b) is an adoption of the Molineux doctrine as one of the criteria for joinder of offenses. In People v. Molineux, 168 N.Y. 264 (1901), the Court of Appeals outlined the principle that proof of another crime is competent to prove the specific crime charged only when it tends to establish:

(1) motive;

(2) intent;

(3) the absence of mistake or accident;

(4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other; or

(5) the identity of the person charged at trial.

An illustrative use of the Molineux doctrine in the joinder situation occurred in People v. Yuk Bui Yee, 94 Misc.2d 628, 405 N.Y.S.2d 386 (Sup. Ct. N.Y. Co. 1978) (defendant was charged with thirteen offenses in the indictment); see also People v. Johnson, 48 N.Y.2d 925, 425 N.Y.S.2d 55 (1979) (evidence which was necessary to prove that the defendant was in possession of narcotics was admissible as evidence in chief upon a burglary count).

For further cases involving joinder under the "common scheme or plan" notion of the old C.C.P. §279, see People v. Kenny, 64 Misc.2d 615, 315 N.Y.S.2d 313 (Wayne Co. Ct. 1970), where a forgery count and a petit larceny charge were joined; see also People v. Trammell, 50 Misc.2d

179, 267 N.Y.S.2d 434 (Sup. Ct. Erie Co. 1966), where two counts of conspiracy and perjury were joined.

Where multiple charges of an indictment occur at distinct times and are not part of a common scheme or plan, and evidence of one can not be used as evidence in chief of another, joinder is not permissible. See People v. Pepin, 6 A.D.2d 992, 176 N.Y.S.2d 15 (4th Dept. 1958) (one count of robbery on July 18 and one count of robbery on August 8); People v. Namolik, 8 A.D.2d 685, 184 N.Y.S.2d 700 (4th Dept. 1959) (one count of theft of an automobile, one count of burglary of a tavern, and one count of theft of a wristwatch); People v. Fringo, 13 A.D.2d 887, 215 N.Y.S.2d 206 (3d Dept. 1961) (one count of possession of obscene prints, and one count of possession of fireworks for sale).

(6) Joinder of Offenses Defined by the Same or Similar Statutory Provision: CPL §200.20(2)(c)

CPL §200.20(2)(c) provides that when two or more offenses are not joinable pursuant to subdivisions (2)(a) or (2)(b), they may nevertheless be charged in the same indictment if they are defined by the same or similiar statutory provisions and consequently are the same or similar in law.

(7) Joinder of Offenses not Joinable with Each Other but Joinable to Other Offenses Charged: CPL §200.20(2)(d)

CPL §200.20(2)(d) provides that when two counts of an indictment are not joinable to each other pursuant to subsections (a), (b), or (c) of that statute, but are joinable with a third offense contained in the indictment pursuant to those subsections, the joinder of all three offenses is permitted.

> The provision can be illustrated in this way. The first count of the indictment charges an assault committed on January

> 1st. The second count charges a robbery which occurred on January 15th involving a different victim. The two charges are not joinable. However, the third count charges an assault committed in the course of the January 15th robbery. The second count, therefore, is joinable with the third pursuant to CPL §200.20(2)(a). The first count may also be joined with the third pursuant to CPL §200.20(2)(c). Thus, all of the charges may be recited in one indictment under the authority of CPL §200.20(2)(d) ... [A]ny other offense joinable with the two unrelated counts may be joined in the indictment. Thus, if the assault charged in the first count involved a loaded pistol, a charge of a felonious possession of firearms [Penal Law §265.05(2)] may be joined with it as well as with two other counts charging unrelated offenses.
>
> Waxner, New York Criminal Practice, §9.4(4), Matthew Bender, (1977).

See generally People v. Maldonado, 75 A.D.2d 558, 427 N.Y.S.2d 414 (1st Dept. 1980), where the court held that as a number of counts of assault and attempted murder on three different individuals, two of which involved the use of a gun, were joinable as based on the same statutes, the gun charge was joinable with all of them in the same indictment.

(8) "Superjoinder" and the Case of People v. D'Arcy

In People v. D'Arcy, 79 Misc.2d 113, 359 N.Y.S.2d 453 (Allegany Co. Ct. 1974), the court upheld the joinder of eighty-five separate misdemeanor counts relating to six separate criminal offenses in a single indictment by resorting to all four permissible joinder situations as set out in CPL §200.20(2). The case is illustrative of the complex joinder situations which can develop when an attempt is made to join charges of multiple offenses into a single indictment. The myriad of joinder situations which are theoretically possible under CPL §200.20(2) become reality in the D'Arcy decision. People v. D'Arcy, 359 N.Y.S.2d at

467-470.

(9) Severance: CPL §200.20(3)

The joining of offenses that have no relationship to each other, except that they are defined by the same or similar statutory provision, can severely prejudice a defendant, especially where joinder is based on CPL §200.20(2)(c), and not the strength of the specific evidence regarding each one. In People v. Babb, 194 Misc. 5, 88 N.Y.S.2d 212 (Gen. Sess. N.Y. Co. 1949), the first count of an indictment charged the defendant with manslaughter resulting from the performance of an abortion. The next two counts related to the same abortion, but the last three counts related to abortions performed on three different persons on separate dates. Upon the defendant's motion, the last three counts were severed and ordered to be tried separately. The court stated that it would be difficult for a jury to hear evidence of death and then disregard it when considering the charges of abortion which were unrelated to the manslaughter.

In People v. Pepin, 6 A.D.2d 992, 176 N.Y.S.2d 15 (4th Dept. 1958), the indictment charged the codefendants with committing a robbery on July 18, but charged only one of the codefendants for a robbery committed on August 8. The court held that a severance motion should have been granted because the joinder was prejudicial to the defendant who participated in only one of the crimes.

By contrast, in People v. Brownstein, 21 Misc.2d 717, 197 N.Y.S.2d 755 (Ct. of Spec. Sess. of N.Y.C., N.Y. Co. 1960) the defendants failed to meet their burden of proof to obtain a trial order of severance. They were charged with 251 counts of permitting violations of the Multiple Dwelling Law. They moved to sever these charges, which involved five

different buildings, and would have required five separate trials instead of one. The court ruled that severance was unwarranted in the interests of justice, since the five trials would require substantially the same witnesses and the resolution of substantially the same issues of fact.

In determining the possible prejudicial effects of a denial of a severance motion, appellate courts place significant weight on the actual outcome of the trial. For example, in People v. Ranellucci, 50 A.D.2d 105, 377 N.Y.S.2d 218 (3d Dept. 1975), the trial court's refusal to sever a charge of grand larceny in the second degree from two other charges was not reversible error in light of the fact that the jury acquitted the defendant on two of the three charges. Similarly, in People v. Peterson, 42 A.D.2d 937, 348 N.Y.S.2d 137 (1st Dept. 1973), aff'd, 35 N.Y.2d 659, 360 N.Y.S.2d 640 (1974), a denial of a motion to sever various counts of robbery, burglary, larceny and other offenses was not prejudicial to the defendant because the jury acquitted him on three of the counts and the evidence of guilt on the remaining counts was overwhelming. (see also People v. Lowe, 91 A.D.2d 1101, 458 N.Y.S.2d 357 (3d Dept. 1983).

(10) Consolidation of Indictments: CPL §200.20(4); CPL §200.20(5)

When two or more indictments have been filed charging the same defendant or defendants with separate offenses which are joinable in a single indictment pursuant to CPL §200.20(2), the court may, upon motion of either the district attorney or defense counsel, order that the indictments be consolidated and treated as a single indictment for trial purposes. CPL §200.20(4). As in People v. Godek, 113 Misc.2d 599, 449 N.Y.S.2d 428 (Sup. Ct. Suffolk Co. 1982), cert. denied, 464 U.S. 1047

(1984), where defendant was charged with eighteen separate counts of promoting obscene sexual performance by a child, twelve of those counts were consolidated. The court found no rational distinction between the first twelve counts which relate to materials seized in the motel room. All these materials constituted integral parts of a single criminal venture. However, the remaining six counts were not consolidated as these materials were seized from defendant's vehicle and did not arise from the same fact pattern. See People v. Lane, 56 N.Y.2d 1, 451 N.Y.S.2d 6 (1982) for a discussion of the requisite showing to defeat a motion to consolidate. By the same statute, any nonjoinable offense contained in the consolidated indictments may be prosecuted separately since the consolidation is for the limited purpose of trying the joinable offenses.

(11) Joinder and Severance of Multiple Defendants in a Single Indictment: CPL §200.40(1)

CPL §200.40(1) provides that two or more defendants may be jointly charged in one indictment as long as:

a) all such defendants are jointly charged with every other offense alleged therein; or

b) all the offenses charged are based upon a common scheme or plan or;

c) all the offenses charged are based upon the same criminal transaction as that term is defined in CPL §40.10(2).

In New York, prior to 1926, a defendant had an absolute right to a separate trial. Thereafter, the law was amended to permit courts, in their discretion, to jointly try defendants who had been jointly indicted. C.C.P. §391. This provision was the forerunner of CPL

§200.40.

The justification for a joint trial of multiple defendants is the economy and the expedition of a single trial. See People v. Krugman, 44 Misc.2d 48, 252 N.Y.S.2d 846 (Sup. Ct. Kings Co. 1964). Thus, CPL §200.40(1) permits the court, upon a motion showing good cause by the People or the defendant, to order separate trials of one defendant from others, or to order that two or more defendants be tried separately from two or more other defendants.

It should be noted that an amendment to CPL §200.40(1), enacted in 1974, provides that the severance motion must be made within the time period specified by the omnibus pretrial motion machinery as set forth in CPL §255.20.

The defendant was entitled to a new trial in People v. Potter, 52 A.D.2d 544, 382 N.Y.S.2d 79 (1st Dept. 1976), where the prosecution argued in summation that evidence relating to an offense to which a co-defendant pleaded guilty could be used as evidence against the defendant, and the trial court failed to correct this error by proper jury instructions.

In Bruton v. United States, 391 U.S. 123 (1968), it was held that when two defendants are tried together, a codefendant's extrajudicial confession is not admissable even if the trial court gives a limiting instruction that the confession could only be used against a codefendant, since admitting such a confession violates defendant's right of confrontation. See also, Cruz v. New York, ___ U.S. ___, 107 S.Ct. 1714, (1987) (reaffirming Bruton principle). However, in Richardson v. Marsh, ___ U.S. ___, 107 S.Ct. 1702 (1987), the Supreme Court declined to extend the Bruton rationale to bar admission of a nontestifying codefendant's

confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to her existence.

(a) Severance Because Defendant Will Call Codefendant as Witness

> A... problem occurs when a defendant desires to call his codefendant as a witness in his behalf. He may have a constitutional right to do so (People v. Caparelli, 21 A.D.2d 882, 251 N.Y.S.2d 803), but the codefendant has a constitutional right to remain silent even to the extent of not being compelled to claim his privilege in the presence of the jury trying him [citations omitted]. In such a case, separate trials seem essential.
>
> Krugman, 252 N.Y.S.2d at 850 (emphasis in original).

(b) Burden and Standard of Proof

A court is not required to sever trials where the possibility of the codefendant's testimony is merely colorable or speculative. People v. Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369, cert. denied sub. nom. Victory v. New York, 461 U.S. 905 (1974). See also People v. Johnson, 124 A.D.2d 1063, 508 N.Y.S.2d 728, (4th Dept. 1986).

(12) Consolidation of Indictments Against Different Defendants: CPL §200.40(2)

CPL §200.40(2) provides that where each of two indictments charges the same offense but against different defendants, the multiple indictments may be consolidated by the court in its discretion upon application of the People. In short, where both defendants could have been jointly charged pursuant to CPL §200.40(1) in a single indictment, but for some reason were not, consolidation may be ordered.

Subdivision 2 also permits consolidation of indictments containing

a count or counts in common against different defendants; consolidation is so ordered for the limited purpose of trying the defendants on those charges which are applicable to all. In such a case, the separate indictments remain in existence with regard to any offenses which are not common to all and may be prosecuted separately.

The offenses contained in the multiple indictments which are the subject of a consolidation order must be identical. In People v. Valle, 70 A.D.2d 544, 416 N.Y.S.2d 600 (1st Dept. 1979) a defendant was indicted on charges of criminal possession of weapons in the third degree and criminal possession of a controlled substance in the seventh degree. From the same incident, two others were indicted on charges of criminal possession of drugs in the first degree and criminal sale of drugs in the third degree. Over objection, consolidation was ordered, but the Appellate Division reversed the conviction on the grounds that the charges contained in the two consolidated indictments were not the same.

It has been held that it is error to consolidate two indictments when only one of the multiple defendants was charged with gun possession in one of the indictments and the charge was not tried separately. People v. Minor, 49 A.D.2d 828, 373 N.Y.S.2d 354 (1st Dept. 1975). However, reversal for misjoinder was not required since the defendant failed to raise the claim prior to trial and counsel for both defendants specifically stated to the court that they had no objection to the joint trial.

Absent a motion for consolidation by the People pursuant to CPL §200.40(2), the trial court was without authority to order consolidation of the indictments. Gold v. McShane, 74 A.D.2d 616, 425 N.Y.S.2d 341 (2d Dept. 1980), appeal dism'd, 51 N.Y.2d 910, 434 N.Y.S.2d 992 (1980).

The provision for consolidation of multiple indictments against different defendants had no counterpart in law prior to the enactment of the Criminal Procedure Law in 1971; accordingly, case law on the subject is relatively sparse.

(13) Duplicitous Counts Prohibited

Each count of an indictment may charge one offense only. CPL §200.30(1). When a statute defines, in different subsections, different ways of committing an offense, and the indictment alleges facts which would support a conviction under either subdivision, it charges more than one offense. See CPL §200.30(2). Such an indictment is duplicitous, and accordingly subject to a motion to dismiss [see discussion in Section I.(1)(a)(i), infra)]. See generally People v. Nicholson, 98 A.D.2d 876, 470 N.Y.S.2d 854 (3d Dept. 1983) (where the court determined that duplicity is an objection directed only to the form of an indictment and is therefore waived by a guilty plea.) For example, in People v. Pries, 81 A.D.2d 1039, 440 N.Y.S.2d 116 (4th Dept. 1981), the court held that accepting eight specific dates from the rape victim in satisfaction of the statutory indictment requirements violated the rule that each count of an indictment may charge only one offense; each separate act of rape was a separate and distinct offense. See also People v. James, 98 A.D.2d 863, 471 N.Y.S.2d 158 (3d Dept. 1983) (where the test for duplicity is whether defendant can be convicted of either of crimes charged in the count if the district attorney waives the other; here the charge of second degree sexual abuse against two victims was duplicitous.)

E. Indictment Where There Is a Previous Conviction

(1) Allegation of Previous Conviction Prohibited

When the fact that the defendant has been previously convicted of

an offense raises an offense of lower grade to one of higher grade (predicate felony), an indictment for such higher offense may not allege such previous conviction. If a reference to previous conviction is contained in the statutory name or title of such an offense, such name or title may not be used in the indictment, but an improvised name or title must be used which, by means of the phrase "as a felony" or in some other manner, labels and distinguishes the offense without reference to the previous conviction. CPL §200.60(1). This subdivision does not apply to an indictment or a count thereof that charges escape in the second degree under Penal Law §205.10 or escape in the first degree under Penal Law §205.15. Ibid.

(2) Requirement that District Attorney File Special Information

An indictment for such an offense must be accompanied by a special information, filed by the district attorney with the court, charging that the defendant was previously convicted of a specified offense. Except as provided in subdivision three, the People may not refer to such special information during the trial nor adduce any evidence concerning the previous conviction alleged therein. CPL §200.60(2).

Failure to file the special information with the indictment does not render the indictment jurisdictionally defective and a defense motion to dismiss on this ground should be denied where the district attorney filed the special information and served a copy on defense counsel after defense counsel made the motion to dismiss. People v. Briggs, 92 Misc.2d 1015, 401 N.Y.S.2d 984 (Jefferson Co. Ct. 1978).

(3) Subsequent Proceedings

After commencement of the trial and before the close of the People's

case, the court, in the absence of the jury, must arraign the defendant upon the special information, and must advise him that he may admit the previous conviction alleged, deny it or remain mute. Depending upon the defendant's response, the trial of the indictment must then proceed as follows:

(1) If the defendant admits the previous conviction, that element of the offense charged in the indictment is deemed established, no evidence in support thereof may be adduced by the People, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.

(2) If the defendant denies the previous conviction or remains mute, the People may prove that element of the offense charged before the jury as a part of their case. CPL §200.60(3).

Note: Nothing contained in CPL §200.60 precludes the People from proving a prior conviction before a grand jury or relieves them from the obligation or necessity of so doing in order to submit a legally sufficient case. CPL §200.60(4).

F. Amendment

At any time before or during trial, the court may, upon application of the People and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the

evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits. Where the accusatory instrument is a superior court information, such an amendment may be made when it does not tend to prejudice the defendant on the merits. Upon permitting such an amendment, the court must, upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense. CPL §200.70(1).

An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it; nor may an indictment or superior court information be amended for the purpose of curing:

(1) a failure of the indictment to charge or state an offense; or

(2) legal insufficiency of the factual allegations; or

(3) a misjoinder of offenses; or

(4) a misjoinder of defendants. CPL §200.70(2).

Where an indictment originally charged the defendant and another with acting in concert in a robbery but the charges against the former defendant were dismissed, the indictment cannot be amended on the eve of trial to charge the defendant as the sole perpetrator. The People's remedy is representment of the case to another grand jury. People v. Hill, 102 Misc.2d 814, 424 N.Y.S.2d 655 (Sup. Ct. Bronx Co. 1980). However, pretrial amendment of an indictment was proper to delete the name of a codefendant, who had been acquitted on the merits, since this did not alter the theory of the People's case or prejudice the defendant in any way. People v. Reddy, 73 A.D.2d 977, 424 N.Y.S.2d 238 (2d Dept. 1980). Similarly, "[a]n indictment may be amended before trial or even

during trial with respect to errors concerned with 'names of persons' [citations omitted] provided that upon amendment the court, upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense." People v. Robinson, 71 A.D.2d 779, 419 N.Y.S.2d 320, 321 (3d Dept. 1979).

The defendant, under the circumstances of the case, was not prejudiced by an amendment which substituted "a quantity of heroin" for "a quantity of cannabis sativa" in an indictment charging criminal sale of a controlled substance. People v. Heaton, 59 A.D.2d 704, 398 N.Y.S.2d 177 (2d Dept. 1977). Similarly, it was proper to permit an amendment to the indictment charging attempted bribery to change the alleged official misconduct from not arresting the defendant to releasing the already arrested defendant since an examination of the grand jury minutes revealed that this was the evidence adduced; the theory of the prosecution was not changed. See People v. Salley, 72 Misc.2d 521, 339 N.Y.S.2d 702 (Nassau Co. Ct. 1972). See also People v. Lugo, 122 Misc.2d 316, 470 N.Y.S.2d 525 (1983) (where substitution of a new complaining witness who had signed a corroborating affidavit for the original complainant who did not sign such an affidavit and of whom defendant had no prior knowledge, after 165 days from arraignment, was more than a "purely technical change" permissible in amending indictment and could not be allowed.); People v. Renford, 125 A.D.2d 967, 510 N.Y.S.2d 433 (4th Dept. 1986). (The portion of an indictment charging grand larceny was not fatally defective for its failure to allege specifically value of the property stolen and could be amended during trial).

The trial court committed reversible error when it refused to grant

the People's motion to amend an indictment, which originally charged that one Sabu Ganett sold heroin to Joseph Petronella, to state the defendant's true name Sabu Gary; the indictment was not fatally defective as "[i]t is obvious that the Grand Jury intended to indict the specific person who sold heroin to Petronella on March 12, 1976 ...." People v. Ganett, 51 N.Y.2d 991, 435 N.Y.S.2d 976 (1980).

(a) Indictment May Be Amended on Defendant's Motion

Although CPL §200.70 does not specifically authorize a court to amend an indictment on defendant's motion, nevertheless where such an amendment is necessary to guarantee the defendant his constitutional right to a fair trial, the court must do so. See People v. Cirillo, 100 Misc.2d 527, 419 N.Y.S.2d 820 (Sup. Ct. Bronx Co. 1979) (indictment amended on defendant's motion to strike the prejudicial words, "a narcotics violator," used to describe the alleged recipient of the usurious loan that defendant was charged with arranging).

Note: A defendant may not compel the amendment of an indictment by an Article 78 proceeding. In the Matter of Brown v. Rubin, 77 A.D.2d 608, 430 N.Y.S.2d 112 (2d Dept. 1980).

G. Superseding Indictment

If at any time before entry of a plea of guilty to an indictment or commencement of a trial thereof, another indictment is filed in the same court charging the defendant with an offense charged in the first indictment, the first indictment is, with respect to such offense, superseded by the second and, upon the defendant's arraignment upon the second indictment, the count of the first indictment charging such offense must be dismissed by the court. The first indictment is not, however, superseded with respect to any count contained therein which charges an

offense not charged in the second indictment. A superseding indictment may be filed even when the first accusatory instrument is a superior court information. CPL §200.80.

Any offense contained in a prior indictment must be dismissed in a superseding indictment. In the Matter of Gold v. McShane, 74 A.D.2d 616, 425 N.Y.S.2d 341 (2d Dept.), appeal dism'd, 51 N.Y.2d 910, 434 N.Y.S.2d 992 (1980).

Once a grand jury has heard evidence sufficient to support an indictment, it may vote a superseding indictment without examining the witnesses anew as long as twelve of the original grand jurors vote. On the other hand, it is also proper for the district attorney to call witnesses before the second grand jury that votes the superseding indictment who were not called before the first. People v. Lunney, 84 Misc.2d 1090, 378 N.Y.S.2d 559, 565 (Sup. Ct. N.Y. Co. 1975). Accordingly, where alleged "alibi" witnesses had earlier told police that they were not with defendant at the time of the crime, resubmission to obtain testimony before a second grand jury was not error. People v. Potter, 50 A.D.2d 410, 378 N.Y.S.2d 100 (3d Dept. 1976).

Note: If the People lose their appeal from an order suppressing evidence, they may not obtain a superseding indictment, as their appeal was based on their certification that the granting of the motion to suppress effectively destroyed the People's case. In the Matter of Forte v. Supreme Court, County of Queens, 62 A.D.2d 704, 406 N.Y.S.2d 854 (2d Dept. 1978), aff'd sub nom In the Matter of Forte v. Supreme Court of State of New York, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979).

H. Defendant's Arraignment on Indictment

(1) Arraignment; Requirement that Defendant Appear Personally

A defendant must appear personally to be arraigned on an indictment. See CPL §210.10.

(2) Securing Defendant's Appearance

(a) Defendant in Custody. If the defendant was previously held by a local criminal court for the action of the grand jury, and if he is confined in the custody of the sheriff pursuant to a previous court order issued in the same criminal action, the superior court must direct the sheriff to produce the defendant for arraignment on a specified date and the sheriff must comply with such direction. The court must give at least two days notice of the time and place of the arraignment to an attorney, if any, who has previously filed a notice of appearance on behalf of the defendant with such superior court, or if no such notice of appearance has been filed, to an attorney, if any, who filed a notice of appearance in behalf of the defendant with the local criminal court. CPL §210.10(1).

(b) Defendant at Liberty. If a felony complaint against the defendant was pending in a local criminal court or if the defendant was previously held by a local criminal court for the action of the grand jury, and if he is at liberty on his own recognizance or on bail pursuant to a previous court order issued in the same criminal action, the superior court must, upon at least two days notice to the defendant and his surety and to any person other than the defendant who posted cash bail, and to any attorney who

would be entitled to notice under circumstances prescribed in CPL §210.10(1), direct the defendant to appear before the superior court for arraignment on a specified date. If the defendant fails to appear on such date, the court may issue a bench warrant and, in addition, may forfeit the bail, if any. Upon taking the defendant into custody pursuant to such bench warrant, the executing police officer must without unnecessary delay bring him before such superior court for arraignment. CPL §210.10(2).

(c) Where Indictment Commences Criminal Action

CPL §1.20 states that a criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court. An accusatory instrument is defined as an indictment, an information, a misdemeanor complaint or a felony complaint. See also McClellan v. Transit Authority, 111 Misc.2d 735, 444 N.Y.S.3d 985, 986 (N.Y.C. Civil Ct. Kings Co..1981); But cf. Snead v. Aegis Security Inc. et. al., 105 A.D.2d 1060, 482 N.Y.S.2d 383 (4th Dept. 1984).

If the defendant has not previously been held by a local criminal court for the action of the grand jury and the filing of the indictment constituted the commencement of the criminal action, the superior court must order the indictment to be filed as a sealed instrument until the defendant is produced or appears for arraignment, and must issue a superior court warrant of arrest; except that if the indictment does not charge a felony the court

may instead authorize the district attorney to direct the defendant to appear for arraignment on a designated date. A superior court warrant of arrest may be executed anywhere in the state. Such warrant may be addressed to any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued. It must be executed in the same manner as an ordinary warrant of arrest, as provided in CPL §120.80, and following the arrest the executing police officer must without unnecessary delay perform all recording, fingerprinting, photographing and other preliminary police duties required in the particular case, and bring the defendant before the superior court. CPL §210.10(3).

There is no authority for sealing an indictment for any period beyond that which is required for the appearance of the defendant for arraignment. People v. Ebbecke, 99 Misc.2d 1, 414 N.Y.S.2d 977, 980 (Sup. Ct. N.Y. Co. 1979).

(3) Defendant's Rights on Arraignment

Upon the defendant's arraignment before a superior court upon an indictment, the court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him, and the district attorney must cause him to be furnished with a copy of the indictment. CPL §210.15(1).

The defendant has a right to the aid of counsel at the

arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to obtain the same. CPL §210.15(2).

If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment.

A defendant who proceeds at the arraignment without counsel does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision two which are necessary to effectuate it, and that he may exercise such rights at any stage of the action. CPL §210.15(5).

(4) Court's Instructions on Arraignment

The court must inform the defendant of all rights specified in CPL §210.15(2). The court must accord the defendant oppor-

tunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them. CPL §210.15(3).

(5) Bail

Upon arraignment, the court, unless it intends to make a final disposition of the action immediately thereafter, must, as provided in CPL §530.40, issue a securing order releasing the defendant on his own recognizance or fixing bail or committing him to the custody of the sheriff for his future appearance in such action. CPL §210.15(6).

I. Grounds for Dismissal of an Indictment

(1)Indictment is Defective Within the Meaning of CPL §210.25

(a) Generally

A defendant may move to dismiss the indictment on the ground that it is defective within the meaning of CPL §210.25. See CPL §210.20(1)(a)

CPL §210.25 sets forth three kinds of defects:

(1) lack of substantial conformity to the requirement of Article 200 (form and content) except where such defect can be cured by amendment and the People so move;

(2) the court does not have jurisdiction of the offense charged;

(3) the statute defining the offense is unconstitutional or otherwise invalid.

[i] Indictment Fatally Defective

The two cases which set forth the criteria of specificity in factual

allegations which an indictment must meet are People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978) (indictment charged criminal usury), and People v. Fitzgerald, 45 N.Y.2d 574, 412 N.Y.S.2d 102 (1978) (indictment charged criminally negligent homicide). In Iannone, the indictment charged that defendant on or about specified dates in the County of Suffolk, "not being authorized and permitted by law to do so, knowingly charged, took and received money as interest on a loan of a sum of money from a certain individual at a rate exceeding twenty-five percentum per annum and the equivalent rate for a shorter period." The indictment was held to be sufficient. Iannone, 45 N.Y.2d at 592, 412 N.Y.S.2d at 112.

The Court in Iannone ruled that the sufficiency of an indictment must be considered in light of modern discovery rules and the availability of a bill of particulars. The Court held that the "essential function of an indictment qua document is simply to notify the defendant of the crime of which he stands indicted." Iannone, 45 N.Y.2d at 598, 412 N.Y.S.2d at 116. The Court added that "[w]hen indicting for statutory crimes, it is usually sufficient to charge the language of the statute unless that language is too broad [citations omitted]." Ibid.

In Fitzgerald, the first count of the indictment charged:

> that the defendant [at a named time, date, and place], with criminal negligence, caused the death of one Cara Pollini, while operating a 1967 Ford automobile and striking said Cara Pollini with said automobile.
>
> Fitzgerald, 45 N.Y.2d at 576-77, 412 N.Y.S.2d at 103.

The indictment was held to be sufficient since, under Iannone, it informs the defendant of the basis for the accusation in order that he may

prepare a defense. Fitzgerald, 45 N.Y.2d at 580, 412 N.Y.S.2d at 105. Additionally, the indictment may be coupled with a bill of particulars which sets forth the specific acts underlying the charge. Id.

In People v. Morris, the Court of Appeals upheld an indictment which lacked a precise date for the occurrence of the crime. The bill of particulars provided a reasonable approximation under the circumstances of this case, of the date or dates involved. Significant factors in considering the sufficiency of the dates are the span of time set forth and the knowledge the People have or should have of the exact date or dates of the crime. People v. Morris, 61 N.Y.2d 290, 473 N.Y.S.2d 769 (1984). See People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986); People v. Willette, 109 A.D.2d 112, 490 N.Y.S.2d 290 (3d Dept. 1985); People v. Cassiliano, 103 A.D.2d 806, 477 N.Y.S.2d 435 (2d Dept. 1984), cert. denied, 105 S.Ct. 1176 (1985); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dept. 1984).

See also People v. Jackson, 46 N.Y.2d 721, 413 N.Y.S.2d 369 (1978), where the Court held that an indictment charging sodomy is not fatally defective because it fails to specify the exact nature of the deviate sexual acts allegedly performed, as that information can be supplied in a bill of particulars. See also People v. Nicholas, 70 A.D.2d 804, 417 N.Y.S.2d 495 (1st. Dept. 1979); People v. Setford, 67 A.D.2d 1060, 413 N.Y.S.2d 775 (3d Dept. 1975); People v. Bneses, 91 Misc.2d 625, 398 N.Y.S.2d 507 (Sup. Ct. N.Y. Co. 1977) (failure of burglary indictment to specify object crime not fatal; defect could be cured by a bill of particulars); People v. D'Arcy, 79 Misc.2d 113, 359 N.Y.S.2d 453 (Albany Co. Ct. 1974), distinguishing People v. Thompson, 58 Misc.2d 511, 296 N.Y.S.2d 166 (Saratoga Co. Ct. 1959) [the court in D'Arcy held that the

failure to specify the intended benefit in an indictment charging official misconduct was not fatal].

In People v. Monahan, 114 A.D.2d 380, 493 N.Y.S.2d 898 (2d Dept. 1985), the court held that an indictment was not fatally defective which accused defendant as a principal where the proof adduced at trial established him as an accessory and the prosecutor did not formally move to amend the indictment. See also, People v. Clapper, 123 A.D.2d 484, 506 N.Y.S.2d 494 (3d Dept. 1986) (jury instructions were proper, that defendant charged with a violation of Vehicle and Traffic Law §1192(3) could also be convicted under §1192(2)); People v. Singleton, No. 3156E, slip op. (2d Dept. April 2, 1987) (indictment held sufficient charging defendant with robbery and criminal use of a firearm which alleged only that defendant "displayed what appeared to be a handgun" held sufficient).

An indictment will, of course, be dismissed where the factual allegations per se establish that it does not charge a crime. See People v. Asher, 94 A.D.2d 704, 462 N.Y.S.2d 60 (2d Dept. 1983) (where the court dismissed the indictments for criminal possession of a weapon in the second degree because of failure to charge that weapons were possessed with intent to use them unlawfully against another.) People v. W. D. Boccard & Sons, 74 A.D.2d 654, 425 N.Y.S.2d 130 (2d Dept. 1980) [indictment charging forgery must be dismissed where it alleged that defendant had concealed the markings on a transition piece, (a section of a manhole)]; see also People v. Mohondhis, 86 Misc.2d 800, 383 N.Y.S.2d 824 (Sup. Ct. Queens Co. 1976), where the court granted defendant's motion for a trial order of dismissal because it was proved that the alleged owner of the stolen property was not the owner on the date of the alleged

unlawful possession, as he had been reimbursed by the insurance company.

Note: In People v. Grosunor, 109 Misc.2d 663, 440 N.Y.S.2d 996 (N.Y.C. Crim. Ct. Bronx Co. 1981), the court held the prosecutor's failure to file a nonhearsay affidavit corroborating the factual allegations in the prosecutor's information, as opposed to the failure to allege every material element of the crime, did not constitute a jurisdictional defect.

An indictment may employ a fictitious name, provided that it is accompanied by a description sufficient to establish that defendant is the person charged. People v. Brothers, 66 A.D.2d 954, 411 N.Y.S.2d 714 (3d Dept. 1978); People v. Doe, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (Nassau Co. Ct. 1977).

Note: Defendant must state the nature of the defect in his motion papers. People v. Hicks, 85 Misc.2d 649, 381 N.Y.S.2d 794 (N.Y.C. Crim. Ct. N.Y. Co. 1976).

1. Duplicitous counts

A count in an indictment may not charge more than one offense [CPL §200.30(1)] and it is void as duplicitous if it does. See discussion in Section D(13), supra. However more than one criminal act may be set forth in a count of an indictment, where the two or more acts constitute a single criminal transaction. People v. Branch, 73 A.D.2d 230, 426 N.Y.S.2d 291 (2d Dept. 1980) (one count of an indictment may charge a bank robbery from three different tellers at one bank); People v. Cianciola, 86 Misc.2d 976, 383 N.Y.S.2d 159 (Sup. Ct. Queens Co. 1976) (the number of separate counts of criminal contempt under the Penal Law are determined by the separate subject areas of questioning that took place; People v. Barysh, 95 Misc.2d 616, 408 N.Y.S.2d 190 (Sup. Ct. N.Y.

Co. 1978).

In People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986), defendant was convicted of twenty counts of sodomy, sexual abuse, and endangering the welfare of a child over a period of approximately three years. The Court upheld those counts accusing defendant of endangering the welfare of a child over an approximate two year period since it may be characterized as a "continuing offense". However, the Court held the sodomy and sexual abuse counts to be duplicitous, since the repeated acts could not be treated as "one continuous crime".

2. Waiver

Failure to timely object to facial defects in an indictment constitutes a waiver on appeal. People v. Brothers, 66 A.D.2d 954, 411 N.Y.S.2d 714 (3d Dept. 1978); People v. Dumblauski, 61 A.D.2d 875, 402 N.Y.S.2d 89 (3d Dept. 1978). People v. Grimsley, 60 A.D.2d 980, 401 N.Y.S.2d 643 (4th Dept. 1978). However, if the indictment is defective because it does not charge a crime, such a defect is not waived by a guilty plea. People v. Adams, 28 A.D.2d 708, 280 N.Y.S.2d 974 (2d Dept. 1967). Similarly, if the indictment is defective because it charges only a lesser included offense than the one the defendant had been originally charged with, that defect may not be waived by a guilty plea. People v. Herne, 110 Misc.2d 152, 441 N.Y.S.2d 936 (Franklin Co. Ct. 1981).

[ii] Jurisdictionally Defective

1. No Jurisdiction in County

An indictment must be dismissed as jurisdictionally defective where it fails to state the county where the alleged crime was committed, and the People concede that they could not prove particulars other than those stated in the indictment. People v. Puig, 85 Misc.2d 228, 378

N.Y.S.2d 925 (Sup. Ct. N.Y. Co. 1976). However, where the agreement to sell drugs was made in Richmond County, the indictment in Richmond County was not jurisdictionally defective, even though the actual transfer took place in New York County, since "sale" in Article 220 (controlled substances) encompasses an agreement to sell. People v. Cousart, 74 A.D.2d 877, 426 N.Y.S.2d 295 (2d Dept. 1980). See also People v. Brill, 82 Misc.2d 865, 370 N.Y.S.2d 820 (Nassau Co. Ct. 1975) (Nassau County had jurisdiction to prosecute the sale in New York County of allegedly obscene films to a Nassau County dealer for resale in Nassau County).

2. No Jurisdiction in Court

An assault and burglary indictment must be dismissed where it resulted from a transfer by a Family Court clerk without the required judicial determination, even though, at the time of the motion to dismiss, the parties were divorced. People v. Reuscher, 89 Misc.2d 160, 390 N.Y.S.2d 568 (Sup. Ct. Suffolk Co. 1976). An attempted grand larceny indictment must be dismissed where the criminal court's plenary jurisdiction extends only to misdemeanors or lesser included offenses. See People v. Senise, 111 Misc.2d 477, 444 N.Y.S.2d 535 (N.Y.C. Crim. Ct. Queens Co. 1981) (the court also held that the trial judge's action of reducing the felony charge to a misdemeanor without a factual showing that no felony existed had no effect).

3. Unauthorized Prosecutor

Where a special prosecutor for corruption had no authority to act, the indictment was jurisdictionally defective; he was, in effect, an unauthorized person in the grand jury room. People v. DiFalco, 44 N.Y.2d 482, 406 N.Y.S.2d 279 (1978). However, the presence of unauthorized

persons before the grand jury does not automatically require dismissal. Dismissal based on unauthorized persons' presence in grand jury room requires possibility of prejudice to the defendant or impairment of the proceeding's integrity. People v. DiFalco, supra; People v. Hyde, 85 A.D.2d 745, 445 N.Y.S.2d 800 (2d Dept. 1981).

Note: The failure to comply with the waiver of the non-residence requirement does not affect the authority of an appointee to serve as a special assistant district attorney. Therefore, this individual's presentation to grand jury did not impair the proceeding's integrity. People v. Dunbar, 53 N.Y.2d 868, 440 N.Y.S.2d 613 (1981).

[iii] Statute Unconstitutional

A legislative enactment carries a strong presumption of constitutionality. Wasmuth v. Allen, 14 N.Y.2d 391, 397; 252 N.Y.S.2d 65, 69 (1964). Defendants have the burden of proving invalidity beyond a reasonable doubt. People v. Billi, 90 Misc.2d 568, 395 N.Y.S.2d 353 (Sup. Ct. Kings Co. 1977) (even though cocaine is not a narcotic but a stimulant, its classification as such by the Legislature in Article 220 and the Public Health is not per se unreasonable; defendant has a heavy burden of proving that he was singled out for selective prosecution). See People v. Linardos, 104 Misc.2d 56, 427 N.Y.S.2d 900 (Sup. Ct. Queens Co. (1980)) (defendant did not sustain burden).

Note: At least one court has held that a defendant is entitled to a hearing on his claim that he is being subjected to selective prosecution. People v. Marcus, 90 Misc.2d 243, 394 N.Y.S.2d 530 (Sup. Ct. Spec. Narc. N.Y. Co. 1977). But see People v. Rodriguez, 79 A.D.2d 539, 433 N.Y.S.2d 584 (1st Dept. 1980), aff'd, 55 N.Y.2d 776, 447 N.Y.S.2d 246 (1981) (no right to a hearing on selective prosecution where the motion

papers alleged no facts to support such a claim).

The fact that a statute might be unconstitutionally applied to others is not a ground for granting the motion. People v. Valentin, 93 Misc.2d 1123, 404 N.Y.S.2d 66 (Sup. Ct. Bronx Co. 1978). See also People v. M & R Records, 106 Misc.2d 1052, 432 N.Y.S.2d 846 (Sup. Ct. Suffolk Co. 1980).

(2) Legally Insufficient Evidence

A grand jury may only return an indictment when (a) the evidence before it is legally sufficient to establish that the defendant committed the offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense, is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that defendant committed the offense. See CPL §190.65(1). "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent. CPL §70.10(1). Legally sufficient for grand jury purposes, was held to mean "prima facie," not proof "beyond a reasonable doubt." People v. Stevens, 84 A.D.2d 753, 443 N.Y.S.2d 754 (2d Dept. 1981); People v. Rodriguez, 110 Misc. 2d 828, 442 N.Y.S.2d 948 (Sup. Ct. Kings Co. 1981). "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

Except as otherwise provided in the CPL such apparently reliable evidence may include or consist of hearsay. CPL §70.10(2).

The New York City Criminal Court held in People v. Haskins, 107 Misc.2d 480, 435 N.Y.S.2d 261 (N.Y.C. Crim. Ct. N.Y. Co. 1981), that hearsay evidence is admissible only if it satisfies some guarantee of reliability. Thus, the affidavit of the defendant's alleged employer was held inadmissible since it was not prepared regularly in the course of business, but was prepared "upon demand" in the course of the Labor Department's investigation. Therefore, the court rejected defendant's motion to dismiss the charges violating the Labor Law.

The test to be applied on a motion to dismiss an indictment for insufficiency of evidence before the grand jury under CPL §210.20(1)(b) is whether there has been a clear showing that the evidence before the grand jury, if unexplained and uncontradicted, could not warrant conviction by a trial jury. People v. Dunleavy, 41 A.D.2d 717, 341 N.Y.S.2d 500 (1st Dept. 1973), aff'd without opinion 33 N.Y.2d 573, 575, 347 N.Y.S.2d 448 (1973); see also People v. Green, 80 A.D.2d 995, 437 N.Y.S.2d 482 (4th Dept. 1981); People v. Ruggieri, 102 Misc.2d 238, 423 N.Y.S.2d 108 (Sup. Ct. Kings Co. 1979). An indictment cannot be dismissed for insufficient evidence unless the evidence also fails to establish any lesser included offense. People v. Vandercook, 99 Misc.2d 876, 417 N.Y.S.2d 447 (Albany Co. Ct. 1979).

In People v. Sullivan, 68 N.Y.2d 495, 510 N.Y.S.2d 518 (1986), the Court held, "when a grand jury is presented with conflicting versions of a shooting death, it may choose to indict the defendant for second degree manslaughter rather than intentional murder, provided that either charge is supported by sufficient evidence".

The court found the evidence was legally sufficient to affirm the defendant's conviction in People v. Buthy, 85 A.D.2d 890, 446 N.Y.S.2d 756 (4th Dept. 1981). Defendant escaped from the custody of the commissioner of Mental Hygiene, a public servant under whose restraint he had been placed by court order, and the evidence was sufficient to support the offense charging escape in the second degree, since that evidence clearly established the defendant's commission of escape in the third degree. Evidence was also held to be legally sufficient to sustain a robbery conviction in People v. Cephas, 110 Misc.2d 1075, 443 N.Y.S.2d 558 (Sup. Ct. N.Y. Co. 1981). The court held that the evidence sufficiently indicated that force had been used since the bag was either in the hand, or on the arm or shoulder of the victim and the taking was done in a way likely to prevent or overcome resistance. See also People v. Howard, 79 A.D.2d 1064, 435 N.Y.S.2d 399 (3d Dept. 1981) (the loss of two front teeth is a permanent and serious injury, legally sufficient to sustain an assault charge). Similarly, the fact that defendant was seen returning the dirty pillows after having charged the hospital for cleaning them, was a sufficient basis to support an indictment of grand larceny in the third degree. People v. Sobel, 87 A.D.2d 656, 448 N.Y.S.2d 511 (2d Dept. 1982). However, where a shotgun was approximately one-half the height of the defendants and no evidence was presented to the grand jury indicating that the defendants were garbed in a manner to aid, rather than hinder concealment of the weapon, the grand jury minutes were legally insufficient to sustain the charge of criminal possession of a weapon in the third degree. People v. Cortez, 110 Misc.2d 652, 442 N.Y.S.2d 873 (Sup. Ct. N.Y. Co. 1981). See also People v. Kiszenik, 113 Misc.2d 462, 449 N.Y.S.2d 414 (Sup. Ct. N.Y. Co. 1982)

(absent any evidence that the defendant participated in or had actual knowledge of certain aspects of a conspiracy, evidence was held insufficient to sustain that portion of the indictment).

Note: The Court of Appeals in People v. Warner-Lambert Company, 51 N.Y.2d 295, 434 N.Y.S.2d 159 (1980), cert. denied, 450 U.S. 1031 (1980), held that an indictment may be legally sufficient even though reasonable cause to believe that the defendant committed a crime is not shown; the evidence in determining this motion must be viewed in the light most favorable to the People. However, in Warner-Lambert, the Court dismissed the indictment for manslaughter and criminally negligent homicide based on the fact that defendant's factory exploded on the ground that the evidence established that the triggering cause was neither foreseen nor foreseeable.

(3) Defective Grand Jury Proceeding

A defendant may move to dismiss an indictment on the ground that the grand jury proceeding was defective within the meaning of CPL §210.35. See CPL §210.20(1)(c). The defects set forth in CPL §210.35 are:

(1) the grand jury was illegally constituted;

(2) fewer than sixteen grand jurors were present;

(3) fewer than twelve grand jurors concurred in the finding of the indictment;

(4) defendant was not afforded his right to appear and testify under CPL §190.50. [For example, see People v. Hooker, 113 Misc.2d 159, 448, N.Y.S.2d 363 (Sup. Ct. Kings Co. 1982) (the proper remedy for a defendant who had been denied the right to testify before the grand jury was not dismissal of indictment contingent on defendant's appearing

before a grand jury, but rather, outright dismissal of the indictment); see also People v. Willis, 114 Misc.2d 371, 451 N.Y.S.2d 584 (Sup. Ct. Queens Co. 1982)];

(5) the proceeding otherwise fails to comply with the requirements of CPL Article 190 to the defendant's prejudice.

In People v. Wilkins, 68 N.Y.2d 269, 508 N.Y.S.2d 893 (1986), the Court held that a prosecutor may not withdraw a case from the grand jury after presentation of the evidence, and resubmit the case to a second grand jury without the consent of either the first grand jury or the court which impaneled it. See also People v. Grafton, 115 A.D.2d 952, 497 N.Y.S.2d 528 (4th Dept. 1985).

Some defects are technical and require a showing of prejudice. See generally, People v. Wilson, 77 A.D.2d 713, 430 N.Y.S.2d 715 (3d Dept. 1980) (although mother of infant rape victim was an unauthorized person in the grand jury room, defendant did not show prejudice so his motion to dismiss the indictment would be denied); People v. Baker, 75 A.D.2d 966, 428 N.Y.S.2d 353 (3d Dept. 1980) (motion denied because defendant was not prejudiced by fact that member of indicting grand jury was non-resident of county); People v. Erceg, 82 A.D.2d 947, 440 N.Y.S.2d 726 (3d Dept. 1981) (dismissal was not warranted, although off-the-record conversations were held between the prosecutor and the grand jurors because the court did not find a showing of prejudice to the defendant). However, the grand jury's failure to vote voids the indictment. People v. Collins, 104 Misc.2d 330, 428 N.Y.S.2d 385 (Onondaga Co. Ct. 1979).

(a) Adequacy of Instructions to Grand Jury

The New York Court of Appeals in People v. Calbud Inc., 49 N.Y.2d 389, 426 N.Y.S.2d 238 (1980), an obscenity prosecution, refused to

dismiss the indictment even though the district attorney's instructions were incomplete, as he neglected to mention that obscenity was to be judged by the criteria of "State-wide community standards." The court stated that a grand jury need not be instructed with the degree of precision required in instructions for a petit jury. It is sufficient if the district attorney provides the grand jury with enough information to enable it to decide intelligently whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime. See also People v. Goetz, 68 N.Y.2d 96, 506 N.Y.S.2d 18 (1986). In the ordinary case, this standard may be met by reading the appropriate sections of the Penal Law. Calbud, supra. See People v. Loizides, 123 Misc.2d 334, 473 N.Y.S.2d 916 (Suff. Co. Ct. 1984) (where inadequate or incomplete legal instructions to a grand jury may constitute grounds for dismissal of an indictment as defective). But cf. People v. Darcy, 113 Misc.2d 580, 449 N.Y.S.2d 626 (Yates Co. Ct. 1982) (the grand jury was not provided with sufficient information to decide intelligently whether a crime had been committed; instructions given to grand jury did not include substance of regulations of United States Department of Agriculture).

Note also that where a district attorney gave a grand jury the impression that the rebuttable presumption of possession which could be drawn from the presence of a weapon in an automobile was mandatory, the indictment was dismissed. People v. Garcia, 103 Misc.2d 915, 427 N.Y.S.2d 360 (Sup. Ct. Bronx Co. 1980). The court stated that the case before it was not the typical situation referred to in Calbud. Also in Pegale v. Montalvo, 113 Misc.2d 471, 449 N.Y.S.2d 377 (Sup. Ct. Kings Co. 1982), the court held that the prejudicial procedural error in the

presentation required its dismissal. In this case, there was substantial conflict in the eyewitness testimony. The court ruled that the failure to adequately advise the jurors that if they declined to indict the defendant at that time, another panel could reconsider the matter in the future; this could have misled the jury. But note in People v. Rex, 83 A.D.2d 753, 443 N.Y.S.2d 516 (4th Dept. 1981), that failure of the district attorney to instruct grand jurors of the necessity to corroborate the confession of the defendant and her accomplice's written statement did not present a showing of prejudice to the defendant. See also People v. Mayer, 122 Misc.2d 1036, 472 N.Y.S.2d 568 (Nassau Co. Ct. 1984); People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1986) (People are under no duty to charge the grand jury with a potential defense of mental disease or defect).

(4) Defendant Has Immunity

A defendant who has been granted immunity under CPL §50.20 or CPL §190.40 can move to dismiss the indictment on this ground. See CPL §210.20(1)(d).

CPL §190.40 provides for the conferring of immunity on a person subpoenaed to appear before a grand jury:*

> §190.40 Grand jury; witnesses, compulsion of evidence and immunity
>
> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

* CPL §50.20 provides for the complusion of evidence by the offer of immunity in legal proceedings other than grand jury proceedings.

> (a) He has effectively waived such immunity pursuant to section 190.45; or
>
> (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.
>
> (c) The evidence given by the witness consists only of books, papers, records or other physical evidence of an enterprise as defined in subdivision one of section 175.00 of the penal law, the production of which is required by a subpoena duces tecum, and the witness does not posess a privilege against self-incrimination with respect to the production of such evidence. Any further evidence given by the witness entitles the witness to immunity except as provided in subparagraphs (a) and (b) of this subdivision.

The New York rule is that full transactional immunity must be conferred on the witness before he can be compelled to waive his privilege against self-incrimination. In Felder v. New York State Supreme Court, 44 A.D.2d 1, 352 N.Y.S.2d 706 (4th Dept. 1974), the court reversed petitioner's criminal contempt conviction, holding that petitioner, who was already indicted for hindering prosecution, had properly refused to answer questions before the grand jury about a murder since he was only offered immunity on any possible murder charge and was not offered the full transactional immunity required by statute.

(a) Prosecutor's Duty to Explain Immunity to Witness

A prosecutor has a duty to explain to the witness that he receives transactional immunity when he answers the questions propounded before the grand jury. People v. Masiello, 28 N.Y.2d 287, 321 N.Y.S.2d 577 (1971); People v. Tramunti, 29 N.Y.2d 28, 323 N.Y.S.2d 687 (1971); see

also People v. Franzese, 16 A.D.2d 804, 228 N.Y.S.2d 644 (2d Dept. 1962), aff'd without opinion, 12 N.Y.2d 1039, 239 N.Y.S.2d 682 (1963).

It is not mandated that the prosecutor use the statutory language or even employ the phrase "transactional immunity," "as long as it is brought home to the witness that he has been accorded full and complete immunity and cannot thereafter be prosecuted." People v. Mulligan, 29 N.Y.2d 20, 23; 323 N.Y.S.2d 681, 683 (1971).

If a grand jury witness waives immunity, if such a waiver is obtained in violation of the witness' state constitutional right to counsel, such a waiver is not effective within the meaning of CPL §160.40(2)(6). People v. Chapman, 69 N.Y.2d 497, 516 N.Y.S.2d 159 (1987).

(b) Scope of Immunity

Complete immunity under the CPL may be obtained only by compliance with the immunity statutes [CPL §§50.10, 50.20, and 190.40], each of which requires that the person receiving immunity give testimony as a witness in a legal proceeding. People v. Caruso, 100 Misc.2d 601, 419 N.Y.S.2d 854 (Sup. Ct. Kings Co. 1979), citing People v. Laino, 10 N.Y.2d 161, 173; 218 N.Y.S.2d 647, 657 (1961), and People v. Avant, 33 N.Y.2d 265, 272, 352 N.Y.S.2d 161 (1973). In Caruso, a prosecutor offered defendant immunity if he would submit to an office interview. The court in Caruso ruled that it would enforce the implied bargain and held accordingly, that full transactional immunity had been conferred by this agreement, even though the law did not authorize the prosecutor to give immunity in this manner. See also Brockway v. Monroe, 59 N.Y.2d 179, 464 N.Y.S.2d 410 (1983).

In People v. Kramer, 123 A.D.2d 786, 507 N.Y.S.2d 866 (2d Dept.

1986), the court held that it was within the prosecutor's discretion not to request that a witness receive transactional immunity where the witness stated that, if called to testify, he would assert his privilege against self-incrimination.

[i] Immunity Does Not Extend to Perjury and Contempt

Immunity does not extend to subsequent perjury charges against a witness based on false answers or contempt charges based on refusal to answer or to a witness who gives answers so patently evasive as to be tantamount to a refusal to answer. CPL §50.10(1); see also People v. Arnette, 58 N.Y.2d 1104, 462 N.Y.S.2d 817 (1983); People v. Rappaport, 47 N.Y.2d 308, 418 N.Y.S.2d 306 (1979), cert. denied, 444 U.S. 964 (1979).

However, In the Matter of Rush v. Mordue, 68 N.Y.2d 348, 350-1, 509 N.Y.S.2d 493,494 (1986), the Court held:

> "Where a witness is called before a Grand Jury and, without having executed a waiver of immunity, gives testimony concerning the truthfulness of a prior sworn statement and disavows that prior statement as having been false when given, transactional immunity resulting from the compelled testimony is acquired with respect to that prior statement, and the witness may not thereafter be prosecuted for perjury based upon the inconsistency between the prior sworn statement and the Grand Jury testimony."

[ii] Future Acts Not Covered

Testimony before the grand jury does not confer immunity as to acts committed in the future. But where proof of the future crimes was so completely intertwined with prior acts for which a defendant has received immunity, immunity must be extended as to them. People v. Conrad, 93 Misc.2d 655, 405 N.Y.S.2d 559 (Monroe Co. Ct. 1976), aff'd, 44 N.Y.2d 863, 407 N.Y.S.2d 694 (1978); People v. Lieberman, 94 Misc.2d 737, 405

N.Y.S.2d 559 (Sup. Ct. Queens Co. 1978).

[iii] Coextensive with Evidence Given; Handwriting Exemplars Covered

A defendant "gives evidence" within the meaning of the immunity statute when he furnishes a handwriting exemplar under a subpoena ad testificandum. People v. Perri, 95 Misc.2d 767, 408 N.Y.S.2d 709 (Sup. Ct. Kings Co. 1978), aff'd 72 A.D.2d 106, 423 N.Y.S.2d 679 (2d Dept. 1980), aff'd, 53 N.Y.2d 957, 441 N.Y.S.2d 444 (1981). Accordingly, the court in Perri dismissed the indictment, which charged defendant, a businessman, with filing a false application to the Emergency Aid Fund set up after New York City's blackout, because the indictment was based on evidence of a compelled handwriting exemplar. The court, in so holding, stated:

> It is to be noted that defendant in this case was not required to furnish a handwriting exemplar under a subpoena duces tecum with respect to his business enterprises, but rather was brought before the Grand Jury under a subpoena ad testificandum contrary to CPL §190.40(2)(c). Thus the district attorney did not follow statutory requirements in securing these handwriting exemplars. After all, if the exemplars were so necessary to the People's case, the district attorney could have obtained the books and records of defendant's business enterprises including its canceled checks and other signed documents via a subpoena duces tecum. The narrow limitations of CPL §190.40 are balanced by the remedy provided.
>
> Perri, 408 N.Y.S.2d at 714.

[iv] Responsive Answers Covered

Defendant could not be prosecuted for selling narcotics where her admissions to these crimes were not volunteered but were in response to questions asked of her in a grand jury proceeding investigating an

unrelated homicide. People v. McFarlan, 89 Misc.2d 905, 396 N.Y.S.2d 559 (Sup. Ct. N.Y. Co. 1975), aff'd, 42 N.Y.2d 896, 397 N.Y.S.2d 1003 (1977), and see Brockway v. Monroe, 59 N.Y.2d 179, 464 N.Y.S.2d 410 (1983).

(5) Prosecution Barred by Reason of a Previous Prosecution

A person may move to dismiss an indictment on the ground that it is barred by reason of a previous prosecution within the meaning of CPL §40.20. See CPL §210.20(e). Article 40 of the CPL codifies New York State's double jeopardy protections. CPL §40.20(1) states that simple rule that "a person may not be twice prosecuted for the same offense." If a defendant's double jeopardy protections are violated, the indictment must be dismissed. CPL §210.20(e). An offense is defined as any conduct "which violates a statutory provision defining an offense." CPL §40.10(1). When any conduct violates more than one statutory provision, each is defined as a distinguishable separate criminal offense. Ibid. Additionally, if the conduct results in injury, loss, or death to two or more persons, these offenses are deemed to be separate. Ibid.

Indictment of a defendant in New York for second degree murder was barred by his acquittal in Maryland of conspiracy to commit murder based on the same facts. Wiley v. Altman, 76 A.D.2d 891, 431 N.Y.S.2d 826 (1st Dept. 1980) (Article 78 proceeding), aff'd, 52 N.Y.2d 410, 438 N.Y.S.2d 490 (1981). See also, In the Matter of Johnson v. Morgenthau, 69 N.Y.2d 148, 512 N.Y.S.2d 797 (1987); In the Matter of Pemberton v. Turner, 124 A.D.2d 338, 508 N.Y.S.2d 294 (3d Dept. 1986); People v. Harris, 116 A.D.2d 588, 497 N.Y.S.2d 446 (2d Dept. 1986).

(a) When Jeopardy Attaches

Defendant's double jeopardy protection attaches at that point in a criminal proceeding when he is deemed to have been prosecuted. Once this point has been passed, the defendant cannot be retried unless the trial is terminated by the disagreement of the jury, by their discharge pursuant to law, by the consent of the accused or because of extreme necessity such as illness or death. People v. Goldfarb, 152 A.D. 870, 138 N.Y.S. 62 (1st Dept. 1912), aff'd, 213 N.Y. 664 (1914). Pursuant to CPL §40.30(1) a defendant is prosecuted when he is charged by an accusatory instrument and either (a) the action terminates in a conviction upon a plea of guilty; or (b) proceeds to the trial stage and a jury is impanelled and sworn* or, in the case of a trial by the court without a jury, a witness is sworn. People v. Prescott, 66 N.Y.2d 216, 495 N.Y.S.2d 955 (1985); McGrath v. Gold, 36 N.Y.2d 406, 369 N.Y.S.2d 62 (1975); People v. Scott, 40 A.D.2d 933, 337 N.Y.S.2d 640 (4th Dept. 1972).

(b) Exceptions

Even though the defendant may have been prosecuted, by virtue of CPL §40.30, under specific circumstances, retrial will be proper. Many of these exceptions have been recognized for quite some time; [see People v. Goldfarb, supra], and they are codified in CPL §40.30(2)(4).

Subdivision 2 of CPL §40.30 allows for the retrial of the defendant if the original prosecution occurred in a court which lacked jurisdiction. Steingut v. Gold, 54 A.D.2d 481, 388 N.Y.S.2d 622 (2d Dept. 1976), aff'd, 42 N.Y.2d 311, 397 N.Y.S.2d 765 (1977). Additionally, in subdivision 2, if the prosecution was procured by the defendant, without

* This is constitutionally mandated. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156 (1978).

the knowledge of the appropriate prosecutor, for the purpose of pleading to a lesser charge, when sufficient facts existed for the prosecution of a greater charge, retrial will be permitted. See People v. Daby, 56 A.D.2d 873, 392 N.Y.S.2d 325 (2d Dept. 1977). This subdivision provides for reprosecution in the event that the defendant, appearing before a friendly judge, induces the judge to allow him to plead to a lesser charge. See Denzer, Richard G., Practice Commentary To McKinney's Consolidated Laws of New York, CPL §40.30.

Subdivisions 3 and 4 concern those situations where prosecution has commenced and jeopardy has attached but the criminal proceedings are subsequently nullified by court order. Subdivision 4 permits reprosecution of the defendant if the indictment is dismissed on the basis of some defect but the court authorizes the People to resubmit the charge to a grand jury for the purpose of obtaining a new indictment. People ex rel. Zakrzewski v. Mancusi, 22 N.Y.2d 400, 292 N.Y.S.2d 892 (1968). If there was no court permission for the new accusatory instrument the indictment should be dismissed.

Subdivision 3 deals with prosecutions that have been terminated by a court order nullifying the trial proceeding and directing a new trial in the same court. Under these circumstances the second trial is not truly a second prosecution but merely a continuation. It is important to note that subdivision (3) permits a new trial of the same indictment in the same court, it does not permit trial of a new indictment or in a different court. There, retrial is permitted upon a proper declaration of a mistrial which contemplates further proceedings but not when the proceedings are terminated in defendant's favor. Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141 (1977).

A mistrial may be declared upon defendant's request or upon the court's or prosecutor's initiation without defendant's consent. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075 (1976). A defendant often requests a mistrial when errors have occurred during the trial that are considered so prejudicial as to deprive him of a fair trial. However, the decision of whether to consent to a mistrial is to be made by a defendant's attorney, and personal consent of the defendant is not required. People v. Ferguson, 67 N.Y.2d 383, 502 N.Y.S.2d 972 (1986). A court may order a mistrial without defendant's consent only upon a showing of "manifest necessity." Examples of "manifest necessity" are lack of readiness of key court personnel, counsel, and witnesses or jurors, and "hung jury" situations. A prosecution is deemed to have terminated in defendant's favor upon acquittal or upon a determination of the court that the evidence advanced at trial was insufficient as a matter of law in the form of a reversal or a trial order of dismissal. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978); Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151 (1978), cert. denied, 104 S.Ct. 718 (1984), reh'g denied, 104 S.Ct. 1431 (1984); Sanabria v. United States, 437 U.S. 54, 98 S.Ct.
2170 (1978). Note that whether characterized as a "mistrial" or a "trial order of dismissal" by the trial court, an appellate court may look behind the order to the finding to determine whether the proceedings were properly terminated before a decision was rendered by a jury so as to permit retrial and whether the decision was actually on the merits. Lee v. United States, supra. Insofar as a trial order of dismissal is deemed to have been made with defendant's consent, a prosecutor may appeal the dismissal and, if successful, retry the defendant. United States v.

Scott, 437 U.S.82, 98 S.Ct. 2187 (1978), reh'g denied, 439 U.S. 883 (1978), reh'g denied, 99 S.Ct. 226 (1978), overruling United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006 (1975). The key question is whether the dismissal "contemplates an end to all prosecution of the defendant for the offense charged." Lee v. United States, 432 U.S. 23, 30; 97 S.Ct. 2141, 2145 (1977).

Note: That if the original charge against the defendant is dismissed at the close of the trial on the ground that the defendant can only be found guilty of a lesser included offense, and thereafter, a mistrial is declared because the jury cannot reach agreement, the prohibition against double jeopardy precludes reindictment of defendant on the original greater charge. People v. Mayo, 48 N.Y.2d 245, 422 N.Y.S.2d 361 (1979) (a robbery prosecution).

The most difficult aspect of the double jeopardy rule occurs in relation to the prosecution of criminal conduct that is comprised of several offenses which may or may not require joinder. CPL §40.10(1) defines a criminal transaction as "any group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture." Braunstein v. Frawley, 64 A.D.2d 772, 407 N.Y.S.2d 250 (3d Dept. 1978). Theoretically, one would assume that where a group of acts were defined as a criminal transaction, joinder would be required. In fact, this is precisely what CPL §40.40(1) calls for. But the courts have been inconsistent in their enforcement of these rules and CPL Article 40 itself allows for numerous instances where separate prosecutions are permitted. Section 40.20(2) outlines those

situations where a person may be prosecuted separately for two offenses based on the same criminal act or transaction: (a) the offenses have different elements and the acts establishing one offense are distinguishable from those establishing the other [People v. Durant, 88 Misc.2d 731, 389 N.Y.S.2d 533 (Suffolk Co. Ct. 1976)]; (b) each of the offenses contains an element which is not an element of the other, and the statutory provision designed to prevent the offenses concern different types of harm [People v. Green, 89 Misc.2d 639, 392 N.Y.S.2d 804 (Dist. Ct. Nassau Co. 1977)]; (c) one of the offenses consists of possession of contraband matter and the other its use [Abraham v. Justices of N.Y. Sup. Ct., Bronx Co., 37 N.Y.2d 560, 376 N.Y.S.2d 79 (1975); People v. Abbamonte, 43 N.Y.2d 74, 400 N.Y.S.2d 766 (1977); People v. Vera, 47 N.Y.2d 825, 418 N.Y.S.2d 575 (1979) (the fact that federal authorities were unaware of state sale was irrelevant];* (d) the first prosecution is for assault and the second is for murder where the death occurs after a prosecution for assault or other non-homicide offense [People v. Rivera, 90 A.D.2d 40, 455 N.Y.S.2d 801 (1st Dept. 1982), aff'd, 60 N.Y.2d 110, 468 N.Y.S.2d 601 (1983)]; (e) offenses involve death, injury, or loss to more than one person [People v. Dean, 56 A.D.2d 242, 392 N.Y.S.2d 134 (4th Dept. 1977), aff'd, 45 N.Y.2d 654, 412 N.Y.S.2d 353 (1978)]; (f) one of the offenses was prosecuted in another jurisdiction, and was dismissed for

* Note that the United States Constitution's prohibition against double jeopardy does not preclude prosecutions by two sovereigns, state and federal [Barktus v. Illinois, 359 U.S. 121, 79 S.Ct. 676 (1959), reh'g denied, 360 U.S. 907 (1959)]. This prohibition is statutory and accordingly may be waived on appeal by a plea of guilty. People v. Williams, 103 Misc.2d 256, 425 N.Y.S.2d 762 (Sup. Ct. Kings Co. 1980).

failure to state an element required for conviction which element is not required for another offense pursuant to the laws of this state. CPL §40.20(2)(a-f).

Finally, CPL §40.40(2) and (3) discuss those instances where separate prosecution will not be allowed. Subdivision 2 describes a situation where sufficient evidence exists to support a conviction for two or more offenses, but only one indictment is sought. There prosecution on the second charge will be barred since the district attorney could readily have tried them both together. If, on the other hand, the district attorney proceeds to solicit indictments on all charges and then chooses to prosecute only one, paragraph 3 provides a system whereby prosecution on the other counts will be barred. Defendant must first apply for consolidation and then the court must improperly deny the application. Auer v. Smith, 77 A.D.2d 172, 432 N.Y.S.2d 926 (4th Dept. 1980), appeal dismissed, 52 N.Y.2d 1070 (1981); People v. Durant, 88 Misc.2d 731, 389 N.Y.S.2d 533 (Suffolk Co. Ct. 1976).

(c) Collateral Estoppel; Inapplicable to Codefendants

When an issue of ultimate fact has once been determined by a valid and final judgment the issue cannot be relitigated between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436 (1970). In People v. Goodman, 69 N.Y.2d 32, 38, 511 N.Y.S.2d 565 (1986), the Court determined that "before collateral estoppel may be applied in a subsequent criminal case, there must be an identity of parties and issues and a prior proceeding resulting in a final and valid judgment in which the party opposing the estoppel had a 'full and fair opportunity' to litigate." See also People v. Acevedo, 122 A.D.2d 577, 504 N.Y.S.2d 922

(4th Dept. 1986), leave to appeal granted 68 N.Y.2d 775, 506 N.Y.S.2d 675 (1986).

Principles of collateral estoppel may never be applied so as to allow the acquittal of one defendant to bar prosecution of another. People v. Berkowitz, 50 N.Y.2d 333, 428 N.Y.S.2d 927 (1980).

(6) Untimely Prosecution

Under CPL §210.20(1)(f), the superior court, upon the motion of the defendant may dismiss the indictment if the prosecution is untimely. In a criminal case, the actions must be commenced within the prescribed statute of limitations or else it will be time barred. These periods, as set forth in CPL §30.10, vary according to the severity of the criminal charge. Their purpose is to ensure prompt prosecution of criminal charges.

Pursuant to CPL §30.10(2), prosecution for a class A felony may be commenced at any time. Prosecution for any other felony must be commenced within five years of its commission. Prosecution for a misdemeanor must begin within two years after its commission and prosecution for a violation within one. The length of the sentence which can be imposed determines the classification of the crime, irrespective of any name it might be given. People on Inf. of LaBounty v. County Excavation, Inc., 77 Misc.2d 358, 351 N.Y.S.2d 931 (Justice Ct. Albany Co. 1974). In that case, although the offenses charged the defendants with a misdemeanor, they were in fact only violations and therefore a one-year statute of limitations applied. The indictment was dismissed as untimely.

The statutory period begins to run from the commission of the crime and not from its discovery. Delay in a trial proceeding is often preju-

dicial to a defendant as it impairs his ability to prove his innocence. Thus, motions to dismiss pursuant to this section will be liberally granted and the People have the burden of showing that the statute is inapplicable under the facts of a particular case. Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858 (1970); People v. McAllister, 77 Misc.2d 142, 352 N.Y.S.2d 360 (N.Y.C. Crim. Ct. Kings. Co. 1974); People v. Fletcher Gravel Co. Inc., 82 Misc.2d 22, 368 N.Y.S. 392 (Onondaga Co. Ct. 1975). The defendant is entitled to a hearing when he alleges that adjournments were improperly granted. People v. Berkowitz, supra.

If the People can show that, during the statutory period, the defendant was continually outside the state's jurisdiction or his whereabouts were unascertainable through the exercise of reasonable diligence, the statute will be tolled. CPL §30.10(4)(a). However, under no circumstances will the period be extended by more than five years. Ibid. Additionally, if a prosecution is lawfully commenced and subsequently dismissed with leave to resubmit, this period will not be included. CPL §30.10(4)(b).

Finally, CPL §30.10(3) sets out four exceptions to the general rule. A prosecution for larceny committed by a person in violation of a fiduciary duty may be commenced anytime within one year of its discovery. CPL §30.10(3)(a). Also, a prosecution for an offense involving misconduct in public office can commence anytime while the defendant is in office or within five years after termination of said office. CPL §30.10(3)(b). However, in no event can the period be extended more than five years beyond the applicable time period. This subdivision was added from the original Code of Criminal Procedure because of the inherent difficulties involved in discovering crimes of this nature. See Denzer,

Richard G., Practice Commentary to McKinney's Consolidated Laws of New York, CPL §30.10.

(a) Generally

Defendant's motion to dismiss based on a denial of his constitutional right to a speedy trial depends in part on how the delay of the trial is characterized. The Supreme Court draws a distinction between delays prior to indictment and those which occur after the criminal process has begun. Generally, a pre-indictment delay requires a showing of prejudice before the indictment will be dismissed and is governed by the Due Process Clause. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971). On the other hand, a post-indictment delay is governed by the Sixth Amendment and is analyzed on the basis of several different factors: extent of delay, loss of key witnesses, prejudice to the defendant, etc. See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972).

Under CPL §30.20, general speedy trial relief is prescribed for a defendant. A defendant is entitled to a hearing where he makes factual allegations in his motion to dismiss on this ground. People v. Berkowitz, supra.

The New York Court of Appeals has established a procedure that must be followed by the prosecutor to establish that the People are "ready for trial". Summing up prior decisions, the Court declared that "ready for trial" encompasses two elements - (a) communication of readiness by the People, and (b) present readiness (as opposed to a prediction or expectation of future readiness). It then held that "communication" requires either: (1) a statement of readiness in open court, or (2) written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk to be placed in the original record. Where the

statement is made in open court and defense counsel is not present, the prosecutor must notify defense counsel of the statement of readiness. People v. Kendzia, 64 N.Y.2d 331, 486 N.Y.S.2d 888 (1985).

One of the first cases to analyze this statute: People ex rel. Franklin v. Warden, Brooklyn House of Detention, 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973), determined that the words, "the People must be ready for trial," did not mean that the defendant had to be brought to trial within the six-month period. In this case, the defendants had been incarcerated within the Brooklyn House of Detention for more than six months. However, because of court congestion, their cases had not yet proceeded to trial. The prosecutor was ready to present the case at all times. These circumstances were deemed to be outside the control of the prosecution and the court, and therefore it was not required that either the indictments be dismissed or the defendants released. See People v. Watts, 86 A.D.2d 964, 448 N.Y.S.2d 299 (4th Dept. 1982), aff'd, 57 N.Y.2d 299, 456 N.Y.S.2d 677 (1982). See also People v. Ganci, 27 N.Y.2d 418, 318 N.Y.S.2d 484 (1971), cert. denied, 402 U.S. 924 (1971).

Additionally, the statute allows for other circumstances which will be excluded from the time period. By and large, these factors are deemed to be within the control of the defendant or else circumstances over which the prosecution has no control. Where adjournments are allowed at a defendant's request, those periods of delay are expressly waived in calculating the People's trial readiness without the need for the People to trace their lack of readiness to defendant's actions. People v. Kopciowski, 68 N.Y.2d 615, 505 N.Y.S.2d 52 (1986). See also, People v. Meierdiercks, 68 N.Y.2d 613, 505 N.Y.S.2d 51 (1986).

If the delay is occasioned by pre-trial motions of the defendant or continuances requested by him then the statutory period is not chargeable

to the prosecution but will be tolled. People v. Dean, 45 N.Y.2d 651, 412 N.Y.S.2d 353 (1978). CPL §30.30(4)(a) and (b). An indictment which replaces an earlier one in the same criminal action relates back to the original accusatory instrument for the purposes of computing excludable time under CPL §30.30(4). People v. Sinistaj, 67 N.Y.2d 236, 501 N.Y.S.2d 793 (1986). If the delay is caused by the defendant's absence or incarceration in another jurisdiction, the statutory period will not be included, provided that the prosecution makes diligent efforts to locate the defendant. People v. Patter son, 38 N.Y.2d 623, 381 N.Y.S.2d 858 (1976); People v. McLaurin, 38 N.Y.2d 123, 378 N.Y.S.2d 692 (1975); CPL §30.30(4)(c)(e). In those situations where a felony complaint has been filed but a defendant is absent or unavailable, the Court of Appeals has approved a recent Appellate Division, Second Department, decision which allows the prosecutor to delay presenting the cases of absent or unavailable defendants to the grand jury. The Court found that the delay in prosecution "results from" defendant's absence and therefore falls within the statutory exceptions. CPL §30.30(4)(c). People v. Bratton, 65 N.Y.2d 675, 491 N.Y.S.2d 623 (1985), affirming for reasons stated in 103 A.D.2d 368, 480 N.Y.S.2d 324 (2d Dept. 1984). Finally, the prosecution is also permitted delays attributable to exceptional circumstances. See CPL §30.30(4)(g); People v. Goodman, 41 N.Y.2d 888, 393 N.Y.S.2d 985 (1977) (continuances granted because of the unavailability of material evidence); People v. Hall, 61 A.D.2d 1050, 403 N.Y.S.2d 112 (2d Dept. 1978) (stenographer had transcribed unintelligible court notes because of a nervous breakdown).

If the People are not ready for trial within six months of the commencement of criminal proceedings, CPL §30.30 mandates dismissal.

People v. Cook, 63 A.D.2d 842, 406 N.Y.S.2d 850 (4th Dept. 1978). Upon a showing by a preponderance of the evidence that the prosecution is not ready, the indictment must be dismissed unless the People establish periods of exclusions which justify the delay. People v. Del Valle, 63 A.D.2d 830, 406 N.Y.S.2d 642 (4th Dept. 1978). See also, People v. Santos, 68 N.Y.2d 859, 508 N.Y.S.2d 411 (1986). Affidavits merely asserting court backlog [People v. Williams, 67 A.D.2d 1094, 415 N.Y.S.2d 155 (4th Dept. 1979)], or unsatisfactory excuses as to why an ongoing narcotics investigation had delayed the trial [People v. Washington, 43 N.Y.2d 772, 401 N.Y.S.2d 1007 (1977)] are insufficient to justify trial delay. See also People v. Rice, 87 A.D.2d 894, 449 N.Y.S.2d 522 (2d Dept. 1982); People v. Gordon, 125 A.D.2d 257, 509 N.Y.S.2d 543 (1st Dept. 1986).

The Court of Appeals has recently held that postreadiness delay is not excused because it is inadvertent, no matter how pure the intention. The "exceptional fact or circumstance" allowance of CPL §30.30(3)(b) evidences that more than good faith is required. People v. Anderson, 66 N.Y.2d 529, 498 N.Y.S.2d 119 (1985).

[i] General Speedy Trial Relief

Under CPL §30.20, general speedy trial relief is still available to the defendant in that this section codifies the right in general terms and specifies in subdivision 2 that, insofar as practicable, criminal cases must be given trial preference over civil, and of all the criminal cases, trial preference must be given to those where the defendant is incarcerated. Prior to the enactment of the new CPL §30.30, with specified time period guarantees, §30.20 was the statutory provision available

to protesting defendants. Although use of CPL §30.20 is far less necessary since the enactment of §30.30, it can still be used where (1) post-indictment delays are justified as unavoidable because of court congestion, and (2) where the total excluded time, including authorized adjournments and excludable delays, allegedly prejudiced the defendant. See, e.g., People v. Berkowitz, supra; People v. White, 72 A.D.2d 913, 422 N.Y.S.2d 193 (4th Dept. 1979), aff'd, 81 A.D.2d 486, 442 N.Y.S.2d 300 (4th Dept. 1981), cert. denied sub. nom. Williams v. New York, 455 U.S. 992 (1982).

In People v. Taranovich, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975), the court listed five factors that it considered determinative of the need to dismiss to effect the guarantee for speedy trial. The court advised a balance between: (1) extent of delay; (2) reasons for the delay; (3) nature of the underlying charge; (4) pre-trial incarcerations; and (5) prejudice to the defendant. In that case, even though there was a one year delay between indictment and trial, since there was no showing of prejudice to the defendant, the court found that he was not entitled to dismissal. Note that this action was commenced prior to the effective date of CPL §30.30.

In People v. Staley, 41 N.Y.2d 789, 396 N.Y.S.2d 339 (1977), the original charges were dismissed without prejudice to the grand jury but thirty-one months later an indictment for the offense was returned. Although the pre-indictment delay was not covered by CPL §30.30, the overwhelming delay in bringing the defendant to trial worked to deny him due process of law.

To reiterate, the outcome of defendant's motion to dismiss will depend on whether the delay is characterized as pre- or post-indictment.

There is no absolute rule in this area of the law by which each case will be decided. Perhaps it is best to recognize the restrictions in CPL §30.30, but also to consider the balancing factors of People v. Taranovich, supra. If the commencement of the actions is delayed, the defendant may be entitled to dismissal whether or not there is a showing of prejudice, a violation of the statute of limitations or a violation of CPL §30.30. See People v. Singer, 44 N.Y.2d 241, 405 N.Y.S.2d 17 (1978). Lack of pretrial incarceration as well as lack of prejudice to the defendant's case, can, however, outweigh the claim. People v. Neiss, 81 A.D.2d 599, 437 N.Y.S.2d 460 (2d Dept. 1981), citing Taranovich.

Also note that the Court of Appeals has now made it clear that motions made pursuant to CPL §210.10(2) must be made prior to commencement of trial. CPL §210.10(2) is not modified by the provision in the omnibus motion procedure section that grants the trial court discretion to entertain untimely made pretrial motions [CPL §255.20(3)]. People v. Lawrence, 64 N.Y.2d 200, 485 N.Y.S.2d 233 (1984).

(7) Motion to Dismiss In Furtherance of Justice

CPL §210.20(4)(i) provides that under CPL §210.40 an indictment may be dismissed in the judge's discretion where some compelling factor renders such a decision just. CPL §210.40 provides that the court must, to the extent applicable, examine and consider, individually and collectively, the following:

(a) the seriousness and circumstances of the offense;

(b) the extent of harm caused by the offense;

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character and condition of the defendant;

(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;

(h) the impact of a dismissal on the safety or welfare of the community;

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

An order dismissing an indictment in the interest of justice may be issued upon motion of the People or of the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefore upon the record.

In the Matter of Morgenthau v. Roberts, 65 N.Y.2d 749, 492 N.Y.S.2d 21 (1985), the Court of Appeals made it clear that CPL §210.20 provides only for dismissal of indictments and trial courts may not dismiss a criminal complaint on grounds which the Legislature never authorized; nor is there inherent or supervisory authority for such a dismissal.

(8) Motion to Dismiss for "Some Other Jurisdictional or Legal Impediment" to Conviction of Defendant [CPL §210.20(1)(h)]

An indictment will only be dismissed pursuant to this section if none of the other sections outlined in CPL §210.20 apply. People v.

Frisbie, 40 A.D.2d 334, 339 N.Y.S.2d 985 (3d Dept. 1973). The provision was inserted because "of the impossibility of specifying every kind of contention which may properly be raised in an attack upon an indictment." Denzer, Richard, McKinney's Consolidated Laws Of New York, C.P.L. §210.20, pp. 339-340 (1971).

Very few cases have been decided pursuant to this section and thus its scope has not been well defined. A lower court held that subdivision (h) "would appear to apply prospectively to impediments to conviction upon the indictment, rather than to defects in the indictment or underlying grand jury proceedings, which are the subject of other paragraphs of this section" (§210.20). People v. Grogh, 97 Misc.2d 894, 412 N.Y.S.2d 760, 762 (Sup. Ct. Queens Co. 1979). While that may represent a logical extension of the Frisbie holding cited above, there has been no definitive ruling as to when this section applies, except to say that such impediments must be substantial. People v. Coppa, 57 A.D.2d 189, 394 N.Y.S.2d 219 (2d Dept. 1977).

J. Motion Practice and Procedure

CPL §210.20 sets forth the procedure for a motion to dismiss an indictment. It must be made generally within the 45 day period for pretrial motions under CPL §255.20 except for motions to dismiss for denial of a speedy trial. Resubmision may be authorized if the indictment was dismissed as defective, for insufficient evidence, for defective grand jury proceedings or in the interests of justice. CPL §210.20(2); see also People v. Hoffer, 77 A.D.2d 911, 431 N.Y.S.2d 79 (2d Dept. 1980). However, resubmission even on these grounds is improper unless authorized by the court. See also In the Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 493 N.Y.S.2d 452 (1985) (trial court lacks the authority to shorten the

statutory time period in which to make pretrial motions).

(a) Procedure [CPL §210.45]

[i] Motion Must Be in Writing

A motion to dismiss an indictment pursuant to section 210.20 must be made in writing and upon reasonable notice to the people. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence supporting or tending to support the allegations of the moving papers. CPL §210.45(1). See People v. Jack, 117 A.D.2d 753, 498 N.Y.S.2d 741 (2d Dept. 1986).

[ii] Filing and Service

The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers, and may further submit documentary evidence refuting or tending to refute such allegations. CPL §210.45(2) and (7).

After all papers of both parties have been filed, and after all documentary evidence, if any, has been submitted, the court must consider the same for the purpose of determining whether the motion is determinable without a hearing to resolve questions of fact.

[iii] Summary Granting of Motion

The court must grant the motion without conducting a hearing if:

(a) The moving papers allege a ground constituting a legal basis

for the motion pursuant to subdivision one of CPL §210.20; and

(b) such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof. CPL §210.45(4).

The court may deny the motion without conducting a hearing if:

(a) the moving papers do not allege any ground constituting a legal basis for the motion pursuant to subdivision one of CPL §210.20; or

(b) The motion is based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all essential facts; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof. CPL §210.45(5).

[iv] Hearing

If the court does not determine the motion pursuant to subdivision four or five, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present in person at such hearing but may waive such right. CPL §210.45(6).

Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion. CPL §210.45(7).

[v] Dismissal Without Resubmission

When the court dismisses the entire indictment without authorizing resubmission of the charge or charges to a grand jury, it must order

that the defendant be discharged from custody if he is in the custody of the sheriff, or if he is at liberty on bail it must exonerate the bail. CPL §210.45(8).

[vi] Dismissal With Resubmission

When the court dismisses the entire indictment but authorizes resubmission of the charge or charges to a grand jury, such authorization is, for the purposes of this subdivision, deemed to constitute an order holding the defendant for the action of a grand jury with respect to such charge or charges. Such order must be accompanied by a securing order either releasing the defendant on his own recognizance or fixing bail or committing him to the custody of the sheriff pending resubmission of the case to the grand jury and the grand jury's disposition thereof. Such securing order remains in effect until the first to occur of any of the following:

(a) A statement to the court by the People that they do not intend to resubmit the case to a grand jury;

(b) Arraignment of the defendant upon an indictment or prosecutor's information filed as a result of resubmission of the case to a grand jury. Upon such arraignment, the arraigning court must issue a new securing order.

Note: When a prosecutor seeks leave to resubmit a matter to a grand jury, the application for resubmission must be accompanied by facts sufficient to permit a proper exercise of discretion by the reviewing judge. People v. Dykes, 86 A.D.2d 191, 449 N.Y.S.2d 284 (2d Dept. 1982). See also People v. Ladsen, 111 Misc.2d 374, 444 N.Y.S.2d 362 (Sup. Ct. N.Y. Co. 1981) (the district attorney disclosed facts in his affirmation which showed the existence of new evidence justifying

resubmission of the case to the grand jury).

(c) The filing with the court of a grand jury dismissal of the case following resubmission thereof;

(d) The expiration of a period of forty-five days from the date of issuance of the order; provided that such period may, for good cause shown, be extended by the court to a designated subsequent date if such be necessary to accord the People reasonable opportunity to resubmit the case to a grand jury.

Upon the termination of the effectiveness of the securing order pursuant to paragraph (a), (c) or (d), the court must immediately order that the defendant be discharged from custody if he is in the custody of the sheriff, or if he is at liberty on bail it must exonerate the bail. Although expiration of the period of time specified in paragraph (d) without any resubmission or grand jury disposition of the case terminates the effectiveness of the securing order, it does not terminate the effectiveness of the order authorizing resubmission. CPL §210.45(9).

II. BILLS OF PARTICULARS

(a) Generally

A bill of particulars is a written statement by the prosecutor specifying items of factual information not included in the indictment but which pertain to the offense charged. The statement must specify the substance of each defendant's conduct encompassed by the charge which the people intend to prove at trial and whether the people intend to prove that the defendant acted as principal, accomplice, or both. The prosecutor is not required to include matters of evidence relating to the manner in which the people intend to prove the elements of the offense charged or any item of factual information included in the bill of particulars.

CPL §200.95(1)(a).

A request for a bill of particulars is a written request served by the defendant upon the people without leave of court. It must be in writing, must specify the items of factual information desired, and must allege that defendant cannot adequately prepare or conduct his defense without the information sought. CPL §200.95(1)(b).

The request must be made within 30 days after arraignment and before commencement of trial. CPL §200.95(3). The prosecutor must serve the requested bill of particulars within 15 days of service of the request or "as soon thereafter as is practicable" CPL §200.95(2). However, if the People do file a bill late a defendant must show prejudice before the information will be dismissed. People v. Elliott, 65 N.Y.2d 446, 492 N.Y.S.2d 581 (1985). The prosecutor may serve a written refusal to comply with a request where the request is untimely; the defendant seeks factual information which is not authorized to be included in a bill of particulars; the information sought is not necessary to enable the defendant to prepare or conduct a defense; or where it would warrant a protective order. CPL §200.95(4). Where there is a showing of good cause for an untimely request and the information is otherwise properly sought the court must order the prosecutor to comply with the request. CPL §200.95(5)

At any time prior to trial the prosecutor may serve upon defendant and file with the court an amended bill of particulars. At any time during trial, upon application of the prosecutor and with notice to the defendant, the court may, after affording defendant an opportunity to be heard, permit the prosecutor to amend the bill of particulars. The court must find however that the prosecutor has acted in good faith and that no

undue prejudice will accrue to the defendant. The court must grant an adjournment to the defendant where such is necessitated by an amendment. CPL §200.95(8).

The court may, upon application of the prosecutor or "any affected person" or on its own initiative issue a protective order denying, limiting, conditioning, delaying, or regulating the bill of particulars for good cause based upon a number of factors which outweigh the need for a bill of particulars. CPL §200.95(7)(a).

The sanctions for failure to comply with discovery specified in CPL §240.70 are available for a failure to comply with a request for a bill of particulars. CPL §200.95(5).

(b) Nature and Scope of Bill of Particulars

A defendant is not entitled to receive notice of the prosecution's evidence by a bill of particulars. See People v. Davis, 41 N.Y.2d 678, 394 N.Y.S.2d 865 (1977). In a burglary prosecution, the defense was not entitled to obtain in a bill of particulars a specification of the portion of the building that defendant allegedly entered. People v. Raymond G., 54 A.D.2d 596, 387 N.Y.S.2d 174 (3d Dept. 1976). However, where defendants were charged with acting in concert in perpetrating the shooting death of the victim, the defense was entitled to a specification in the bill of particulars as to whether they were charged with hiring an assassin or as direct perpetrators, even though, arguably, this is the "theory" of the People's case. People v. Taylor, 74 A.D.2d 177, 427 N.Y.S.2d 439 (2d Dept. 1980).

A bill of particulars is not a discovery device and may not be used to acquire the records of the composition, attendance and votes of the

grand jury. See People v. Davis, supra. See also Cosgrove v. Doyle, 73 A.D.2d 808, 423 N.Y.S.2d 734 (4th Dept. 1979) (petition for writ of prohibition granted to restrain trial judge from enforcing his decision allowing two individuals to obtain in a bill of particulars information about the voting and attendance records of the grand jury).

(c) Defendant Must Show Items Are Necessary to His Defense

The test in determining whether to grant defendant's requests for items in a bill of particulars is not whether such items will be useful to his defense, but whether they are necessary for it. People v. Wayman, 82 Misc.2d 959, 371 N.Y.S.2d 791 (Justice Ct. Town of New Windsor Orange Co. 1975). "The defendant has the burden of satisfying the court that the items sought are necessary." Wayman, 371 N.Y.S.2d at 794. For example, a pharmacist charged with the illegal sale of methaqualone, who had an alibi defense, was entitled to specification in the bill of particulars of the persons to whom he allegedly illegally sold the drug. People v. Einhorn, 75 Misc.2d 183, 346 N.Y.S.2d 986 (Sup. Ct. N.Y. Co. 1973). Similarly, a defendant charged with the depraved indifference homicide of an infant who died after he was hospitalized, is entitled in a bill of particulars to a full and complete statement describing the circumstances leading to the discontinuance of the victim's life support systems and the donation of certain of the victim's organs. People v. Bisonnette, 107 Misc.2d 1049, 436 N.Y.S.2d 607 (Saratoga Co. Ct. 1981). On the other hand, as the state does not have to prove the object crime in a burglary, the defendant was not entitled to a specification in the bill of particulars as to what crime he intended to commit upon the unlawful entry. People v. Mackey, 49 N.Y.2d 274, 425 N.Y.S.2d 288

(1980).

Specification of the benefit received by defendant as pleaded in a count of official misconduct was a proper subject for a bill of particulars. People v. D'Arcy, 79 Misc.2d 113, 359 N.Y.S.2d 453 (Allegany Co. Ct. 1974).

VOIR DIRE PROCESS AND PROCEDURES

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VOIR DIRE PROCESS AND PROCEDURES

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VOIR DIRE PROCESS AND PROCEDURES

(1) Jury Selection: The Governing Law

(a) Formation of Jury

1. On the trial of an indictment, the jury consists of twelve jurors, and at the court's discretion, from one to four alternate jurors may be selected. CPL §§270.05(1), 270.30.

2. If the defendant is charged in an information, the jury consists of six jurors and, at the court's discretion, one or two alternates. CPL §§360.10(1), 360.35(1).

3. Jury is formed and selected as prescribed in the Judiciary Law. CPL §§270.05(2), 360.10(2).

4. It has been held that the Commissioner of Jurors cannot be compelled to disclose the names and addresses of persons selected and sworn as jurors in a highly publicized trial, and that §509(a) of the Judiciary Law protects information in records used in or created by the juror selection process from unrestricted disclosure. Newsday, Inc. v. Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182 (2nd Dept. 1986), appeal granted, Mo. No. 264 (N.Y. April 30, 1987). However, disclosure will be granted to defense counsel as part of trial preparation for the valid purpose of advancing the right to a fair trial. People v. Perkins, 125 A.D.2d 816, 509, N.Y.S.2d 441 (3d Dept. 1986).

(b) Composition of Jury

1. Every defendant is guaranteed the right to a trial by an

impartial jury, absent any systematic, deliberate discrimination or exclusion with respect to the compilation of a general list from which jurors are drawn. People v. Chestnut, 26 N.Y.2d 481, 311 N.Y.S.2d 853 (1970), petition for writ of habeas corpus denied, United States ex rel. Chestnut v. Criminal Court of the City of New York, 442 F.2d 611 (2d Cir. 1971), cert. denied, 404 U.S. 856 (1971). See also New York State Constitution, Article 1, Section 2, and United States Constitution, Sixth Amendment.

2. "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." Brown v. Allen, 344 U.S. 443, 474 (1953).

3. See Taylor v. Louisiana, 419 U.S. 522 (1975), which held that a statutory procedure automatically exempting women from jury service violated defendant's right to be tried by a fair cross-section of community. [Note: The defendant, a male, had standing to claim this.] See also Duren v. Missouri, 439 U.S. 357 (1979), holding unconstitutional the automatic granting of requests for exemption by prospective female jurors.

4. Juries need not mirror the community and defendants are not entitled to a jury of any particular composition.

   a. People v. Shedrick, 104 A.D.2d 263, 482 N.Y.S.2d 939

(4th Dept. 1984), aff'd, 66 N.Y.2d 1015, 1017, 499 N.Y.S.2d 388 (1985) ("there is no unequivocal requirement that juries be drawn from a pool of residents from throughout the entire county wherein the court convenes");

b. People v. Marrero, 110 A.D.2d 784, 487 N.Y.S.2d 853 (2d Dept. 1985) (defendant's claim that the jury did not consist of a cross section of the community because jury selection took place on September 22 and 23, 1983, during the Jewish holiday of Succoth, which allegedly prevented Orthodox Jews from serving on the jury is without merit).

c. People v. Henderson, 128 Misc.2d 360, 490 N.Y.S.2d 94 (Buffalo City Ct. 1985) (defendants were not entitled to jury panel drawn only from residents of city rather than from the entire county where, although blacks and Hispanics were seriously underrepresented in the present county-based pool system, such under representation was the inadvertent effect of an effort to set up central jury pool for entire county rather than a deliberate discriminatory attempt to exclude minorities).

d. In order for a defendant to be entitled to a hearing on the issue of discrimination, it is necessary for him to prove an intentional and systematic system of discrimination.

Mathematical disparities alone were insufficient

to raise the issue. See People v. Chestnut, supra; People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976).

Assertions of a discriminatory process concerning the selection of jury panels are insufficient without proof of any facts in support of such assertions. People v. Liberty, 67 A.D.2d 776, 412 N.Y.S.2d 699 (3d Dept. 1979). People v. Tucker, 115 A.D.2d 175, 495 N.Y.S.2d 244 (3rd Dept. 1985) (whether a challenge to the jury selection process is based on the equal protection clause or the due process clause, it must be supported by a demonstration of the demographic breakdown of the jury panels selected in order to show some systematic discrimination).

See, infra p. 18, discussion of Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986) which overruled the evidentiary requirement first announced in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, reh'g denied, 381 U.S. 921 (1965) which required a defendant alleging discrimination in the prosecutor's use of peremptory challenges to show a systematic pattern of discrimination.

e. See also Castaneda v. Partida, 430 U.S. 482 (1977):

> [In] order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied [citations omitted]. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a signficant period of time [citations omitted]. This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class.... Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Id. at 494-95 (1977).
(Footnote omitted.)

People v. Robinson, 114 A.D.2d 120, 125, 498 N.Y.S.2d 506 (3rd Dept. 1986) (college students do not fall into any distinctive group within the meaning of the "fair cross section of the community requirement" for prospective jurors).

(c) Challenge to Panel - CPL §§270.10, 360.15

1. Available only to defendant.

2. Systematic exclusion must be alleged. See, infra p. 18, discussion of Batson v. Kentucky, 454 U.S. 852, 106 S.Ct.

3. Made in writing, before selection starts. If not made, it is deemed waived. People v. Prim, 47 A.D.2d 409, 366 N.Y.S.2d 726 (4th Dept. 1975), modified on other grounds, 40 N.Y.2d 946, 390 N.Y.S.2d 407 (1975).

4. If prosecutor denies the existence of the alleged facts, the court must conduct a hearing at which witnesses may be called and examined.

5. The defendant has the burden of proving prima facie that a defect exists. In order to substantiate a charge of systematic exclusion of a particular class of persons, the defendant must adduce evidence that the group allegedly excluded constitutes a distinct class. See Brown v. Harris, 666 F.2d 782 (2d Cir. 1981) (insufficient evidence that persons between the ages of 18 and 28 constitute a distinct class; further, as persons under 21 were not eligible to serve as jurors until recently, the alleged exclusion could not be systematic); see also People v. Bartolomeo, 126 A.D.2d 375, 513 N.Y.S.2d 981 (2d Dept. 1987) (young black adults ranging in age from 18 to 21 years are not a distinctive group in the community). Once established the burden is on the government to show that the pool of jurors did not systematically exclude certain groups. Alexander v. Louisiana, 405 U.S. 625 (1971); Taylor v. Louisiana, supra; Rose v. Mitchell, 443 U.S. 545 (1979).

6. Court determines issues of law and fact.
1712 (1986).

7. If the challenge is allowed, the panel must be discharged.

(d) Challenges for Cause (Individual Jurors). CPL §§270.20, 360.25

1. Not qualified under the Judiciary Law. See Judiciary Law §§509, 510, 511 (as amended, Ch. 316, L.1977).

   a. A juror must be a U.S. citizen and a resident of the county. Judiciary Law §510(1).

   b. A juror must be not less than eighteen years of age. Judiciary Law §510(2).

   c. A juror must not have a mental or physical condition, or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror. Judiciary Law §510(3).

   d. A juror must be able to read and write English. Judiciary Law §510(5). People v. Guzman, 125 Misc.2d 457, 478 N.Y.S.2d 455 (N.Y. Sup. Ct. 1984) (prospective juror who was otherwise qualified and who communicated in signed English, could not be challenged for cause).

   e. A juror must not have been convicted of a felony. Judiciary Law §510(4).

   f. Certain government officials,as well as persons in active service in the Armed Forces, are automatically disqualified. Judiciary Law §511(1), (2), (3), (4).

   g. A person who has served on a grand or petit jury within the State, including in a federal court, within two years of the proposed service is

automatically disqualified. Judiciary Law §511(5). People v. Foster, 69 N.Y.2d 1144, 490 N.Y.S.2d 726 (1985) (co-defendants waived any objection based on juror's prior service where they failed to join in third co-defendant's peremptory challenge after his challenge for cause was denied); see also People v. O'Hare, 117 A.D.2d 757, 498 N.Y.S.2d 478 (2d Dept. 1986).

h. See Carter v. Jury Comm., 396 U.S. 320, 90 S.Ct. 518 (1970). State is free to confine selection of jurors to citizens, to persons meeting specified qualifications of age and educational attainment, and to those in possession of good intelligence, sound judgment and fair character.

2. Prospective juror has a state of mind likely to preclude him from rendering an impartial verdict based on the evidence adduced at the trial.

a. Prospective juror has an opinion as to the defendant's guilt or innocence. People v. Brown, 111 A.D.2d 248, 489 N.Y.S.2d 91 (2d Dept. 1985) (the trial court was in error in denying defendant's challenge for cause of a prospective juror who stated, during voir dire, that "if the police arrest [defendant] he has done something" and reiterated that belief twice during subsequent questioning); see

also People v. Johnson, 113 A.D.2d 900, 493 N.Y.S.2d 618 (2d Dept. 1985) (prospective juror's assumption that the complainant was a victim of some wrongdoing was a natural assumption to make and trial court properly denied defense counsel's request to discharge for cause); People v. Culhane, 33 N.Y.2d 90, 350 N.Y.S.2d 381 (1973); People v. Biondo, 41 N.Y.2d 483, 393 N.Y.S.2d 944 (1977). In such a case, the juror is nevertheless qualified if the juror an expurgatory oath and declares to the satisfaction of the court that the juror can put aside his bias and render an impartial verdict according to the evidence. However, the juror must state unequivocally that his or her prior state of mind will not influence the verdict; a juror's willingness to do "everything within [her] power" to be fair and impartial has been found not to be sufficient. People v. Taylor, 120 A.D.2d 325, 502 N.Y.S.2d 1 (1st Dept. 1986).

b. Juror states that he has strong views about the type of crime with which the defendant is charged and no expurgatory oath is administered. People v. Morrer, 77 A.D.2d 575, 429 N.Y.S.2d 913 (2d Dept. 1980).

c. Bias implied from juror's past history. People v. Oddy, 16 A.D.2d 585, 229 N.Y.S.2d 983 (4th Dept. 1962); People v. Sellers, 73 A.D.2d 697, 423 N.Y.S.2d 222 (2d Dept. 1979).

d. Juror familiar with media accounts of the crime or of defendant, not excused solely for that reason. People v. Culhane, supra; People v. Genovese, 10 N.Y.2d 478, 225 N.Y.S.2d 26 (1962).

> There is no requirement "that the jurors be totally ignorant of the facts and issues involved" (citations omitted) or the defendant's other involvements with the law (citations omitted). What is generally condemned is the "trial by newspaper" or other media in which a substantial portion of the community has been exposed to inflammatory reports purportedly establishing defendant's guilt (citations omitted).

People v. Moore, 42 N.Y.2d 421, 432, 397 N.Y.S.2d 975, 982 (1977).

People v. Knapp, 113 A.D.2d 154, 495 N.Y.S.2d 985 (3rd Dept. 1985) (voir dire examination of jurors for defendant's second trial on a charge of reckless murder was not improperly conducted on the ground that the media and public were not excluded while jurors were questioned regarding publicity as to prejudicial matters).

e. Prospective juror has actual bias caused by a highly unfavorable impression of the defendant's over-all reputation or character and there appears to be a possibility that such impressions of the defendant will influence juror's verdict. People v. Torpey, 63 N.Y.2d 361, 482 N.Y.S.2d 448 (1984).

3. Prospective juror is related within the sixth degree of consanguinity or affinity to the defendant, victim, prospective witness, or counsel; has been an adverse party to such a person in a civil action, or has accused or been accused by such a person in a criminal action; or has come other relationship with such a person what is likely to prevent the juror from reaching an impartial verdict. CPL §270.20(1)(c).

   a. Juror may be in a disqualifying relationship to defendant if he holds a professional or occupational position similar to the victim's. People v. Culhane, supra, 33 N.Y.2d at 105, 350 N.Y.S.2d at 394-95 (1973); People v. Smith, 110 A.D.2d 669, 487 N.Y.S.2d 585 (2d Dept. 1985) (in a case involving the murder of an off-duty police officer trial court acted properly in denying defendant's challenge for cause of a prospective juror whose son was a police detective where juror indicated he did not see his son often, did not discuss police matters with him, believed that his son could make mistakes and indicated he could be impartial). Fact that victim is a homosexual and crime was one of many assaults on homosexuals does not per se disqualify a homosexual juror. People v. Viggiani, 105 Misc.2d 210, 431 N.Y.S.2d 979 (N.Y. Crim. Ct. 1980).

   b. Juror who had worked as a part-time police officer in

the district attorney's office and had close personal and professional relationship with the prosecutor who tried the case should have been excluded for implied bias. People v. Branch, 46 N.Y.2d 645, 415 N.Y.S.2d 985 (1979). The Court in Branch further held that where a suspect relationship is the basis for the implied bias, the expurgatory oath is not available [as it is when the juror has an opinion as to the guilt or innocence of the defendant; see People v. Biondo, supra].

> We would add that the trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service. Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury. The presumption of innocence, the prosecutor's heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias.

People v. Branch, supra, 46 N.Y.2d at 651-52, 415 N.Y.S.2d at 988.

c. People v. Rentz, 67 N.Y.2d 829, 501 N.Y.S.2d 643 (1986) (juror was acquainted with two prosecution witnesses. The relationship with one was essentially professional but with respect to the other witness, according to the juror's own assessment, somewhat intimate as well. Under the circumstances, the court

should have found this juror unqualified to serve); People v. Hernandez, 122 A.D.2d856, 505 N.Y.S.2d 908 (2d Dept. 1986) (prospective juror's former employment as a police officer was insufficient to support a challenge for cause).

d. What makes a relationship suspect is determined by a consideration of all facts and circumstances. See, e.g., People v. Provenzano, 50 N.Y.2d 420, 429 N.Y.S.2d 562 (1980), where the Court held that the juror did not have a suspect relationship from which could be inferred an implied bias not curable by an expurgatory oath where the juror had a nodding acquaintance with the district attorney who tried the case and had campaigned for the party slate on which he ran. See also People v. Smith, 111 A.D.2d 883, 490 N.Y.S.2d 277 (2d Dept. 1985) (merely because the murder took place in a subway station and one of the People's witnesses was the token booth clerk on duty at the time, there was no merit to defendant's claim that two prospective jurors who were bus drivers employed by the New York City Transit Authority would be unlikely to render an impartial verdict); People v. Downs, 77 A.D.2d 740, 431 N.Y.S.2d 197 (3d Dept. 1980); People v. Harris, 84 A.D.2d 63, 445 N.Y.S. 530 (2d Dept. 1981), aff'd, 57 N.Y.2d 335, 456 N.Y.S.2d 694 (1982), cert. denied, 460 U.S. 1047 (1983) (trial court did not err in refusing to grant a challenge

for cause to a sworn juror, although the prosecutor had previously dismissed a charge against that juror's daughter, since there was no evidence that the juror knew this; further, when the prosecutor revealed this fact during voir dire before the juror was sworn, defense counsel failed to ask for further examination and later in the trial, defense counsel opposed a proposed substitution of an alternate). See also Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982), (juror while sitting on case submitted an application for a position as an investigator to the district attorney's office; the trial court's refusal to set aside the verdict after a hearing into the juror's possible bias did not deny defendant due process); People v. Clark, 125 A.D.2d 868, 510 N.Y.S.2d 223 (3d Dept. 1986) (Denial of challenge for cause based on juror's close personal relationship with District Attorney required reversal).

4. Prospective juror was a witness at the preliminary hearing or grand jury, or is to be a witness at the trial. CPL §270.20(1)(d).

5. Prospective juror served on grand jury which indicted defendant or served on prior trial jury where defendant was on trial. CPL §270.20(1)(e).

6. It is constitutional error to foreclose inquiry about a juror's possible racial prejudice; racial prejudice is a ground for challenge for cause. In People v. Blyden, 55

N.Y.2d 73, 447 N.Y.S.2d 886 (1982), the Court ordered a new trial and held that a prospective juror who stated that he "had feelings against minorities," should have been disqualified for cause since his shallow incantation -- "I think I could [be impartial]" -- did not overcome the clear indication of the juror's bias. See also St. Lawrence v. Scully, 523 F.Supp. 1290, (S.D.N.Y. 1981); aff'd, 697 F.2d 296 (1982) (notwithstanding prospective juror's expurgatory statement, the court did not err in disqualifying this juror, who indicated that it would "definitely be difficult for him to keep the question of race out of his mind during deliberations of the facts, but he would try," since racial issues were inextricably bound up with the trial). Note that the United States Supreme Court has held that the state trial courts are required, under the United States Constitution, to inquire about the possible racial biases of prospective jurors only when racial issues are inextricably bound up with the trial [see Ham v. South Carolina, 409 U.S. 524 (1973) (defendant was a black civil rights worker who claimed that police had framed him on the drug charge)]; further that Court has held that federal courts must not only inquire about bias in such situations but must also inquire when the charged crime is violent and the victim and perpetrator are of a different race. Ristaino v. Ross, 424 U.S. 589 (1976); Rosales-Lopez v. United States,

451 U.S. 182 (1981).

A trial court has discretion to limit the voir dire examination into the alleged racial bias of prospective jurors to prevent irrelevant and repetitious questioning. St. Lawrence v. Scully, supra.

7. If the death penalty is applicable and the prospective juror entertains such conscientious opinions, either against or in favor of the death penalty, as to preclude him from rendering an impartial verdict such juror may be challenged for cause. CPL §270.20(1)(f).

a. In Lockhart v. McCree, 106 S.Ct. 1758 (1986), the Supreme Court addressed the question left open in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968): Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial?

In a five-member majority opinion, authored by Justice Renhquist, the Court held that even assuming arguendo that death qualification in fact produces juries somewhat more "conviction prone" than "non-death qualified" juries, the Constitution does not prohibit the states from "death qualifying juries in capital cases".

"Death qualification" of a jury does not violate the fair cross section requirement of the Sixth Amendment.

So called "Witherspoon excludables"*, unlike minorities or women, do not constitute a distinctive group for fair cross section analysis since such a group is defined solely in terms of its shared attitudes and includes only those persons who can not and will not conscientiously obey the law with respect to one of the issues in a capital case.

"Death qualification" jury does not violate a defendant's Fourteenth Amendment right to an impartial jury since the Constitution does not require that a mix of individual viewpoints be represented on a jury.

Witherspoon, supra and Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521 (1980), which proscribed the use of "death qualifying" juries in capital sentencing cases are distinguishable from Lockhart which deals with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant.

b. In Buchanan v. Kentucky, ___ U.S.___, 55 U.S.L.W.

*Witherspoon excludables - prospective jurors who state that they can not under any circumstances vote for the imposition of the death penalty.

5026 (1987), the Supreme Court extended its holding in Lockhart by ruling that a "death-qualified" jury could hear the non-capitol murder case of a defendant being tried jointly with a codefendant facing the death penalty.

(e) Peremptory Challenges - CPL §§270.25, 360.30

1. An objection to juror for no specific reason.

2. In Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986) the Supreme Court reaffirmed that portion of Swain v. Alabama, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-827, reh'g. denied, 381 U.S. 921 (1965) which recognzied that a "state's purposeful or deliberate denial of [blacks] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."

In Batson, supra, a black man was indicted in Kentucky on charges of second degree burglary and receipt of stolen goods. After the court had excused a number of jurors the prosecutor used his peremptory challenges to strike all four black persons on venire and a jury composed only of white persons was selected and ultimately convicted the black defendant. Under Swain, supra, the defendant would have had to make out a prima facie showing of a pattern of systematic discrimination against blacks by the prosecutor in his use of peremptory challenges before the prosecutor would have been required to explain his exercise of the peremptories.

Batson, supra, however, overrules the Swain evidentiary requirement. Now a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial (emphasis added). Batson, 106 S.Ct. at 1711.

> To establish such a showing the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate" (citation omitted). Finally, the defendant must show that these facts and any other relevent circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race... Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors... The prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race.

Batson v. Kentucky, 106 S.Ct. at 1711-1712.

Batson was given retroactivity to all cases on direct review or not yet final in Griffin v. Kentucky, ___ U.S.___, 107 S.Ct. 708 (1987). See also People v. Ford, 69 N.Y.2d 775, 513 N.Y.S.2d 106 (1987); People v. Hockett, ___A.D.2d ___, 512 N.Y.S.2d 679 (1st Dept. 1987), holding that prosecutor's use of 12 of

17 peremptory challenges to remove potential black jurors required granting of new trial, although jury included two black members; and People v. Harper, 124 A.D.2d 593, 507 N.Y.S.2d 874 (2d Dept. 1986), sustaining the prosecutor's use of peremptory challenges that left four black jurors and at least two black alternate jurors, and prosecutor did not use all preemptories. The "neutral explanation" requirement of Batson was found to have been fulfilled in People v. Simpson, 121 A.D.2d 881, 504 N.Y.S.2d 115 (1st Dept. 1986), and in People v. Cartagena, ___ A.D.2d___, 513 N.Y.S.2d 497 (2d Dept. 1987).

3. Court must excuse person challenged.

4. Number of challenges depends on the nature of the crime charged. CPL §§270.25(2), 360.30, 360.35.

   a. Class A felony - twenty challenges for regular jurors, two for each alternate.

   b. Class B or C felony - fifteen challenges for regular jurors, two for each alternate.

   c. Class D or E felony - ten challenges for regular jurors, two for each alternate.

   d. Misdemeanor - three challenges for regular jurors, one for each alternate.

5. Joint trial of two or more defendants does not increase the number of challenges. They must be exercised jointly by a majority decision. CPL §§270.25(3), 360.30(2). See also State v. King, 36 N.Y.2d 59, 364 N.Y.S.2d 879 (1975), and People v. Anthony, 24 N.Y.2d 696, 301 N.Y.S.2d 961

(1969), where the Court of Appeals allowed defendant no more challenges than statute afforded.

6. No prejudice if court allows less than the statutory number of peremptory challenges unless defendant exhausted all challenges allowed. People v. DiPalma, 23 A.D.2d 853, 854, 259 N.Y.S.2d 264, 266 (2d Dept. 1965), aff'd, 17 N.Y.2d 455, 266 N.Y.S.2d 813 (1965), cert. denied, 385 U.S. 864 (1966).

7. A trial court committed reversible error when it refused to grant to defense counsel, as promised, an extra peremptory challenge, after defense counsel, in reliance on that promise, peremptorily challenged a juror who had seen the defendant in handcuffs. People v. Dixon, 81 A.D.2d 620, 438 N.Y.S.2d 6 (2d Dept. 1981); People v. Hines, 109 A.D.2d 893, 487 N.Y.S.2d 86 (2d Dept. 1985); but see People v. Gantz, 104 A.D.2d 692, 480 N.Y.S.2d 583 (3rd Dept. 1984).

8. Reversible error to wrongly deny a challenge for cause if defendant then peremptorily challenges juror and defendant's peremptory challenges are exhausted before the conclusion of jury selection. People v. Culhane, supra; see also People v. Moorer, 77 A.D.2d 575, 429 N.Y.S.2d 913 (2d Dept. 1980).

9. It has been held that number of peremptory challenges is determined by the highest crime charged for which there is legally sufficient evidence. Thus, if the evidence before the Grand Jury was insufficient to support the charge

contained in the indictment but would support a lesser included charge, the number of challenges applicable to the lower offense are permitted. People v. McGee, 131 Misc.2d 770, 501 N.Y.S.2d 1002 (1986).

(f) Procedure for Examination of Jurors; CPL §§270.15, 360.10

1. Twelve jurors (or six in local criminal court) are drawn and seated in jury box.

2. Seated jurors must be immediately sworn to answer truthfully all questions concerning their qualifications.

3. The court, in its discretion, may require prospective jurors to complete a questionnaire concerning their ability to serve as fair and impartial jurors.

   a. An official form for such questionnaire shall be developed by the Chief Administrator of the courts in consultation with the Administrative Board of the courts.

   b. A copy of each completed questionnaire shall be given to the court and each attorney prior to examination of prospective jurors.

4. The court shall initiate the examination of prospective jurors by identifying the parties and counsel and briefly outlining the case to the prospective jurors. The court then shall question sworn members of the panel regarding their qualifications to serve as jurors in the action.

5. Both parties may question the prospective jurors concerning their qualifications.

   a. The prosecutor commences the examination.

b. The scope of the examination is in the discretion of the court.

(i) Questioning is limited to unexplored matter affecting prospective juror qualifications.

(ii) Repetitious or irrelevant questioning shall not be permitted.

(iii) Questions regarding a juror's knowledge of rules of law shall not be permitted. See also People v. Bouleware, 29 N.Y.2d 135, 324 N.Y.S.2d 30 (1971), cert. denied, 405 U.S. 995 (1972).

c. After the parties conclude their questioning, the court may ask any further questions it deems proper regarding the qualifications of the prospective jurors.

6. The court may regulate for a stated period the disclosure of juror's addresses, either business or residence, upon a showing of good cause by any party or affected person or upon its own initiative. Such protective order, however, will not be applicable to counsel for either side.

7. The Court in its discretion, may, without the consent of counsel, direct that all sworn jurors be removed from the jury box. Such sworn jurors who are removed from the jury box shall be seated elsewhere in the courtroom separate and apart from the unsworn members of the panel.

8. Upon the consent of both parties, the sworn jurors may be removed from the courtroom to the jury room during the remainder of the jury selection process.

9. After examination by both parties is completed, both sides, commencing with the People, may exercise challenges for cause.

10. Following the determination on challenges for cause, both sides, commencing with the People, may exercise peremptory challenges.

11. Remaining jurors are then sworn and the procedure begins again until the full jury is impaneled.

12. If before twelve jurors are sworn, a juror already sworn becomes unable to serve by reason of illness or other incapacity, the court must discharge him. See People v. Wilson, 106 A.D.2d 146, 484 N.Y.S.2d 733 (4th Dept. 1985) (the discharge of a sworn juror for work related duties does not qualify as an incapacity within the meaning of CPL §270.15).

(g) Discharge of a Juror - CPL §270.35

1. The court must discharge a juror if after the trial jury has been sworn but before the verdict has been rendered, a juror is unable to continue to serve by reason of illness, or other incapacity or for any reason is unavailable for continued service.

2. The court must also discharge a juror when it finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial.

a. "[T]he standard for disqualifying a sworn juror over

defendant's objection (i.e., 'grossly unqualfied') is satisfied only 'when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict.'" People v. Buford, 69 N.Y.2d 290, 298, 514 N.Y.S.2d 191 (1987) (quoting People v. West, 92 A.D.2d 620, 622, 459 N.Y.S.2d 909 [3d Dept. 1983] [Mahoney, P.J., dissenting], rev'd on dissenting opn below, 62 N.Y.2d 708, 476 N.Y.S.2d 530 [1984]); see also People v. Benson, 123 A.D.2d 470, 506 N.Y.S.2d 480 (3d Dept. 1986).

b. People v. Galvin, 112 A.D.2d 1090, 492 N.Y.S.2d 836 836 (3rd Dept. 1985) (sworn juror was properly dismissed as grossly unqualified where prior to opening statements juror indicated she had seen a personal friend sitting with defendant's grandmother in courtroom and juror stated she would "feel certain pressure" in continuing to serve under those circumstances).

c. But see People v. Ivery, 96 A.D.2d 712, 465 N.Y.S.2d 371 (4th Dept. 1983) (it was reversible error for trial court judge to discharge sworn juror as grossly unqualified where the juror told trial court during prosecutor's cross-examination of a defense witness that he considered a question "irrelevant" and juror later refused to answer the prosecutor's question regarding whether he had made up his mind on the

defendant's guilt).

d. People v. Sims, 110 A.D.2d 214, 494 N.Y.S.2d 114 (2d Dept. 1985) (discussion among jurors regarding a newspaper article about the case did not amount to substantial misconduct warranting their discharge where only one juror had actually read the headline and all jurors could nonetheless state that they could confine their deliberations to the evidence).

e. People v. Russell, 112 A.D.2d 451, 492 N.Y.S.2d 420 (2d Dept. 1985) (trial court properly protected both defendant's and the People's right to a fair trial by dismissing a juror as grossly unqualified where the juror was alleged to have slept through various portions of the trial testimony).

f. People v. Pascullo, 120 A.D.2d 687, 502 N.Y.S.2d 275 (2d Dept. 1986) (jurors, sitting on the trial of a white defendant who was charged with assaulting an off duty black police officer, who witnessed a demonstration in front of the court house against the trial judge's use of a racial reference in an unrelated case should have been questioned individually and not as a collective body regarding whether they could remain impartial after observing the demonstration).

g. People v. Anderson, 123 A.D.2d 770, 507 N.Y.S.2d 246 (2nd Dept. 1986) (trial court erred in not permitting defense counsel to fully discuss with

jurors the impact of their contact with trial spectators, including one who identified himself as the defendant's cousin).

h. In People v. Rodriquez, 125 A.D.2d 82, 512 N.Y.S.2d 67 (1st Dept. 1987), the trial court declined to excuse a juror who during deliberations in a drug sale case expressed concern that an incident in which she had been "bothered, touched, handled by a dark Hispanic man in the subway" might influence her judgment about the defendant, also a dark Hispanic. The appellage court affirmed, noting that there were no alternate jurors remaining and that the judge had extended discussions with the juror concernity her ability to reach an imparitive verdict.

i. A juror who deliberately makes an unauthorized visit to a crime scene becomes an unsworn witness against the defendant, in violation of the defendant's Sixth Amendment right to confrontation. People v. Crimmins, 26 N.Y.2d 319, 310 N.Y.S.2d 300 (1970); People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526 (1967). However, when the juror coincidentally views the crime scene on the way to and from home, no misconduct is committed. People v. Mann, 125 A.D.2d 711, 510 N.Y.S.2d 196 (2d Dept. 1986).

3. Each case must be evaluated on its individual facts to determine if a juror is "grossly unqualified." The allegedly unqualified juror should be questioned in

chambers in the presence of counsel and the defendant. Counsel should be permitted to participate in the inquiry. In excusing a juror, the court may not speculate on the possible partiality of a witness based on equivocal responses, but must be convinced that the juror will be prevented from reaching an impartial verdict. People v. Buford, 69 N.Y.2d 290, 514 N.Y.S.2d 191 (1987). See also People v. Tufano, 124 A.D.2d 688, 507 N.Y.S.2d 920 (2d Dept. 1986) (trial court's failure to make inquiry of juror who expressed concern during deliberations about her ability to reach a just decision required reversal of conviction).

4. The discharged juror must be replaced with an available alternate. If no alternate juror is available, the court must declare a mistrial pursuant to CPL §280.10(3). People v. Burns, 118 A.D.2d 864, 500 N.Y.S.2d 545 (2d Dept. 1986) (defendant failed to preserve for appellate review his contention that his right to a jury trial was violated when the trial court replaced a juror with an alternate so that the juror could go on vacation).

5. If the trial jury has not begun its deliberations, the consent of the defendant is not required. However, once the trial jury has begun its deliberations, defendant's written consent to the replacement must be obtained in open court and in the presence of the court. People v. Cannady, 127 Misc.2d 783, 487 N.Y.S.2d 294 (N.Y. Sup. Ct. 1985) (once a jury has begun deliberations in a trial in

absentia, an alternate juror may not be substituted for a discharged juror, even if defense counsel consents, because defendant's written consent cannot be obtained).

(h) Preliminary Instruction by Court - CPL §270.40

1. After the jury has been sworn and before the People's opening address the court must instruct the jury generally concerning its basic functions, duties and conduct.

2. The preliminary instructions must include the following admonitions:

   (a) jurors may not converse among themselves or with anyone else upon any subject connected with the trial;

   (b) jurors may not read or listen to any accounts or discussion of the case reported by newspapers or other news media;

   (c) jurors may not visit or view the premises or place where the offense or offenses charged were allegedly committed;

   (d) jurors may not visit or view any other premises or place involved in the case;

   (e) jurors must promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.

3. People v. Townsend, 111 A.D.2d 636, 490 N.Y.S.2d 201 (1st Dept. 1985), aff'd, 67 N.Y.2d 815, 817; 501 N.Y.S.2d 638 (1986). (Trial court's distribution to the jury of a

written outline of the elements of the charges constituted error "by permitting even encouraging, the jurors to refer to the written outline during trial, the court invited piecemeal, premature analysis of the evidence. The court's outline in effect served as a checklist against which jurors could measure the evidence as it came in, with the attendant danger that jurors would conclude defendant was guilty even before he could present evidence or argument. That danger was heightened here by the fact that the issues of voluntariness and credibility, both central to the defense, were not part of the outline").

See also People v. Vincenty, 68 N.Y. 2d 994, 508 N.Y.S.2d 938 (1986).

(4) People v. Compton, 119 A.D.2d 473, 500 N.Y.S.2d 685, 686 (1st Dept. 1986) (although it may not be reversible error per se in all cases for the trial court to provide the jury written instructions relating to the specific elements of the crime charged, such practice was error where the submission to the jury resulted in an "unbalanced charge that highlighted certain legal principles and omitted any reference to presumption of innocence, reasonable doubt, burden of proof and the critical issue of credibility").

(5) See also People v. Koschtschuk, 119 A.D.2d 994, 500 N.Y.S.2d 895 (4th Dept. 1986). A verdict sheet on which the possible verdict of not guilty is conspicuously absent and which not only lists the offenses submitted to the jury, but provides facts alleged and sought to be proved by the People is improper and its use deprived defendant of a fair trial.

VOIR DIRE IN NEW YORK

By

MICHAEL KAVANAGH

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VOIR DIRE IN NEW YORK

A. INTRODUCTION

The trial of a criminal case begins in almost every instance with the selection of a jury. Since the decision to accept a particular person as a member of the jury is at best an educated guess, the need for preparation is obvious.

Before the selection process begins, each lawyer should have an idea of the type of person he wants on the jury and, equally important, an idea of the type of person he wants to avoid. This profile of a prospective juror is prepared by a thorough knowledge of the facts and value judgments which counsel must make as to the impact of those facts upon certain types of people. For example, a prospective juror who has strong ties to law enforcement should be avoided in any prosecution where the defendant, a police officer, has been charged with police brutality. While many of the evaluations made are more subtle, the need for this type of preparation is extremely important and absolutely essential if counsel is to achieve his objectives in this process.

In addition to preparing the juror profile, there are other practical suggestions which should help. First, and foremost, counsel would be well advised to follow their instincts in making the decision concerning the suitability of a potential juror's service. If deep reservations exist, it is my opinion the better choice is to remove the juror. Even if ultimately you are wrong,

jurors for this initial interview. Should a trial court decide to call substantially more than twelve, certain tactical considerations must come into play in deciding how to exercise one's peremptory challenges; (270.15[1][a])

b) the trial judge may have each juror at this point complete a questionnaire, a copy of which is then provided to the court and to the attorneys; (270.15[1][a])

c) the trial judge must initiate the questioning of prospective jurors by identifying the parties, briefly outlining the nature of the action, and then questioning the jurors concerning their qualifications; (270.15[1][b])

d) the trial court, when it completes its interview, must afford counsel, beginning with the prosecution, a fair opportunity to question prospective jurors as to any unexplored matter affecting their qualifications. However, the trial court shall not permit questions which are repetitious or irrelevant, or involve matters of law, and the scope of this examination rests solely within the sound exercise of its discretion; (270.15[1][c])

e) prior to the questioning, the trial court for good shown cause, upon the motion of either party or any affected person, or upon its own initiative, may issue a protective order for a stated period regulating the disclosure of the business or residential address of any prospective or sworn juror to any person or persons other than counsel for either party. Good

cause is found to exist where the court determines that there is a likelihood of bribery, jury tampering, or of physical injury or harassment to the prospective juror (CPL 270.15[1][a]).

Exercise of Challenges

After the questioning of prospective jurors has been completed, the respective parties must exercise whatever challenges they feel are appropriate. If either party requests, the court must entertain the exercise of any challenge inside the courtroom, but outside the hearing of any of the prospective jurors. (270.15[2])

The challenges are exercised in the following order:

- the prosecution, if it has any, must exercise its challenge for cause; the defense must then exercise its challenge for cause; the prosecution then exercises its peremptory challenges; the defense, after the prosecution has completed and has informed it of what peremptory challenges it has exercised, must then exercise its peremptory challenges. Once the defense has made its decision known concerning the exercise of its peremptory challenges, the remaining prospective jurors must be sworn. The prosecution is precluded at this point and is found to have waived any peremptory challenge regarding those jurors. (270.15[2]) Those jurors sworn must then remain in the jury box and jury selection continues. However, with the consent of the prosecution and defense, the sworn jurors may be removed from the jury box to the jury room for the remainder of the selection

it is better to have the juror off the jury than having to look at him throughout the trial and worry about whether it was a mistake.

The decision to accept or reject a potential juror is under the best of circumstances a difficult one and is made easier only if there is a meaningful exchange during the voir dire. The existence of such an exchange is facilitated by asking questions which call for extensive answers or explanations on the part of the jury. There is nothing so unproductive as a voir dire in which the lawyer does all of the talking and the juror is simply left with giving one word affirmative or negative responses. Questions asked during the voir dire should be designed towards drawing out the juror and encouraging meaningful participation on the juror's part.

Finally, counsel should avoid at all cost being repetitious. Not only does this serve to alienate prospective jurors, but it also can create significant problems with the trial judge.

B. OTHER OBJECTIVES

The primary purpose of the voir dire, although not necessarily the goal of the attorneys, is to insure that a fair and impartial jury is ultimately impanelled to decide guilt or innocence.

Additional objectives that counsel should have in mind while participating in this process are:

(1) Obtain information about a particular juror's background.

Prior to the commencement of jury selection counsel should have an idea as to the type of juror he is looking for and, equally important, the type of juror he is looking to avoid. The voir dire should be used to illicit information which counsel feels is of assistance in allowing him to make this decision correctly and intelligently.

(2) Educate the jury about the particular case.

The selection process often represents an excellent opportunity to expose and, hopefully, soften the impact of weaknesses in the prosecution's case. A witness' criminal record, the fact that an accomplice has received immunity from prosecution in return for his cooperation, and the lack of an eyewitness to the crime are examples of issues which may be covered during the voir dire and should be discussed with potential jurors to insure that their importance is not grossly exaggerated during the trial.

(3) Establish a rapport with the jury.

The voir dire provides the unique opportunity for trial counsel to converse on a one-to-one basis with prospective jurors and, hopefully, develop a feeling of mutual respect and trust by the manner in which his questioning is conducted.

C. PEOPLE v. BOULWARE (29 NY2d 135[1971])

An essential prerequisite to the proper preparation for jury selection is counsel's familiarity with the Court of Appeals opinion in People v. Boulware. This opinion sets forth

guidelines which describe the respective rights of the trial judge and counsel in the conduct of the voir dire. While the trial court is given broad discretion in this area, the opinion sets forth in clear and unequivocal language the right of counsel to actively participate in the questioning of the jury.

> "The judge presiding necessarily has broad discretion to control and restrict the scope of the voir dire examination. To that end, he may, in order to prevent inordinate interruptions and undue delay in the proceedings, question prospective jurors at the opening of the voir dire, during the course thereof or after counsel has conducted their examinations. The only condition imposed is that fair opportunity be accorded counsel to question about matters, not previously explored, which are relevant and material to the inquiry at hand." (Boulware, at p. 140).

While there has been considerable activity within the State Legislature during recent legislative sessions urging the adoption of Federal rules concerning the conduct of the voir dire, the law in the State of New York and the rights accorded to counsel pursuant to People v. Boulware remain intact (See also CPL 270.15[1]; Turner v. Murray, #84-6646, United States Supreme Court, wherein it was found that a defendant had the constitutional right to inform jurors during jury selection of the victim's race and inquire about possible racial prejudice where the underlying crime involved allegations of interracial violence).

D. CHALLENGES

I. Introduction

The most important procedural device available during a voir dire is the challenge. By their educated and constructive use,

counsel can have a profound impact upon the ultimate makeup of the trial jury and, hopefully, tailor it to one which would be sympathetic to his ultimate position in the law suit.

There are three types of challenges: A challenge to the entire panel (CPL 270.10); a challenge for cause (CPL 270.20); and the peremptory challenge (CPL 270.25).

II. Challenge to the Panel

The defendant may challenge the manner in which the entire jury panel was selected. He must allege, to be successful, that the procedure used to form the panel -

a. did not conform to the requirements of the judiciary law; and

b. as a result, caused him substantial prejudice (CPL 270.10).

There are certain procedural requirements which are unique to the challenge to the panel. They are:

a. the application can only be made by the defendant;

b. it must be made prior to the commencement of jury selection;

c. it must be in writing (but see People v. Parks, 41 NY2d 36 [1976]); and

d. it must set forth grounds upon which the challenge is based.

III. Hearing

The defendant is not automatically entitled to a hearing on his motion to challenge the panel. The application may be

identifiable group of people (Buron v. Missouri, 439 US 357 [1979]). Additionally, the Constitution has not been found to require that the trial jury itself must actually mirror the community or reflect the various distinctive groups in the population (Fay v. New York, 322 US 261 [1947]; Apodacha v. Oregon, 406 US 404 [1972]; see also Smith v. Texas, 311 US 128 [1940]; Ballard v. United States; 329 US 187 [1946]; Taylor v. Louisiana, 419 US 522).

VI. Grand Jury

While the right to voir dire the grand jury has been abolished by enactment of the Criminal Procedure Law, the defendant can still attack the manner in which the grand jury was impanelled if he can establish that the procedures used violated the provisions of the Judiciary Law (CPL 210.35, 210.20; People v. Huffman, 41 NY2d 29 [1976]).

It should be noted that in most jurisdictions the procedures used to impanel a jury have been tested and have been found to be valid. As a result, the motion to challenge the panel is rarely used, is almost never successful, and, as a result, has become almost extinct from criminal practice within this State.

VII. Challenge for Cause

This challenge, which is addressed to a particular juror, in essence alleges that during the voir dire it has been demonstrated that the juror should not serve because:

a) the juror does not possess the qualifications required by the Judiciary Law (CPL 270.20[1][a]); or

summarily denied if it fails to set forth more than mere naked assertions that the panel was improperly constituted (People v. Lanahan, 96 AD2d 675 [1983]; People v. Davis, 57 AD2d 1013 [1977]).

IV. Burden of Proof

The burden of proof initially rests with the defendant and requires him to make a prima facie showing that the panel has been formed in violation of the Judiciary Law. Once that showing has been made, the prosecution must then demonstrate that the manner of selection and return in this particular case is valid and conforms to the Judiciary Law; or, if a violation exists that the defendant has not been substantially prejudiced (Alexander v. Louisiana, 405 US 625 [1971]; People v. Guzman, 89 AD2d 14 [1982]).

V. Constitutional Violation

Even if the dictates of the Judiciary Law have been complied with in the manner in which the panel was formed, a constitutional violation may exist. Under the Sixth Amendment of the United States Constitution, the source from which prospective jurors are drawn and the manner in which they are selected must reasonable reflect a cross section of the community (Brown v. Allan, 344 US 443 [1953]; Glasser v. United States, 315 US 60, 85-86). However, simple mathematical disparity is not sufficient to establish a constitutional violation; instead, it must be demonstrated that the method used to prepare the panel involved the intentional or systematic discrimination of a

b) the juror has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial (CPL 270.20[1][b]); or

c) the juror is related in some degree to one of the parties or witnesses at the trial, or he is an adverse party to any such person in a civil or criminal action, or bears some relationship to any such person of such nature that is likely to preclude him from rendering an impartial verdict (CPL 270.20[1][c]); or

d) the juror is a witness at the preliminary examination or before the grand jury, or is to be a witness at the trial (CPL 270.20[1][d]); or

e) the juror has served on the grand jury which found the indictment, or served on a trial jury in a prior civil or criminal action involving the same conduct charged in the indictment (CPL 270.20[1][e]); or

f) there is a possibility that the crime charged is punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of the death penalty as to preclude him from rendering an impartial verdict (CPL 270.20[1][f]).

VIII. Judiciary Law

As to the specific qualifications of a particular juror, the Judiciary Law is divided into three parts: the first deals with the qualifications that are necessary for a prospective juror to be eligible to serve (Judiciary Law Section 510); the second

deals with conditions which will automatically disqualify a prospective juror from jury service (Judiciary Law Section 511); and, finally, conditions which would entitle a prospective juror to be exempt from jury service (Judiciary Law Section 512).

IX. Qualifications

The minimum qualifications for the prospective juror are:

a) be a citizen of the United States and a resident of the County;

b) be less than seventy six and not less than eighteen years of age;

c) not have a mental or physical condition or combination thereof which causes the person to be incapable of performing in a reasonable manner the duties of a juror;

d) not have been convicted of a felony; and

e) be intelligent, of good character, able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire, and to be able to speak the English language in an understandable manner.

X. Disqualifications

The following would disqualify a person from prospective jury service:

a) he is a member in active service in the armed forces of the United States;

b) an elected Federal, State, City, County, Town or Village Officer;

c) head of a civil department of the Federal, State, City, County, Town or Village government; members of a public authority or State Commission or board and the Secretary to the Governor;

d) a federal judge or magistrate or a judge of the unified court system;

e) a person who has served on a grand or petit jury within the State, including in a Federal Court, within two years of the date of his next proposed service.

XI. Exemptions

The following would entitled the juror, if he choose, to be exempt from jury service:

a) he is a member of the clergy or Christian Science Practitioner officiating as such and not following any other calling;

b) a licensed physician, dentist, pharmacist, optometrist, psychologist, podiatrist, registered nurse, practical nurse, embalmer or a Christian Science nurse exempt from licensing by subdivision G of Section 6908 of the Education Law regularly engaged in the practice of his profession;

c) an attorney regularly engaged in the practice of law as a means of livelihood;

d) a police officer as defined in Section 1.20 of the Criminal Procedure Law; or an official or correction officer of any State correctional facility or of any penal correctional institution which is defined as a peace officer in subdivision 25 of Section 2.10 of the Criminal Procedure Law; or a member of a

fire company or department duly organized according to the laws of the State or any political subdivision thereof and performing duties therein; or an exempt volunteer fireman as defined in Section 200 of the General Municipal Law;

e) a sole proprietor or principal manager of a business, firm, association or corporation employing fewer than three persons, not including such proprietor or manager who is actually engaged full time in the operation of such business as a means of livelihood;

f) a person 70 years of age or older;

g) a parent, guardian or other person who resides in the same household with a child or children under 16 years of age and whose principal responsibility is to actually and personally engage in the daily care and supervision of such child or children during a majority of the hours between 8:00 a.m. and 6:00 p.m., excluding any period of time during which such child or children attend school for regular instruction;

h) a person who is a prosthetist or an orthotist by profession or vocation;

i) a person who is a licensed physical therapist regularly engaged in the practice of his or her profession.

It is important to note that the existence of an exemption is a matter of choice for the prospective juror to exercise and cannot be used by counsel to disqualify the juror from jury service. The failure to possess the requisite qualifications or the existence of a condition disqualifying a juror from prospective

service may be used by counsel as a challenge for cause and, if found to exist, mandate that the challenge be granted.

XII. Bias and Prejudice

In recent years, no area of the voir dire has become more troublesome for a prosecutor than the challenge for cause based upon bias or prejudice. Recent litigation has put prosecutors on notice that any questions in this area should, for the integrity of any conviction subsequently obtained, be resolved in favor of consenting to the challenge for cause. As the Court of Appeals has stated "... the Trial Court should lean towards disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service. Even if through such caution the court errs and removes an impartial juror, the worst the court will have done ... is to replace one impartial juror with another impartial juror" (People v. Branch, 46 NY2d 645, 651-652 [1979]).

A challenge for cause based upon bias and prejudice essentially falls into two categories:

a) State of Mind:

If during the voir dire it is demonstrated that a prospective juror's state of mind is such as to likely preclude him from rendering an impartial verdict based upon the evidence, he should be excused (CPL 270.20[1][b]; People v. Blyden, 55 NY2d 73 [1982]; People v. Torpey, 63 NY2d 361 [1984], reargument denied 64 NY2d 885).

b) Relationship:

If some relationship exists between a prospective juror and some participant in the law suit, whether that be defendant, attorney, witness, et al., the nature of that relationship will be closely examined to determine if it alone is likely to preclude a juror from rendering an impartial verdict (People v. Branch, 46 NY2d 645; People v. Provenzano, 50 NY2d 420). The existence of this relationship will, if appropriate, create an implied bias which will override any oath that a prospective juror may be prepared to take to assure the Court of his neutrality.

c) Other grounds:

The remaining grounds are fairly obvious and do not require extensive comment. Of interest, however, is recent litigation concerning the eligibility of persons suffering from physical handicaps to serve on juries (see People v. Guzman, 125 Misc. 2d 457 [1984] where a prospective juror who was deaf understood sign language and was found qualified to serve on a jury). In addition, the Supreme Court has recently found that no constitutional violation of due process is committed by excluding from jury service in capitol cases those persons who morally object to the imposition of capitol punishment. In New York, by statute and case law, simply because a prospective juror entertains strong beliefs about the death penalty does not in an of itself mean that they must be disqualified from jury service. Only if that belief has manifested itself in such a way as to raise a question about the juror's ability to be fair will removal be

warranted (People v. Fernandez, 301 NY 302 [1950]; cert. den. 340 US 914; hearing denied 340 US 940; see also CPL 270.20[1][f]).

Finally, reversible error is only committed in improperly denying a challenge for cause if, after the challenge has been made, the party exercising it is forced to use a peremptory challenge to remove the juror. Even then, the error will not be preserved unless that party subsequently exhausts all of the peremptory challenges to which he is entitled (CPL 270.20[2]).

IV. Peremptory Challenges

Until recently, a peremptory challenge was properly defined as "... an objection to a prospective juror for which no reason need be assigned" (CPL 270.25[1]). Now, as a result of the United States Supreme Court's ruling in Batson v. Kentucky (#84-6263 [decided April 30, 1986] 54 L. W. 4425) a prosecutor's use of these challenges is subject to judicial scrutiny and, if found to have been used in a racially discriminate manner, can constitute a violation of the Equal Protection clause of the United States Constitution.

While announcing that this was a firmly established principle, the court went on to define the threshold requirements necessary for such a claim to be made. It held that a defendant may establish a prima facie case for such a violation by showing:

a) he is a member of a cognizant racial group;

b) his group members have been excluded from service on the jury; and

c) the facts and circumstances of the particular case raise an inference that exclusion was based upon race.

Once the prima facie case is established, the burden rests upon the prosecution to demonstrate that in fact a neutral explanation not related to race exists for the exercise of the challenge. This justification cannot rest upon the assumption or the intuitive judgment that the particular juror would be partial to the defense because of their shared race.

Left specifically unanswered by this decision is what the trial judge should do in the face of such a violation. The obvious remedy would be the disallowance of the exercise of the peremptory challenge with the result that the juror would be sworn and would be allowed to serve on the jury over the prosecutor's objection.

Whether the prosecution could make the same claim, should the defense choose to exercise its peremptory challenges in a racially discriminate manner, is one of many questions that have been left unanswered by this decision.

The most obvious result of Batson is that the right to exercise peremptory challenges is no longer absolute and that the prosecution should be prepared to justify their exercise in any case where a prospective juror and defendant share the same racial background.

V. Procedure for Exercising Peremptory Challenges

Each side, depending upon the most serious charge for which the defendant is on trial, is accorded a specific number of

peremptory challenges. The statutory scheme allots the number of challenges as follows:

> A felony equals 20 challenges; two for each alternate;
>
> B or C felony equals 15 challenges; two for each alternate;
>
> D or E felony equals 10 challenges; two for each alternate;
>
> Indicted misdemeanors equals 10 challenges; two for each alternate;
>
> Justice Court or Criminal Court trials equals 3 challenges; one for alternate. (CPL 270.25[2])

If there are two or more defendants on trial, the total number of peremptory challenges assigned to them is the same as if only a single defendant is on trial; if a disagreement exists regarding the exercise of a particular peremptory challenge in a multiple defendant trial the majority rules; otherwise, if there can be no agreement, the challenge is disallowed (CPL 270.25[3]).

Questioning of Prospective Jurors

If a challenge to the panel has not been made or has been denied, jury selection may finally begin. The following represents an outline of the procedure that must be followed during the questioning process:

a) the trial judge directs that the names of at least twelve prospective jurors be drawn from the panel for the purpose of being interviewed. Of note is the fact that no limit is placed on the trial judge on the number of prospective jurors that he may initially call and could conceivably result in some trial judges calling substantially more than twelve prospective

process. This becomes tactically significant, for without the consent of either party, the trial court is limited to the number of prospective jurors it may call for questioning to the number of vacant seats available in the jury box. The decision to give consent should take into account the number of peremptory challenges each side has remaining. If one side has considerably more peremptory challenges left than the other, that party has a significant tactical advantage in that it receives a full look at what prospective jurors could be called and is given the opportunity to fully implement and utilize peremptory challenges it has remaining to its advantage. (270.15[3])

Alternate Jurors

The decision to impanel alternate jurors is one left to the sound exercise of the trial court's discretion. If it decides that alternate jurors are necessary, it may impanel up to four jurors to serve on an alternate basis.

The first alternate juror sworn for service is the first alternate to be used to replace a regular juror should the need arise.

Under the Criminal Procedure Law, counsel is provided with two challenges for each alternate to be seated. This provision has been the subject of varying interpretations in that some courts have read it to mean that counsel if provided with a total of four challenges that it may use as it sees fit, while others have interpreted the provision to provide that counsel is

given two challenges for each seat to be occupied by a prospective alternate juror.

After the trial jury has been sworn, but before rendition of verdict, a regular juror, under certain circumstances, may be replaced by an alternate. However, if the jury has begun its deliberations, the alternate may be seated only with the written consent of the defendant. Should the defendant refuse to consent, the trial court must order a mistrial.

SUGGESTED AREAS FOR INTERVIEW

Since much of what transpires during the voir dire is under the control of the trial judge, counsel should become aware of the specific judge's habits to insure that he can conduct his questioning in a manner that does not irritate the judge or create problems for him with respective jurors.

In every case, there are general questions which concern sensitive matters which counsel must explore with the jury. It is advisable at the outset to explain to the prospective jurors that should there be any areas which they would like to discuss with the court in private, they should notify the court so that the questioning can take place at the bench. In addition, questions concerning prior arrests of prospective jurors or members of their family, possible drug or alcohol use, etc., should be discussed in a general way so as to put all of the jurors on notice that these are areas of concern during the voir dire. A suggested method is to indicate that it is not your intention to embarrass any particular juror, but that you would have to ask

the entire panel whether or not anyone has ever had anyone in their family who has been adversely affected by drugs or alcohol. Should that question receive an affirmative response, counsel should invite the juror to the bench so that they can discuss the matter in more detail with the court. The same technique should apply to arrests and prior confrontations with the Criminal Justice System.

The following represents a sample list of areas and questions which counsel should consider using during the voir dire:

1. Family Status:
   - marital status
   - number and age of children

2. Occupation:
   - job description
   - length of service

3. Residence:
   - home ownership
   - length
   - other occupants
   - other property, such as rental property

4. Prior Jury Service:
   - civil
   - criminal
   - number of criminal cases
   - types of criminal cases
   - result
   - grand jury service
   - military court-martial boards

5. Military Service:
   - branch
   - dates of service
   - job description
   - court-martials served
   - membership and veterans groups

6. Law Enforcement Contact:
   - Any members of family employed as police officer, correction officer, attorneys

7. Crime Victim:
   - number
   - types of crimes
   - locations
   - circumstances
   - membership in crime victims association
   - investigating agency
   - experience as a witness

8. Educational Background:
   - types of degrees
   - names of schools
   - job related training

9. Clubs and Organizations:
   - veterans groups
   - groups which are politically active, such as NRA, RID, MADD, etc.

10. Hobbies and Special Interests:
   - reading material
   - sports and activities

OPENING STATEMENTS

The opening statement represents the first time either side can talk about the facts of the case with the jury in some detail. Since the prosecution must go first, this statement represents an excellent opportunity to make a positive and, hopefully, lasting impression on the jury regarding the merits of the case (CPL 260.30).

The prosecution has no choice - it must make an opening statement and even with the defendant's consent, this obligation cannot be waived in a trial by jury (People v. Kurtz, 51 NY2d 380 [1980]). The defendant, on the other hand, is not obligated to make such a statement. It is his right and can be waived. While the Criminal Procedure Law seems to clearly mandate that this statement, if the defendant chooses to make it, must be made immediately after the prosecution's opening. Authority exists for the proposition that the defendant can wait and give the statement after the prosecution has rested its case (People v. Theriault, 75 AD2d 971 [1980]).

Technically, the opening is supposed to contain a statement of the facts which the prosecution hopes to prove through the introduction of evidence during the trial. Such a requirement does not mean that the opening cannot be constructed in such a way as to be an interesting, imaginative and, if possible, exciting recitation of the facts. This statement can provide the prosecution with an enormous tactical advantage by focusing the jury's attention at the outset of the trial on the strengths of the

APPENDIX

August, 1987

I. QUESTIONNAIRE

The State Legislature has amended Section 270.15 CPL to authorize the preparation of a questionnaire by the Office of Court Administration to be used in the discretion of the trial court at the outset of the voir dire. If it is utilized in a given case, the trial court must provide copies of the completed document to counsel for both sides prior to examination of prospective jurors.

A copy of the form prepared by OCA for this purpose has been attached and is being utilized in some jurisdictions within the State.

II. REPETITIOUS QUESTIONS

The trial court is now obligated by law to restrict counsel's questioning to those areas not previously covered during the voir dire and must specifically prohibit "...questioning that it repetitious or irrelevant, or questions as to a jurors knowledge of rules of law." Section 270.15(1)(c) CPL.

III. PROTECTIVE ORDER

Upon application of either party or on its own initiative, the trial court for good cause shown may regulate disclosure of a prospective juror's business or residential address. Good cause is deemed to exist where the trial court determines that there is a likelihood of bribery, jury tampering or physical injury or harassment of the prospective juror. Section 270.15(1)(a) CPL.

prosecution's case. It should be prepared and rehearsed much like a summation. If executed properly, it can set the tone for the entire trial and greatly enhance the prosecution's chances for success.

Finally, failure to make a legally sufficient opening statement which sets forth facts supporting each and every element of the crimes charged in the indictment will not lead to dismissal of the charges. Where a defendant moves to dismiss on the grounds that the opening is insufficient, the trial court can either deny the motion or it can grant leave to the prosecution to supplement the opening to cure any defect that might have previously existed (People v. Brown, 104 AD2d 696 [1984]; People v. Parker, 97 AD2d 620[1983]; People v. Kurtz, 51 NY2d 380 [1980]; certiorari denied 451 US 911).

It should be noted that the opening statement should be used to identify only that evidence which the prosecution knows will be received into evidence during the trial. Inclusion of facts and circumstances which clearly would be inadmissible could lead to the declaration of a mistrial or, if a conviction is subsequently obtained, appellate reversal (People v. Wallace, 267 App. Div. 838 [1944]; People v. Gonzalez, 24 AD2d 989 [1965]).

Such an order does not apply to counsel for either party. As such, counsel for the defendant is under an obligation as an officer of the court not to disclose this information to his client. Whether such a restriction may violate a defendant's right to counsel has not yet been decided.

OPENING STATEMENTS:

Win it in the Opening*

-by-

Robert J. Jossen
Shereff, Friedman, Hoffman & Goodman
New York, New York

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Win it in the Opening

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Since some studies show that approximately 80% of jurors decide who should win the case during the opening statements, the importance of the opening cannot be overstated. Clarity and logic are the goals; when you finish the opening, the jury should have a clear understanding of the case, your theory, and why you should win.

A. Overview

1. Clearly Explain Your Theory so the Jury will be Able to Integrate the Evidence into the Overall Picture.

The opening statement should be used to put before the jury your client's story and theory of the case. In the preparation of any trial, every step of counsel's preparation must be geared to what you will ask the jury to find in summation; toward this end, the opening statement is the first effective opportunity (apart from voir dire where permitted) to set that theory before the jury.

2. Tie in the Opening statement to the Planned Closing Argument.

If you have done your job properly in the opening statement (and throughout the trial) you will be able to begin the closing argument by referring back to the opening statement itself. On the other hand, if the opening statement has promised more than you can deliver, or if it is based on a misconception or faulty analysis of the case, it will later become a disastrous liability. Extreme caution must be used not to promise evidence or a theory that you will be unable to substantiate in the course of the trial. Moreover, the opening statement must be prepared only after a complete and exhaustive analysis of the case.

3. Diffuse the juror's Feelings of Intimidation; Tell a Clear Story.

As the jurors hear the opening remarks, remember that they are in a "foreign" environment and may find it uncomfortable, intimidating, and confusing. Your job is to overcome this discomfort and nervousness. One way to accomplish this is to make the opening statement clear, simple, and uncomplicated. Generally, the opening should be a narrative form -- tell a story, bearing in mind that most people are unaccustomed to learning through hearing, as opposed to seeing or reading. Use simple words and visual aids, and avoid legalistic phrases (except to the extent a phrase is critical to your case and you want to begin to familiarize the jury to the concept, e.g., "reasonable doubt", etc). A disjointed or confusing opening statement will lose the jury and often create an insurmountable hurdle.

4. Quickly Catch the Jury's Attention.

During the preparation, you should devote considerable energy to finding some way to immediately grasp the jurors' attention. Long prefactory remarks will lose their attention. Tell the jury as quickly as possible what the case is about. Find something dramatic, or something with which the jurors are likely to be able to identify or in which they are likely to be interested, as the means for starting your remarks. This is particularly difficult in cases involving cut and dried commercial transactions, but even here the effort must be made to catch the jurors' attention. For example, consider the contrast between the following two ways of starting an opening statement:

(a) "This is a commercial breach of contract case between the Plaintiff and the Defendant in which the defendant failed to perform its contractual obligations of performance as legally required."

(b) "This case is about a broken promise. In October, 1983, A made a deal with B: A sold B 100 boxes of nuts and bolts. This was a simple deal, no different than the kinds of situations each of you has experienced when you've sold something to someone else. B promised to pay; but after getting the nuts and bolts, B didn't do it, and that's why B has been sued. My client wants B to live up to its promise, just as anyone else would expect if they had made

such a deal, and that's what this case is all about."

5. Use the Opening to Develop Rapport and Confidence with the Jury.

Remember that in your opening statement, as in every other aspect of trial, you are on "display" to the jury. Jurors will react well to, and identify with, a lawyer who exudes nonarrogant confidence and professionalism. For this reason, using your communication skills will be of the greatest importance in making the opening statement.

6. Be Brief.

An opening need not be, and shouldn't be, prolonged in order to be effective. What points you make and how you make them are what count, not the length of your opening or the fact that you have covered every conceivable point. If you are properly selective, you will be assured that your opening is brief enough. This approach also highlights what you believe are the most important points.

7. Win It in the Opening.

There are those who belittle the importance of an opening statement and who think that cases are not won or lost in openings. They are wrong; some recent studies show that 30% of jurors make up their minds during opening and never change their opinions. The opening sets the pace and tone for the rest of the case. It's the only opportunity until summation to speak to the jury directly. Don't minimize this opportunity; use it for all its worth to win your case.

B. Structure of the Opening.

1. Introduction.

Begin the opening statement by introducing yourself and your client. This should be done even though it will already have been done in the course of jury selection; remember, it often takes jurors a while to acclimate to the courtroom setting and to the various parties' identities.

It is extremely important to tie your own introduction to that of your client. You want the jury to identify you with your clients: you can walk over and stand behind them or have them stand up. You should also personalize clients so that the jurors can more easily identify with them; refer to them by their first names unless that would seem affected.

2. Quickly Get to the Matter at Hand.

Once your introduction has been made don't delay getting to the point of telling the jury what the case is about. Some lawyers feel the need to go into a long exposition about the purpose of an opening statement, about the functions of jurors in the judicial system, about matters concerning the course of the trial, and the like. The vast majority of these explanations are unnecessary (and already will have been given to the jury by an effective trial judge); generally, they accomplish little other than to confuse the jury and to sound like "speeches".

3. Give the Jury Enough Information to Understand the Case Without Overwhelming Them with Details.

Perhaps the most difficult part of preparing the opening statement is the determination of how much information to give the jury. This raises countervailing considerations: on the one hand you want the jury to have a clear and complete understanding of the case; on the other hand, the jury is unlikely to follow numerous details (in particular, dates, places and names). Too much detail will lose the jury -- a cardinal sin to be avoided. A rule of thumb suggestion: by the end of your opening the jury should have enough information to understand the case, recognize the critical events involved, identify the parties, and understand your client's position. This will enable the jury to return a favorable verdict.

4. Use Visual Aids When Permissible.

An opening statement can be made all the more effective if you use visual aids to help the jury grasp the nature of the case and the critical events. Charts, photographs, and blackboards are some of the most effective tools, and in many jurisdictions, it is proper to use them even though they have not yet been introduced in evidence. The use of visual aids, however, must be well planned; they should be used only at critical parts in the opening and then put out of the jury's view. You don't want to conduct your entire opening statement with these aids because eventually they will detract from the jury's concentration on you and on your presentation of the case.

5. Confront Problems and Weaknesses in the Case.

If there are fundamental probems in your case which the other side will likely dwell upon (or already has mentioned), it is a mistake to overlook these problems in the opening. It is better to "draw the teeth" on these weaknesses by directly addressing the matters and attempting to diffuse them.

This general principle extends, as well, to matters of sensitivity which which may affect your client. For example, if your client has had marital difficulties which you know are likely to come out in the trial, tell the jury about this in your opening: "You will hear that Mary has been divorced; I know that you will not permit that fact to be used as a means of diverting your attention from the true questions in this case." (The same is true about matters like criminal records, prior bad acts, inconsistent statements, or damaging admissions --**provided** you know that such evidence will be adduced and received.) To ignore these questions means that the only opportunity you will have to address them openly will be in summation; and, summation is often too late to diffuse an issue which, if properly considered and handled with good taste, would have been put to one side in the opening statement.

6. Emphasize the Weakness in Your Adversary's Case.

You should point out any fundamental flaw or weakness in your adversary's case. However, avoid the temptation simply to flag some unattractive fact which truly is of no consequence to the outcome of the case.

If there is a vital weakness in your adversary's case, point it out to the jury. And, when you do so, be direct about the manner in which you are making the attack. For example, "In addition to all these things concerning

the care which my client used in driving his truck on the night of the accident, I ask you to pay particularly close attention when you hear about how much beer Mr. Jones had to drink before he started driving his car that night."

7. Emphasize Vital Pieces of Evidence or Witnesses on Which You Want the Jury to Focus.

In most cases there will be a particular witness, or a particular document, which will be a focal point for your position. The jury should hear about that witness or that document in your opening statement. You may not want to tell the jury the significance of this testimony or the significance of the document; nevertheless, you do want to make sure that the jury will be paying very close attention when you get to that point of the trial where this evidence will be covered. For example: "During the trial you will see a letter dated October 12, 1983 from Robert; read tnat letter carefully and listen to the testimony about that letter; then, ask yourself now that letter shows that Robert lived up to his part of the deal."

8. Forewarn the Jury About Conflicts in the Testimony.

If you know that your case will involve contradictions or conflicts in testimony between witnesses, candidly tell the jury about this. It is a mistake to make an opening which suggests there is only one version of the events when you know that the jury will hear conflicting versions. Tell the jury that there will be such conflicts and explain why the evidence will support your client's version. (As with all matters which suggest that the opening statement is to be used for argument, attention should be drawn to the next chapter heading concerning the proper use of an opening).

9. Finish Your Opening Statement Expressing Confidence that the Jury will Return the Verdict You Want.

The opening should be delivered confidently and without any doubt as to your view of the case and your expectation of the outcome. Tell the jury at the conclusion of your opening that you are "confident that they will return a verdict in favor of Robert" and explain just what the verdict will be. For example, in a criminal case representing the defendant, tell the jury that you are "confident they will return a not guilty verdict"; in a personal injury case representing the plaintiff, tell the jury that you are "confident they will return a verdict for Mary in the amount of $_____", and give them the dollar amount of damages you expect to recover, unless it a case where you believe it will be better to see how the trial goes before setting an amount.

C. Problem Areas to Keep in Mind.

1. Argument in the Opening Statement is Improper; Let the Facts Argue for You.

It is the general rule of law that argument in an opening statement is improper. This does not mean, however, that you may not (or should not) explain your theory of the case or set out the facts from an advocate's point of view. Generally, if your statement explains what you expect to prove (or what you expect the evidence will show), you will be on firm ground. There is a subtle difference between what is a proper opening statement and what is an improper argumentative opening statement, and inexperienced trial lawyers often have trouble making this distinction. Be careful to avoid expressions of your opinion, direct statements why a

particular piece of evidence is not credible, or any kind of prolonged or extensive direct attack on your adversary's case. Labels and characterizations are unnecessary; let your argument come through with a compelling and creative statement of the evidence you expect to prove in the light most favorable to your client. This is perhaps the greatest skill to be developed in an opening statement.

Example:

"The evidence will show that on the night of July 12, 1980 Robert was maimed when he was struck in a crosswalk by a car driven by Mr. Howard. You will hear from the bartender of the E-Z bar and grill that only a few moments before the accident, Mr. Howard left the bar after having four scotches and three beers. You will hear from the bystanders that Mr. Howard drove his car at 60 miles per hour down Main Street, ran a red light, and struck Robert as he stepped into the crosswalk. You will see from medical records and from the testimony of Dr. X that Robert spent 10 weeks in Merch Hospital, underwent three operations, and will never be able to use his withered arm. We will show you that a verdict of three million dollars is the very least that can be done to allow Robert to begin to lead as normal a life as is possible."

2. Dealing with Evidence of Questionable Admissibility.

In may cases, you must wrestle with the difficult problem of how to handle evidence which you know may not be admitted at the trial -- either for legal reasons or because the opposition will decide not to produce evidence (the latter being a particular problem in criminal case). If you

refer to evidence which ultimately is not admitted, the jury will remember that you promised to produce evidence and then did not do so. Also, it is improper to refer to evidence which you know will not be admitted (for example, evidence which the court has ordered excluded on a motion in limine), and doing so may subject you to sanctions, or, at the very least, to the active displeasure of the trial judge.

On the other hand, to avoid any reference to evidence which may or may not be admitted is to relinquish the opportunity to put that evidence before the jury in the context of the theory of the case as explained in your opening statement. There is no easy rule of thumb to apply here. You must exercise your best judgment as to the likelihood of the evidence being admitted and the consequences to the overall case if you refer to evidence which later is not admitted.

3. Avoid Detailed Instructions on the Law.

With respect to the opening statement (as with the summation), instruction on the law is the exclusive province of the judge. Any attempt to thoroughly summarize the law governing the case will meet with objections from your adversary and possible interruption by the judge. Notwithstanding this, it is generally proper -- and often essential -- to refer briefly to the legal principles which are vital to your case. The obvious example is the opening for the defense in a criminal case where emphasis must be put on the Government's burden of proof and the concept of reasonable doubt. While this will vary from jurisdiction to jurisdiction, most trial judges will permit brief references to legal principles, provided they are accurate and don't become unduly involved. An effective way to resolve this dilemma

is to make a statement along the following lines: "In my summation, when discussing the evidence, I will ask you to pay particular attention to his Honor's instructions on the law concerning the Government's burden of proof and the concept of reasonable doubt."

4. Cover Expert Witnesses.

If your case involves expert witnesses, it is important to explain what an expert witness is in general, who your expert will be, and why the expert will be testifying. By contrast, if your adversary's case will rely heavily upon experts, care should be taken to explain that a jury is not required to follow what an expert says.

5. Deal with Complicated or Technical Matters.

If your case involves complicated or technical matters, use the opening to make sure that the jury will not be afraid of these matters and that they will not "tune out" to such evidence. This problem may be dealt with in a number of different ways: you might suggest that an expert witness will explain the technical information; you should attempt, wherever possible, to simplify this information in your opening; you might say that you too were confused by these matters at first, but that they weren't as complicated as they seemed after hearing an explanation.

6. Sensitize the Jury to Particularly Explicit or Gory Demonstrative Evidence.

If your case involves explicit or gory facts, and if these facts will be demonstrated either by physical or demonstrative evidence, the jury should be informed about this. In a personal injury action, for example, if the

evidence will include photographs showing your client's gory physical injuries at the time of the accident, the jury should be told this in your opening so that they won't be caught up with the "shock" of such evidence. By the same token, to prevent any backlash to such matters, the jury should be told why such evidence will be shown in the course of your case.

D. Special Problems in Criminal Cases.

1. Whether and When to Open.

In a criminal case, the defense does not have to make an opening statement. In many jurisdictions, if the defendant chooses to make an opening, this can be done either immediately after the prosecution's opening or, in the discretion of the judge, after the close of the prosecution's direct case. The difficulty with the decision whether and when to open for a defendant in a criminal case is simply that you may decide at the conclusion of the prosecution's case not to put on a defense at all, and to rely upon the failure of the Government's evidence. If an opening statement has been made immediately after the prosecution's opening, and then no defense case is put in, you risk the possibility that the jury will believe that, since no case was put in, the defendant in fact has no defense.

2. Maintain Flexibility.

Since it is often difficult to anticipate whether a defense case will be presented and, in particular, whether the defendant will testify, it is

frequently necessary for the defense to make an opening statement in a manner which preserves the flexibility to go either way. In doing so, however, you must not suggest that whether the defendant will testify, or put in a defense, will turn on how strong the Government's case may be. If you are truly in doubt whether the defense will present a case, don't promise one.

E. Mode of Communication.

1. Don't Read.

There is nothing more lackluster than to have an opening statement read to the jury. If you read, your opening may be delivered flawlessly and in beautiful prose, but it will all be for naught. It is far more important to show the jurors your interest, concern, and familiarity with your case by speaking without the use of notes -- even if it comes across unpolished or with occasional incomplete thoughts. You may, however, use notes in outline form if you find it is necessary to refer to them between pauses. It is also helpful to write your opening statement completely in advance, and to practice delivering it. But when it comes to making he opening itself, put the written material away.

2. Maintain Eye Contact

Look at the jurors when you are making an opening and show them tnat you care about them as well as about your case. It is important to look at as many different jurors as possible in the course of your opening statement; do not devote all of your attention to one or two individuals. You will

find that the jurors will appreciate your attention and interaction and they will be more receptive to your presentation.

3. Maintain a Friendly Confidence.

Whether out of nervousness or aloofness, some lawyers forget such friendly but important gestures as a smile. Let the jurors know that you are a human being, that you have a sense of humor, and that no matter how important your client's case is to you, you still can remember the basic courtesies which people should extend to one another. Don't be afraid to laugh at your own mistakes, and above all don't be self-conscious of what you are doing. Your preparation and professional skills will assure the ultimate outcome of your trial, provided you have not "turned off" the jury by appearing too distant or condescending. Most importantly, be yourself; what works for a flamboyant and experienced trial lawyer can make a fool out of someone who does not have the same courtroom presence. Experiment with the styles with which you think you will be most comfortable, and when you find one that works for you, stick with it.

4. Be Courteous to Your Adversary.

Jurors, like most people, generally do not like hostility or anger. The trial lawyer who demeans, insults, or baits and adversary is inviting the jury to dislike him and to extend sympathy to the other side. Even in the most hostile of litigations, there is room for courtesy and basic decency before the jury. Your efforts to prevent any hostility or ill feelings from coming out in front of the jury will normally be rewarded.

F. Use of Defensive Tactics.

1. Respond to Your Adversary's Opening.

Well developed skills in handling an opening statement include a well considered response to the opening statement by your adversary. Many inexperienced trial lawyers prepare for an opening without giving adequate thought the way they will respond to their adversary's opening; this is a major mistake and may leave you flustered if your adversary takes advantage of the situation.

2. Making Objections During the Opening.

As one is developing experience with trial work, it is necessary to become familiar with the circumstances when objections are proper as a matter of law and as a matter of tactics. As a matter of law, there are four fundamental types of objections to remember

(a) The opposition is engaging in argument;

(b) The opposition is making reference to a matter which is inadmissible;

(c) The opposition is making reference to a matter which is prejudicial and/or not relevant;

(d) The opposition is engaging in detailed instructions on the law.

Once you recognize the grounds for these objections, the next step to consider is when, as a tactical matter, an objection should be made. Many lawyers do not want to interrupt an adversary's opening remarks with objections because they are concerned that the jury will regard this as discourteous, or because they want to avoid inviting similar objections at appropriate points is to give your adversary an unfair advantage and potentially to place before the jury matters which will be highly damaging to your client's case. As with other areas, discretion is critical. But, when in doubt, if you think that your adversary is gaining an unfair advantage, do not hesitate to get up on your feet to make an objection.

3. Motions Based on the Opening Statement.

Occasionally, a motion for a mistrial following your adversary's opening is appropriate. Such a motion is in order if your adversary has made a particularly prejudical comment which you fear may not be cured by an instruction from the trial judge. In some jurisdictions, and particularly in criminal cases, a motion by defendant for dismissal will be in order if the party with the burden of proof has failed to set forth in its opening statement a prima facie case. Finally, even if you believe the mistrial motion will not prevail, it is often a useful motion to make (obviously, out of the jury's hearing) to establish a point for a record on appeal if you are ultimately unsuccessful in the case, or to sensitize the judge to a particular position which you want to take throughout the course of the trial. Bear in mind, however, that you should never make a mistrial motion if you do not really want it to be granted; if the judge is inclined to grant the motion, either you will be stuck with your original position, or

you will incur the trial judge's unending displeasure, and distrust by stating you didn't truly want the motion granted.

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DIRECT EXAMINATION

and

CROSS-EXAMINATION

July, 1987

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DIRECT EXAMINATION

I. Purpose of Direct Examination

A. Direct examination is the heart of a trial.

B. Coherent statement of the facts by your witnesses is essential to the jury's understanding and acceptance of your position.

C. Basic obstacles

1. Witnesses themselves.

2. Q and A format is a strained device for obtaining information.

3. Rules of evidence limit the form of questions, as well as their content.

4. Objections break up the testimony, diverting the attention of the jury.

5. Cross-examination chops the progression of witnesses.

II. Basic Rules Governing Direct Examination

A. Leading questions are generally not permitted.

B. Questions calling for a narrative are within the discretion of the court.

1. When witness has been properly prepared, they are very effective.

C. Miscellaneous Improper Questions

1. Asked and Answered
2. Assumes facts not in evidence
3. Misstates evidence
4. Confusing
5. Speculative
6. Compound
7. Argumentative

III. Organization of Direct Examination

A. Chronological Organization

B. Logical Progression of Proof of Elements

IV. Preparation For Direct Examination

A. Prepare Yourself

1. outline what witness has to say

2. organize examination of what witness has to say, using chronological or logical organization or combination of both

B. Prepare Witness

1. review with witness the questions you are going to ask.

2. prepare for cross-examination (see Cross Examination Outline at V, K).

C. Prepare outline of a proof checklist for each witness who will testify

D. Prepare for proper pace of examination

V. How To Conduct Direct Examination

A. Look and listen to witness

B. Look at jury

C. Start easy

D. Ask simple questions

E. Use plain words

F. Avoid objections

G. Don't repeat answers but incorporate into next question

H. Be humble

CROSS-EXAMINATION

I. Purpose of Cross-Examination

A. To explain, add to, or qualify the testimony given on direct, or compel admission of facts inconsistent with or contradictory of it.

B. To elicit new matter favorable to your case.

C. To discredit or weaken the effect of the story told by the witness:

1. Show witness has lack of knowledge of the facts.

2. Show inadequacy of perceptive faculties.

3. Inaccurate recollection.

4. Inability to accurately express what he has perceived or remembered.

5. Tendency to exaggerate.

6. Unsoundness of judgment and inherent improbability of the truth of all or portions of his direct testimony.

D. To discredit or destroy the witness by showing him unworthy of credence.

1. Show interest of witness direct or indirect.

a. Interest in party for whom he appears.

b. Interest in outcome.

c. Motives for testifying.

d. Relationship - associations, friendship, hostility, bias or prejudice.

2. Basic Impeachment techniques

a. Conviction of crime.

b. Bad acts.

II. Deciding To Cross-Examine

A. When To Cross-Examine

1. When testimony has significantly harmed your case.

2. Where witness has held back information of value.

3. When you feel strongly that you must.

4. Where there is reasonable expectation of some success.

B. When Not To Cross-Examine

1. Where witness has not testified to anything that hurts your case or the theory of defense.

2. Where there is little to be gained by cross-examination.

a. Where there is doubt that witness' testimony has hurt your case.

b. Where there is minor or insignificant harm to your case by testimony.

c. Where emphasis of witness' testimony by repetition outweighs harm done by his testimony.

3. Never ask a question on cross-examination merely on basis that it has been suggested by your client.

4. Never cross-examine where direct examination of witness has been illogical, confusing, rambling and unclear.

5. Do not cross-examine a witness unless you have a definite objective in mind.

III. Preparation For Cross-Examination

A. Visit scene of alleged crime.

1. Know the physical layout, lighting conditions, and note any possible obstructions in the vision of the witness.

B. Make a list of witnesses.

1. Know the witness --

a. Private life.
b. Prejudice of witness.
c. Prior criminal record.
d. Prior statements to Grand Jury or other documents or statements used to refresh witness' recollection.
e. Obtain transcripts of all sworn statements such as testimony at the preliminary hearing, etc.

C. Master the facts of the case.

1. Know the strength and weaknesses of case.

2. All known witnesses, both favorable and unfavorable should be interviewed.

3. Know contents of all letters and documents.

4. List subject of witness' testimony.

5. List objective of cross-examination of this witness.

6. List known details of testimony.

7. List probable admissions of witness.

8. List all items or information which tends to discredit witness.

9. List all documents or prior inconsistent statements of witness.

10. List improbabilities of witness' testimony.

D. Master the law of the case.

1. Know what you/defense must prove.

2. Know how you/defense must prove case.

3. Know when burden of proof or burden to come forth with evidence shifts.

IV. How To Cross-Examine

A. Manner and Technique

1. Clear, simple, short leading questions.

2. Keep control of witness:

a. Avoid questions that are so broad that witness is allowed to elaborate.
b. Wherever possible, confine witness by questions which can be answered "yes" or "no."

3. Be a gentleman/gentlewoman at all times.

4. Work towards a fitting climax.

5. Prepare in advance for cross-examination of known witnesses as much as possible.

6. Stand as close to witness as possible and look him squarely in the eye.

7. Carefully appraise the witness' type, capability and disposition in addition to any special circumstances which requires special treatment of the witness.

8. Suit type and style of cross-examination to the particular witness.

9. Springing a trap -- importance of timing in cross-examination so that witness is unable to extricate himself.

10. Accent improbabilities and contradictions.

11. Test witness' memory and faculties.

12. End examination on making a dramatic and telling point.

B. Phases of Cross-Examination

Cross-examination, like many other applied sciences, consists of separate and distinct phases, which

ordinarily (and with some exceptions) should be undertaken in the following order:

1. Phase One: Fleshing out of the witness' knowledge, including negative knowledge -- closing the doors. Commitment.

2. Phase Two: Establishing favorable points.

3. Phase Three: IMPEACHMENT.

C. What To Avoid

1. Never give appearance of being slick, smooth, tricky or harsh.

2. Never shout at witness.

3. Never argue with the witness.

4. Never show disrespect for the witness unless it is clear that jury feels he deserves it.

5. Never appear to merely confuse the witness by trickery.

6. After making a telling point, don't beat it to death by unnecessary repetition.

7. Know when to be cautious -- don't dive into areas where you may be hurt -- be cautious where exploring unknown.

8. Avoid calling a witness a liar.

9. Avoid asking questions where call for or permit an explanation.

10. Avoid "nit picking" and making use of immaterial or inconsequential errors made by witness.

11. Never press for an answer to questions unless you are positive the answer will be favorable to your case.

12. Know when to stop.

V. Preparing Your Witness For Cross-Examination

A. Explaining What Cross-Examination Is All About.

The best method is to use actual examples, and explain the purpose of cross-examination, to wit: to change the direction of direct examination; to change the position of the witness as to a particular point; to create doubt; to cause annoyance to the witness; to place the witness ill at ease; and to attack his credibility.

B. Dissect The Case For The Witness.

Differentiate the main issues of his testimony as opposed to the minor insignificant trivia. Example: In a case having to do with a homicide -- how the death occurred and the specific details are the key issues for the prosecution; and not how many times he was married, the exact address where he lived six years ago, etc. Most witnesses have difficulty separating the important from the unimportant.

C. Answering The Questions.

Prepare the witness to answer the questions by repeating part of the question. For example:

"Q. Is your name John Smith?"

"A. My name is John Smith."

This will eliminate the double-barrelled question and the tendency to answer "yes" and "no" and thereby fall into the cross-examiner's trap. Example: "Your name is John Smith and you weren't really at State Street, were you?" The tendency for the witness who has not been used to answering with the use of a question as a prelude to his answer might be to answer "yes" or "no," and both answers would be wrong. The correct answer would be:

"Yes, my name is John Smith, and no, it is not true that I was not at State Street."

Simple demonstrations like this to the witnesses will relax the witness and confirm that he is smart enough to handle the cross-examiner.

D. The Contradictory Statement.

Prepare the witness for contradictions in a prior statement by encouraging him/her to admit that he/she may have made that statement, rather than denying it and then have him/her explain the statement is contradictory now as opposed to then; i.e., he/she didn't understand it; it wasn't a complete answer; it is no different than what he/she testified to then; he/she was confused. Encourage him/her not to be worried about contradictory statements relative to trivia. Example, the car was going 40 miles an hour and in a statement he/she said it was going 42.

E. Avoidance Of The Self-serving, Non-responsive Answer.

The problem witness should be encouraged, if an introvert, to explain his/her answers; if an extrovert, to keep his/her answers to a minimum and avoid self-serving, long-winded, unresponsive answers. Wait for the question.

F. A Trial Is Not A Play.

There are no scripts, no memory answers, and the answers have to come from the witness and not from any other person or prepared text. Explain that answers can be different. Eliminate the fears:

1. that they are committing perjury if they don't answer a question just right

2. the fear of the court, i.e., contempt, punishment, et al.

3. fear of the opposing attorney

There is nothing wrong with an answer such as, "I don't remember," "I didn't know," "I don't understand the question," "Please repeat the question."

G. Cross-examination Is Not A Guessing Game.

Explore the prospective witness all the reasons why he/she should not guess, estimate, or speculate.

H. Rules Of Evidence.

Explain briefly the hearsay doctrine and other related "do's" and "don'ts" and THE REASONS WHY.

I. Let The Witness Ask You Questions.

Procedure, issues in the case, pitfalls, dress, demeanor.

J. Sample Questions.

Go into depth on sample questions, pointing out the differences between the easy ones, the hard ones, and the ones that will be used for the purpose of attacking credibility -- prior convictions and/or skeletons.

K. Eliminating All Fears.

A heart-to-heart talk with the witness as to anything that the witness could be hiding and would not want to have known, and an in-depth explanation as to the advantages that the law has for the witness in such situations and that the court will restrain the cross-examiner from getting into irrelevant, incompetent, and immaterial issues. Most lay witnesses believe that when they are on the stand their lives from the womb to the tomb are open books. You must explain the fallacy of this belief.