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MARIO M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF CRIMINAL JUSTICE SERVICES

Lawrence T. Kurlander
Director of Criminal Justice
Commissioner,
Division of Criminal Justice Services

John Poklemba
Counsel

BUREAU OF PROSECUTION SERVICES
Executive Park Tower
Stuyvesant Plaza
Albany, New York 12203

JOHN E. CARTER, JR.
Director

Donna L. Mackey, Esq.
Training Coordinator

112901

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TABLE OF CONTENTS

PRACTICAL EVIDENTIARY PROBLEMS

The Art of Objecting: Some Practical Considerations

The Introduction of Recorded Tapes at Trial

Documentary Evidence: A Two-Page Primer on Introducing Business Records

Evidence of Other Crimes: A Brief Review of the Molineux Doctrine

The Proper Boundaries of Cross-Examination Under the Sandoval Decision

by Michael S. Ross, Esq.
LaRossa, Axenfeld & Mitchell

Revised in July, 1987, by
Donna L. Mackey,
BPS Staff Attorney

PRACTICAL EVIDENTIARY PROBLEMS

TABLE OF CONTENTS

PRACTICAL EVIDENTIARY PROBLEMS

THE ART OF OBJECTING: SOME PRACTICAL CONSIDERATIONS

A. Deliberate By-Pass and Waiver Rule

1. For purposes of State appellate review, timely and accurate objections must be interposed. People v. Vincent, 34 A.D.2d 705 (2d Dept. 1970), aff'd, 27 N.Y.2d 964 (1970); see also People v. Lyons, 125 A.D.2d 593, 509 N.Y.S.2d 654 (2d Dept. 1986); People v. Gorman, 125 A.D.2d 733, 509 N.Y.S.2d 156 (3d Dept. 1986); People v. Jones, 124 A.D.2d 596, 507 N.Y.S.2d 738 (2d Dept. 1986); People v. Enright, 122 A.D.2d 443, 504 N.Y.S.2d 834 (3d Dept. 1986); People v. Garrido, 123 A.D.2d 784, 507 N.Y.S.2d 260 (2d Dept. 1986), and see CPL §470.05(2).

   a. If a general objection is sustained, the ruling will be upheld on appeal if any ground existed for the exclusion of the evidence.

   b. Conversely, if a general objection is overruled, and the evidence objected to is admitted, the objection is not preserved for appeal unless the evidence was not admissible for any purpose or the omitted ground is not one that could have been overcome even if it had been specified.

   c. If a specific objection is sustained, on appeal the ruling must be upheld on that ground alone unless the evidence was totally incompetent. (See generally, Richardson on

Evidence, §§537-38 10th Ed. 1973).

d. Failure to object will not preserve the issue for appeal. People v. Bryant, 31 N.Y.2d 744 (1972). See also People v. Balls, 69 N.Y.2d 641, 511 N.Y.S.2d 586 (1986) (defendant's unelaborated general objection to the prosecutor's reference in summation to speculative facts was not sufficient to preserve other alleged prejudicial comments for appellate review); People v. Guerro, 69 N.Y.2d 628, 511 N.Y.S.2d 226 (1986) (defense counsel's objections were too general and did not specifically state the proper statutory violation); People v. Simmons, 121 A.D.2d 579, 503 N.Y.S.2d 630 (2d Dept. 1986) (defendant failed to object to the charge); People v. Smalls, 121 A.D.2d 579, 503 N.Y.S.2d 631 (2d Dept. 1986) (defendant did not object to the charge); People v. McCutcheon, 124 A.D.2d 1023, 509 N.Y.S.2d 220 (4th Dept. 1986).

(1) The Appellate Divisions have "interest of justice" jurisdiction to disregard waiver. People v. Vasquez, 47 A.D.2d 934 (2d Dept. 1976); CPL section 470.15(3)(c).

e. An "exception" is not necessary because the prevailing rule, C.P.L.R. section 4017 and CPL section 470.05(2), has overruled the common law practice in this area. See Richardson, supra, at section 539.

2. At a State trial, an objection based upon a constitutional right must be raised or will generally be deemed waived for federal writ of habeas corpus purposes. Stone v. Powell, 428 U.S. 465 (1976); Pacelli v. United States, 588 F.2d 360 (2d

Cir. 1978), cert. denied, 441 U.S. 908 (1979).

B. Tactical Considerations

1. How to make the objection:

   a. Object, without stating the specific ground in the presence of the jury; or

   b. Object, stating the specific ground in the presence of the jury; or

   c. Request a bench conference (also referred to as a side-bar).

2. Sensitize the jury during voir dire to the fact that you will be making objections, asking for side-bars, etc. and that it is your duty to attempt to keep out improper evidence. The jury must be told that your objections do not mean that you are attempting to hide evidence from them or that you are being an obstructionist. Also ask the court to include a similar admonition in both its preliminary instruction and its own voir dire of the jury. Prepare the instruction you would like and hand it up to the court in typed form.

3. Determine the procedure the judge wishes to follow concerning objections.

   a. For example, tell the judge: "Your honor, I've practiced before a number of judges, each with his/her own preferred practice. What is your procedure?" (This looks good for the record on appeal.)

   b. You may be able to get a concession from the court allowing standing objections.

4. In determining when to object, be very sensitive to how it will

look to the jury.

a. Constant objections may suggest to the jury that you are attempting to, or succeeding in, preventing a witness from telling the jury what it wants to hear (i.e., "the truth").

b. Therefore, both when asking the judge what his/her procedure is, and during trial, maximize the use (if possible) of standing objections.

5. What remedial action should you couple with your objection?

a. Move to strike, thereby preventing any mention of the question or answer in summation.

b. Move for an instruction by the court to have the jury disregard the question and answer.

c. Again, in your early discussions with the court determine the preferred procedure.

6. The Litmus Test of Objecting: Why?

a. Objections are not made as an academic exercise -- you may be right, but does it matter?

b. Everything done in a courtroom by an advocate must have both reason and purpose. No real purpose is served by having a record that is textbook perfect.

c. The manner and extent of your objections should depend on your trial strategy. Do not make objections over minor points; object to further your "grand scheme" for the trial.

d. Remember that in objecting you may be incurring the rath of the judge and, irrespective of the ruling on the par-

ticular objection, you may be eroding your credibility for purposes of further objections that really count. Moreover, the judge may later rule against you on significant matters to avoid the appearance that you are getting everything you want from the court.

e. "Bait" theory: The matter being inquired into may be objectionable, but you have not objected and the door has now been opened. You may, on <u>your</u> examination based on your earlier decision not to object, now be able to inquire into an otherwise closed objectionable area. <u>Or</u>, you may now be able to explore that area in greater depth than you would have, had you objected earlier.

(1) A subtle, but effective approach is to "kinda" (half-heartedly and not very convicingly) object. Expecting the objection to be overruled you have now preserved your record on appeal and, hopefully, in meeting the objection, your opponent will state a justification for his/her questioning that will open up a closed area of inquiry or legitimately broaden an area of your examination. This is the best of both worlds.

C. Specific Objections

1. Objection to inadequate foundation.

a. Objecting to the introduction of an exhibit or document on the ground that there has been an inadequate foundation can serve two purposes:

(1) You may actually be able to keep damaging evidence

out of the case. If this is your sole aim, evaluate the likelihood of success, because your reservoir of credibility with both the judge and jury erodes as each unsuccessful objection is made.

(2) The second more significant purpose in objecting to the inadequate foundation of certain evidence is the coupling of the objection with a request for a brief voir dire. After making the objection you sit your adversary down and you take the floor! This breaks up the momentum of your adversary, breaks the rapport between the witness and the jury and between the examiner and the witness and often rattles your opponent, disrupting his or her game plan of direct examination.

(a) Of course, you must stay within the confines of proper voir dire, i.e., admissibility of evidence, and not its weight.

(b) And if you should succeed in keeping the evidence out, even temporarily, your opponent's trial strategy will be disrupted. Opposing counsel may have to call other witnesses to lay a proper foundation for the proffered evidence and will be forced to try to rehabilitate this witness.

(c) In any case, you may be able to obtain a dry run examination of the witness.

b. Be careful in stating your objection as to the inadequate

grounds. If you state precisely what is lacking, your opponent may quickly furnish what you have directly suggested. But of course, without being overly specific, you must advise the court of the basis for your objection.

2. Objections that require an offer of proof.

   a. Either at the time opposing counsel calls a witness who you think will be prejudicial to your case and whom you believe to be irrelevant to the issues on trial, or when it becomes clear that counsel will call such a witness and the judge may be more receptive to argument, you may object and ask for an "offer of proof."

   b. Of course, in making the objection you will have to state your grounds, but in doing so you will be sensitizing the judge (even the jury if they are present) to your position concerning the witness. In fact, your adversary, who is the proponent of the witness, may state incorrect or insufficient grounds for justifying the witness' testimony. Moreover, if during the course of a witness' testimony he or she is about to enter an improper and prejudicial area, you should renew or make for the first time your request for an offer of proof. If appropriate, you may argue that the witness' testimony should be excluded because it is either cumulative, confusing of the issues, misleading, a waste of time or simply unfairly prejudicial. See Federal Rule of Evidence 403.

3. Request for limiting instruction.

a. Often evidence is introduced which is patently objectionable unless it is coupled with a limiting instruction. Thus, if you cannot by objection succeed in excluding certain evidence, when your objection is over-ruled you should respectfully request that the jury immediately be told, for example, that:

(1) the evidence applies only to a particular defendant; or

(2) The evidence goes only to the credibility of the witness, and not to issues of substance.

b. You should go into court armed with a list of the objections you can anticipate (see Exhibits B and C) and the particular language of the cautionary or limiting instructions you are asking for.

(1) Couch the instruction in language most favorable to you. Allowing a court to instruct, without guidance, can be highly damaging to your case.

(2) If a judge asks you for the specific language you would prefer, it is difficult to fashion the best instruction while you are on your feet. And, if after giving its own instruction, the court asks you in front of the jury if you have any "quarrel" with the instruction, you may be forced to say "no" simply to avoid antagonizing the jury.

4. Objections relating to chain of custody.

a. If you believe that your adversary will attempt to introduce physical evidence you should meticulously

formulate an "anticipated chain of custody." Thus, at the moment your opponent ostensibly completes laying the foundation through witnesses and offers the exhibit into evidence, you will be able to see whether he or she has satisfied your chain. If not, and there is no obvious explanation, you will be in a better position to argue what link in the chain is missing, and thus why your objection to the introduction of the evidence should be sustained.

5. Renewing pretrial motions in limine during the course of the trial in tne form of trial objections.

   a. Motions in limine are among the most potent devices for preventing either a defense attorney or a prosecutor from improperly presenting to the jury "bootleg" (otherwise inadmissible) evidence. This pretrial motion, if granted, can prohibit both the introduction of evidence and the asking of suggestive and prejudicial questions. (Recall the adage: "You can't unring a bell!"). The subject matter of motions in limine include Sandoval issues, Molineux issues and even issues relating to permissible areas of cross-examination of prospective witnesses. If the pretrial motion in limine is denied because it is "premature" or for substantive reasons, the dynamics of the trial may well justify later transforming this pre-trial motion into a trial objection to the proffer of evidence or the asking of specific questions. With the other evidence presented at the trial, facts may now have

come to light which justify a partial or total exclusion of the evidence or a limiting instruction or a combination of the two.

6. Objection to the swearing of the witness.

   a. Such an objection goes to the competency of the witness.

   b. Object, when appropriate, unless and until a full voir dire.

7. The "extra-legal" objection.

   a. Objections can be raised and directed to the manner in which defense counsel asks a question of a witness. They may also be based upon any impropriety of defense counsel, witness, juror or even the court and may be made at any stage of the trial, including the voir dire, opening statement or closing argument. These are legally sanctioned objections.

   b. There are "extra-legal" objections which are not sanctioned but are widely used during a trial. Reference is made to them here so that new attorneys are aware of them and can deal with them more effectively.

   c. The first category of extra-legal objections is the "change of pace" objection. This objection most often occurs when you are cross-examining a witness and your questions are causing concern to your adversary. The witness is being "hurt": he or she is not coming across well to the jury and/or his or her answers are damaging your adversary's game plan or strategy. Opposing counsel poses an objection and requests leave to approach the

bench. Counsel objects on any one of a number of spurious grounds.

Although the objection will be overruled, several minutes have been used very effectively by your adversary, not to obtain a favorable ruling, but to halt your momentum and to give the witness a chance to recover.

d. Another classic extra-legal objection is the tactical use of the speaking objection which "instructs the witness." In making an objection defense counsel will suggest the answer to the witness (and thus subliminally to the jury). Virtually every attorney has heard the following objection: "I object; there is no way the witness could know." The witness then innocently replies to the original question by saying, "I don't know."

e. The third prevalent extra-legal objection is the "argumentative objection." Rather than stating a technical evidentiary basis for an objection, defense counsel argues or announces a theory to the court and thus to the jury thereby accomplishing a mid-trial mini-summation.

f. Possible ways to deal with the extra-legal objection:

(1) Fight fire with fire: e.g., answer an argument with an argument; respond to an objection by saying "As counsel well knows..."

(2) When the objection is overruled, say: "Thank you, Your Honor, may I proceed along the same line..." (The jury is told that you were right.)

(3) Respond to the objection by showing that your adver-

sary is unfair: "I submit, Your Honor, this evidence is extremely important and there is no basis in law why the jury should be prevented or hindered from hearing it."

(4) In the context of speaking or argumentative objections, you may wish to overlook the first time your adversary makes such an extra-legal objection. However, when it happens more than once, you can alert the jury to this unfair practice by addressing the court and saying "Your Honor, my adversary has just instructed the witness what to say or has summed up to the jury, and I ask you to admonish Mr./Ms. _____ and instruct him (or her) not to make speeches in front of the jury." Or, you may say, "As Your Honor has instructed both sides, no speeches are necessary. Simple objections are enough!"

8. Objections to a witness' refreshing his or her recollection with documents.

a. The procedure whereby witnesses cavalierly are shown documents by defense counsel is a prime source of an abuse of the rules of evidence and an equally prime area for effective objections.

b. A brief example of a defense attorney's improper referral to a "report" illustrates the potential use of objections in this area:

Defense Counsel: Sir, what time did you _____?

Witness: May I refer to my report?

Defense Counsel: Of course.

Witness: I entered at about 3:30 p.m.

Needless to say, the witness will eventually paraphrase the report rather than testify from memory. And, it will not be easy to impeach the witness using the report. Therefore, as soon as defense counsel says "Of course [you may refer to the document]" you should say: "Your Honor, excuse me, may I briefly voir dire the witness."

If the judge says yes, consider the following series of questions:

Prosecutor: How long ago did you _____ (perform the activity related to the report in question)?

Witness: A least a year and a half ago.

Prosecutor: And I suppose you've been involved in many, many cases since then?

Witness: Of course.

Prosecutor (speaking very gently): So it would be fair to say that at this very moment you don't have any actual recollection of _____ (activity releated to the report in question)?

Witness: No, I suppose not.

Prosecutor: Your Honor, I now object to the witness' reference to any written material.

Court: Sustained (i.e., witness has stated that there is no independent recollection to be refreshed).

What has happened is that defense counsel did not adequately "prep" (i.e. prepare) the witness to say that "my memory or recollection could be refreshed" with the document. Any attempt to circumvent this ruling by establishing the report as a past recollection recorded or as a business record is open to independent lines of attack. To constitute a past recollection recorded this witness must vouch for the accuracy of the written document. Richardson, supra, at sections 469 et seq. Therefore, in a voir dire as to the past recollection recorded of a report made out by another individual, the following brief series of questions could be used:

Prosecutor: Sir, is this your signature on the report?

Witness: No, it is the signature of my associate.

Prosecutor: Prior to today, did you actually read this report to verify its accuracy?

Witness: No, I don't recall that I did (Or I did, but I didn't verify its accuracy, I just assume it is correct.)

Given these answers in the voir dire, the court should prevent both the witness' reference to the document or its being read as past recollection recorded. Moreover, if defense counsel attempts to enter a report into evidence as a business record, you may be able to successfully object on the ground that it was prepared for the purpose of, or in anticipation of litigation. Richardson, supra, at sections 303 et seq. But see People v. Mack, 86 Misc.2d 364, 382 N.Y.S.2d 424 (Supreme

Ct. Westchester Co. 1976) in which the court admitted a laboratory report prepared by a county laboratory of various rape-related specimens.

D. Special Problems and Considerations in a Prosecutor's Decision to Object.

1. The discussion above applies to both defense counsel and prosecutors in formulating and executing objections to specific categories of evidence and opposing counsel's conduct. There are, however, certain conceptual notions which a prosecutor in particular must constantly keep in mind.

2. Statistically, it is the prosecutor who goes forward with the overwhelming percentage of witnesses in a criminal case and his objections to evidence will focus generally on the mode of cross-examination of his witnesses by defense counsel.

3. Stated simply, the prosecutor should attempt to appear that:

   a. He or she has nothing to hide;

   b. He or she believes in the strength of the "People's case," and the case will survive the oratory, histrionics and posturing of the defense attorney; and,

   c. Since he or she has had ample time to prepare, he or she is never surprised by anything <u>legitimate</u> that is said.

4. Of course, the prosecutor knows the points of the People's case that the defendant would like to explore in cross-examination but which are <u>improper</u> areas of cross-examination. The prosecution will have a number of witnesses on its direct case; if the prosecutor is silent when defense counsel begins to explore an improper area with one particular witness, the

prosecutor may well be opening up this area of inquiry as to all the prosecution witnesses; this is also known as the "cat out of the bag" problem.

5. When should a prosecutor object?

   a. If a prosecutor intends to call a number of witnesses, it may be wise not to object during the cross-examination of a particular witness because the prosecutor's next witness will recoup the losses. Thus, a prosecutor will be able to throw defense counsel off guard by continually curing his or her case as different witnesses proceed to testify. This also has the desirable effect of not causing a prosecutor to "throw all of his eggs in one basket" by trying to save and rehabilitate a single witness.

   b. Objecting to notorious, loud, insinuating and prejudicial questions is of paramount importance. The "isn't it a fact...?" questions which are emotionally charged and insinuate the worst (and are often unfounded and in bad faith) are hardly erased from the juror's minds with a simple "no" answer (i.e., one cannot "unring a bell"). It is therefore important that a prosecutor, perhaps even with a bit of righteous indignation, vigorously and openly request the judge to give an immediate instruction to the jury that "it is the answer, and not the questions which must be considered by the jury." If the court is unwilling to give such an instruction or it is insufficient, the prosecutor may be compelled to continually object on the ground that "Your Honor, that question assumes a fact not in evidence!"

(1) The best response to improper and prejudicial questions from a defense attorney must in the final analysis come from the witness stand. Prosecution witnesses should be prepared, if and when appropriate, to answer unfair questions by looking defense counsel squarely in the eyes and sincerely announcing "That's not true and you know it!" This response is better than any judicial ruling.

c. If your witness is being badgered and roughed-up, but is withstanding it, do not object. For in summation you will be able to argue that defense counsel's questions were loud, pointed and there was much arm waving. Yet after all is said and done, it is the answers of the witness which count; and this witness withstood vigorous cross-examination and was truthful.

d. However, do not let your witnesses "go down the drain." Many witnesses will be nervous and unsure of themselves. They look to the prosecutor for protection and do not expect to be abandoned. And the jury is keenly aware of these dynamics. Therefore, carefully pick your spot, and come to the witness' assistance when things go too far.

(1) It may even be appropriate to make a speaking or argumentative objection, i.e., "There is no need for defense counsel to yell at the witness; I'm sure defense counsel knows how to ask a proper question."

e. Always evaluate the decision to object, recognizing your

option to rehabilitate the witness on redirect examination on your terms.

6. A prosecutor's objections during the defendant's testimony.

a. When a defendant puts on a case, the traditional roles of the prosecutor and defense counsel are reversed. No matter how strong the prosecution's case, when the defendant announces he or she will take the witness stand, the jurors' ears perk up. They will be eager to hear the defendant's story. If you, the prosecutor, keep popping up with objections, they will not only get dizzy, but also angry. Realize that the jury will be with you, the prosecutor, on cross-examination.

b. Of course, if you do object, again pick your spots carefully, i.e., object to rank hearsay as to important matters and object if appropriate when important documents will be introduced through the defendant.

c. Remember, if the prosecution's case has been good, the jury will be waiting for you to roll up your sleeves on cross-examination. The jury loves a good fight, probably even wants to see one, and they will be eager to declare either the prosecutor or the defendant the winner at the end of the cross-examination. And, when a defense attorney objects during the cross-examination of a defendant, it invariably appears as if counsel is trying to hide something, or the defendant "simply can't take it."

E. Objections With Respect to Certain Categories of Witnesses.

1. Children

a. A jury will naturally feel empathy for a child and a judge will make allowance for a child's testimony. Therefore, objections which would ordinarily be appropriate will be considered obstructionist if made during a child's testimony.

b. Therefore, the better approach is to ask for a brief voir dire of the child to test his testimonial abilities and thus avoid prejudicial testimony in the jury's presence.

2. Women (not rape or sexual abuse cases)

a. Women can pose potential problems that call for actively making objections as opposed to conducting a full fledged cross-examination. Lawyers have recognized that a woman may play upon her feminity and, intentionally or otherwise, utilize an emotional outburst to get out what would otherwise be inadmissible and damaging testimony.

b. The attorney who is confronted with a woman as a witness must react to the dynamics of the situation: look into the jury box, determine whether the woman cuts a sympathetic figure, and make a judgment whether you will be able to keep the witness' testimony on cross-examination limited. If you do not think you can control her on cross-examination, control her testimony on direct using respectful objections, and leave her as untouched as possible on cross-examination.

(1) For example, pin the witness down to times and details by objecting to broad and ambiguous questions or answers. This avoids what you would have to do on

cross-examination and obviates the necessity of fencing and parrying with an otherwise sympathetic witness.

3. Elderly witnesses

   a. If you object to the testimony of an elderly witness you merely maximize sympathy for the witness.

   b. Be alert, however, and object to rambling, nonspecific and irrelevant narratives that may harm your case.

4. Character witnesses

   a. Many prosecutors believe the best approach is to get character witnesses on and off the stand as quickly as possible. [When possible, however, the "have you heard" questions can be most effective on cross-examination. See, e.g., People v. Alamo, 23 N.Y.2d 630, 298 N.Y.S.2d 681 (1969), cert. denied, 396 U.S. 879 (1969)].

   b. Very often, defense attorneys will attempt to utilize character witnesses to introduce an abundance of otherwise inadmissible evidence concerning good acts and high personal opinions of the defendant.

   c. To avoid the necessity for excessive and often too late objections, a prosecutor may wish to move in limine prior to the character witness' testimony. With the appropriate language in hand, the judge should be informed that the next witness is a character witness and while you do not presume to instruct the court or defense counsel on the appropriate boundaries of direct examination, you do "wish to avoid a situation where the court, in sustaining the

objection, will be trying to pour back into the bottle milk already spilt. I am not saying defense counsel will adduce evidence of _____ through the witness, but I put him on notice I will object vigorously to such clearly improper and inadmissible testimony." Of course, the judge will probably not formally grant the motion in limine, but he will be sensitized to improper questions and answers and will probably intervene sua sponte if necessary, cut defense counsel off and give strong cautionary instructions. At the very least, the court will allow defense counsel to get away with eliciting improper information only once.

d. On the other hand, the prosecutor may, based on the strength of his or her case, freely allow character witnesses to testify, hoping the jury will simply believe these witnesses are part of the parade of the defendant's contrived defense.

F. Objections during the Course of Opening Statement

1. The operative principle here is quite simple and is embodied in the maxim that an opening must announce what the party intends to prove -- it is no place for argument! Although some leeway is accorded counsel, most judges expect quick objections to argumentative matters that are more appropriate for summation.

G. Objections during Summation*

1. The prosecutor's vantage point.

a. The key rule is do not object unless absolutely necessary and you are sure you are right. For example, if defense counsel is arguing about matters not in evidence, do announce "there is no such evidence and I object to defense counsel's allegations in summation." Recall, however, that:

(1) by objecting, you call attention to defense counsel's argument; and

(2) if the court overrules you, this adds credence to defense counsel's summation.

b. If serious error is committed by defense counsel, couple your objection with a request for remedial relief, i.e., cautionary instructions.

c. Rather than object during the defendant's summation and call attention to various points, you may wish to wait until it is over to proceed to the sidebar and object and hope for curative instructions.

d. A prosecutor may object if the defense summation misstates the testimony of a witness, misstates a critical point of law, or constitutes a rank appeal to prejudice or sympathy. Again, object <u>if</u> the error is significant.

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* A quick reminder to prosecutors: it is inappropriate to begin your summation by saying "I did not interrupt defense counsel and I expect or hope he (or she) shows me the same courtesy." A complete discussion of the proper scope of summation is contained in <u>The Criminal Lawyer's Summation Manual</u>, published by BPDS.

e. Remember, that when defense counsel is objecting during your summation, more often than not he or she is attempting to break your train of thought and your momentum and perhaps hopes to make a bit of a speech as well. Generally, your only legitimate protection will come from the court when it overrules the objection. You must maintain your composure and take advantage of the objection by not simply continuing, but by repeating the objected-to matter, thus reminding the jury of the argument and the fact that the judge has implicitly approved your argument by overruling the objection!

(1) Remember also that you must never reduce the trial to a personal confrontation between you and your adversary. Be above the affray and rely on the strength of your arguments.

f. In deciding if and when to object to the defendant's summation, realize that if counsel's summation is excessive he or she will be opening the door to fair comment and to arguments by you that would ordinarily be prohibited.

2. The defendant's vantage point.

a. Generally, a prosecutor will not object too much during defense counsel's summation and defense counsel may therefore wish to "stretch" his or her argument early in the summation to see how far he or she can go without objection. Since defense counsel may get in his or her "first stretch" before the first major objection by the prosecu-

tor, defense counsel should save the "first stretch" for a potent claim or argument.

b. When defense counsel is objecting he or she may find it appropriate to turn to the jury and/or make a speech.

(1) If the judge has been unfairly ruling against defense counsel during trial, summation may be the right time to show that the judge and prosecutor have "ganged up" against the defendant and hope for sympathy by announcing in the objection: "It's absolutely unfair that ..." Then turn to the jury and say, "it's you who decide the case, not the D.A. or the judge."

(2) Defense counsel must stress his or her legitimacy during objections.

c. Defense counsel's objections must be timely and accurate if error is to be preserved on appeal.

(1) Ask for specific curative instructions; and

(2) Allow the jury to hear the grounds for the defense objections, and make the grounds intelligible to the jury.

d. If defense counsel has been aggressive during trial with his or her objections, summation is a good time to apologize and tell the jury counsel was only trying to do his or her job and keep out inadmissible evidence.

H. Objections to the Court's Charge.

1. Objections to the court's charge are <u>never</u> made in the presence of the jury; you have had your turn to speak, now the jury expects the judge to have the floor.

2. Take careful notes, and save objections until the jury is excused.

CONCLUSION

This discussion has attempted to provide only the barest outline of the factors that must be considered in the making of objections. Suffice it to say that making objections properly is an art -- an art which involves a mastery of the rules of evidence and an understanding of trial strategies. The basic principles which underlie a decision to make any one of the various objections are:

(1) preserve your record;

(2) keep out evidence that is damaging to your case;

(3) be sensitive to how your objections will affect the jury's view of your case; and

(4) utilize your objections to control the conduct of your adversary so that the jury will fairly decide the case.

APPENDIX A

GENERAL REMINDERS:

Before starting each trial, you may wish to briefly review the following list of "do's," "dont's" and "remembers":

1. Objections are made to the court. They are not made to your adversary. To do otherwise only opens the door to criticism and admonition by the court.
2. Make certain (though respectfully and tactfully) that the court rules on your objection. The court's ruling must be clear and if you are not certain, ask the court to repeat its ruling.
3. Timeliness in raising an objection is absolutely crucial. An objection which comes after the witness has answered serves little purpose even if the court admonishes the jury to disregard the improper testimony.
   a. If you cannot object in time, "move to strike" the answer.
4. If the witness starts talking as you are making your objection, ask the court to instruct the witness to cease talking as soon as the objection is made and allow the court to rule.
5. Always stand when making your objection. Get the court's attention as soon as you believe either the question or the answer sought is improper. A clear and polite "I object, Your Honor" will signal the court, the jury, the

witness, and opposing counsel. Then, if the court's procedure is to state the grounds for the objection, do so.

a. Again, as noted earlier, determine what the court's preference is for the appropriate procedure in making objections. As a general rule, the appropriate procedure is to briefly state the specific grounds of an objection. The added value of stating the ground for your objection is that the jury is alerted to the specific unfair nature of your adversary's questions.

6. Objections need not only be made during trial at the time the evidence is offered. If you anticipate certain "bootleg" evidence will be introduced at any time during trial, move in limine to exclude it.

7. When contemplating the use of a voir dire to test the qualifications (i.e. competency) of a witness to testify, remember that you must ask the court to allow you to inquire on voir dire and you may ask that it be conducted outside the presence of the jury (although this request is not often granted unless strong justification is offered). Remember also that since the voir dire is generally conducted in the jury's presence, it may backfire on you. If the judge overrules your objection which gave rise to the voir dire, it will place undue emphasis on the witness' credibility. After all, after you questioned the

witness' credentials to testify during the voir dire the court will likely overrule your objection and allow the witness to testify. Weigh the risk of having the witness' credibility enhanced against the possibility of excluding his testimony or damaging his credibility through voir dire.

8. Where it is important that the jury not hear the reason for the objection, you may request a bench conference (also known as a side-bar). Often, both prosecutor and defense counsel may be harmed by having to openly explain the basis for certain objections. Thus, consider a bench conference or side-bar whenever the basis for the objection or its refutation would be harmful to you if made in the presence of the jury.

   a. Do not allow your adversary to argue the basis for the evidence's introduction or for an objection in front of the jury. Anticipate such argument and move for a side-bar immediately.

9. Questions objectionable as to form and subject matter.

   a. Appendices B and C list the major categories of questions objectionable as to form and subject matter. Understanding the objectionable nature of these categories is a prerequisite to effective trial advocacy, and this outline simply cannot devote enough time to discuss them. However, major considerations involve the following:

   b. Questions improper as to form.

(1) The major category is the leading question. A leading question is one which suggests the desired answer. A question which merely requires a yes or no generally fits into this category. Leading questions will be permitted on direct examination if: the witness is hostile or is an adverse party; the question is preliminary in nature and the answer is not offered to prove a factual issue in contention; or the question is used to refresh the witness' recollection.

(2) The second major category of questions which are objectionable as to form are those that are "argumentative." Such questions generally seek to persuade the jury rather than obtain testimony from the witness or seek to draw out inferences from the facts.

c. Questions objectionable as to subject matter.

(1) Questions which improperly go beyond the scope of direct, cross, re-cross, etc.

A cross-examiner is obligated to stay within the bounds of direct examination because of the common law notion that the witness was called to testify to a particular area and the proponent of the witness has not vouched for the witness outside this area. If the cross-examiner wishes to go beyond the scope of direct, he or she must obtain permission of the court to call the witness as his or her own. Of

course, this does not apply to questions beyond the scope of direct which are related to the credibility of the witness.

(2) Questions which assume a fact not in evidence.

This type of question is self-explanatory and the objection should be coupled, if appropriate, with a motion to strike.

(3) Questions which are objectionable due to an inadequate foundation.

These questions typically involve a witness' testimony where a material fact has been omitted and without which there is no reason to believe the witness is competent to testify. For example, a witness is asked a question about an event; yet there is no testimony that the witness was ever in a position to see, hear, observe or be able to testify about the event. Another example of this type of objection is the expert witness who is asked to render an opinion, although there has been no proper foundation or factual basis for him to do so.

10. Objection coupled with a motion for a mistrial.

a. Even if a defense or prosecution objection is sustained, a motion for a mistrial may be in order if the objectionable matter will preclude a fair trial for either party. CPL section 280.10 subd. (1) and (2). Of course the double jeopardy doctrine comes into play, and the prosecution must remember that a mistrial, in the absence of

"manifest necessity," may bar retrial. Arizona v. Washington, 434 U.S. 479, 506 (1978); see also United States v. Grasso, 552 F.2d 46 (2d Cir. 1977).

11. Do not allow opposing counsel to improperly control the flow of the trial by unfairly and excessively requesting side-bars. Numerous side-bars have the effect of breaking the flow of either your direct or cross-examination. The court should be reminded that these side-bars are unnecessary, time consuming, and that the constant interruptions make the witness' testimony unintelligible to the jury.

APPENDIX B

(This list, inserted in plastic cover, should be kept on your table during trial.)

LIST OF COMMON OBJECTIONS TO THE FORM OF QUESTIONS

Ground for Objection	
Q...	is leading
Q...	is unclear, confusing, ambiguous, key term is undefined
Q...	is a multiple or compound question
Q...	is too general -- calls for a narrative; limit to time, place
Q...	is repetitive (asked and answered)
Q...	misquotes or mischaracterizes testimony of this witness or prior evidence
Q...	assumes a fact not in evidence
Q...	is argumentative
Q...	is misleading, oppressive, harassing or badgering

APPENDIX C

(This list, inserted in a plastic cover, should be kept on your table during trial.)

LIST OF COMMON OBJECTIONS TO THE SUBSTANCE OF QUESTIONS

Ground for Objection

Relevance

Incompetent witness (lacks personal knowledge)

Question or document calls for hearsay

Inadmissible opinion

Inadmissible conclusion

Speculation, guessing and not a fact

Inadmissible state of mind

Improper impeachment:
- by prior conviction
- by specific instances of conduct
- prior statements not inconsistent

Privileged material

Cumulative

Cross-examination beyond scope of direct

Question calls for a collateral matter the court has excluded or should exclude

Exhibits:
- No proper foundation or authentication
- Chain of custody
- Use of or reading from a document not in evidence (very common)
- Document speaks for itself

Improper rehabilitation

Redirect beyond scope of cross-examination

THE INTRODUCTION OF RECORDED TAPES AND TRANSCRIPTS AT TRIAL*

I. Pretrial Procedure

A. The usual procedure is to have both the prosecutor and defense counsel stipulate to the accuracy of a transcript and the audibility of a tape before trial. If no "stipulated" transcript can be developed, the jury may be given:

1) a transcript containing both versions;

2) two transcripts, the reasons for the disputed portions and an instruction to determine which, if either, is accurate; or

3) the opportunity to hear the disputed tape twice, once with each transcript. See United States v. Onori, 535 F.2d 938 (5th Cir. 1976). See also Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962); People v. Hochberg, 87 Misc.2d 1024, 386 N.Y.S.2d 740 (Sup. Ct. Albany Co. 1976), aff'd, 62 A.D.2d 239 (3d Dept. 1978).

II. Trial Procedure: Laying the Foundation

Although individual courts vary on the precise elements of foundation that are a condition precedent to the admission of tapes, generally, the following six facts should be established by the proponent of a tape recording:

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* This brief outline does not address the many statutory requirements which must be met at trial prior to the introduction of tapes which are the product of court-ordered electronic surveillance. See CPL Article 700; 18 U.S.C. §2518 et. seq. Thus, this outline will be relevant to tapes which were obtained with the consent of at least one party.

1. the device utilized to record the conversation was functionally capable of taping the conversation in question;
2. the operator was competent to operate the device;
3. the recording is authentic, without alterations, additions or deletions;
4. the recording was properly preserved;
5. the speakers are properly identified;
6. the taped conversation was not improperly included or involuntarily made.

See United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959); United States v. Pageau, 526 F.Supp. 1221 (N.D.N.Y. 1981); People v. Ely, 68 N.Y.2d 520, 510 N.Y.S.2d 532 (1986); People v. Warner, ___ A.D.2d ___, 510 N.Y.S.2d 292 (3d Dept. 1987); People v. Carrasco, 125 A.D.2d 695, 509 N.Y.S.2d 879 (2d Dept. 1986) (tapes must also be audible). See also People v. Rao, 53 A.D.2d 904, 913; 386 N.Y.S.2d 441, 451 (2d Dept. 1976) (Titone, J., dissenting), indictment dism'd, 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dept. 1980).

However, in United States v. Floyd, 681 F.2d 266 (5th Cir.), cert. denied, 460 U.S. 1035 (1982), the Court of Appeals for the 5th Circuit required only the following for admission of tapes of conversations:

(1) competency of the operator;
(2) fidelity of recording equipment;
(3) absence of material alterations in relevant portions of recording; and

(4) identification of relevant speakers.

Note: An identification of defendant's voice on tape by a witness who is an accomplice as a matter of law cannot serve as independent corroborative proof of the witness' testimony connecting defendant with the crimes charged. People v. Dennison, 83 A.D.2d 754, 443 N.Y.S.2d 516 (4th Dept. 1981) (the crimes charged were hindering prosecution and divulging the contents of an eavesdropping warrant).

It should be remembered that the conversation on the tape must be independently admissible under some exception to the hearsay rule. People v. Sapia, 41 N.Y.2d 160, 167; 391 N.Y.S.2d 93 (1976), cert. denied, 434 U.S. 823 (1977).

Finally, the general rule is that the jurors may refer to the verified transcripts only when the tapes are played -- the transcripts are only aids in listening; they are not evidence. A cautionary instruction to this effect should be given whenever tapes are used and in the final charge. See People v. Kuss, 81 A.D.2d 427, 442 N.Y.S.2d 313 (4th Dept. 1981); People v. Tapia, 114 A.D.2d 983, 495 N.Y.S.2d 93 (2d Dept. 1985). Generally, transcripts should not be given to the deliberating jury without consent of the parties. See United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Springer, 460 F.2d 1344, 1354 (7th Cir. 1972), cert. denied, 409 U.S. 873 (1972); United States v. Carlson, 423 F.2d 431, 440 (9th Cir. 1970), cert. denied, 400 U.S. 847 (1970); People v. Campbell, 55

A.D.2d 688, 389 N.Y.S.2d 146 (3d Dept. 1976);* People v. Mincey, 64 A.D.2d 615, 406 N.Y.S.2d 526 (2d Dept. 1978). See also People v. Pagan, 80 A.D.2d 924, 437 N.Y.S.2d 384 (2d Dept. 1981) and People v. Colon, 87 A.D.2d 826, 449 N.Y.S.2d 11 (2d Dept. 1982) (in both of these cases, the undercover officer's transcript of a Spanish language tape should not have been given to jurors who did not understand Spanish).

A correct recording was inadmissible when it was made by defendant's accomplice acting as a police informant, because the conversations were recorded after defendant had been arrested, retained counsel, and released on bail. People v. Brooks, 83 A.D.2d 349, 444 N.Y.S.2d 615 (1st Dept. 1981), citing Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 (1964) and People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980). See also People v. Jewell, 123 A.D.2d 463, 506 N.Y.S.2d 237 (3d Dept. 1986); People v. McCoy, 122 A.D.2d 957, 506 N.Y.S.2d 103 (2d Dept. 1986) (videotapes are admissible). See also, People v. Branch, ___ A.D.2d ___, 513 N.Y.S.2d 261 (3d Dept. 1986),(tape recording was held inadmissible because it contained highly prejudicial statements made by a police officer about other uncharged crimes, which had no probative value). But see People v. Irizarry, ___ A.D.2d ___, 511 N.Y.S.2d 758 (4th Dept. 1987) where the trial court properly admitted tape recordings into evidence to establish defendant's knowledge and intent in a possession of cocaine prosecution.

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* The Second Circuit, however, does not follow this rule; the decision on the submission of transcripts to the jury during their deliberations is left to the discretion of the trial judge. United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972).

Even conceding that police did not act in bad faith but destroyed consent tape recordings for reasons of economy, the court in People v. Saddy, 84 A.D.2d 175, 445 N.Y.S.2d 601 (2d Dept. 1981) reversed defendant's conviction for criminal sale of a controlled substance and ordered a new trial, because defendant contended on appeal that these tapes would have aided his agency defense. This type of destruction of evidence violates the spirit of the rule in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), which mandates the disclosure to the defense by the prosecution of any exculpatory evidence. See also People v. Rothman, 117 A.D.2d 538, 498 N.Y.S.2d 811 (1st Dept. 1986); and People v. Pantino, 106 A.D.2d 412, 482 N.Y.S.2d 334 (2d Dept. 1984). But see People v. DeZimm, 102 A.D.2d 633, 479 N.Y.S.2d 859 (3d Dept. 1984), lv. to appeal denied, 66 N.Y.2d 1039 (1985) (police officers' failure to record defendant's conversations with allegedly wired informant did not violate the rule in Brady; defendant's motion to set aside the verdict convicting him of an illegal drug sale was denied).

DOCUMENTARY EVIDENCE

A Two-Page Primer on Introducing Business Records

Although there are many grounds upon which documents may be introduced into evidence, the one which is most used and most valuable to the practicing attorney is the Business Record Exception to the Hearsay Rule (see CPLR section 4518(a); Fed. Rule of Evidence 803(6); Richardson on Evidence, supra, at sections 298 et seq.).

The following is a suggested procedure:

1. Your Honor, I ask that this document be marked for identification as People's Exhibit 1.*
2. Sir, I show you People's Exhibit 1 for identification. Do you recognize it?
3. What do you recognize it to be?
4. How do you recognize it?
5. Was this document produced from the files of X Corporation (or any enterprise)?
6. Is it an original?
7. Was it the regular course of business of X Corporation to keep and maintain such records?
8. Was People's Exhibit 1 for identification made in the regular course of business of X Corporation.
9. Was it the regular course of business of X Corporation to keep and maintain such records at or about the time of the transactions reflected therein?

*If possible "premark" exhibits. This would eliminate the need for Question 1.

10. Your Honor, I now offer People's Exhibit 1 for identification into evidence as People's Exhibit 1.

EVIDENCE OF OTHER CRIMES:

A Brief Review of the Molineux Doctrine*

Both State and federal courts have long accepted the proposition that evidence of "other crimes" may be admissible at a trial if introduced for a purpose other than showing a propensity of the defendant to commit the crime in issue. For example, the New York Court of Appeals in People v. Jackson, 39 N.Y.2d 64, 67-8, 382 N.Y.S.2d 736 (1976), explained:

> While it is true that evidence of unconnected, uncharged criminal conduct is inadmissible if the purpose is to establish a predisposition to commit the crime charged (People v. Fiore, 34 N.Y.2d 81, 84; People v. Dales, 309 N.Y. 97, 101; Coleman v. People, 55 N.Y. 81, 90), such evidence may be admissible if offered for relevant purpose other than to establish criminal propensity (People v. Fiore, supra; see, e.g., People v. McKinney, 24 N.Y.2d 180, 184; People v. Gaffey, 182 N.Y. 257, 262; People v. Molineux, 168 N.Y. 264, 291-294). The danger that the jury might condemn a defendant because of his past criminal activity rather than his present guilt has been propounded as justification for the exclusion. However, when the prior activity is directly probative of the crime charged, the probative value is deemed to outweigh the danger of prejudice (People v. McKinney, supra, at p. 184). In People v. Molineux (supra, at p. 293), this court indicated that "[t]he exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged 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 one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial."
>
> Jackson, 39 N.Y.2d at 67-68, 382 N.Y.S.2d at 738 (emphasis added).

Accord, People v. Vails, 43 N.Y.2d 364, 401 N.Y.S.2d 479 (1977); People v. Grieco, 125 A.D.2d 489, 509 N.Y.S.2d 407 (2d Dept. 1986) (evidence of prior uncharged crime of possession of cocaine was admissible to prove the defendant's knowledge of cocaine in his drug prosecution).

In People v. Kampshoff, 53 A.D.2d 325, 385 N.Y.S.2d 672 (4th Dept. 1976) cert. denied, 433 U.S.911 (1977) the court noted that the five traditional Molineux "categories are merely illustrative and not exclusive". See also People v. Beckles, ___ A.D.2d ___, 512 N.Y.S.2d 826 (1st Dept. 1987). Thus, evidence of other crimes may be admissible where material though not strictly within one of the five Molineux categories. For example, evidence of a defendant's prior crimes may be introduced on the prosecution's rebuttal case to rehabilitate a witness. See People v. Greenhagen, 78 A.D.2d 964, 433 N.Y.S.2d 683 (4th Dept. 1980) (defendant's prior rape of teen-age step-daughter who testified at his trial for the alleged rape of her infant sister was admissible to show that the witness' alleged "bias" was not wilfull). Similarly, evidence of prior crimes committed by a defendant is admissible where such evidence is crucial to explaining the facts and circumstances surrounding the charged crime. See People v. LeGrand, 76 A.D.2d 706, 431 N.Y.S.2d 850 (2d Dept. 1980) (bizarre cult leader's prior crimes were admissible to show the control he had over his followers which explained why they passively watched him murder the victim). See also People v. Ciervo, 123 A.D.2d 393, 506 N.Y.S.2d 462 (2d Dept. 1986) (evidence of defendant's prior bad acts reflected on her credibility to disprove defendant's claim of

"battered woman's syndrome" and was admissible with limiting instructions); see also, People v. Douglas, ___ A.D.2d ___, 513 N.Y.S.2d 211 (2d Dept. 1987) (testimony regarding uncharged criminal acts is admissible to establish that "two perpetrators were acting in concert"). But see People v. Blanchard, 83 A.D.2d 905, 442 N.Y.S.2d 140 (2d Dept. 1981) (statement properly excluded from evidence as it was merely cumulative on the issue of identification but placed defendant and the already convicted codefendant at the scene of the robbery immediately prior to its occurrence).

Evidence of other crimes is admissible to show intent (mens rea). See People v. Roides, 124 A.D.2d 967, 508 N.Y.S.2d 827 (4th Dept. 1986) (evidence of defendant's prior threats and assaults on his wife were probative of defendant's intent and possible motive for starting the fire in an arson prosecution); People v. Lawson, 124 A.D.2d 853, 508 N.Y.S.2d 623 (3d Dept. 1986) (codefendant's statements that defendant participated in a prior uncharged burglary and stole checks were probative of defendant's intent to commit forgery and properly admitted into evidence); People v. Volcipello, ___ A.D.2d ___, 513 N.Y.S.2d 838 (2d Dept. 1987) (an employee of the defendant was properly permitted to testify about the defendant's improper criminal conduct to establish intent and a pattern of check manipulation); and People v. Short, 110 A.D.2d 205, 494 N.Y.S.2d 19 (2d Dept. 1985) (where defendant was charged with grand larceny of gasoline by "pumping out" gasoline storage tanks, evidence of a prior conviction for a previous pump-out, although

prejudicial, was relevant to the issue of whether defendant acted with larcenous intent and its admission did not constitute an abuse of discretion). People v. Lisk, 76 A.D.2d 942, 428 N.Y.S.2d 729 (3d Dept. 1980) (evidence of defendant's prior robbery convictions was admissible to show that defendant, who drove the getaway car, knowingly aided and abetted his companions to commit the robbery.) See People v. Chavis, 99 A.D.2d 584, 471 N.Y.S.2d 421 (3d Dept. 1984) (evidence indicating that defendant was present at a prior bank holdup properly admitted to prove state of mind where defendant claimed he was unaware companions had robbed a bank). See also People v. Gross, 74 A.D.2d 701, 426 N.Y.S.2d 118 (3d Dept. 1980) (evidence of defendant's prior burglaries was admissible to negate his defense of lack of intent to steal). In establishing mens rea, evidence of other crimes is admissible to negate the possibility of accident, as where evidence of past child abuse is introduced in a prosecution for a child abuse homicide. People v. McNeely, 77 A.D.2d 205, 433 N.Y.S.2d 293 (4th Dept. 1980); People v. Kinder, 75 A.D.2d 34, 428 N.Y.S.2d 375 (4th Dept. 1980).

Evidence of defendant's prior crimes was admissible to rebut defendant's insanity defense and advance the People's theory that defendant's explosive personality, as manifested in past violent crimes, led him to commit the crime, as opposed to the defense theory that he suffered from temporary insanity as defined in the law. People v. Santarelli, 49 N.Y.2d 241, 425 N.Y.S.2d 77 (1980). See also People v. Clark, 94 A.D.2d 846, 463 N.Y.S.2d 601 (3d Dept. 1983) (prosecution allowed to use defendant's prior acts to establish defendant's irrational behavior was

feigned to avoid punishment and to rebut claim that behavior was caused by mental deterioration resulting from a motorcycle accident).

The connection between the prior uncharged crime and the crime for which a defendant is on trial must, in the words of Molineux, bear a logical nexus if the "probative value is [to be] deemed to outweigh the danger of prejudice." People v. Bolling, 120 A.D.2d 601, 502 N.Y.S.2d 77 (2d Dept. 1986). See People v. Johnson, 122 A.D.2d 341, 504 N.Y.S.2d 311 (3d Dept. 1986) (defendant's prior act of accidently fracturing a baby's leg did not constitute an immoral act or uncharged crime, and its probative value was outweighed by its potential for prejudice). See also, People v. Sanders, ___ A.D.2d ___, 513 N.Y.S.2d 413 (1st Dept. 1987). The Appellate Division Second Department, in People v. Napolentano, 58 A.D.2d 83, 395 N.Y.S.2d 469, 475 (1977), outlined the boundaries of the Molineux nexus requirement in the context of the motive exception by quoting from language of the Court of Appeals in People v. Fitzgerald, 156 N.Y. 253, 259 (1898):

> The motive attributed to the accused in any case must have some legal or logical relation to the criminal act according to known rules and principles of human conduct. If it has not such relation, or if it points in one direction as well as in the other, it cannot be considered a legitimate part of the proof.
>
> "To put it another way, evidence of the commission of another crime is admissible when it tends to prove a motive for the crime charged, but only if it has a logical relationship to the commission of the crime 'according to known rules and principles of human conduct'."
>
> Napolentano, at 93, 395 N.Y.S.2d at 475.

For example, evidence of defendant's involvement in illegal drug sales was germane to show the motive for drug-related murder. People v.

Pucci, 77 A.D.2d 916, 431 N.Y.S.2d 72 (2d Dept. 1980). See also People v. Carter, ___ A.D.2d ___, 516 N.Y.S.2d 52 (2d Dept. 1987) (although the defendant's prior crimes were probative of the issue of motive, the court should have minimized the potential for prejudice by limiting the testimony); People v. Hernandez, 124 A.D.2d 821, 508 N.Y.S.2d 541 (2d Dept. 1987) (the victim's testimony, that she rejected the defendant's prior sexual advances, was admissible to establish the defendant's motive and intent for shooting her); People v. McKinley, 123 A.D.2d 362, 506 N.Y.S.2d 374 (2d Dept. 1986) (the complainant persuaded the victim of a prior crime to testify against the defendant resulting in a conviction; thus defendant's prior conviction was relevant to establish defendant's motive for injuring the complainant). See also People v. Ventimiglia, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981) (defendant's statement indicating that there was a place to dispose of the murder victim -- "where we put people ... and they haven't found them for weeks and months" -- was admissible to prove premeditation in a murder trial). By contrast, see People v. Irby, 79 A.D.2d 713, 434 N.Y.S.2d 252 (2d Dept. 1980) (in a prosecution for assault where the weapon was a knife, a prior assault with a knife is not admissible to negate the defense of accident where the prior assault involved a different victim under different circumstances).

Similarly, the common scheme or plan proviso of the Molineux rule requires more than mere similarity. As the Court of Appeals explained:

> mere similarity, however, between the crime charged and the uncharged crime is not sufficient; much more is required...
>
> * * *
>
> [H]ere, the only relationship between the pay-

> ments and the solicitation are their close similarity and that a single construction project was involved.
> People v. Fiore, 34 N.Y.2d 81, 85-87; 356 N.Y.S.2d 38, 42-44 (1974)

One court has held that to be sufficiently similar to come within the common scheme exception, the prior uncharged conduct must "demonstrate a unique scheme or pattern, which is sometimes referred to as a 'signature' of the party charged." United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979); People v. Robinson, 114 A.D.2d 120, 498 N.Y.S.2d 506 (3d Dept. 1986). See also United States v. Danzey, 594 F.2d 905 (2d Cir. 1979), cert. denied, 441 U.S. 951 (1979) (in which the court utilized the "close parallel" approach); People v. Beam, 57 N.Y.2d 241, 455 N.Y.S.2d 575 (1982) (evidence of similar crimes is admissible to prove identity in a sex offense prosecution where the pattern of initial encounter and specific sexual attacks indicate a unique modus operandi even though any one aspect of the encounters taken individually might not be unique). See also People v. Sanza, 121 A.D.2d 89, 509 N.Y.S.2d 311 (1st Dept. 1986) (the court held that defendant's modus operandi in his three other rape convictions which were admitted into evidence for the purpose of establishing defendant's identity, lacked any commonality with defendant's present rape charge and required exclusion); People v. Rojas, 121 A.D.2d 315, 503 N.Y.S.2d 783 (1st Dept. 1986) (a glassine bag marked "Capital" which contained cocaine that was found on defendant's person was not admissible at trial to prove the defendant's identity where defendant was accused of selling heroin in a bag also marked "Capital" to a police officer). People v. Allweiss, 48 N.Y.2d 40, 421 N.Y.S.2d 341 (1979); People v. Christopher, 65 N.Y.2d 417, 492 N.Y.S.2d 566 (1985). But see, People v. Buccina 124 A.D.2d 983, 508 N.Y.S.2d 806 (4th Dept.

1986) (evidence that defendant sold marijuana on prior occasions was not admissible to prove defendant sold marijuana in this case because modus operandi was not unique); People v. Neu, ___ A.D.2d ___, 513 N.Y.S.2d 531 (3d Dept. 1987) (in order to introduce evidence of prior crimes for the purpose of establishing identity, the defendant's identity cannot be established by other evidence in the case).

Note: To introduce evidence of prior uncharged arson in an arson prosecution, it must first be proven that past fires were incendiary. People v. Vincek, 75 A.D.2d 412, 429 N.Y.S.2d 928 (4th Dept. 1980).

If the similar act resulted in an acquittal, it may not, under collateral estoppel and double jeopardy principles, be introduced against the defendant at the later trial under the Molineux rule or its equivalent under the Federal Rules of Evidence. See People v. Bouton, 50 N.Y.2d 130, 428 N.Y.S.2d 218 (1980). See also Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972); United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979); State v. Wakefield, 278 N.W.2d 307 (Minn. 1979).

Likewise, where there was no direct evidence linking defendant to a series of car thefts, it was error to admit this evidence in defendant's prosecution for criminal possession of stolen property although there was some evidence that a similar modus operandi was employed in these thefts and the theft of the car possessed by defendant. People v. Dellarocco, 86 A.D.2d 720, 446 N.Y.S.2d 567 (3d Dept. 1982).

A defendant who petitions for a writ of habeas corpus on the ground that the improper admission of evidence of prior crimes deprived him of a fair trial is entitled to have the trial court consider only whether the evidence was rationally connected to the crime charged. Carter v. Jago,

637 F.2d 449 (6th Cir. 1980), cert. denied, 456 U.S. 980 (1982).

Under the aegis of Federal Rule of Evidence 404(b), federal courts have likewise permitted the introduction of evidence of other crimes on a number of grounds* and have generated a wealth of case law in this area that may be instructive to the State prosecutor. See, e.g., United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975), cert. denied, 425 U.S. 958; United States v. Drummond, 511 F.2d 1049, 1055 (2d Cir. 1975), cert. denied, 423 U.S. 844 (1975).

As the Second Circuit Court of Appeals recently explained:

> In United States v. Benedetto [571 F.2d 1246 (2d Cir. 1978)] and United States v. Gubelman [571 F.2d 1252 (2d Cir. 1978)], we set forth at some length the analysis to be applied by the district courts in deciding whether to admit other crimes as evidence. Under both our prior precedents and the Federal Rules of Evidence, the trial judge must first find that the proffered evidence is relevant to some issue at trial other than to show that the defendant is a bad man. Then, if the judge finds the evidence is relevant, he must also determine that the probative worth of, and the Government's need for, the evidence is not substantially outweighed by its prejudice to the defendant. * * * Only when both of these tests have been affirmatively satisfied is the evidence properly admitted. However, when the trial court has carefully made the requisite analysis, the exercise of his broad discretion will not be lightly overturned. See United States v. Deaton, 381 F.2d 114, 118 n.3 (2d Cir. 1967).
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> United States v. Williams, 577 F.2d 188, 191 (2d Cir. 1978), cert. denied, 439 U.S. 868, 99 S.Ct. 296 (1978) (footnotes omitted) (emphasis added).

* Rule 404(b) specifically provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Moreover, evidence of such other offense need only be demonstrated by "plain, clear and concise" evidence, and not beyond a reasonable doubt. See, e.g., United States v. Leonard, supra, 524 F.2d at 1090-91.

See also United States v. Lyles, 593 F.2d 182, 193 (2d Cir. 1979), cert. denied sub. nom Holder v. United States, 444 U.S. 847 (1979); United States v. Manafzadeh, 592 F.2d 81, 86 (2d Cir. 1979); United States v. Knuckles, 581 F.2d 305, 314 (2d Cir. 1978), cert. denied, 439 U.S. 986 (1978) [quoting United States v. Magnano, 543 F.2d 431, 435 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977)]; United States v. O'Connor, 580 F.2d 38, 43 (2d Cir. 1978); United States v. Margiotta, 662 F.2d 131 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); United States v. Levy, 731 F.2d 997 (2d Cir. 1984); United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987); United States v. Dunn, 805 F.2d 1275 (6th Cir. 1986).

See also People v. Tedder, 801 F.2d 1437 (4th Cir. 1986) where the court did not abuse its discretion by admitting evidence of defendant's prior drug transaction where the court gave the jury careful cautionary instructions. But see United States v. Huddleston, 802 F.2d 874 (6th Cir. 1986) where the government failed to prove the defendant's prior sale of television sets was illegal, the court abused its discretion by admitting this "'misconduct'" into evidence.

When both tests of balancing the probative value of the similar act evidence against its prejudicial value have been carefully satisfied, the trial court's exercise of broad discretion will not lightly be disturbed. See United States v. William, supra; see also United States v. Robinson, 560 F.2d 507, 514-515 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978); United States v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

Federal courts have of course recognized that similar acts are admissible to prove a defendant's knowledge, intent and identity when these are in issue at the trial. See, e.g., United States v. Williams,

supra, 557 F.2d at 191-92; United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Alessi, 638 F.2d 466 (2d Cir. 1980); United States v. Benedetto, 571 F.2d 1246, 1248 (2d Cir. 1978); United States v. Cavalaro, 553 F.2d 300, 305 (2d Cir. 1977); United States v. Grady, 544 F.2d 598, 604-05 (2d Cir. 1976); United States v. Santiago, 528 F.2d 1130, 1134 (2d Cir. 1976), cert. denied, 425 U.S. 972 (1976); United States v. Papadakis, 510 F.2d 287, 294-95 (2d. Cir. 1975), cert. denied, 421 U.S. 950 (1975); United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981), cert. denied, 455 U.S. 945 (1982); United States v. Roglieri, 700 F.2d 883 (1983).

Significantly, courts have recently grappled with the question of when knowledge, intent and identity are truly in issue. In United States v. O'Connor, supra, 580 F.2d at 42, the court ruled that similar act proof of identity was improper only because "defendant's counsel had disclaimed any intention of pressing the identity issue, and had conducted his cross-examination accordingly." Similarly, in United States v. DeVaughn, 601 F.2d 42 (2d Cir. 1979), the defendant had offered a formal "concession" on the identity issue which "[t]he Government refused to accept." Id. at 46. In United States v. Manafzadeh, supra, 592 F.2d at 87, defense counsel had "advised the court that if the jury found that he had created the checks or had caused them to be deposited, which was the Government's theory of the case, [he] was willing to stipulate that he had the requisite intent." And in United States v. Cummings, 798 F.2d 413 (10th Cir. 1986) the court properly admitted evidence of defendant's prior conviction of receiving a stolen truck to establish defendant's knowledge of dealing in stolen trucks, and to reduce the possibility of mistake or accident.

In each of these cases the defendant did what was required to prohibit the prosecution from introducing similar act evidence, namely to "affirmatively take the issue of intent [or knowledge or identity] out of the case." United States v. Williams, supra, 577 F.2d at 191.

Moreover, the Second Circuit stated in United States v. Benedetto, supra, -- in language since quoted in other cases, see, e.g., United States v. Manafzadeh, supra, 592 F.2d at 87; United States v. O'Connor, supra, 580 F.2d at 41 -- that proof of knowledge and intent is improper where these elements, "while technically at issue, [are] not really in dispute." Benedetto, 571 F.2d at 1249.

In each of the cases discussed above in which reversals occurred, the defendant had in fact affirmatively taken the issue out of the case. Where a defendant rests without presenting any evidence in his behalf, it is reversible error for the prosecution to introduce prior narcotics convictions to show intent, since intent is not an issue. See United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980). Similarly, the Fifth Circuit has held that where intent is not generally inferrable from the act charged, and defendant fails to give enforceable pretrial assurance that he will not dispute intent, the Government's case-in-chief may include extrinsic evidence of other crimes under a Molineux theory. United States v. Webb, 625 F.2d 709 (1980).

Where intent is in issue, as where a defense of entrapment is raised to a charge of selling cocaine, evidence of prior crimes, such as a conviction for simple marihuana possession, is not admissible because a simple drug possession conviction is not closely similar to and therefore is not sufficiently probative of a narcotics sale. United States v.

Bramble, 641 F.2d 681 (9th Cir. 1981), cert. denied, 459 U.S. 1072 (1982).

Therefore, prosecutors must be extremely careful before introducing similar act evidence to prove identity, knowledge and intent.

The Fifth Circuit in the forgery prosecution of an Immigration Inspector ruled that the introduction of thirty-two additional forgeries was reversible error, rejecting the Government's argument that they were admissible to show a common scheme or plan.

> This [common scheme or plan] exception applies when evidence of uncharged offenses is necessary to explain the circumstances or setting of the charged crime; in such a situation, the extrinsic evidence "complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place." McCormick, Law of Evidence §190, at 448 (2d ed. E. Cleary 1972) (footnote omitted), quoted in 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404[16], at 404-60 (1980). The justification for this exception is that the evidence is being admitted for a purpose other than to prove propensity...
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> United States v. Krezdorn, 639 F.2d 1327, 1332 (5th Cir. 1981), cert. denied, 104 S.Ct. 1416 (1984).

One of the most significant uses of similar act evidence is in the area of corroboration of various aspects of the prosecution's case. In United States v. Williams, 577 F.2d at 190, the defendant was charged with conspiracy to commit bank larceny, principally on the basis of the testimony of a co-conspirator. The co-conspirator testified that during the planning stages of the conspiracy the defendant had reassured him by claiming that, "I did bank jobs before." The Government was permitted to corroborate this testimony by introducing the defendant's five-year-old conviction for receipt of the proceeds of a prior bank robbery. The

court reasoned that "the prior conviction strongly bolstered a key portion of Simmons' inculpatory testimony and thereby tended through a series of direct inferences to prove appellant's participation in the conspiracy -- the ultimate fact to be proved by the Government." Williams, 577 F.2d at 192.

Such corroborative similar act evidence is admissible if "the corroboration is direct and the matter corroborated is significant." United States v. Williams, 577 F.2d at 192. See also United States v. DeVaughn, supra; United States v. O'Connor, supra; United States v. Mohel, 604 F.2d 748 (2d Cir. 1979).

Utilizing another Molineux-related theory, in the much publicized case of United States v. Haldeman and Ehrlichman, 559 F.2d 31 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied, 434 U.S. 1077 (1977), the District of Columbia Court of Appeals affirmed the defendants' convictions for conspiracy, obstruction of justice as well as individual perjury counts. At trial, the Government had been allowed to introduce evidence of the "Ellsberg break-in" on the theory, inter alia, that it would "show a central motive for the conspiracy by proving the occurrence of activity the conspirators desperately wanted to conceal..." Haldeman and Erlichman, 559 F.2d at 88. The appellate court affirmed:

> The general rule in this country is that evidence of other crimes is admissible to show, inter alia, motive, so long as its probative value outweighs its prejudicial effect. As Dean Wigmore pointed out, this is basically a question of relevancy, "and the fact that the circumstance offered also involves another crime by the defendant charged is in itself no objection, if the circumstance is relevant [to show motive]." We do not understand Haldeman and Ehrlichman to challenge this statement of the law; rather, as we have noted above, they argue

> that "[w]hen balanced against the lengthy, inflammatory evidence of Ehrlichman's involvement in the Ellsberg matter *** the probative value of this prior criminal activity was outweighed by the prejudice which it caused to Mr. Ehrlichman's defense." Ehrlichman br. at 50. Having reviewed the facts carefully, we disagree and find the balance to lie clearly in favor of the probative value of the evidence with only minimal danger of improper prejudice.
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> Haldeman, 559 F.2d at 88-89 (footnotes omitted) (emphasis in original).

In overview, then, it should be observed that Molineux and its federal counterpart have been expansively applied by trial and appellate judges. Courts are not quick to find that the prejudice of admitting evidence of other crimes outweighs the probative value of such evidence. In the final analysis the issue becomes one of the defense attorney's ability to demonstrate carefully that the "other crimes" evidence will so infect the trial that the jury will focus more on the possible propensity of the defendant to commit crimes than on his guilt or innocence of the crime charged. If the defense attorney cannot sustain such a showing, the "other crimes" evidence will in all likelihood be admitted.

Note: It is the province of the trial court, not the jury, to determine the admissibility of evidence of unrelated crimes under the Molineux doctrine. People v. Dellarocco, 86 A.D.2d 720, 446 N.Y.S.2d 567 (3d Dept. 1982).

THE BOUNDARIES OF CROSS-EXAMINATION UNDER THE SANDOVAL DECISION

by Michael S. Ross, Esq.
LaRossa, Brownstein & Mitchell

Revised in July, 1987, by
Donna L. Mackey, BPS Senior
Staff Attorney

I. SANDOVAL AND ITS PROGENY

A. Generally

New York's highest court has repeatedly recognized that cross-examination of a defendant concerning his prior criminal, immoral and wrongful conduct, within the bounds of fairness, is not only consistent with the constitutional mandate of a fair trial, but in addition, it performs the vital function of assisting the trier of fact in determining credibility.

> "The manner and extent of the cross-examination lies largely within discretion of the trial judge."* [Citations omitted.] Accordingly, although there may be room for a difference of opinion as to the scope and extent of cross-examination, the wide latitude and the broad discretion that must be vouchsafed to the trial judge, if he is to administer a trial effectively, precludes

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* Accord, People v. Duffy, 36 N.Y.2d 258, 262, 263, 367 N.Y.S.2d 236, 239, 240 (1975), cert. denied, 423 U.S. 861 (1975), where the Court reaffirmed the proposition that the exercise of such discretion by the trial court is not reversible except in instances of clear abuse and misjudgment. See also People v. Canty, 60 N.Y.2d 830, 464 N.Y.S.2d 693 (1983); People v. Smith, 59 N.Y.2d 156, 464 N.Y.S.2d 399 (1983); People v. Blim, 58 A.D.2d 672, 395 N.Y.S.2d 752 (3d Dept. 1977); People v. Shields, 46 N.Y.2d 764, 413 N.Y.S.2d 649 (1978); People v. Newton, 46 N.Y.2d 877, 414 N.Y.S.2d 680 (1979).

this court, in the absence of "plain abuse and injustice" [citation omitted], from substituting its judgment for his making that difference of opinion, in the difficult and eneffable realm of discretion, a basis for reversal.

> We may not here say that prejudice or "injustice" resulted from the district attorney's interrogation or that permitting the vigorous cross-examination constituted "plain abuse." [Sic.] The evidence against defendant was clear and, since the outcome of the case depended almost entirely upon whether the testimony of the victim or of the defendant was credited by the jury, there was good and ample reason to give both sides a relatively free hand on cross-examination in order to afford the jury the full opportunity to weigh and evaluate the credibility of each witness.
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> People v. Sorge, 301 N.Y.198, 201-202 (1950).

> It is well settled that a defendant who chooses to testify may be cross-examined concerning any immoral, vicious, or criminal acts which have a bearing on his credibility as a witness. (People v. Webster, 139 N.Y. 73; Richardson, Evidence [9th ed.] §510). The offenses inquired into on cross-examination to impeach credibility need not be similar to the crime charged, and questions are not rendered improper merely because of their number provided they have some basis in fact and are asked in good faith. (People v. Sorge, 301 N.Y. 198, 200; 93 N.E.2d 637, 638; People v. Alamo, 23 N.Y.2d 630, 298 N.Y.S.2d 681, 246 N.E.2d 496 (1969). Nor does a negative response by a defendant preclude further inquiry by the prosecutor in a legitimate effort to cause the defendant to change his testimony. Otherwise, a "witness would have it within his power to render futile most cross-examination." (People v. Sorge, 301 N.Y. 198 at 201, 93 N.E.2d 639).
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> People v. Schwartzman, 24 N.Y.2d 241, 244; 299 N.Y.S.2d 817, 820 (1969), cert.

denied, 396 U.S. 846 (1969).*

Because these decisions provided little guidance as to how judicial discretion concerning cross-examination was to be exercised, the New York Court of Appeals handed down its landmark decision in People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974). In Sandoval, the Court ruled that the trial judge may make an advance ruling as to the use by the prosecutor of prior convictions or proof of the commission of specific criminal, vicious or immoral acts to impeach a defendant's credibility. Specifically:

> [f]rom the standpoint of the prosecution, then, the evidence should be admitted if it will have material probative value on the issue of defendant's credibility, veracity or honesty on the witness stand. From the standpoint of the defendant it should not be admitted unless it will have such probative worth, or, even though it has such worth, if to lay it before the jury or court would otherwise be so highly prejudicial as to call for its exclusion. The standard -- whether the prejudicial

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* Several appellate division decisions have narrowed this broad language to preclude cross-examination concerning the acts underlying pending criminal charges. People v. Hepburn, 52 A.D.2d 958, 383 N.Y.S.2d 626 (2d Dept. 1976); People v. Reyes, 48 A.D.2d 632, 368 N.Y.S.2d 198 (1st Dept. 1975). These courts have reasoned that to allow cross-examination concerning acts relating to outstanding indictments, informations or complaints would require a defendant "to prove his defense to the unrelated crime." But see People v. Edwards, 80 A.D.2d 993, 437 N.Y.S.2d 479 (4th Dept. 1981) (although a prosecutor may not ask a defendant whether he has been indicted, he may cross-examine about the facts underlying a pending indictment where such cross-examination would be proper under the Sandoval criteria). Accord People v. Melideo, 124 A.D.2d 1045, 508 N.Y.S.2d 750 (4th Dept. 1986); People v. Porter, 47 A.D.2d 908, 366 N.Y.S.2d 224, 225 (2d Dept. 1975). However, the New York Court of Appeals in People v. Davis and James, 43 N.Y.2d 17, 29; 400 N.Y.S.2d 735, 741 (1977), cert. denied, 435 U.S. 998 (1978) (the death penalty test case), "deemed without merit" the defendant-appellant's claim that such cross-examination was reversible error. On a related issue, courts have ruled that a defendant may be cross-examined concerning "non-final" convictions (i.e., subject to appellate review). See also People v. Pavao, 59 N.Y.2d 282, 464 N.Y.S.2d 458 (1983). See Annot., 14 A.L.R.2d 1272 (1976).

> effect of impeachment testimony far outweighs the probative worth of the evidence on the issue of credibility -- is easy of articulation but troublesome in many cases of application.
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> Sandoval, 34 N.Y.2d at 376, 357 N.Y.S.2d at 854-855.

See People v. Burroughs. ___ A.D.2d ___, 511 N.Y.S.2d 947 (2d Dept. 1987) People v. Burke, ___ A.D.2d ___ 511 N.Y.S.2d 946 (2d Dept. 1987); People v. Norman, ___ A.D.2d ___, 512 N.Y.S.2d 196 (2d Dept. 1987); People v. Caudle, ___ A.D.2d ___, 513 N.Y.S.2d 27 (2d Dept. 1986); see also People v. Davis, 44 N.Y.2d 269, 405 N.Y.S.2d 428 (1978), in which the Court applies the same "balancing approach" as in Sandoval, i.e., weighing the People's interest in exploring the veracity of a witness against the risk that the presumption of defendant's innocence may go by the board because of a jury's natural tendency to conclude that a defendant who has committed previous crimes is likely to have committed the crime charged or is deserving of punishment. In Davis, Judge Fuchsberg briefly addressed but did not decide the issue of whether Sandoval is applicable when a case is tried without a jury. There is now a conflict in the case law as to whether Sandoval applies to a non-jury trial. Contrast People v. Rosa, 96 Misc.2d 491, 409 N.Y.S.2d 117 (N.Y.C. Crim. Ct. N.Y. Co. 1978) (Sandoval inapplicable) with Hale v. Jay, 101 Misc.2d 636, 421 N.Y.S.2d 802 (Greenburgh Town Ct. Westchester Co. 1979) (in a proceeding to enforce the criminal penalties of the Consumer Protection Code of Westchester County, the court held that Sandoval did apply to a non-jury trial and that a judge who finds himself influenced by inadmissible evidence of prior crimes after deciding the motion can himself and send the case for retrial to another judge).

In People v. Pollock, 50 N.Y.2d 547, 429 N.Y.S.2d 628, 629 (1980), the New York Court of Appeals specifically stated that its decision in

Sandoval did not change the pre-existing law governing the scope of cross-examination for impeachment purposes but simply provided a procedural vehicle whereby a defendant could obtain an advance ruling as to the scope of cross-examination which would be permitted if he were to take the witness stand. The determination of that scope is still the province of the trial court. Further, "in the usual case, appellate review of the exercise of discretion by the trial court in any particular instance ends in the intermediate appellate court [citations omitted]." Pollock, 50 N.Y.2d at 550, 429 N.Y.S.2d at 629. See also People v. Canty, 60 N.Y.2d 830, 831; 464 N.Y.S.2d 693, 694 (1983); People v. Smith, 59 N.Y.2d 156, 167-68; 464 N.Y.S.2d 399, 405 (1983).

Note: Every error in a Sandoval ruling does not require reversal, defendant must demonstrate that he has been prejudiced. See People v. Spivey, 125 A.D.2d 349, 509 N.Y.S.2d 74 (2d Dept. 1986) (the court's improper Sandoval ruling at trial was considered harmless error, in light of the overwhelming proof of defendant's guilt); People v. Grossman, 125 A.D.2d 985, 510 N.Y.S.2d 382 (4th Dept. 1986). In addition, evidentiary rulings generally do not rise to the constitutional level; a petition for a writ of habeas corpus was denied in United States ex rel. Reid v. Dunham, 481 F.Supp. 366 (E.D.N.Y. 1979), where it was alleged that a violation of Sandoval violated her due process.

However, a court cannot deny a defendant's Sandoval motion on the theory that no similar restriction was made on the cross-examination of the People's witnesses. People v. Brown, 84 A.D.2d 819, 444 N.Y.S.2d 121 (2d Dept. 1981) (defendant's convictions for third degree burglary and third degree criminal mischief reversed, because the trial court's erroneous ruling caused defendant to refrain from testifying and he was the only source of his defense).

Note: In People v. McGee, 68 N.Y.2d 328, 508 N.Y.S.2d 927 (1986) the defendant argued that the trial court improperly refused to give him a Sandoval ruling regarding questions that his codefendant might ask him on cross examination. The Court of Appeals held that when defendants are tried together Sandoval applies only to cross-examination by the prosecutor and thus a Sandoval ruling made with respect to one does not apply to limit the scope of cross-examination of that defendant by the other. People v. McGee, 68 N.Y.2d 328, 508 N.Y.S.2d 927 (1986). "While the interest of the defendant in a prospective ruling under Sandoval is not insubstantial, it must yield to the right of the codefendant to confront and cross-examine his accusers". Id. See also People v. Catalano, 124 A.D.2d 304, 507 N.Y.S.2d 1020 (3d Dept. 1986).

B. The Sandoval Criteria

In evaluating precisely which crimes and conduct may be the subject of cross-examination, five questions are to be considered:

1. Were the crimes* remote in time for the present charges?

Cases in this area are far from uniform in their determination of what constitutes remoteness. Courts have ruled that crimes ranging from five years [People v. Wilson, 75 Misc.2d 720, 348 N.Y.S.2d 486 (Sup. Ct. Queens Co. 1973)] to those dating back 30 years [United States v. Holley, 493 F.2d 581 (9th Cir. 1974), cert. denied, 419 U.S. 861 (1974)] are not too remote for impeachment purposes under appropriate circumstances.

* For purposes of this discussion, "violations" are not included as crimes. Although Criminal Procedure Law Section 60.40 specifically permits any questions regarding "offenses" which is defined as "conduct for which a sentence...of imprisonment...is provided by any law" [Penal Law Section 10.00(1)], a number of courts have ruled that certain violations are too minor to reflect upon credibility. See, e.g., People v. Moore, 42 A.D.2d 268, 346 N.Y.S.2d 363 (2d Dept. 1973); People v. Jackson, 79 Misc.2d 814, 817; 361 N.Y.S.2d 258, 262 (Sup. Ct. Queens Co. 1974). Accordingly, in the area of traffic infractions there is general judicial agreement that the violation is too minor to be the basis of cross-examination. People v. Dickman, 42 N.Y.2d 294, 298; 397 N.Y.S.2d 754, 757 (1977); People v. Sandoval, supra, at 377, 357 N.Y.S.2d at 856; People v. Jackson, supra.

Other cases have indicated that eight years [People v. King, 72 Misc.2d 540, 339 N.Y.S.2d 358 (Sup. Ct. Queens Co. 1972)], 15 years [People v. Daniels,* 77 A.D.2d 745, 430 N.Y.S.2d 881 (3rd Dept. 1980)], and 20 years [People v. McCleaver, 78 Misc.2d 48, 354 N.Y.S.2d 847 (Sup. Ct. N.Y. Co. 1974)] are too remote for cross-examination purposes. See also People v. President, 47 A.D.2d 535, 363 N.Y.S.2d 612 (2d Dept. 1975), where the Appellate Division held that cross-examination as to a 30-year-old manslaughter conviction was improper. But see People v. Portalatin, 126 A.D.2d 577, 510 N.Y.S.2d 696 (2d Dept. 1987) where the Appellate Division held that defendant's eight and eleven-year-old convictions were not too remote.

Because the question of remoteness is obviously difficult, no clear time limits can be set forth. However, as a number of courts have adopted the view that since Penal Law §70.06(1)(b)(iv) bars the use of a conviction of a crime which is more than ten years old as a predicate for charging the defendant as a second felony offender, this time period might reasonably be utilized as a basis for limiting examination into prior misconduct and conviction. See, e.g., People v. Jackson, 79 Misc.2d 814, 361 N.Y.S.2d 258 (Sup. Ct. Queens Co. 1974).

2. Was the prior crime or misconduct based on an addiction or uncontrollable habit?

In Sandoval the Court of Appeals explained that "crimes or conduct

* However, in Daniels, the conviction was affirmed on the ground that the error was harmless because even though the defendant did not testify as a result of the trial court's erroneous decision to allow cross-examination with respect to a 15-year old conviction, he could nevertheless properly have been cross-examined about four other convictions had he chosen to testify. See also People v. Williams, 84 A.D.2d 965, 446 N.Y.S.2d 717 (4th Dept. 1981) (improper cross-examination about 11 and 12-year old convictions harmless error because more recent convictions were properly admitted; therefore, it was unlikely that "the error prompted defendant's decision not to testify or otherwise caused prejudice").

occasioned by addiction or uncontrollable habit, as with alcohol or drugs (...unless independently admissible to prove an element of the crime charged...) may have lesser probative value as to lack of in-court veracity (cf. United States v. Puco, supra, 453 F.2d 539 (1971), cert. denied, 414 U.S. 844 (1973)."* See also People v. Rivera, 60 A.D.2d 523, 400 N.Y.S.2d 3 (1st Dept. 1977).

Note that in People v. Tramontano, 65 A.D.2d 762, 409 N.Y.S.2d 772 (2d Dept. 1978), it was held that trial court erred in permitting the prosecutor to cross-examine defendant, ultimately convicted of first degree robbery, about his possession of a hypodermic needle after charges arising therefrom had been dismissed. The court deemed possession of the hypodermic to be minimally related to the defendant's credibility. Furthermore, as possession of a hypodermic is a drug-related offense, the defendant would be unduly prejudiced before the jury if he were portrayed as an addictive personality with a propensity toward criminality.

3. Did the prior crimes or misconduct involve individual dishonesty?

One must begin with the proposition that cross-examination concerning convictions or misconduct is optimal when it demonstrates a "determination deliberately to further self-interest at the expense of society or in derogation of the interests of others..." People v. Sandoval, supra, 357 N.Y.S.2d at 855. The same sentiments are expressed in People v. Greer, 42 N.Y.2d 170, 397 N.Y.S.2d 613, 617 (1977). Thus, "perjury, fraud and deceit, larceny by misrepresentation, and other closely related

*NB: Distinction should be made in drug cases between possession for one's own use and possession for sale to others since the latter is not occasioned by irrational or uncontrollable need.

crimes which have at their very core the prior dishonest or untruthful quality of the defendant" are always relevant to credibility. People v. Mallard, 78 Misc.2d 858, 864-65, 358 N.Y.S.2d 913, 919 (Sup. Ct. Queens Co. 1974) (emphasis in original). See also Sandoval, 357 N.Y.S.2d at 855; People v. Edwards, 80 A.D.2d 993, 437 N.Y.S.2d 479 (4th Dept. 1981).

The Sandoval Court explained that the acts which fall into this category include: "[c]ommission of perjury or other crimes or acts of individual dishonesty or unworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust)..." Sandoval, 357 N.Y.S.2d at 856. See also People v. Mayrant, 43 N.Y.2d 236, 401 N.Y.S.2d 165 (1977). Furthermore, some appellate courts have held that trial courts have erred in allowing prosecutors to introduce prior offenses committed by the defendant if they are similar to those with which he is charged. See, e.g., People v. Johnson, 64 A.D.2d 907, 408 N.Y.S.2d 519 (2d Dept. 1978), aff'd on opinion below, 48 N.Y.2d 674, 421 N.Y.S.2d 881 (1979) (in a robbery prosecution, the trial court erred when it ruled that the prosecutor could question defendant, if the defendant elected to testify, as to both the existence of and the facts underlying two previous convictions for possession of stolen property); People v. Carmack, 44 N.Y.2d 706, 405 N.Y.S.2d 446 (1978) (extensive cross-examination of defendant on prior drug possession was improper since such evidence would tend to demonstrate a propensity to commit the very crime for which defendant was on trial rather than to impeach his credibility); People v. Cotton, 61 A.D.2d 881, 402 N.Y.S.2d 871 (4th Dept. 1978) (in assault prosecution, trial court erred in denying defendant's motion to preclude cross-examination with respect to a prior assault conviction);

People v. Walker, 59 A.D.2d 666, 398 N.Y.S.2d 285 (1st Dept. 1977) (reversal of conviction for rape because prosecutor focused on defendant's prior rape conviction in summation solely to show a propensity on the part of defendant to commit rape). But see People v. Pavao, 59 N.Y.2d 282, 292; 464 N.Y.S.2d 458, 463 (1983) (the Court of Appeals held that mere similarity does not automatically preclude cross-examination on the prior similar offense); People v. Weeks, ___ A.D.2d ___, 510 N.Y.S.2d 920 (3d Dept. 1987) (the court permitted the prosecution to cross examine the defendant on prior similar sexual acts involving the same victim in the defendant's trial on sexual abuse); People v. Wendel, 123 A.D.2d 410, 506 N.Y.S.2d 472 (2d Dept. 1986) (in a burglary prosecution, the trial court admitted evidence of two prior burglaries committed by the defendant as it related to the issue of credibility). See also People v. Byrd, ___, A.D.2d ___, 513 N.Y.S.2d 496 (2d Dept. 1987), People v. McCutcheon, 122 A.D.2d 169, 504 N.Y.S.2d 708 (2d Dept. 1986); People v. Tucker, 122 A.D.2d 237, 505 N.Y.S.2d 5 (2d Dept. 1986).

Suprisingly, there has been judicial approval for cross-examination concerning prior heroin use and the cost of drug addiction in robbery prosecutions. [People v. Wright, 41 N.Y.2d 172, 175; 391 N.Y.S.2d 101; 103-104 (1976); People v. Duffy, 36 N.Y.2d 258, 262-63; 367 N.Y.S.2d 236; 239-240, cert. denied, 423 U.S. 861 (1975)] although great care should be exercised in this area. See, e.g., People v. Mallard, supra (in robbery prosecution, prosecutor could not cross-examine about defendant's nine prior convictions, dealing principally with narcotics and gambling); Albertson v. State, 554 P.2d 661 (N.M. Sup. Ct. 1976) (prohibition of cross-examination concerning prior marihuana possession and use). And, generally, violent misconduct is not the proper subject of cross-examina-

tion if spontaneous or implusive. See, e.g., People v. English, 75 A.D.2d 981, 429 N.Y.S.2d 98 (4th Dept. 1980) (the trial court properly exercised its discretion when it ruled that defendant could not be cross-examined on his prior convictions for crimes of violence but could be asked about past convictions for burglary and criminal possession of stolen property).

"A person ruthless enough to sexually exploit a child may well disregard an oath and resort to perjury if he perceives that to be in his self-interest." So stated the New York Court of Appeals in People v. Bennette, 56 N.Y.2d 142, 451 N.Y.S.2d 647 (1982), reiterating the principle that a prosecutor is not necessarily precluded from cross-examining a defendant about a prior sex crime, even where a child was the victim, despite the potential inflammatory effect on the jury of allowing such evidence.

In Bennette, defendant was charged with burglary and his defense was misidentification, although he testified that he did reside in the apartment adjoining complainant's at the time of the crime. The trial was held in 1977; in 1973 defendant had pleaded guilty to sodomy involving a child [the opinion below records this conviction as one for sexual abuse]. The trial court denied the defendant's Sandoval motion and permitted cross-examination about the conviction and the underlying facts. The Appellate Division reversed on the law, apparently setting forth an inflexible rule prohibiting the prosecutor from impeaching the defendant's credibility by cross-examination on prior sexual offense involving a child, at least where some weaknesses are evident in the prosecutor's case. The Court of Appeals reversed the order of the Appellate Division, remitting the case for a review of the facts, holding that while there

might be factors in an individual case justifying the exclusion of evidence of the prior crime, a trial court is not bound to exclude such evidence of the prior crime, as a matter of law.

> In this case the defendant's credibility was an important issue at the trial. As noted, there was other evidence pointing to the defendant's guilt, but it was not conclusive...
>
> The defendant's conviction for sodomy was not irrelevant to the question of his veracity. Although sodomy is not the type of crime which necessarily involves an act of dishonesty - like perjury, fraud, bribery and similar offenses - it may, as the trial court recognized, indicate a willingness or disposition by the defendant to voluntarily place "advancement of individual self-interest ahead of principle or of the interests of society" and thus "may be relevant to suggest readiness to do so again on the witness stand" [citing Sandoval at 377]. Of course an impulsive or uncontrollable act may have little or no relevance to a defendant's credibility; but in this case there was no suggestion, at trial or on appeal, that the defendant did not act voluntarily and deliberately when he committed the act of sodomy...
>
> The probative value of this evidence was not diminished by the passage of time. This was not an incident buried deep in the defendant's past. It was, as the prosecutor noted, a recent conviction... Thus it cannot be said that it was unnecessary for the
>
> prosecutor to bring this particular conviction to the jury's attention. In sum, despite the inflammatory nature of the proof there were legitimate and perhaps compelling reasons for permitting the People to cross-examine the defendant concerning his prior conviction for sodomy and thus justification for the exercise of discretion by the trial court.

See People v. Zada, 82 A.D.2d 926, 440 N.Y.S.2d 673 (2d Dept. 1981), a prosecution for felony murder, robbery, and burglary, where the court

held the trial court's ruling on defendant's Sandoval motion that cross-examination of defendant about a 1974 conviction for intentional murder would be permitted since that conviction involved a "crime of calculated violence, which demonstrated defendant's willingness to place his own self-interest ahead of the interests of society..."

4. Are the crimes and conduct similar to that for which the defendant is presently being charged?

This area presents difficult and almost esoteric problems. In Sandoval the Court of Appeals indicated that despite any limiting instructions there is always the danger that the past crime will be taken as proof of the commission of the present one. People v. Sandoval, supra, 357 N.Y.S.2d 849 at 856. Significantly, however, although the commission of a prior similar offense might be interpreted by a jury as proof of a defendant's "propensity" to commit a particular type of crime, his "willingness" to violate the law to serve his own self-interest may well be recognized as "very material proof of lack of credibility ...[citations omitted]. To balance these opposing factors is difficult and should generally be left to the trial court...[citations omitted]." People v. Talamo, 55 A.D.2d 506, 508-09; 391 N.Y.S.2d 474, 476 (3rd Dept. 1976), citing People v. Duffy, supra, 367 N.Y.S.2d 236 at 239-40. One trial court in a Sandoval motion in a robbery prosecution permitted cross-examination as to whether defendant had a prior conviction but refused to allow the prosecutor to inquire as to the nature of the crime, which was also robbery and its decision was upheld. People v. Young, 77 A.D.2d 672, 429 N.Y.S.2d 803 (3rd Dept. 1980).

Note that in People v. Rahman, 62 A.D.2d 968, 404 N.Y.S.2d 110 (1st Dept. 1978), aff'd, 46 N.Y.2d 882, 414 N.Y.S.2d 683 (1979), the court held the fact that a defendant may specialize in a certain kind of

illegal activity (in this case, drugs) does not shield him from having previous convictions introduced to impeach his credibility.

> To hold otherwise defies common sense and, in effect, serves to make the criminal specialist a member of a chosen class, free from the burden of having his credibility impeached for prior convictions relating to his specialized field of endeavor - a result not envisioned under Sandoval.
> Rahman, 404 N.Y.S.2d at 112.

See also People v. Hendrix, 44 N.Y.2d 658, 405 N.Y.S.2d 31 (1978), reversed on a writ of habeas corpus issued on other grounds, 639 F.2d 113 (2d Cir. 1981); accord People v. Hill, 79 A.D.2d 641, 433 N.Y.S.2d 611 (2d Dept. 1980) (in narcotics prosecution, the People could introduce evidence of defendant's treatment for addiction).

Repeatedly, either intentionally or otherwise, evidence of similar misconduct is improperly used to show criminal propensity. For example, in People v. Santiago, 47 A.D.2d 476, 367 N.Y.S.2d 280 (1st Dept. 1975), the court explained that cross-examination as to similar narcotics offenses was technically appropriate under People v. Schwartzman, supra, but where the intent of the prosecutor was to show propensity and willingness to commit crimes (as opposed to willingness to put one's self-interest above society in the context of credibility), reversible error was committed. See also People v. Colgan, 50 A.D.2d 932, 377 N.Y.S.2d 602 (2d Dept. 1975); People v. Brown, 70 A.D.2d 1043, 417 N.Y.S.2d 560 (4th Dept. 1979); People v. Figueroa, 80 A.D.2d 520, 436 N.Y.S.2d 1 (1st Dept. 1981) (trial court erroneously ruled at Sandoval hearing that defendant in weapons prosecution could be cross-examined about two prior weapons convictions); People v. Irby, 79 A.D.2d 713, 434 N.Y.S.2d 252 (2d Dept. 1980) (defendant could not be cross-examined about a prior assault with a knife in a prosecution for assault with a knife;

prosecution's argument that this evidence negated accident under the Molineux doctrine was without merit, even though defendant took the stand and testified that the stabbing was an accident). The Appellate Division decision in People v. Duffy, [44 A.D.2d 298, 202; 354 N.Y.S.2d 672, 677 (2d Dept. 1974), aff'd, 36 N.Y.2d 258, 367 N.Y.S.2d 236 (1975), motion to amend remittitur granted, 36 N.Y.2d 857, 370 N.Y.S.2d 919 (1975), cert. denied, 423 U.S. 861 (1975)] poses an alternative: one might "limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity."* See also People v.

* Appellate courts have approved of cross-examination concerning a variety of prior similar offenses. See, e.g., United States v. Ortiz, 553 F.2d 782 (2d Cir. 1977), cert. denied, 434 U.S. 897 (1977) (defendant charged with cocaine distribution was properly impeached based upon a four-year old prior conviction for selling heroin); People v. Poole, 52 A.D.2d 1010, 383 N.Y.S.2d 688 (3rd Dept. 1976) (defendant charged with murder was properly cross-examined concerning a prior homicide resulting in manslaughter conviction); People v. Hepburn, 52 A.D.2d 958, 383 N.Y.2d 626 (2d Dept. 1976) (approval of cross-examination concerning narcotics charges similar to the one for which defendant was on trial); People v. Watson, 57 A.D.2d 143, 393 N.Y.S.2d 735 (2d Dept. 1977), rev'd on other grounds, 45 N.Y.2d 867, 410 N.Y.S.2d 577 (1978) (proper cross-examination in a rape prosecution concerning prior conviction for attempted rape); People v. Stewart, 85 Misc.2d 385, 380 N.Y.S.2d 909 (Sup. Ct. Erie Co. 1976) (proper cross-examination concerning prior rapes where the defendant is charged with a similar offense); People v. Green, 67 A.D.2d 756, 412 N.Y.S.2d 447 (3d Dept. 1979) (trial court did not abuse its discretion in prosecution for sexual abuse in allowing prosecutor to cross-examine the defendant as to a prior conviction of menacing). Similarly, in the "death penalty" decision, People v. Davis and James, 43 N.Y.2d 17, 400 N.Y.S.2d 735 (1977), cert. denied, 435 U.S. 998, 438 U.S. 914 (1978), the Court of Appeals "deemed without merit" the defendant's claim that the prosecution was improperly permitted to cross-examine the defendant (charged with murder) concerning a prior felony-murder involving a weapon, a prior weapons conviction, and prior robbery offense. Davis and James, 43 N.Y.2d at 29, 400 N.Y.S.2d at 741. The lower court's Sandoval-related decision in the Davis and James case was affirmed even though the key issue in the case was whether the gun had gone off accidently in the tussle and struggle between the deceased and the defendant. The result in David and James might have been different had the prior bad conduct occurred long before the time in question. See, e.g., People v. Caviness, 38 N.Y.2d 227, 379 N.Y.S.2d 695 (1975) (improper to allow cross-examination of a defendant concerning a 25-year-old prior weapons conviction). See discussion in Section I C., infra.

Hampton, ___ A.D.2d ___, 511 N.Y.S.2d 328 (2d Dept. 1987) (the court did not abuse its discretion by allowing the prosecution to cross examine the defendant charged with robbery about a prior robbery conviction inasmuch as the court excluded evidence of defendant's other prior robbery and burglary convictions).

5. What was the age of the defendant at the time the prior misconduct took place?

The troublesome question of youthful offenses has been pondered by courts for some time. The general rule is that youthful offender adjudications may not be brought out at trial, although the underlying acts themselves may be explored in the discretion of the court. See, e.g., People v. Sanza, 37 A.D.2d 632, 323 N.Y.S.2d 632 (2d Dept. 1971). Moreover, one appellate court has recognized that crimes committed in one's youth have "little, if any value as a barometer of the defendant's character or trustworthiness and even less value as an indicator of moral turpitude." People v. Moore, 42 A.D.2d 268, 273; 346 N.Y.S.2d 363, 368 (2d Dept. 1973) (impeachment concerning acts of vandalism when defendant was 12 years old was improper).

C. Decisions of Interest

With the above five questions in mind, several rather interesting decisions deserve brief mention. In People v. Caviness, 38 N.Y.2d 227, 327 N.Y.S.2d 695 (1975), the Court of Appeals reversed a manslaughter conviction where the question of whether the deceased or the defendant originally possessed the weapon was "critical" to a determination of guilty and where the prosecution was permitted to cross-examine the

defendant concerning a 1951 possession of weapon conviction. Noting that:

1) the 1951 possession had little if any bearing upon credibility in a 1973 trial;

2) the defendant was never seen actually holding the weapon; and

3) the proof was far from overwhelming, the Court concluded that, in context, there was a:

> significant probability that the permitted evidence (of the prior conviction) would be taken, improperly it is true, as some proof of the commission of the crime charged, the disclosure of the gun possession conviction was highly prejudicial and was far from harmless (citations omitted).
>
> People v. Caviness, supra, at 233, 379 N.Y.S.2d at 701.

Less predictably, the court in People v. Stewart, supra, allowed cross-examination of the defendant as to eleven prior incidents or rape, larceny, and reckless endangerment where the pending charge was rape because the case was one that turned purely upon the credibility of the complaining witness versus the defendant.* The prosecutor had, in the eyes of the trial judge, established that the purpose of the attempted impeachment was to cast doubt upon credibility and not to show criminal

* In fact, in Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1967), former Circuit Judge, and now Chief Justice, Warren Burger concluded that where the defense cross-examined the complaining witness concerning his prior criminal record it was only fair that the prosecution be able to do likewise since: "[t]he admission of Appellant's criminal record here, along with the criminal record of the complaining witness, was not in a vindictive or 'eye for an eye' sense, as Appellant argues. Rather, it was received because the case had narrowed to the credibility of two persons -- the accused and his accuser -- and in those circumstances there was greater, no less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed."

propensity. See People v. Fallon, 76 A.D.2d 982, 429 N.Y.S.2d 80 (3d Dept. 1980) (trial court properly ruled that if defense questioned prosecution witness as to the underlying facts of his earlier assault conviction, then the People could question defendant as to the underlying facts of his earlier assault convictions).

In People v. Colgan, supra, the conviction was reversed because the defendant had conceded on direct examination a prior conviction for robbery and the prosecution dwelt on it in cross-examination in an excessive manner. The court felt that once such a concession is made, further reference to the impeaching conviction or misconduct can have as its only purpose an improper intention to demonstrate "propensity" to commit criminal acts. The Second Department in People v. Godin, 50 A.D.2d 839, 377 N.Y.S.2d 427, 428 (1975), ruled that under the proper circumstances menacing and harassment may be the basis for impeachment since "[s]uch inquiry may reflect upon a defendant's willingness to stand." Finally, the Fifth Circuit reversed defendant's marihuana conviction where she was cross-examined on her criminal record for prostitution. The court stated that a prostitution offense does not substantially impugn credibility since it does not entail dishonest or false statement. United States v. Cox, 536 F.2d 65, 70-71 (1976).

(1) "Sandoval Compromise"

Note that at least one trial court has created a "Sandoval Compromise." In People v. Bermudez, 98 Misc.2d 704, 414 N.Y.S.2d 645 (Sup. Ct. N.Y. Co. 1979), the defendant, charged with robbery, offered a defense of misidentification, alibi and, in effect, perjury by the complainant. Defendant moved to preclude the prosecutor from cross-examining him about his prior convictions, some of which were for

robbery.

The court held that a "Sandoval Compromise" would be utilized to allow the prosecutor to ask a single question as to whether the defendant had been convicted of prior offenses. The court stated that to allow the prosecutor to ask additional questions to pinpoint the nature of the prior convictions or underlying immoral acts would unduly prejudice defendant. Thus, from the prosecutorial standpoint, the defendant's credibility will have been brought into sufficient question since defendant will not be testifying as if he had an "unblemished record." Furthermore, from the defense standpoint, defendant will not be faced with the possibility that his past record alone may determine his fate with the jury.

As set forth in Bermudez, "[t]he Sandoval Compromise is an attempt to strike a middle course; to protect rights and interests; to minimize prejudice; and to maximize just treatment to both the defendant and the People by the exercise of sound judicial discretion." People v. Bermudez, supra, 414 N.Y.S.2d at 469. See People v. Moore, 82 A.D.2d 972, 440 N.Y.S.2d 418 (3rd Dept. 1981) where the Appellate Division, Third Department held that in a prosecution for robbery and murder the trial court properly permitted the prosecutor to cross-examine the defendant as to whether he had previously been convicted of robbery but properly precluded the prosecutor from asking defendant about the facts underlying that conviction. See also People v. Digugliemo, 124 A.D.2d 743, 508 N.Y.S.2d 244 (2d Dept. 1986) (the court restricted the prosecution's cross-examination to the question of whether or not the defendant had been previously convicted of a crime and prohibited inquiry into the underlying facts of these crimes); People v. Vasquez, 123 A.D.2d

409, 506 N.Y.S.2d 471 (2d Dept. 1986) (Sandoval ruling limited cross examination of the defendant to the fact that he had been convicted of two felonies and one misdemeanor).

(2) Necessity of a Record

In People v. Anderson, 75 A.D.2d 988, 429 N.Y.S.2d 117 (4th Dept. 1980), an arson prosecution, the Fourth Department remitted the case for a hearing because the lower court's failure to make a record of the Sandoval motion rendered the reviewing court unable to determine whether the probative value of the defendant's prior convictions for arson would be outweighed by the prejudicial effect of admitting this evidence of past similar crimes. See also People v. Cook, 125 A.D.2d 822, 510 N.Y.S.2d 490 (3d Dept. 1986). But see People v. Anderson, 124 A.D.2d 851, 508 N.Y.S.2d 621 (3d Dept. 1986) (even though the trial court improperly failed to make a record of its Sandoval ruling, the court's ruling could be gleaned from defendant's cross-examination).

(3) Charge Dismissed after Plea Proper Subject of Cross-Examination

Since a dismissal in satisfaction of a plea is not an acquittal on the merits, it is a proper subject of cross-examination. People v. Alberti, 77 A.D.2d 602, 430 N.Y.S.2d 6 (2d Dept. 1980), cert. denied, 449 U.S. 1018 (1980).

(4) Necessity of Instruction Where Requested

It is reversible error for the trial court to refuse the defense's request to instruct the jury that they are to consider the evidence of the defendant's prior crimes as relating only to his credibility. People v. Moorer, 77 A.D.2d 575, 429 N.Y.S.2d 913 (2d Dept. 1980).

(5) Timeliness of Motion

At least one court has held that a Sandoval motion is untimely if made after the People have rested and may properly be denied on that ground. People v. Wyche, 79 A.D.2d 1070, 435 N.Y.S.2d 805 (3rd Dept. 1981). The court in Wyche so held even though this was an assault prosecution and the two prior convictions were for assault. The court reasoned that the purpose of a Sandoval motion is that the defendant may obtain a prospective ruling which the prosecution has an opportunity to meet and oppose.

The defendant is entitled, however, to rely on the trial court's Sandoval ruling. See People v. West, 62 N.Y.2d 708, 476 N.Y.S.2d 530 (1984), where the Court of Appeals held reversible error occured when the trial court permitted the District Attorney to question the defendant regarding the underlying facts of a prior conviction after the court had previously ruled such cross-examination would not be permissible.

II. PROCEDURES FOR IMPLEMENTING THE SANDOVAL RATIONAL

The main focus of the Sandoval decision is a determination of whether the truth will be served by letting the jury hear the defendant's story from him or by foregoing that opportunity because of fear of prejudice founded upon a prior conviction or bad act. Sandoval, 357 N.Y.S.2d 853, 854. People v. Rodriquez, 120 A.D.2d 623, 502 N.Y.S.2d 89 (2d Dept. 1986). Procedurally, to allow for such a determination, by affidavit or live testimony, a defendant may, prior to his testifying:

1. Inform the court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf. Sandoval, 357 N.Y.S.2d at 856*

2. Establish he is "the only available source of material testimony" and that his testimony is critical. See, e.g., Sandoval, 357 N.Y.S.2d at 856.

Significantly, the burden of proof is upon the defendant to demonstrate that "the prejudicial effect of the admission of evidence (of prior misconduct) for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion." Sandoval, 357 N.Y.S.2d at 856.**

Note: The Second Department has held that a defendant who fails to make a sufficiently broad Sandoval application will be deprived only of the benefit of and advance ruling regarding any prior convictions or misconduct not specified in the motion. He retains the right, however, to object at trial to prejudicial cross-examination, and when his objection challenges inquiry into his prior misconduct, he is entitled to a ruling based upon the same criteria as would have been applied had the issue been raised before trial. People v. Ortero, 75 A.D.2d 168, 428 N.Y.S.2d 965, 969 (1980) (trial judge improperly permitted inquiry into alleged foreign violent crimes which the defense was unaware at the time

* The defendant bears the burden of telling the court about the prior misconduct - he cannot compel the prosecutor to do so. People v. Poole, supra. The District Attorney, however, must provide a yellow sheet. In Re Legal Aid, 47, A.D.2d 646, 364 N.Y.S.2d 17 (2d Dept. 1975). Indeed, if the defendant fails completely to disclose his criminal history to the court and the prosecutor, "he could be cross-examined concerning [these undisclosed convictions] at the trial." People v. Batchelor, 57 A.D.2d 1059, 1060-1061; 395 N.Y.S.2d 846, 848 (4th Dept. 1977).

** Should a defendant lose his Sandoval motion, inquiry can go no further once he has admitted to the prior misconduct and/or conviction relating thereto. People v. Watson, 57 A.D.2d 143, 393 N.Y.S.2d 735 (2d Dept. 1977), rev'd on other grounds, 45 N.Y.2d 867, 410 N.Y.S.2d 577 (1978).

he made his Sandoval motion). Similarly, the Fourth Department ruled that a defendant who failed to make a Sandoval motion but who made an appropriate exception to the introduction of evidence of his prior convictions preserved the issue for review. People v. Velazquez, 77 A.D.2d 845, 431 N.Y.S.2d 37 (4th Dept. 1980). But see People v. Matthews, 68 N.Y.2d 130, 506 N.Y.S.2d 154 (1986) where at a Sandoval hearing, the defendant requested the court to preclude any questioning of the defendant relating to his prior juvenile offender convictions. The defendant failed, however, to ask the court to bar the prosecution from inquiring into a bank robbery conviction that was asked about at trial. The Court of Appeals held that a defendant who waives his right to an advance ruling, cannot claim to be prejudiced by the fact that he was asked about the criminal conduct at trial. Id. See also People v. Cridelle, 72 A.D.2d 859, 421 N.Y.S.2d 735 (3d Dept. 1979) (court could permit cross-examination about defendant's prior assault conviction where defendant had failed to request its exclusion at Sandoval hearing).

III. THE APPLICATION OF THE SANDOVAL DOCTRINE TO THE GRAND JURY PROCESS

Although there is uncertainty as to the appropriate procedures concerning cross-examination of witnesses before the grand jury, one fact is clear -- there is to be no Sandoval hearing impediment to the grand jury process. For example, in People v. Adams, 81 Misc.2d 528, 366 N.Y.S.2d 311 (Sup. Ct. N.Y. Co. 1975), the court emphasized that the traditional rules of evidence apply in the grand jury. [Cf. Criminal Procedure Law §§60.40; 190-30(1).] In addition, although no Sandoval

hearing should be held because it would interrrupt the grand jury process [United States v. Dionisio, 410 U.S. 1 (1973)], if cross-examination by the District Attorney is excessive, or no limiting instructions are given, an appropriate motion to dismiss the indictment may be granted. Similarly, in People v. Hargrove, 80 Misc.2d 317, 363 N.Y.S.2d 241 (Sup. Ct. Westchester Co. 1975), the court dismissed an indictment where the prosecutor impeached by way of:

1) a 27-year old trespass conviction;

2) a 25-year old larceny conviction; and

3) a 17-year old marihuana conviction.

In addition, the court held that where Sandoval impeachment is utilized, limiting instructions must be given, although again, the court did not indicate there was a need for a hearing.

IV. FEDERAL RULES OF EVIDENCE GOVERNING ADMISSION OF EVIDENCE OF PRIOR BAD ACTS TO IMPEACH

Rule 609(a) of the Federal Rules of Evidence is the Federal parallel to Sandoval. It provides that a defendant may be cross-examined about a prior crime "only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

This Rule must be read with Rule 407 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Ninth Circuit has held that Rule 403 does not apply where the relevance of the earlier offense is upon the question of credibility. See United States v. Leyva, 659 F.2d 118 (9th Cir. 1981), cert. denied, 454 U.S. 1156 (1982) (District Court properly ruled that evidence of defendant's prior misdemeanor conviction for welfare fraud would be admissible if defendant testified in her own behalf at her trial on charges of forging Social Security checks).

Other circuits have considered Rule 403 applicable even when the prior crime involves honesty. See United States v. Brunson, 65 F.2d 110 (7th Cir. 1981), cert. denied, 454 U.S. 1151 (1982), where the court found that the district court properly applied Rule 403 to permit the People, in a prosecution for counterfeiting, to cross-examine appellant about prior counterfeiting activities, after he testified that he did not intend to defraud with the counterfeit money he was charged with making.

Note: In Luce v. United States, 469 U.S. 38, 105 S.Ct. 460 (1984), the Supreme Court held that under the Federal Rules of Evidence, Rule 609(a), a defendant must testify in order to preserve for review a claim of improper impeachment.

(1) Remoteness

In considering whether prior crimes are too remote to be the subject of cross-examination, the Federal Rules of Evidence do not set an inflexible standard. Rule 608(b) states:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, which ever is the later date, unless the court determines, in the interests of

justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect..."

The Eighth Circuit ruled in United States v. Speno, 625 F.2d 779 (1980), that the admission of evidence of a defendant's 22-year-old conviction was proper where credibility was crucial in the case. See also United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969).

V. THE PROSECUTOR'S USE OF SANDOVAL TO SHIELD PROSECUTION WITNESSES FROM IMPEACHMENT

As noted earlier, the Court of Appeals has held firmly to its belief that the "manner and extent of the cross-examination lies largely within the discretion of the trial judge' (citations omitted)." People v. Sorge, 301 N.Y. at 201-02. And this applies equally to the defendant, the defendant's witnesses and the witnesses for the prosecution. The Supreme Court has declared "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." Pointer v. Texas, 380 U.S. 400, 404; 85 S.Ct. 1065, 1968 (1965). Nevertheless, "the right to confront and to cross-examine is not absolute and may, in appropriate cses, bow to accommodate other legitimate interests in the criminal trial process (citations omitted)." Chambers v. Mississippi, 410 U.S. 284, 295; 93 S.Ct. 1038, 1046 (1973). A prosecutor may seek a Sandoval-like ruling limiting the cross-examination of his witnesses on the ground that:

1) to do so is necessary to avoid annoyance and undue embarrassment of the witness [see, e.g., United States v. Perry, 512 F.2d 805, 807 (6th Cir. 1975); ABA Code of Professional Responsibility, Disciplinary Rule 7-106 (C)(2)]; and/or

2) the convictions or allegedly improper conduct which the

defendant seeks to utilize as impeachment material is in fact not probative on the issue of credibility before the court. See "United States Court of Appeals 1974-1975 Term Criminal Law and Procedure," 64 Georgetown Law Journal 167, 364-367 (1975); People v. Pollard, 54 A.D.2d 1012, 388 N.Y.S.2d 164 (3d Dept. 1976) (defendant properly precluded from cross-examining prosecution witness on mereuse of drugs).

Of course, since such an application of Sandoval limits the scope of a defendant's constitutional right of confrontation, great care must be taken so as not to cut off legitimate areas of inquiry. For example, in People v. Ricks, 51 A.D.2d 1062, 381 N.Y.S.2d 527 (2d Dept. 1976), the Second Department found no fault in the prosecutor's successful efforts to limit the cross-examination of one of its witnesses concerning his alleged homosexuality, which the court felt was not sufficient to impugn credibility. The court did reverse the resulting conviction, however, because the alleged homosexuality may have reflected upon the witness' possible bias, interest and prejudice in testifying.* See also United

* See also Davis v. Alaska, 415 U.S. 308, 317 (1974), wherein the Supreme Court found reversible constitutional error in limiting examination of a key prosecution witness for a juvenile delinquency adjudication on the ground that under the facts of that particular case, it may have demonstrated a motive to lie. People v. Smoot, 59 A.D.2d 898, 399 N.Y.S.2d 133 (2d Dept. 1977), is also significant in this regard. The Second Department ruled in that case that there was "no authority for applying the Sandoval rule to a witness who is not a defendant." Smoot, 399 N.Y.S.2d at 135. Thus it appears, at least until the Court of Appeals rules otherwise, that a prosecution witness may be freely cross-examined concerning any criminal conduct which bears on his or her credibility even if only remotely. Of course, this memorandum's discussion, infra, of cross-examination of sexual offense victims remains unchanged since the Legislature has provided explicit boundaries for proper examination in such cases. See discussion of People v. Conyers, 86 Misc.2d 754, 382 N.Y.S.2d 437 (Sup. Ct. N.Y. Co. 1976), aff'd without opinion, 63 A.D.2d 634, 405 N.Y.S.2d 409 (1st Dept. 1978), above.

States v. Nuccio, 373 F.2d 168 (2d Cir. 1966), cert. denied, 387 U.S. 906 (1967), reh'g. denied, 389 U.S. 889 (1967).

Indeed, the constitutional implications of a prosecutor's utilization of the Sandoval rationale is best viewed in light of statutory provisions allowing for restricted cross-examination of rape complainants concerning prior sexual conduct. In People v. Conyers, 86 Misc.2d 754, 382 N.Y.S.2d 437 (Sup. Ct. N.Y. Co. 1976), aff'd without opinion, 63 A.D.2d 634, 405 N.Y.S.2d 409 (1st Dept. 1978), the court balanced the umbrella of protections accorded by Criminal Procedure Law, §60.42, against a defendant's right to effective cross-examination. Finding that restricted cross-examination may be justified to avoid harassment, annoyance, humiliation and inquiry into matters "the probative value" of which is minimal, Justice Lang concluded:

> [n]ational trends have reflected a changing attitude regarding the relevancy of prior convictions (or misconduct) as an impeachment tool [citations omitted]. Under People v. Sandoval, supra, the first inroads were made in this jurisdiction in the reevaluation of the use of prior convictions on cross-examination of defendants. [CPL] Section 60.42 represents a second step which, rather than giving greater protection to defendant's right to a fair trial, has as its aim the protection of privacy of complaining witnesses.
>
> Conyers, 382 N.Y.S.2d at 444.

Thus, it appears that a trial court may constitutionally grant a prosecutor's request that the impeachment of his witness be limited and need not encompass every conceivable act or prior misconduct or conviction. If the District Attorney can establish that examination into such matters would not be probative on the issue of credibility, a defendant's right to a fair trial will remain intact. However, such efforts to

restrict the scope of cross-examination must be cautiously pursued inasmuch as the Sixth Amendment's right of confrontation is inextricably linked to a defendant's ability to question fairly the witnesses against him. See People v. Allen, 67 A.D.2d 558, 416 N.Y.S.2d 49 (2d Dept. 1979), aff'd in memorandum on opinion below, 50 N.Y.2d 898, 430 N.Y.S.2d 588 (1980). In Allen, the Appellate Division ruled that it was constitutional error for the trial court to limit cross-examination of prosecution witnesses as to their criminal history under Sandoval; however, the error was harmless beyond a reasonable doubt, as the jury was presented with ample evidence that these witnesses were prior inmates with extensive criminal backgrounds. The Court of Appeals in Allen stated:

> "[W]e would note that we do not agree with the defendant that every error which improperly curtails a defendant's right to cross-examine a prosecution witness with respect to prior criminal acts is per se reversible error. That would be particularly inappropriate in cases such as this, where the witnesses' prior criminal history was extensively explored on cross-examination although not totally or definitively set forth as the defendant may have wished."
> Allen, 430 N.Y.S.2d at 588.

By contrast, in People v. Provenzano, 79 A.D.2d 811, 435 N.Y.S.2d 369 (3d Dept. 1980), a murder prosecution, the court reversed defendant's conviction because defense counsel was prevented from cross-examining the eyewitness, whose testimony was the sole corroboration of the accomplice testimony, about frauds that this eyewitness committed the same year that he allegedly witnessed the murder.

In addition, where the witness' criminal history is crucial to the defense, there can be no restriction on cross-examination; if a witness pleads the Fifth Amendment, his entire testimony will be stricken. See People v. Farruggia, 77 A.D.2d 447, 433 N.Y.S.2d 950 (4th Dept. 1980),

where the court held that failure to strike the testimony for the prosecution of an alleged extortion victim was error where the victim pleaded the Fifth Amendment when defense counsel questioned him about past crimes. It was counsel's theory that the desire to avoid prosecution for his own crime motivated the "victim" to frame defendant.

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THE USE OF EXPERT TESTIMONY

By
Michael S. Ross, Esq.
LaRossa, Axenfeld & Mitchell

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I. INTRODUCTION:

Lawyers have long recognized that the underlying attraction to the use of expert testimony at trial is the average juror's inherent distrust of uncorroborated testimony. Few lawyers enjoy the extensive preparation necessary for an expert witness, yet expert testimony is utilized at many trials because lawyers simply do not wish to rely solely upon fallible and often weak eyewitness testimony. Whatever the drawbacks of expert testimony, one thing is abundantly clear: expert testimony does make a difference in a criminal case. Juries are generally fascinated by expert testimony; the more esoteric and sophisticated the expert testimony, the more entranced the jury becomes. Indeed, not only do juries look with fascination upon expert testimony, but they are often suspicious of any attorney who calls an opposing expert witness a charlatan and at the same time calls his own expert witness a master of science.

Obviously, this short monograph cannot consider all of the strategic and legal principles that relate to the use of expert testimony. As a realistic alternative, however, this monograph will address five key questions that relate to proper handling of expert testimony on direct examination and cross-examination.

II. FIVE KEY QUESTIONS RELATING TO THE USE OF EXPERT TESTIMONY:

QUESTION NO. 1: DO YOU WANT EXPERT TESTIMONY?

If you as a prosecutor have a strong case, you should recognize that the mere preparation of an expert witness may result in the creation of substantial Brady or Rosario material which must be eventually turned over to defense counsel. Thus, your own efforts may undermine what otherwise might have been strong and uncontradicted eyewitness testimony from your key witness. For example, the preparation of a crime scene diagram may actually convince the average juror that your witness could not have physically seen the drug transaction that the witness is alleged to have seen. Another recurring problem is the typical white-collar case involving various forged signatures. As a prosecutor, you may have a number of individuals who can identify the defendant's signature on various checks. These individuals, your evidence indicates, know the handwriting of the defendant and there is absolutely no reason to doubt the reliability of their testimony. Yet if you obtain exemplars from the defendant and subject them to an expert witness handwriting analysis, this may result in an expert's findings which are "inconclusive." You will therefore have created perhaps the only doubt in an otherwise strong case.

This principle of "more is less" is equally applicable to the defense. For example, to the extent that defense counsel obtains an expert and the expert's reports are inculpatory, the reciprocal discovery provisions of CPL §240.30 may require counsel to turn the expert's findings over to the prosecution. Indeed, this may suggest evidence to

the prosecution that it would otherwise not have utilized. One final example is the classic situation of a rape case in which pubic hairs are found at the scene. Then the question for both for the prosecution and the defense is whether these pubic hairs should be subjected to a neutron activation analysis test. In a case where the defendant claims the complainant is not credible, and the prosecution believes the contrary is true, unexpected findings of a neutron activation test may devastate an otherwise strong defense or prosecution case.

Accordingly, while expert testimony is a significant tool in the hands of a good prosecutor or a good defense attorney, it can nonetheless undermine what would otherwise be a strong case. In deciding whether or not to use expert testimony the controlling principle should be "use it if you need it, but if you don't need it, don't use it."

QUESTION NO. 2: ARE YOU LEGALLY PERMITTED TO USE EXPERT TESTIMONY IN THIS CASE?

Assuming that you would like to use expert testimony in a particular case, the next question becomes: "Can I use it?" This monograph will not attempt to cover the numerous legal materials contained in the 1980 BPDS manual entitled Scientific Evidence and Expert Testimony. That manual should be consulted whenever you contemplate using or confronting expert testimony. However, some legal principles warrant special mention here.

The controlling test enunciated by numerous courts with respect to the admissibility of expert testimony is whether or not the proposed testimony of the expert witness is beyond the ability of the typical

juror. These words are easily said but they are deceptive in their application. In preparing your case, you must ask yourself, whether you are asking the expert witness to do something that the average juror could not do himself or herself. Moreover, in order to testify, the expert must give his opinion with a "reasonable degree of scientific certainty." This is a term of art which is a blend of both law and science. And while private litigators in civil litigation have great flexibility in the selection and scheduling of their expert witnesses, prosecutors and appointed defense attorneys are greatly limited by budgetary considerations. Generally, you will not have a great deal of time to speak with your expert witness and often your expert will not be your idea of the "perfect witness." Regrettably, there have been instances where an attorney has placed his expert on the witness stand and for 40 minutes has elicited key expert opinions "with a reasonable degree of scientific certainty." Yet, after two or three hours of cross-examination the expert may have totally undermined the case which his testimony was meant to buttress. Indeed, under able cross-examination an expert may waiver and change his conclusion from "reasonable degree of scientific certainty" to that of "maybe" or to no more than "probably." Such concessions on cross-examination may result in the expert's entire testimony being stricken.

The difficulties in using expert testimony are highlighted by the traditional example of the robbery case in which the victim saw the assailant for only a few seconds and the case turns totally upon the reliability of the identification testimony. The prosecution in its case, from opening through summation, will argue that "the eye is like a

camera"; whereas the defense will contend that the eye and the human mind are incapable of "freezing an image" and, therefore, the identification testimony cannot rise to the level of proof beyond a reasonable doubt. The defense bar has expended considerable effort in recent years attempting to introduce expert testimony establishing that eyewitness testimony is inherently unreliable. Yet courts have repeatedly held that this type of evidence is not admissible because the ability of the human eye and brain to recall images is something within the comprehension of the average juror. You should understand, however, that what cannot be done directly can often be done indirectly. For example, a defense attorney who cannot make his point with an expert in the area of eyewitness testimony, may be able to introduce evidence from a serologist that because the key witness was drinking before he witnessed the event, his ability to see and remember was severely impaired. Accordingly, even if an attorney cannot introduce expert testimony to establish a given fact, expert testimony on another issue may provide him with equally helpful testimony.

QUESTION NO. 3: HOW DO YOU PREPARE FOR THE DIRECT EXAMINATION OF YOUR EXPERT WITNESS?

Having decided that you can and will use expert testimony, the next issue centers upon your personal preparation for the direct examination of your expert witness. The first principle that you should remember is that, generally, you should not agree at trial to stipulate to the expertise of your witness. You should decline this stipulation even if both the court and the defense attorney attempt to "rush" you during your qualification of the expert. It is important that you argue that

the issue is the "credibility" of the expert witness in the eyes of the jury and not merely the "admissibility" of the expert's testimony. Only if you are given a complete stipulation by your adversary that there will be no adverse comment on the expert's testimony should you consider shortening the qualification of your expert or accepting counsel's stipulation that your witness is indeed an expert..

The significance of properly qualifying an expert witness cannot be overstated. Your direct examination should begin with the expert's training, his background, the professional organization(s) he belongs to, any article(s) that he has written, and the number of times that he has testified in court as an expert. After you have done all this, you should pause a moment, look at the judge, look at the jury, and say "I now tender Dr. X as an expert witness in the scientific field of (for example) voice spectography." This rhythmed qualification of an expert can have a truly impressive effect on a jury. Unless your opponent is willing to totally stipulate that your expert is truly credible in the given scientific discipline, you should not forego fully qualifying your expert. Thus, in preparing for the direct examination of your expert witness you must give significant attention to the way you will set forth his qualifications to the jury and the way that you will lay the foundation for the judge declaring your witness an "expert."

The second element in preparing yourself for direct examination is to educate both yourself and your witness about the impropriety of testimony on "an ultimate issue." What is an ultimate issue? For example, while it may not be improper in a given case for a medical

examiner to describe a wound as "defensive," some judges would consider the term "defensive" as really being testimony concerning an ultimate issue of fact. Other judges may rule that "defensive" describes the wound, not the posture or conduct of the victim. Another common situation involves expert testimony in arson cases. Generally, New York courts will not permit testimony with respect to the "incendiary" nature of a fire. Although an expert is capable of testifying to the incendiary nature of the fire, such testimony usurps the role of the jury in that it relates to the ultimate issue at trial, which is whether there was arson. Therefore, a cautious way to proceed is to first research the law in the case you are dealing with to determine those matters that the expert may testify to without usurping the jury's function. Then, having learned what the scope of permissible testimony is, explain this to your expert and make sure that he is not lulled or tricked into testifying concerning those matters. Improper expert testimony as to ultimate issues at the very least will result in your being rebuked in the presence of the jury, or even worse, the declaration of a mistrial by the court. In sum, educate your witness not to testify to ultimate issues of fact.

The third element of your preparation is to explain to your witness that his conclusions should be articulated using the standard of "a reasonable degree of scientific certainty." This is the principle that must guide <u>all</u> of his testimony both on direct and cross-examination. This does not mean "probability"! Your expert must be constantly reminded during the preparation stage that the sole standard of his

testimony, indeed the very language of his testimony, must be to a "reasonable degree of scientific certainty." Your witness must not base his testimony upon the mere probability of an event, because, legalities aside, juries are rarely impressed with the term "probability." Preparation in this area will insure that the jury will understand the thrust of the expert's testimony and will feel that his testimony is credible even in the face of substantial cross-examination.

The fourth essential step in preparing for direct examination centers upon the question of what your expert can testify to and what exactly your expert can rely upon. In People v. Sugden, 35 N.Y.2d 69, 358 N.Y.S.2d 737, 315 N.E.2d 787 (1974), the psychiatrist who was testifying for the prosecution concerning the defendant's sanity was able to rely upon statements of a third party, someone who had seen the defendant at the time of the act in question. The third party's statements were included in a report to which the psychiatrist had had access. The third party did not testify at trial and therefore the expert's conclusion was based upon hearsay evidence, the basis of which had not been subject to the rigors of cross-examination. The Court of Appeals accepted the hypothetical question procedure whereby an expert witness bases his conclusion upon facts not in evidence if: 1) it is customary in the expert's profession to rely upon those types of statements; and 2) it is fundamentally fair to allow the expert to rely upon these statements, keeping in mind the Sixth Amendment's confrontation clause. Thus Sugden's conviction was affirmed because psychiatrists customarily rely upon statements by other people contained in a patient's file, and

the Court found nothing unfair in having the psychiatrist rely upon those statements from the perspective of the confrontation clause.

The fifth element in your preparation for direct examination relates to what your expert can base his opinion upon. There are three ways that an expert can obtain sufficient information to form an opinion at trial. First, he can have personal knowledge of the events in question. Situations involving direct knowledge are not only rare but, from a strategic point of view, the expert who is also a personal witness may be alleged to have a built-in bias. Therefore, the direct knowledge expert generally is not the most desirable type of witness. The second way in which your expert can obtain sufficient information to testify arises in civil trials where the parties may have sufficient funds to allow their expert to sit through the entire trial. In this manner, the expert witness will truly be able to base his opinion upon every piece of evidence in the case. Two problems arise, however: 1) it is too expensive for the average practicing criminal attorney in New York; and 2) an expert who appears sufficiently interested to sit through an entire trial may be accused of bias towards the party for whom he is testifying. The third way your expert can obtain sufficient information upon which to form an opinion is the more common and valuable approach of having your expert testify through the use of hypothetical questions. The New York Court of Appeals decision in People v. Sugden, supra, makes it clear that hypothetical questions are now permitted as a cornerstone of expert testimony. The use of hypothetical questions has many virtues, the most obvious of which is the fact that their proper

use will afford you a free mini-summation in the middle of trial. With this in mind, you should arrange for your expert witness to testify at a strategic point in trial. Your witness should testify when the hypothetical questions you ask will highlight your view of the evidence as previously introduced by other witnesses. (And for this reason, you should vigorously resist any attempts by an expert to testify when he wants to as opposed to when your case requires it.) For example, an expert from the medical examiner's office can be asked the following hypothetical question: "Assume that the victim is 5'8". And assume further that the assailant is 6'4" (the same height as the defendant). And assume that the victim is in a weakened condition. And assume that the assailant is armed with a knife and is attempting to stab the victim." The hypothetical aspect of the questioning can go on for some time. Then you will ask: "Are the wounds that you found on the decedent's body consistent with stab wounds being made in an offensive manner by someone of the defendant's height, stature, etc." Indeed, you can go further with the hypothetical question by assuming that a weapon recovered at the scene was the murder weapon and you can ask the pathologist to show the jury how such a wound may have been inflicted. You are accomplishing two things through the use of such hypothetical questions: you are obtaining expert testimony quickly and efficiently, and you are being afforded a mini-summation at a time you choose and in the manner that bolsters your view of the evidence because it comes not only from your mouth but from the mouth of an expert witness as well.

Keep in mind that in framing your hypothetical question, do not ask long and complex questions that are objectionable as to form. Nor should the questions be misleading. Make your hypothetical question a composite of several short, clear, and distinct questions, each one of which reflects a view of the evidence that may be skewed to your interpretation but nonetheless is based upon a fair view of the evidence so far introduced at trial. It is essential to remember that you need not dryly and neutrally interpret the facts--a hypothetical question should be based upon your view of the evidence in the case.

The sixth element in preparing for direct examination of your own expert is to understand the type of language that your expert must use. Experts are not comfortable with the terminology of lawyers. Indeed, all of their training centers upon the use of scientific terms and probabilities; they are simply not accustomed to the type of testimony which we as lawyers require. There is a perpetual tug of war in cross-examination in which the cross-examining attorney will ask the expert: "Is this only probable?" The expert responds: "Possible." Other times, the question is "Is it possible?" The expert's answer is: "Probable." Thus the tug of war between "possible" and "probable" begins to confuse the jury and certainly undermines the effectiveness of the expert's testimony. Consequently, in preparing for and structuring your direct examination, you must foreclose the inherent ability of any good cross-examiner to undermine your expert by questioning "possibility versus probability." Your direct examination should focus upon the clear, strong probability of your expert's conclusions.

Hand in hand with the need to make expert testimony intelligible from the point of view of "possible" versus "probable" is the need to reduce all of the testimony of your expert to intelligible terms any juror will understand. Any scientific term used by your expert should be the subject of a separate question by you to explain what the particular term means. This not only serves to clarify the testimony but also establishes a teacher-student rapport between the expert and the jury. Once this rapport is effectively established, the jury may look very critically upon any attempt on cross-examination to insinuate that your expert has not testified truthfully or honestly. You should also be aware that on cross-examination counsel may attempt to use a term mentioned on direct examination but will give that term a different connotation. You must understand what your expert knows certain words to mean and you must insist, using proper objections, that the term on cross-examination be used in the same way that it was used on direct examination.

The seventh element of your preparation for direct examination requires you to speak with your expert witness and explain to him the relationship of his testimony to the broad issue of guilt or innocence in your particular case. It is true that by explaining the entirety of your case you are creating, in some sense, a partisan witness. On the other hand, the witness will not appreciate the pitfalls he will be facing on cross-examination unless he understands the ultimate point opposing counsel will be trying to make. Your expert should be told that the issue in the case relates to certain factual findings and that

opposing counsel in cross-examination will attempt, directly or indirectly, to make certain points. If your expert knows that he may be facing a rigorous cross-examination in a particular area, not only will he be intellectually prepared when he is in court, but he may, in fact, further educate himself in the area before trial.

The eighth element in preparing for direct examination is to insist that every single piece of paper that your expert has prepared or which is in the expert's file be turned over to you for examination and analysis. The scratch notes of a chemist or a ballistics expert may contain comments concerning the state of the exhibit when it first was obtained by the expert and may contain preliminary findings. The final report that you have may not pose any difficulties for you; yet, if defense counsel obtains preliminary notes which you have never seen, you may be devastated in the midst of trial because you did not prepare a suitable explanation on direct examination for the contents of those notes. Moreover, you will never be able to fully understand what your expert has done in the case until he has explained every piece of paper in his file to you.

The ninth element in preparing for direct examination is to ask your expert what major problems he has faced on previous occasions in which he testified. The expert is perhaps in the best position to tell you what areas he is weakest in; what areas juries seem to be most interested in during cross-examination; and what areas he believes opposing counsel can score the most points on during cross-examination. If you understand what the weakest aspects of your expert's testimony

were in the past, you may be able on direct examination to minimize those weaknesses. The old adage of "drawing the teeth" is useful in the area of expert testimony. For example, if your witness does not have an advanced degree, rather than allowing opposing counsel to bring this out on cross-examination, you should point this out on direct examination. Then immediately after your expert answers that he has no advanced degree, you should follow up by asking a question relating to the vast practical experience your witness has in the area in question.

The tenth element of your preparation for direct examination requires you to orient your expert to the use of "book impeachment." In book impeachment, your expert is asked whether or not he recognizes a certain book as a learned treatise. In most instances your expert will have to admit that the book is a learned treatise and is respected and utilized by him and other experts in the area. Your expert is then asked whether or not the treatise says something that is directly inconsistent with his testimony on direct examination. You should prepare your expert for this type of impeachment by reminding him, and having him remind the jury, that learned treatises are general educational texts. To be educational and to be relevant, the text must broadly address the average and typical case. Your expert should be prepared for your question on redirect examination concerning whether <u>this case</u> is a typical case. Your expert should be prepared to state that this is not a typical case, that it is unusual and, for this reason, the learned treatise does not apply. The jury may then be persuaded not only that your expert's credibility was not damaged by the learned treatise, but

more importantly, that this case is a special one requiring the use of your expert.

QUESTION NO. 4: HOW DO YOU PREPARE FOR THE CROSS-EXAMINATION OF YOUR OPPONENT'S EXPERT WITNESS?

If possible, prior to trial, you should attempt to identify who the opposing expert witnesses will be. You should investigate each expert's credentials with the appropriate schools, agencies or licensing authority. Although you will generally not find too much information that will hurt an expert's credibility, there are situations in which you will discover that the organizations that the expert belongs to are nothing more than organizations which are incorporated by one or two people and simply charge a membership fee without establishing any criteria for membership. Next, speak to other lawyers who have confronted the expert concerning what to expect and what the expert's weaknesses are. Finally, you should consult with your own expert to determine what the strengths and weaknesses of the opposing expert are. Exhaustive pretrial consultations with your expert are essential if you are to be prepared for the cross-examination of your opponent's expert. In sum, the best way to prepare for the cross-examination of an adverse expert witness is to read, study and ask questions.

QUESTION NO. 5: WHAT ARE THE ESSENTIALS OF YOUR CROSS-EXAMINATION OF AN ADVERSE EXPERT WITNESS?

As indicated above, there is simply no substitute for adequate preparation. You must read the treatises and articles written by other experts; you must study the facts and the law; and you must speak to your own expert at length. In addition to these basics, there are also

some techniques of cross-examination that can be kept in mind and applied in many cases.

The first general rule of cross-examination is to attack the qualifications of an opponent's expert only if you are sure that this person lacks adequate qualifications or is obviously less qualified than your own expert. Given the number of experts in various scientific fields, it is difficult to convince a jury that a highly educated person whose terminology is precise and technical is not a qualified expert.

Second, do not cross-examine an expert concerning how much the expert is being paid for his or her services unless you are reasonably certain that the answer will suggest to the jury that this witness is clearly biased on your opponent's behalf. If you do know that the witness is testifying on a contingent basis, then you should certainly bring this out on cross-examination. However, the possibility that an expert's testimony is contingent upon the outcome of a case is very unlikely. The one area that you may wish to inquire into is the difference between how much the expert is paid for his office work and how much the expert is paid for the time he spends testifying at trial. Many experts are paid not only to prepare for the trial but also for the time spent testifying, since they are paid on a per diem or hourly basis with trials consuming a great deal of time. The expert may be asked whether or not he knew at the time he did the preliminary examination of various exhibits that, if he found favorably for your adversary, he would then be in a position to testify at trial. At least in this way you can establish a psychological predisposition by the expert prior to the time he drew his initial conclusions in the case.

Third, it cannot be sufficiently stressed that you should not cross-examine an expert concerning any subject matter unless you are totally prepared. Your expertise is in law; the expert's expertise is in the area that he testifies to and works with every day. Unless you are prepared to go "head to head" with an expert, avoid having the expert "bury you" with his expertise.

Fourth, one way to overcome the informational advantage that an expert has over you is to frame your questions so as to require short and definitive answers. Do not give an expert the opportunity on cross-examination to enlarge upon and to emphasize the matters that he testified to on his direct examination.

Fifth, if your opponent's expert were asked certain hypothetical questions on direct examination you should modify the hypothetical with established facts favorable to your theory of the case. After having asked the expert on cross-examination to examine the facts utilizing your view of the facts, press him to change the conclusions he made on direct examination. Thus, you may be able to defuse an expert's testimony by modifying the facts upon which the expert rendered his opinion.

A sixth concept to keep in mind in confronting an expert witness involves the "whip saw" inherent in expert testimony. During your cross-examination you should attempt to do one of two things. First, you should attempt to make the expert concede that he is not "positive" about his conclusion in this case and that he <u>may</u>, in fact, be wrong. Second, in the alternative, if the expert is not willing to admit that he may be wrong in this case you should press him to tell the jury

whether or not he has ever been wrong in giving an expert opinion. Either one of these answers provides ammunition for you during summation. If the expert says he may be wrong in this case, then you can forcefully argue that the expert, though acting in good faith, simply may be wrong and therefore his conclusion should be rejected. On the other hand, if he says he is positive and has never been wrong, then you may argue that this person simply should not be believed because everyone, including this expert witness, sometimes has been wrong. To the extent that the expert refuses to admit his own fallibility, he certainly lacks the type of credibility that the jury should expect from an honest witness testifying before them.

A seventh consideration in confronting an expert witness is an effort in your cross-examination to place the expert in the posture of an "advocate." That is, you should attempt to convince the jury that this witness is not disinterested or neutral. You can accomplish this by asking the witness when he was first given the hypothetical that related to his testimony at trial. He should be asked whether or not he knew the hypothetical was provided by your adversary and whether or not your adversary told him of his "theory." If, in fact, the expert was given a hypothetical or given a set of facts only shortly before trial, you can suggest to the jury that the expert was not utilized to provide needed information, but rather that this expert was testifying "as expected."

In your questioning of the expert, you should find out from him how many times he has testified for the defense versus how many times he has

testified for the prosecution. In this day of specialization, experts tend to specialize in testimony for either the defense or the prosecution, with the exception of psychiatric experts. For example, if you bring out on your cross-examination that this witness has testified 10 times for the prosecution and 200 times for the defense, the average juror will receive the subliminal message that this expert is a defense advocate and can be relied upon to help your adversary, perhaps without regard to the facts.

Finally, in those instances in which you will not be using an expert but your opponent will be utilizing an expert, it is always important to obtain a limiting instruction from the court. Both before and after the expert witness testifies, during the charge to the jury, and in the court's voir dire, the court should stress that expert testimony is simply evidence offered to assist the jury and does not usurp the jury's own role of deciding all the facts.

III. OVERVIEW OF THE PRINCIPLES RELATING TO THE INTRODUCTION OF PHYSICAL EVIDENCE AT TRIAL.

Generally, expert testimony at a criminal trial will be inextricably linked to certain physical evidence which opposing counsel will attempt either to introduce or to exclude from evidence. The physical evidence may consist of objects found at the crime scene; it may consist of a sample or exemplar from the defendant's person; or it may even take the form of a chart which an expert utilizes to render intelligible to the jury other evidence already introduced. The following is a brief

overview of the principles relating to the introduction of physical evidence at trial.

A. Developing, Preserving And Introducing Evidence

Generally physical exhibits constitute either the corpus delicti of a crime or somehow connect a defendant to the scene of the crime. The former category includes, for example, a contraband firearm; the latter, a fingerprint found on the firearm. The major problems in this area are the development and preservation of the evidence and the laying of a foundation for its admission. While the problems are shouldered principally by the prosecutor in a criminal trial, defense counsel should be familiar with the legal issues that may arise in order to make proper objections.

(1) Development And Preservation Of Evidence

Many prosecutors face difficulties in training their investigators properly to gather and preserve physical evidence. A second problem that can arise is inadequate equipment or technical personnel. For example, an arresting officer might want to check an illicit drug laboratory for fingerprints but may not know how to do it himself, whom to call for assistance or even how to prevent the fingerprints from being disturbed pending the arrival of specially trained officers. If there is any solution to these problems, it is the willingness of prosecutors to work with their investigators before they go out on a case. The prosecutor must work with his investigators and explain what sort of physical evidence they should look for and how it should be processed. The prosecutor must get involved with his investigators as early as possible.

(2) Establishing A Foundation: Chain Of Custody

Chain of custody is perhaps one of the most misunderstood and overused concepts in criminal trial law. In the courtroom an attorney offering evidence should be able to establish the chain as quickly and painlessly as possible.

a). In essence, chain of custody relates to the "materiality" of the evidence. In a drug trial, an offered exhibit consisting of a baggie of cocaine is material only if it is the baggie of cocaine which is in issue—the one the defendant is charged with having possessed or distributed. Chain of custody is no more than the proof that this baggie is in fact the baggie.

b). Chain of custody discrepancies often go to the weight of the evidence and not its admissibility. [For a more detailed legal discussion, see BPDS manual on Scientific Evidence And Expert Testimony, Chapter IV, Section C (1).]

c). Chain of custody in criminal cases is, of course, generally the principal concern of prosecutors, as opposed to defense attorneys. Prosecutors should impress upon their agents the need to keep things simple. When a private home or apartment is to be searched, one agent should be placed in charge of collecting all items seized. He should mark all exhibits, take them all into his custody and be solely responsible for their processing.

If that is accomplished, only one witness will be needed to establish the chain for all of the items. The exact manner of handling an exhibit depends on its character. It may also be helpful to take pictures before, during and after the search.

1). A physical object which does not require laboratory analysis can be handled quite simply. The seizing agent places his initials and date on the item at the time of seizure. At trial he can then testify that he recognizes this as an item taken from the defendant's residence because of those identifying marks and that it appears to be in the same condition as when seized.

2). Physical exhibits which must be subjected to some sort of laboratory analysis must be handled more carefully so that it will be inferred that when the lab analyzed the item, it was in the same condition that it was when seized. "Lock seal" and "heat sealed" plastic envelopes are the best devices for preserving and handling evidence. Lock seal envelopes have, for example, been treated by courts as virtual per se proof of the chain of custody. See United States v. Picard, 464 F.2d 215, 216, n.1 (1st Cir. 1972); United States v. Jackson, 482 F.2d 1264, 1266 (8th Cir. 1973).

(3) Objections Relating To Chain of Custody

a). If you believe that your adversary will attempt to introduce physical evidence (based on his own investigation of the case and discovery or reciprocal discovery) you should meticulously formulate an "anticipated chain of custody." Thus, at the moment your opponent ostensibly completes laying the foundation through witnesses and offers the exhibit into evidence, you will be able to see whether he or she has satisfied your chain. If not, and there is no obvious explanation, you will be in a better position to argue what link in the chain is missing, and thus why your objection to the introduction of the evidence should be sustained.

B. Demonstrative Exhibits

(1) General Considerations

Almost by definition, expert testimony relates to evidence which is difficult for the jury to comprehend. Therefore, exhibits which illustrate, demonstrate or simplify expert testimony are invaluable and should be utilized by both prosecutor and defense counsel alike. Such exhibits can be grouped into two classes: those which summarize and those which are designed to visually portray matters which the jury would not otherwise be able to see.

(2) Exhibits Which Summarize Events

(a) Charts

Perhaps the classic example of the use of charts is that

used to summarize the government's proof in net worth tax evasion cases. After taking testimony from numerous witnesses, the government expert takes the stand and, reviews the entire case for the jury with charts.

(b) Maps

Maps can be an invaluable tool to summarize mobile surveillance. Few things are as meaningless and confusing to a jury as an hour's testimony relating to mobile surveillance. Testimony can be rendered intelligible and even dramatic by the use of a map with the relevant routes and places indicated on it. With the particular route established by the map, the testifying agents can meaningfully relate where the defendant drove, where he stopped, etc.

(3) Exhibits Which Purport To Recreate A Scene Or Event

a). In criminal trials most judges do not permit attorneys to stage live demonstrations and scientific tests, nor do judges often permit a jury to view the scene of the crime. A good alternative, however, is to bring the event to the jury by way of video tape. A video tape can bring to the jury visual representations which otherwise could be presented only through a witness' necessarily limited description of the event or scene.

b). Exhibits created for trial can give the jury a visual perspective which no eyewitness may have enjoyed, such as

the use of an aerial photo or an architect's model of a building.

(4) Practical Considerations

a). The time to begin considering visual exhibits for trial is while the case is still under investigation. Sensitize your investigators to the possible use of video tape and still photography.

b). In choosing a medium for presentation of information there are a number of choices: photographs, movies, charts, projected transparencies, etc. Your choice must be geared to two factors--the preferences of the trial court (i.e., is it likely the court will allow you to introduce or utilize the exhibits) and the most effective means of getting the message to the jury.

(5) The Proper Handling Of Physical Exhibits In The Courtroom

a). Mark all of your exhibits before you get to court. This simple step will save you substantial time in the courtroom, and will make a favorable impression with the jury.

b). Along with your "pre-marked" exhibits, prepare an exhibit list that you can check as you go along and verify that all exhibits are admitted into evidence.

c). All charts and drawings should be prepared in advance rather than drawn by witnesses in the course of their testimony. Similarly, all video tape recorders, movie projectors and the like should be set up and ready to go.

d). Check the courtroom before the case begins. If you are using charts, be sure that there is an easel to set them on and colored pens to work with. If you have electrical apparatus, be sure that there is an extension cord available.

e). Remember that there may be situations in which you want to keep your adversary from seeing your exhibits. Therefore, consider keeping certain exhibits "covered" when you take them into the courtroom.

f). You should prepare your exhibits to make as forceful a point as possible with the jury. For that reason too, keep your exhibits before the jury as long as possible. On the other hand, tactfully remove your adversary's exhibits from view as soon as possible.

g). After an exhibit is admitted into evidence, you may wish to give the jury the exhibit or copies of it. Have a copy for each juror or exhibit a large blow-up so that all jurors can see it at once.

(6) Objection To Inadequate Foundation

a). Objecting to the introduction of an exhibit on the ground that there has been an inadequate foundation can serve two purposes:

1. You may actually be able to keep damaging evidence out of the case. If this is your sole aim, evaluate the likelihood of success, because your reservoir of

credibility with both the judge and jury erodes as each unsuccessful objection is made.

2. The second more significant purpose in objecting to the inadequate foundation of certain evidence is the coupling of the objection with a request for a brief voir dire. After making the objection you cause your adversary to sit down and you take the floor. This breaks up the momentum of your adversary, breaks the rapport between the witness and the jury and between examiner and the witness and often rattles your opponent, disrupting his or her game plan of direct examination.

   (a) Of course, you must stay within the confines of proper voir dire, i.e., admissibility of evidence, and not its weight.

   (b) And if you should succeed in keeping the evidence out, even temporarily, your opponent's trial strategy will be disrupted. Opposing counsel may have to call other witnesses to lay a proper foundation for the proffered evidence and will be forced to try to rehabilitate this witness.

   (c) In any case, you may be able to obtain a dry run examination of the witness.

b). Be careful in stating your objection as to the inadequate grounds. If you state precisely what is lacking, your opponent may quickly furnish what you have indirectly suggested. But of course, without being overly specific, you must advise the court of the basis for your objection.

(7) Exhibits Which "Speak For Themselves"

With regard to many types of exhibits, e.g., photos and letters, it is often said that "the exhibit speaks for itself," meaning that technically, no further testimony is required concerning the exhibit once it is admitted. The statement "the exhibit speaks for itself" is generally made in the form of an objection to testimony after an exhibit is admitted. There are two situations in which this principle is bothersome.

a). In certain instances you may want to both admit a photograph and have a witness testify to the matter depicted therein. The answer to the problem is simple: first, have the witness testify to his observations; then ask him if he can identify the photograph, offer it and ask that it be passed to the jury.

b). In situations where you do in fact want the exhibit to "speak for itself" you want to get it into the jurors' hands then, not days later when they finally begin their deliberations. You may appear before judges who do not want to take time to let the jury examine the exhibits as

they are admitted into evidence. Where that is the case, you may be able to overcome the judge's reluctance by preparing photostatic copies of the exhibit so that the jurors can examine them simultaneously, thus saving time. You might also consider using some sort of projector system.

IV. FINAL COMMENT

Perhaps the final comment that should be made with respect to expert testimony is that while jurors cannot become experts, we somehow ask them to assess the technical jargon and conclusions provided by the expert. Yet, most trial lawyers agree that jurors do a remarkably good job of evaluating expert testimony. If this is so, we, as attorneys, must ask ourselves how jurors do it. There are four ways in which a juror can realistically evaluate an expert witness' credibility. These four evaluation techniques are important to keep in mind in preparing for a trial in which expert testimony will be utilized. First, the juror examines the expert witness' qualifications, a process over which we, as attorneys, have very little control. Second, the juror uses his common sense to evaluate the testimony of the witness. Keeping in mind this test of common sense, an attorney can prepare for either cross or direct examination. The third way a juror evaluates expert testimony is by examining the appearance, personality and over-all credibility of the expert witness. In this regard, you must attempt to either enhance or detract from the obvious aspects of the expert witness' demeanor at

trial. Fourth, and most important, a juror views the credibility of the expert witness as inextricably tied to the credibility of the attorney who sponsored that witness and placed that witness on the stand. Accordingly, an attorney must, from the beginning of the trial until the entry of the verdict, present himself or herself as fair, diligent and open-minded, a person whose credibility is above reproach. In this way, your own credibility will spill over and enhance the credibility of the expert witness that you placed on the stand. Indeed, if the jury recognizes that your opponent's expert witness is diametrically opposed to the position you are taking at trial, your own credibility may, in a close case, defeat the conclusion or opinion which the expert has given simply because the jury would not believe anyone whose position is contrary to yours.

112904

PREPARATION FOR TRIAL

by

CHARLES J. HEFFERNAN, JR.

I. INTRODUCTION:

A. These materials discuss preparation for the trial of a criminal case and some of its components. Designed for the beginning prosecutor, they highlight some approaches and thoughts that will be helpful in undertaking the heavy responsibility of representing the public in litigation of a criminal accusation. These materials should not be viewed as an exhaustive discussion of the subjects covered, but rather as a means of assisting the prosecutor in deciding what must be done before the words "Ready for trial" can be truthfully uttered in court.

B. Some general observations about the process of becoming an able litigator should be made at the outset;

(1) Advocacy at the trial bar requires many skills. Among the most important of those skills is a thorough grasp of the law in general, and particularly of the law at issue in each litigation . As the party bearing the burden of proof, the prosecutor is expected to know the law well. Toward that end, the new prosecutor is encouraged to keep current with the emerging criminal (and relevant civil) law, and also to devise a convenient personal filing system that will permit ready retrieval. This is one form of organization that will pay dividends as the prosecutor begins to assemble requested jury instructions, or trial memoranda of law. Additionally, familiarity with - and accurate representation of - the law contribute to the professional reputation that each lawyer gains

with the judiciary and defense bar. Each lawyer should strive to be known as an informed, balanced, reasoned and vigorous advocate.

2. Be mindful that litigations are sometimes influenced by the conduct of counsel. Juries in criminal cases often focus on the performance of the prosecutor during the trial, and may permit their evaluation of the prosecutor to impact on their deliberation and final vote. Accordingly, prosecutors must constantly recall that they are being themselves judged, in a sense, by the jurors throughout the trial, and should strive to maximize professionalism, and eliminate impressions of self-importance, excessive zeal, lack of preparation and haughtiness. See People v. Grice, 100 A.D.2d 419, 474 N.Y.S.2d 152 (4th Dept. 1984).

3. Equally important is the prosecutor's approach to the trial judge. A prosecutor who impresses the court as conversant with the law, balanced in his or her approach to the case, and professional in relation to opposing counsel is the ideal. Toward that end, it is often helpful to prepare a trial memorandum of law listing and discussing pertinent legal issues that will arise at trial for submission to the court before jury selection begins. In this connection, it is imperative that the prosecutor be candid with the court in all respects. In briefing or arguing legal issues, the prosecutor should not seek to conceal from the court authority which is

contradictory to the position being urged upon the court, but should seek to distinguish it from the facts at bar, if it is reasonably possible to do so.

4. Remember, too, that litigation skills will be honed and improved only as a function of the use that they receive and the determination of the individual. Lawyers entering trial practice must guard against forming too early an appraisal of their own abilities, be that appraisal positive or negative. Great care must be taken lest the twin diseases of the young litigator germinate: despair or self-deception.

5. The one constant of the trial practice is that one's rate of success tends to mirror the care of one's preparation. There is no easy road to excellence.

II. PREPARATION: THE FIRST STEPS

A. The Essentials:

1. Trial Preparation involves these basic functions:

(a) Mastering <u>all</u> of the facts of the case

(b) Digesting the applicable law (e.g. elements of crimes and defenses; burdens of proof; evidentiary postures; governing procedural regulations)

(c) Critically analyzing the case - from the perspective of both sides

(d) Formulating a trial preparation plan

(e) Organizing for trial

B. Organizing For Trial Preparation

1. The heading of this section may seem curious. Its phrasing was intentional, however, since it is key to trial preparation to know how to organize for trial preparation. Acquiring information is of no moment if it cannot be found when needed. Two items, the well-ordered case file, and the trial notebook, will facilitate the prosecutor's organization for trial preparation and for trial itself.

2. The Case File:

(a) The case file should be organized into a series of individual folders, clearly labelled, that permit easy reference.

(b) While the complexity of the system will depend upon the case at issue, some universal categories can be found:

(i) Prosecution Summary:

The chronology of the facts of the case should be listed in simple, summary form. The summary is particularly helpful in complex cases (e.g. the multi-event drug conspiracy), and will assist the prosecutor in interviewing witnesses and later in presenting their testimony at trial.

(ii) Chronology of the Prosecution:

Beginning with the arrest, and continuing through final disposition, the chronology lists

each event, in capsule form. Included will be (among other things) recital of events at the arrest, lineup, arraignment, indictment, and every court appearance. The latter section is vital since careful notation of calendar call proceedings will be useful in resolving subsequent disputes with counsel regarding actions taken at those hearings.

(iii) The Motion List

In cases involving substantial motion practice, a chronological list of motions filed, with dates and description of decision, may be considered.

(iv) Correspondence File

All letters should be retained. Notes should also be made, in the form of memoranda to file, of conversations with counsel or other parties. The effort spent in preserving a record of contacts will be useful in some litigation.

(v) Preparation Tasks

A checklist of reminder notes of things that must be done. Keeping this in a central file will aid order.

(vi) Pleadings

Copies of all pleadings, including the indictment, should be filed. Note should be made of

the date of service upon, or receipt from, opposing counsel.

(vii) Witness Statements (or Rosario Material)

The defense is entitled to copies of all statements of prosecution witnesses. These must be provided counsel upon completion of jury selection (CPL §240.45), or before the witness testifies in a pre-trial hearing. In order to allow for orderly compliance with the discovery obligation, and also to assure that the prosecutor has obtained - and read - all statements by each witness, effort must be made early in the preparation period to gather and file statements. Occasionally, such statements can be found in sources other than the usual police reports: the witness may have spoken to the media, and his/her statement may appear in print or on tape; or the witness may have filed papers in an ancillary proceeding (civil law suit, or application for compensation as a crime victim). All such sources should be pursued; the pain of confrontation on the stand with a defense - located contradictory statement should not be experienced by the thorough prosecutor.

(viii) Minutes File

Transcripts of prior proceedings, such as arraignment, hearings, or grand jury should be

filed. Copies will be needed for discovery by counsel.

(ix) Grand Jury Slips and Exhibits

The list of dates of grand jury appearances, together with exhibits used in that presentation, should be filed here.

(x) Trial Exhibits

Three components comprise this file:

(A) A list of exhibits to be introduced at trial, in desired order, accompanied by the name of the witness through whom the exhibit will be offered, and a summary of the necessary foundation for its receipt in evidence;

(B) A copy of a blank court exhibit sheet, identical to the one used by the clerk. As exhibits are entered on the court record, the prosecutor makes similar entries on his own sheet. This will assist in keeping track of the exhibits, and will assure an easy way of seeing that exhibits are referred to properly, and will avoid the prospect of inadvertent failure to introduce an exhibit. It will also aid the prosecutor in checking on counsel's reference to items that may not be in evidence.

NB: Early assembly of all "property" which the prosecution desires to introduce at trial is prudent in view of the provision under CPL §240.40(1)(b) that allows the court, in its discretion, to order disclosure to the defense, upon showing of material need and reasonableness, of "property" (beyond that which is discoverable upon defense demand) that will be offered at trial. While the statute does provide for a protective order upon satisfactory showing of the People, it is safe to assume that courts will frequently grant discovery. If an item of property is not noticed to the defense after discovery order because the prosecutor did not then know of its existence, the Court may insist upon a showing of due diligence having been exercised, and could preclude the prosecution from introducing the item if not so satisfied. This can and should be avoided by an exhaustive early search for such items by the prosecutor.

(xi) Tape Transcripts

Transcripts of audio or video recordings must be neat and of flawless accuracy. Generally 20 copies are needed for each transcript in a one-defendant case (12 jurors, 2 alternate jurors,

defendant and counsel, judge, reporter, witness and prosecutor).

(xii) Scientific Reports

Copies of the autopsy report, chemist's analysis, etc.

(xiii) Media File

Copies of all press coverage of the case, particularly printed articles, should be filed. They may be needed for reference in the event of a defense motion (change of venue, disqualification of a juror, etc.).

(xiv) Criminal History: Prosecution Witnesses

Although the prosecution is not required to fingerprint its witnesses in order to determine if they have a criminal history, records of known convictions must be furnished to the defense (CPL §240.45). It is prudent to begin to gather this information early on in preparation, since it sometimes takes time where a distant jurisdiction is involved.

(xv) Criminal History: Defendant

Certified copies of all convictions, togegther with copies of the respective accusatory instruments, and other available information about those convictions (transcripts of plea or trial, police reports, etc.) may prove helpful at trial in a number of ways: impeaching the defendant

on cross-examination; employing it where appropriate with other defense witnesses; or offering it as evidence in chief where decisional law so provides, as in rebuttal to a claim of entrapment.

(xvi) Photos

All forensic or other photographs can be filed here, together with requests for enlargements.

(xvii) Miscellaneous

3. The Trial Notebook

(a) The trial notebook is recommended as a valuable preparation tool. Simply a binder filled with blank paper, it is divided into sections, discussed immediately below. As preparation begins, insertions of relevant planning material can be made for the individual components of the trial. Also, during the trial the prosecutor can use the binder to record events or thoughts that can be used subsequently. Perhaps most centrally, use of the trial binder will again reinforce a sense of organization, both internally and to others.

(b) Some standard (but not exclusive) sections will form the trial notebook

(i) Preparation

The never-ending need to make certain checks, particularly during the heat of trial, can be noted in this section.

(ii) Voir Dire

Among the components found here are:

(A) A profile of the desired juror for this trial

(B) Summary of the applicable law, to include number of challenges, method of challenging, grounds for excusal for cause, the forbidden areas of discussion in voir dire, etc. See annexed "Court's Exhibit #1".

(C) A copy of the form used by the clerk to record jury selection

(D) A form, organized into 12-14 squares, which lists the number of challenges, the general areas to be covered in voir dire and other useful information. Such forms can be self-devised or purchased commercially.

(E) Any requests (or responses to anticipated defense requests) for unusual methods of questioning the veniremen - e.g. individual, in camera questioning about psychiatric/psychological history of jurors or associates in a case with such issues.

(iii) Opening Statement

The substantial outline - if not the text - of the opening statement can be filed here. Early assembly of the trial notebook will allow the prosecutor to

draft and revise this and other sections as necessary. Care should be taken that the opening statement complies with the statutory requirements, and also that it makes sense to the jury and is easy to follow.

(iv) Direct Case: People

For each witness, the Model Witness Sheet (see appendix), or some equivalent, will permit not only reference to the prior statements of the witness, but will also provide a place to list the agenda for examination of the witness. For beginning prosecutors, the agenda offers a particularly reliable way of checking that all elements of the proposed testimony are included in the examination, and that all exhibits about which the witness will testify can be offered. In cases involving lengthy fact patterns, the prosecution summary, discussed earlier, may be an alternate form of agenda (e.g. when the undercover agenda testifies about a large number of meetings with the defendants).

(v) Cross Examination of People's Witnesses

Notes taken during cross examination of prosecution witnesses accomplish a number of objectives:

(A) Allow prosecutor a ready chronology of the examination;

(B) Permit, by use of any handy margin reference (e.g. "RD" for "Redirect") the prosecutor, on

redirect examination, to conduct the rehabilitation clearly and to re-focus the jury's attention on the strength of the case.

(vi) Direct Examination of Defense Witnesses

Careful note-taking during the defense direct, may be helpful. It is NOT suggested that the prosecutor rival a scrivener during that examination, since it is quite important to watch the witness and assess the impact of the testimony, as well as the viability of various approaches to cross examination.

(vii) Cross Examination of Defense Witnesses

Preparation for cross examination of anticipated defense witnesses should be done early. Among the sources to be checked for fertile examination clues are statements of such witnesses, criminal history, and the defense opening statement.

(viii) Summation

As with the opening statement, the skeleton of the final summation should appear early in the course of preparation. As more is known, the final form of the closing argument will emerge. Thoughts arising in court can be placed in this section for later reference. The prosecutor should formulate a theory of summation and test - and retest - its validity with both colleagues and non-attorney friends.

(ix) Applicable Law

Copies of statutes or decisional law or other material should be filed here for ready reference. See also the "Trial Notebook: Some Common Cases" which appears as an appendix to these materials.

(x) Requested Jury Instructions

It is often helpful to prepare requested jury instructions. They can be used both in intricate areas of law and also in other contexts. They should be filed with the Court as early as feasible.

(xi) Miscellaneous Matters.

III. USE AND DEVELOPMENT OF AVAILABLE INFORMATION

A. General Principles

1. The decision to gather information beyond what the police provide at the intake interview is an important one, and is a function of several factors. The most fundamental factor is always the theory of the prosecution - what will be proved and how? What is necessary to prove the theory? What will enhance the chance of success?

2. The prosecutor should be familiar with the resources within the immediate and cooperating other jurisdictions - photo labs, voice prints, facilities, psychologists and the like. Also important is acquiring a familiarity with the vast range of documentary information on file with public and non-public agencies. Some such materials are

found below. It is always better to have too much than too little information.

3. The method by which the evidence is obtained. The use of subpoenas must always be lawful, and never reckless or punitive. Avoid practices that are legal but suggestive of unprofessionalism or bad faith.

ALWAYS DO THESE essential elements of trial preparation:

(a) Acquire every report or piece of paper on file or in the possession of the police department. Do the same with any other repository of information about your case.

(b) Scrutinize everything that you have from the perspective of the adversary. Look for mistakes, determine how many there are and how well they can be exploited Draw these mistakes or apparent contradictions to the attention of the witness or reporting officer and get an explanation (if there is one) for the contradiction (if such it be).

(c) Visit the scene of the crime, and other germane locations. Do so with a police officer or investigator, and never alone. Check for understanding of where and how the events are alleged to have happened. Understand distances, lighting and other conditions. Decide whether visual aids (photos, videos, diagrams, charts, etc.) are in order. If so, put the request for such aids in promptly. Consider

whether a motion for an on-site visit by the trial jury should be made.

(d) Listen to every tape recording. Better to hear the original. Do this as early as possible in the case. Be vigilant that the transcripts for the tapes are unassailable. Equally important, search for language that the defense will seek to exploit. Have that language explained away, if possible, by the prosecution witnesses.

(e) Examine all physical evidence. In one large cocaine case, the prosecutor opened the package before the jury only to reveal a mass of black gob - in stark contrast to the anticipated white powder. Pre-trial inspection of the package may have revealed the problem and its ready explanation (decomposition over the lengthy period before trial). If a court order is necessary to allow inspection, obtain one. The certainty of knowing the case in all its aspects cannot be overrated. The common apprehension about disturbing or altering the "chain of custody" of a proposed exhibit should be eased by recalling that in many jurisdictions the "chain" will affect the weight to be given the exhibit by the fact finder, but will not affect its admissibility. See, e.g., People v. Julian, 41 N.Y.2d 340, 342; 392 N.Y.S.2d 610, 612 (1977).

B. Sources of Useful Information

1. Police Records:

(a) Complaint Report (UF61)
(b) Arrest Report
(c) Complaint Follow-up (DD-5)
(d) Stop and Frisk Report
(e) Request for Departmental Recognition
(f) Unusual Occurrence Report
(g) Firearm Discharge Report
(h) Officer's memo book
(i) NYSIIS Record
(j) BCI Photos (Mug shot and stand-up)
(k) 911 Tapes and sprint print-out
(l) Aided card
(m) Homicide Detective's notebook
(n) Narcotics buy money request form
(o) Incident Report (for Housing Police and Transit Police)

2. Correction Dept. Records:

(a) Pedigree (239-A)
(b) Inmate Property
(c) Cash Account Form (85-A)
(d) Inmate Medical Records
(e) Visitor Log

3. Forensic Evidence:

(a) Ballistics Report
(b) Fingerprint Information
(c) Chemical Reports
(d) Handwriting Analysis
(e) Forensic Photographs
(f) Voice prints: too little used, problem of establishing identity of the speaker.
(g) Medical Records: Check entire Medical Examiner file, especially for untyped results of tests.

4. Judicial Records:

(a) Minutes of Proceedings in:

(i) Lower courts
(ii) Supreme or County Court
(iii) Grand Jury
(iv) Other courts within and outside the jurisdiction

(b) Certificates of Disposition

(i) While People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S. 2d 849, 314 N.E.2d 413 (1974), and its progeny can be read to hold that the defendant has the burden to identify the convictions he wants suppressed at trial as well as the justification for such an order, courts sometimes let that burden devolve upon the prosecutor. Thus, the prosecutor should obtain those certificates.

(ii) Additionally, the prosecutor may need the certificates in order to establish predicate or persistent felon status.

(c) Papers of lower and superior courts.

5. Other Criminal Records:

(a) FBI Sheets
(b) Criminal records from other states

6. Premises Records:

(a) Utilities (gas, oil, eletric)
(b) Telephone
(c) Mortgages
(d) Lease and application papers

7. Financial:

(a) Banks:
(i) Signature card
(ii) Application form with background data
(iii) Copies of cancelled checks
(iv) Transaction statements
(v) Safe deposit contracts
(vi) Mortgage and loan agreements

(b) Credit Records:

(i) Credit cards
(ii) Credit surveys

8. Employment Records:

   (a) Application forms
   (b) Attendance records
   (c) Payroll records

9. Seek cooperation of other prosecutorial agencies:

   (a) District Attorney
   (b) Special Prosecutor
   (c) United States Attorneys
   (d) Strike Forces
   (e) State Attorney General

10. Miscellaneous Items:

   (a) Weather reports
   (b) Medical records
   (c) Precinct maps
   (d) Street maps
   (e) Sketches, maps or floor plans of crime scene
   (f) Photos of crime scene
   (g) Motor vehicle records
   (h) State Liquor Authority

C. Developing Information

   (a) On January 1, 1980, the procedures for discovery in criminal cases in New York State changed substantially. Both parties now have the right to obtain discovery of designated items from one another upon written demand, as opposed to the previous need for formal motion. Additionally, the statute allows both parties to seek a court order for other forms of relief.

   (b) Discovery by Prosecutor Upon Written Demand (CPL §240.30):

      (i) subject to constitutional limitations, the defense must disclose and make available for the prosecutor's inspection, photographing, copying or testing, any written report or

document (or portion thereof) concerning a physical or mental examination, or scientific test, experiment, or comparison made by or at the request of the defendant, and which the defendant intends to introduce at trial.

(ii) the demand will not only help the prosecutor prepare for trial when the defense effects timely compliance, but also puts the defense on notice that any subsequently obtained items must be promptly furnished to the prosecutor. Also, the demand will serve as a predicate for judicial motion, after defense noncompliance, under CPL §240.40(2).

(c) Discovery by Prosecutor Upon Court Order [CPL §240.40(2)]

(i) In addition to affording redress for unjustified defense noncompliance with a prosecutor's demand for discovery, this section allows the court to order a defendant to provide a number of forms of non-testimonial evidence.

(ii) Such an order may, among other things, require the defendant to:

(A) Appear in a lineup.

(B) Speak for identification by a witness or potential witness.

(C) Be fingerprinted.

(D) Pose for photographs not involving reenactment of an event.

(E) Permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto.

(F) Provide specimens of his handwriting.

(G) Submit to a reasonable physical or medical inspection of his body.

2. By Court Order:

By decisional law, many forms of non-testimonial evidence are available to the prosecutor, by court order upon a satisfactory showing of need. Some of the forms discussed below, have now been incorporated in the revised CPL Article 240. The prosecutor should consider the need for -- and propriety of -- a court order for these (and other similar forms of relief:

(a) To enter premises for the purpose of obtaining a photo, sketch or diagram.

(b) To obtain handwriting exemplars. See, e.g., United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); Matter of District Attorney of Kings County v. Angelo G., 48 A.D.2d 576, 371 N.Y.S.2d 127 (2d Dept. 1975).

(c) To obtain voice exemplars. See, e.g., United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

(d) To compel participation in a lineup:

(i) In general. See Matter of Alphonso C. (Morgenthau), 50 A.D.2d 97, 376 N.Y.S.2d 126 (1st Dept. 1975), for discussion of court's authority to compel participation in a lineup before filing of accusatory instrument.

(ii) In a changed appearance:

(A) Before an accusatory instrument is filed (and in the absence of probable cause), courts are chary of prosecutor's application for such relief. See, e.g., Application of Mackell, 59 Misc.2d 760, 300 N.Y.S.2d 459 (Sup. Ct. Queens Co 1969); People v. Vega, 51 A.D.2d 33, 379 N.Y.S.2d 419 (2d Dept. 1976).

(B) Once the suspect has been charged (or probable cause exists), courts can exercise power to compel suspect to conform his appearance to that affected by the perpetrator, for the purpose of appearing in a lineup. See, e.g., People v. Cwikla, 46 N.Y.2d 434, 414 N.Y.S.2d 102, 386 N.E.2d 1070 (1979) (don wig and facial hairs); People v. Delgado, 97 Misc.2d 716, 412

N.Y.S.2d 254 (Sup. Ct. Bronx Co. 1978) (shave a beard); Holtz v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910) (model a blouse); United States v. Gaines, 450 F.2d 186 (3d Cir. 1971), cert. denied, 405 U.S. 927, 92 S.Ct. 978, 30 L.Ed2d 801 (1972) (wear a scarf partially covering face); United States v. Hammond, 419 F.2d 166 (4th Cir. 1970) cert. denied 397 U.S. 1068, 90 S.Ct. 1508, 25 L.Ed.2d 690 (1970) (wear an artificial goatee).

(e) To submit to surgery to permit the recovery of evidence. See, e.g., People v. Smith, 80 Misc.2d 210, 362 N.Y.S.2d 909 (Sup. Ct. Queens Co. 1974) and cases cited therein, as well as Bloom v. Starkey, 65 A.D.2d 763, 410 N.Y.S.2d 361 (2d Dept. 1978) (removal of bullet from suspect's body); Matter of Barber v. Rubin, 65 A.D.2d 811, 410 N.Y.S.2d 361 (2d Dept. 1978) (extraction of hair roots from head). Before granting applications of this sort, courts will usually conduct a hearing to consider and balance such factors as the need for recovery of the desired evidence, the degree of body intrusion involved in the surgical procedure, the attending danger to the subject, and other germane concerns.

(f) To obtain palm prints. See, e.g., People v. Mineo, 85 Misc.2d 919, 381 N.Y.S.2d 179 (Sup. Ct. Queens Co. 1976).

(g) For blood tests. See, e.g., People v. Longo, 74 Misc.2d 905, 347 N.Y.S.2d 321 (Nassau Co. Ct. 1973).

(h) To obtain essential official records to which access is blocked by local law. See, e.g., People v. Muldrow, 96 Misc.2d 854, 410 N.Y.S.2d 21 (Sup. Ct. Bronx Co. 1978) (court directed New York City Department of Health to provide the district attorney with health records of child rape victim, where agency, in reliance on provision of New York City Health Code barring access to such records by persons from outside the agency, had refused to comply with a subpoena for their production, under circumstances where these records were critical to the prosecution of the rape suspect).

(i) To obtain police personnel files. See Civil Rights Law of the State of New York, Section 50-a: People v. Gissendanner, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 925 (1979).

(j) To obtain a pre-trial psychiatric examination of a witness. As indicated in People v. Lowe, 96 Misc.2d 33, 408 N.Y.S.2d 873 (N.Y.C. Crim. Ct. Bronx Co. 1978) applications of this sort (usually made by the

defense) will be granted only where there is substantial showing of need and justification.

(k) If defendant in a murder prosecution offers psychiatric reports in support of his affirmative defense of extreme emotional disturbance, the People may have defendant examined by a psychiatrist retained by the People. People v. Atwood, 101 Misc.2d 291, 420 N.Y.S.2d 1002 (Sup. Ct. N.Y. Co. 1979)

3. Use -- And Abuse -- of Subpoena Power

(a) See Generally.

(i) CPL Article 610;

(ii) ABA Standards relating to the Administration of Criminal Justice. The Prosecution Function, Standard 3.1(d), Investigative Function of the Prosecutor.

(b) Beware of the "office" subpoena. Since most prosecutors in New York State lack power to compel a witness' attendance or a document's production at his office (as opposed to grand jury or court appearance) subpoenas should never be used for either of these purposes. See People v. Arocho, 85 Misc.2d 116, 379 N.Y.S.2d 366 (Sup. Ct. N.Y. Co. 1976).

(c) Similarly, it is improper to issue a subpoena duces tecum to obtain information for the police to use in investigation they are conducting independent of the grand jury (e.g. telephone toll records).

(d) For court or grand jury subpoenas, be certain that the return date is a day when the matter is before the court or the grand jury.

(e) Grand Jury subpoenas should not be issued after the indictment has been voted or filed, absent special circumstances approved by the appropriate superior.

IV. INTERVIEWING WITNESSES

A. Preparation for the Interview:

1. All reports, statements and testimony by or about the witness should be read with an eye toward both grasping the substance of the witness' account, and noting any discrepancies or potential problems in the early accounts. The witness can be questioned in a more efficient manner if the prosecutor is conversant with the account and any liabilities it may have.

2. Similarly, audio and video tapes should be previewed in preparation for the interview. Tape recordings should be checked for clarity, and referrred to an appropriate technician for filtering out of extraneous sounds. Most large police agencies have such equipment.

3. If time permits, visual aids that will be used during trial should be prepared, checked for accuracy, and ready for use during the initial interview. Such aids are underutilized in trials generally. They have a number of inherent advantages, the most prominent of which is

heightening the jury's understanding of the proof. They are especially helpful in such areas as:

(a) Grasping the thrust of a complex commercial crime.

(b) Envisioning details of a street scene.

(c) Seeing relationships in conspiracy cases.

B. Some General Considerations:

1. Who to Interview:

All persons with relevant information should be interviewed. Special attention should be paid to those whose testimony does not seem consistent with the apparent theory of the prosecution, since:

(a) the reports of that witness' testimony may not be accurate. Only an interview should satisfy the prosecutor as to that person's actual testimony;

(b) The prosecutor must be aware of any damaging testimony, and prepare to deal with it at trial;

(c) The prosecutor must furnish to the defense any known exculpatory evidence or information.

Additionally, any police officer who has prepared a report should be interviewed.

It is especially wise to promptly interview any witnesses who may tell one version, only to "flip" at trial. CPL 60.35 permits the use of signed or sworn prior statements if a witness at trial testifies in a manner which tends to disprove the position of the party who called him. (But see People v. Fitzpatrick, 40 N.Y.2d 44, 386 N.Y.S.2d 28 (1976),

which holds that witness' failure to remember does not qualify as testimony tending to disprove the calling party's position).

2. Where to Conduct the Interview:

   (a) Preferably in the prosecutor's office.

   (b) Where not possible, may do so elsewhere. It is, however, extremely unwise for a prosecutor to go to the defense attorney's office for any purpose, including interviewing a witness. Where other out-of-office interviews are done, the prosecutor should always be accompanied by a police officer or investigator.

3. When to interview:

   (a) As soon as possible.

   (b) Long delays may frustrate collection of derivative information, or prohibit verification of surprise negative information.

4. How to Interview:

   (a) General Considerations:

      (i) Avoid multiple parties questioning the witness.

      (ii) In advance of the interview an agenda should be prepared listing either the particular questions or general areas to be covered with the witness.

      (iii) Avoid threatening, berating or bluffing the recalcitrant witness.

(iv) Maintain a record (preferably by diary entry) of the time the interview began and ended, and the parties present.

(v) If the witness insists upon his attorney's presence during the interview, do not refuse this request, even if there is no apparent criminal liability.

(vi) Do not interview the witness alone. Have a police officer, investigator, secretary or stenographer present.

(vii) Avoid taking notes, since they may be deemed Rosario material, and hence discoverable. People v. Consolazio, 40 N.Y.2d 446, 387 N.Y.S.2d 62, 354 N.E.2d 801 (1976).

(viii) Let the witness tell you what happened. Encourage him or her to use a narrative form, as this not only will permit a clearer sense of the facts, but will afford the prosecutor a chance to appraise the witness in terms of intelligence, verbal ability, memory, emotion, personality, bias, etc. After the narrative, specific questions can be addressed to fill in gaps.

(b) Content of the Interview:

(i) The interview has two goals: to decide, finally, whether the witness will be called by the prosecution at trial; and to prepare the

witness, if he will testify, both for direct and cross-examination.

(ii) As a guideline the prosecutor should probe all details of event, background, follow-up, relationships between the witness and defendant, past similar conduct, motive, etc.

(iii) The witness should be made to feel comfortable, and important. He should be told the status of the case, what his role is, when he will testify, and be given an opportunity to have his questions about the process answered.

(iv) His right to decide to speak or to refrain from speaking to opposing counsel should be explained to him.

(v) The witness should see any physical exhibits about which he will testify. His ability to identify the object should be reviewed.

(vi) If visual aids are to be used during the testimony, the witness should orient himself to them during the interview.

(vii) Prosecutors do not uniformly agree on the question of whether a witness should be permitted to see his prior statements during the interview. Certainly there is no legal infirmity in the practice. Moreover, it will generally strengthen the witness' confidence to make those

statements available to him during the interview.

(viii) The witness should review the entirety of all tapes in which he is involved. He should also see the transcripts of those tapes. Appropriate questioning about content or taping procedure should be done.

(ix) If measurements (distance, time, speed, build, etc.) figure into the testimony, the witness' estimations and recollections about them should be carefully reviewed in the interview. Experience teaches that the layman is less than exact in such estimates.

(x) The witness should be prepared for the likely defense approach, be it attack, mockery, etc. He should be told that composure and politeness to counsel are essential, and that anger or emotion may be just what counsel is seeking to elicit.

(xi) The witness should be told to avoid looking at the prosecutor during cross examination, lest counsel suggest, or the jury assume, that answers are being signalled.

(xii) The nature of the process of making objections, together with the meaning of "overruled" and "sustained" should be explained.

(xiii) Show the courtroom to the witness beforehand, and orient him to the locations of the parties.

(xiv) Witnesses should be encouraged to avoid jargon or unnatural language, and to recount their testimony in everyday conversational terms.

(xv) Any impeachment material (convictions, prior bad acts, etc.) should be reviewed on direct examination. If this will not be possible, explain to the witness what the defense is likely to do.

(xvi) In appropriate situations, the most important witnesses may profit by a simulated cross-examination, with a colleague playing the defense attorney. Such "dry runs" often are revealing to the witness, and can imbue him with renewed confidence.

(xvii) The dress of the witness is important. Natural, non-flamboyant attire should be the norm.

(xviii) Be aware of the need to identify cultural problems that may impede the witness' testimony. Particularly troublesome are different use of language, or customs of judicial systems in other countries.

(xix) Above all, tell the witness to listen to the question and answer only that question. Do not volunteer.

(xx) See appendix, "You As A Witness".

(c) Some Special Problems

(i) Children as Witnesses

The CPL provisions on child witnesses should be mastered. Patience is required in preparing children. If the trial prosecutor has shortcomings in this area, perhaps ask a colleague to assist. That person may have a gentler approach that will build rapport. It is usually helpful if the child's parents are fully briefed on the routine do's and dont's of giving testimony.

(ii) Accomplice Witnesses

These witnesses must be prepared for a near-devastating attack on the motives for testifying, as well as their often checkered backgrounds. They should be presented to the jury as what they are - people who, for their own interest, have elected to cooperate against their friends or associates.

(iii) Expert Witnesses:

The expert, to be effective, must not lose the jury in a blitz of technical language. Simplicity of expression should be stressed, to the extent that it is possible.

Preparation of an expert may include soliciting the expert's advice on his/her most effective testimonial experiences. What is the

best way to explain these facts to the jury? Newer prosecutors especially can benefit from the experience of the expert.

In a related vein, it may be useful to ask the expert what he or she would do in cross-examining as defense counsel. This not only will help the litigator, but will also encourage the expert to consider the weak points of his or her testimony.

(d) Summary:

In a word, witnesses must be oriented to the experience of giving testimony in public, perhaps a new phenomenon for the witness. After the preparation session(s), the witness should feel informed about what will come next. The witness must also feel important. The best way to do that is for the prosecutor to be fully respectful and professional in readying that witness for trial.

E. Taking Statements From Defendants

1. Prosecutors in some jurisdictions are called upon to take statements from persons who are either under arrest or are suspects in homicides or other serious crimes. Such interviews often occur at police precinct stationhouses. What follows is a survey of some procedures that may prove useful to the prosecutor in taking such statements. CAVEAT: these are suggestions only. The policies of the

respective prosecutors' offices will finally determine how, or if, such statements will be taken.

2. Before leaving the prosecutor's office, arrangements should have been made for recording the statement in one of the following ways:
   (a) Stenographic machine
   (b) Tape recording
   (c) Videotape
   (d) Verbatim shorthand method.

   This is vital, since there must be no doubt as to exactly what the suspect said. The decision as to whether to use tape or videotape is a policy decision for each office to make. Arguments for and against each can be made. Both methods do, however, add dimensions not afforded by the printed record.

3. Upon arriving at the precinct, the police should fully brief the prosecutor as to:
   (a) Facts of the case
   (b) Full details concerning the suspect's background
   (c) What led police to the suspect
   (d) Any statement police obtained from suspect before the prosecutor's arrival
   (e) The treatment of suspect from apprehension to present, including
      (i) Length of custody.
      (ii) Has suspect slept, eaten, visited bathroom, or been given opportunity to do so?

(iii) Has an attorney entered the case?

(iv) Whom has suspect telephoned?

4. Before questioning begins, the prosecutor should:

(a) Be certain that police have:

(i) Vouchered all relevant evidence.

(ii) Had necessary photos taken.

(iii) Gathered the names of all available witnesses and taken statements from them.

(iv) Preserved all personal effects of the victim.

(b) Speak, if circumstances permit, to the witnesses.

(c) Prepare a list of questions or subject matters to explore with the subject (e.g. if an insanity defense is likely, ask suspect if he know what he was doing during the incident, why he did it, etc.). It is, of course, foolish to enter the subject interview unprepared, hoping to "wing it".

(d) Control the number and identity of persons present during the interview. The fewer the witnesses at the Huntley hearing, the better. Small number of people present forecloses a defense argument of intimidation by numbers. As a flexible guideline, the prosecutor, reporter, one or two detectives and the suspect should be the only persons present. Also, it is better to avoid unnecessary entering or leaving the room while interview is in progress.

(e) Establish that only one person - the prosecutor - will ask questions of the suspect. Others in the

room should write their questions and give them to the prosecutor. This assists in retaining continuity and discipline in the interview.

(f) Remember that the record of the interview must - for better or worse - stand for itself in court. Be certain to describe for the record anything requiring a description - e.g. if the suspect holds his hands three feet apart to indicate a distance, recite into the record exactly what he is doing. Ask the suspect if he concurs with your description of the distance.

5. The Interview:

(a) Upon entering room, introduce yourself to the suspect.

(b) Introduce others present in the room to the suspect. Have them identify themselves for the record.

(c) State your location and the time. ("We are here at the 13th Precinct. It is August 15th, 19__, and the time is 10:20 A.M.")

(d) Advise the suspect that the interview is being recorded. ("Mr. Jones, you see a man to your left who is using a videotape machine. His name is Paul Brown and he is a technician who works for the District Attorney's Office. He is recording everything being said in this room. Do you understand that this interview will be recorded?")

(e) Tell suspect why you are present ("I'd like to talk to you about the shooting of Rhett O'Hara at Central

Park on August 1.") Elicit the suspect's acknowledgement of his understanding of the subject of the interview.

(f) Advise the suspect of his Miranda rights. Do so slowly and carefully, being certain that your explanation is simple and clear. Ask the suspect to indicate, verbally, his understanding of each right. Ask if he has any questions about what you explained.

(g) If the suspect has put a limitation of any sort (e.g. will discuss the killing but not a related sex crime, or, as happened in one case, the suspect will only answer questions in yes-no form), have him indicate on the tape that he has put a limitation on the questioning, and have him indicate what the restriction is. This will blunt defense suggestions at trial that there was something improper or curious in the manner of questioning.

(h) Consider having the suspect acknowledge that his basic comforts have been met (food, sleep, bathroom), and that he's had an opportunity to make a telephone call if applicable.

(i) Toward defusing a later issue, have the suspect indicate his understanding that the fact that he may have given the police a signed statement in no way obligates him to give another to you, the prosecutor.

(j) Ask the suspect if he is or has recently been under the influence of drugs or alcohol. See, e.g., People v. Woodson, 87 Misc.2d 575, 385 N.Y.S.2d 998 (S.Ct. Bronx Co. 1976); People v. Durante, 48 A.D.2d 962, 369 N.Y.S.2d 560 (3rd Dept. 1975).

(k) After preliminaries, begin the substantive part of the interview. Best approach: have the suspect give a narrative, followed by necessary specific questions to establish elements and negate defenses.

(l) Consider having the suspect draw a diagram of the area of relevant events. Ask him to sign and date it on the record. Voucher this promptly, after it is signed by the police officer.

(m) Use any physical exhibits (photos, weapons, garments, etc.) that are at hand. Ask the suspect to identify them and show how they relate to the account he gives.

(n) Before concluding the interview, check your agenda one last time to see that all questions or subject areas of interest have been covered.

(o) Close by noting the time and that the interview is concluded.

V. EXAMINING THE DEPARTING OR ABSENT WITNESS

A. Gaining access to certain types of witnesses may require use of statutory mechanisms:

1. Out of State Witness:

   See CPL §640.10, Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases.

2. Jailed Witness:

   (a) Within New York State: CPL Article 630

   (b) Outside the State: CPL Article 650

3. The "Material" Witness:

   (a) See CPL Article 620

   (b) Remember: the prosecutor must be able to show not only that witness possesses material information, but also that he will not be amenable or responsive to a subpoena when needed.

B. Where a witness is soon to depart the jurisdiction (as the robbery victim who was in New York on business from Australia), the CPL permits perpetuation of testimony for subsequent use at trial.

1. See CPL Article 660, Securing Testimony for Use in Subsequent Proceeding - Examination of Witness Conditionally.

2. NB:

   (a) Must show a need for this procedure.

   (b) The examination must permit the scope normally afforded at trial (as opposed to more limited grand jury or preliminary hearing).

C. It is also possible to examine a witness on commission. See CPL Article 690.

VI. FINALIZING PREPARATION: SOME THOUGHTS

A. Once the reports have been studied, the summaries prepared, the witnesses interviewed, the visual aids ordered and checked, the "final approach to landing" at trial should begin.

B. A critical overview of the case, its strengths and weaknesses, should be done. Is there more that can be done? (The answer is almost always yes - it is up to the prosecutor to distinguish between the important and the unimportant in this regard).

C. Some questions are in order.

1. Has a viable theory of the prosecution been constructed? And tested?
2. Has the likely defense been diagnosed? And prepared for?
3. Has the Voir Dire preparation been done? Do I know my ideal juror? My law?
4. Is the opening statement ready? Is it lucid and appropriately strong?
5. Are the agendas for examination of prosecution witnesses done?
6. Is the exhibit list finalized?
7. Are memoranda of law and requested jury instructions prepared?
8. Have all witnesses been subpoened or alerted?
9. Have all the physical exhibits been tested and checked?
10. Is all of the required discovery material in the hands of the defense or ready to be furnished?
11. Are scheduling problems worked out?
12. Is the trial notebook in final form?

13 Has the summation been thought out?

14. Have I left anything out?

D. KNOWING THE PLAYERS - AND THE UMPIRE

Part of trial preparation is acquiring a sense of the adversary and the judge. For no matter how technically proficient one is, a litigator must know how to act - or not act - vis-a-vis opposing counsel and the court.

Knowing the practices, abilities and strategies of defense counsel is an invaluable aid to the prosecutor. Armed with this sense, he or she can not only prepare the witnesses for likely defense practices or approaches, but can also focus on what can be done to blunt the defense stratagem.

Similarly, it is good to know the trial judge's demands, procedures and preferences.

Toward this end, the prosecutor will profit from reading available transcripts of defense counsel's earlier trials, from reviewing the court's charges on similar issues in the past, and from also discussing with others their experiences with defense counsel and the trial judge.

E. A WORD ABOUT JURY SELECTION: THE PERIL OF GREED:

Prosecutors should be mindful of CPL §270.20 which addresses challenges of an individual juror for cause, the statutory grounds therefore, and, most importantly, the fact that an erroneous ruling by the court on such a challenge can, in some circumstances, result in reversible error. For recent examples of unfortunate reversible error of this genre, see People v. Branch, 46 N.Y.2d 645, 415 N.Y.S. 2d 985 (1979); but see People

v. Provenzano 50 N.Y.2d 420, 429 N.Y.S.2d 562 (1980). Therefore, if confronted with the prospect of seating a juror who may be tainted for the prosecution by virtue of prior association or activity the prosecutor should seriously consider not opposing a defense motion to challenge that person.

VII. CONCLUSION:

Trial work is arduous, painstaking and tiring, but rewarding without parallel. The elation of knowing that one's diligence of preparation has helped to win a motion, defeat a motion, or persuade the jury to the worth of the cause is well worth the effort. As new lawyers, and beginning prosecutors, the richest gift in the inventory is the capacity to learn, both from others and by study, and thus to grow. Good luck as you enter one of the most stimulating arenas, the trial bar.

APPENDICES:

1. Preparation For Trial and Witness Interview, by Seymour Rotker
2. Witness Review Sheet
3. Model Witness List (3 pp.)
4. You As A Witness
5. Trial Notebook: Some Common Cases, compiled by Charles J. Heffernan, Jr.

PREPARATION FOR TRIAL

WITNESS INTERVIEW

By: Seymour Rotker
Chief Assistant District Attorney
Bronx County

ACKNOWLEDGMENT

I wish to acknowledge assistance rendered by my colleagues of the Bronx District Attorney's Office, First Assistant District Attorney Bruce Goldstone for his help in drafting the narrative of the Witness Interview and to William A. Quinn, Bureau Chief of the Homicide Bureau, for his help in drafting the Checklist Questions.

III. Witness Interview

A. Once the witness enters your office (it is a good idea to have the arresting officer present - it gives the witness a feeling of continuity since by the time the witness has been "handled" by several Assistant District Attorneys (unless your office has vertical representation) treat him with courtesy, respect and try and put him at ease. If he relates that he has a problem with his employer assuage him and contact the employer to insure the fact that the witness will not suffer because of his appearance in court. If you know that a case will not proceed to trial on the day the witness has been requested to come - notify him immediately so that he won't waste his time or lose a days wages. A witness will generally view a court appearance as a traumatic event and you should do everything possible to put him at ease so that the testimony to be elicited will come out in the best possible light for the people.

1. If the witness has been a crime victim advise him of possible assistance he can receive (Crime Victims Compensation, Victim Witness Program).

2. If witness is indigent make sure he gets transportation costs and a witness fee.

3. If he is going to be interviewed through lunch - it is a nice gesture to order a sandwich for him.

B. Your objective is to get all of the facts and details that the witness can recollect - whether or not they may be favorable or unfavorable to your case.

1. Certainly if the witness should provide you with exculpatory material, that should immediately be turned over to defense counsel under the "Brady" doctrine.

2. It is a good practice to let the witness run through his "story" one time without interruption and without making notes.

(i) You should be thoroughly familiar with the allegations, since you have read the file and thus the witness's statement will be somewhat familiar to you.

3. After the initial "debriefing" you may ask pointed questions to clarify the witness's statement - Don't suggest answers.

(i) If the witness claims he has forgotten matters previously testified to (at preliminary hearing or Grand Jury) he may be given the transcribed testimony merely for the purpose of refreshing his recollection.

4. Go back over the story and seek to have the witness elicit his story in a clear logical order. You may take notes once the story is intact. The notes may be discoverable and used for the purpose of cross-examination by defense counsel.

C. Tell your witness what to expect when he goes to court. Describe the courtroom; who will be present (Judge, Jury, defendant, defense attorney, spectators); if possible show him the courtroom; tell him to speak loud enough for the jury to hear and audibly.

1. Tell the witness to have counsel repeat a question if he doesn't understand same.

D. Attached are typical fact sheets. Civilian and police witness information forms and defendant information forms can be used as a guideline for questioning a witness, especially as to background or pedigree information. (Attachment A,B,C,D)

(i) This is especially useful at case intake or grand jury level for witness interview.

E. Attached are detailed questions that could be asked of civilian and police witnesses.

IV. Interview of Hostile Witnesses and Defendants

A. When alibi witnesses are identified make every effort to interview the witness for several reasons.

(i) It is possible that you have the wrong defendant. Interview of witnesses should be done promptly and their statement should be checked out.

(ii) The witness's memory should be probed as to how he recollects where the defendant was at the time and place of occurrence.

(iii) He should be questioned about his relationship with the defendant - is the witness interested in the outcome of the case.

(iv) Where possible a formal statement (by a stenographer) should be taken.

B. Prior to interviewing a defendant make sure you have had an opportunity to speak with the arresting officer to ascertain all of the facts possible.

(i) It is best to interview a defendant and have a stenographer present to record the questions and answers.

(ii) The time of commencement of the statement should be recorded as well as the time of its conclusion.

(iii) The arresting officer should be present.

(iv) A statement should be taken, even if it is exculpatory. You are pinning a defendant to a story and giving him little opportunity to change positions at the time of trial - if he feels it would be advantageous.

(v) Give the Miranda warnings and make sure the defendant understands them and is clearly waiving his rights.

(vi) If the defendant appears to have a language difficulty obtain the use of an interpreter - preferably not a police officer but an employee of the District Attorney's Office. If no one else is available use a police officer.

(vii) When questioning the defendant don't put words in his mouth, let him use his language to describe the details. Don't lead the defendant and get a slew of yes and no responses.

(viii) Try and pin down defendant to dates, times, places and the elements of the crime - don't belabor the point and appear to be browbeating the defendant.

(ix) If a prior statement was given to the police officer ascertain on the record that the officer apprised the defendant of his constitutional rights and if defendant waived them.

(x) If defendant gives an alibi try to get the witness in immediately for interview.

NARRATIVE OF WITNESS INTERVIEW

Interview witnesses only immediately prior to trial except in cases involving retarded witnesses, young witnesses or perhaps certain situations that have a complicated background. Aside from these instances you must be aware of the fact that a witness has gone through a long process of interview, ie. in the precinct, Criminal Court, Grand Jury and may have been called back on these occasions several times. To call a witness into your office on numerous occasions could result in economic problems for the witness (ie. perhaps they are taking time off from work, losing money or at least annoying their employer) is a situation you don't want to create. Secondly, when you have a witness in immediately prior to trial, what that witness has told you is still fresh in his mind when he gets on the stand. If you interviewed a witness months earlier it probably will have to be done over again and if you don't re-interview the witness you are running the risk that the witness has forgotten the facts.

On this first contact with your witness it might be advisable to indicate a friendliness which goes a little beyond a public official speaking to a person who is going to testify. You must be aware of the fact that when these witnesses come to your office it is a very important event for them, something which they may have been thinking about for weeks prior to their visit; something which may have kept them awake the night before and if you do observe any of the signs of this maybe even more time should be spent in trying to relax your witness. Putting a witness at ease will allow a freer more accurate flow of information.

The actual preparation for each individual trial and each individual witness obviously varies. However, there are certain things that the witness can be prepared for regardless of the case or the type of witness.

First they should be prepared for such questions by defense counsel as have you ever spoken to the Assistant District Attorney before; just let me interject that this preparation is as to standard questions that a witness can expect should come after you have gone through the factual pattern involved in that particular case. I am taking it out of order at this time merely because it applies to practically every witness. When a witness is asked that by defense counsel often in a mistaken belief that they are helping their position and helping you they will say no, I have not spoken to the assistant district attorney because they believe in that manner they are showing that everything they are saying is true and hasn't been implanted in their mind by anyone. You must be very careful to warn your witnesses that if they are asked this they must answer truthfully. If they have spoken to you once for fifteen minutes they are to say, I spoke to Mr. Smith once. How long? For fifteen minutes. If they spoke to you more than once that should be stated. They are on the stand to tell what actually occurred not only about the crime but about other relevant matters. You will find that your witnesses are going to be more credible if they are not trying to match wits with th, defense attorney. However, if they are asked, did the

assistant district attorney tell you what to say?, the answer to that of course is no. Testimony should not be suggested. The witness should speak in his own jargon. If that question is asked the witness should reply, I was asked questions and I answered them. He could further elaborate, the assistant district attorney asked me what happened, as I was telling it he might have interrupted me at times to ask for certain details which I had omitted or perhaps asked me to repeat when I hadn't made something clear to him, but he did not tell me what to say, he was trying to find out from me what had happened.

Next you should prepare your witness with questions that deal with times, dates, places, distances. Some defense attorneys are under the belief that they will establish themselves as the new Clarence Darrow by asking twelve questions relating to how long certain events took. Any discrepancy in questions of time, distances, etc. can be used to attack the witness's credibility. Therefore you should tell your witness never to give specifics as to time and distances unless he is positive about same.

Then we have the problem of objections. You may raise an objection to the court, it may be sustained, but it will mean nothing because your witness has already answered the question. Each witness, before appearing in court, should be told that if you stand up to make an objection he is not to say anything until the judge has ruled.

A witness should be instructed that any answers given to your questioning should be brief. They should not add anything that is more than is required as an answer to your question. You as the attorney should have the ability to bring out everything you want brought out through your questions. That additional burden of having a witness bring it out even though there is no question is unfair to the witness and is also dangerous for things may be innocently said which could be harmful to your position. Obviously the more the witness says the more material defense counsel will have to cross-examine. On cross-examination the same principle applies. The witness's answer should be directly related to the question, no additional information should be added. If it is felt necessary that more material should be brought out, you will have the opportunity on redirect to bring out that information, but many times the witness will add something which was not in response to a question and that one or two phrase answer will be the basis for an hour of cross-examination which can be very damaging to your witness.

When a witness is being questioned concerning events that may have taken place quite some time in the past he may have a problem in remembering a specific event. The witness should be advised if that occurs, he is not to try to invent an answer in order to satisfy defense counsel. The proper answer is I don't remember. No jury expects a witness to recall each and every detail of an event that took place months ago. In fact, if each detail is remembered with exact precision jurors may become suspicious of the origin of that testimony. However, a witness is also to be instructed that

a statement, I don't remember, is not to be used as an excuse to avoid answering a question that the witness just doesn't feel like answering. Your obligation is to review with the witness those essential areas of inquiry that establish your prima facie case, without resorting to an answer of "I'm sorry, I don't remember at this time".

Every witness that you are interviewing should be asked, have you ever been convicted of a crime or have you ever been arrested. You never can tell until you ask the question whether a witness may have a criminal record. An arrest cannot be brought out by defense counsel. Ask that question in your office. Advise the witness as to the distinction between an arrest and a conviction. Check the witness's background for accuracy. Your witness can be asked about convictions, as well as any immoral acts committed by him. In a large number of cases the defendant is from the same area as your witness and will know about the witness's background. Be prepared for it. Try never to be surprised by any answer given in a courtroom. Ask your witness, is there anything that you think the defendant or his friends might be aware of in his background; any particular incident which might be unfavorable that could be brought to the attention of the jury. The rapport that you have established with this witness, especially when he first came into the office, will be very important as far as how accurate an answer you will get from him when you ask that question. Explain to the witness you are not asking about conviction, arrests or immoral acts in his background because you don't trust him or because you think he is the type of person who would commit such acts, but merely because you want to be prepared when you go into court to a degree where nothing that occurs in that courtroom, in questioning the witness, will come as a surprise to you. You want the witness to tell the truth and to take the edge off if he is asked the question. Once a witness starts to cover up, starts to lie, starts to hem and haw as to a tangential matter it has the effect of carrying over onto subject matter where your witness is completely truthful. A witness can be told how to answer a question but not what to say.

When questioning a witness about his background regardless of what answer the witness gives you, do not show any sign of disapproval. If you show disapproval you will discourage your witness from leveling with you, not only as to his background but perhaps about any other portion of the event which he feels will meet with your disapproval. Don't show disapproval of anything that your witness does except if it concerns failure to cooperate. Let's assume you have a victim who acted foolishly when approached by the perpertrator and people do very often in times of stress act foolishly. Do not indicate that you think they were stupid, do not indicate that you think that it's unbelievable, that they could have done something of this nature. Once you do that the next portion of their story where they feel you might feel they acted stupid, you will not be ascertaining what really happened, you will be getting an answer that he thinks that he should give you which would meet with your approval. You may find that when you get into court this testimony will easily be contradicted by defense witnesses or cross-examination.

As you are speaking to your witness observe what do you think about the way he dresses. He should appear in court clean and neat. Sometimes you will have to tell a witness, "I'd like you to look a little more dressed when you appear in court". Make certain that there is not a misunderstanding when you say that, very often you can tell somebody that you would like them to dress a little better on the day of trial. Explain that you want them to look neat and clean. If you don't feel that your witness will understand it, you might even have to ask what clothes are you planning to wear, what style is it and actually approve and disapprove of each item that the witness has to wear. With men this situation doesn't arise quite as often as with women witnesses. Your witness should be told to dress for court, not as if he was going to a party. You don't want to make it appear obvious that a 30 year old night club singer witness is now coming into court looking like she is on leave from a convent. Don't make the dress of your witness obviously something they are not and yet on the other hand don't let them come into court dressed in a manner which might alienate certain jurors or which might put a label on them which they might not in any manner deserve.

You will find that sometimes a witness has been interviewed by defense counsel or by an investigator he employed. He may have signed statements. Ask the witness if he signed a statement for anyone. Be prepared to make an application to the court to have that signed statement given to you (possible reciprocal discovery). Determine how the statement was obtained and if there was any overreaching. Ask your witness if anyone was a witness to the event. Many times you will get a case jacket which will list three or four witnesses to various aspects of a crime and by the time you go to trial you may very well find out that there were seven or eight. The police work in many cases is only good up to a certain point. They make an arrest, they act very well in the street but they are not lawyers, they are not aware of everything that would be required or even desirable in a courtroom. Don't assume that your folder is a finished product. Try to find out from the witness if there is anyone else who saw this, or if they tell you about something that perhaps they didn't see but they think they know, ask them is there anyone we could get who could come in and testify to that.

Just as defendants may have information about your witness's background because they are from the same neighborhood, your witness very likely will have information about the defendant's background. Don't fail to ask in those type of situations, "is there anything about the defendant that you can tell me?". Check it out as best you can, establish your good faith and you may have a very fruitful field on cross-examination if the defendant takes the stand.

Find out from your witness if at any time he was threatened at any time after the commission of the crime. If it is the type of threat that can be brought out during trial, usually it makes a big impression with the jury, not only because it shows consciousness of guilt on the part of the defendant, but because juries react strongly and emotionally to threatening a witness after a crime has been committed.

If for any reason you make notes as to what a witness is telling you, be accurate. Cases have held that not only is it necessary to turn over a verbatim transcript of any conversation or statement made by a witness, it is also necessary to turn over any notes made by an assistant district attorney or a police officer which are the substance of what they have been told by a witness. This can prove very damaging because when a witness first speaks to a police officer or an assistant district attorney, before the conversation is completed, there can be omissions, there can be distortions or things can be said in a manner which would not be helpful to your position at trial. Not that you are trying to hide anything, not that you are trying to change anything, but as I said before, the same matter can be given in many ways even though each of these ways is truthful. There is no reason to give defense counsel the unprepared statement of any witness. If you have made notes of a conversation then it is necessary to turn this over to the defense counsel. At the time of trial preparation, based upon the facts and information at your disposal, you should be convinced of the defendant's guilt. If you haven't reached that conclusion you shouldn't be trying the case, you should be investigating further. It is not necessary to rationalize any or all inconsistencies between witnesses. Some could be due to honest mistakes or differences of perceptions. In multiple witness cases each witness should be interviewed separately so that you can be assured that their recollection is their own and not that of another witness. You can endeavor to jog the recollection of a witness through the use of prior statements given or testimony or the asking of probing questions.

Do not have a police witness go into court where his answers are so obviously anti-defendant that the jury begins to wonder, has he fabricated, has he exaggerated, is he purposely trying to create something, an impression in our minds perhaps that shouldn't be there. Let him give every fact and you prepare him accordingly. Don't let him make it appear that he has a personal vendetta and is out to bury that defendant and is being cute with the defense lawyer in his attempt to do it. Jurors are not fools. They may become aware of things even though they would not verbalize them later but over all feelings are created and it's up to you to sense in the office if your police officer is testifying in such a way that an over all feeling of unfairness on his part will be created in the jurors mind. If so, his testimony will not be helpful to your case and it might make it appear, as defense counsel often complains, that this is a conspiracy frame-up of his victimized client. Don't accept everything the police officer says. If he tells you something that sounds improbable tell him of your feelings. If in the course of his activities in this particular case he committed acts which might not have been the wisest course of action he should state what he actually did rather than what he thinks should have been done. Very often a policeman is forced to react to a situation immediately and take that course of action which he believes will insure not only his own safety but the safety of people around him. This can be explained in summation.

A police officer should come in looking presentable and neat as other witnesses. If he comes in looking unkempt, slouching in his seat, etc. it is very hard for a juror to reconcile this particular officer with the respect that he would ordinarily have for such a witness. Make certain he sits erectly when testifying, that he does not cover his couth and that he is not chewing gum, that he looks neat, that he is shaven. This witness should also be told, just as all other witnesses, regardless of who they may be, about their demeanor on the stand. They should look at you when you are asking the questions, they should look at defense counsel when he asks the questions, if the judge happens to address them they shou turn to the judge when answering him. The only exception to this would be if it's a long answer given by the witness, they may if they wish, turn to the jury. A witness should never look in his lap, the back wall or over the head of the questioner. Many people believe that when a person is lying he will be unable to look you in the eye and when a person does look at you directly, it is an indication of his truthfulness. Personally, I don't accept this at all as I have seen many people lie and look you square in the eye and I have also seen people tell the truth and yet avert their eyes from yours for various other reasons. For basically the same reason your witness should not hold a piece of kleenex on his or her lap and wring it, tear at it, fold it, should not fidget with any ornament, piece of jewelry, but should sit erect as stated, hands either on the arms of the chair or in ones lap.

From time to time you will encounter a witness of tender years. It is proper to discuss with a child (under the age of 13) what is the meaning of an oath so that the child can be sworn. If you are having difficulty getting through to the child he can be sent to a family clergyman for further instruction. There is nothing improper in this. Once we get past the point of ascertaining that the meaning of an oath is understood by the child we come to the problem of establishing a relationship with the child because even more than an adult, a certain feeling of trust, confidence and basically just liking you is of extreme importance. If the child doesn't like you you are not going to get the full story, so a certain amount of time should be devoted in the beginning and intermittently in establishing a relationship with the child so that the child feels that he can tell you something. Again, even more than an adult, whatever you hear from the child do not show disapproval, do not show surprise. Once you start showing that what you learn from that child is going to be severely curtailed. Preparing a child, especially in a sex case, you may feel that the child is not speaking freely because of parents or relatives are in the room. If you have this feeling find some excuse to ask the adult to leave your office, then ask that child whether they would feel more comfortable speaking to you alone. If the child says yes explain to the parents that you prefer to speak to the child with them waiting in your outer office. However, when I say alone it would be preferable not to be entirely alone, there should be a police officer or office colleague sitting in the room in the event that the child becomes disturbed because of a recitation of the events. You will not be accused by the parent or guardian of causing the child's disturbance.

When using an expert as your own witness show as much deference and respect in the courtroom to your expert as possible. In preparing your expert in the office remember, he may be an expert in that particular field but when it comes to the question of how to testify, you are the expert. Prepare the expert in basically the same manner as you would any other witness, except of course an expert can give opinion testimony where other witnesses cannot but don't be afraid to instruct an expert no matter how much he knows, no matter how renowned in his field, even if he has testified many times before. Your knowledge on how to testify in your particular trial should be better known to you than any witness you are calling to testify.

CHECKLIST OF TYPE OF QUESTIONS TO ASK POLICE OFFICER ON INTERVIEW

POLICE OFFICER:

1. Name, rank, shield, assignment, number of years on police force
2. On ____ date, _____month, ____ year what was your assignment
3. On ____ day, _____month, ____ year did you respond to vicinity/premises _____.
   (a) time
   (b) how long did response take
   (c) partner on that date
4. What did you see and do upon arrival
5. Did you speak to anyone
   (a) name and address
   (b) what did you say
   (c) what were you told
   (d) did you make notes
   (e) any official forms filled out:
       UF 61
       DD 5's
       other (eg alarm)
6. Did you recover any weapon(s) at the scene
   (a) itemize
7. Did you search any person for weapons at scene
   (a) whom
   (b) circumstances
8. Did you take anyone into custody
   (a) whom
   (b) where and when
   (c) circumstances (articulable facts)
9. Did you arrest anyone
   (a) who
   (b) when
   (c) where
   (d) circumstances
   (e) other police present
10. Upon arrest was defendant spoken to
    (a) where
    (b) when
    (c) did defendant get Miranda warning
    (d) what did defendant respond

10. (Cont'd)

(e) what did defendant say exactly
what did defendant say in substance

(f) did you make contemporaneous notes
did you make notes later
(1) when
(2) where
(c) produce notes

11. Did defendant say anything spontaneously

12. Defendant's condition at time of interrogation

(a) influence of alcohol
(b) influence of drugs
(c) influence of withdrawal
(d) was defendant struck, hit or slapped by any police officer
(e) condition of defendant at time of arrest

13. Did anyone call on behalf of defendant claiming to be an attorney

(a) time
(b) who called
(c) what was said

14. Was defendant's family at police station

15. Did he (she or they) request to see defendant

16. Was request, if made, honored

CHECKLIST OF TYPE OF QUESTIONS TO ASK CIVILIAN WITNESS ON INTERVIEW

CIVILIAN:

1. Name, age, employment or school, welfare number, next of kin
2. Prior arrests - details

   Prior convictions-when, where, sentence(s)
3. Psychiatric history -
   (a) hospitalization, when and where, dates
4. Taking what drugs or medication this time and at time of homicide
5. Testify in Grand Jury; number of times
6. Tell police what occurred: what did you say
   (a) where
   (b) when
   (c) to whom
   (d) did police make notes of interview
   (e) how many times
7. Interviewed by assistant district attorney
   (a) where
   (b) when
   (c) what did you say
8. Did assistant district attorney record interview
   (a) steno
   (b) his own notes
   (c) did you sign anything
9. Did anyone other than the police or the assistant district attorney interview you
   (a) when
   (b) where
   (c) who
   (d) how many times
   (e) did you sign anything
   (f) what did you say
10. Did you ever say anything different
11. Did you testify in any related proceeding
    ie (a) Family Court
    (b) Police hearings at Civilian Review Board
    (c) State Liquor Authority
    (d) Other

12. Did you get money from anyone connected with the case -
    (a) defendant
    (b) defendant's family or friends
    (c) police
    (d) District Attorney's Office
    (e) other

13. Did you identify the defendant
    (a) How; pictures
        line-up
        show-up
    (b) number of times
    (c) did you identify anyone besides defendant
    (d) did you know defendant
        (1) how long
        (2) circumstances

14. Prior to event did you have any problems with defendant
    (a) Bias
    (b) Interest
    (c) Hostility

15. On ____ date ____ time ___ place where were you
    (a) what were you doing
    (b) how far from event
    (c) lighting conditions
    (d) who were you with

16. What did you see?
    What did you do?
    What was said and by whom?

17. Are there any other witnesses to this incident
    (a) how do you know

18. Did you speak to defendant after event
    (a) where
    (b) when
    (c) circumstances
    (d) did you act at behest of police

19. On date _____ time _____ place of occurrence were you
    (a) wearing glasses
    (b) required to wear glasses

20. Was either defendant or deceased drinking prior to or during incident to your personal knowledge?

OFFICE OF THE
DISTRICT ATTORNEY
OF BRONX COUNTY, N.Y.
POLICE WITNESS FORM

DATE | DOCKET NUMBER

ASSY. U.S. | DEFENDANT(S)

I. WITNESS

NAME (LAST, FIRST, MIDDLE) | PHONE-RES. | DOB (MO. DA. YR.) | HT | WT | RACE | MILITARY SERVICE BRANCH | SER. NO.

ADDRESS (INCLUDE APT. NO.) | PHONE-BUS. | MARITAL STATUS | NO. OF CHILDREN | OCCUPATION

SHIELD NO. | COMMAND | RANK | COMMENDATIONS FOR VALOR

ASSIGNMENT (INCLUDE ADD'L NO., SECTOR, ORDER) | YEARS ON FORCE

TOUR OF DUTY | DATE OUT | CHARGE | NO. OF ARRESTS | NO. OF TIMES TESTIFIED | CRIM. CT. | GRAND JURY | SUPR. CT.

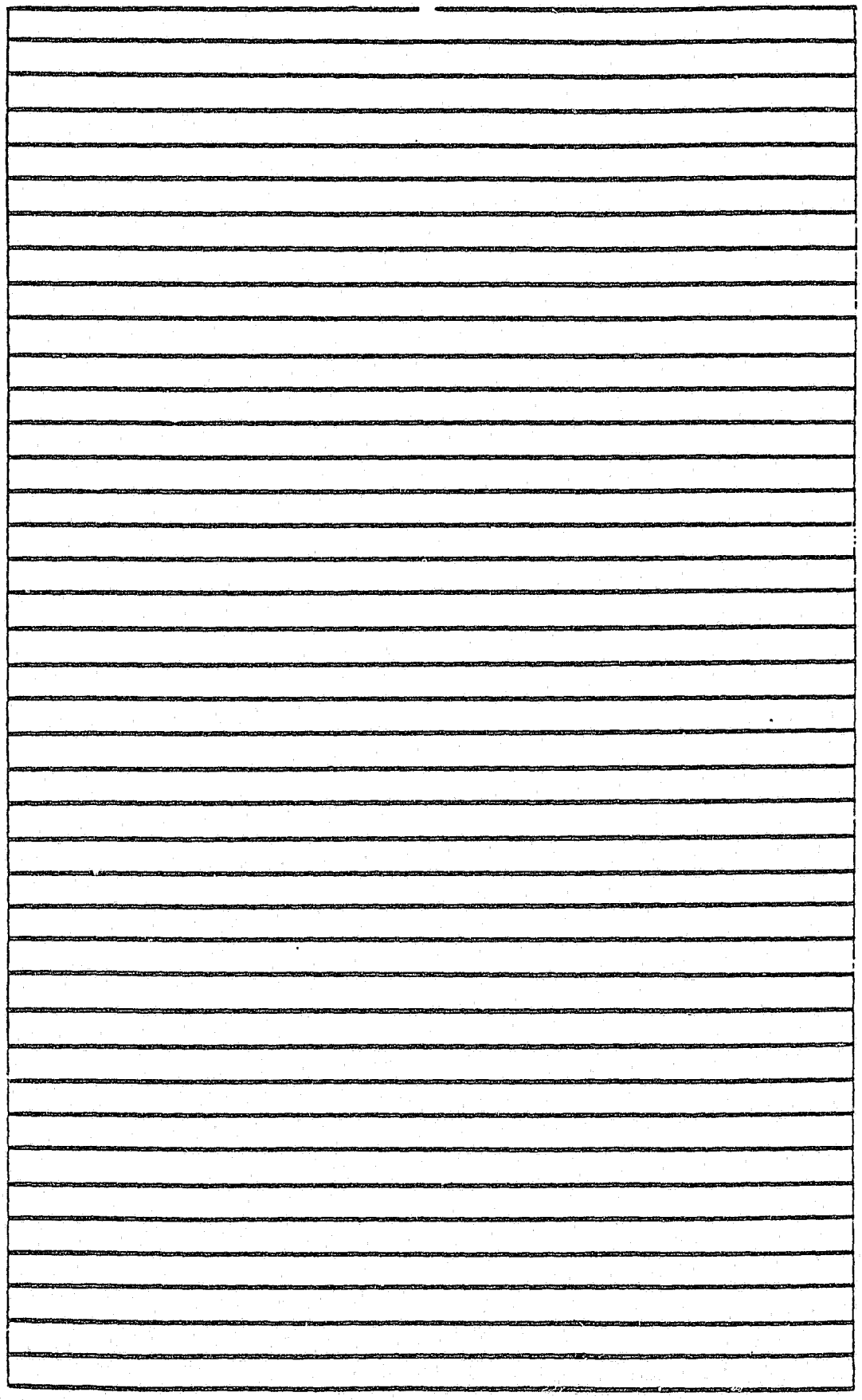
PEDIGREE (LAST, FIRST, MIDDLE) | SHIELD NO. | WITNESS RELATIONSHIP TO DEFENDANT OR WITNESSES

EVALUATION OF: (1) CASE | (2) DEFENDANT | (3) WITNESS(ES)

DEFENSES AND CREDIBILITY PROBLEMS

LIST ALL FORMS COMPLETED BY POLICE OFFICER

STATEMENT OF WITNESS. RELATE IN DETAIL THE COMPLETE STATEMENT OF THE WITNESS AND INCLUDE THEREIN THE FOLLOWING FACTS LEADING UP TO THE INCIDENT, TIME SEQUENCE, LOCATIONS, DESCRIPTIONS, LIGHTING CONDITIONS, DETAILS OF ALL OUT OF COURT IDENTIFICATIONS AND REACTION TO THE CRIME, INCLUDE ANY SPEECH PROBLEMS WITH THIS WITNESS. (REVERSE SIDE MAY BE USED)



OFFICE OF THE
DISTRICT ATTORNEY
OF BRONX COUNTY N.Y.
CITIZEN WITNESS FORM

CASE | DOCKET (INDICTMENT) NUMBER
ASST. D.A. | DEFENDANT(S)

I. WITNESS

NAME (LAST, FIRST, MIDDLE) | D.O.B. (MO DAY YR) | AGE | HT | WT | RACE | LANGUAGE | INTERPRETER NEEDED? | | YES | | NO

ADDRESS (INCLUDE APT. NO.) | PHONE NO. (RES.) (BUS.) | HOW LONG? | ALTERNATE CONTACT NAME ADDRESS PHONE

MARITAL STATUS | LIST SPOUSE AND CHILDREN BY NAME AND AGE (IF ANY) | YEARS MARRIED | RESIDES WITH WHOM AND RELATIONSHIP

II. WORK STATUS

EMPLOYER'S NAME | ADDRESS | PHONE | NATURE OF WORK | HOW LONG? | SALARY (WK./MO./YR.)

IF UNEMPLOYED, LAST EMPLOYER'S NAME | ADDRESS | PHONE | NATURE OF WORK | HOW LONG? | SALARY (WK./MO./YR.)

IF WELFARE, CENTER NAME | ADDRESS | I.D. NO. | CASE WORKER | AID'D LAST | AMOUNT

IF NO WELFARE, DESCRIBE MEANS OF SUPPORT

III. PERSONAL DATA

LEVEL OF EDUCATION | MILITARY: BRANCH | YEARS | TYPE OF DISCHARGE | DECORATIONS | PRESENT STATUS

NARCOTIC HISTORY: TYPE | DAILY USE AND COST | YEARS | SUPPORT METHOD | DRUG PROGRAMS (PAST AND PRESENT)

PSYCHIATRIC HISTORY (INSTITUTION, DATE, LEVEL)

PHYSICAL HISTORY (INJURIES, DISABILITY)

UNUSUAL AND DISTINCTIVE CHARACTERISTICS | NUMBER OF YEARS OR MONTHS SINCE LAST CRIME | ALCOHOL CONSUMPTION (DAY OF INCIDENT / IN GENERAL)

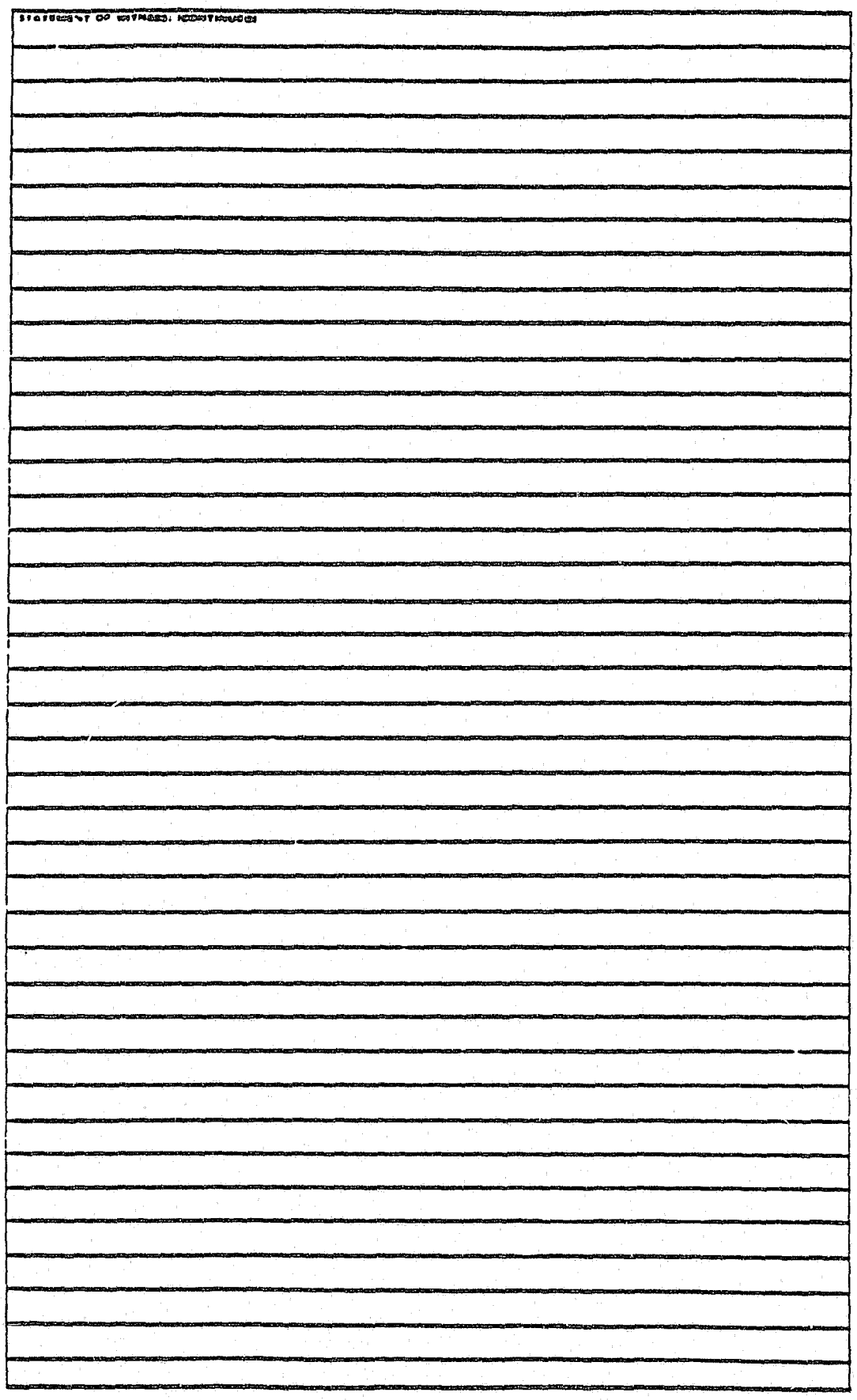
III. CRIMINAL RECORD (ACCORDING TO WITNESS)

ARRESTS (UNDER 16) HISTORY: NO. OF ARRESTS | CHARGES | DISPOSITION

ADULT HISTORY: NO. OF ARRESTS | CHARGES | DISPOSITION

PRIOR RELATIONSHIP TO DEFENDANT AND/OR WITNESSES

STATEMENT OF WITNESS: RELATE IN DETAIL THE COMPLETE STATEMENT OF THE WITNESS AND INCLUDE THEREIN THE FOLLOWING: FACTS LEADING UP TO THE INCIDENT, TIME SEQUENCE, LOCATIONS, DESCRIPTIONS, LIGHTING CONDITIONS, DETAILS OF ALL OUT OF COURT IDENTIFICATIONS AND REACTION TO THE CRIME. INCLUDE ANY HEARSAY PROBLEMS WITH THIS WITNESS.



OFFICE OF THE
DISTRICT ATTORNEY
OF BRONX COUNTY, N.Y.
DEFENDANT FORM

DATE | CHARGES | INDICTMENT NO.
ARR. NO. | | COURT NO.

I. IDENTIFICATION

DEFENDANT'S TRUE NAME (LAST, FIRST, MIDDLE) | D.O.B. (MO / DY / YR) | HT | WT | RACE | D.P.
| | | | | | NYSID#

DEFENDANT'S STATED NAME OR ALIAS | ADDRESS WITH (NAMES AND RELATIONSHIP)

ADDRESS (INCLUDE APT. NO.) | PHONE NO. | SOCIAL

MARITAL STATUS (LIST SPOUSE AND CHILDREN BY NAME AND AGE IF ANY) | LANGUAGE

INTERPRETER NEEDED
[ ] YES [ ] NO

II. WORK STATUS

EMPLOYER'S NAME	ADDRESS	PHONE	NATURE OF WORK	HOW LONG	SALARY (WEEKLY/MO.)
IF UNEMPLOYED OR RECEIVING WELF.	ADDRESS	PHONE	NATURE OF WORK	HOW LONG	SALARY (WEEKLY/MO.)
IF UNEMPLOYED, STATUS NAME	ADDRESS	PHONE	CASE NUMBER	REC'D LAST	AMOUNT

IF NO WELFARE, DESCRIBE MEANS OF SUPPORT

III. PERSONAL DATA

LEVEL OF EDUCATION	MILITARY BRANCH	YEARS	TYPE OF DISCHARGE	DECORATIONS	PRESENT STATUS
NARCOTICS HISTORY TYPE	DAILY USE AND COST	YEARS OF DAILY USE		DRUG PROGRAMS (PAST AND PRESENT)	

PSYCHIATRIC HISTORY (DIAGNOSIS CONCISELY)

PHYSICAL HISTORY (DISEASES CONCISELY)

DISEASES: (1) VENEREAL (2) HEPATITIS (3) TUBERCULOSIS | MEMBER OF GANG OR NOTORIOUS ORGANIZATION

IV. CRIMINAL HISTORY (ACCORDING TO DEFENDANT)

JUVENILE/YOUTHFUL OFFENDER HISTORY			ADULT HISTORY				
NO. OF ARRESTS	CHARGES	DISPOSITIONS	NO. OF ARRESTS	NO. CONVICTIONS	NO. TIMES SENT TO PRISON	NO. PLEAS	NO. TRIALS

FOR EACH CONVICTION LIST HISTORY AS FAR BACK AS INFORMANCE WHEN POSSIBLE!

DATE	CHARGES	FACTS	DISPOSITIONS

NUMBER PENDING CASES	BAIL OR PAROLE	CHARGES	ATTORNEY(S)	COURTS

OF POPULATION: CHARGES	NAME OF PROBATION OFFICER	CHARGES	NAME OF PAROLE OFFICER
PRESENT		PAST	

V. THIS CASE

TYPE OF CRIME	TYPE OF LEGALITY	NUMBER INVOLVED
ALCOHOL CONSUMPTION		NARCOTICS
MENTAL		PHYSICAL
REACTION TO ARREST		
DEFENDING ALIBI		

RELATE TO EXTENT AVAILABLE THE DEFENDANT'S VERSION OF FACTS IN DETAIL. MUST INCLUDE THE FOLLOWING INFORMATION:

1. STATEMENTS (TO [illegible], [illegible], [illegible], ADMISSIONS/GUILTY)
2. DEGREE OF KNOWLEDGE OF [illegible]
3. RELATIONSHIP TO PHYSICAL EVIDENCE
4. INTENDED TO DEFEND

WITNESS #_____

WITNESS REVIEW SHEET

PEOPLE v. _____

INDICT. NO._____

	Yes	No
TESTIFIED BEFORE G.J.?	☐	☐
TESTIFIED AT PRELIM.?	☐	☐
AFFIDAVIT?	☐	☐
REPORT OR MEMO	☐	☐

NAME

RESIDENCE ADDRESS

PHONE

EMPLOYMENT

ADDRESS

PHONE

WILL TESTIFY TO EXHIBITS?

RESUME OF TESTIMONY:

WORK SHEET (Page 2)

Unusual Occurrence Report (UF 49s)

Xerox of P.O.'s Memo Book

Yellow Sheet (DD 24)

Pedigree (DD 19s)

Mug Shots of Defendant

Stand-Up Photos (Stand-Up #)

Department of Corrections

Pedigree (239-A)

Inmate Property Envelope (111-A)

Cash Account Form (85-A)

Medical Records (13-F)

Approved Visitor's Card

Other

DEFENDANT'S BACKGROUND

FBI Sheet-Ordered: Received:

Prior N.Y. County Cases Ordered: Received:

Outside N.Y. County Cases Ordered: Received:

Youth Records

Welfare Records

U.S. Armed Forces Records

Employment Records

School Records

ROR Report Checked

DACC Contacted

MISCELLANEOUS RECORDS

Weather Report

Maps and Diagrams

Business Records

Line-Up Report (Photos of Line-Up)

WORK SHEET (Page 3)

Check Chain of Possession of Evidence

Other

AVAILABILITY OF WITNESSES

	Name	Days off	Vacation
C/W			
Witnesses: 1)			
2)			
3)			
A/O			
P/O			
P/O			

YOU AS A WITNESS

I urge you to consider the following suggestions so that if and when you have occasion to testify as a witness, you will be most effective. Since you are taking an oath, we want you to tell the truth and nothing but the truth, but there are different ways to tell the truth. If a witness is halting, stumbling, hesitant, arrogant, or inaccurate, the jury may doubt him. The witness who is confident and straightforward will enable the jury to have faith in what he is saying.

1. Be prepared. Don't try to memorize what you are going to say, but do try to refresh your mind on those matters upon which you will be examined. Try to recall the scene, the objects there, the distances, and just what happened. If the question is about distances or time, and if your answer is only an estimate, be sure you say it is only an estimate.

2. Present a proper appearance. Dress neatly. Do not come into court or testify while chewing gum or smoking. When taking the oath, stand upright, pay attention and say, "I do," clearly. While testifying, avoid nervous mannerisms which distract the jury.

3. Always face the person questioning you. Speak up clearly and loudly enough so that the farthest juror can hear you easily. Don't nod for a "yes" or "no." Be serious in the courtroom and just as respectful in your answers to the defense counsel as to the prosecutor and the judge. Never argue with the defense attorney.

4. Listen carefully to the questions asked of you. No matter how nice the attorney may seem on cross-examination, he may be trying to discredit you. Understand the question, have it repeated if necessary, then give a thoughtful, considered answer. Do not give a snap answer without thinking. Don't rush into answering, but neither should there be an unnaturally long delay to a simple question if you know the answer.

5. Explain your answer, if necessary. Give the answer in your own words, and if a question can't be truthfully answered with a "yes" or "no," you have a right to explain the answer.

6. Answer only the question asked you. Do not volunteer information not actually asked for. If your answer was not correctly stated, correct or clarify it immediately.

7. Unless certain, don't say, "that's all of the conversation" or "nothing else happened." Instead say, "that's all I recall," or "that's all I remember happening." It may be that after more thought or another question, you will remember something important.

8. Don't get angry. Keep calm. Be courteous, even if the lawyer questioning you may appear discourteous. Don't appear to be a cocky witness. Any lawyer who can make a witness angry will probably cause the witness to exaggerate, appear unobjective, and emotionally unstable.

9. Give positive, definite answers when at all possible. Every material truth should be readily admitted, even if not to the advantage of the prosecution. Do not stop to figure out whether your answer will

help or hurt your side. Just answer the questions to the best of your memory without exaggerations. If asked about little details which a person naturally would not remember, it is best just to say so if you don't remember. Don't get in a trap of answering question after question with "I don't know."

10. If you don't want to answer a question, do not ask the judge whether you must answer it. If the question is improper, the District Attorney will object. Don't look at the District Attorney or at the judge for help in answering a question. You are on your own.

11. Sometimes a defense attorney may ask you, "have you talked to anybody about this case?" If you say, "no," the judge or jury knows that probably isn't right because the prosecutor talks to the witness in advance of trial. So answer frankly that you have talked with the lawyers, your family, other witnesses, or whomever.

12. Finally, be your natural self. If you try to imagine that you are talking to friends or neighbors on the jury, you will be more convincing and will do a fine job.

OPENING STATEMENTS

JOHN F. KEENAN
Criminal Justice Coordinator
for New York City

The purpose of an opening statement is merely to outline what the prosecution expects to prove during the course of the trial. A skillful and well-delivered opening will, however, do more than merely supply the jury the bare bones of the case. It will create a favorable first impression and will set the stage for the introduction of the evidence which will be offered at trial.

If the prosecution exhibits an air of calm confidence during the opening, this attitude will contagiously affect the jury. Unconsciously, the jury will be set at ease. Instinctively, they will become aware that the People have the matter under control. An atmosphere, an aura, demanding justice will be the backdrop in which the case commences. Since justice is what the State seeks, an immediate advantage is gained.

This quiet certainty concerning the rightness of the prosecution's cause can only be achieved if the opening is carefully and painstakingly prepared. Confidence in the prosecution case is not instilled if the District Attorney fumbles and bumbles and "ers" and "ahs" in the course of his opening remarks. Most of us are not direct descendants of Demosthenes or Patrick Henry and there is no substitute, during any phase of a trial, for careful preparation. This is particularly true in an opening where, for the first time, the jury learns what the prosecution's case is all about.

Preparation results in clarity and if there is one quality that a good opening possesses, it is clarity. When the District Attorney makes

his initial statement to the jury, the triers of the fact, for the first time, are learning what the case is all about. If the case is not made clear to them at the time of the opening, it is likely that it will be confused from then on. Confusion causes acquittals, so make it clear!

Since the opening is much like a synopsis or the table of contents of a good book, the jury should be told just that. The opening is being presented to them so that they can follow the evidence with understanding as the testimony unfolds.

Early in the opening it is a good idea to recite or summarize the body of the main charge or charges of the indictment to the jury. That indictment or charge is the framework of reference within which the jury will operate and it is a good idea to let the jury know that right at the outset.

If the particular jurisdiction requires that the indictment be worded in legalistic verbiage and the indictment is so couched, here is an opportunity to explain it in everyday, sensible language understandable to the layman. An adept advocate takes advantage of this situation and explains that the "wilfully, feloniously and of malice aforethought" in the indictment means that the defendant thought about what he was going to do before he did it, and then he went ahead and did it, on purpose.

The best general format to follow in an opening statement is to set forth the facts chronologically. Set the stage! "The place we will be concerned with for the next several days is...The time of our chief interest will be...." Lead in and let the jury become privy to the

prosecution evidence. Paint the picture in broad strokes. Be positive, not hesitant. Be direct, not apologetic. Don't talk down to the jurors. Don't argue in the opening. That is objectionable and thus subject to interruption. What is desired is a fluid, free-flowing clear exposition of the People's proof. This proof will establish the defendant's guilt and this is what you are seeking to convey.

In opening don't say, "The prosecution expects to establish," state -- "The People will prove."

When you come to the end of the opening, tell the jury that at the completion of the case "in the name of the People of the State of _____ and in the interests of justice I will ask you to convict this defendant of (the crime(s) charged in the indictment)."

An opening statement is much like a promissory note which the trial prosecutor is presenting to the jury. If the District Attorney's proof does not live up to the contents of the opening, then there is a default. In the case of such a default the jury might well be justified in acquitting. For this reason, it is fatal to overstate the People's case in opening remarks. Limit yourself to what you are sure you can prove. Don't get carried away by your own eloquence. Overstating is disastrous. When you fail to prove what you said you would, the jury will hold your case to account.

However, when you do open be sure to make out a case on your opening. In some jurisdictions a failure to establish a prima facie case on the People's opening results in a dismissal of the indictment.[1]

1 People v. Levine, 297 N.Y. 144, People v. Gray, 303 N.Y. 660, McGuire v. United States, 152 F.2d 577, State v. Loeb (Mo.) 190 S.W. 299, also cf §260.30, Criminal Procedure Law, State of New York. But see People v. Coppa, 65 A.D.2d 581, 409 N.Y.S.2d 157 (2d Dept. 1978).

Because of the great tactical advantage to be gained by presenting a clear, articulate and convincing opening the opportunity to make such a statement should never be waived, even in those jurisdictions which do not require that an opening statement be made.

The People's opening sets the tone and background for the entire trial and is a crucial stage of the case.

OUTLINE

PROSECUTION OPENING STATEMENT

INTRODUCTION — DUTY OF THE DISTRICT ATTORNEY TO OPEN

NO DUTY ON THE PART OF THE DEFENDANT TO OPEN

OPENING NOT EVIDENCE EVIDENCE FROM WITNESSES AND EXHIBITS

OPENING A PREVIEW OF EVIDENCE SO JURY CAN FOLLOW EVIDENCE

WITH FACILITY AND UNDERSTANDING

DEFENDANT IS BEFORE THE BAR OF JUSTICE CHARGED WITH THE

CRIME OF _____

WE SHALL BE CONCERNED WITH THE EVENTS WHICH ALLEGEDLY

TRANSPIRED ON _____

REVIEW EVIDENCE

YOU WILL FIND _____

EVIDENCE WILL INDICATE _____

THE PEOPLE EXPECT TO PROVE _____

PLEASE KEEP MINDS OPEN UNTIL ALL THE EVIDENCE IS PRESENTED

AND THE COURT INSTRUCTS YOU ON THE LAW

AT THE CONCLUSION OF THE CASE I SHALL ASK YOU IN THE NAME OF

THE PEOPLE OF THE STATE OF NEW YORK TO FIND THE

DEFENDANT _____ GUILTY OF THE

CRIME OF _____

CRIMES CHARGED BY THE COURT _____

SAMPLE

PROSECUTION OPENING STATEMENT

MAY IT PLEASE THE COURT, MR. _____

MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY.

AT THIS POINT IN THE TRIAL, AS THE ASSISTANT DISTRICT ATTORNEY IN CHARGE OF THE PROSECUTION OF THIS CASE, THE LAW IMPOSES UPON ME THE DUTY OF MAKING AN OPENING STATEMENT TO YOU.

NOW THE PURPOSE OF THIS OPENING IS MERELY TO OUTLINE FOR YOU JUST WHAT THE PEOPLE EXPECT TO PROVE BY WAY OF EVIDENCE IN THIS CASE.

THERE IS NO SUCH CORRESPONDING DUTY IMPOSED ON THE DEFENSE.

THEY MAY OR MAY NOT MAKE AN OPENING, AS THEY SEE FIT.

HOWEVER, I SHOULD CAUTION YOU AT THIS TIME THAT WHAT I AM ABOUT TO SAY BY WAY OF OPENING REMARKS IS NOT EVIDENCE AND SHOULD NOT BE CONSTRUED BY YOU AS EVIDENCE.

YOU WILL GET THE EVIDENCE FROM THE LIPS OF THE WITNESSES AFTER THEY ARE SWORN AND FROM WHATEVER EXHIBITS ARE RECEIVED IN EVIDENCE.

I THINK IT PROBABLY MOST REASONABLE TO CONSIDER THIS OPENING AS A PREVIEW OF WHAT YOU ARE ABOUT TO HEAR FROM THE WITNESSES, SORT OF LIKE A TABLE OF CONTENTS TO A BOOK, PRESENTED TO ENABLE YOU TO FOLLOW THE TESTIMONY WITH THAT MUCH MORE FACILITY AND UNDERSTANDING.

NOW FOR PURPOSES OF MY OPENING I WILL READ TO YOU THE INDICTMENT HANDED UP BY THE GRAND JURY AGAINST THIS DEFENDANT.

---- READING OF INDICTMENT ----

NOW THAT IN SUBSTANCE IN BROAD STROKES IS WHAT THE PEOPLE WILL PROVE IN THIS CASE.

AFTER THE EVIDENCE HAS ALL BEEN PRESENTED TO YOU IN THE NAME OF THE PEOPLE OF THIS STATE, I WILL ASK YOU TO FIND THE DEFENDANT GUILTY AS CHARGED.

112905

THE POLICE WITNESS: PROBLEMS AND PROCEDURES FROM THE PROSECUTOR'S VIEW IN STREET CRIME CASES

By:

Brian Barrett, Former Deputy Commissioner, Department of Investigation, City of New York

THE POLICE WITNESS: PROBLEMS AND PROCEDURES FROM THE PROSECUTOR'S VIEW IN STREET CRIME CASES

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In criminal litigation the policeman's lot is not a happy one. He is caught between two somewhat contradictory and erroneous perceptions that are part of common knowledge: Police officers are regularly perceived as artful perjurers, attempting to disguise sloppy and incompetent detective work or trying to obtain a conviction of someone they dislike by means of a frame-up. At the same time the public has been trained by entertaining police detective shows on television to view police officers as fantastically competent and omniscient investigators who are never working more than one case at a time and can solve the most intricate crime in 60 minutes (minus time for commercials). Police officers, so goes the latter perception, are at the tip of a vast police apparatus that brings an army of scientists, lab technicians, undercover operatives and informers to bear on every case important enough to warrant serious attention.

The reality is far different. Most cases are "made" by uniformed officers who have never been schooled in any investigative arts or procedures. Their education is usually from the job, on the streets. Their primary job is not unlike that of an army of occupation -- patrolling hostile streets in grim neighborhoods, intervening, often after-the-fact,

in scenes of great confusion and danger under the worst possible circumstances for making accurate observations. Police officers are no better equipped than any other citizen for dealing with fear, intolerance and racial stereotypes. Their primary job is to intervene in dangerous situations to defuse the danger, disarm the combatants, aid the wounded and apprehend the wrongdoers -- and to do all that in as brief and non-inflammatory a manner as possible -- to get in, do what has to be done, and get out.

The uniformed police officer has little or no formal training to equip him. The detective has some training in ballistics, lab analysis and hand-writing work -- at least enough to make him aware of the possibilities -- but most street crime cases do not lend themselves to this kind of analysis. And for detectives, at least in New York City, the staggering caseload assigned to each prevents almost all sophisticated work.

The perspective of the police witness will deal with particular problems that come up under the subjects of Informal Education, Evidence Acquisition, and Communication. Under these headings are discussed a number of procedures available to prosecutors to maximize the effectiveness of the typical police officer who is a witness in a street crime case.

I. INFORMAL EDUCATION

A. Legal Division Bulletins: Excellent and thorough (though often unread and unfollowed) analyses of particular legal issues. The best in recent months and years are annexed at the end of this chapter. They treat the relevant issues in criminal law

that arise in police work and are often crucial to the outcome of a case.

B. On-The-Job Education: The bulk and most important part of a police officer's education is the feedback to him from Assistant District Attorneys: from their analysis of cases; their answers to his questions; their suggestion of alternatives to particular patterns of conduct they have engaged in in making arrests or seizures or conducting investigations; and informing police officers of the consequences of the method of acquiring evidence from the seizure or failure to seize evidence, as well as the forensic value of particular items of evidence.

II. EVIDENCE ACQUISITION

The police officer's greatest enemy is his proficiency; the bulk of the arrests are made by a small number of very active officers. This results in confusion of cases, loss of memory as to detail, encouragement to take shortcuts, failure to seize evidence because of a perceived need to invest considerable resources of time and hastily-prepared and incorrect reports.

The Assistant District Attorney must approach every case with the goal of ascertaining and fixing the facts immediately -- to learn and establish, as precisely as possible, every significant detail -- to "freeze the past" as it has been stated. This requires very specific questioning of the police officer at the beginning of the case to learn what he has seen and to pin it down.

Careful scrutiny of the facts surrounding a particular incident and detailed and tough-minded probing of the officer's account will necessarily lead to the discovery of exculpatory evidence in some cases, to inconsistencies and often blatant falsehoods in others, to erroneous reports, to mistaken witnesses, to evidentiary weaknesses. All this material that usually must be known to the defense attorney and to the court and jury. Some or all of it will have the effect of making some cases unprosecutable although the defendant is, in fact, guilty. That is the unfortunate but necessary consequence of the responsible handling of criminal prosecution.

The questioning must deal with observations made by the observer and what he or she did to seize evidence.

A. Observations

1. Who and what was where, estimates of distances of objects, people, vehicles and the like (have officer diagram, in the rough, areas and location of significance, including any distances he traversed) and details of any unusual things.
2. Details of the movement or transportation of any physical property at issue (particularly in burglary and larceny cases).
3. Lighting conditions: not only conclusions but bases of conclusions (phase of moon, open or cloudy sky, working streetlights, illumination from store windows, etc.) Could officer read by or make precise observations by the light he used: if description of lighting conditions

appears insufficient to make observations he is relating, explore probability there were light sources he didn't perceive or has forgotten.

4. The number, description, names and addresses or apparent addresses or location of all people at or near the location and the names or descriptions of all police officers there.

5. Where contraband is recovered from an area, as opposed to from a particular person, a full description of the surroundings, particularly any other property in proximity to the contraband.

6. The details of the clothing and features of anyone arrested, particularly anything distinctive or unusual, such as scars, missing teeth, wounds, jewelry, pierced ears and the like.

7. In any case where a weapon was fired, observations relevant to the question of proof that a <u>real</u> bullet (as opposed to a blank) was fired: injuries, bullet holes, shattered windows, fragments of bullets or objects struck, type of shells recovered, frequency of discharges at time weapon recovered in terms of other rounds recovered.

8. Where a weapon is recovered outside or on the street but not on the person of the defendant, a full description of the condition of the gun: its cleanliness, oiliness, temperature, adhesion of other objects or material to it, exact location, any objects near to or touching it.

B. Seizure of Evidence

1. Contraband. The officer will have seized all possible contraband (weapons, stolen property, narcotics). He must be questioned very specifically as to description of all such material.

2. The officer will have taken from the person of anyone arrested all property on his person. Unfortunately, he will have returned to that individual all property he believes rightfully belongs to the defendant. When that has happened, the assistant must direct the officer to return to the defendant, if that is still possible, and take from him all property that is conceivably related to the case, including papers, money, jewelry, tokens, any objects of value, wallet and keys. The assistant should scrutinize this material and compare any list and description supplied by the crime victim or witness of relevant property with the material before authorizing its return.

3. The officer must be questioned in detail about the defendant's clothing, and the details should be compared with any witness' description in any case where the identification will be an issue (in the case), no matter how spurious an issue it is. When distinctive clothing worn by the defendant matches a detailed description given by a witness, the clothing should be seized from the defendant. Where there is a mis-match, the officer and witness must be questioned rigorously to test the reliability of the identification and the reasons for the mis-match. When

clothing is seized, the defendant should be photographed. Shoes, scarves, coats, and hats should be examined most particularly -- these are garments most often noted in detail by witnesses.

4. The assistant must pay particular attention to portable evidence of clear forensic value and seize it: if the witness says, for example, that he was hit with a brick and a brick was found near the scene of the incident, it should be seized if it is still available. If a bullet hit a trash basket, have the basket seized and vouchered. All recovered evidence should be examined for forensic value undetected by the officer -- often the value will be clear from a detailed interview of the witness. The assistant must question the officer and witness closely to ascertain whether any other individuals physically possessed any items of evidence at any time at issue and then interview each of those people (although technical rules of chain of custody do not usually apply to most pieces of physical evidence).

5. In cases of forcible breaking or taking (burglaries, auto larcenies, etc.) the premises or automobile must be minutely examined as to the mode and damage done in the breaking and that damage compared with any tool or instrument recovered from the defendant or from the scene. For example, it is insufficient to accept the inferential conclusion that because there were indentations on a window frame and the defendant had a screwdriver in his

pocket, that the screwdriver caused the indentations. A comparison of the screwdriver with the marks, however, is of great weight (often, of course, against the People's case). Shoes worn by the defendant should be compared with any footprints at any location relevant to the case.

6. The officer must be questioned very closely as to remarks, exclamations, expressions, statements, admissions, pedigree information and confessions made by the defendant. The officer's lack of appreciation for the value of such evidence is compounded by his very natural desire to avoid contributing this type of evidence, which usually exposes him to the acutely uncomfortable cross-examination of a "Huntley Hearing." The substance of all remarks should be elicited, and the questioning of the officer in this area should begin by an informal and seemingly off-the-cuff, casual inquiry as to "What does this guy (meaning the defendant) say about all this?" The prefatory question: "Did the defendant make any statements?", will usually elicit a negative answer from the officer. An officer's simple statement that the defendant made no statements is inaccurate and insufficient and the officer must be probed more deeply, with such follow-up questions as "Well, what did he say about where he got the gun?", or "Why did he say he was out there next to that car in the middle of the night?". Remember the First Law of Criminal Prosecution: The Presumption of Falsity: all witnesses say at least something false. Probe the method by which the "Miranda"

warnings were given -- if they were given. If the officer states that he gave the rights from memory, have him repeat them -- and note the ease, fluency and accuracy of what he says. If the officer has consigned to writing the substance or circumstances surrounding remarks made by the defendant, that writing should be inspected. If he has not, he should be instructed to do so, as close as he can to achieve an accurate and complete narration of the remarks and their circumstances and repeating, as closely as he can, the words used by the defendant. "Cop-ese" should be avoided (e.g. "Me and the female perpetrator...").

7. Inquire into the scientific testing area when relevant. Except in very unusual circumstances (homicides, sex crimes, some large commercial frauds), no scientific testing or analysis other than submission of loaded guns or narcotics for testing will have been performed, contemplated or imagined. Often it is possible early in the case to instruct the officer to have such tests conducted, particularly the obtaining of fingerprints from rooms and property in burglary cases where the defendant was not apprehended inside the premises, or the testing of blood or hair found on a weapon that can be linked to the defendant in assault cases. Usually, however, testing will be of no value because the opportunity has passed. The assistant should inquire in detail into the reasons that the testing is no longer of possible value (re-entry of

the tenants into burglarized premises and obliteration of the prints; handling or wiping of weapons; cleaning of torn, dirtied or semen-stained clothes and the like) to prepare the officer for subsequent cross-examination questions directed toward the failure to obtain such testing.

8. Get names, addresses and descriptions of all possible witnesses to any relevant part of the criminal transaction and arrange with the officer to interview all of them. The officer should be examined in detail as to what each of the witnesses told him and the assistant should clearly understand what the officer is certain of, what the officer is less sure of, what the officer assumed and what the officer does not know at all.

   The more effort that is put into this part of officer preparation, the less the outcome of the case ultimately depends on police testimony, which means the less that the case can be harmed by defense attacks on frailties and claimed falsehoods inherent in police testimony.

   The assistant should not hesitate to ask the officer for his own perception of the witness' credibility, character and reliability. He knows both the witness and the defendant better and has the accumulated wisdom of the street.

9. Circumstances surrounding all prior identifications by civilian and often police witnesses must be explored. This is the second largest area of litigation (after

search and seizure issues) at hearing and trial and it is also the area most susceptible to fundamental injustice. Emotional excitement, suggestion, bigotry and anger are, to many people, powerful inducements to making, at least unconsciously, false identifications. If there has been a reliable identification, the facts and circumstances surrounding it should be detailed. If there has not been a reliable identification, one should be immediately arranged. Thus, if there has been a photographic identification procedure (usually involving showing one or more large books containing numerous "mug shots" to a witness), the facts surrounding that identification must be explored. What was said to the witness, the number of photographs used, inspection of the actual photographs and the vouchering of them for ultimate use at trial or hearing, the time and date of the display of the photo array must all be detailed. If there was a line-up, not only should all that type of information be included, but the assistant must obtain the names, addresses and descriptions of the "stand-in", must compare clothing and hair styles between the suspect and the stand-ins and between suspect and the description of the perpetrator, must obtain a photograph of the lineup, and should closely explore any conversation with the lineup and should closely explore any conversation with the accused as to any request for counsel. In one-on-one in-person confrontations, the inquiry should be even more detailed,

not only of the officer but also of the witness. Such identifications may be used ultimately at trial -- and often that testimony concerning prior identifications is the difference between an acquittal or conviction -- but only if the suggestiveness in such identification is overweighed by proximity in time and place to the incident, and there exist exigencies or other good reasons that justify less formal identification procedures than lineups.

III. COMMUNICATION

The ability of the officer to communicate concerning the incident in which he has made an arrest is as vital as his skills and abilities in acquiring the evidence. The prosecutor should be particularly attuned to problems that come up in Reports and Documents, Pre-trial Interviews and Testimony.

A. Reports and Documents

1. Routine Arrest-related records: The arresting officer is responsible for completing reports that synopsize the allegation, observations concerning the arrest and pedigree information about the defendant. In New York City this is called an Arrest Report. Police officers also make up a report concerning the criminal incident itself and, in cases where the arrest occurs substantially after the crime, this report is made up at a different time and often by different officers. In New York City it is

called the Complaint Report or UF61. Both reports synopsize the victim's version of how the incident took place and may also contain such additional items as descriptions of the perpetrators and listing of property stolen. Often these reports are second or third-hand hearsay and the account may be vastly different from the account told by the witness to the assistant.

The assistant may scrutinize every detail of every such report and check each discrepancy. Such discrepancies must be reconciled with the witness to ascertain the truth and with the officer to discover the error that led to the erroneous narration.

The most common police errors (as opposed to legitimate mistakes by the witness) are:

a. The fact pattern related in the report is in error because the subscribing officer never spoke to the witness;

b. The descriptions listed for perpetrators are the officer's estimates or perceptions from different expressions stated by the witness. (E.g. The witness, asked how tall the robber was, says "About your height." The officer writes down 5' 10". Worse, the witness replies: "Oh, about medium height." The officer subscribes 5' 10".);

c. The times, dates and places are misdescribed because of imprecision by the officer in ascertaining those details;

d. The officer, in cases of multiple defendants, is confused as to which perpetrator did which acts;

e. The officer is shading the account for reasons unrelated to the underlying crime, e.g. to give his partner or supervisor a role in the incident which he did not in fact perform; to explain a substantial and possible unjustifiable use of force against the defendant; to magnify his own role in the incident;

f. The erroneous report has been shown to and subscribed by the witness because the officer did not read the report to the witness or take pains to ensure that the witness understood it when he was given the report to sign.

2. Court Documents: The primary document with which the assistant may be concerned is the Court's accusatory instrument - the felony complaint, information or misdemeanor complaint that is made up on the basis of the officer's account of the incident and is subscribed and sworn to by the officer. All of the above problems can occur at this stage and because the affidavit is sworn, the recitation of erroneous material is more serious, its use as impeachment material is greater and the willingness of the officer to concede error in recording is reduced. The assistant must read the entire document, both the introductory material of location, time, date and place and the recitation of facts, as well as the accusatory part, very carefully (although the witness is deemed not

to have sworn to the accusatory portion of the affidavit).

3. Particular Problem Reports: The Unusual Incident Report (New York City only), any recommendation for citation or honors, and the detective reports. The Unusual Incident Report, compiled in major crimes or any situation where the officer used his weapon, is based on many conclusory and hearsay accounts and is even more routinely erroneous in major details than the routine reports. It is often difficult or impossible to ascertain who supplied information or who the actual writer of the report is (which diminishes greatly the report's value to the defense as "Rosario" material).

The recommendation for citation is a much greater problem. This is the arresting officer's own narration of the incident in question supporting his recommendation that he be given a merit citation. It usually, if not always, grossly exaggerates his role and the amount of heroism surrounding it and quite often contains blatant misstatements of fact and outright falsehoods. In every case, no matter how seemingly routine, where the arresting officer had any form of active role, the assistant should ask if there has been a citation recommendation and must read it carefully if there has been one. The officer should be asked not to submit any such recommendation if he has not yet done so, or if he does, the assistant should scrutinize it for accuracy. The fact that the

officer did nothing particularly meritorious or heroic in the case at hand should not lull the assistant into the belief that the officer will not submit a citation recommendation -- to the contrary, it should make the assistant doubly alert.

Detective activity reports (called, in New York City, Complaint Follow-Up Reports or DD-5's) are sometimes made up for the purpose of showing superior officers the amount of work detectives are devoting to particular cases and not for any substantive reason. They, thus, may contain erroneous, misleading, irrelevant and inaccurate material concerning the progress of an investigation, particularly reflecting canvasses of buildings that are not in fact done, notations indicating interviews of witnesses not in fact held, synopses of witness interviews that are not correct and second-and-third-hand accounts that are wrong. At least one DD-5 -- and as many as hundreds -- exist in each felony case where the arrest followed the incident by a day or more. The assistant must obtain and scrutinize each report and must interview the subscribing detective.

B. Pre-Trial Interviews

The basic rule to follow where interviewing the police officer(s) involved in a particular case is to conduct all interviews in the context that the officer is being interviewed in preparation for trial. The assistant should be attuned to conclusions by the police officer that flow, to a greater or lesser extent, from his own state of mind rather than the

suspect's. For example, the officer's statement that the suspect "knocked down" someone is, or should be, based on his actual observations of a number of physical acts which led him to that conclusion. There are hundreds of such conclusions that will be destroyed by competent cross-examination, and the assistant must explore them in the pre-trial interview. The officer's account that the perpetrator "saw me and ran," or that the officer saw "a pool of blood" or the like should not be taken on face value. Some matters of particular note:

1. Selective Narration

The police officer may omit particular facts or details for a number of reasons. Facts which he has learned may or will subject him to a suppression hearing often go un-volunteered. Thus, the officer must be questioned very closely about all prior identifications, particularly photographic arrays and show-ups; all temporary seizures and perusals of the details and circumstances of all remarks and statements made by the defendant (discussed above).

Also, the officer may omit facts that will, he believes, result in other police officers' being inconvenienced by coming to court. Thus, if some other officer has possession of recovered contraband or physically participated in the arrest or chase of the defendant or ran the identification procedure or searched the defendant or took statements, the officer may omit relating that information unless pressed as a favor to the absent

officer who doesn't want to be involved in the case. In each case the arresting officer should be questioned not only as to what he did and what he saw but also to what he was told by other officers involved and as to what he saw or knows that they did.

2. Accommodation Falsehoods

The officer may ascribe to himself acts done by other officers for the same reasons that he may omit telling about those acts at all. This type of fact relation -- which may end up in testimony where there is inadequate probing fo the officer's account, and thus become known as accommodation perjury -- is usually the product of the same type of misplaced altruism as Selective Narration.

C. Testimony

The police officer should be prepared for testifying as if he had never testified before, no matter how experienced a witness he is. The assistant must completely familiarize himself not only with the facts of the case but with the personality, character and communication skills of the police officer and must evaluate those characteristics in light of the tension of adversarial litigation. The assistant should never assume that the officer is capable of handling any particular facet of examination and cross-examination without testing it and must go over the account of the officer, the types of questions the assistant intends to ask at the particular proceeding (remembering the different burdens and admissibility rules at the Grand Jury, Suppression Hearing and Trial stages) and must

test the officer's coolness and candor with trick, hostile and unfair questions of the sort to be expected in cross-examination. Some common rules and problems are:

1. The assistant should use the interview setting to emphasize to the officer that all the assistant wants of the officer is the narration of the absolute truth. There will be inconsistencies between officers' accounts, or between the current testimony and prior testimony or reports or the like. These discrepancies will be brought out fully and candidly through direct examination of the officer and he should be told that and should have asked of him the questions that explore and, hopefully, defuse those inconsistencies. This is a good opportunity to impress on the officer the absolute need of candor: a jury that perceives that the police officer is being less than fully honest is an acquitting jury, no matter how strong the proof;
2. The same witness-preparation tactic often generates, in the officer, evasiveness, hostility or anger. Again, the assistant can use the interview session to impress on the officer the need of avoiding anger and hostility. Such a witness does not think well in responding to questions and gives the jury the perception that he is less than fully truthful. The officer should be instructed to delay his answer to a question until any anger cools enough to answer courteously and cooly;

3. The officer should be repeatedly admonished, particularly when his answers to preparation questions are incorrect, to listen and fully understand every question before answering. He should be told to ask the questioner for an explanation or re-reading of any question he does not understand. He should be told repeatedly to answer each question truthfully, specifically and precisely from only his own recollection. He should be told -- like any other witness -- that the shortest answer on cross-examination is the best answer; when a question can be answered "yes" or "no", that should be the answer;
4. The officer should be told to answer only those questions to which he knows the answer and not to attempt to answer -- to bluff or guess -- questions to which he does not know the answer. HOWEVER, the assistant must be aware that many police officers have a disconcerting propensity to develop nearly complete amnesia, answering that he does not know the answer, to every question - no matter how simple - after being tripped up by opposing counsel on one question. The officer should be told that if he thinks he knows the answer, or knows an approximate answer, he shouldn't be afraid to say so, with appropriate reservations as to his certainty;
5. The assistant should go over direct testimony with the officer, telling the officer the thrust of the answers he is looking for in response to particular questions. The assistant, however, should avoid coaching the police

witness and should, as a general rule, ask specific questions of the officer and evaluate the answer, then re-phrase questions where the answers were inadequate;

6. The assistant should not normally give the police witness -- at least in routine cases -- a copy of his prior testimony for perusal. There will be some loss of spontaneity and the defense attorney will have been given some fuel for impeachment. Where the testimony is extensive, however, or complex, the assistant should go over the details of that testimony by asking questions of the officer along the same lines. The assistant should compare the officer's answers with his prior responses (without showing or telling the officer the prior responses) and where there are inconsistencies, the assistant should tell that to the officer and go over the area, attempting to reconcile or clarify any confusion. The officer should be strongly admonished, however, that he must tell the truth, and if his current recollection is inconsistent with a prior answer, he should candidly admit that and expect to be questioned on it in court;

7. The assistant should follow the same procedure with police reports and inconsistencies and inaccuracies in them. Here, the assistant must be even more assertive in instructing the officer to admit the incorrectness of any erroneous material in the police reports. Police officers are often unwilling to acknowledge that they made up an incorrect report and some have been known to testify

falsely so as to be consistent with a report. The officer should be instructed to listen to the thrust of questions, to sense when he is being brought into the position of being inconsistent with a prior report or prior testimony and to be truthful -- not to be taken off-guard, but to admit any mistake he has made;

8. In going over anticipated testimony, the assistant should attempt to discourage the use, by the officer, of police jargon. When he makes references to military-style time, to number references to particular radio dispatches, to "exiting" his vehicle or conducting a "vertical patrol", the assistant should come back with lay vernacular in those areas. The officer should not be coached, however, to speak in a vein that is unfamiliar or uncomfortable to the officer, only to avoid words and phrases that cannot be natural to anyone. Much police argot is uttered in a mistaken perception of the kind of language that is suited to legal proceedings and the officer is no more comfortable with it than the jury;

9. The officer should be instructed to dress and carry himself comfortably but appropriately for a courtroom. If he normally works in uniform, he should wear it; if he normally works in civilian garb, he should wear a suit and tie or a jacket and tie. Undercover wear is inappropriate, as are leisure suits and lounge wear. He should be instructed to speak forcefully but casually and professionally. Specifically, he should be told: No gum

chewing, keep his hands out of his pocket and folded in his lap or placed on the arms of the chair (to avoid, like all witnesses, nervous habits of putting hands in front of one's mouth or speaking with one's hands) and to always look at the questioner when listening and to look at the questioner, the judge or the jury when answering. The assistant should advise the officer not to look at the assistant except when the assistant is asking questions and the assistant should take pains to insure that he or she is not looking at the officer when the officer is testifying on cross-examination;

10. The assistant must remember that the officer is a witness in court, not an ally. The officer is just as capable of mistake, bias or perjury as any other witness, just as he is as vulnerable to confusion, loss of memory and unfair attack as any other witness. The assistant's role vis-a-vis a police witness is as an officer of the court, not protector. The assistant has a duty, under the Canons of Ethics and the Brady line of cases, to insure that the officer is speaking truthfully and that material which throws doubt on the accuracy of his testimony is made known to the defendant and to the trier of the fact. The officer, however, is as entitled to respect and the presumption of integrity as any other witness, no matter how professional he is. And, ultimately, the officer and the assistant have the same obligation: to ensure that justice is done to the defendant by means of fair and truthful process of trial and verdict.

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THE POLICE OFFICER AS A WITNESS: A PRACTICAL PERSPECTIVE

DEFENSE VIEW

by

MARTIN B. ADELMAN, ESQ.

TABLE OF CONTENTS

THE POLICE OFFICER AS A WITNESS: A PRACTICAL PERSPECTIVE

DEFENSE VIEW - MARTIN B. ADELMAN, ESQ.

Revised June 1981, by
Martin B. Adelman, Esq.
revised June 1985 by
John L. Callaghan, BPDS
Senior Staff Attorney

I - INTRODUCTION

A criminal trial without a police witness is rare. They sometimes are the sole witnesses against the defendant, or bolster other proof of guilt by testimony of confessions, statements or admissions, flight or discovery of the fruits of the crime. Even when the arrest was remote from the crime, the officer will occasionally testify to rebut some claim made by the defendant. Lastly, the officer may be called by the defense to establish one of its claims or to rebut another prosecution witness. Indeed, even where the officer's testimony adds nothing to the case against the defendant, many prosecutors will call him, just to impress the jury with the fact that this is a criminal trial.

Dealing with police officers as witnesses poses special problems for defense counsel. The officer receives formal training about testifying, discusses the subject with fellow officers and has the benefit of the greatest teaching device of all -- experience as a witness (sometimes more than defense counsel as a lawyer). The officer is also better able to participate in "witness preparation" by the prosecutor than is a civilian witness.

On the other hand, the officer carries the impediment of having to fill out multiple forms regarding the circumstances of the crime, his investigation and the arrest. He has to testify before the grand jury

and at various pre-trial hearings. All of these provide ammunition for cross-examination.

The last component in this picture is the public's (and thus the jurors') attitudes toward police officers. Some percentage will follow the judge's standard admonition and regard the officer's testimony as they would any other witness'. Most people will probably follow their preconceptions, ranging from sublime confidence to unshakable skepticism.

Cross-examination of the officer at trial is the culmination of all defense counsel's contacts with the officer. This outline will attempt to present useful suggestions for handling this task. Mastery of cross-examination comes with learning (at lectures such as this), reading,* preparation, more preparation, natural skill and experience.

Before dealing with cross-examination of the officer-witness, some time can profitably be spent discussing the situations in which defense counsel encounters the officer, and how these affect cross-examination.

II - PRE-COURT CONTACT WITH THE OFFICER

(A) Client in custody. Assume, as frequently happens, that the defendant is arrested and defense counsel is contacted. Be sure to learn who arrested the defendant, where the defendant is being held and what the charges are. Immediately try to locate the defendant and talk to him, in person or by telephone. Then speak to the arresting officer. The attitude should be non-hostile and defense counsel should make notes while talking to the officer. Be sure to cover the following:

(1) the officer's full name, shield and command.

*An excellent book is Francis L. Wellman's The Art of Cross-Examination; (4th rev. ed., MacMillan, New York, 1962)

(2) inform him of your representation of the defendant.

(3) ask "What's it about?"

(4) ask if your client already made a statement or has been been identified.

(5) specifically instruct the officer to take no (further) statement from your client nor seek a waiver by the client of any of his rights, in your absence, in this case or in any other matter.

(6) get further details of charges, including officer's estimation of the case.

(7) discuss possibility of desk appearance ticket (CPL Article 150), if applicable.

(8) agree to meet the officer in court.

(B) Arranging a surrender. Your client contacts you and tells you he is wanted by the police. After a full interview, contact the officer who is seeking the client, if known; otherwise contact the detective squad in the locale where the crime occurred, or where the client resides, or the prosecutor's office. After locating the proper officer:

(1) inform him of your representation.

(2) seek details of charges.

(3) instruct officer regarding statements and waivers (see (5) above), and give client a letter embodying the instructions to deliver to the arresting officer or his superior officer.

(4) arrange a mutually convenient time for surrender.

(C) Representation at lineup. If the client will be in a lineup, be sure to attend (bring someone else along as a witness, as well).

Prepare by interviewing the client and the officer, and, if possible, the witnesses prior to the lineup. The role of defense counsel at a line up has most recently judicially defined as relatively passive. The Court of Appeals in People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159, 165 (1982), cert. denied 459 U.S. 846 (1982), stated that "[c]ounsel may not actively advise his client during the lineup itself."

Note: Paperno & Goldstein, Criminal Procedure in New York, Acme Law Book Company, §78, page 146 offers valuable suggestions. Consider trying the following, where relevant:

(1) taking your own photograph of the array;

(2) suggesting a blank lineup;

(3) having the client change clothes with someone else;

(4) having the client and stand-ins dressed in similar clothes;

(5) arranging for client to be placed in different positions;

(6) reviewing wording of questions addressed to the witness;

(7) ensuring that each witness views the lineup alone;

(8) advising defendant to assume the same pose as stand-ins

(9) advising the client not to look suspicious.

Make copious notes of all that occurs at the lineup, particularly factors which have legal effect on identification procedures (for use at a Wade hearing). Try again to interview witnesses after the lineup, away from police officers.

The above actions are proper on the part of counsel to assure a fair lineup. Cf. People v. Yut Wai Tom, 53 N.Y.2d 44, 439 N.Y.S.2d 896 (1981).

III - ARRAIGNMENT

Having the case called is the last item, there is much to do before you step up before the Judge. First, get a copy of the papers, including the complaint, locate the officer and try to talk to him. Discuss:

(A) The case. You are seeking information here, including the officer's assessment of the case. Do not cross-examine or seek impeachment material for later cross-examination.

(B) Bail issues. Ascertain if the defendant ran or resisted arrest; if not, you can argue "the wicked flee when no man pursueth; but the righteous are as bold as a lion" (Proverbs, 28:1).

IV - PRELIMINARY HEARING

While a felony case is in the local criminal court, the defendant is entitled to a preliminary hearing (CPL §180.10). The function of the hearing is to determine if "there is reasonable cause to believe that the defendant committed the [crime] charged." This is a very low standard of proof -- even less than a prima facie case. A hearing should almost never be waived, if available.

(A) Defense preparation for preliminary hearing. If time allows, subpoena the police department for all relevant reports on the case. Frequently, the testifying officer will not have all his own forms with him, much less those of other officers. The subpoena must be "so ordered" (CPL §610.20). People v. Hodge, 53 N.Y.2d 313, 441 N.Y.S.2d 231 (1981); see also CPLR §2307 and People v. Simone, 92 Misc.2d 306, 401 N.Y.S.2d 130 (Sup. Ct. Bronx Co. 1977), aff'd., 71 A.D.2d 554 (1st Dept. 1979) (judicial subpoena duces tecum must be issued by the court on

motion and on one day's notice to the opposing party and the target of the subpoena; subpoena is not discovery device). Cf. People v. Grosunor, 108 Misc.2d 932, 439 N.Y.S.2d 243 (N.Y.C. Crim. Ct. Bronx Co. 1981), for subpoena of records of non-police government personnel where similar rules apply. (In Grosunor, a substantial issue arose concerning the District Attorney's standing to challenge a subpoena served upon an agency and employee not under his jurisdiction.) The subpoena should be served several days in advance of the hearing and defense counsel should check with the clerk of the court as to whether the records have been received. If they have, defense counsel should inspect them prior to the commencement of the hearing (some courts require judicial authorization for inspection).

(B) Prosecution's direct case at preliminary hearing. In most instances, the prosecutor will seek to elicit the minimum necessary testimony to warrant holding the case for the grand jury or trial. The prosecution calls its witnesses first and hears the burden of proof on the limited issue presented. While the officer is testifying on direct, keep in mind:

(1) Will the prosecution be able to make out reasonable cause to believe that the defendant committed the crime charged? If not, consider confining your cross-examination to that issue, in hopes of winning the preliminary hearing. But note if the prosecution loses a felony prelminary hearing (and the local criminal court dismisses the charge), the prosecutor still can present the case to a grand jury and obtain a valid indictment.

(2) Note whether anything in the officer's testimony is consistent with what other witnesses have said or what is in the police reports.

(3) Object to questions or answers only if you have a good reason or a chance of winning the hearing. First, you want all the information the officer has to give and to estimate the officer's impact as a witness. Also, you want to set a relaxed atmosphere in the hope that this may carry over to your examination.

(C) Cross-examination of the Officer at the Preliminary Hearing.

Prior to cross-examination, call for the production of all reports and statements of the officer under People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961); such reports and statements must be produced at preliminary hearings. Butts v. Justices, 37 A.D.2d 607, 323 N.Y.S.2d 619 (2d Dept. 1971), appeal dism'd, 29 N.Y.2d 707, 325 N.Y.S.2d 747 (1971). A prosecutor's work sheet, quoting or summarizing the officer's account, is Rosario material. People v. Consolazio, 40 N.Y.2d 446, 387 N.Y.S.2d 62 (1976), cert. denied, 433 U.S. 914, 97 S.Ct. 2986 (1977). If any dispute arises as to the existence of prior statements, the court has the responsibility of determining whether any relevant statements exist and may inspect the statement or the entire file in camera. People v. Poole, 48 N.Y.2d 144, 422 N.Y.S.2d 5 (1979). If you have not seen the disclosed material before, ask for a few moments to review it and make notes about the contents. In conducting the actual cross-examination of the officer, avoid a hostile approach.

(1) Generally, first cover matters relevant to the issue. If the prosecutor objects, you should win the point and

perhaps gain breathing room to probe further. The judge will allow you the greatest latitude in areas relevant to the hearing. However, if a question strays from the probable cause issue, expect a prompt objection on the ground that it is beyond the scope of the preliminary examination.

(2) Pin down the officer's answers on matters that will be critical at trial or where there is an inconsistent statement (without revealing the inconsistency and educating the witness).

(3) Seek identity of other persons (including other police) who may be witnesses at trial.

(4) Try to get as much discovery possible. While even the Supreme Court has recognized that the preliminary hearing is valuable as a discovery device for the defense [Coleman v. Alabama, 399 U.S. 1, 9; 90 S.Ct. 1999, 2003 (1970), per Brennan, J.] most local criminal court judges keep a tight rein on defense counsel.

People v. Hodges, supra, characterized preliminary examination as a "minitrial," with disclosure available to a limited degree which significantly presents a vital opportunity for defendant to obtain the equivalent of disclosure. Thus, "there's no harm in asking" and therefore counsel can explore other facets of the case, not strictly relevant on the hearing, to the extent that the court will allow such examination. Lay the groundwork for cross-examination at trial or pre-trial hearing.

Aside from the obvious preview value of such testimony, you may benefit from the officer's lack of preparation to testify on these subjects.

(5) Consider calling other officers (not called by the prosecution) as defendant's witnesses. The defense has a right to call witnesses, subject to the court's discretion. CPL §180.60(7). This tactic is rarely permitted by local criminal court judges and one must anticipate that all officers will undoubtedly testify adversely to the defendant. This device should only be attempted where you have no hope of winning the hearing, but want to pin down the testimony of as many police witnesses as you can. As the officer is your witness, you cannot use the normal methods of cross-examination.

(6) Always get at least one ruling limiting your cross-examination to avoid the perpetuation of testimony. See People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975); People v. Corley, 77 A.D.2d 835, 431 N.Y.S.2d 21 (1st Dept. 1980) appeal dismissed, 52 N.Y.2d 783, 436 N.Y.S.2d 21 (1980).

V - DISCOVERY

Introduction

CPL Article 240, effective January 1, 1980, changed discovery procedure for both sides. [For an extensive discussion, see Criminal Discovery, 1982 by Hon. D. Bruce Crew, III, published by BPDS.]

Under the prior law, a court order was required for discovery [CPL §240.10(1)]. The new law permits discovery upon demand for routine material for both the People and the defendant [CPL §§240.10(1), 240.20, 240.30].

The new CPL Article 240 specifies what property the defendant may demand from the prosecutor. Under the prior law, only the defendant's statements made to a grand jury or law enforcement personnel were automatically discoverable. Physical and mental examination reports, and all other material within the prosecutor's control were within the judge's discretion to order discovery. The new statute, CPL §240.20(1)(a)-(g), states what property is discoverable on demand. This includes physical or mental examination reports, photographs or drawings of the defendant, property taken from the defendant or his codefendant, and any evidence favorable to the accused as required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

Note: Under the new CPL Article 240, "at the trial" means as part of the People's or the defendant's direct case. CPL §240.10(4). Therefore, the provision in CPL §240.40 for discretionary discovery of any material that the People intend to introduce at trial which is necessary to the defendant's preparation of his defense, arguably does not include matter the People do not intend to offer as part of the direct case, but might refer to on cross-examination or in rebuttal, unless such material is discoverable under Brady or Rosario.

(A) Discovery of Police Reports; Rosario Material. Police officers' reports made in connection with their investigation and their records of the statements of witnesses are "Rosario material," that is, they must be given to the defense if they relate to the subject matter of

the testimony that the witness will give at trial. People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961). In People v. Consolazio, 40 N.Y.2d 446, 387 N.Y.S.2d 62 (1976), the rule in Rosario was extended to any oral statements offered by a witness which an Assistant District Attorney had noted on his worksheets for the case.

The significance of the substance of the witness' prior statements is irrelevant to any determination of whether the failure to turn over Rosario material was harmless error; such failure will only be deemed harmless when the material not turned over is merely duplicative of other material which was made available to defense counsel. Consolazio, supra; see also People v. Cadby, 75 A.D.2d 713, 427 N.Y.S.2d 121 (4th Dept. 1980); People v. Baker, 75 A.D.2d 966, 428 N.Y.S.2d 353 (3rd Dept. 1980). For example, where the police report (Rosario material) that was not turned over was merely duplicative of police notes that defense counsel had already received, the fact that the report was not turned over was not prejudicial to defendant and therefore not a basis for reversal. People v. King, 79 A.D.2d 992, 434 N.Y.S.2d 462 (2d Dept. 1981). See also People v. Renner, 80 A.D.2d 705, 437 N.Y.S.2d 749 (3rd Dept. 1981), where failure to give grand jury testimony of a witness did not result in error since defendant was not convicted on the specific count to which the testimony referred.

(B) Discovery of Police Personnel files. Discovery of police personnel files is limited by statute. A person may apply to a court, which must review the request, give interested parties an opportunity to be heard and then may order such records made available to the person requesting them as the court deems relevant and material after an in

camera review and determination. Civil Rights Law §50-a, negating People v. Sumpter, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sup. Ct. N.Y. Co. 1973).

(C) Discovery of Scientific Tests and Examination Reports. Reports of scientific test results are discoverable by the defense under CPL §240.20(1)(c), and by the prosecutor under CPL §240.30(1). Both sides must make a diligent good faith effort to make available such property where it exists, but are not required to obtain by subpoena duces tecum property which opposing counsel may thereby obtain. CPL §§240.20(2); 240.30(2).

VI- HEARINGS ON PRETRIAL MOTIONS

Where defense counsel has moved to suppress evidence (e.g., confession, identification, search and seizure) pursuant to CPL Article 710 or on other grounds, and the motion is not granted or denied on the papers, a hearing must be held. CPL §§710.60; 710.40. The hearing is held before the judge alone, prior to trial.

The issues to be determined will usually be legal: based upon the officer's claims, were his actions proper? Rarely will the court disbelieve the officer even if his story is improbable, or he is impeached, or contradicted by the defendant or those close to him. People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971), and People v. McMurty, 64 Misc.2d 63, 314 N.Y.S.2d 194 (N.Y.C. Crim. Ct. N.Y. Co. 1970). But see People v. Quinones, 61 A.D.2d 765, 402 N.Y.S.2d 196 (1st Dept. 1978), and People v. Gonzales, 109 Misc.2d 448, 439 N.Y.S.2d 970 (N.Y.C. Crim. Ct. Bronx Co. 1980). Testimony from disinterested witnesses, independent experts, or incontrovertible physical or documentary proof will generally be

necessary to move the court to discredit the officer's factual account. Ultimately, the hearing court, having the benefit of observing the witnesses as they testify, can credit the testimony of any witness, and unless substantially unsupported by the record, its findings of fact will rarely be disturbed. People v. Morris, 83 A.D.2d 691, 442 N.Y.S.2d 607 (3rd Dept. 1981).

In evaluating the propriety of the officer's acts, the court will obviously apply the legal tests established by the relevant cases. Additionally, many police departments issue "legal bulletins" to their officers establishing departmental practice for conducting line-ups, obtaining confessions, etc. A sample is annexed. Relevant and up-to-date departmental memoranda may be obtained by a "so ordered" subpoena. Proof of a departure from established departmental procedures may be significant in establishing your case on the pre-trial hearing.

(A) Preparing for the pre-trial hearing. Prepare factually by reviewing the facts in detail with the defendant and witnesses and subpoena all police department records. Prepare legally by reading all the relevant cases, particularly the most recent ones, as the law is constantly changing in the most sensitive area of police-citizen confrontations. Ask the court to order disclosure of Rosario material prior to commencing the hearing as disclosure at pretrial hearings is required under People v. Malinsky, 15 N.Y.2d 86, 262 N.Y.S.2d 65 (1965).

(B) Direct examination by the prosecutor. The prosecution bears the burden of going forward, the defendant bears the burden of proof. People v. Malinsky, supra (search and seizure); People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965) (confessions) and People v. Rahming, 26 N.Y.2d 411, 311 N.Y.S.2d 292 (1970) (identification). Thus, the

district attorney will proceed with direct examination of the officer first.

During the direct examination, note whether the prosecutor has established the vital legal points with respect to the issue being tried. If he has not, and you do not expect the defect to be cured by another witness, strongly consider staying away from the area where the testimony was insufficient or even foregoing cross-examination entirely.

(C) General observations on cross-examination at pre-trial hearing. In deciding on your course of cross-examination, judge your own abilities as a cross-examiner and the officer's abilities as a witness (how well he testifies and how well prepared he seems). Have a clear idea of what you are trying to establish by your examination.

As in the preliminary hearing, evaluate your chances of success on the issue being litigated. If you have a chance, consider a narrow inquiry focusing only on relevant issues. If you do not, a broader scope for discovery and trial preparation is in order.

(D) Obtaining minutes of the hearing. If there has been a hearing (whether you have won or lost on the issue), always be sure to obtain the minutes for use at the trial. If the defendant can afford to pay for them, order them from the stenographer and follow up to be sure they are done. If the defendant is indigent (even if defense counsel is retained) the minutes can be obtained at government expense. See County Law §722-c and People v. Zabrocky, 26 N.Y.2d 530, 311 N.Y.S.2d 892 (1970). However, to be timely, the request for free minutes should be made, at the latest, at the outset of the hearing. People v. Peacock, 31 N.Y.2d 907, 340 N.Y.2d 642 (1972).

VII - ISSUES ARISING AT THE PRE-TRIAL HEARINGS

(A) Right to counsel. This issue is fundamental in most identification and confession cases. The Court of Appeals in People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159 (1982), cert. denied, 459 U.S. 846 (1982), held that there is no absolute right to counsel at a lineup (corporeal identification) when conducted as part of an investigation even if a defendant has requested the presence of his attorney. The decision was premised on the necessity for prompt investigation as close in time as possible to the occurrence of the incident. Only after initiation of formal prosecutorial proceedings does this right indelibly attach. Note that not all identification cases involve the right to counsel: it is not applicable at photo arrays, [People v. Gonzalez, 27 N.Y.2d 53, 313 N.Y.S.2d 673 (1970), cert. denied, 400 U.S.996 (1971)], or in prompt post-crime confrontations or unarranged viewings [People v. Logan, 25 N.Y.2d 184, 303 N.Y.S.2d 353 (1969), cert. denied, 396 U.S. 1020 (1970); People v. Brnja, 50 N.Y.2d 366, 372; 429 N.Y.S.2d 173, 176 (1980); People v. Smith, 110 Misc.2d 616, 442 N.Y.S.2d 719 (Sup. Ct. Bronx Co. 1981)]. A defendant represented by an attorney may not be subjected to interrogation, whether or not the defendant is in custody, unless he waives counsel in the presence of counsel. People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980), broadening the rule in People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419 (1976) and People v. Arthur, 22 N.Y.2d 325, 292 N.Y.S.2d 663 (1968). However, even a defendant who is represented by counsel may volunteer a statement to police. People v. Kaye, 25 N.Y.2d 139, 303 N.Y.S.2d 41 (1969); People v. Pinzon, 44 N.Y.2d 458, 406 N.Y.S.2d 268 (1978). Such volunteered statements must be genuinely spontaneous and not the result of any subtle conduct, acts or

remarks of police officers designed towards indirectly eliciting incriminating responses. Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682 (1980); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977). Nor may the statements be the product of inducement, encouragement, provocation, or acquiescense, no matter how subtly employed. People v. Stoesser, 53 N.Y.2d 648, 438 N.Y.S.2d 990 (1981); People v. Grimaldi, 52 N.Y.2d 611, 439 N.Y.S.2d 833 (1981); People v. Cunningham, 49 N.Y.2d 203, 424 N.Y.S.2d 421 (1980); People v. Maerling, 46 N.Y.2d 289, 413 N.Y.S.2d 316 (1979). In People v. Gillespie, 83 A.D.2d 712, 442 N.Y.S.2d 721 (3rd Dept. 1981), defendant, after arrest upon an information and a warrant, questioned police officers about the charges against him. In the course of this discussion defendant made inculpatory statements. The court found his statements not "blurted" out but the product of a conversation between defendant and police officers and, therefore, inadmissible under Samuels, Settles and Cunningham. Cf. People v. Lanahan, 55 N.Y.2d 711, 447 N.Y.S.2d 139 (1981); People v. Lucas, 53 N.Y.2d 678, 439 N.Y.S.2d 99 (1981); People v. Rivers, 83 A.D.2d 978, 443 N.Y.S.2d 35 (3rd Dept. 1981), aff'd, 56 N.Y.2d 476 (1982). Statements obtained in violation of defendant's right to counsel may be used to impeach a defendant who takes the stand and testifies inconsistently with those statements if the statements were voluntary. People v. Maerling, 64 N.Y.2d 134, 485 N.Y.S.2d 23 (1984). Courts have narrowly construed any assertion that defendant waived counsel or volunteered statements to the point that any post-arrest activity by police officers leading to incriminating statements is subject to minute scrutiny. Cf. People v. Barnes, 83 A.D.2d 978, 443 N.Y.S.2d 68 (1st Dept. 1981), for the extent to which reviewing courts will proceed in searching the record for deliberate or negligent

failure to respect a defendant's right to counsel. Essentially, almost any remarks by a police officer which would appear designed to trigger a defendant's response can render statements inadmissible. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981).

A represented defendant may not be questioned even if the questioning is about an unrelated charge. People v. Rogers, 48 N.Y.2d 167, 422 N.Y.S.2d 18 (1979). One police agency's actual knowledge of such an unrelated charge is not constructively imputed to another unless the two agencies are involved in what might be deemed a joint investigation or there is an indication of evasion of the limitations imposed on an agency having actual knowledge. People v. Fuschino, 59 N.Y.2d 91, 463 N.Y.S.2d 394 (1983). People v. Bertolo, 65 N.Y.2d 111, 490 N.Y.S.2d 475 (1985) (non-custodial interrogation, where police do not actually know that earlier unrelated charges are pending and that defendant is represented by counsel on the prior charges does not violate defendant's right to counsel and doesn't require imputation of knowledge of defendant's representation.) People v. Bertolo, 65 N.Y.2d 111, 490 N.Y.S.2d 475 (1985). Further a defendant has a right to counsel which attaches when an accusatory instrument is filed, as that instrument commences the criminal action. Accordingly, an unrepresented defendant against whom a felony complaint was filed could not be questioned unless he waived counsel in the presence of counsel. People v. Charleston, 54 N.Y.2d 622, 442 N.Y.S.2d 493 (1981); People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892 (1980); People v. Muccia, 83 A.D.2d 687, 442 N.Y.S.2d 312 (3rd Dept. 1981); People v. Howard, 106 A.D.2d 663, 482 N.Y.S.2d 917 (2d Dept. 1984).

If a defendant is in custody and his whereabouts are concealed from his attorney, any statements elicited from the defendant will be inadmissible at trial even if he has waived his constitutional right to the presence of counsel. People v. Bevilacqua, 45 N.Y.2d 508, 410 N.Y.S.2d 549 (1978). In People v. Brown and Reed, 66 A.D.2d 158, 412 N.Y.S.2d 522 (4th Dept. 1979), the defendant was taken into custody and questioned concerning a recent murder. He had neither requested nor retained counsel. The public defender's investigator called the District Attorney and inquired as to his whereabouts. The District Attorney denied that defendant was in custody at that time. The court excluded from trial those statements made by the defendant after the phone call, on the ground that his deception by public officials had prevented defendant from receiving the assistance of those legitimately concerned with his welfare. In People v. Bartolomeo, 53 N.Y.2d 225, 440 N.Y.S.2d 894 (1981), defendant, arrested on an arson charge, was represented by counsel; subsequently, he was questioned by detectives on a homicide matter; the detectives were aware of the arson case. His statements were ordered suppressed since officers had actual knowledge and were under an obligation to inquire whether defendant was represented by counsel. Compare People v. Kazmarick, 52 N.Y.2d 322, 438 N.Y.S. 247 (1981); see also People v. Servidio, 77 A.D.2d 191, 433 N.Y.S.2d 169 (2d Dept. 1980), aff'd., 54 N.Y.2d 951 (1981)

In cross-examining the officer in a case where right to counsel is an issue, focus on:

(1) The precise language of the warnings administered by the officer, did he read to the defendant from a card or recite warnings from memory? Defects in the rendition of

the warnings are frequently fatal to the prosecution's case. People v. Dunnett, 44 A.D.2d 733, 354 N.Y.S.2d 174 (3rd Dept. 1974). But see California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806 (1981) (no requirement of the exact order in issuing Miranda warnings).

(2) The precise language of the defendant's waiver of his rights. Mere silence, after receiving the warnings, may not be enough. People v. Dellorfano, 77 Misc.2d 602, 352 N.Y.S.2d 963 (Suffolk Co. Ct. 1974); People v. White, 85 A.D.2d 787, 445 N.Y.S.2d 327 (3rd Dept. 1981) (mere affirmative responses were insufficient under all of the facts and circumstances in the record to establish the Poeple's burden of proof of voluntariness). In this aspect of the inquiry, the defendant's education, health, criminal background, intelligence, etc., are all important factors in determining if he knew and understood the rights he allegedly waived. If these are real issues for the defense, consider how you can establish them through the officer.

(3) Any attempt by the defendant to refuse to answer, limit questioning, or seek further information on his right to counsel may negative a waiver, even if initially properly obtained.

If a defendant indicates that he wishes to exercise his right to remain silent, the interrogators must scrupulously honor his request by cutting off questioning. See Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321 (1975);

People v. Kinnard, 62 N.Y.2d 910, 479 N.Y.S.2d 2 (1984). However in Mosley the United States Supreme Court found petititioner's statements voluntary because after Mosley had refused to answer, "the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been the subject of the earlier interrogation." Id., 423 U.S. at 106, 99 S.Ct. at 327. Furthermore, if a defendant invokes his right to counsel, any purported subsequent waiver of that right cannot take place outside the presence of counsel. People v. Cunningham, 49 N.Y.2d 203, 424 N.Y.S.2d 421 (1980).

(4) Any statements made by the police officers to the defendant in order to induce him to waive his rights. Misstatements of fact to the defendant, in order to induce a waiver, are constitutionally impermissible. Miranda v. Arizona, 384 U.S.436, 476; 86 S.Ct. 1602, 1629 (1966). However, the police need not inform the defendant as to the gravity of the charges against him. People v. Lewis, 43 A.D.2d 989, 352 N.Y.S.2d 248 (3rd Dept. 1974).

Note that resolution of the right to counsel issue is only for the court at the pre-trial hearing; the defense may not relitigate the issue to the jury at the trial. [CPL §710.70(3)(4)].

(B) Identification. Where there has been a previous identification of the defendant, from a photo, at a show-up or a lineup, the defense is

entitled to a pre-trial hearing (called a Wade hearing) to test the reliability of the identification. If the defense can establish that the identification procedure was unnecessarily suggestive and conducive to mistaken identification, the court will bar the witness from testifying at the trial regarding the prior identification. People v. Damon, 24 N.Y.2d 256, 299 N.Y.S.2d 830 (1969). Additionally, unless an independent basis for the witness' ability to identify the defendant can be established, the tainted prior identification may bar the witness from making an in-court identification of the defendant at all. People v. Ballott, 20 N.Y.2d 600, 286 N.Y.S.2d 1 (1967); see also People v. Torres, 72 A.D.2d 754, 421 N.Y.S.2d 275, 277 (2d Dept. 1979); People v. Cyrus, 76 A.D.2d 842, 428 N.Y.S.2d 325 (2d Dept. 1980); People v. Miller, 74 A.D.2d 961, 425 N.Y.S.2d 895 (3rd Dept. 1980); People v. Williams, 73 A.D.2d 1019, 424 N.Y.S.2d 757 (3rd Dept. 1980); People v. Thomas, 72 A.D.2d 910, 422 N.Y.S.2d 188 (4th Dept. 1979). A Supreme Court decision, Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977), emphasized that "reliability" (accuracy or independent basis) is the determinative factor. In the Manson case while there was a concededly unnecessarily suggestive identification procedure, the Court held that an independent basis had been established and approved an in-court identification of the defendant. Additionally testimony about the earlier improper identification was admitted, a departure from prior rulings. Significantly the Manson opinion notes that this testimony came in without objection, and the case may therefore be viewed as not representing a departure from prior law. Sometimes prosecutors try to prove their case on a Wade hearing entirely through the testimony of the police officers, contending that there is no need to produce the eyewitness. While some Judges routinely require the

production of the eyewitness, your examination of the officer should be extremely thorough, not only for trial preparation, but to induce the court to require the testimony of the eyewitness to resolve the "independent basis" test. Major areas of inquiry are (1) what the eyewitness originally told the officer about the underlying circumstances of the crime and (2) all the factors attendant upon the identification procedure.

Regarding the underlying circumstances, ascertain what the eyewitness said with respect to:

(1) the length of total observation of the perpetrator;

(2) how much attention was focused on the perpetrator;

(3) whether the perpetrator's features were observable;

(4) what was the lighting;

(5) distance between the eyewitness and the perpetrator:

(6) witness' eyesight;

(7) witness' emotional state;

(8) prior acquaintanceship between witness and perpetrator;

(9) all descriptions of the perpetrator provided by the witness to all officers (original responding officer, detectives, police sketch artists, Bureau of Criminal Identification, etc.).

Next go into circumstances of the identification procedure:

(1) what was said to the eyewitness in inviting him to the identification proceeding and statements made to him prior to his viewing the array;

(2) description and photograph of the lineup or production of the photographs from which the eyewitness selected the defendant's;

(3) mechanics of the lineup, were the participants asked to speak, act in particular manner, exhibit any part of their body or try on any clothing? At which point was the identification made?

(4) if more than one eyewitness, did they view array together, did one hear the other make an identification, did they have a chance to talk after the first one identified and before the second one viewed?

(5) the actual language of the identification. Was it "He looks like the man" or "He is the man"?

(C) Search and seizure. The focus here is on the officer's probable cause to take the steps which led to the discovery of the items. The law is in great flux in street searches and automobile searches, and fine distinctions are drawn on the amount of information the officer must have had to sustain an inquiry, a frisk or a search. The standards for each are different and emerging, and are beyond the scope of this outline. Objective facts known to the officer, as well as "hunches" are relevant.

If consent is alleged, focus on the totality of circumstances to prove the defendant's will was over-borne. People v. Gorsline, 47 A.D.2d 273, 365 N.Y.S.2d 926 (3rd Dept. 1975). One factor, although not determinative, is whether the officers informed the defendant that he had a right to refuse to consent. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980); People v. Gonzalez, 39 N.Y.2d 122, 383 N.Y.S.2d

215 (1976); People v. Talbot, 44 A.D.2d 641, 353 N.Y.S.2d 842 (3rd Dept. 1974).

D. Custodial Interrogation and Probable Cause

In the wake of Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979), a threshold inquiry is proper to ascertain if police officers had probable cause to seize a defendant for questioning. In Dunaway, defendant was subjected to arrest for purposes of interrogation during which he admitted to participation in a homicide. Defendant's confession was suppressed as obtained in violation of his Fourth Amendment rights, since police officers lacked any reliable basis for the arrest. Thus, while one may accompany police officers to headquarters for questioning, such action must be voluntary and without coercive influences on the part of police officers. Such factors as the number of officers, display of weapons, tone of voice and the like bear upon consent to interrogation. Mere interrogation while in a police station is not per se coercive, Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711 (1977), and an arrest will not be found when one is asked to submit to questions with the understanding that the questioning can be stopped at any time and that one is under no compulsion to so submit and is free to leave. See United States v. Mendenhall, supra; People v. Yukl, 25 N.Y.2d 585, 307 N.Y.S.2d 857 (1969), cert. denied, 400 U.S. 851 (1970). One is in custody if deprived of his freedom in any significant way or if led to believe that he is so deprived. People v. Rodney P., 21 N.Y.2d 1, 9; 286 N.Y.S.2d 225 (1967). Perception of custody is governed by the reasonable man standard enunciated in People v. Yukl, 25 N.Y.2d 585, 589; 307 N.Y.S.2d 857, 859-60 (1969):

> In deciding whether a defendant was in custody prior to receiving his warnings, the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position. (Citations omitted).

Having voluntarily answered questions in the presence of police officers, one can be subjected to arrest if incriminating statements are made. Accordingly, bona fide consent dispenses with requirements of probable cause for custodial interrogation. People v. Hodge, 44 N.Y.2d 553, 406 N.Y.S.2d 736 (1978); People v. Coker, 103 Misc.2d 703, 427 N.Y.S.2d 141 (Sup. Ct. Bronx Co. 1980).

VIII - THE TRIAL - THE OFFICER AS A WITNESS

(A) Formulating the defense strategy. The description of available devices to interview and cross-examine the officer listed above should not mislead the reader into assuming that all, or even any of them, will be present in any particular case. Many cases are tried where there was neither a preliminary hearing nor a hearing on a pre-trial motion.

But whether you have a lot or a little information, you should still try to devise the defense theory of the case prior to commencing the trial. This is critical for it affects every aspect of the trial, from voir dire and jury selection, opening, cross-examination, presenting the defense, to summation and requests to charge.

(b) Jury selection. To the extent that you anticipate the officers' testimony and its impact on the jury, try to get jurors who

will agree with your ultimate position on summation (by which time you have to take a position).

(C) Opening. Many lawyers prefer not to box themselves in by enunciating a defense theory, but instead, deliver a generalized speech or even waive opening. These techniques have the advantage of preserving maximum flexibility but ignore the vital function of enabling the jury to anticipate what the defense is hoping to prove while its hearing the testimony.

(D) Rosario material. Rosario material must be disclosed prior to the prosecutor's opening. CPL §240.45(1)(a). Damon material must be given by the defense to the prosecutor after the presentation of the People's direct case and before the presentation of defendant's direct case. CPL §240.45(2).

(E) Direct examination - defense counsel's role. Pay strict attention to the prosecutor's direct examination of police witnesses. Be aware of the following dangers on direct:

(1) Background material - introductory narrative, not directly probative of defendant's guilt is admissible on the theory that the prosecution may prove the background and circumstances of the case. This is within the sound discretion of the trial judge, but object to overly extensive backgrounding, particularly if it paints a large criminal picture in which your defendant plays only a small part. People v. Stanard, 32 N.Y.2d 143, 344 N.Y.S.2d 331 (1973); People v. Maldonado, 50 A.D.2d 556, 376 N.Y.S.2d 512 (1st Dept. 1975).

(2) Characterizations - officers may try to characterize incidents and state conclusions. Insist on facts, not opinion.

(3) Gratuitious material. Officer-witnesses frequently use the prosecutor's questions to launch into extraneous and damaging facts. Insist that officer answer the question.

(4) Leading questions. Do not bother to object on introductory material or where the defense is not hurt (you may need the same courtesy in presenting the defense). Do not allow leading to go into the important elements of the case, however, and if it becomes a pattern, object that the testimony must come from the witness, not the examiner. People v. Arce, 42 N.Y.2d 179, 397 N.Y.S.2d 619 (1977); People v. Johnston, 47 A.D.2d 897, 366 N.Y.S.2d 198 (2d Dept. 1975).

(5) Refreshing recollection. Officers have learned to request permission to refresh recollection and use it as an opportunity to read their notes into evidence. This is improper and should not be allowed. Richardson on Evidence (Prince) §479 (9th Ed.); §466 (10th Ed.); People v. Betts, 272 App.Div. 737, 74 N.Y.S.791 (1947), aff'd 297 N.Y.1000 (1948); Cf. People v. Ramos, 41 A.D.2d 669 (2d Dept. 1973).

(6) Bolstering of complainant's identification. Only the eyewitness is permitted to testify regarding the fact of the eyewitness' prior identification of the defendant. People v. Trowbridge, 305 N.Y. 471 (1953). The only

exception is where the eyewitness is incapable of making an in-court identification. CPL §60.25(1). Where an independent basis exists for identification, improper bolstering by reference to a previous identification may be subject to the harmless error rule. See People v. Adams, 53 N.Y.2d 241, 440 N.Y.S.2d 902 (1982), where a proper in-court identification by an eyewitness to the crime overcame prior improper out-of-court identification testimony.

(7) Questions repeating damaging facts already established.

(8) Continuing to ask questions along a line previously ruled improper by the court. People v. Alicea, 37 N.Y.2d 601, 376 N.Y.S.2d 119 (1975).

(9) Unsupported inferences that the defendant intimidated or threatened any witness. People v. Petrucelli, 44 A.D.2d 58, 353 N.Y.S.2d 194 (1st Dept. 1974).

(10) If the prosecutor did not serve pre-trial notice of intention to introduce confession, statement or admission, or of pre-trial identification, and the officer seems to be headed in that direction, object strenuously. See CPL §710.30 and §710.30;(3).

(11) If the officer testifies about a search which led to evidence offered against the defendant, and no pre-trial motion to suppress was made, move to hold a hearing out of the presence of the jury. CPL §710.60(5).

(12) Defendant's post-arrest silence - when a defendant, after being advised of his Miranda rights, refuses to speak at

all, it is improper for the prosecution to elicit this fact or comment thereon in any form. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976); People v. Conyers, 49 N.Y.2d 174, 179-80; 424 N.Y.S.2d 402, 406 (1980). However, in Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124 (1980), the Supreme Court held that as a matter of Federal Constitutional law, pre-arrest silence could be employed for impeachment purposes when the defendant testified. The defendant may also be cross-examined about post-arrest inconsistent statements which he made after receiving Miranda warnings. Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180 1980). But see People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981), whch reaffirmed the holding in Conyers I that New York's Constitution prohibits the cross-examination of a defendant about his pre-arrest silence to impeach his trial testimony.

(13) Omission of exculpatory fact - if a defendant has spoken to the police, but omitted a vital fact, now offered in exculpation, can this be elicited to impeach him? Yes, holds the Court of Appeals in People v. Savage, 50 N.Y.2d 673, 431 N.Y.S.2d 382 (1980), cert. denied, 449 U.S. 1016 (1980). Note that in Savage the statement was post-arrest and defendant had waived his Miranda rights. Clearly, the rule therefore applies equally to pre-arrest or post-arrest statements made by a defendant who gives an explanation which does not mention the clearly exculpatory detail he proffers at trial. An excellent case summariz-

ing the issues, and the rationale, is People v. Gilmore, 76 A.D.2d 548, 430 N.Y.S.2d 854 (2d Dept. 1980). See also Matter of Charles B., 83 A.D.2d 575, 441 N.Y.S.2d 132 (2d Dept. 1981).

(14) Reference to a previously entered and subsequently withdrawn guilty plea by defendant. People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53 (1961).

(15) Note weak spots in direct for exploitation on cross.

(16) Be aware not only of what is brought out, but also of apparent gaps in the testimony. Be wary of traps.

(F) Should the defense cross-examine the officer? First, it is not necesary to examine every witness, merely because he was called by the prosecution. The key question is "has the witness hurt you?" and the corollary is "can he hurt you more?" If the defense has not been damaged by the direct testimony, strongly consider waiving cross-examination.

Two exceptions to this observation should be mentioned. First, situations exist where the officer has not hurt the defense on the prosecutions direct case, but you anticipate that he will be recalled to rebut some part of the defense case. In that case you may wish to discredit the officer immediately so that his rebuttal testimony will not be as damaging when it is offered.

The other instance is not true cross-examination, but arises where you wish to elicit some matter helpful to the defense. In these situations great care must be employed to insure that you get the answers you want. More will be said about this later.

(G) Techniques of cross-examination of officer-witness at trial.

(1) have a purpose, plan and direction. Sketch out your cross-examination.

(2) chronological order of cross-examination - generally favored as easier to do and for jury to understand, but is also easier for witness to anticipate. Consider hybrid of chronological and broken order.

(3) insist on respect.

(4) try to start strong and be sure to end strong.

(5) controlling the officer-witness.

(a) use leading questions.

(b) make questions short, plain and simple.

(c) make your questions suggest answers which appear reasonable and logical.

(d) "know" the answers to your questions.

(e) if an answer hurts, do not show it and move on.

(6) pinning answers down - if you are seeking favorable material or to impeach the officer, do not rush too fast to the clincher, or ultimate question. Be sure that all the relevant details are established before asking it, to avoid the officer slipping out by changing a fact.

(7) stay away from gaps or errors in direct testimony, you may fill them in by eliciting answers.

(8) be ready to stop when you have achieved the purpose you desire. Countless cases have been lost because of one question too many.

(9) be flexible. If you are doing well and shaking the witness, try for more. On the other hand, if it is not going well, do not continue to take lumps. Hit your best points, end well and sit down.

(H) Technique of impeachment of police-officer-witness by prior inconsistent statement.

(1) prior to trial, prepare an "inconsistency scorecard" - list all versions of the relevant facts given by the officer. Add to it what is said on direct examination.

(2) lay the factual foundation - be sure that you have established all the essential facts before eliciting prior inconsistent statement to avoid wriggling out.

(3) lay the legal foundation - learn method of properly proving prior inconsistent statement. Richardson on Evidence, (Prince) §501 (10th Ed.).

(a) ask the witness if he ever made the prior inconsistent statement - summarizing first and then direct quotation. If he acknowledges having made the prior inconsistent statement, that may end the inquiry

(b) if the witness denies having made the prior inconsistent statement, or says he does not recall, read the precise statement to him and offer it in evidence.

(c) establish factors proving greater reliability and "sanctity" of prior statement.

(4) is an omission a prior inconsistent statement? If the officer failed to mention a relevant fact in a prior account, this may be a prior inconsistent statement. But

you must first establish that the witness' attention was called to the matter and he was asked the facts embraced in the question posed at trial. People v. Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369 (1973), cert. denied sub. nom. Victory v. New York, 416 U.S. 905 (1974).

(5) be constantly aware that impeachment by prior inconsistent statement may open the door to rebuttal by proof of a prior inconsistent statement. People v. Singer, 300 N.Y. 120 (1949). But examine the rule closely; a prior inconsistent statement is admissible only if the witness' testimony has been attacked as a recent fabrication [People v. Caserta, 19 N.Y.2d 18, 277 N.Y.S.2d 647 (1966)] and the previous inconsistent statement must have been made before the imputed motive to lie arose [People v. White, 57 A.D.2d 669, 393 N.Y.S.2d 615 (3rd Dept. 1974)].

(I) Other methods of impeaching the officer-witness.

(1) by demonstrating the inherent improbability of his story or internal inconsistencies therein.

(2) by contradiction of other witnesses, police or civilian.

(3) demonstrating ineptitude. If the defense theory is that the defendant is the wrong man, consider demonstrating ineptitude as grounds for theory that police took the easy way out.

(4) frame - have to establish not only possibility, but facts sufficient for jury to accept evil motive of officer.

(J) Using the officer as a defense witness.

(1) in certain instances, the officer may be valuable to the defense in establishing some fact, major or minor, corroborative of the defense theory.

(2) should only attempt if you have material indication that the officer will testify as you desire (by previous testimony, report, or informal statement, etc.). Rarely do it blindly and, if so, try to keep your purpose concealed.

(3) in trying to elicit favorable testimony, defense counsel may frequently get an objection that he is going into matters not covered on direct examination. It should be permitted, but the court may deny you the privileges of cross-examination (the ability to lead).

(4) build the officer up, get testimony establishing accuracy of recollection of fact testified to, elicit indicia of reliability and sanctity of favorable testimony.

(K) Re-direct examination of officer by prosecution. The prosecutor will re-direct if the defense has scored points on cross-examination which he can dilute (frequently) because he has inadvertently omitted something on direct. Be alert and object to the following:

(1) mere repetition of direct examination under guise of rebuttal.

(2) attempting to prove prior consistent statement without proper foundation.

(3) eliciting entirely new material, not mentioned on direct or cross-examination at all. But recognize that the order

of proof is in the sound discretion of the trial judge. CPL §260.30(7). Indeed new rebuttal testimony has been held admissible after the close of People's case and the defendant's motion for a trial order of dismissal People v. Ayers, 55 A.D.2d 783, 389 N.Y.S.2d 481 (3rd Dept. 1976).

(4) improper rebuttal of testimony elicited upon cross-examination of defense witnesses. People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969), cert. denied 396 U.S. 846 (1969).

(5) asking "summation" questions.

IX - TYPICAL ISSUES IN CROSS-EXAMINATION OF OFFICER-WITNESS AT TRIAL.

(A) Identification. If the defense is mistaken identification, it is frequently necessary to elicit details of inadmissible pre-trial identification procedures to support the ultimate contention that the eyewitness picked out the wrong man because of suggestive identification procedures. But going into the identification procedures even slightly, or intimating this was the reason for error, opens the door for full exploration of the pre-trial identification procedures on the prosecution's redirect. People v. Vinson, 48 A.D.2d 730, 367 N.Y.S.2d 863 (3rd Dept. 1975) and People v. Peterson, 25 A.D.2d 437, 266 N.Y.S.2d 884 (2d Dept. 1966). This rule does not extend to composite sketches made by police artists, however. People v. Lindsay, 42 N.Y.2d 9, 396 N.Y.S.2d 610 (1977). Thus, eliciting details of pre-trial identification procedures, without any real hope of establishing suggestiveness to the jury's satisfaction, has been held incompetent conduct of defense counsel

requiring reversal. See People v. Sarmiento, 40 A.D.2d 562, 334 N.Y.S.2d 210 (2d Dept. 1972).

(B) Undercover officers. This can be an extremely difficult cross-examination. Generally you will not have the benefit of any pre-trial testimony of the undercover officer. On the other hand, such officers are frequently required to keep more detailed records of their activities than other officers, and thus present more material for cross-examination on prior inconsistent statements.

The prosecutor may move to close the courtroom to the general public during the officer's testimony under People v. Hinton, 31 N.Y.2d 71, 334 N.Y.S.2d 885 (1972), cert. denied, 410 U.S. 911 (1973); [see also People v. Cuevas, 50 N.Y.2d 1022, 431 N.Y.S.2d 686 (1980), citing Hinton]. Always oppose such an application and insist that a hearing be held and a proper showing made before the application is granted. People v. Jones, 47 N.Y.2d 409, 418 N.Y.S.2d 359 (1979), cert. denied 444 U.S. 946 (1979). Closing the courtroom is a matter of discretion and its abuse can lead to reversal. Boyd v. Lefevre, 519 F.Supp. 629 (E.D.N.Y. 1981); People v. Boyd, 59 A.D.2d 558, 397 N.Y.S.2d 150 (2d Dept. 1977); People v. Cousart, 74 A.D.2d 877, 426 N.Y.S.2d 295 (2d Dept. 1980).

In cross-examining undercover officers, emphasize their use of deceit. Blur the lines between police conduct and criminal conduct. Use leading questions exclusively.

(C) Drug cases - affirmative defense - proof through officer. Frequently, the defendant is only left with defenses of desperation agency, entrapment and duress. Understand that by raising such defenses, it becomes appropriate to focus an inquiry into the defendant's past. Proof of similar acts (prior and subsequent) becomes admissible to aid

the jury in determining if defendant was predisposed to commit the crime charged or whether it was the influence of the police which led him to them. People v. Calvano, 30 N.Y.2d 199, 331 N.Y.S.2d 430 (1972); People v. Kegelman, 73 A.D.2d 977, 424 N.Y.S.2d 239 (2d Dept. 1980).

Question the officer closely to try to establish some aspect of the affirmative defense. Hopefully you can prove something, and even negative answers have the value of imparting to the jury a better understanding of your claims during the prosecution's direct case. To establish the defense entirely through your client's testimony is quite difficult - the double hurdles of the interested witness charge and burden of proof make this course unfruitful. Areas of inquiry include:

(1) lack of previous drug dealing by defendant.

(2) defendant's ignorance of drugs or drug dealing.

(3) officer's promise to defendant of gain from them in event of sale.

(4) inveigling, wheedling or persistence by officers to get defendant to obtain drugs from them.

(5) provision of means for crime by officer - did they advance money, provide car, etc. See People v. Gonzalez, 66 A.D.2d 828, 411 N.Y.S.2d 632 (2d Dept. 1978).

(D) Accomplice cases. Where an accomplice will testify against the defendant, the defense can lay the groundwork for impeaching him by cross-examination of the officers. Try to establish that:

(1) accomplice lied to officers initially in denying guilt.

(2) threats of harsh punishment before accomplice turned.

(3) accomplice learned that he could get a deal by suggestions by police.

(4) accomplice receiving special benefits from police.

(5) accomplice withheld certain evidence from the police which he now offers at trial.

X - POLICE EXPERT WITNESSES

Police experts include chemical analysts (drugs and other suspected substances), gunsmiths (operability of weapons, functions and ballistics), handwriting analysts and fingerprint specialists. If such an expert will testify, your preparation for cross-examination must begin well before trial.

In the defense request for discovery of experts' reports made in connection with the case, disclosure is mandatory. CPL §240.20(1)(c). Also, seek an opportunity for defense counsel or his expert to examine the item about which expert testimony will be offered. People v. Courtney, 40 Misc.2d 541, 243 N.Y.S.2d 457 (Sup. Ct. N.Y. Co. 1963) and People v. Spencer, 79 Misc.2d 72, 361 N.Y.S.2d 240 (Sup. Ct. Erie Co. 1974).

If there is a real question as to the character of the item analyzed, hired an expert to examine it. If the defendant has funds, he should pay for the expert directly. If the defendant cannot afford an expert (even if defense counsel is retained), the court may authorize payment of the expert's fee from public funds. County Law §722-c.

If, after all of the above, you have no real reason to suspect that the police expert's testimony can be shaken, strongly consider stipulating to his testimony, unless you intend to establish some fact favorable to the defense.

If you are going to cross-examine the police expert, be fully prepared. Obtain a list of leading texts, read them and have them available in court for use on cross-examination. Consult your own expert to review your proposed cross-examination.

(A) Suggested areas for cross-examination of police experts:

(1) demonstrate the limited area of his expertise and training (consider subpoenaing police academy, or other training facility manuals and course outline).

(2) lack of recognition of leading tests in field.

(3) conflicts between expert's opinion and recognized authority; first induce him to acknowledge eminence of test, then demonstrate conflict.

(4) try to get expert to waffle on certainty of conclusion expressed in direct. An opinion is no more than an educated guess.

(5) demonstrate that by insertion of indisputable fact or removal of one demonstrably weak fact, the conclusion would or might be different.

(6) if a hypothetical was used on direct, show that expert really did not understand it by seeing if he can recall each fact.

(7) question closely, avoid debating area of expertise.

Experts are sometimes particularly vulnerable in the foundational aspects of their testimony. An old argument that no longer has much vitality is the "chain of custody" of the suspected substance. Older cases [(such as People v. Lesinski, 10 Misc.2d 254, 171 N.Y.S.2d 339 (Sup. Ct. Erie Co. 1958)] held that the prosecution had to negative every

possibility of tampering or alteration by calling all persons who had access to the substance prior to the test, or the foundation was not established. The Court of Appeals, in People v. Connelly, 35 N.Y.2d 171, 359 N.Y.S.2d 266 (1974), laid this contention to rest as an element of admissibility as long as the item is "sufficiently connected" to defendant. See also People v. Julian, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977).

XI - SUMMATION

(a) Defense. In summarizing testimony, always be assiduously careful not to misstate or exaggerate evidence. If offering your evaluation of the officer's testimony, make your theory entirely clear to the jury. If the defense contends that the officer has framed the defendant, say so and bolster the argument with all the evidence you have brought in demonstrating such a motive on the officer's part. If, on the other hand, you are arguing mistake, make that clear and state that you are not implying evil motive on the witness' part. Anticipate the prosecutor's arguments and defuse them.

Get into the "guts of the case." Do not rehash the facts or expansively argue the ultimate theories - the art of summation is convincing the jury that the facts lead to the conclusion you suggest.

In considering any argument, anticipate the prosecutor's response. If he can rebut your argument and win the point, consider not making the argument at all. See People v. DeCristofaro, 50 A.D.2d 994, 376 N.Y.S.2d 688 (3rd Dept. 1975).

If you can formulate an ultimate question which cannot be answered and which should result in a not guilty verdict, pose it and challenge

the prosecutor to answer it. However, be aware that a challenge invites reasonable response and may open the door to fair comment. People v. Rodriguez, 62 A.D.2d 929, 403 N.Y.S.2d 275 (1st Dept. 1975).

(B) Prosecution. Be alert to improper arguments and do not hesitate to object during the defendant's summation - this is entirely proper. People v. DeJesus, 42 N.Y.2d 519, 399 N.Y.S.2d 196 (1977); People v. Marcelin, 23 A.D.2d 368, 260 N.Y.S.2d 560 (1st Dept. 1965); Cf. People v. Reina, 94 A.D.2d 727 (2d Dept. 1983). Be alert particularly to arguments which:

(1) State that the jury will have to resolve who - the defendant or the officer - is lying, or that an acquittal is tantamount to a finding that the officers committed perjury. People v. Ingram, 49 A.D.2d 865, 374 N.Y.S.2d 327 (1st Dept. 1975); People v. Bryant, 77 A.D.2d 603, 430 N.Y.S.2d 101 (2d Dept. 1980); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). See also United States v. Praetorius, 622 F.2d 1054 (2d Cir. 1979).

(2) Contain misrepresentation of testimony, argument of facts not in the record or urge inferences not fairly supportable by evidence. People v. Ashwal, 39 N.Y.2d 105, 383 N.Y.S.2d 204 (1976); People v. Marcelin, supra; People v. Farruggia, 77 A.D.2d 447, 433 N.Y.S.2d 950 (4th Dept. 1980).

(3) Involve the prosecutor personally vouching for credibility of officers. People v. Figueroa, 38 A.D.2d 595, 328 N.Y.S.2d 514 (2d Dept. 1971); People v. McKutchen, 76 A.D.2d 934, 429 N.Y.S.2d 460 (2d Dept. 1980).

XII - REQUEST TO CHARGE

A defendant is entitled to have a court charge that a police witness testimony should not be given any more or less credibility than anyone else. This is to dispel any notion that a police officer because of his official status can be more worthy of belief than a defendant or others. In People v. Gadsen, 80 A.D.2d 508, 435 N.Y.S.2d 601 (1st Dept. 1981), a failure to so charge upon request was held reversible error especially in context of a charge that a defendant is testifying as an interested witness whose testimony should be weighed carefully and scrutinized more closely than the testimony of others. Cf. People v. Arillo, 58 A.D.2d 875, 396 N.Y.S.2d 483 (2d Dept. 1977).

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LAW GOVERNING INSANITY

By

Naomi Werne
BPS Staff Attorney

May, 1982

Revised in May, 1987
by
Nancy Walker-Johnson
BPS Law Student Intern
and
John E. Carter, Jr.
Director, Bureau of Prosecution Services

TABLE OF CONTENTS

PAGE

LAW GOVERNING INSANITY

Introduction

The question of a defendant's sanity may arise at different stages of the criminal proceeding. Counsel may move to have the court determine whether his client is competent to stand trial (competence is termed "fitness to proceed"; see CPL Article 730). Counsel may raise an affirmative defense of insanity on behalf of his client. If the client is acquitted or pleads guilty on the ground of insanity, the law mandates his initial commitment for examination to a mental health facility, in accordance with specified procedures, to determine whether he will be held in a mental health facility or released. Fitness to proceed, the insanity defense, and post-acquittal commitment involve distinct yet interrelated areas of law. Therefore, this course manual will treat all three subjects in one chapter: "Law Governing Insanity."

A. Article 730 - Determination of Fitness to Proceed

(1) Competence to Stand Trial; Due Process

Inherent in the constitutional guarantee of due process is the right to a fair trial. A condition precedent to a fair trial or to a knowing, voluntary, and intelligent guilty plea is the ability of the defendant to have a rational as well as a factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 (1960). The test is whether defendant has sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, not merely whether a defendant is oriented as to time and space

and has some recollection of events. Dusky v. United States, supra. In addition, counsel's opinion is entitled to probative value in determining competency to stand trial. United States ex rel. Curtis v. Zelker, 466 F.2d 1092 (2d Cir. 1972), cert. den., 410 US 945 (1973). The burden of proof, the criteria to be applied in determining mental competence to stand trial, the quantum of evidence necessary to support a finding of competence to stand trial, and the quantum of evidence necessary to support a finding of competence to stand trial or plead guilty, are discussed below in the context of New York State's Criminal Procedure Law Article 730 and its provisions for determining "fitness to proceed".

In Sharp v. Scully, 509 F. Supp. 493 (S.D.N.Y. 1981), the court ruled that competency to stand trial establishes a finding of competency to plea bargain. See People v. Owens, 111 A.D.2d 274, 489 N.Y.S.2d 110 (2d Dept. 1985); People v. Ozman, 108 A.D.2d 762, 484 N.Y.S.2d 920 (2d Dept. 1985).

(2) Definition of Fitness to Proceed

CPL §730.10(1), in accordance with constitutional principles, defines a person who is not competent to stand trial as an "incapacitated person":

> "Incapacitated person" means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.

(3) Determination of Fitness to Proceed

(a) Order of Examination

At any time after arraignment and, in the case of a charge by a

felony complaint, prior to holding defendant for the action of the grand jury, the court in which the criminal action is pending must issue an order of examination when it is of the opinion that defendant is an incapacitated person. CPL §730.30(1). An "order of examination" is issued to a director of: (1) a State hospital; or (2) a hospital certified by the State as adequate for such examinations; or (3) community mental health services, directing that defendant be examined to determine if he is an incapacitated person. See CPL §730.10(2) and (4). The appropriate director is selected in accordance with rules jointly adopted by the Judicial Conference and the State Commissioner of Mental Hygiene (referred to below as the "Commissioner"). See CPL §730.20(1).

The director must select two qualified psychiatrists to examine the defendant, of whom the director himself may be one; except that if the director is of the opinion that the defendant may be mentally defective, he may designate one qualified psychiatrist and one certified psychologist to examine the defendant. See CPL §730.20(1). A qualified psychiatrist is a physician certified or eligible to be certified by the American Medical Board of Psychiatry and Neurology or by the American Osteopathic Board of Psychiatry and Neurology. CPL §730.10(5). A certified psychologist is one registered under Article 153 of the Education Law. CPL §730.10(6).

The New York Court of Appeals in People v. Armlin, 37 N.Y.2d 167, 371 N.Y.S.2d 691 (1975), reversed the defendant's rape conviction and ordered a new trial, on the ground that the director who had received the order of examination had designated only one psychiatrist to examine the defendant. See also People v. Ross, 50 A.D.2d 1064, 375 N.Y.S.2d 714 (4th Dept. 1975), where the court set aside defendant's plea of guilty

to sexual abuse and issued a new order of examination where the defendant had been examined by only one psychiatrist under the first order of examination. See also People v. Vallelunga, 101 A.D.2d 603, 474 N.Y.S.2d 857 (3d Dept. 1984), where the court held that examination by one psychiatrist was not sufficient to determine defendant's ability to stand trial. But see People v. Foster, 54 A.D.2d 595, 387 N.Y.S.2d 480 (3d Dept. 1976), where the court refused to reverse a conviction, holding the rule in Armlin inapplicable to invalidate defendant's plea of guilty entered after an examination by only one examining psychiatrist, appointed by the court under its inherent power at defense counsel's request to determine if there was medical evidence to support a defense of insanity to the charge. (See Section B[2], infra for a discussion of this type of examination.) The court in Foster stated that Armlin was distinguishable because it involved an order of examination under Article 730, under which the examining psychiatrists are to determine defendant's competency to stand trial or to take a plea, not defendant's sanity at the time of the crime.

(4) Court's Discretion to Issue Order of Examination

If the evidence raises a bona fide doubt as to defendant's competency to stand trial, the trial court's failure to make an inquiry into defendant's competence under the appropriate state procedure is a denial of due process. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836 (1966). See also Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975), where the United States Supreme Court reversed petitioner's conviction for aiding and abetting others to rape his wife and ordered a new trial,

on the ground that the trial court's failure to order a pre-trial psychiatric examination deprived petitioner of his right to a fair trial, thereby depriving him of due process of law.

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts....
>
> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made. That this might have aborted the trial is a hard reality, but we cannot fail to note that such a result might have been avoided by prompt psychiatric examination before trial, when it was sought by petitioner.

Id. at 420 U.S. at 180-82, 95 S. Ct. at 908-09.

In People v. Arnold, 113 A.D.2d 101, 495 N.Y.S.2d 537 (4th Dept. 1985), the Appellate Division held that the trial court had abused its discretion in not ordering a hearing when defendant failed to controvert the People's claim that he was a second felony offender. The defendant had no prior felony convictions, a pretrial inmate medical report indicated a need for ongoing psychiatric observation and treatment, and the pre-sentence report revealed a history of mental illness and incompetency. The Appellate Court adhered to a strict construction of article 730 by focusing on what the trial court did in light of what it knew or should have known about the defendant at any time before final judgment.

In United States ex rel. Laudati v. Ternullo, 423 F. Supp. 1210 (S.D.N.Y. 1976), the trial court's denial of a second competency hearing was held to not violate the defendant's rights because defense counsel vigorously opposed a second psychiatric examination and defendant had refused to permit a defense of not guilty by reason of insanity. The New York Court of Appeals in People v. Peterson, 40 N.Y.2d 1014, 391 N.Y.S.2d 530 (1976), held that the trial court had abused its discretion by refusing defense requests to issue an order of examination in light of defendant's incoherent outbursts at the trial. In People v. Monroe, 84 A.D.2d 540, 443 N.Y.S.2d 103 (2d Dept. 1981), the Appellate Division ruled that the lower court erred in imposing sentence on a plea of guilty without further inquiry after defendant at the sentencing hearing claimed insanity and a need for psychiatric care. But see People v. Salladeen, 42 N.Y.2d 914, 397 N.Y.S.2d 994 (1977), where the New York Court of Appeals found defendant's "abusive" courtroom behavior insufficient grounds for finding that the trial court abused its discretion when it

refused to issue an order of examination.

In a habeas corpus proceeding, United States ex rel. Schmidt v. LaVallee, 445 F. Supp. 1156 (S.D.N.Y. 1977), the district court held that, standing by itself, the fact that defendant had previously been hospitalized for mental illness does not mandate a competency hearing where the question of competency had first been raised by the defendant at the sentencing hearing. Accord, People v. Sterling, 72 A.D.2d 611, 421 N.Y.S.2d 121 (2d Dept. 1979). Cf. People v. Bradt, 77 A.D.2d 795, 430 N.Y.S.2d 742 (4th Dept. 1980) (judgment reversed and plea vacated where a competency hearing should have been conducted in light of defendant's past history of commitment), and People v. Catapano, 73 A.D.2d 975, 424 N.Y.S.2d 242 (2d Dept. 1980) (defendant's history of confinement in mental institutions, detailed in the pre-sentence report, required the sentencing court to inquire into defendant's mental capacity prior to imposing sentence, whether or not that issue had been raised by counsel). A history of drug use is merely a relevant factor in the trial judge's determination of competency and does not per se render a defendant incompetent to stand trial. United States v. Oliver, 626 F.2d 254 (2d Cir. 1980). In addition, a defendant's mild mental retardation does not render defendant unfit to proceed. People v. Claron, 103 Misc.2d 841, 427 N.Y.S.2d 146 (Sup. Ct. N.Y. Co. 1980). In People v. Bronson, 115 A.D.2d 484, 495 N.Y.S.2d 716 (2d Dept. 1985), the Appellate Division held that the trial court had not abused its discretion when it failed to conduct a hearing, even though the examination by psychiatrists and the pre-sentence reports revealed defendant to be mildly retarded and suffering from significant psychiatric disorders. See also People v. Harris,

109 A.D.2d 351, 491 N.Y.S.2d 678 (2d Dept. 1985).

The "senseless" nature of a crime, without more, was held not to be enough evidence of incompetence to render the trial court's refusal to issue an order of examination an abuse of discretion in People v. Falu, 37 A.D.2d 1025, 325 N.Y.S.2d 798 (3d Dept. 1971). Similarly, the mere fact that psychiatric treatment was recommended for defendant upon his discharge from the armed services does not require the trial court to issue an order of examination. See People v. Smyth, 3 N.Y.2d 184, 164 N.Y.S.2d 737 (1957). However, where a defendant had a psychiatric history that included two suicide attempts and was under psychiatric treatment at the time of the trial, the court abused its discretion in failing to issue an order of examination. People v. Hill, 39 A.D.2d 949, 333 N.Y.S.2d 238 (2d Dept. 1972). Cf. People v. Clickner, ___A.D.2d ___, 512 N.Y.S. 2d 572 (3d Dept. 1987) (defendant's history of alcohol and substance abuse, mental patient treatment, and two attempted suicides prior to sentencing did not warrant the ordering of a psychiatric exam where the record revealed that defendant was alert, coherent, and actively participated in all pretrial and plea hearings); People v. Colville, 74 A.D.2d 928, 426 N.Y.S.2d 94 (2d Dept. 1980) (court's refusal to order a psychiatric examination after defendant's attempted suicide during summations was not an abuse of discretion).

Where it is determined that a trial court's refusal to issue an order of examination deprived a defendant of a fair trial, a new trial must be ordered because the passage of time makes it too difficult to determine retrospectively whether defendant was competent at the time of trial. People v. Peterson, supra, citing Dusky v. United States, supra

(more than one year had passed since the trial); Pate v. Robinson, supra (six years); Drope v. Missouri, supra (five years).

A new trial may not be required if there exists sufficient contemporaneous evidence bearing on competency from which a determination can be made. In such a case, a new competency hearing is sufficient. See People v. Gonzalez, 20 N.Y.2d 289, 282 N.Y.S.2d 538 (1967), remittur amended, 20 N.Y.2d 801, 284 N.Y.S.2d 458 (1967), cert. denied, 390 U.S. 971 (1968), cited in Peterson and discussed further in Section A(6)(a), infra. People v. Hudson, 19 N.Y.2d 137, 278 N.Y.S.2d 593 (1967), aff'd on remand, 31 A.D.2d 607, 295 N.Y.S.2d 1000 (1st Dept. 1968), aff'd, 25 N.Y.2d 609, 306 N.Y.S.2d 1 (1969), cert. denied, 398 U.S. 944 (1970);

An incapacitated person cannot waive his right to have his competence determined. Pate v. Robinson, supra; see also People v. Mullooly, 37 A.D.2d 6, 322 N.Y.S.2d 7 (1st Dept. 1971). However, in People v. Donovan, 53 A.D.2d 27, 385 N.Y.S.2d 385 (3d Dept. 1976), defense counsel informed the court during the trial that he might move for an adjournment to have his client hospitalized on the ground that tranquilizing medication was hindering the client's ability to assist in his own defense. The trial court informed counsel that if he made such a motion, the court would issue an order of examination. As counsel did not so move, no examination was ordered. The appellate court refused to reverse the conviction, holding that, under the circumstances, the trial court's failure to order an Article 730 examination was not an abuse of discretion.

If at the time of the sentencing hearing a prisoner fails to assert adequately that he was incompetent at the time of the guilty plea, the prisoner is not precluded from asserting his incompetence at a habeas

corpus proceeding. Suggs v. LaVallee, 570 F.2d 1092 (2d Cir. 1978).

A defendant who seeks to set aside a conviction after trial or upon a guilty plea on the grounds of incompetence must adduce evidence that he was incompetent at that time. "[T]he People are not required to assume the burden again of establishing that what was done was regular in the absence of evidence to the contrary." People v. Salmon, 67 A.D.2d 758, 412 N.Y.S.2d 446 (3d Dept. 1979).

The delay between application for a determination of competency to stand trial and the actual determination are not chargeable against the People for speedy trial purposes. People v. Miller, 78 A.D.2d 817, 433 N.Y.S.2d 130 (1st Dept. 1980).

(5) Procedures for Conducting Psychiatric Examination under Article 730

(a) Method of Examination

In conducting an examination, the psychiatric examiners may employ any method which is accepted by the medical profession for the examination of persons thought to be mentally ill or mentally defective. The court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination. See CPL §730.20(1).

(b) Examination Reports

Each psychiatric examiner, after he has completed his examination of the defendant, must promptly prepare an examination report and submit it to the director (CPL §730.20[5]), defined in CPL §730.10(4) to mean the director of (1) a state hospital operated by the Department of Mental Hygiene or (2) a hospital operated by a locality and certified

by the Commissioner as an adequate facility to determine whether a defendant is incapacitated, or (3) community mental health services. "Examination report" is a report made by a psychiatric examiner in which he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion with particular reference to those aspects of the proceedings where the defendant would lack the capacity to understand or to assist in his own defense. The State Administrator and the Commissioner jointly adopt the form of the examination report and the State Administrator prescribes the number of copies of the report to be submitted to the court by the director. CPL §730.10(8).

In People v. Lowe, 109 A.D.2d 300, 491 N.Y.S.2d 528 (4th Dept. 1985), the appellate court held that defendant had been deprived of a full and impartial determination of his capacity to stand trial where only one psychiatrist examined defendant, and the pscyhiatrist's report was submitted in a letter and not on the form prescribed by statute. Since the report failed to state that the examining psychiatrist was a qualified psychiatrist within the meaning of CPL §730.10(5) or the nature and extent of the examination as required by CPL §730.10(8), the psychiatrist was not an eligible examiner pursuant to article 730.

When the examination reports do not agree, the director must designate a third qualified psychiatrist to examine the defendant and submit a third report. CPL §730.20(5). However, in People v. Grieco, 82 Misc.2d 500, 368 N.Y.S.2d 992 (Sup. Ct. Westchester Co. 1975), the trial court, finding defendant incapacitated after a hearing,

dispensed with the appointment of a third psychiatric examiner, even though one of the two psychiatrists, who originally agreed with the other in his report that defendant was fit, testified at the hearing that defendant was unfit. The court stated that, while a literal reading of CPL §730.20(5) would mandate a third examination, it would construe that statute broadly and not require one, as the ultimate determination of capacity rests with the court and not the psychiatrists.

Upon receipt of the examination reports, the director submits them to the court which issued the order of examination. See CPL §730.20(5).

(c) Place of Examination

Subsections (2), (3), and (4) of CPL §730.20 contain the provisions governing where the defendant shall be examined. If the defendant is in custody, it must be conducted at the place where he is held; however, if the state director deems it necessary, the defendant may be confined to a hospital for the examination. The examination may not be conducted in the District Attorney's office. People v. McCabe, 87 A.D.2d 852, 449 N.Y.S.2d 245 (2d Dept. 1982).

(d) Discovery of Examination Reports

The court must furnish copies of the examination reports submitted to it by the director to both defense counsel and the District Attorney. CPL §730.20(5).

(e) Admissibility of Defendant's Statements Made at Examination

When a defendant is subjected to examination pursuant to

an order issued by a criminal court under Article 730, any statement made by him for the purpose of the examination or treatment is inadmissible in evidence against him in any criminal action on any issue other than his mental condition, but it will be admissible on the issue of competence whether or not it would otherwise be deemed a privileged communication. CPL §730.20(6). See also People v. Hayes 55 A.D.2d 812, 390 N.Y.S.2d 281 (4th Dept. 1976) (reversible error resulted where trial court failed to instruct jury to disregard evidence of defendant's inculpatory admission to psychiatric examiner); Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), where results of a pre-trial psychiatric examination were held admissible only for determining competency to stand trial and inadmissible on the issue of sentencing.

(f) Payment of Examiner

CPL §730.20(7) provides for payment of and reimbursement for the expenses of the psychiatric examiner.

(6) Hearing on Fitness to Proceed after Examination

(a) When Required

If, after examination, the examination reports submitted to the court show that each psychiatric examiner is of the opinion that defendant is not an incapacitated person, the court may on its own motion conduct a hearing to determine the issue of capacity, and must conduct such a hearing upon motion by either the defendant or the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed; if the court is not so satis-

fied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director. CPL §730.30(2).

If the examination reports show that each examiner is of the opinion that the defendant is incapacitated, the court may on its own motion conduct a hearing to determine the issue, and must conduct such hearing upon motion by either the defendant or the district attorney. CPL §730.30(3). Where the psychiatric reports show that the examiners disagree, the court must conduct a hearing to determine the issue of capacity. See CPL §730.30(4). In such instances, the defense must have a chance to cross-examine the experts. People v. Charette, 78 A.D.2d 567, 431 N.Y.S.2d 733 (3d Dept. 1980) (defendant's plea of guilty to attempted sodomy in the first degree vacated and case remanded where expert evidence should have been subject to cross-examination by defendant).

Since a defendant must be competent before he can be tried or permitted to enter a plea of guilty, the trial court's failure to hold a hearing after issuing an order of examination where there is evidence that defendant may be incapacitated requires a reversal of the conviction and a new hearing on the issue of capacity. People v. Bangert, 22 N.Y.2d 799, 292 N.Y.S.2d 900 (1968); People v. Gonzalez, 20 N.Y.2d 289, 282 N.Y.S.2d 538 (1967), remittur amended, 20 N.Y.2d 801, 284 N.Y.S.2d 458 (1967) cert. denied, 390 U.S. 971, 88 S.Ct. 1093 (1968); People v. Hudson, 19 N.Y.2d 137, 278 N.Y.S.2d 593 (1967), aff'd on remand, 31 A.D.2d 607, 295 N.Y.S.2d 1000 (1st Dept. 1968), aff'd, 25 N.Y.2d 609, 306 N.Y.S.2d 2 (1969), cert. denied, 398 U.S. 944, 90 S.Ct. 1852 (1970); People v. Greenwood, 54 A.D.2d 1123, 388 N.Y.S.2d 796 (4th Dept. 1976);

People v. Candella, 49 A.D.2d 800, 373 N.Y.S.2d 240 (4th Dept. 1975) (defendant remanded to county judge for resentencing after period of voluntary commitment which was limited to the time required for treatment). People v. Clancy, 39 A.D.2d 538, 331 N.Y.S.2d 49 (1st Dept. 1972); State ex rel. Candella v. Director, Marcy Psychiatric Center, 88 Misc.2d 44, 387 N.Y.S.2d 978 (Sup. Ct. Oneida Co. 1976). See also Riccardi v. United States, 428 F. Supp. 1059 (E.D.N.Y. 1977), aff'd without opinion, 573 F.2d 1294 (2d Cir. 1977) (no error in failing to hold competency hearing sua sponte since claim of incompetency had not been raised at trial and opinions from seven doctors, psychologists, and caseworkers concluded that defendant was not psychotic or severely neurotic). In People v. Freyre, 76 Misc.2d 210, 348 N.Y.S.2d 845 (Sup. Ct. N.Y. Co. 1973), the defendant, committed to a psychiatric hospital following his conviction, after seventeen years moved to set aside the verdict on the ground that the court should have ordered a competency hearing sua sponte during trial. He asserted that his bizarre behavior during trial evidenced his incapacity, despite the fact that the examination reports stated he was "fit." After a hearing, the court granted defendant's motion, based in part on portions of a book written by one of the examining psychiatrists (since deceased) describing defendant's case and describing him as "schizophrenic," although that psychiatrist had stated in his examination report that defendant was not schizophrenic but only sociopathic.

In United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d. Cir. 1972), cert. denied, 408 U.S. 927 (1972), the defendant had sought in state court to set aside his conviction because he had not been afforded a hearing under Article 730 prior to pleading guilty. He had

received a full hearing on the question of his capacity at the time of the plea by the state court, which had denied his motion to set aside his plea. The federal court refused to issue the writ because petitioner had been afforded a full and fair hearing and the finding of capacity was fully supported by the evidence. The court distinguished Pate v. Robinson, supra, where the record established the defendant's incapacity. The court noted that petitioner had initially been convicted after trial, a conviction later reversed on appeal because of trial errors and that, before this first trial, petitioner had been examined under Article 730 and found fit to proceed after a hearing. The plea which the petitioner sought to vacate had been entered in the second prosecution, ordered by the state appellate court after it reversed his first conviction.

Where a defendant fails to move for a hearing under Article 730 and the examination reports show that both examiners find the defendant fit to proceed, appellate courts have not found an abuse of discretion when the trial court failed to conduct a hearing sua sponte on the sole ground that defendant had a history of psychiatric treatment. People v. Lacher, 59 A.D.2d 725, 398 N.Y.S.2d 363 (2d Dept. 1977); People ex rel. Williams v. Monroe, 58 A.D.2d 588, 395 N.Y.S.2d 216 (2d Dept. 1977), leave to appeal denied, 43 N.Y.2d 643, 401 N.Y.S.2d 1028 (1977); People v. Frisbee, 55 A.D.2d 996, 390 N.Y.S.2d 696 (3d Dept. 1977); People v. Rivera, 50 A.D.2d 805, 375 N.Y.S.2d 406 (2d Dept. 1975); People v. MacCumber, 46 A.D.2d 938, 362 N.Y.S.2d 41 (3d Dept. 1974).

However, procedures providing for competency hearings for criminal defendants are available any time after arraignment and before imposition of sentence. People v. Maddicks, 118 A.D.2d 437, 499 N.Y.S.2d

93 (1st Dept. 1986) (defense counsel did not request hearing until after he received an evaluation from his own expert. The court held that this did not constitute an unreasonable delay. The statute does not require that defendant request a hearing immediately upon issuance of reports from court-appointed psychiatrists). In People v. Colon, ___ A.D.2d ___, 512 N.Y.S.2d 809 (1st Dept. 1987), the defendant received a pre-trial competency hearing pursuant to CPL 730.30 at which the court found him fit to proceed. Months after the verdict in this case, but prior to sentencing, the defendant was found to be incapacitated at a competency hearing in a subseqent murder case. The court held that while the "defendant was not entitled to a new competency hearing as to the issue of his capacity during trial, ..he was entitled to such a hearing, under the circumstances and facts presented herein, before sentencing."

Where defendant was initially committed to a psychiatric facility as incapacitated and later the director stated that he was then fit to proceed, the court ordered a new hearing upon defendant's motion to determine his capacity, on the ground that the question of capacity must ultimately be determined by the court, not by the psychiatrist. People v. Acevedo, 84 Misc.2d 563, 377 N.Y.S.2d 932 (Dutchess Co. Ct. 1975).

A defendant's demeanor at trial is a factor to be weighed in determining whether the trial court abused its discretion in failing to hold an Article 730 hearing, but it is not dispositive. People v. Armlin, 37 N.Y.2d 167, 371 N.Y.S.2d 691 (1975); see also Pate v. Robinson, supra.

In People v. Arias, 71 A.D.2d 551, 418 N.Y.S.2d 75 (1st Dept. 1979), the court held that as a defendant had been committed to a

psychiatric facility on the ground that he was incompetent shortly after his conviction, due process required that a hearing be held to determine whether he was competent at the time of the trial.

(b) Burden and Standard of Proof

Since the law presumes sanity, at the hearing under Article 730 a presumption exists that the defendant is not an incapacitated person. However, once the defendant introduces any evidence of incapacity, the People must prove his capacity. Before 1979 it was held that the standard of proof was a preponderance of the evidence. See People v. Carl, 58 A.D.2d 948, 397 N.Y.S.2d 193 (3d Dept. 1977), rev'd on other grounds, 46 N.Y.2d 806, 413 N.Y.S.2d 916 (1978); People v. Santos, 43 A.D.2d 73, 349 N.Y.S.2d 439 (2d Dept. 1973); People v. Sanchez, 86 Misc.2d 81, 382 N.Y.S.2d 449 (N.Y.C. Crim. Ct. N.Y. Co. 1976); People v. Miller, 84 Misc.2d 310, 376 N.Y.S.2d 2393 (N.Y.C. Crim. Ct. Bronx Co. 1975); People v. Vega, 73 Misc.2d 857, 342 N.Y.S.2d 693 (N.Y.C. Crim. Ct. N.Y. Co. 1973). Proof beyond a reasonable doubt is not constitutionally mandated, as a defendant's capacity to stand trial is collateral to the question of actual guilt or innocence. People v. Santos, supra.

With the 1979 decision of the United States Supreme Court in Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979), where the standard of preponderance was rejected for civil commitments, it was not entirely clear what standard of proof would be required for Article 730 hearings. In Addington, the Court held that a person cannot be civilly committed to a psychiatric facility involuntarily absent clear and convincing evidence of mental incapacity; the preponderance of evidence standard does not satisfy due process. Since a person found

to be incapacitated to stand trial is initially civilly committed to a psychiatric facility involuntarily for observation (see discussion in Section A (7)(a), infra), it might appear that incapacity must now be established by clear and convincing evidence. Indeed, one court so held in a case involving the commitment of a juvenile against whom a finding of delinquency had been adjudicated but who had not yet been the subject of a dispositional hearing. See Matter of Ralph M., 99 Misc.2d 828, 417 N.Y.S.2d 608 (Fam. Ct. N.Y. Co. 1979). However, in Warren v. Harvey, 632 F.2d 925 (2d Cir. 1980), cert. denied, 449 U.S. 902, 101 S.Ct. 273 (1980), the court upheld the constitutionality of a Connecticut statute imposing the preponderance of evidence standard, citing relevant differences between persons acquitted of a criminal charge by reason of insanity, and other persons facing civil commitment. In Brown v. Warden, Great Meadow Correctional Facility, 682 F.2d 348 (1982), cert. denied, 459 U.S. 991, 103 S.Ct. 349 (1982), the court reviewed the New York standard of proof and held that a preponderance of the evidence standard does not deprive defendant of due process. The court set out three factors by which to evaluate the impact on due process: (1) are private interests affected by the proceedings; (2) the risk of error created by the state's chosen procedure; and (3) counterveiling government interest which supports the use of the challenged procedure. New York courts continue to require proof by a fair preponderance of the credible evidence. People v. Breeden, 115 A.D.2d 484, 495 N.Y.S.2d 715 (2d Dept. 1985).

Capacity is a question of law and fact, determined by the trial court, with the aid of the examining psychiatrists. Courts cannot delegate this ultimate determination to the psychiatric experts. See

People v. Grieco, 82 Misc.2d 500, 368 N.Y.S.2d 992 (Sup. Ct. Westchester Co. 1975); People v. Valentino, 78 Misc.2d 678, 356 N.Y.S.2d 962 (Nassau Co. Ct. 1974), citing People v. Francabandera, 33 N.Y.2d 429, 354 N.Y.S.2d 609 (1974).

In addition to hearing the "neutral experts" appointed to conduct the examination, the trial court must permit both parties to offer their own expert testimony. People v. Christopher, 65 N.Y.2d 417, ___ N.Y.S.2d ___ (1985).

The court in People v. Valentino, supra, 356 N.Y.S.2d at 967-968, set forth criteria which a court may consider in determining capacity:

1. Is the defendant oriented as to time and place?
2. Can the defendant perceive, recall, and relate?
3. Does the defendant have at least a rudimentary understanding of the process of trial and the roles of judge, jury, prosecutor and defense attorney?
4. Can the defendant, if he wishes, establish a working relationship with his attorney?
5. Does the defendant possess sufficient intelligence to listen to the advice of counsel (without necessarily choosing to adopt it) and, based on that advice, appreciate that one course of conduct may be more beneficial to him than another?
6. Is the defendant's mental state sufficiently

> stable to enable him to withstand the stresses of the trial without suffering a serious, prolonged or permanent breakdown? Will the trial be long, complex, short, or simple? Are adjustments required in the manner of trial rather than a finding of incapacity?

These criteria are cited with approval in People v. Parsons, 82 Misc.2d 1090, 371 N.Y.S.2d 840 (Nassau Co. Ct. 1975). See also People v. Picazzo, 106 A.D.2d 413, 482 N.Y.S.2d 335 (2d Dept. 1984).

The single factor set forth in an examining psychiatrist's report that defendant is "fit" but "might disorganize" under the stress of a trial, in and of itself, does not mandate a finding of incapacity. People v. Sullivan, 48 A.D.2d 398, 369 N.Y.S.2d 744 (1st Dept. 1975), aff'd, 39 N.Y.2d 903, 386 N.Y.S.2d 399 (1976).

The question arises as to what evidence is sufficient to support a finding of capacity. Where injuries incurred in the commission of a crime cause genuine amnesia, a defendant is entitled to a hearing on capacity, but a finding of capacity may be made if supported by the evidence in a particular case. People v. Francabandera, 33 N.Y.2d 429, 354 N.Y.S.2d 609 (1974) (a defendant who suffered amnesia after he was shot by police while attempting murder in the presence of eyewitnesses and who had a history of alcoholism to support a defense of intoxication -- his only possible defense to the charge of attempted intentional murder -- was not an incapacitated person on the ground that his injuries rendered him incapable of participating in his defense). See also People v. Pisco, 69 Misc.2d 675, 330 N.Y.S.2d 542 (Dutchess Co. Ct. 1972) (defendant suffered amnesia from the removal of a bullet from a head

wound received in the course of the crime but could meaningfully participate in his defense and therefore was not an incapacitated person).

At least one court has held that where a defendant claims amnesia, he has the burden of proof of incapacity by a preponderance of the evidence, because this condition is peculiarly within the defendant's knowledge. People v. Rivera, 111 Misc. 2d 713, 444 N.Y.S.2d 858 (Sup. Ct. N.Y. Co. 1981).

If a defendant takes medication which results in intermittent mental confusion, this is not necessarily grounds for a finding of incapacity to proceed but the trial judge must be alert to see whether at any point during the trial the defendant becomes too confused to proceed. People v. Parsons, supra. See also People v. Moore, 78 A.D.2d 997, 433 N.Y.S.2d 689 (4th Dept. 1980) (hearing necessary to determine if defendant's guilty plea was competent where defendant was taking the same medication that he had consumed at the time of the crime); People v. Valente, 77 A.D.2d 917, 430 N.Y.S.2d 681 (2d Dept. 1980) (prior to sentencing, the defendant in a burglary case suggested that he had been under the influence of alcohol and valium during the commission of the crimes so as to negate the element of intent necessary for conviction of those crimes; accordingly, the trial court should have conducted an inquiry to establish whether defendant had been aware of what he had been doing during the crimes, and whether defendant knowingly waived the defense of absence of intent as a result of intoxication); People v. Parizo, 78 A.D.2d 863, 432 N.Y.S.2d 627 (2d Dept. 1980).

The New York Court of Appeals in People v. Reason, 37 N.Y.2d 351, 372 N.Y.S.2d 614 (1975), held that if a defendant has the capacity to stand trial, he is competent to represent himself (proceed pro se),

although the court must in addition determine if his waiver of counsel is knowing, intelligent, and voluntary. However, at least one court had held that before a defendant found competent to stand trial can waive his right to trial by jury, the court must hold a hearing to ascertain that the defendant is fully aware of the consequences of waiving a trial by jury. See People v. Rivera, 95 Misc.2d 760, 408 N.Y.S.2d 310 (Sup. Ct. Erie Co. 1978). The court ruled that a finding of competency to stand trial gives a defendant a right to proceed pro se as held in Reason, because only passive activity may be involved, but the constitutional right to a jury trial, formerly mandated, cannot be simply stipulated away without inquiry, at least in a case where defendant's competency had been at issue. See also People v. Christopher, 101 A.D.2d 504, 476 N.Y.S.2d 640 (4th Dept. 1984), rev'd on other grounds, 65 N.Y.2d 417 (1985), where the court ordered a second competency hearing when defendant repeatedly waived his right to a jury trial.

(c) Counsel Not Required at Article 730 Examination; Right to Counsel at Hearing

It has been held that the fact that an accused was not represented by counsel at the examination under Article 730 does not per se invalidate those proceedings. See People v. Gabel, 49 A.D.2d 962, 373 N.Y.S.2d 684 (3d Dept. 1975). However, see People v. Rice, 76 Misc.2d 632, 351 N.Y.S.2d 888 (Suffolk Co. Ct. 1974), where the court ordered a new Article 730 hearing because counsel had not been present at the Article 730 hearing held on a Jewish holiday.

(d) Holding Hearing In Camera

Where extensive pretrial publicity renders it likely that the

defendant's right to a fair trial would be seriously endangered if the Article 730 hearing were held in open court, the hearing may be held in camera, with a provision that the transcript be made available to the press and public if the defendant is found to be an incapacitated person. People v. Berkowitz, 93 Misc.2d 873, 403 N.Y.S.2d 699 (Sup. Ct. Kings Co. 1978) citing, inter alia, Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756 (1977), motion for reargument denied, 43 N.Y.2d 846, 402 N.Y.S.2d 1029 (1978), aff'd, 443 U.S. 368 (1979). The court in so holding noted that the fitness to proceed hearing is not a trial on the merits but a pre-trial proceeding to adjudicate a limited and narrow issue. (But see Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 423 N.Y.S.2d 630 [1979] [insufficient showing of prejudice to justify closure].)

(7) Procedure after Examination and Hearing

(a) Local Criminal Court; Order of Observation

When a local criminal court, following a hearing conducted pursuant to CPL §730.30(3) or (4), is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed. If it is satisfied that the defendant is an incapacitated person, or if no motion for such a hearing is made, such court must issue a final or temporary order of observation committing him to the custody of the Commissioner for care and treatment in an appropriate institution for a period not to exceed ninety days from the date of the order. When a local criminal court accusatory instrument other than a felony complaint has been filed against the defendant, the court must issue a final order of observation; when a felony complaint has been filed against the

defendant, the court must issue a temporary order of observation, except that, with the consent of the district attorney, it may issue a final order of observation. CPL §730.40(1).

When a local criminal court has issued a final order of observation, it must dismiss the accusatory instrument filed in such court against the defendant and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such accusatory instrument. When the defendant is in the custody of the Commissioner at the expiration of the period prescribed in a temporary order of observation, the proceedings in the local criminal court that issued the order shall terminate for all purposes and the Commissioner must promptly certify to the court and to the appropriate district attorney that the defendant was in his custody on such expiration date. Upon receipt of the certification, the court must dismiss the felony complaint filed against the defendant. CPL §730.40(2). After a felony complaint against a defendant has been dismissed on this ground, the district attorney has no obligation to inform the defendant of a subsequent grand jury proceeding. See People v. Moss, 99 Misc.2d 534, 416 N.Y.S.2d 741 (Sup. Ct. Queens Co. 1979), wherein the court denied defendant's motion to dismiss the indictment because she had not been notified of the grand jury proceeding, convened after the expiration of the temporary order of observation and dismissal of the felony complaint, at which time defendant had been examined again and found competent.

Once a final order of observation is issued, the court has no power to amend it and issue a temporary order of observation so that the defendant may be indicted. Issuance of a final order of observation terminates all further criminal prosecution of the charges. See People

v. Paulides, 88 Misc.2d 1061, 389 N.Y.S.2d 1018 (Nassau Co. Ct. 1976).

(b) Grand Jury Procedure

When the local criminal court has issued an order of examination or a temporary order of observation, and when the charge or charges contained in the accusatory instrument are subsequently presented to a grand jury, the grand jury need not hear the defendant pursuant to CPL §190.50 unless, upon application by defendant to the superior court that impaneled the grand jury, the superior court determines that the defendant is not an incapacitated person. CPL §730.40(3). The constitutionality of this section has been upheld. See People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1986); People v. Searles, 79 Misc.2d 850, 361 N.Y.S.2d 568 (Sup. Ct. N.Y. Co. 1974). But see People v. Balukas, 95 A.D.2d 813, 463 N.Y.S.2d 534 (2d Dept. 1983), where the defendant was hospitalized for a psychiatric examination the same day that the grand jury convened to hear the evidence on her charges. The court dismissed the indictment against her because it would have been difficult for defendant to apply to the court to determine incapacitation and as a result allow the court to decide if the grand jury should hear defendant's testimony.

In People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1986), the defendant, while committed for a mental competency hearing, was notified that charges would be presented to the grand jury. The prosecution presented its case pursuant to CPL §730.40(3), and neither defendant nor anyone on his behalf testified before the grand jury. The People did not present any evidence of defendant's psychiatric history and his mental condition at the time of the offense. Moreover the grand jury was charged that it could presume the defendant's sanity. In upholding

denial of defendant's motion to dismiss the indictment, the Court of Appeals held that the People had no duty to instruct the grand jury as to the defense of mental disease or defect, nor submit evidence of defendant's psychiatric history because such a determination was not within province of the grand jury. Because determining that the defense of mental disease or defect presupposed a finding of factual guilt, the court concluded that consideration of the defense should rest exclusively with the petit jury. In People v. Galuppo, 98 Misc.2d 395, 413 N.Y.S.2d

In People v. Galuppo, 98 Misc.2d 395, 413 N.Y.S.2d 880 (Sup. Ct. N.Y. Co. 1979), the People were permitted to prevent exploration into defendant's mental condition at the grand jury as long as the prosecutor advised the grand jury on the defense of justification. "[T]he nature of the defense of mental disease or defect precludes its being the subject of grand jury consideration." Id., 413 N.Y.S.2d at 883.

(c) Procedure After Indictment Filed

When an indictment is filed against a defendant after a local criminal court has issued an order of examination and before it has issued a final or temporary order of observation, the defendant must be promptly arraigned upon the indictment, and the proceedings in the local criminal court then terminate for all purposes. The district attorney must notify the local criminal court of the arraignment, and the court must dismiss the accusatory instrument filed against the defendant. If the director has submitted the examination reports to the local criminal court, the court must forward them to the superior court in which the indictment was filed. If the director has not submitted the reports to

the local criminal court, he must submit them to the superior court in which the indictment was filed. CPL §730.40(4).

When an indictment is timely filed against the defendant after the issuance of a temporary order of observation or after the expiration of the period prescribed in the order, the superior court in which the indictment is filed must direct the sheriff to take custody of the defendant at the institution in which he is confined to bring him before the court for arraignment upon the indictment. After the defendant is arraigned upon the indictment, the temporary order of observation or any order issued pursuant to the Mental Hygiene Law after the expiration of the period prescribed in the temporary order of observation shall be deemed nullified. Notwithstanding any other provision of law, an indictment filed in a superior court against a defendant for a crime charged in the felony complaint is not timely if it is filed more than six months after that expiration of the period prescribed in a temporary order of observation issued by a local criminal court where the felony complaint was pending. An untimely indictment must be dismissed by the superior court unless the court is satisfied that there was good cause for the delay in filing the indictment. CPL §730.40(5).

(d) Superior Court; Orders of Commitment and Retention

When a superior court, following a hearing conducted pursuant to CPL §730.30(3) or (4), is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed. If it is satisfied that the defendant is an incapacitated person, or if no motion for a hearing is made, it must adjudicate him an incapacitated person, and must issue a final order of observation or an order of

commitment. When the indictment does not charge a felony or when the defendant has been convicted of an offense other than a felony, the court must:

(a) issue a final order of observation committing the defendant to the custody of the Commissioner for care and treatment in an appropriate institution for a period not to exceed ninety days from the date of such order; and

(b) dismiss the indictment filed in the court against the defendant, which dismissal constitutes a bar to any further prosecution of the charge or charges contained in the indictment.

When the indictment charges a felony or when the defendant has been convicted of a felony, it must issue an order of commitment committing the defendant to the custody of the Commissioner for care and treatment in an appropriate institution for a period not to exceed one year from the date of such order. Upon the issuance of an order of commitment, the court must exonerate the defendant's bail if he was previously at liberty on bail. CPL §730.50(1).

When a defendant is in the custody of the Commissioner immediately prior to the expiration of the period prescribed in a temporary order of commitment and the superintendent of the institution wherein the defendant is confined is of the opinion that the defendant continues to be an incapacitated person, the superintendent must apply to the court that issued such order for an order of retention. The application must be made within sixty days prior to the expiration of the period on forms

that have been jointly adopted by the Judicial Conference and the Commissioner. The superintendent must give written notice of the application to the defendant and to the mental hygiene legal service. Upon receipt of the application, the court may, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct such hearing if a demand therefore is made by the defendant or the mental hygiene legal service within ten days from the date that notice of the application was given them. If, at the conclusion of a hearing conducted pursuant to this subdivision, the court is satisfied that the defendant is no longer an incapacitated person, the criminal action against him must proceed. If it is satisfied that the defendant continues to be an incapacitated person, or if no demand for a hearing is made, the court must adjudicate him an incapacitated person and must issue an order of retention which shall authorize continued custody of the defendant by the Commissioner for a period not to exceed one year. CPL §730.50(2).

When a defendant is in the custody of the Commissioner immediately prior to the expiration of the period prescribed in the first order of retention, the procedure set forth in subdivision two of CPL §730.50 governs the application for and the issuance of any subsequent orders of retention which may not exceed two years each; but the aggregate of the periods prescribed in the temporary order of commitment, the first order of retention and all subsequent orders of retention cannot exceed two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment or for the highest class felony of which he was convicted. CPL §730.50(3).

When a defendant is in the custody of the Commissioner at the expiration of the authorized period prescribed in the last order of

retention, the criminal action pending against him in the superior court which issued the order terminates for all purposes, and the Commissioner must promptly certify to the court and to the district attorney that the defendant was in his custody on the expiration date. Upon receipt of the certification, the court must dismiss the indictment, a dismissal which bars any further prosecution of the charge or charges contained in the indictment. CPL §730.50(4).

When, on the effective date of CPL §730.50(5), any defendant remains in the custody of the Commissioner pursuant to an order issued under former Code of Criminal Procedure §662-b, the superintendent or director of the institution where a defendant is confined must, if he believes that the defendant continues to be an incapacitated person, apply to a court of record in the county where the institution is located for an order of retention. The procedures for obtaining an order pursuant to subdivision five shall be in accordance with the provisions of subdivision two, three and four of CPL §730.50, except that the period of retention pursuant to the first order obtained under subdivision five shall be for not more than one year and any subsequent orders of retention must be for periods not to exceed two years each; but the aggregate of the time spent in the custody of the Commissioner pursuant to any order issued in accordance with the provisions of former Code of Criminal Procedure §662-b and the periods prescribed by the first order obtained under subdivision five and all subsequent orders of retention must not exceed two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment or the highest class felony of which he was convicted. CPL §730.50(5).

(e) Procedure Following Custody by Commissioner

When a local criminal court issues a final or temporary order of observation or an order of commitment, it must forward the order and a copy of the examination reports and the accusatory instrument to the Commissioner, and, if available, a copy of the pre-sentence report. Upon receipt thereof, the Commissioner must designate an appropriate institution operated by the Department of Mental Hygiene in which the defendant is to be placed. The sheriff must hold the defendant in custody pending such designation by the Commissioner, and when notified of the designation, the sheriff must deliver the defendant to the superintendent of the institution. The superintendent must promptly inform the appropriate Director of the mental hygiene legal service of the defendant's admission to such institution. If a defendant escapes from the custody of the Commissioner, the escape shall interrupt the period prescribed in any order of observation, commitment or retention, and the interruption shall continue until the defendant is returned to the custody of the Commissioner. CPL §730.60(1).

Except as otherwise provided in CPL §730.60(5) and (6), when a defendant is in the custody of the Commissioner pursuant to a temporary order of observation or an order of commitment or an order of retention, the criminal action pending against the defendant in the court that issued the order is suspended until the superintendent of the institution in which the defendant is confined determines that he is no longer an incapacitated person. In that event, the court that issued the order and the district attorney must be notified, in writing, by the superintendent of his determination. The court will then direct the sheriff to take custody of the defendant at the institution and bring him before the

court, whereupon the criminal action against him must proceed. CPL §730.60(2).

When a defendant is in the custody of the Commissioner pursuant to an order issued in accordance with CPL Article 730, the Commissioner may transfer him to any appropriate institution operated by the Department of Mental Hygiene. The Commissioner may discharge a defendant in his custody under a final order of observation at any time prior to the expiration date of such order, or otherwise treat or transfer the defendant in the same manner as if he were a patient not in confinement under a criminal court order. CPL §730.60(3).

A defendant in the custody of the Commissioner pursuant to an order of commitment or an order of retention, may make any motion authorized by Article 730, which is susceptible of fair determination without his personal participation. If the court denies the motion, it must be without prejudice to a renewal after the criminal action against the defendant has been ordered to proceed. If the court enters an order dismissing the indictment and does not direct that the charge or charges be resubmitted to a grand jury, the court must direct that the order of dismissal be served upon the Commissioner. See CPL §730.60(4).

When a defendant is in the custody of the Commissioner pursuant to an order of commitment or an order of retention, the superior court that issued the order may, upon motion of the defendant, and with the consent of the district attorney, dismiss the indictment when the court is satisfied that:

(a) the defendant is a resident or citizen of another state or country and that he will be removed thereto upon dismissal

of the indictment; or

(b) the defendant has been continuously confined in the custody of the Commissioner for a period of more than two years.

Before granting a motion under this subdivision, the court must be further satisfied that dismissal of the indictment is consistent with the ends of justice and that custody of the defendant by the Commissioner pursuant to an order of commitment or an order of retention is not necessary for the protection of the public and that care and treatment can be effectively administered to the defendant without the necessity of such order. If the court enters an order of dismissal under subdivison five, it must set forth in the record the reasons for such action, and must direct that the order of dismissal be served upon the Commissioner. The dismissal of an indictment pursuant to subdivision five constitutes a bar to any further prosecution of the charge or charges contained in the indictment. CPL §730.60(5).

No committed person may be given any passes, furloughs, or have his restricted status changed without notice to the district attorney, the Superintendent of State Police, the sheriff of the county where the facility is located, the police department having jurisdiction of the area where the facility is located, any person who reasonably might be the victim of such person, and any other person the court may designate. CPL §730.60(6)(a). The district attorney, after he receives the notice, may move for a hearing to contest the temporary release or change of status, at which both he and the committed person's attorney are entitled to inspect the committed person's clinical records in the custody of the

Commissioner. CPL §730.60(6)(c).

Notice must also be given to all of the above-named persons if such person escapes from the facility. CPL §730.60(6)(b).

(f) Procedure Following Termination of Custody by Commissioner

When a defendant is in the custody of the Commissioner on the expiration date of a final or temporary order of observation or an order of commitment, or on the expiration date of the last order of retention, or on the date an order dismissing an indictment is served upon the Commissioner, the superintendent of the institution in which the defendant is confined may retain him for care and treatment for a period of thirty days from that date. CPL §730.70.

If the superintendent determines that the defendant is mentally ill or mentally defective as to require continued care and treatment in an institution he may, before the expiration of the thirty-day period, apply for an order of certification in the manner prescribed in Mental Hygiene Law §9.33. See CPL §730.70.

The reference to the Mental Hygiene Law in the CPL is to Mental Hygiene Law §31.33, renumbered §9.33 in 1977 (Ch. 978, L. 1977).

(g) Jackson Hearing

CPL §730.70 is in accord with the rule in Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845 (1972), that the constitutional guarantees of due process and equal protection mandate that a person, initially confined in a psychiatric facility for the criminally insane as a result of a determination that he is not competent to stand trial, must within a reasonable time be civilly committed if it is unlikely that he will in the foreseeable future regain his mental capacity. See also People v.

Arendes, 92 Misc.2d 372, 400 N.Y.S.2d 273 (Sup. Ct. Queens Co. 1977) (petitioner confined under criminal commitment for thirteen years has right to Jackson hearing at which the People, if they oppose his conversion to civil status, would have the burden of proving his likelihood of regaining capacity to stand trial by a preponderance of the evidence).

(8) Determination of Juvenile's Fitness to Proceed

Prior to September 10, 1979, there was no provision comparable to Article 730 in the Family Court Act providing procedures to determine whether a juvenile against whom a delinquency proceeding was pending had capacity to participate in a fact-finding hearing. Accordingly, one court found that it had no power to commit a juvenile who had been found incapable of participating in the fact-finding hearing, absent civil certification under Mental Hygiene Law §15.27, and called upon the Legislature to remedy this situation. See Matter of Jack T., 98 Misc.2d 16, 413 N.Y.S.2d 957 (Fam. Ct. Kings Co. 1978). Another court held otherwise. See Matter of Ralph M., 99 Misc.2d 828, 417 N.Y.S.2d 608 (Fam. Ct. N.Y. Co. 1979). In any event, paragraph 13 of Family Court Act §301.2 defines "incapacitated person" as one unable to understand the proceedings against him or to assist in his defense because of mental illness, mental retardation or developmental disability, as defined in Mental Hygiene Law §1.03(20), (21), and (22). The court may order, on an inpatient or outpatient basis, that the juvenile be examined (1) by qualified psychiatrists [as defined in CPL §730.10(b)] to determine mental illness; or (2) by one or two qualified psychiatrists and by one certified psychologist [as defined in CPL §730.10(6)] to determine

retardation or developmental disability. Family Court Act §322.1.

(a) Procedure To Determine Capacity

After receipt of the reports, the court must conduct a hearing upon five days notice and opportunity to be heard to the respondent, his counsel or law guardian, and the Commissioner of Mental Health or of Mental Retardation and Developmental Disabilities (whichever is appropriate). Family Court Act §322.2(1). If the court finds that the juvenile is incapacitated, it must proceed with a hearing to determine whether there is probable cause to believe that the respondent committed a crime. Family Court Act §322.2(3).

(b) Commitment Procedure

If the court finds there is probable cause to believe that respondent committed a misdemeanor, the respondent shall be committed to the custody of the appropriate commissioner for a period not in excess of 90 days. Family Court Act §322.2(4). If the court finds there is probable cause to believe that respondent committed a felony it shall order respondent committed to custody of the appropriate commissioner for a period not in excess of one year. Such period may be extended upon written application to the court by the commissioner not more than sixty days prior to the expiration of the period. Written notice of the application must be given to respondent, counsel or law guardian for respondent, and the mental hygiene legal service if respondent is at a residential facility.

The court must then conduct a hearing on the issue of capacity and either return respondent to family court upon a finding that respon-

dent is no longer incapacitated or authorize continued custody for a period not in excess of one year. The extentions may not continue beyond respondent's eighteenth birthday. Family Court Act §322.2(5)(a).

(c) Review by Commissioner

The commissioner shall review respondent's condition within 45 days of commitment and every 90 days thereafter upon notice to respondent and counsel or law guardian for respondent. The commissioner, upon written notice to respondent, the presentment agency and the mental hygiene legal service (if applicable) shall apply for an order dismissing the petition whenever he determines that there is a substantial probability that respondent will continue to be incapacitated for the foreseeable future. Respondent may also apply for such an order and may demand a hearing within ten days of receipt of the notice of application by the commissioner. Family Court Act §322.2(5)(d).

(d) Commitment or Release after Dismissal of Petition

Voluntary or involuntary commitment under the Mental Hygiene Law is not precluded by an order dismissing the petition. Unless the juvenile is so committed when the petition is dismissed he must be released. Family Court Act §322.2(6).

(e) Transfer to Non-Residential Facility

The Commissioner or the juvenile may petition the court for a hearing to determine if the juvenile, committed to a residential facility, may be more appropriately treated in a non-residential facility. Family Court Act §322.2(7).

an act, which if committed by an adult, would constitute a crime. The court distinguished this position from a pretrial sanity hearing, which is a "more critical stage of the prosecution." See In re Lee. v. County Court, 27 N.Y.2d 432, 318 N.Y.S.2d 705 (1971), cert. denied, 404 U.S. 823 (1971).

B. Evidence of Insanity

Penal Law §40.15 provides for the defense of mental disease or defect in any criminal prosecution:

> In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:
>
> (a) The nature and consequence of such conduct; or
>
> (b) That such conduct was wrong.

(1) Required Notice of Intent to Offer Mental Disease Or Defect Defense

"Psychiatric evidence" of mental disease or defect of the defendant excluding criminal responsibility pursuant to Penal Law §40.15 is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to rely upon such defense. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence. CPL §250.10(2).

(2) Psychiatric Examination

A district attorney has a right to have the court direct a psychiatric examination of any defendant who has raised an insanity defense. See CPL §250.10(3). See also People v. Traver, 70 Misc.2d 162, 332 N.Y.S.2d 955 (Dutchess Co. Ct. 1972), citing Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705 (1971), cert. denied, 404 U.S. 823 (1971), decided under the former Code of Criminal Procedure. A defendant who is introducing psychiatric evidence of the affirmative defense of extreme emotional disturbance must also submit to such an examination. People v. Atwood, 101 Misc.2d 291, 420 N.Y.S.2d 1002 (Sup. Ct. N.Y. Co. 1979). So must a defendant who offers psychiatric evidence relevant to a defense of organic amnesia in a perjury prosecution initiated after he testified that he was not able to recall certain events about which he was questioned in the grand jury because of his alleged organic mental condition. People v. Segal, 54 N.Y.2d 58, 444 N.Y.S.2d 588 (1981).

Very often a defendant who raises an insanity defense has undergone a court-ordered psychiatric examination pursuant to Article 730 of the Criminal Procedure Law to determine if he is competent to stand trial. If he is found competent, the results of this examination are admissible in his subsequent prosecution as relevant to the question of his sanity at the time of the crime. See People v. Abdul Karim Al-Kanani, 33 N.Y.2d 260, 351 N.Y.S.2d 969 (1973), cert. denied sub nom. Al-Kanani v. New York, 417 U.S. 916 (1974); People v. Wise, 47 A.D.2d 969, 366 N.Y.S.2d 78 (3d Dept. 1975). Article 730 is discussed in Section A, supra.

If the court finds that the defendant has willfully refused to cooperate fully in the examination ordered pursuant to subdivision three of this section it may preclude introduction of testimony by a psychiatrist or psychologist concerning mental disease or defect of the defendant at trial. Where, however, the defendant has other proof of his affirmative defense, and the court has found that the defendant did not submit to or cooperate fully in the examination ordered by the court, this other evidence, if otherwise competent, shall be admissible. In this case, the court must instruct the jury that the defendant did not submit to or cooperate fully in the pre-trial psychiatric examination ordered by the court pursuant to subdivision three of this section and that the failure may be considered in determining the merits of the affirmative defense. CPL §250.10(5). See also Lee v. County Court, supra, and People v. Sullivan, 39 N.Y.2d 903, 386 N.Y.S.2d 399 (1976).

(3) Defendant's Right to Counsel at Psychiatric Examination

A defendant has a right to have counsel present at any psychiatric examination ordered by the court upon the motion of the district attorney. CPL §250.10(3). See also People v. Cerami, 33 N.Y.2d 243, 351 N.Y.S.2d 681 (1973); Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705 (1971), cert. denied, 404 U.S. 823 (1971); People v. Abdul Karim Al-Kanani, 31 A.D.2d 838, 298 N.Y.S.2d 275 (2d Dept. 1969), aff'd, 26 N.Y.2d 473, 311 N.Y.S.2d 846 (1970). The district attorney also has a right to be present.

Before arraignment, if a defendant asks for counsel, any testimony of a prosecution-ordered psychiatric examination of the defendant before he confers with his attorney is inadmissible. See People v. Lederhilger, 35 A.D.2d 588, 313 N.Y.S.2d 448 (2d Dept. 1970), in which a

murder conviction was reversed and a new trial ordered where a prosecution psychiatrist testified as to his examination of defendant when the examination took place before defendant could confer with the counsel he had requested. If the court upon motion of the district attorney orders a psychiatric examination of a defendant who raises an insanity defense, counsel is entitled to notice as to date, time and place of the examination so that defendant can effectively exercise his right to have counsel present (People v. Cerami, supra) even though counsel functions only as an observer (CPL §250.10[3]; see also Lee v. County Court of Erie County, supra). In People v. Whitfield, 97 Misc.2d 236, 411 N.Y.S.2d 104 (Monroe Co. Ct. 1978), the court found merit in the People's contention that the presence of counsel and a stenographer would impair the integrity of the requested examination and accordingly ordered those individuals to observe and record the examination from behind a one-way mirror.

In Cerami, supra, the New York Court of Appeals ruled that the failure to notify counsel which resulted in counsel's absence from the psychiatric examination ordered upon the district attorney's motion was reversible error even though the court ordered a second examination at which counsel was present, because the psychiatrist's trial testimony was based on both examinations. But see People v. Brown, 50 A.D.2d 1078, 376 N.Y.S.2d 335 (4th Dept. 1975), where the court held that a failure to notify counsel which resulted in counsel's absence was harmless error in view of overwhelming proof of guilt.

Although the district attorney has a right to be present at the court-directed examination as an observer, he may not be present at defendant's own psychiatric examination arranged by defendant's attorney, even though the psychiatrist was appointed by the court at counsel's

request because defendant could not afford to retain the services of a private psychiatrist. People v. Thomas, 77 Misc.2d 1095, 355 N.Y.S.2d 909 (Sup. Ct. N.Y. Co. 1974).

An appellate court found that the trial court's statement to defense counsel that "[the psychiatrist] will examine [the defendant] later this afternoon, or tomorrow morning" constituted sufficient notice in view of the fact that the examination was held that afternoon, and counsel's failure to attend was no bar to the admissibility of the examining psychiatrist's testimony. People v. Wise, 47 A.D.2d 969, 366 N.Y.S.2d 78, 80 (3d Dept. 1975).

Counsel's failure to object to lack of notice until after a trial and conviction has been held to constitute a waiver of the right to counsel at the examination. See People v. Wood, 64 A.D.2d 767, 407 N.Y.S.2d 271 (3d Dept. 1978).

(4) The Psychiatric Examination and the Privilege Against Self-Incrimination

A court-ordered psychiatric examination of a defendant who has raised an insanity defense does not violate the privilege against self-incrimination since the defendant has waived that by interposing the insanity defense. Therefore a defendant cannot object to the introduction of the testimony of a psychiatrist who examined him on this ground. Of course, the examining psychiatrist may only testify on the question of sanity, and not on the question of guilt. Lee v. County Court of Erie County, supra; People v. Sullivan, 39 N.Y.2d 903, 386 N.Y.S.2d 399 (1976). See also People v. Graydon, 43 A.D.2d 842, 351 N.Y.S.2d 172 (2d Dept. 1974), where the court reversed the conviction and ordered a new trial, finding that reversible error resulted because the psychiatrist who had examined the defendant testified that defendant's

exculpatory version of the homicide was incredible. See also People v. Hayes, 55 A.D.2d 812, 390 N.Y.S.2d 281 (4th Dept. 1976) (reversible error to fail to instruct jury to disregard introduction of evidence of defendant's inculpatory admission to examining psychiatrist). See Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981).

(5) The Psychiatric Examination and the Physician-Patient Privilege

The prosecution is permitted to call psychiatric experts to testify even though they have previously treated the defendant where the defendant asserts an insanity defense. By raising that defense, defendant has waived the physician-patient privilege. See People v. Abdul Karim Al-Kanani, 33 N.Y.2d 260, 351 N.Y.S.2d 969 (1973), cert. denied sub. nom. Al-Kanani v. New York, 417 U.S. 916 (1974). See also People v. Edney, 39 N.Y.2d 620, 385 N.Y.S.2d 23 (1976); and United States ex rel. Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976), aff'd, 556 F.2d 556 (2d Cir. 1977); People v. Lamendola, 70 A.D.2d 685, 416 N.Y.S.2d 379 (3d Dept. 1979). In Al-Kanani, the psychiatrist who testified for the People had treated the defendant while he was in custody in a State hospital pending the determination that he was competent to stand trial. In Edney, the psychiatrist who testified for the People had examined defendant at the defense attorney's request. In both cases the courts found a waiver of the physician-patient privilege. Subsequently, the Federal District Court for the Eastern District of New York in United States ex rel. Edney v. Smith, supra, refused to issue a writ of habeas corpus to Edney, holding that the physician-patient privilege had been waived.

In People v. Christopher, 65 N.Y.2d 417, 492 N.Y.S.2d 566

(1985), the court found that admissions by the defendant to the in-take nurse at a psychiatric examining facility did not qualify for suppression under the physician-patient privilege. Defendant's admissions were voluntary and were not made in the course of his psychiatric treatment.

In People v. Edney, supra, the defendant also contended that because his attorney requested the psychiatrist to examine the defendant, the attorney-client privilege precluded that psychiatrist from testifying for the People. The Court of Appeals found that "the traditional and statutory requirements of an attorney-client relationship were simply not established (CPLR 4503, subd. [a])." Edney, 39 N.Y.2d at 626, 385 N.Y.S.2d at 27. The Court stated that in its opinion if the attorney had consulted with the doctor, facts and observations disclosed by the attorney to the doctor would be protected and could not be disclosed by the doctor because of the protection afforded an attorney's work product, citing CPLR 3101. But see People v. Hairston, 111 Misc.2d 691, 444 N.Y.S.2d 853 (Sup. Ct. Bronx Co. 1981) (defendant's statement given to his attorney, who gave it to his doctor, could be inspected in camera by the court to effect redaction of any portion of the statement not relevant to the insanity defense; the relevant portions would be discoverable).

The United States District Court for the Eastern District of New York, in denying defendant Edney's petition for a writ of habeas corpus, found that while an extension of the attorney-client privilege to encompass psychiatric examinations at the request of a defense attorney would be desirable, it is not constitutionally compelled.

(6) Discovery of Psychiatric Reports

The New York Court of Appeals in Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705 (1971), cert. denied, 404 U.S. 823 (1971), held that prior to trial a copy of the psychiatrist's report based on the court-ordered psychiatric examination must be furnished to both sides and, although a stenographic transcript is not required, if one is made it must be furnished to both sides. In accord, People v. Gliewe, 76 Misc.2d 696, 351 N.Y.S.2d 912 (Monroe Co. Ct. 1974). In addition, CPL §240.30(1), providing reciprocal discovery for the district attorney after defense counsel's discovery motions have been granted, applies to discovery of the reports of a psychiatrist who has examined that defendant at the request of the defense in order to prepare an insanity defense. See People v. Gliewe, supra; People v. Hairston, supra, discussed above in Section B(5). See also People v. Cruickshank, 105 A.D.2d 325, 484 N.Y.S.2d 328 (3d Dept. 1985), aff'd 67 N.Y.2d 625, 499 N.Y.S.2d 663 (1986).

(7) Right to Court Appointed Psychiatrist

In a decision by the United States Supreme Court, Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), the court held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that the state provide access to a psychiatrist's assistance at trial, if a defendant cannot otherwise afford one.

An indigent defendant may not have two court appointed psychiatrists to assist in his defense. People v. Franco, 120 A.D.2d 609, 502 N.Y.S.2d 82 (2d Dept. 1986), appeal den. 68 N.Y.2d 757 (1986).

(8) Evidence of Insanity: Burden and Standard of Proof

In 1984, the legislature repealed P.L. §30.05 and enacted P.L. §40.15. This action changed the insanity defense to an affirmative defense, thereby shifting the burden of proof from the People to the defendant. Defendant must show by a preponderance of the evidence that, at the time he committed the offense charged, he suffered from a mental disease or defect. The shift in the burden of proof has been held constitutional by the U.S. Supreme Court; see Martin v. Ohio, 107 S.Ct. 1098 (1987); Rivera v. Delaware, 429 U.S. 877, 97 S.Ct. 226 (1976); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002 (1952). The Appellate Division, Fourth Department, upheld the constitutionality of Penal Law § 40.15 in People v. Kohl, ___ A.D.2d ___, 514 N.Y.S.2d 154 (4th Dept. 1987). The court explicitly rejected defendant's argument that Penal Law §40.15 was inconsistent with the decision in People v. Silver, 33 N.Y.2d 475, 354 N.Y.S.2d 915 (1974). In Silver, the Court of Appeals reaffirmed that the presumption of sanity is sufficient to sustain the people's burden in the absence of evidence to the contrary or in the face of weak rebuttal proof.

> Reconstituting the defense of insanity as an affirmative defense does not run afoul of that holding. Instead, requiring defendant to establish insanity by a preponderance of the evidence merely recognizes the presumption until such proof is offered.

Id., 33 N.Y.2d at 483.

Sanity is a question of fact and law, initially determined by the jury, whose verdict will not be set aside if supported by the evidence. The jury may reject expert testimony. See People v. Lancaster, supra; People v. Bell, 64 A.D.2d 785, 407 N.Y.S.2d 916 (3d

Dept. 1978). Thus, when there is conflicting testimony, the question of defendant's sanity is for the jury to determine. People v. Jandelli, 118 A.D.2d 656, 499 N.Y.S.2d 962 (2d Dept. 1986). One court has stated that before a jury's verdict of sanity will be set aside, there must be a "serious flaw" in the People's evidence. See People v. Hicks, 125 A.D.2d 332, 509 N.Y.S.2d 62 (2d Dept. 1986); People v. Robertson, 125 A.D.2d 344, N.Y.S.2d 998 (2d Dept. 1986); People v. Lamendola, 70 A.D.2d 685, 416 N.Y.S.2d 379, 380 (3d Dept. 1979).

(9) Evidence of Insanity; Nature and Scope

The New York Court of Appeals found no issue of fact for the jury where defendant at trial does not raise an insanity defense and there is no evidence of insanity other than the motiveless nature of the homicide and defendant's bizarre courtroom behavior. People v. Sullivan, 39 N.Y.2d 903, 386 N.Y.S.2d 399 (1976).

Psychiatric testimony that defendant suffered from fugue states (periods of temporary amnesia), coupled with defendant's history of mental problems, do not necessarily establish legal insanity in that a person can be "mentally sick" and still know and appreciate the nature and consequences of his criminal conduct, and that it was wrong; that is, he cannot meet the legal test of insanity. People v. Baldi, 80 Misc.2d 118, 362 N.Y.S.2d 927 (Sup. Ct. Queens Co. 1974), rev'd on other grounds, 76 A.D.2d 259, 429 N.Y.S.2d 677 (2d Dept. 1980), rev'd and remanded, 54 N.Y.2d 137, 444 N.Y.S.2d 893 (1981), aff'd, 96 A.D.2d 212, 468 N.Y.S.2d 498 (2d Dept. 1983); United States v. Williams, 483 F.Supp. 453 (E.D.N.Y. 1980), aff'd 63 F.2d 770 (1980).

The People may offer evidence of defendant's prior violent

(f) Return to Family Court

Either the Commissioner or the juvenile may petition the court for a hearing on the ground that the juvenile is no longer incapacitated. If the Commissioner so petitions, he must give twenty-four hours notice to the juvenile and his counsel or law guardian, who must have an opportunity to be heard. If after the hearing, the court finds that the juvenile is no longer an incapacitated person, it must return him to the Family Court. Family Court Act §322.2(8).

(g) Credit for Time in Commissioner's Custody

Any time spent by the juvenile in the custody of the Commissioner is to be credited toward any period in a dispositional order. Family Court Act §322.2(9).

(h) Right to Counsel

The juvenile cannot waive his right to counsel in a proceeding to extend or continue a commitment to the custody of the Commissioner of Mental Health or Mental Retardation and Developmental Disabilities (see Family Court Act §249[a]). In Matter of Cheri, H., 121 Misc.2d 973, 469 N.Y.S.2d 551 (Fam. Ct. Bronx Co. 1983), where the parents would not provide juvenile with an attorney, the court ruled that the parents cannot waive juvenile's right to counsel.

However, a juvenile does not have a constitutional right to have an attorney present at the diagnostic mental hearing conducted subsequent to the fact-finding hearing and prior to the dispositional hearing. In re Jose D., 66 N.Y.2d 638, 495 N.Y.S.2d 360 (1985). When a diagnostic study is conducted, the juvenile has already been found to have committed

criminal conduct to rebut an insanity claim only if that "evidence bears some articulable relation to the issue" and the probative value outweighs its potential for prejudice. People v. Santarelli, 49 N.Y.2d 241, 425 N.Y.S.2d 77 83 (1980). In Santarelli, the People sought to prove that defendant's fatal shooting of his brother-in-law was not the result of temporary insanity, but merely another manifestation of defendant's "explosive personality" which did not reach legal insanity. The Court of Appeals, however, ruled that testimony about some prior behavior was inadmissible where the witness was unaware of the facts surrounding the defendant's violent outbursts since this bore no relation to the issue of defendant's overreactions to mild stresses. But see People v. Clark, 94 A.D.2d 846, 463 N.Y.S.2d 601 (3d Dept. 1983), where the court allowed evidence of defendant's prior conduct (suicide attempt) to be used by the district attorney to rebut defendant's evidence attempting to prove insanity.

A statement by the prosecutor in his summation, without a defense objection, that the prosecution psychiatrist was more credible than the defense psychiatrist was held not to require reversal in the interests of justice. See People v. Lamendola, supra.

Denial of a defense request for an adjournment was not error even though the defense psychiatrist was unavailable to testify because of defense counsel's delay in seeking the psychiatrist's services until a period of nearly three months had elapsed after the service of the required notice of an insanity defense and the defense psychiatrist's report was available to the defense at the trial. See People v. Congilaro, 60 A.D.2d 442, 400 N.Y.S.2d 409 (4th Dept. 1977).

(10) Medical Evidence of Insanity; Nature and Admissibility

Under the former Penal Law of 1909, the rule was that a psychiatrist could not base his expert opinion on the question of defendant's sanity in whole or in part on interviews with third parties. If the expert did, his testimony was inadmissible. See People v. Keough, 276 N.Y. 141, 11 N.E.2d 570 (1937). This is no longer true. Once the court is assured that there is a reasonable basis for the psychiatrist's opinion, it is admissible though based in part on out-of-court statements of persons not available for cross-examination, provided the jury is made aware of the source of the opinion. See People v. Stone, 35 N.Y.2d 69, 358 N.Y.S.2d 737 (1974), citing CPL §60.55. Psychiatric testimony that these interviews with third parties were necessary to formulate an opinion affects only the weight to be given such testimony and the jury may be so instructed. See People v. Stone, supra. See also People v. Sugden, 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974), where the New York Court of Appeals ruled admissible a psychiatrist's testimony, though based in part on the out-of-court prior statement of a third party who was a witness and, therefore, available for cross-examination.

However, the Court in Sugden contrasted the holding in that case with its earlier ruling that same year in Stone, which involved psychiatric testimony based on out-of-court statements of third parties not available for cross-examination. The Court stated that the ruling in Stone might not be applicable where the third parties interviewed were unavailable for cross-examination if their statements were more relevant to the question of guilt than the question of sanity, concededly not the case in Stone.

Where a psychiatric expert bases his opinion in part on hospital records, those records need not be introduced into evidence. People v. DiPiazza, 24 N.Y.2d 342, 300 N.Y.S.2d 545 (1969).

The type of expert medical evidence relevant to sanity must be established as reliable before it is admissible. Psychiatric evidence is sufficiently reliable to be admissible. However, evidence that a defendant has a chromosomal abnormality is not admissible since the scientific community has not generally accepted the theory that this abnormality has any relationship to insanity. See People v. Yukl, 83 Misc.2d 364, 372 N.Y.S.2d 313 (Sup. Ct. N.Y. Co. 1975) (court refused to appoint cytogeneticist to test defendant's blood for chromosomal abnormality).

Reference to defendant's prior vicious, immoral or criminal acts, if supported by independent evidence and relevant to the question of sanity, may be incorporated in a hypothetical question to the expert psychiatric witness on the People's direct case. See People v. Santarelli, 64 A.D.2d 803, 407 N.Y.S.2d 744 (3d Dept. 1978), rev'd on other grounds, 49 N.Y.2d 241, 425 N.Y.S.2d 77 (1980).

(a) Trial Court's Discretion to Admit Expert Testimony

In People v. Diaz, 51 N.Y.2d 841, 433 N.Y.S.2d 751 (1980), a psychologist who administered some psychological tests to the defendant was not permitted to testify as to defendant's mental state at the time the tests were given. The trial court asserted that the psychologist was not an established expert in diagnosis, merely an expert at administering tests. The majority of the Court of Appeals found that it was within the trial court's discretion to refuse to admit the psychologist's testimony.

The dissenters, Judges Meyer and Fuchsberg argued that the 1980 amendments to Penal Law §60.55 eliminated any distinction between psychologists and psychiatrists.

(11) Instructions to the Jury

Penal Law §40.15 provides that a defendant is legally insane if he does not know or appreciate the nature and consequences of his conduct and that it was wrong. Penal Law §30.05 had been construed to include appreciation as well as knowledge; mere surface knowledge is not sufficient. See People v. Adams, 26 N.Y.2d 129, 309 N.Y.S.2d 145 (1970), cert. denied sub. nom. Adams v. New York, 399 U.S. 931 (1970). In People v. Adams, supra, defendant challenged the propriety of the trial court's instruction on the definition of insanity. The Court of Appeals found the instruction proper:

> In this case, the trial court instructed the jury that the law would absolve the defendant only if she suffered a defect of reason as the result of a mental disease or defect which prevented her from having the substantial capacity to know or appreciate either the nature and consequences of the charged conduct or that such conduct was wrong. The court added that the People must prove both elements--i.e., that at the time of the killing the defendant knew she was hurting the decedent and that she knew this act was wrong. The court explained that mere surface knowledge is not sufficient to meet this requirement, and described surface knowledge as the type of knowledge children have of propositions which they can state, but cannot understand. Such knowledge, the court charged, has no depth and is divorced from comprehension. The Judge added, that the law intends to impose criminal responsibility upon the defendant only when and if it is proven beyond a reasonable doubt that she has some understanding, as opposed to surface understanding of the legal and moral import of the conduct involved.

> In regard to the requirement that the defendant must know that the act was wrong, the court instructed the jury that to be held responsible the defendant must have realized that the act was against the law and against the commonly accepted standards of morality. A mere opinion contrary to the general morality, or a substantial propensity to commit crimes, the Judge noted, is not sufficient to indicate the defendant did not understand the act was wrong. As an example, the court explained that a man who kills because he is under the impression that he is a messenger of God sent to kill all the atheists, may understand the nature and consequences of his act, but does not know or appreciate that such conduct is wrong.
>
> It is argued by the defendant that the use of the term "defect of reason" in the instruction misled the jury into believing that they were not permitted to acquit the defendant unless they found she was suffering from a mental defect. We do not agree. The use of the term "defect of reason" by the court, when read in the context of the entire charge, is clearly not misleading. In marshaling defendant's psychiatric evidence, the Judge in his charge carefully pointed to testimony that she "was not suffering from any mental defect, but a mental disease." Moreover, as previously mentioned, the court specifically instructed the jury that defendant would be relieved of criminal responsibility if they found she was suffering from a defect of reason as a result of mental defect or disease which prevented her from having the substantial capacity to know or appreciate either the nature and consequences of the charged conduct or that such conduct was wrong. From this, it is apparent that the jury would not have been misled as the defendant suggests.

People v. Adams, supra, 26 N.Y.2d at 135-36, 309 N.Y.S.2d at 148-49 (emphasis in original).

Appellate courts have found reversible error where the trial court refused defendant's request to charge that a defendant is insane if he does not know and appreciate the nature and consequences of his conduct and that it was wrong. An instruction to the jury on the legal definition of insanity which only charges the language of the statute

("know or appreciate") is insufficient. See People v. Morales, 62 A.D.2d 946, 404 N.Y.S.2d 344 (1st Dept. 1978), involving a prosecution of a female as an aider and abettor of rape, robbery, and murder.

Formerly, a defendant was not entitled to have the jury instructed that if he were acquitted by reason of insanity he would not go free but would be committed to a mental hospital. People v. Adams, 26 N.Y.2d 129, 309 N.Y.S.2d 145 (1970), cert. denied, 399 U.S. 931 (1970). The reason for this rule was that punishment is outside the province of the jury and that such an instruction would encourage "compromise verdicts" of acquittal. Currently, CPL §300.10(3) provides that where a defendant raises the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, the court must instruct the jury that, in the event of an acquittal on the ground of mental disease or defect, there will be a hearing to determine the defendant's present mental condition and, where appropriate, involuntary commitment proceedings. CPL §300.10(3) does not apply to trials concluded before its effective date. People v. Bassik, 53 N.Y.2d 1032, 442 N.Y.S.2d 485 (1981).

Where defendant had interposed the insanity defense in his trial for attempted murder in the first degree, the court also permitted the additional jury charge of extreme emotional disturbance upon defendant's request. People v. Ford, 102 Misc.2d 160, 423 N.Y.S.2d 402 (Sup. Ct. Bronx Co. 1979). The Court of Appeals reversed defendant's conviction for manslaughter in the first degree, when the Court found that the trial court erroneously related the insanity defense solely to the charge of second degree murder and to the element of intent with respect to intentional manslaughter. As to the manslaughter charge, the

trial judge failed to instruct the jury that even if they found that the defendant had the requisite intent to inflict serious physical injury... they should nevertheless determine whether she possessed "substantial capacity to know or appreciate either... the nature and consequences of such conduct; or... that such conduct was wrong" (Former P.L. §30.05[1]). People v. Young, 65 N.Y.2d 103, 107; 490 N.Y.S.2d 179, 162 (1985). Additionally, the insanity defense should be charged even if the jury finds defendant acted while under extreme emotional disturbance. People v. Johns, 122 A.D.2d 74, 504 N.Y.S.2d 485 (2d Dept. 1986).

A defendant was not prejudiced by the psychiatrist's testimony that a person like defendant would be discharged if sent to a mental hospital since the psychiatrist had testified that defendant was not insane and the evidence supported the verdict of guilty. People v. Szwalla, 31 A.D.2d 979, 297 N.Y.S.2d 843 (3d Dept. 1969), aff'd, 26 N.Y.2d 655, 308 N.Y.S.2d 386 (1970), cert. denied, 408 U.S. 926 (1972).

C. Plea of Not Responsible by Reason of Mental Disease or Defect

CPL §220.15 provides a procedure whereby a defendant may enter a plea of not responsible by reason of mental disease or defect. The district attorney must state to the court, either orally on the record or in a filed writing, that the People consent to the entry of such a plea and that the People are satisfied that the affirmative defense of lack of criminal responsibility by reason of mental disease or defect would be proven by the defendant at trial by a preponderance of the evidence. The district attorney must state to the court in detail the evidence available to the People and the reasons for recommending such plea. If necessary, the court may conduct a hearing on the issue. CPL §220.15(1).

(1) Advice of Counsel

The defense attorney must explain the evidence to the court, and must state whether, in his opinion, the defendant has any other defenses. Counsel must assure the court that, in his opinion, defendant is fit to proceed and understands the nature and consequences of such a plea. CPL §220.15(2).

(2) Colloquy

Before accepting a plea of not responsible by reason of mental disease or defect, the court must address the defendant in open court and determine that he understands each of the following:

(a) The nature of the charge to which the plea is offered, and the consequences of such plea;

(b) That he has the right to plead not guilty or to persist in that plea if it has already been entered;

(c) That he has the right to be tried by a jury, the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself;

(d) That if he pleads not responsible by reason of mental disease or defect, there will be no trial with respect to the charges contained in the indictment, so that by offering this plea he waives the right to such trial;

(e) That if he pleads not responsible by reason of mental disease or defect, the court will ask him questions about the offense or offenses charged in the indictment and that he will thereby waive his right not to be compelled to incriminate himself; and

(f) That the acceptance of a plea of not responsible by reason of mental disease or defect is the equivalent of a verdict of not responsible by reason of mental disease or defect after trial. CPL §220.15(3).

By contrast, under former Penal Law §30.05 in any pre-pleading colloquy where defendant pleads guilty to a crime, but his statements indicate a possible insanity defense, the trial court has a duty to conduct an inquiry to determine if he is knowingly, voluntarily, and intellingently waiving this defense. People v. Monroe, 84 A.D.2d 540, 443 N.Y.S.2d 103 (2d Dept. 1981) (defendant, during the colloquy preceding his plea of guilty to burglary and attempted rape, told the court that he had been going for psychiatric "help" for a long time, that he knew he "was insane when those things happened," and he asked the court to see that he got "help").

A local criminal court has jurisdiction to accept a plea of not responsible by reason of mental disease or defect, notwithstanding the statute's reference to "indictment." People v. Johnny P., 112 Misc.2d 647, 445 N.Y.S.2d 1007 (N.Y.C. Crim. Ct. N.Y.Co. 1981). Further, the court may appoint a psychiatrist to assist the defendant as an "interpreter" in this type of proceeding. See Johnny P., supra at 650, 445 N.Y.S.2d at 1010, (citing Judiciary Law §387), where the court held that its power to appoint an interpreter "is not limited to instances in which the failure of communication exists because of a language barrier, but extends as well to instances involving other disabilities (Judiciary Law §390 referring to sign language interpreters)."

(3) Conditions Precedent for Acceptance of Plea

The court must determine that there is a factual basis for such a plea before accepting it. It must address defendant in open court and make any necessary inquiry to determine that the plea is knowingly, voluntarily, and intelligently made, that defendant has the capacity to assist in his own defense, and understands the consequences of such a plea. CPL §220.15(4).

Before accepting a plea of not responsible by reason of mental disease or defect, the court must find and state each of the following on the record in detail and not in conclusory terms:

(a) That it is satisfied that each element of the offense or offenses charged in the indictment would be established beyond reasonable doubt at a trial;

(b) That the defense of lack of criminal responsibility by reason of mental disease or defect would be proven by the defendant at a trial by a preponderance of the evidence;

(c) That the defendant has the capacity to understand the proceedings against him and to assist in his own defense;

(d) That such plea by the defendant is knowingly and voluntarily made and that there is a factual basis for the plea;

(e) That the acceptance of such plea is required in the interest of the public in the effective administration of justice. CPL §220.15(5).

(4) Acceptance of Plea

When a plea of not responsible by reason of mental disease or defect is accepted by the court and recorded upon the minutes, the provisions of CPL §330.20 govern all subsequent proceedings against the defen-

dant. CPL §220.15(6). However, in In Matter of Lockett v. Juviler, 65 N.Y.2d 182, 490 N.Y.S.2d 764 (1985), rev'd sub nom. Warren v. Montemango, 618 F.Sup. 147 (E.D.N.Y. 1985), rev'd sub nom. Lockett v. Montemango, 784 F.2d 78 (1986), cert. denied 107 S.Ct. 120 (1986),the Court of Appeals held that a trial court has inherent power to vacate a plea of not responsible by reason of mental disease or defect on application of the People where the defendant obtained the plea by fraud or misrepresentation. Defendant alleged, and the examining psychiatrists confirmed, that he suffered from a post-traumatic stress disorder due to his combat service in the Vietnam War. Before a scheduled hearing was to be held pursuant to a CPL §330.20(6) examination, the People discovered that defendant had served his entire military obligation at an Air Force base in Texas. Noting that the statutory authority for vacating the plea exists only where the application is made by the defendant [CPL §220.60(3)], the Court found the absence of such authority not controlling because courts traditionally have inherent power to vacate orders and judgments obtained by fraud and misrepresentation. The court found no double jeopardy attachment due to the fraud.

(5) Pre-Pleading Competency Investigation

In People v. Spagna, 108 Misc.2d 1, 436 N.Y.S.2d 931 (N.Y. Co. Crim. Ct. 1981), a case of first impression, the local criminal court, upon joint application of opposing counsel, ordered a pre-pleading competency investigation in a felony matter which would ultimately fall within the jurisdiction of a superior criminal court. The defendant in Spagna, a friendless, eighty-year-old man, had set a small fire in his unheated, cold-water New York City apartment to keep himself from freezing. When arrested, Spagna had no friends or relatives and nowhere to

go. The court, the prosecutor, and the defense counsel agreed that the only way that defendant could have a safe place to stay would be to have him committed for examination as part of a pre-pleading investigation which had previously been reserved for felony prosecutions in the court of superior criminal jurisdiction. Defendant was to be housed at Bellevue Hospital until a facility could be found for him. The People assured the court that at that time they would move to dismiss the charges in the interests of justice.

D. Law Governing Post-Acquittal Commitment

The New York Court of Appeals in People v. Lally, 19 N.Y.2d 27, 277 N.Y.S.2d 654 (1966), upholding the provision of the former Penal Law requiring mandatory commitment for persons acquitted of crimes on the ground of insanity, stated:

> [w]e see no reason why a man who has himself asserted that he was insane at the time the crime was committed and has convinced the jury thereof, should not in his own interest and for the protection of the public be forthwith committed for detention, examination and report as to his sanity.

Id. at 33, 277 N.Y.S.2d at 659.

This reasoning was applied to uphold the constitutionality of CPL §330.20, the current statute requiring the initial commitment of all persons acquitted on the ground of insanity. See People ex rel. Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 401 N.Y.S.2d 462 (1977); People v. McNelly, 83 Misc.2d 262, 371 N.Y.S.2d 538 (Sup. Ct. N.Y. Co. 1975); see also Lee v. Kolb, 449 F. Supp. 1368 (W.D.N.Y. 1978), vacated without opinion, 591 F.2d 1330 (2d Cir. 1978) (a petition for habeas corpus was granted to the extent that petitioner was afforded a

post-commitment hearing but his challenge to the constitutionality of CPL §330.20 was rejected).

In Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063 (1962), the United States Supreme Court ruled that a District of Columbia statute which provided for summary post-acquittal commitment could not constitutionally be applied to a defendant acquitted on the ground of insanity who had been found competent to stand trial but whose guilty plea had been refused by the trial judge who acquitted him. The Court found that as the defendant had affirmatively asserted his sanity, he could not be treated as a person acquitted on the ground of insanity after a trial.

Commitment to a mental hospital is a deprivation of liberty which involves the due process clause of the Fourteenth Amendment. See Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254 (1980) (a prisoner must receive notice and a hearing before he may be involuntarily transferred to a mental hospital on the ground that he is mentally ill). Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493 (1979); O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486 (1975); Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209 (1967); Baxtrom v. Herold, 383 U.S. 107, 86 S.Ct. 760 (1966). Due process is not a fixed or rigid concept. For example, a juvenile committed by his parents to a mental hospital, unlike an adult, is not denied due process if he is denied an adversarial hearing on his commitment, as long as there are state regulations mandating periodic, independent medical review of the juvenile's status. See Parham v. J.R., supra. The law governing post-acquittal commitment must be read in light of the rule that a person committed to a mental hospital is deprived of his liberty and therefore his commitment must comply with the guarantees inherent in the due process clause.

(1) The Statute

In September 1980, the new CPL §330.20 (amended 1982) on post-acquittal commitment went into effect. Unlike the previous statute, which required that a person acquitted of a crime by reason of mental disease or defect automatically be committed into the custody of the Commissioner of Mental Hygiene, the revised statute provides for an immediate psychiatric examination to determine if the acquitted defendant suffers from a "dangerous mental disorder" or is "mentally ill." Those terms are defined in CPL §330.20(1), subsections (c) and (d):

> "[D]angerous mental disorder" means: (i) that a defendant currently suffers from a "mental illness" as...defined in subdivision twenty of section 1.03 of the mental hygiene law, and (ii) that because of such condition he currently constitutes a physical danger to himself or others.
> "Mentally ill" means that a defendant currently suffers from a mental illness for which care and treatment as a patient in the in-patient services of a psychiatric center under the jurisdiction of the state office of mental health, is essential to such defendant's welfare and that his judgment is so impaired that he is unable to understand the need for such care and treatment; and, where a defendant is mentally retarded, the term "mentally ill" shall also mean, for purposes of this section, that the defendant is in need of care and treatment as a resident in the in-patient services of a developmental center under the jurisdiction of the state office of mental retardation and developmental disabilities.

The examination is conducted by "two qualified psychiatrists...or one qualified psychiatrist and one licensed psychologist" designated by the State Commissioner of Mental Health or the State Commissioner of Mental Retardation and Developmental Disabilities after an examination order is

issued by the court. CPL §330.20(2). A psychiatrist or psychologist retained by the defendant may be permitted to attend the examination, and the clerk of the court must send a copy of the court's "examination order to the mental hygiene legal service and such service may thereafter participate in all subsequent proceedings under this section." CPL §330.20(2).

(a) Examination

The examination may be conducted at a secure facility (CPL §330.20 [1][b]) when the defendant is in custody, or it may be conducted on an out-patient basis in the court's discretion, if the defendant is not in custody at the time of the verdict. If, however, the Commissioner informs the court that confinement of the defendant is necessary for an effective examination, the court must direct that the defendant be confined in a facility designated by the Commissioner until the examination is completed. CPL §330.20(3).

(b) Duration and Conduct of Examination

The defendant undergoing examination in a secure facility may not be confined for more than thirty days unless the Commissioner applies to the court for one additional thirty-day extension in order to complete the examination. "During the period of such confinement, the physician in charge of the facility may administer or cause to be administered to the defendant such emergency psychiatric, medical or other therapeutic treatment as in his judgment should be administered." CPL §330.20(4). The initial period permitted an out-patient examination is also thirty days, although, upon application of the Commissioner, the court may

extend the period for a reasonable time. CPL §330.20(4).

If the reports of the psychiatric examiners differ as to the defendant's mental condition, the Commissioner must designate another psychiatric examiner to evaluate the defendant. After the court which issued the examination order receives the findings, it may designate additional psychiatric examiners if it is not satisfied with the findings of the original examiners. CPL §330.20(5).

(c) Initial Hearing and Commitment

Within ten days of the receipt of the final reports, the issuing court must hold an initial hearing to determine the defendant's present mental condition. At this hearing the burden is on the district attorney to "establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill." CPL §330.20(6). Commentators on the revised statute have interpreted this burden to be the civil standard of a preponderance of the evidence. People v. Plaksin, 107 Misc.2d 696, 435 N.Y.S.2d 894 (Sup. Ct. Kings Co. 1981), one of the first cases to appear under this newly enacted statute, agreed that the People had to prove defendant was dangerously mentally ill by a preponderance of the evidence. Plaksin, 435 N.Y.S.2d at 895. But this view was rejected in Matter of Rose, 109 Misc.2d 960, 441 N.Y.S.2d 161 (Sup. Ct. Kings Co. 1981), where the court held that the standard was "clear and convincing" evidence. However, in People v. Escobar, 61 N.Y.2d 431, 474 N.Y.S.2d 453 (1984), the Court of Appeals held that a "fair preponderance of the credible evidence" was the standard to be used in post-trial commitment hearings. The court held that the fair preponderance standard did not violate due process.

If, at the initial hearing or any of the other hearings governed by CPL §330.20 which attempt to determine the defendant's present mental state, the court is dissatisfied with the findings of the psychiatric examiners, it "may direct the commissioner to designate one or more additional psychiatric examiners to conduct an examination of the defendant and submit a report of their findings." The court may also, upon its own motion or at the request of a party, designate one or more psychiatric examiners to examine and report on the defendant's condition. The district attorney may apply for permission to have the defendant submit to an examination by the district attorney's examiner, and that examiner may testify at the hearing in question. CPL §330.20(15).

If the court finds that the defendant has a dangerous mental disorder, it must issue a commitment order for a term of up to six months. CPL §330.20(1)(f). If the court finds that the defendant does not have a dangerous mental disorder but is mentally ill, then he is subject to the civil commitment procedures prescribed in the Mental Hygiene Law. The court then issues an order of conditions, valid for five years, which directs defendant to comply with a prescribed treatment plan, and commits him to the custody of the Commissioner. The order of conditions may be extended for an additional five years upon a showing of good cause. This commitment order, further retention, conditional release or discharge are deemed issued under the provisions of the Mental Hygiene Law. If the court concludes that the defendant does not have a dangerous mental disorder and is not mentally ill, it must discharge the defendant, either unconditionally or subject to an order of conditions. CPL §330.20(7).

(d) First and Subsequent Retention Orders

If the defendant has been committed, at least thirty days before expiration of the defendant's prescribed period of commitment, the Commissioner must apply to the issuing court, or to a superior court of the county in which the secure facility is located, either for a first retention order or for a release order.

The district attorney, the defendant and his counsel, and the mental hygiene legal service must receive written notice of the application. (See People ex rel. Thorpe v. Von Holden, 63 N.Y.2d 546, 483 N.Y.S.2d 662 [1984], where service of the Commissioner of Mental Health's application for a first retention order was not made on defendant's attorney. The Court reversed the Appellate Division's vacating of defendant's writ of habeas corpus and remanded to the county court to conduct a hearing within 10 days, or to order defendant's release. The Court points out that the requirements of CPL §330.20[8] mandate certain procedures not only in order to protect the public, but to ensure that defendant's constitutional rights are not violated). At this time, the court may, on its own motion, conduct a hearing to determine whether the defendant has a dangerous mental disorder. The court must conduct a hearing if the district attorney, the defendant or his counsel, or the mental hygiene legal service demands one within ten days of notification of the Commissioner's application. At this hearing, the burden is on the Commissioner to establish that the defendant has a dangerous mental disorder or is mentally ill to the satisfaction of the court (by a preponderance of the evidence, People v. Escobar, infra.). A finding that the defendant has a dangerous mental disorder requires that the court issue a first retention order which essentially recommits the

defendant for a period of time not to exceed one year. Should the court find the defendant mentally ill but not dangerous, it must issue a first retention order, and, under CPL §330.20(11) a transfer order and an order of conditions. If the defendant is found neither dangerous nor mentally ill, the court must issue a release order and an order of conditions under CPL §330.20(12). See CPL §330.20(8). These procedures apply to second retention orders as well which commit defendants for a period not to exceed two years.

(e) Transfer

A transfer order allows the Commissioner to transfer, from a secure facility to a non-secure facility, a defendant who is in his custody pursuant to a retention order or a recommitment order, when the Commissioner believes that defendant does not have a dangerous mental disorder. The transfer must be consistent with the public safety and welfare of the community and the defendant, and the clinical condition of the defendant must warrant his transfer. The Commissioner may apply for the transfer order to the court that issued the defendant's commitment order, or to a superior court in the county in which the secure facility is located. The district attorney, the defendant and his counsel, and the mental hygiene legal service must receive ten days written notice from the Commissioner. The court may conduct a hearing on its own motion to determine whether to grant the application; it must conduct a hearing if the district attorney so requests. At the hearing, the district attorney must establish, to the satisfaction of the court, that the defendant has a dangerous mental disorder or that the issuance of the transfer order is inconsistent with the public safety and welfare. CPL

§330.20(11).

If the court finds that the defendant does not have a dangerous mental disorder, or if it finds that a transfer is consistent with the public safety and welfare of the community and the defendant and that the defendant's condition warrants the transfer, then the court must grant the application. A court must also issue a transfer order when, in connection with an application for an initial order or subsequent retention order, it finds that a defendant is mentally ill but is not dangerous. In addition, whenever a court issues a transfer order it must also issue an order of conditions. CPL §330.20(11).

(f) Release

The Commissioner may apply for a release order when he believes a defendant committed pursuant to a retention order or a recommitment order no longer has a dangerous mental disorder and is no longer mentally ill. The application may be issued to the court which committed the defendant or to a superior court in the county where the facility is located. The application must describe the defendant's current mental condition, the past course of treatment, and set forth a history of the defendant's conduct subsequent to his commitment, a written service plan for continued treatment, and a detailed statement of the extent to which supervision of the defendant after release is proposed. The district attorney, the defendant and his counsel, and the mental hygiene legal service must receive ten days written notice. After receiving the application, the court must promptly conduct a hearing to determine the defendant's present mental condition. The district attorney must establish to the satisfaction of the court that the defendant has a

dangerous mental disorder or is mentally ill. If the court finds that the defendant suffers from a dangerous mental illness, then the application must be denied. If the court finds that the defendant is mentally ill but not dangerous, it must issue a transfer order if the defendant is confined in a secure facility. The court must issue the release order if it finds that the defendant does not have a dangerous mental disorder and is not mentally ill. A court must issue an order of conditions whenever it issues a release order. If the court had previously issued a transfer order with conditions, it must issue a new order of conditions with the release order. The conditions issued with a release order must be reasonable and appropriate and must contain a service plan prepared by a psychiatrist familiar with the defendant's case history. The Commissioner must determine that such defendant is receiving the services specified in the service plan and is complying with any conditions specified in the plan and the order of conditions. CPL §330.20(12).

(g) Furloughs

During the commitment of a defendant, the Commissioner may apply for a furlough order if the Commissioner believes that, "consistent with the public safety and welfare of the community and the defendant," the defendant's condition warrants the granting of a furlough. The defendant would then be allowed temporarily to leave the facility for a period not exceeding fourteen days, either with or without constant supervision. Either the court which issued the commitment order or a superior court in the county where the secure facility is located may consider the application. Ten days written notice to the district attorney, the defendant, defendant's counsel, and the mental hygiene

legal service is required. The court may, on its own motion, conduct a hearing to determine whether the application should be granted, and it must conduct a hearing if the district attorney so requests. At least one court has held that the district attorney as well as the committed person's attorney has a right to receive copies of the committed person's clinical records after the notice of the proposed furlough and prior to any hearing. People v. Jones, 112 Misc.2d 841, 447 N.Y.S.2d 612 (Sup. Ct. Queens Co. 1982).

The court will grant a furlough order only if it finds the granting of the order is consistent with the public safety and welfare of the community and the defendant, and the defendant's condition warrants the privileges of the issuance of a furlough order. The furlough order may contain any terms and conditions that the court deems necessary and appropriate. If the defendant fails to return at the time specified in the furlough order, he is deemed to have escaped. CPL §330.20(10).

(h) Discharge

When a defendant has continuously been on out-patient status for three years or more pursuant to a release order, and the Commissioner is of the view that the defendant no longer has a dangerous mental disorder and is no longer mentally ill, the Commissioner may apply for a discharge order. He must consider public safety, and the welfare of the community and the defendant in his decision. The notice requirements and place of the application are the same as in the other subdivisions of CPL §330.20. The court may hold a hearing, on its own motion, to determine whether the application should be granted; it must hold a hearing on the

request of the district attorney. This subdivision does not place on the district attorney the burden of proving that the defendant has a serious mental disorder or is mentally ill; it does not mention the burden at all. But if the court finds that the Commissioner's views are accurate, it must grant the discharge order. CPL §330.20(13).

(i) Recommitment

If at any time during the period covered by an order of conditions the Commissioner or the district attorney believe that a defendant has a dangerous mental disorder, either may, upon written notice to the defendant, defendant's counsel, and the mental hygiene legal service, apply to the court which issued the order of conditions for a recommitment order. CPL §330.20(14). (If the applicant is the Commissioner of Mental Health, then notice must also be given to the district attorney. If the applicant is the district attorney, then notice must be given to the Commissioner of Mental Health.) The court must order the defendant to a hearing to determine if the defendant does have a dangerous mental disorder. The order may be a "written notice, specifying the time and place of appearance," and, depending upon the court's directions, the order may be served personally upon the defendant or mailed to defendant's last known address. If the defendant fails to appear, the court may issue a warrant directing an appropriate peace officer to take the defendant into custody and escort him to court. The defendant may then be confined in an appropriate institution located near the court site. CPL §330.20(14).

At the recommitment hearing, the applicant, be it the Commissioner or the district attorney, must establish to the court's

satisfaction that the defendant has a dangerous mental disorder. If the applicant meets this burden of proof, the court must issue a recommitment order and defendant's first and subsequent retentions will be governed by CPL §330.20(8) and (9). CPL §330.20(14).

No application can be made by the Commissioner of Mental Health pursuant to CPL §330.20 without an accompanying affidavit from at least one psychiatrist supportive of the relief requested in the application. All parties entitled to receive notice of the application are also entitled to receive a copy of the affidavit. Such affidavit shall set forth the defendant's clinical diagnosis, a detailed analysis of his or her mental condition which caused the psychiatrist to formulate an opinion, and the opinion of the psychiatrist with respect to the defendant. Any application submitted without the required affidavit shall be dismissed by the court. CPL §330.20(20).

(j) Rehearing, Review and Rights of Defendant

Review of commitment, retention, or recommitment orders is available under CPL §330.20(16) for defendants who have been placed in the Commissioner's custody pursuant to such orders. Within thirty days of any such order, any defendant may apply for a rehearing and a review in accordance with the provisions of Mental Hygiene Law §§9.35 or 15.35. CPL §330.20(16). People v. Escobar, supra, holds that the standard of proof here, as in an initial commitment hearing, is "by a fair preponderance of credible evidence."

Subject to the limitations of the new statute, patients committed under the new insanity defense act have the same rights granted to patients committed under the Mental Hygiene law. CPL §330.20(17).

(k) Notification of Release or Discharge

Subdivision 18 of CPL §330.20 prevents any person confined to a secure facility from being discharged or released without the Commissioner giving at least four days' written notice to the district attorney, the police department which has jurisdiction of the area to which the defendant is to be discharged or released, or any other person designated by the court. The notice shall be by the facility staff physician who was treating the defendant; if the staff physician is not available, then the defendant's treatment team leader can supply notice. Some other member of the facility's clinical staff must send notice if neither of the above is immediately available. The notice must be given by any means reasonably calculated to give prompt actual notice. CPL §330.20(18).

(l) Notification in Case of Escape

If a defendant in the Commissioner's custody pursuant to CPL §330.20 escapes, the department facility staff must notify the following persons immediately:

a) the district attorney;

b) the superintendent of the state police;

c) the sheriff of the county where the escape occurred;

d) the police department which has jurisdiction of the area where the escape occurred;

e) any person whom the facility staff believes to be in danger; and

f) any law enforcement agency and any person the facility

staff believes would be able to apprise such endangered persons of the defendant's escape.

Notice to the law enforcement agencies should be provided as soon as the facility staff knows of the escape and the notice should include the nature of the danger, information as will adequately identify both the defendant and the person or persons believed to be in danger, and the nature of the danger. CPL §330.20(19).

The notice must be given by any means reasonably calculated to give prompt actual notice and should originate from the facility staff physician who was treating the defendant. If the staff physician is unavailable, then the defendant's treatment team leader should send the notices; if neither is immediately available, some other member of the facility's clinical staff must provide the notice. CPL §330.20(19).

Any peace officer has the authority to apprehend, restrain, transport and return the defendant to the facility from which he escaped, and it is the peace officer's duty to assist any of the Commissioner's representatives who request aid in taking the defendant into custody. CPL §330.20(19).

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NEW YORK LAW GOVERNING ARSON

By

Naomi Werne
Senior Staff Attorney
Bureau of Prosecution Services
New York State Division of Criminal Justice Services

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Revised June 1987
by

Donna L. Mackey
Staff Attorney
Bureau of Prosecution Services

Table of Contents

ARSON

Introduction

Article 150 of the Penal Law sets forth the degrees of the offense of arson. It should be noted that arson is restricted to damaging a "building" or "motor vehicle." Other unlawful property damage by fire or explosion is governed by the criminal mischief provisions of Penal Law §§145.00 - 145.12. If a person commits arson and causes the death of another person who was not a participant in the crime, the felony murder statute [Penal Law §125.25(3)] applies.

A. Definitions

1. "Building." As used in Article 150, "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. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building. Penal Law §150.00(1). "Building" includes an abandoned building. People v. Richberg, 56 A.D.2d 279, 392 N.Y.S.2d 16 (1st Dept. 1977).

2. "Motor Vehicle." As used in Article 150, "motor vehicle" includes every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven invalid chairs being operated or driven by an invalid (b) vehicles which run only upon rails or tracks; and (c) snowmobiles as defined in Article 47 of the Vehicle and Traffic Law.

This inclusion of a motor vehicle as a structure which may be the subject of an arson (L.1979, c.225), was part of a larger enactment establishing a State Office of Fire Prevention and Control to coordinate statewide efforts to combat arson-for-profit, which extends to the destruction of automobiles and trucks. See Hechtman, Supplementary Practice Commentary, N.Y. Penal Law §150.00, p.49, (McKinney, 1975). Prior to the amendment to this statute, setting fire to a vehicle could be the basis only for a conviction of criminal mischief; see People v. Hollis, 73 A.D.2d 994, 424 N.Y.S.2d 31 (3d Dept. 1980), where, despite evidence that defendant set fire to a commercial trailer, he was convicted only of criminal mischief and the arson count against him was dismissed. An inoperable vehicle, one which is not capable of being driven on a public highway at the time it is set on fire is not a motor vehicle within the meaning of Article 150. People v. Carey, 120 Misc.2d 862 (Suffolk County Ct. 1983).

B. Elements And Degrees Of Arson

A person is guilty of arson in the fourth degree, a Class E felony, when he recklessly damages a building or motor vehicle by intentionally starting a fire or causing an explosion. Penal Law §150.05. A person who commits arson in the fourth degree does not act intentionally in damaging the building or motor vehicle, according to the Penal Law definition of intentional conduct in §15.05(1): "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

The mental culpability accompanying the act of damaging a building or motor vehicle in the commission of arson in the fourth degree is "recklessness": "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto." Penal Law §15.05(3). The other element of mental culpability in fourth degree arson which must accompany the act of starting the fire or causing the explosion which damages the building or motor vehicle exists where the defendant starts the fire or causes the explosion intentionally, according to the language of the statute, though no conscious deliberate intent to cause damage is in the mind of the defendant.

Where the evidence justified a finding by the jury that defendant threw a lit cigarette into a hayloft knowing it was lit, defendant was properly convicted of fourth degree arson although there was no proof that he intentionally started the fire. See People v. Keith A.U., 47 A.D.2d 791, 365 N.Y.S.2d 570 (3d Dept. 1975). See also People v. Gerasimovic, ___ A.D.2d ___, 507 N.Y.S.2d 873 (2d. Dept. 1986), where evidence established that defendant intentionally started a fire, but because defendant was intoxicated it was held that defendant recklessly damaged the building. In People v. Kazmarick, 99 Misc.2d 1012, 417 N.Y.S.2d 671 (Sullivan Co. Ct. 1979), aff'd 75 A.D.2d 1026, 427 N.Y.S.2d

1021 (3d Dept. 1980), aff'd, 52 N.Y.2d 322, 438 N.Y.S.2d 247 (1981), the court denied defendant's motion to dismiss the indictment for murder on the ground that defendant could be convicted of one of the lesser included offenses of manslaughter or criminally negligent homicide if it were proved that he had, as charged, dropped a lighted match on a paper strewn floor in a wood frame building with knowledge that people were sleeping inside. But see People v. Lebron, 68 A.D.2d 836, 414 N.Y.S.2d 518 (1st Dept. 1979), where the court vacated defendant's plea of guilty to arson in the fourth degree since the pre-plea colloquy established only that defendant had thrown a cigarette on the floor of an apartment he was painting; and People v. Gibson, 115 A.D.2d 559, 496 N.Y.S.2d 81 (2d Dept. 1985), where the court affirmed the defendant's conviction of second degree arson, since the record established that defendant intended to burn down the building occupied by his girlfriend, and there was no evidence to find that defendant acted recklessly, warranting the charge of arson in the fourth degree.

Note: Proof of criminal negligence, that is, a failure to perceive a substantial and unjustifiable risk where such a failure would constitute a gross deviation from the standard of care that a reasonable person would observe in the situation [Penal Law §15.05(4)], is not the required mental culpability accompanying the act of damaging a building or motor vehicle in the crime of arson in the fourth degree. Similarly, there is no such crime as "felony arson," analogous to felony murder, which imposes criminal liability for a negligent burning of a building or motor vehicle during the commission of a felony other than arson, unless it is, of course, proved beyond a reasonable doubt that the defendant acted

recklessly when he damaged the building or motor vehicle. For example, if a person unlawfully entered another's barn and lit a match, intending to steal liquor, but tripped and fell, starting a fire, he has not committed fourth degree arson. See Hechtman, Practice Commentary, N.Y. Penal Law §150.05, p.86, (McKinney, 1975).

Setting a fire or causing an explosion which damages a building or motor vehicle is the conduct required for fourth degree arson. The result of "damage" is required to complete the crime, that is, an injury to the building or motor vehicle which impairs its use or lowers its value.

Affirmative Defense: In any prosecution under Penal Law §150.05, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle. Penal Law §150.05(2).

Note: The defendant has the burden of proving by a preponderance of the evidence that he alone had a possessory or proprietary interest in the building or motor vehicle. This defense does not deny due process by placing on a defendant the burden of proving his innocence since the statute does not shift to the defendant the burden to disprove any fact essential to the crime of fourth degree arson; See Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977).

A person is guilty of arson in the third degree, a class C felony, when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion. Penal Law §150.10. The element of mental culpability in the crime of third degree arson is present where the defendant intends to damage a building or motor vehicle by starting a

fire or causing an explosion. Damage must be his conscious objective or he does not have the required mental culpability for a conviction of third degree arson. The required result in the crime of third degree arson is the same as that element in fourth degree arson: damage to a building or motor vehicle. See People v. McDonald, 115 A.D.2d 223, 496 N.Y.S.2d 161 (4th Dept. 1985), rev'd on other grounds, 68 N.Y.2d 1, 505 N.Y.S.2d 824 (1986); People v. Cisco, ___ A.D.2d ___, 514 N.Y S.2d 796 (2d Dept. 1987) (defendant was found guilty of arson in the third degree and felony murder when the evidence indicated he threw a grenade in a living room window, killing a woman and three children).

Note: Arson in the third degree carries a mandatory term of state imprisonment. Penal Law §60.05(4).

Affirmative Defense: In any prosecution under Penal Law §150.10, it is an affirmative defense under subdivision 2 that:

(a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct; and

(b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose; and

(c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

A person is guilty of the class B felony of second degree arson when he intentionally damages a building or motor vehicle by starting a fire, and when,

(a) another person who is not a participant in the crime is present in such building or motor vehicle at the time; and

(b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possiblility. Penal Law §150.15.

There are actually two elements of mental culpability in the crime of second degree arson:

1. Intent (a conscious objective) to damage a building or motor vehicle by starting a fire: this is the same element of mental culpability that must be proved to convict a person of third degree arson;
2. Knowledge that a person who is not a participant in the crime is present in the building or motor vehicle at the time or the existence of circumstances which render the presence of such a person a reasonable possibility.

Note: "Knowledge" (acting "knowingly") is defined in Penal Law §15.05(2) as awareness by an actor that his conduct is of the nature described by a statute defining an offense or awareness that a specific circumstance, described by a statute defining an offense, exists. But a person who did not have actual knowledge of the presence in a building or motor vehicle of another person who was not a participant in the crime, is still criminally liable for second degree arson if he intentionally damages that building or motor vehicle by starting a fire if he reasonably should have known that another person was present. For example, the defendant owns a run-down hotel in a town in the mountains which is not occupied by guests during winter but transient tramps passing through the town often spend the night there, and defendant knows

this fact. A tramp is sleeping in the building on a winter night when defendant sets fire to the building, trying to make it look like an accident so that he can collect the insurance money. Defendant has committed second degree arson and, if the tramp died, the defendant would be guilty of felony murder. However, if nobody ever trespassed into the hotel and the defendant reasonably believed that the hotel was unoccupied, since no guests or workers were there and the surrounding area was deserted, but the night of the arson a burglar had entered, defendant would not be guilty of second degree arson. He would however, be guilty of arson in the third degree because, although he owned the building and had no reason to believe he was endangering the life or property of another, he was damaging the building to commit an insurance fraud, an unlawful purpose.

The requisite element to establish second degree arson is damaging a building or motor vehicle by starting a fire when another person, not a participant in the crime, is present therein at that time or in an adjoining building to which the fire spreads. See People v. Davis, 89 Misc.2d 535, 392 N.Y.S.2d 195 (Sup. Ct. Kings Co. 1977). Accord, People v. Fisher, 112 A.D.2d 1008, 492 N.Y.S.2d 816 (2d Dept. 1985). But see People v. Keech, 121 Misc.2d 368, 467 N.Y.S.2d 786 (Sup. Ct. Monroe County 1983) where the court declined to follow People v. Davis, supra., and where the proof before the grand jury contained evidence of defendant's intent to start a fire and to damage the garage where the fire was ignited, but indictment did not allege that defendant intended to damage occupied building next door, the court held that the indictment charging second degree arson was defective on its face. To constitute second degree arson, intent to start fire and intent to damage building are both required. Location at which ignition occurs standing alone,

neither proves nor disproves intent to damage inhabited building, or any other element of second degree arson. People v. Keech, supra. See also People v. Tanier, 84 A.D.2d 374, 446 N.Y.S.2d 829 (4th Dept. 1982). The conduct proscribed does not include damaging the occupied building or motor vehicle by causing an explosion or by use of an incendiary device; such an act, if committed with the required mental culpability is proscribed under Penal Law §150.20 as first degree arson. See also People v. Medina, 120 A.D.2d 749, 502 N.Y.S.2d 792 (2d Dept. 1986); People v. Harris, 122 A.D.2d 493, 505 N.Y.S.2d 355 (3d Dept. 1986); People v. Hemphill, 124 A.D.2d 862, 508 N.Y.S.2d 297 (3d Dept. 1986).

A person is guilty of first degree arson (a class A-I felony) under Penal Law §150.20 when he intentionally damages a building or motor vehicle by causing an explosion or a fire where (a) such explosion or fire is caused by an incendiary device, propelled, thrown, or placed inside or near such building or motor vehicle; or when such explosion or fire is caused by an explosive or when such explosion or fire either (i) causes serious physical injury to another person other than a participant, or (ii) the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor; and when (b) another person who is not a participant in the crime is present in such building or motor vehicle at the time; and (c) the defendant knows that fact or the circumstances are such as to render the presence of such person therein a reasonable possibility. Penal Law §150.20 further provides:

> 2. As used in this section, "incendiary device" means a breakable container designed to explode or produce uncon-

> tained combustion upon impact, containing flammable liquid and having a wick or a similar device capable of being ignited.

This statute was amended to include in the definition of first degree arson the setting of a fire by an incendiary device, as well as by causing an explosion. The purpose was apparently to punish arson committed with a Molotov cocktail or similar device as arson in the first, rather than the second, degree, overruling People v. McCrawford, 47 A.D.2d 318, 366 N.Y.S.2d 424 (1st Dept. 1975), where the court held that a Molotov cocktail was not an explosive device, relying on the definitions in the Labor Law, General Business Law and the Vehicle and Traffic Law. See also People v. Jones, 119 A.D.2d 769, 501 N.Y.S.2d 176 (2d Dept. 1986) where the trial testimony supported the fact that the defendant filled a bottle with a volatile flammable oil, lit it and threw the bottle through an apartment window which he knew was occupied, the Appellate Division held that there was sufficient evidence to convict the defendant of arson in the first degree. However, no definition of explosive exists in the Penal Law.

Note: The mental culpability in the crime of first degree arson is the same as that which must be proved to convict a defendant of second degree arson.

C. Problems Of Proof In Arson Prosecutions

(1) Search And Seizure In Premises Where Fire Occurred

Evidence acquired without a search warrant while firefighters are lawfully on the premises putting out the fire or within a reasonable time thereafter is admissible under the "plain view" doctrine; see People v. Calhoun, 90 Misc.2d 88, 393 N.Y.S.2d 529 (Sup. Ct. Kings Co. 1977), aff'd 67 A.D.2d 1110, 413 N.Y.S.2d 535 (2d Dept. 1979), aff'd, 49 N.Y.2d 398,

426 N.Y.S.2d 243 (1980). But once the fire has been extinguished, is a warrant required before a fire marshal may search the burned premises and make observations or seize evidence for use in an arson investigation?

The trial court in Calhoun, rejected defendant's contention that such a search violated the Fourth Amendment. Defendant, a tenant, was charged, inter alia, with second degree arson in his New York City apartment, which he was occupying at the time of the fire although an unexecuted dispossess order had been issued by the Civil Court. Two fire marshals arrived at defendant's apartment approximately four hours after the fire had been extinguished and the firefighters had left the premises to investigate the origin of the fire pursuant to New York City Administrative Code §488(2)-1.0 which authorizes fire marshals to investigate "[t]he origin, detail, and management of fires in the city, particularly of supposed cases of arson, incendiarism, or fires due to criminal carelessness." (Other subdivisions of Administrative Code §488(2)-1.0 authorize fire marshals to inspect for violations of the Fire Commissioner's regulations or orders or violations of Administrative Code safety provisions). The defendant's apartment was open when they entered since the door had been destroyed in the fire. At defendant's trial for arson, he objected to the proposed introduction of testimony by one of the marshals and photographs of the apartment, citing People v. Tyler, 399 Mich. 564, 250 N.E.2d 467 (Sup. Ct. Mich. 1977), in which the Supreme Court of Michigan had held that such evidence seized without a warrant violates the Fourth Amendment. An appeal in Tyler was decided by the United States Supreme Court in Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978), and will be discussed infra.

The trial court in Calhoun first distinguished the case from Tyler, finding that since defendant's apartment was destroyed by the fire and was no longer habitable, the premises were in effect abandoned and defendant had no reasonable expectation of privacy in the premises, a prerequisite to a Fourth Amendment right, citing Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967). The court further found that since a fire is an emergency and the prompt warrantless investigation of a fire is authorized by the Administrative Code, it is an administrative search in an emergency situation and therefore is permissible under Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967). The trial court analogized the case to People v. Neulist, 43 A.D.2d 150, 350 N.Y.S.2d 178 (2d Dept. 1973), which held that a police warrantless search of the premises where a death occurred, subsequent to a finding by the medical examiner that the death was homicide, was valid since the police entered originally to answer an emergency call and a specific local law (Nassau County Government Law §2101) gave the medical examiner power to investigate the circumstances of a death.

The New York Court of Appeals affirmed Calhoun's conviction, and upheld the reasonableness of the search, although on a different ground than that upon which the trial court based its decision. The Court specifically rejected the trial court's finding that the occurrence of a fire renders a premises abandoned:

> The classic statement that even a "ruined tenement" may be secure against the sovereign (see Miller v. United States), 357 U.S. 301, 307, 78 L.Ed.2d 1332) is literally applicable. For, people often continue to live and work in buildings that have sustained fire damage and, even when the ensuing destruction has made that impossible, remaining personal effects may very well

> invoke continued and respected expectations of privacy. To reinforce this protection, a warrantless intrusion by a government official is presumptively unreasonable, the burden of justifying it devolving upon the People (Vale v. Louisiana, 399 U.S. 30, 34; 90 S.Ct. 1969, 1971 ; People v. Hodge, supra, 44 N.Y.2d, p. 557, 406 N.Y.S.2d p.737. Calhoun, 426 N.Y.S.2d at 245.

The Court, citing Michigan v. Tyler, then affirmed the trial court's holding that the occurrence of a fire, whatever its cause, falls within the scope of the so-called emergency exception to the search warrant requirement. This doctrine sanctions warrantless searches and seizures in circumstances presenting immediate danger to life or property, or, on the same general principle, threat of destruction or removal of contraband or other evidence of criminality. The Court then reviewed the role of the fire marshal in New York City. It noted that while the marshals do not respond to every fire as a matter of routine, there was proof that their task was to investigate all fires of undetermined origin, rather than to conduct a search for evidence of arson. In this case, the fire marshals had no actual knowledge until hours after their arrival that arson was a possibility, for it was only then that they learned that defendant had made arson threats to his landlord. While arson was a possible cause of the fire, other causes, natural and accidental, were theories to be tested by the marshals at the time of their arrival. The Court stressed that if there had been a finding by the trial court that the fire marshal's visit to the premises was motivated primarily by an intent to gather evidence for an arson prosecution, the warrantless intrusion might well have exceeded the bounds of the emergency exception and trespassed on the constitutional guarantee of the Fourth Amendment.

The New York Court of Appeals in Calhoun relied in part in its

decision on the recent opinion of the United States Supreme Court in Michigan v. Tyler, 436 U.S. 499, 94 S.Ct. 1942 (1978), decided after the decision of the trial court in Calhoun. In Michigan v. Tyler, the United States Supreme Court reviewed the decision of the Michigan Supreme Court in People v. Tyler, supra, to consider the applicability of the Fourth Amendment to official entries onto fire damaged premises. Defendants in Tyler were lessees of a furniture store which had burned down on January 21, 1970. Firefighters called in the police after they had just about quenched the fire because of the discovery of two containers of flammable liquid. The police came and took several pictures but had to leave because of the smoke and steam. Four hours after the blaze was extinguished, a fire inspector came, left, and returned an hour later with a detective. They discovered suspicious burn marks in the carpet and pieces of tape with burn marks on the stairs. On February 16, the police returned, investigated, took pictures and seized a piece of fuse. At defendant's trial, a police officer testified that his investigation had determined that the fire was not accidental. Defendants did not challenge the admission of photographs taken while the fire was smoldering but challenged the admission of the evidence seized five hours later and the evidence seized during, and testimony relating to, the search on February 16, on the ground that a search warrant was required by the Fourth and Fourteenth Amendments. The Michigan Supreme Court had held that "[once] the blaze [has been] extinguished and the firefighters have left the premises, a warrant is required to reenter and search the premises, unless there is consent or the premises have been abandoned." People v. Tyler, 399 Mich. at 583, 250 N.Y.2d at 477.

The Michigan court accordingly reversed defendant's convictions and ordered a new trial since it found neither consent nor abandonment. The United States Supreme Court, in reviewing the holding of the Michigan Supreme Court, first reiteratd the principle that the protection of the Fourth and Fourteenth Amendments apply to any search by a government official, even if it is an inspecting "administrative search" (a search to enforce a non-penal statute or regulation), unless the premises searched involved a heavily regulated industry like alcohol or firearms citing its recent decision in Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978).* The United States Supreme Court rejected the prosecution's argument that burned out premises are "abandoned," that is, that the occupants and/or owners have no reasonable expectation of privacy because (a) if they set the blaze, they have abandoned the premises and (b) even if they did not set it, their privacy interest is rendered negligible by the damage. The Court stated:

> [E]ven if the petitioner's contention that arson establishes abandonment be accepted, its second proposition - that innocent fire victims inevitably have no protectible expectations of privacy in whatever remains of their property - is contrary to common experience. People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. The petitioner may be correct in the view that most innocent fire victims are treated courteously and welcome inspections of their property to ascertain the origin of the blaze, but "even if true, [this conten-

* After both Marshall and Michigan v. Tyler were decided, the United States Supreme Court in Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534 (1981) ruled that in a regulated industry such as mining, where workplace safety is crucial, a warrantless inspection in compliance with specific authorized statutory procedures or regulations (the Mine Safety Act) does not violate the Fourth Amendment.

> tion] is irrelevant to the question whether the...inspection is reasonable within the meaning of the Fourth Amendment." [Citation omitted.] Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the petitioner's argument unravels. For it is of course impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that same conviction.
>
> Thus, there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. And under that Amendment, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant." [Citation omitted.] The showing of probable cause necessary to secure a warrant may vary with the object and instrusiveness of the search, but the necessity for the warrant persists.
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> Michigan v. Tyler, 436 U.S. at 505-07, 98 S.Ct. at 1947-48

The Court added:

> To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legis-

> lative and administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors. Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum. See See v. City of Seattle, supra, at 544-545, 87 S.Ct. at 1739-1740; United States v. Chadwick, 433 U.S. 1, 9; 97 S.Ct. 2476, 2482; Marshall v. Barlow's Inc., 436 U.S. at 323, 98 S.Ct. at 1826.
>
> Michigan v. Tyler, 436 U.S. at 507-8, 98 S.Ct. at 1949.

The Court noted that another purpose of the warrant is to provide the property owner with information to reassure him of the legality of the entry.

The Court further held that where the investigators find evidence of wrongdoing in a search under an administrative warrant, it would be admissible in an arson prosecution and could be used to establish probable cause for a search warrant to gather additional evidence. The Court also ruled that where the officers are seeking evidence of arson, the court in which they apply for the search warrant must determine the existence of probable cause to believe a crime was committed before it issues the search warrant. The standard is more stringent than the standard of reasonable cause sufficient to justify the issuance of an administrative search warrant. Reasonable cause for an administrative search warrant exists when conditions are present which reasonably

justify a search under the statute or regulations sought to be enforced. The reasonableness of the administrative criteria for the search is determined in light of the specific purpose of the particular statute or regulation.

However, the Court further ruled that there is an exception to the warrant requirement where a fire has occurred. The existence of "exigent circumstances" creates a recognized exception and "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 465-466; 91 S.Ct. 2022, 2037-38 (1971). Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor by Chief See's removal of two plastic containers of flammable liquid on the floor of one of the showrooms." Michigan v. Tyler, 436 U.S. at 509, 98 S.Ct. at 1950.

The Court added that the Michigan Supreme Court had recognized a right to make a warrantless entry in an emergency such as fire but then had held that the need for a warrant arises when the last flame is extinguished. The United States Supreme Court ruled that the Michigan Court's holding was too narrow, declaring that officials may remain on the premises for a reasonable time thereafter where the condition of the building, as in Tyler, prevented them from making an effective inspection. The Court found that a warrant was not necessary for the early morning reentries on January 22, since these entries were an actual

continuation of the first valid entry. However, the Court agreed with the Michigan Supreme Court that the subsequent warrantless entries on February 16 were unconstitutional and, accordingly, affirmed that court's decision ordering defendant's new trial, stating:

> In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. See Camara, 387 U.S. at 534-539, 87 S.Ct. at 1733-1736; See v. City of Seattle, 387 U.S. at 544-545, 87 S.Ct. at 1739-1740; Marshall v. Barlow's Inc., 436 U.S. at 320-321, 98 S.Ct. at 1824-1825. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. United States v. Ventresca, 380 U.S. 102. Michigan v. Tyler, 436 U.S. at 511-12, 98 S.Ct. at 1951.

In a recent U.S. Supreme Court case the Court dealt again with administrative warrants. In Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984), the Supreme Court held that a warrantless search at the residence of a couple who were out of town, five hours after firemen extinguished a fire of suspicious origin and left the premises, violated the Fourth Amendment. The 5-4 decision refused to exempt from the warrant requirement all administrative investigations into the cause and origin of a fire.

The majority concluded that where reasonable expectations of privacy remain in fire-damaged premises, either consent or exigent circumstances

must be present to justify a warrantless search. Here, the occupants of the private home were not told of the search and took steps to secure their remaining privacy interests in the damaged home against further intrusion. Moreover, several hours separated the initial exigent intrusion to extinguish the fire from the search in question. When a warrant is required, an administrative warrant is sufficient if the primary purpose of the search is to determine the origin and cause of the fire, but a criminal search warrant based upon probable cause is required when authorities seek evidence of criminal activity.

In this instance, a basement search revealed the cause of the fire, so that the search of the rest of the house would have required a criminal search warrant even if the search of the basement was valid.

(a) Administrative Warrant Not Provided For in New York Law

The New York Court of Appeals specifically stated in footnote 3 to its opinion in Calhoun that it did not reach any question involving the use of the administrative warrant and its application to fire inspections which are not incidental to a recent fire. It should be noted that nowhere in New York's Criminal Procedure Law is there a specific provision for an administrative warrant. Article 690 governs the issuance of search warrants, which authorizes only police officers or peace officers appointed by a state university, to search a designated person, place, or vehicle, CPL 690.05. Note that the New York Court of Appeals in Sokolov v. Village of Freeport, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (1981), in holding that the Fourth Amendment was violated by an ordinance which forced landlords to consent to warrantless inspections of their property as a condition precedent to obtaining a rental permit, noted that there

is a requirement of a warrant for an administrative inspection, without stating whether such a warrant could be obtained under Article 690. Accord, People v. James Northrup, Inc., 106 Misc.2d 440, 432 N.Y.S.2d 45 (Sup. Ct. App. T. 9th and 10th Jud. Dist. 1980), aff'd as mdf'd, 53 N.Y.2d 689, 439 N.Y.S.2d 108 (1981).

It is not clear that a legislative action creating an administrative warrant is necessary. Judiciary Law §2-b(3) gives courts of record the power to "devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." In addition, District Attorney's offices of the various counties might be advised to draft a written consent form to enter burned premises for presentment to owners in cases where the time lapse is such that exigent circumstances are no longer clearly present. Certainly an owner of a burned premises, who is either a victim or posing as a victim, is unlikely to withhold his consent. [But note that in a motion to suppress, where the legality of the search and seizure is predicated on consent, the People have a heavy burden of proving consent. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1964). Consent is void if it was obtained as submission to overbearing authority. Id.

(2) Proof of Corpus Delicti

The corpus delicti in arson is damage to a building or motor vehicle from a fire or explosion caused by a criminal human agency, not by accident. People v. Reade, 13 N.Y.2d 42, 241 N.Y.S.2d 829 (1963); People v. Guernsey, 46 A.D.2d 698, 360 N.Y.S.2d 101 (3d Dept. 1974). For example, the fact that a torch was found was evidence that the fire was of incendiary origin. People v. Cannizzaro, 285 App. Div. 747, 141 N.Y.S.2d 169

(3d Dept. 1955), rev'd on other grounds, 1 N.Y.2d 167, 151 N.Y.S.2d 379 (1956). In People v. Moore, 18 A.D.2d 417, 239 N.Y.S.2d 967 (1st Dept. 1963), aff'd without opinion, 13 N.Y.2d 1070, 246 N.Y.S.2d 216 (1963), the corpus delicti of attempted arson of a bar and grill was established by a police officer's testimony to the following facts:

> In the basement of the bar and grill was an incendiary apparatus controlled by an operating radio clock set for 7:45 a.m. The extension cord of a three-burner electric hot plate was plugged into the radio clock. The dials of the hot plate were turned to the hot plate position. Over the hot plate was toweling saturated with gasoline. The toweling stretched through the basement, up the basement stairs, through the kitchen and along the rear of the bar. In front of and below the hot plate were pyramided records, check books and carpeting soaked with gasoline through which was passed the saturated toweling.
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> People v. Moore, Id. at 418, 239 N.Y.S.2d at 968-69.

"In arson cases, proof of criminal agency is, of necessity more often than not solely circumstantial because, in the very nature of things, the fire generally consumes and destroys all evidence of its incendiary origin." People v. Reade, Id. at 46, 241 N.Y.S.2d at 832. [But note that sophisticated laboratory techniques employed today to detect evidence of arson cast doubt upon the applicability of this statement to current prosecutions]. If the only evidence is circumstantial, it is hornbook law that the defense is entitled to a charge that all the evidence must be inconsistent with innocence and exclude, to a moral certainty, every other reasonable hypothesis but that of guilt. [But see concurring opinion of Fuchsberg, J. in People v. Gonzalez, 54 N.Y.2d 729,

442 N.Y.S.2d 980 (1981), a murder prosecution, where the Court held that failure to give the requested circumstantial evidence charge, including the words "to a moral certainty" was not error as the jury was adequately informed of the burden of proof. Judge Fuchsberg stated that he was in agreement with the district attorney, who contended that there is no difference in the burden of proof in a circumstantial case as opposed to a case where direct evidence was presented, noting that the charge employing the phrase "to a moral certainty" is increasingly disapproved].

In one arson case involving circumstantial evidence, a fire marshal who investigated the fire that partially burned and damaged a rooming house in which defendant was a tenant, determined on the basis of his expertise that the fire had originated in a closet in defendant's room because of the extensive damage in that area. There were no electrical wires or heating fixtures near the closet, and defendant testified that he did not smoke and was the sole occupant of the room which he left shortly before the fire was discovered. In addition, there was evidence of defendant's consciousness of guilt: there was proof that he had absented himself from his usual haunts and his job, though wages were owing to him, and that he changed his appearance since the fire by dyeing his hair. This circumstantial evidence excluded to a moral certainty every hypothesis except that the fire was willfully set by human agency. See People v. Reade, supra.

Note: In Reade, the Court declared that while the circumstantial evidence described in the above example sufficiently proved to a moral certainty that the fire was not caused by accident but by a willful human agency, the circumstantial evidence alone did not exclude to a moral certainty every hypothesis except the guilt of the defendant. However,

in Reade the defendant had made a full confession, repudiated at the trial; this confession was sufficiently corroborated by the circumstantial evidence to prove the defendant's guilt beyond a reasonable doubt.

Witnesses testified that at a particular time defendant left her home in her father's automobile. Shortly thereafter, they saw her father's automobile parked by his barn and they saw a person who resembled defendant in height and hair length standing in the middle door of the barn throwing straw or hay onto a small fire. The local fire coordinator, who had investigated the fire, stated that in his opinion the fire was not the result of spontaneous combustion. The fire had damaged the barn. The evidence was sufficient to prove that the crime of arson had been committed. See People v. Guernsey, 46 A.D.2d 698, 360 N.Y.S.2d 101 (3d Dept. 1974). (In Guernsey, the defendant's full voluntary confession was held to be sufficiently corroborated to justify a verdict of guilty).

The testimony of the fire chief that the fire in question was not caused by electricity, natural gas, or spontaneous combustion, thus negating the possibility of accident, and that there was heavy charring in the closet, indicating that the fire originated in the closet, was evidence from which the jury could conclude that the fire was of incendiary origin. See People v. Pettis, 62 A.D.2d 1110, 404 N.Y.S.2d 428 (3d Dept. 1978).

(3) Expert Testimony

Since the fact of arson is one which can ordinarily be easily understood by a jury, professional fire investigators may testify concerning the facts found during the course of their investigation into the origin of the fire, but it is reversible error in the usual case for the court

to permit such an expert to state that the fire was caused by a guilty human agency. The conclusion that the fire was accidental or that it was willful is to be drawn by the trier of fact. People v. Tyler, 14 A.D.2d 609, 221 N.Y.S.2d 804 (3d Dept. 1961); People v. Grutz, 212 N.Y. 72 (1914); People v. Brown, 110 App. Div. 490, 96 N.Y.S. 957 (4th Dept. 1906), aff'd, 188 N.Y. 554 (1907). But see People v. Medina, supra at 750, 502 N.Y.S.2d at 793 where the court held the expert's testimony, that the fire which killed the victim was not accidental, along with the defendant's admission, and his motive to act, was sufficient to support the defendant's conviction of arson in the second degree.

A chief special investigator of the National Board of Fire Underwriters testified at defendant's trial for second degree arson. He testified that an accelerant, possibly gasoline or kerosene, had been poured on the walls of the building and then stated "I felt the fire was of an incendiary nature." Defense counsel objected to this last statement. The court overruled the objection and counsel excepted. Reversible error was committed. The expert's testimony that kerosene or gasoline had been poured on the walls was admissible but his conclusory statement that the fire was of "incendiary nature," that is, that it had been willfully started by someone, was inadmissible opinion evidence. See People v. Tyler, supra. A city assistant fire marshal testified at defendants' joint trial for second degree arson. He stated "[i]n my opinion the fire was set." The court's admission of this statement was reversible error. See People v. Grutz, supra. See also People v. Vincek, 75 A.D.2d 412, 429 N.Y.S.2d 928 (4th Dept. 1980) (people's expert witness was improperly permitted to testify that the fire was

"intentionally set"); see also People v. Koullias, 96 A.D.2d 869, 465 N.Y.S.2d 748 (2d Dept. 1983); People v. Abreau, 114 A.D.2d 853, 494 N.Y.S.2d 762 (2d Dept. 1985)

But see People v. Maxwell, 116 A.D.2d 667, 497 N.Y.S.2d 735 (2d Dept. 1986), leave to appeal denied, 67 N.Y.2d 886 (1986) (where the court held that it is proper for an expert to give an opinion that fires were not chemically, mechanically, electrically or naturally caused.

At defendant's trial for arson, the chief of the fire department was permitted to testify that, after the fire which defendant was accused of causing, he had his men watching the premises at night. The admission of such testimony constituted reversible error. In effect, the chief was giving his opinion that the fire was caused by a criminal human agency, since the jury would conclude that he took these security measures because he thought that the initial fire was caused by arson and wanted to prevent a repetition of the crime. See People v. Brown, 110 App. Div. 490, 96 N.Y.S. 957 (4th Dept. 1906).

At defendant's trial for committing arson by burning her father's barn, the local fire coordinator testified that in his opinion the fire was not caused by spontaneous combustion. His statement was admissible since he did not state the conclusion that the fire was deliberately set; he merely excluded the possibility that the fire was caused by spontaneous combustion. See People v. Guernsey, supra.

At defendant's trial for arson, the fire coordinator testified that the fire in question was started by arson. In view of the defendant's admission in a signed statement that he started the blaze, the testimony of the fire coordinator was admissible. See People v. Cox, 93 A.D.2d 946, 463 N.Y.S.2d 75 (3d Dept. 1983).

See also Reed v. Federal Insurance Co. 123 A.D.2d 188, 510 N.Y.S.2d 618, 620 (2d Dept. 1987) (the court properly permitted the expert witness to testify that the fire was of an incendiary orgin; the fire spread rapidly; the chimney flues had been left open; and within 15 to 20 minutes after the fire started the building collapsed).

(4) Proof Of Defendant's Guilt Of Arson By Circumstantial Evidence

Often the only evidence connecting a defendant with the crime of arson is circumstantial. Proof of a defendant's guilt of arson may be established by circumstantial evidence. People v. Moore, 18 A.D.2d 417, 239 N.Y.S.2d 967 (1st Dept. 1963). Of course, the rule governing proof of guilt of a crime by circumstantial evidence applies: the proof must exclude to a moral certainty every other reasonable hypothesis except the defendant's guilt. For example, at defendant's trial for arson, the People's witnesses testified that:

1. Apartment No. 3 at 435 East 5th Street was not burned or charred nor was there any rubbish in front of that apartment at 1:00 a.m. when the occupant came home.

2. The occupant did not know defendant and had never seen him before in his life.

3. At 3:00 a.m., defendant entered 435 East 5th Street although he did not live there.

4. Defendant leaned in a crouched position against the door of Apartment No. 3 shortly after he entered the building.

5. Defendant left the building quickly, shortly after he was seen crouching against the door of Apartment No. 3.

6. No one else entered or left the building between the time defendant entered and left it.

7. The door of Apartment No. 3 was discovered to be on fire five or ten minutes after defendant left the building.

8. The remains of burned garbage were found outside the door of Apartment No. 3 after the fire was extinguished.

9. The garbage found outside the door of Apartment No. 3 belonged to a tenant of another apartment in the building, who had earlier in the day disposed of it in the lobby of the apartment house.

Proof of the above facts was sufficient to convict defendant of arson. People v. Morganne, 142 N.Y.S.2d 859 (Ct. Gen. Sess. N.Y. Co. 1955), appeal dism'd, 1 A.D.2d 878, 152 N.Y.S.2d 405 (1st Dept. 1956). "It is not essential that the evidence exclude to an absolute certainty the mere possibility that someone else might have set the fire." People v. Cannizzaro, 141 N.Y.S.2d at 171; People v. Sundholm, 105 A.D.2d 1072, 482 N.Y.S.2d 383 (4th Dept. 1984) (exclusive opportunity to premises); People v. Hamilton, ___ A.D.2d ___, 513 N.Y.S.2d 887 (3d Dept. 1987) (defendant's statements were not inconsistent with his innocence to a moral certainty); People v. Mann, ___ A.D.2d ___, 510 N.Y.S.2d 196 (2d Dept. 1986); Reed v. Federal Insurance Co., supra. (court held that issue of whether fire is incendiary could be proven by circumstantial evidence).

In People v. Sibblies, 63 A.D.2d 934, 406 N.Y.S.2d 84 (1st Dept. 1978), the court reversed the defendant's conviction for arson and dismissed the indictment on the ground that the circumstantial evidence was insufficient to exclude every reasonable hypothesis except defendant's guilt. The record established that:

> On August 13, 1975, at about 5 p.m. there was a fire in a building owned by the defendant. From about 1 p.m. to 4:50 p.m. defendant and his nephew were observed by 6 or 8 of their neighbors removing personal property from the building. Defendant was seen carrying several paint cans and three one-gallon milk containers with their tops cut off into the building. Approximately 10 minutes after defendant and his nephew left, the neighbors noted that there was a fire in progress in the building. Several fire department engine companies extinguished the blaze and on the second floor found some plastic containers containing what appeared to be a residue of gasoline and having cloth stuffed into their tops. There was a strong gasoline odor on the first floor. In the area where the fire started, the cockloft of the building, there were several plastic containers filled with a liquid. Eight containers were taken to the precinct and vouchered at the police laboratory. Upon analysis, they proved negative as to the presence of gasoline.
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> Defendant claims that when he arrived at the house he found the cellar door smashed and a window open. During the course of transferring his belongings from the house he had occasion to talk to several of the neighbors. He returned to his home at about 3:55 p.m. and left at 4:15 p.m. for a camp 90 miles from New York City, to visit his daughter and his estranged wife, who was a cook there. Further testimony places him at the camp at about 6:15 p.m. A phone call from a relative advised him of the fire on the following day and he left camp three days later. As to the building itself, the last rent paying tenant left in June, 1975; the last mortgage payment had been made at the time, and no electric bills had been paid since that time. Defendant did not file an insurance claim and says that he intended to abandon the building.
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> Sibblies, 406 N.Y.S.2d at 85.

The court noted that:

> [t]he People argue that presence at the scene, proof of motive, evidence of flight and other conduct indicating consciousness

> of guilt are factors relevant to the question of guilt (citing People v. Reade, 13 N.Y.2d 42, 46; 241 N.Y.S.2d 829, 831 (1963). It is undisputed that defendant was in and out of the building over a period of several hours, during which he engaged in conversation with at least 3 people. It does not appear that he attempted to avoid conversation or that he sulked or otherwise behaved furtively. His presence then was not that of one who was about to commit a crime and feared identification, but was rather more consistent with his avowed purpose to move books and other items from the abandoned building.
>
> Sibblies, 406 N.Y.S.2d at 86.

The court further found that the alleged evidence of motive was inconclusive, noting that "evidence indicates that the mortgagee settled its claim for $500 less than the mortgage balance. The property had been income producing and apparently heavily encumbered. The defendant would have been in better financial condition if he had refurbished and re-let the premises." Ibid. The court added that the People's argument that defendant failed to file an insurance claim to avoid suspicion of arson was "unsupported conjecture" and that the defendant's visit to his family was not conclusive evidence of flight. Ibid.

Similarly, in People v. Piazza (William), 48 N.Y.2d 151, 422 N.Y.S.2d 9 (1979), a case arising out of a prosecution of a father and son for felony murder resulting from an arson, the Court of Appeals reversed the son's conviction for third degree arson on the ground that the evidence, all circumstantial against the son, was equivocal. The Court found that (1) the co-conspirator's admissions did not directly implicate the son; (2) the son's presence at his building, shortly before it burned down, could be attributed to legitimate business, as his tenants had just been served with violation orders from the building

department; and (3) the son's bulldozing of the building site after the arson could conceivably be attributed to the fact that he had received an official order to demolish the hazardous leaning wall left standing after the fire.

In another case, People v. Feuerstein, 74 A.D.2d 853, 425 N.Y.S.2d 379 (2d Dept. 1980), petition for writ of habeas corpus denied in Feuerstein v. New York, 515 F. Supp. 573 (E.D. N.Y. 1981) the following circumstantial evidence was found to exclude innocence to a moral certainty: (1) on the day of the fire, defendant remained in his shoe store after closing time, contrary to his usual practice; (2) then defendant was observed in the back of the store throwing cartons; (3) expert testimony indicated that the origin of the fire was inside the store and that an accelerant had been used; (4) at the time of the fire defendant owed $1,403.35 for back rent and taxes; (5) defendant had stated that business was bad; (6) the store was insured for a total of $87,000 and, after the fire, defendant presented an insurance claim for the full amount; and (7) the defense acknowledged that prior to the fire, the defendant wanted to sell the store.

In People v. Santos, 90 A.D.2d 982, 456 N.Y.S.2d 573 (4th Dept. 1981), evidence that defendant had threatened to get revenge for a person who failed to pay in a numbers game, that the building in which that person resided was set on fire in the early hours of the following morning and that defendant stated that he had taken care of the money regarding the numbers game was insufficient to sustain his conviction for arson. In People v. O'Hara, 108 A.D.2d 876, 485 N.Y.S.2d 372 (2d Dept. 1985), circumstantial evidence indicating a business dispute between defendant and victim, defendant's purchase of a can of black powder of

the same type used to start the fire and purchased from the same store as can found in fire, proof that certain motorcycle parts, sent to defendant from victim's business would fit defendant's motorcycle and defendant's statement that he thought he would have had to have done something "drastic" had victim not agreed to mail him certain motorcycle parts, was insufficient to support conviction of arson in the first degree.

(a)Motive

One type of circumstantial evidence is evidence that the defendant had a "motive" to commit the crime of arson. "Motive" has been defined as "an inducement, or that which leads or tempts the mind to indulge the criminal act." People v. Fitzgerald, 156 N.Y. 253, 258 (1898). A defendant could be motivated to commit arson as a means of collecting fire insurance or from a desire to injure an enemy. See People v. Noren, 123 A.D.2d 453, 506 N.Y.S.2d 756 (2d Dept. 1986) where one week prior to the incident defendant had been fired from his job in the building, the court held that defendant's motive for starting the fire was sufficient to corroborate defendant's admission. But cf. People v. Hamilton, supra. (absent sufficient direct or circumstantial evidence, the evidence of motive alone does not provide proof that defendant was guilty of arson).

[i] Motive To Injure Another

The prosecutor introduced evidence that defendant, charged with setting fire to the house which his estranged wife and child were occupying, had treated his wife cruelly during their marriage and had threatened to kill her. This is admissible evidence of motive; see People v. Bates, 271 App. Div. 550, 67 N.Y.S.2d 1 (4th Dept. 1947). Where the evidence

established defendant previously owned the property which was damaged by the fire and believed the present owner to whom he sold the property did not pay him enough money for it, sufficient evidence indicating motive was established. People v. Landers, 107 A.D.2d 1022, 486 N.Y.S.2d 522 (4th Dept. 1985). See also, People v. Griffin, ___ A.D.2d ___, 511 N.Y.S.2d 136 (2d Dept. 1986) (complainant's testimony was admissible to show an acrimonious relationship with the defendant, and to supply motive for defendant setting fire to complainant's door); People v. Roides, ___ A.D.2d ___, 508 N.Y.S.2d 827 (4th Dept. 1986) (defendant's threats and acts of violence towards his wife were probative of his intent to set fire to his wife's house and his motive); People v. Mann, supra, (codefendant's statement that he threatened to destroy building was properly introduced as evidence of motive).

Note: Motive can only be inferred from proven facts. People v. Lewis, 275 N.Y. 33 (1937); People v. Sowma, 252 App. Div. 413, 299 N.Y.S. 523 (4th Dept. 1937).

[ii] Motive To Collect Fire Insurance

Evidence that a defendant was overinsured and that his business was failing is admissible to prove motive for arson. People v. Cannizzaro, supra. Similarly, where the People proved that there were housing violations pending against thirty-two burned properties, which were the subject of the alleged arsons with which the defendant was charged, evidence that defendant collected insurance on twenty-five of these thirty-two properties was admissible. People v. Goldfeld, 60 A.D.2d 1,

400 N.Y.S.2d 229 (4th Dept. 1977). See also People v. Springer, et. al. ___ A.D.2d ___, 514 N.Y.S.2d 555 (3d Dept. 1987) (motive established by the codefendant who was anxious to rid himself of property which was subject to repeated acts of vandalism and which was not covered by his fire insurance); People v. Feuerstein, 74 A.D.2d 853, 425 N.Y.S.2d 379 (2d Dept. 1980), petition for writ of habeas corpus denied in Feuerstein v. New York, 515 F.Supp. 573 (E.D.N.Y. 1981), where evidence was admitted that, before the fire, defendant had stated that business was bad and that he owed $1,403.35 for rent and taxes, and after the fire, defendant, who had been insured for $87,000, presented a claim for the full amount of insurance.

However, evidence of insurance was insufficient as a matter of law to constitute the required corroborative evidence of an accomplice's testimony where the burned restaurant was a profitable business and was not overinsured. People v. Ice, 265 App. Div. 46, 38 N.Y.S.2d 32 (3d Dept. 1942). Similarly, where the defendant was the mortgagee of the burned property that an accomplice testified that he [the accomplice] had been paid to "torch," this evidence did not sufficiently corroborate the accomplice testimony as a matter of law where it was proved that the property destroyed was worth more than the mortgage and the mortgagor was a solvent corporation. People v. Lashkowitz, 257 App. Div. 518, 13 N.Y.S.2d 663 (3d Dept. 1939).

Evidence that defendant's uncle owned insurance policies on the burned premises was inadmissible in the absence of any claim by the People that the uncle was implicated in the crime. People v. Nicolia, 287 N.Y. 398 (1942).

[iii] Evidence Of Other Fires

Evidence which only establishes that the defendant had other fires on property that he owned where there is no evidence that he was criminally implicated in those fires is inadmissible on the People's direct case. People v. Grutz, 212 N.Y. 72 (1914); People v. Brown, 110 App. Div. 490, 96 N.Y.S. 957 (4th Dept. 1906); People v. Vincek, 75 A.D.2d 412, 429 N.Y.S.2d 928 (4th Dept. 1980); People v. Simpson, 122 A.D.2d 383, 505 N.Y.S.2d 201 (3d Dept. 1986) (evidence concerning prior fire losses to defendant's insured properties was unacceptably prejudicial and far outweighed its probative value).

In addition, if the evidence of prior arsons cannot be classified within the Molineux doctrine exceptions [that is, are they relevant to show motive, intent, common scheme or plan, or to negate mistake or accident], then such evidence is not admissible on the People's direct case. See, e.g., People v. Chaffee, 42 A.D.2d 172, 346 N.Y.S. 2d 30 (3d Dept. 1973) (the People committed reversible error because they did not redact from defendant's confession references to prior arsons, which crimes were not relevant to prove motive, or intent, or common scheme or plan or to negating mistake or accident). But see People v. Ricotta, 117 A.D.2d 682, 498 N.Y.S.2d 422 (2d Dept. 1986) where testimony of a witness was properly admitted to show that defendant had previously started a fire at his former residence to establish defendant's motive in soliciting an accomplice.

If the defendant testifies, defendant may be asked upon cross-examination about other fires that he has had since such a question relates to his credibility; People v. Brown, supra, [citing People v. Jones, 181 N.Y. 516 (1905), aff'd 100 App. Div. 511 (4th Dept. 1905)].

But if defendant has previously been implicated in prior arsons, the rule in People v. Sandoval, [34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974)] applies: the defendant is entitled to a hearing before the court decides whether the prosecutor will be permitted to cross-examine him about these prior crimes, the applicable criteria being whether the probative value of these crimes on the issue of defendant's credibility will be outweighed by their prejudicial impact. See, e.g., People v. Park, 62 A.D.2d 1176, 404 N.Y.S.2d 198 (4th Dept. 1978) (conviction reversed because trial court after Sandoval hearing erroneously ruled that prosecutor could cross-examine defendant about prior arsons and defendant did not testify). See also People v. Anderson, 75 A.D.2d 988, 429 N.Y.S.2d 117 (4th Dept. 1980), conviction rev'd after remand, 80 A.D.2d 33, 437 N.Y.S.2d 985 (4th Dept. 1981), an arson prosecution, where the case was remanded for a hearing to make a record on the Sandoval issue. The Court held that although the prior crime was arson and thus there was a possibility of prejudice, cross-examination about the prior crime was not necessarily precluded. After remand, the Fourth Department reviewed the case again and concluded that the trial court erred when it refused to preclude the People from cross-examining about the prior arson since defendant had been charged with the arson of a social club, apparently motivated by a desire for revenge against his girlfriend, and the prior arson, for which defendant had never been arrested, was allegedly committed six years before when defendant was angry with a previous girlfriend when she severed their relationship. The court found that the prior arson was not a crime so substantially relevant to credibility as to render the proposed cross-examination of sufficient probative value to outweigh the prejudice that would inure to defendant if the jury heard that defendant allegedly committed a prior arson with a similar motive.

[iv] Evidence Of Other Acts Evincing Motive

Evidence of commission of another crime is admissible to prove motive for the crime charged "only if it has a logical relationship to the commission of the crime 'according to known rules and principles of human conduct' [citation omitted]...." People v. Napoletano, 58 A.D.2d 83, 395 N.Y.S.2d 469, 475 (2d Dept. 1977). In Napoletano, two defendants were charged with attempted arson of a restaurant. The prosecution called the former assistant manager of the restaurant as a witness who testified over objection that, on a prior occasion, one of the defendants had stolen a piece of pizza from the restaurant and that he (the assistant manager) had told that defendant not to come back. This testimony should have been excluded. It was evidence of a prior uncharged crime and an immoral act adduced at a time when the defendant had not put his character or credibility in issue and it bore "'no logical relationship to commission of the criminal act with which the defendant was charged' [citation omitted]." Ibid.

Note: When the only evidence that the People have is circumstantial, a complete absence of motive is strong exculpatory evidence. People v. Lewis, supra.

(b) Consciousness Of Guilt

Evidence establishing a consciousness of guilt, such as flight, is another type of circumstantial evidence tending to prove defendant's guilt. People v. Reade, supra. See also People v. Roides, ___ A.D.2d ___, 508 N.Y.S.2d 827 (4th Dept. 1986) (evidence that defendant and members of his family had threatened witnesses to crime was admissible to prove consciousness of guilt in arson prosecution).

(5) Testimony Of Accomplices and Co-conspirators

Testimony of an accomplice must be corroborated by evidence tending to connect the defendant with the crime. CPL §60.22(1). It is insufficient if it merely connects the defendant with the accomplice. People v. Ice, supra. For example, evidence that the defendant had paid the fine to get his alleged accomplice, who was his employee, out of jail on an unrelated charge was insufficient to corroborate the accomplice's testimony. People v. Ice, supra. Similarly, an accomplice's testimony was not corroborated by the testimony of a witness that: (1) he saw the defendant give the accomplice a key; (2) the witness accompanied the accomplice to defendant's business premises, which the accomplice opened with a key; and (3) the accomplice told the witness that it was the key provided by defendant. People v. Lashkowitz, supra. There was no evidence, other than the statement of the accomplice, that the key was the same and hence no corroborative evidence connecting the defendant with the crimes.

An accomplice's testimony in an arson prosecution was held to be sufficiently corroborated by proof of (1) defendant's ownership of the burned properties; (2) the incendiary nature of the thirty-two fires with which defendant was charged; (3) defendant's collection of insurance proceeds from twenty-five of the thirty-two fires; (4) the pendency of housing code violations against many of the burned premises and the fact that some of the fires occurred shortly after defendant received notice of these violations; and (5) defendant's access to keys to the uninhabited apartments where the fires occurred coupled with the fact that tenants testified that previously locked doors were found unlocked. People

v. Goldfeld, supra. In addition, this same court held that taped incriminating conversations to which the defendant was a party corroborated the testimony of the accomplice-informant who made the tapes* since the evidence necessary to corroborate an accomplice may be supplied by the defendant himself. Sufficient corroboration of accomplice testimony was also found in People v. Canale, 76 A.D.2d 1032, 429 N.Y.S.2d 495 (3d Dept. 1980), where another witness testified that he was present at a meeting in a nightclub between defendant and two men to whom he was in debt and he heard them order defendant to burn his restaurant so that he could pay the debt with the insurance proceeds; in addition, other witnesses testified to the presence of the accomplice in defendant's restaurant on the night of the fire and to defendant's financial distress. See also People v. Springer et. al., supra, 514 N.Y.S.2d at 558, where defendant's statement to codefenant upon arrest "look like they got us" was held to corrorbate arson conspiracy accomplice's, testimony.

A court held that an insurance agent's testimony for the defense that defendant had said to him as a joke, "Do you know anyone who could burn my property?" could not be considered as corroboration of the accomplice's testimony. People v. Ice, supra.

If there is prima facie proof of a conspiracy -- a question of law -- the declarations of co-conspirators made in furtherance of the conspiracy are admissible against the defendant. People v. David, 56

* Note: A foundation must be laid for consent recordings; it may be established by the testimony of a participant or a third party who heard a simultaneous transmission that the conversation has been fairly and accurately reproduced. Goldfeld, supra; see also People v. Rodriquez, 78 A.D.2d 659, 433 N.Y.S.2d 650 (4th Dept. 1980), where defendant's conviction for arson was reversed and a new trial ordered because there was no testimony that defendant's taped conversations with the "torch" were a fair and accurate representation.

N.Y. 95, 103 (1874); Ormsby v. People, 53 N.Y. 472, 473 (1873); see also 46 ALR 3d 1148, 1156: "Necessity and Sufficiency of Independent Evidence of Conspiracy to Allow Admission of Extrajudicial Statements of Co-conspirators." Therefore, a witness' testimony that the alleged accomplice told him that the key that the witness saw the defendant give the accomplice was the one that the accomplice used to open defendant's premises to commit arson was inadmissible against the defendant in the absence of any other proof of the conspiracy apart from the accomplice's testimony. People v. Lashkowitz, supra. In addition, the statements must be made in furtherance of the conspiracy. If they were made after its termination they are not admissible. People v. Lashkowitz, supra. Thus, the testimony of an accomplice's chauffeur that five years after the crime, he heard the accomplice ask defendant for payment for the arson, was inadmissible. People v. Lashkowitz, supra.

(6) Admissisons To Private Parties

Courts have held that the constitutional right to privacy renders confidential admissions of a child to his parents concerning a crime, a confidential privileged communication. Matter of A. and M., 61 A.D.2d 426, 403 N.Y.S.2d 375 (4th Dept. 1978); People v. Fitzgerald, 101 Misc.2d 712, 422 N.Y.S.2d 309 (Westchester Co. Ct. 1979); See also People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (2d Dept. 1982).* Therefore, parents subpoenaed to appear before a grand jury to answer questions

* Note that the Fifth Circuit has expressly refused to recognize New York's interpretation of the constitutional right to privacy, at least as applied to a child claiming the privilege during a grand jury investigation of her parents. In re Grand Jury Proceedings, 647 F.2d 511 (5th Cir. 1981).

concerning their son's alleged involvement in an arson could invoke this privilege when questioned about his confidential statements to them. People v. Doe, supra. If necessary, the court could hold an evidentiary hearing on the factual context of the communication to determine if the privilege is applicable.

However, a privilege based on a confidential relationship no longer exists when the relationship is destroyed. See People v. D'Amato, 105 Misc.2d 1048, 430 N.Y.S.2d 521 (Sup. Ct. Bronx Co. 1980), an arson prosecution, where the court ruled that the statutory marital privilege, which prevents either spouse from testifying to confidential communications made by the other, was inapplicable under the facts of that case. In D'Amato, the court permitted an estranged wife to testify to an admission to the arson made by her husband, the defendant, as the admission was made in the context of his threat to burn her home. The court noted that the purpose of the marital privilege was to preserve the integrity and confidentiality of the marital relationship, and since, in the case before it, the marriage was in fact destroyed by the time defendant made the admission, the privilege did not apply. Similarly, if the communications are not confidential but are made in the presence of third parties, there is no marital privilege and the spouse may testify to these communications. People v. Scalise, 70 A.D.2d 346, 421 N.Y.S.2d 637 (3d Dept. 1979). In Scalise, the wife was also permitted to testify that her husband gave her an envelope with money to give to a third person, which the prosecution contended was payment to the "torch," because the husband had never told her what the money was for.

(7) Character Witness Testimony

Testimony of a character witness, if believed, is enough to raise a reasonable doubt. People v. McDowell, 9 N.Y.2d 12, 210 N.Y.S.2d 514 (1961); see also Richardson on Evidence §150. One court in an arson prosecution, after reversing defendant's conviction on the ground of insufficient corroboration of the accomplice testimony, noted that "[b]oth [accomplices] are desperate and depraved characters.... [One accomplice] served a prison sentence for arson...." By contrast, "[p]roof of defendant's good character was furnished by his neighbors who had known him many years." People v. Lashkowitz, supra, 13 N.Y.S.2d at 667, 673. In another arson prosecution where defendant's conviction was reversed for lack of sufficient corroboration of accomplice testimony, the court stated:

> This appellant, who had been a practicing dentist, member of the Wyoming State Board of Dental Examiners, a Captain in the First World War, the father of a young man who had been appointed and was a student at West Point, is not the type which ordinarily in adult years would commit a crime of this kind. The record should be subjected to close scrutiny.
> People v. Ice, 38 N.Y.S.2d at 36-37.

(8) Imposition Of A Fine In An Arson Case

If the defendant gained property, i.e., insurance proceeds, as a result of the arson, the court, upon conviction, may impose a fine not exceeding $5,000 or double the amount of the defendant's gain from the crime. Penal Law §80.00(1). "Gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time

sentence is imposed. Penal Law §80.00(2). When the court imposes a fine for a felony, it must make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue. Penal Law §80.00(3).

The Appellate Division in People v. Goldfeld, 60 A.D.2d 1, 400 N.Y.S.2d 229 (4th Dept. 1977), rejected the contention of the defendant, convicted of arson, that the fact that his insurance company was suing him and that the insurance proceeds which he had collected were placed in an escrow account precluded the sentencing court from fining him an amount equal to the insurance he had received because (1) the sentencing court could not determine his gain, and (2) he was making restitution. The Appellate Division upheld the imposition of the fine, holding that "[t]he fact that the defendant may be required to refund the insurance proceeds as a result of the pending civil action is irrelevant to the imposition of the fine because the statute refers to a refund of money to the victim 'prior to time sentence is imposed' [Penal Law §80.00(3)]."* People v. Goldfeld, supra, 400 N.Y.S.2d at 236.

(9) Restitution

Penal Law §65.10(2) provides in relevant part:

> When imposing a sentence of probation or of conditional discharge, the court shall, as a condition of the sentence, consider restitution or reparation and may, as a condition of the sentence require that the defendant:
>
> (g) Make restitution of the fruits of his offense or make reparation, in an amount he can afford to pay, for the loss or damage caused thereby.

* The cited section is now §80.00(2).

Therefore, upon conviction of an arson defense, a defendant may be ordered to pay restitution for the damages sustained by the victim. See People v. Hall-Wilson, 69 N.Y.2d 154, 513 N.Y.S.2d 73 (1987) where defendant was ordered to pay her employer restitution because her employer had reimbursed the arson victims for their losses.

(10) Use Of Reckless Endangerment Charge in Arson Prosecution

Prosecutors might consider charging the alleged arsonist with reckless endangerment under Penal Law §120.25 based on proof that the fire created a grave risk of death to the occupants and/or firefighters. A person is guilty of this crime "when, under circumstances evincing a depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another person." In People v. Rodriguez, 110 Misc.2d 828, 442 N.Y.S.2d 948 (Sup. Ct. Kings Co. 1981), Justice Gloria Goldstein refused to dismiss a charge of reckless endangerment in an indictment which charged, among other crimes, arson in the third degree, based on allegations that defendants conspired to have an unoccupied supermarket burned and endangered the lives of firefighters. The court found that as the fires set were sufficiently serious to pose a grave risk of death to the firefighters, it was irrelevant that the firefighters were not present when the fire actually started, because their eventual arrival was not only foreseeable but inevitable, declining to follow People v. Buckman, 110 Misc.2d 753, 442 N.Y.S.2d 871 (Sup. Ct. Kings Co.1981), where another court dismissed a charge of reckless endangerment based on allegations that the fire endangered the firefighters. There the court had reasoned that because the firefighters were not present when the fire was started, the endangerment was not directed

at them and, therefore, the charge was deficient on its face. However, the Buckman opinion, as Justice Goldstein notes, ignores the 1978 decision of Judge Milonas in People v. Arzon, 92 Misc.2d 739, 401 N.Y.S.2d 156 (Sup. Ct. N.Y. Co. 1978), where the court refused to dismiss a charge of "depraved mind" murder under Penal Law §125.25(2), which has the same element of intent as reckless endangerment. That charge in Arzon was based on allegations that defendant had deliberately ignited the fifth floor of an abandoned apartment house, and that a firefighter died of injuries sustained when he evacuated the building after a second fire apparently spontaneously broke out on the second floor. The court, in so holding, noted that the casual connection between the homicide and defendant's criminal behavior was not negated by the presence of other contributing factors. See also People v. Lozano, 107 Misc.2d 345, 434 N.Y.S.2d 588 (Sup. Ct. N.Y. Co. 1980) (defendant could be charged with felony murder based on allegations that he caused the death of a fire-fighter who died of a heart attack triggered by smoke he inhaled while fighting the fire that defendant allegedly set).

In People v. Koullias, 96 A.D.2d 869, 465 N.Y.S.2d (2d Dept. 1983) the Second Department upheld the validity of a reckless endangerment count in an arson prosecution holding that a fire or explosion that injures someone several blocks away constitutes reckless endangerment regardless of the defendant's knowledge or design as to a particular victim. The court pointed out that fire fighters only differ from other victims in that they are impelled into the zone of danger by public duty. Their presence may be even more foreseeable than that of a private citizen and they are as likely to fall victim to reckless acts.

(11) Use Of Insurance Law To Aid Prevention And Investigation Of Arson

Insurance Law §319(b) requires insurance companies to cooperate with law enforcement agencies in furnishing all relevant information from an investigation where it is alleged that the fire was caused by means other than an accident. Such information includes, but is not limited to:

(1) pertinent insurance policy information relevant to a fire loss under investigation and any application for such a policy:

(2) policy premium payment records that are available;

(3) history of previous claims made by the insured; and

(4) material relating to the investigation of the loss, and any other evidence relevant to the investigation.

Insurance Law §319(c)

In the absence of fraud or bad faith, insurance companies are immune from incurring any liability for releasing such information. Insurance Law §3432. In addition, the statute prescribes that any law enforcement agency receiving such information may release such information to another law enforcement agency. Insurance Law §319(e).

By contrast, law enforcement agencies may, in its discretion, make its records available to the insurer within 30 days of a written request to do so by the insurer. Insurance Law §319(d).

The Superintendent of Insurance, pursuant to regulations that he may promulgate, must establish a central organization to register property loss to which the insured must report all property losses in excess of five hundred dollars. Insurance Law §318(a)(b). This information is also available to law enforcement agencies under Insurance Law §318(a)(b).

Section 3403 of the Insurance Law requires the adoption of an anti-arson application by insurance companies in cities of over 400,000 persons* in issuing fire policies and explosion insurance to cover all buildings except primarily residential owner-occupied real property consisting of four or fewer dwelling units. The information that must be furnished in this application shall include, but not be limited to:

(1) the name and address of the applicant, any mortgages, and any other parties who have an ownership interest in the property and any other parties who have a real interest in the property or in the proceeds of the claim;

(2) the amount of insurance requested and the method of valuation used to establish the amount of insurance;

(3) the dates and selling prices in all real estate transactions involving such property during the last three years;

(4) the applicant's loss history over at least the last five years with regard to any property in which he held an equity interest or a mortgage and where such loss exceeded one thousand dollars in damages;

(5) all taxes unpaid or overdue for one or more years, and any mortgage payments overdue by three months or more;

(6) all current violations of fire, safety, health, building or construction codes on the property to be insured; and

(7) the present occupancy of the structure.

Insurance Law §3404-c (1-7)

Note: A material misrepresentation on the anti-arson application constitutes grounds for rescission of the policy. Insurance Law §3404-e.

* Figures are based on the 1970 census.

Prior to paying on a policy, all insurers, whether authorized or unauthorized, must notify the tax districts in which the damaged property is located and demand an officer's certificate indicating all outstanding liens, including interest and penalties. Insurance Law §331-d. Further, General Municipal Law §22, which provides that local laws may enable tax districts to claim liens against property from the proceeds of paid fire insurance claims, now provides in subdivision 4 that such claims may only be made where the tax district adopts a local law providing for release or return to the insured of any amounts which it would otherwise be entitled to claim, provided that the insured contracts in writing to restore the premises, subject to such conditions locally legislated to guarantee performance, including but not limited to, the deposit of such proceeds in an escrow account or the obtaining by the insured of a performance bond.

In addition, Insurance Law §2601 (unfair settlement claims practices), excuses the insurer from the prompt settlement requirement where there is a reasonable basis for suspecting arson, provided that the insurer notifies the insured of acceptance or denial of the claim within thirty working days from receiving a properly executed proof of loss.

(a) Examination Under Oath; Prosecution's Use of Statements

A useful tool for the prosecutor is the insured's examination under oath. The insured who wishes to collect is required by the cooperation clause in his policy to submit to such an examination. If an individual insured or a corporate insured's agent pleads the Fifth Amendment or demands that the examination under oath be postponed until after any criminal proceedings are concluded, the insurer has a defense to refusal to pay.

Dyno-Brite, Inc. v. Travelers Companies, 80 A.D.2d 471, 439 N.Y.S.2d 558 (4th Dept. 1981). See also Azeem v. Colonial Assurance Company, 96 A.D.2d 123, 468 N.Y.S.2d 248 (4th Dept. 1983). (attorney's affidavit was insufficient to excuse insured from examination under oath as required by terms of fire insurance policy); Averbuch v. Home Insurance Company, 114 A.D.2d 827, 494 N.Y.S.2d 738 (2d Dept.1985) (insured's willful refusal to answer questions on his examination under oath constituted substantial breach of his fire insurance policy).

Caveat: All insurance investigators and prosecutors should work together, but the prosecutor who gives explicit directions to insurance company representatives about questions that should be asked on the examination under oath may make the representatives his agents. Consequently, if the insured is represented by counsel, even if counsel is not present during the examination, a Sixth Amendment issue may arise if the prosecutor attempts to use any statements made by the insured at the examination. See People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980), where the New York Court of Appeals held that a represented defendant, even if he is not in custody, may not be interrogated by police unless he waives counsel in the presence of counsel. See also People v. Tutora, 116 A.D.2d 607, 497 N.Y.S.2d 470 (2d Dept. 1986); and People v. Chapman, 121 A.D.2d 646, 504 N.Y.S.2d 136 (2d Dept. 1986).

(b) Insurance Frauds Bureau Agents May Be Designated Peace Officers

CPL §2.10 provides that employees of the newly created Insurance Frauds Bureau may be designated by the Superintendent of Insurance as peace officers. See also Insurance Law §402.

(12) Prosecution for Insurance Fraud

Frequently, losses by arsonists are inflated. These inflationary claims are grounds for prosecution for larceny by false pretenses under Penal Law Article 155. In addition, New York prohibits insurance fraud under Penal Law Article 176 which is set forth below:

> §176.00 Insurance fraud; definition of terms.
>
> The following definitions are applicable to this article:
>
> 1. "Insurance policy" has the meaning assigned to insurance contract by section forty-one of the insurance law except it shall include reinsurance contracts, purported insurance policies and purported reinsurance contracts.
>
> 2. "Statement" includes, but is not limited to, any notice, proof of loss, bill of lading, invoice, account, estimate of property damages, bill for services, diagnosis, prescription, hospital or doctor records, x-ray, test result, and other evidence of loss, injury or expense.
>
> 3. "Person" includes any individual, firm, association or corporation.
>
> 4. "Personal insurance" means a policy of insurance insuring a natural person against any of the following contingencies:
>
> (a) loss of or damage to real property used predominantly for residential purposes and which consists of not more than four dwelling units, other than hotels, motels and rooming houses;

(b) loss of or damage to personal property which is not used in the conduct of a business;

(c) losses or liabilities arising out of the ownership, operation, or use of a motor vehicle, predominantly used for non-business purposes;

(d) other liabilities for loss of, damage to, or injury to persons or property, not arising from the conduct of a business;

(e) death, including death by personal injury, or the continuation of life, or personal injury by accident, or sickness, disease or ailment, excluding insurance providing disability benefits pursuant to article nine of the workers' compensation law.

A policy of insurance which insures any of the contingencies listed in paragraphs (a) through (e) of this subdivision as well as other contingencies shall be personal insurance if that portion of the annual premium attributable to the listed contingencies exceeds that portion attributable to other contingencies.

5. "Commercial insurance" means insurance other than personal insurance.

§176.05 Insurance fraud; defined.

A fraudulent insurance act is committed by any person who, knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer or purported insurer, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of an insurance policy for commercial insurance, or a claim for payment or other benefit pursuant to an insurance policy for commercial or personal insurance which he knows to: (i) contain materially false information concerning any fact material thereto; or (ii) conceal, for the purpose of misleading, information concerning any fact material thereto.

§176.10 Insurance fraud in the fifth degree

A person is guilty of insurance fraud in the fifth degree when he commits a fraudulent insurance act.

Insurance fraud in the fifth degree is a class A misdemeanor.

§176.15 Insurance fraud in the fourth degree

A person is guilty of insurance fraud in the fourth degree when he commits a fraudulent insurance act and thereby wrongfully takes, obtains or withholds, or attempts to wrongfully take, obtain or withhold property with a value in excess of one thousand dollars

Insurance fraud in the fourth degree is a class E felony.

§176.20 Insurance fraud in the third degree.

A person is guilty of insurance fraud in the third degree when he commits a fraudulent insurance act and thereby wrongfully takes, obtains or withholds, or attempts to wrongfully take, obtain or withhold property with a value in excess of three thousand dollars

Insurance fraud in the third degree is a class D felony.

§176.25 Insurance fraud in the second degree

A person is guilty of insurance fraud in the second degree when he commits a fraudulent insurance act and thereby wrongfully takes, obtains, or withholds, or attempts to wrongfully take, obtain or withhold property with a value in excess of fifty thousand dollars.

Insurance fraud in the second degree is a class C felony.

§176.30 Insurance fraud in the first degree.

A person is guilty of insurance fraud in the first degree when he commits a fraudulent insurance act and thereby wrongfully takes, obtains or withholds, or attempts to wrongfully take, obtain or withhold property with a value in excess of one million dollars.

Insurance fraud in the first degree is a class B felony.

112909

ROBBERY

By

Naomi Werne,
BPS Senior Staff Attorney.

Revised June, 1987

By

John E. Carter, Jr.
Director, Bureau of Prosecution Services

TABLE OF CONTENTS

ROBBERY

A. Elements Of The Crime

Robbery is intentional forcible stealing. See Penal Law §160.00. The lowest degree, third degree robbery, is the forcible stealing of property. Penal Law §160.05. Aggravating factors, such as the presence of an accomplice, and/or the causing of physical injury to a non-participant in the crime, and/or the displaying of what appears to be a firearm elevate the crime to second degree robbery. Penal Law §160.10. Other aggravating factors such as the causing of serious physical injury to a non-participant, and/or being armed with a deadly weapon, and/or using or threatening the immediate use of a dangerous instrument elevate this crime to first degree robbery. Penal Law §160.15. Under Penal Law §160.15(4), displaying what appears to be a firearm is an aggravating circumstance of first degree robbery, but subdivision 4 provides that it is an affirmative defense that the firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Subdivision 4 further provides that this affirmative defense does not preclude a conviction for second or third degree robbery.

(1) Intent to Forcibly Steal

The prosecution must prove that the defendant intended to forcibly steal before he can be convicted of robbery. Defendant's intent to steal was established where the People proved that defendant took back his gambling losses at gunpoint. See People v. Coates, 64 A.D.2d 1, 407 N.Y.S.2d 866 (2d Dept. 1978) (felony murder); People v. Hodges, 113 A.D.2d 514, 496 N.Y.S.2d 771 (2d Dept. 1985).

(a) No Requirement that Victim Have Legal Title to Property

In Coates, supra, the court ruled that since the case involved a forcible taking of gambling losses, it was immaterial that the victim who won the money by illegal gambling did not have legal title under New York law. (See General Obligations Law §5-421, which gives the loser in illegal gambling the right to sue for his losses within three months.)

Similarly, in People v. Lewis, 71 A.D.2d 7, 422 N.Y.S.2d 380 (1st Dept. 1979), the defendant claimed that he was convicted of a crime with which he was never charged, because the indictment alleged that he stole property from an individual who in fact did not own the property. The court rejected this contention by holding that since the putative owner was a security guard employed to guard property consigned to his employer he was an "owner" of that property within the meaning of Penal Law §155.00(5) because his property right was superior to that of the defendant, the wrongful taker. See also People v. Hutchinson, 56 N.Y.2d 868, 453 N.Y.S.2d 394 (1982); People v. Jones, 99 A.D.2d 559, 470 N.Y.S.2d 941 (1984).

(b) Aider and Abettor

The New York Court of Appeals in a memorandum opinion affirmed defendant's conviction of robbery as an aider and abettor where it was proved that defendant drove the getaway car, although he did not "physically participate in the actual purse snatching...." See People v. Jackson, 44 N.Y.2d 935, 408 N.Y.S.2d 315 (1978); People v. Mercado, 114 A.D.2d 377, 493 N.Y.S.2d 896 (2d Dept. 1985). However, a charge to the effect that merely driving a getaway car with knowledge that a robbery

has taken place is sufficient evidence for a jury to convict of robbery as an aider and abettor was held to be reversible error by an appellate court in People v. Valerio, 64 A.D.2d 516, 406 N.Y.S.2d 481 (1st Dept. 1978), as the defendant was, under the Penal Law, an accessory after the fact. (The court in Valerio noted that under the principles of accessorial liability -- Penal Law Article 20 -- a defendant may be convicted of robbery as an aider and abettor, even though the indictment charges him as a direct participant.) Similarly, where the defendant himself was shot after he and another had attempted to commit murder and his accomplice stole a motorist's car at gunpoint, a reasonable doubt existed as a matter of law as to whether defendant had formed the requisite intent to be culpable as an aider and abettor in the car robbery. People v. Cumberbatch, 56 A.D.2d 808, 392 N.Y.S.2d 655 (1st Dept. 1977).

In People v. DeJesus, 123 A.D.2d 563, 507 N.Y.S.2d 144 (1st Dept. 1986), the defendant and several others were involved in an argument with the complainant and began to beat him. During the beating money was taken from the complainant's pocket by an unidentified individual. In overturning the defendant's conviction, the court held that when codefendants are charged with robbery, the intent of each defendant must be established independently. The requisite intent could not be imputed to all codefendants based on the actions of one of them.

The court found insufficient proof of defendant's criminal intent to commit robbery as an aider and abettor in People v. Rivera, 62 A.D.2d 1005, 403 N.Y.S.2d 294 (2d Dept. 1978). In Rivera, the defendant was driving with a friend when they saw a pedestrian (the complainant), whom the friend mistakenly thought was the man who had burglarized his store.

At gunpoint the friend took the complainant's briefcase, wallet, and sweater, returning everything but the sweater after a search failed to reveal any of the items stolen from the friend's store. The friend testified that the sweater was forgotten in the excitement. The friend further testified that defendant had insisted that he return complainant's property, and that defendant was unaware that his friend had a gun and that he intended to stop the complainant at gunpoint.

There was insufficient evidence of criminal intent to convict defendant as an aider and abettor of first degree robbery based on his accomplice's alleged use of a dangerous instrument (a clothes line) in attacking a customer in the backroom of the store they both robbed, where the evidence established that the accomplice's attack was spontaneous and not part of the robbery that the defendant had planned. People v. Gwynn, 53 A.D.2d 565, 384 N.Y.S.2d 823 (1st Dept. 1976). See People v. Jones, 89 A.D.2d 876, 453 N.Y.S.2d 233 (2d Dept. 1982). See also People v. Parker, 97 A.D.2d 943, 468 N.Y.S.2d 731 (4th Dept. 1983) (the People did not have to prove as an element of first degree robbery that defendant knew that his accomplices intended to use, or threatened the immediate use of, a dangerous instrument).

(c) Proving Intent

In People v. Ramos, 83 A.D.2d 817, 442 N.Y.S.2d 61 (1st Dept. 1981), the defendant had testified at trial that he was merely an innocent bystander to the robbery. While he admitted that he was a passenger in the back seat of the car when the robbery was committed, he claimed that he only observed and did not in any way participate in the robbery and assault committed by one Cosme, the individual in the front seat. He

also testified that he had tried to release Cosme's grip around the victim's neck. Cosme, who pleaded guilty to robbery in the first degree, corroborated the defendant's story. The victim, in contrast, testified that the defendant held an arm around his neck while Cosme punched him. The police corroborated the victim's testimony. The trial court charged in effect that a person is presumed to intend the natural consequences of his acts. The Appellate Division ruled that such a charge unconstitutionally shifts the burden of proof, unless the context establishes that the jury was actually instructed that they could choose to infer intent from acts (citing Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 [1979]). See also People v. Getch, 50 N.Y.2d 456, 429 N.Y.S.2d 579 (1980).

The Appellate Division in Ramos also rejected the People's argument that the evidence of robbery was so overwhelming that intent was established beyond a reasonable doubt, thereby rendering the trial court's improper instruction "superfluous." The Court held that to adhere to such logic would undermine "the fundamental burden of the People to prove independently both the criminal act and the defendant's intent to commit that act." Ramos, 442 N.Y.S.2d at 63.

In People v. Lopez, 58 A.D.2d 516, 395 N.Y.S.2d 455, 456 (1st Dept. 1977), the court held that a defendant, who had sexually attacked a woman and only seized her purse after she dropped it during the struggle, could not as a matter of law be convicted of third degree robbery since "[t]he People's proof failed to establish beyond a reasonable doubt that at the time of his attack upon complainant, defendant had the intent to steal her pocketbook [citations omitted]." See also People v. Lane, 112 A.D.2d 247, 491 N.Y.S.2d 697 (2d Dept. 1985) (the defendant's claim of duress in

a robbery prosecution could not be sustained where he had opportunity to abandon his criminal activity and there was evidence casting doubt on his claim that he was taken by surprise).

(d) Proof of Intent in Attempted Robbery

Evidence of intent in attempted robbery cases may be equivocal. The criterion to be applied is "whether the jury, considering the act and all the surrounding circumstances, could conclude that there was no reasonable doubt that [the] defendants acted with an intent to rob...." People v. Bracey, 41 N.Y.2d 296, 301, 392 N.Y.S.2d 412, 416 (1977). In Bracey, the complainant, a stationery store operator named Starks, testified that he was alone in his store when defendants Bracey and Foster-Bey entered, looked around, bought two cents worth of candy and then left. They came back and walked around his store twice, whereupon Starks went to a phone booth and watched them as they walked toward a green Pontiac with no license plate. Starks saw Bracey enter the car and hand a white canvas shoulder bag to Foster-Bey. Bracey drove off, making a U-turn, while Foster-Bey walked back toward the store. Starks called the police while "all this was going on," and went back into his store. He then saw the green Pontiac parked a block away. Foster-Bey attempted to enter the store, reaching for the door with his left hand and with his right drew out a black object resembling a pipe from the shoulder bag. The police arrived, apprehended him and found a gun in the shoulder bag. The Appellate Division reversed the defendant's conviction for attempted second degree robbery, holding that there was insufficient evidence of intent to rob. The Appellate Division stated that "[t]heir acts...were consistent with the crimes of attempted menacing and attempted assault, as well as attempted robbery." People v. Bracey, supra, 48 A.D.2d 860,

369 N.Y.S.2d 12, 14 (2d Dept. 1975).

However, the Court of Appeals disagreed and reversed the ruling of the Appellate Division. The Court of Appeals conceded that "the fact that Foster-Bey entered a stationery store with a gun in his hand does not unequivocally establish that he intended to commit a robbery. He might have intended, as the Appellate Division noted, to assault or menace the owner, or he might have had an innocent purpose in mind. The act does not speak for itself, as it rarely will in the case of criminal attempt." People v. Bracey, supra, 41 N.Y.2d at 301, 392 N.Y.S.2d at 416. However, the Court added:

> Intent can also "be inferred from the defendant's conduct and the surrounding circumstances" [citation omitted] and "indeed this may be the only way of proving intent in the typical case" of criminal attempt (see Model Penal Code, §5.01, Comments [Tent. Draft No. 10], p.28).
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> * * *
>
> The evidence, of course, must be viewed in the light most favorable to the People since we must assume from the conviction that the jury credited the People's proof [citation omitted]. No one seems to dispute the fact that the evidence submitted by the prosecutor shows that the defendants intended to commit some type of crime. Their conduct obviously fits a familiar pattern common to robberies. The evidence shows that they came to a commercial establishment armed with a gun concealed in a bag, driving a car which could not be easily traced because of a missing license plate. They came in together, looked around and made a token purchase. Outside they exchanged the bag and split up. Bracey drove the car around the block and parked down the street from

> the store, Foster-Bey stationed himself outside and then proceeded into the store with the gun drawn and only withdrew when the police arrived. Under all the circumstances the jury could well find that the defendants, who acted together throughout, had reconnoitered the store and returned to rob it. In fact the only thing that could have made this intention plainer was an actual demand for money.
>
> The defendants urge however, that their conduct is equally consistent with an intent to assault or menace. This of course is a possibility, but the jury was entitled to conclude that it was not a reasonable possibility under the circumstances. According to Stark's testimony, he did nothing which could provoke an assault, and he had never had any contact with either defendant prior to the indictment. In order to find the defendants intended a personal assault or menace under these circumstances, the jury would have to resort to sheer speculation.

Id. at 301-2, 392 N.Y.S.2d at 416.

By contrast, in People v. Pollaci, 68 A.D.2d 71, 416 N.Y.S.2d 34 (2d Dept. 1979), the defendant and codefendant were interrupted by the arrival of police; they had gone no further than to stand at the entrance of a supermarket after it was closed, and look through the glass. The conduct of the two defendants here did not constitute an attempted robbery since there was no overt act which went beyond the state of mere preparation. "[T]he law does not punish evil thoughts." Pollaci, supra, 416 N.Y.S.2d 34 at 37. See People v. Witkowski, 90 A.D.2d 723, 455 N.Y.S.2d 608 (1st Dept. 1982); People v. Ciardullo, 106 A.D.2d 14, 483 N.Y.S.2d 352 (2d Dept. 1984); People v. Bracey, supra, 392 N.Y.S.2d at 416.

(e) Intent of a Juvenile

In Matter of Robert M., 110 Misc.2d 113, 441 N.Y.S.2d 860 (Fam. Ct. N.Y. Co. 1981), the nine year-old respondent, charged with delinquency based on his alleged robbery of a bank, contended that because of his immaturity he was incapable of forming a criminal intent. Although the Family Court in Robert M. declined to impose a common law presumption of infancy, it held that where the respondent offers evidence that any combination of factors, including immaturity, negatives the requisite specific intent, such evidence must be overcome beyond a reasonable doubt. The court found that the petitioner proved that the respondent intentionally committed acts which would have been criminal had he been sixteen years or older.* Accordingly, the court denied the motion to dismiss the petition charging delinquency. See also In the Matter of Thomas F., 95 A.D.2d 811, 464 N.Y.S.2d 77 (2d Dept. 1983).

(2) Conduct; Forcible Stealing

Stealing -- a larcenous taking -- is an essential element of robbery. For example, in People v. Ruckdeschel, 51 A.D.2d 861, 380 N.Y.S. 2d 163 (4th Dept. 1976), the defendant confessed to robbery and it was established that the victim had been stabbed. However, a confession

* Pursuant to Penal Law §30.00(12) individuals fourteen or fifteen years of age are criminally responsible for the crimes of robbery in the first degree (Penal Law §160.15) and robbery in the second degree (Penal Law §160.10) among other specified violent felonies and are initially to be prosecuted in the criminal courts rather than processed in the family court. A person fourteen or fifteen years of age is also chargeable with felony murder where the underlying felony is robbery in the first or second degree. (See Penal Law §30.00, Hechtman, Supplementary Practice Commentaries, Mckinney's Cons. Laws of N.Y., Book 39, Penal Law §30.00.)

must be corroborated by independent evidence that establishes the corpus delicti (CPL §60.50) and there was no evidence, apart from defendant's confession, that a theft had been accomplished or even attempted. Accordingly, the court reversed the defendant's conviction on the first degree robbery count. See People v. Rossman, 95 A.D.2d 873, 463 N.Y.S.2d 891 (1983) (retrieval of victim's wallet without money after defendant put knife to her face was sufficient for jury to determine that one of the purposes of the attack was larceny, an element of robbery).

The defendant must intend to appropriate the property of another permanently or for so extended a period of time or under such circumstances that the major portion of the value or benefit of the property is lost. Penal Law §§160.00, 155.00(3); People v. Garland, 125 A.D.2d 328, 508 N.Y.S.2d 605 (2d Dept. 1986); People v. Pierre, ___ A.D.2d ___, 516 N.YS.2d 308 (2d Dept. 1987).

If the losing participant in illegal gambling activity forcibly takes back his gambling losses, this is stealing within the meaning of the robbery statutes, although the winner does not have legal title under New York law; see People v. Coates, 64 A.D.2d 1, 407 N.Y.S.2d 866 (2d Dept. 1978), also discussed in Section A(1), supra.

In People v. Dingle, 122 A.D.2d 280, 504 N.Y.S.2d 780 (2d Dept. 1986), the defendant, while holding a gun at the head of a supermarket employee, attempted to retreat through the door with a bag of money he had taken from the cashiers. The defendant had trouble getting through the door and released the employee, who then captured the defendant with the help of others. During the struggle the defendant dropped the money. The court found that the defendant's actions constituted a completed larceny of the money, supporting his conviction for robbery in the first

degree.

The theft in robbery must be forcible; that is it must be accomplished with the use or threatened immediate use of physical force (Penal Law §160.00). An indictment charging third degree robbery was held to be sufficient where it simply stated that the defendant "forcibly stole" property from the complainant. People v. Brown, 64 A.D.2d 997, 408 N.Y.S.2d 837 (3d Dept. 1978).

(a) Purse Snatching

The court in People v. Santiago, 62 A.D.2d 572, 405 N.Y.S.2d 752 (2d Dept. 1978), aff'd, 48 N.Y.2d 1023, 425 N.Y.S.2d 782 (1980), held that a defendant who relies on the momentum of a moving train to snatch a purse has used physical force and has therefore committed robbery, not mere larceny. Accordingly, in that case the court found that the defendant was properly convicted of felony murder, since the victim had fallen under the moving train as a result of defendant's attempt to snatch her purse. See also People v. Jackson, 44 N.Y.2d 935, 408 N.Y.S.2d 315 (1978) [discussed in Section A(1), supra,] where the New York Court of Appeals, in a memorandum opinion, affirmed defendant's robbery conviction for aiding and abetting a purse snatching. See also People v. Jones, 66 A.D.2d 956, 411 N.Y.S.2d 715 (3d Dept. 1978) (the trial court did not err in accepting defendant's plea of guilty to robbery in the second degree based on defendant's admission that, when he snatched the victim's purse, she fell to the ground, although the appellate court stated that in affirming it did not pass on the question of whether purse snatching per se was forcible stealing). But see People v. Davis, 71 A.D.2d 607, 418 N.Y.S.2d 127 (2d Dept. 1979), where the

court ruled that, absent evidence that the victim was injured or endangered or that she resisted, the fact that defendant snatched her purse and shopping bag was not sufficient evidence of force or fear to constitute robbery, although it would support a conviction of grand larceny in the third degree.

But in People v. Chessman, 75 A.D.2d 187, 429 N.Y.S.2d 224 (2d Dept. 1980) the Appellate Division held that a purse snatching could constitute the crime of robbery where there was evidence that the perpetrator intended to use force to commit the underlying crime of larceny. The court stated:

> [I]f one inadvertently applies force by coming into contact with an individual without "intentionally" doing so, the requisite of force is not satisfied because it was not exercised "for the purpose of... [p]reventing or overcoming resistance" (Penal Law, §160.00). In such a situation, it was caused accidentally, although in the course of a larceny.
>
> If a person intended to lift a purse or pick a pocket, silently and surreptitiously and with the utmost gentility but tripped accidentally in the process, knocking the victim to the ground, it could not be said that this constituted robbery or attempted robbery. The force would have to be exerted "intentionally," that is, for the purpose of preventing or over-coming resistance to the taking of the property or the retention thereof immediately after the taking or compelling the owner of such property or another person to deliver up the property.

Id. at 194, 429 N.Y.S.2d at 229 (emphasis in original).

(b) Threat of Force

If the element of force is established only by a threat, the context

of the threat is relevant to determine if it is a threat of immediate physical force. See People v. Woods, 41 N.Y.2d 279, 392 N.Y.S.2d 400 (1977). In Woods the complainant testified that a man, accompanied by the defendant, approached her and told her that they had found an envelope containing $60,000. She testified that she had told them that the money was probably counterfeit and suggested that they turn it over to the police.

> At this point the defendant "nudged" the complainant on the elbow and told her that she had to give them $2,500 to insure that she would not tell anyone and "for [her] own safety." He also offered to share the found money with her, but she declined his offer. When she told him she did not have that much money with her, he suggested that she go home to get her bankbook. He then walked with her to the bank and waited for her to withdraw the funds, staying by her side throughout the entire transaction.
>
> The complainant and defendant then left the bank together and were immediately joined by the man who had initially approached her. The two men then escorted her to their car, and, once inside, the defendant told her to give him the money and took it from her. They then allowed her to get out of the car and she walked home and immediately telephoned the police.

Id. at 280.

The Court in Woods rejected the defendant's contention that "the demand that the complainant pay the money 'for [her] own safety' is not a threat of the immediate use of physical force and that the People have failed to establish this essential element of robbery." Id. at 282, 392 N.Y.S.2d at 402. The Court held that:

> [W]e do not have to evaluate those words in a vacuum, but rather, it was proper for the trial court to allow the jury to

> interpret these words in light of the myriad facts and circumstances of this case, and it is within the province of the jury to determine the weight to be accorded the testimony [citations omitted]. It was for the jury to determine, under an appropriate charge, whether the defendant's actions were a mere continuation of the original "con game" or whether the scheme had broken down and the defendant's activities, taken in context and as a whole, constituted threats of the immediate use of physical force. In the instant case, there was ample evidence from which the jury could conclude that the defendant had resorted to the use of threats of the immediate use of physical force to compel the complainant to part with her money.
>
> To suggest that the threatening words, if any there be, must in and of themselves express the immediacy of the use of physical force is to graft an added and unjustified requirement onto the statute and to invade the jury's domain as the fact finder. The statute does not require the use of any words whatsoever, but merely that there be a threat, whatever its nature, of the immediate use of physical force. It certainly should not be read so as to allow a criminal to go free on the mere happenstance that he did not employ what by hindsight a reviewing court would categorize as threatening words of art.

Id. at 282-283.

In People v. Brock, 125 A.D.2d 401, 509 N.Y.S.2d 121 (2d Dept. 1986), the defendant grabbed two gold chains from the complainant's neck and ran off with complainant in pursuit. The defendant went behind some steps and reappeared with a machete. When the complainant asked for the return of his property, the defendant threatened to chop the complainant's foot off if he didn't leave. The court found the jury's determination that the threat occurred "immediately after the taking," as required by Penal Law §160.00(1), amply supported by the evidence.

(c) Forcible Retention

To constitute robbery, the use of force or fear to retain possession of the stolen property after it has been taken will be sufficient. Penal Law §160.00(1). See People v. Guzman, 68 A.D.2d 58, 416 N.Y.S.2d 23 (1st Dept. 1979), where the defendant's use of a knife to overcome the complainant's resistance immediately after the taking of a camera was sufficient to prove robbery.

In People v. Dekle, 83 A.D.2d 522, 441 N.Y.S.2d 261 (1st Dept. 1981), aff'd 56 N.Y.2d 835, 452 N.Y.S.2d 568 (1982) the defendant had removed a radio from the showcase at a department store. After he was apprehended by the store's security officers several blocks away, he told the officers that they would have to take the merchandise from him and removed a closed pocket knife from his back pocket. The Appellate Division, affirming defendant's conviction of robbery in the third degree, noted that whether the defendant's taking of the radio was a continuous act, including the removal of its price tags in the adjacent department and its removal from the store, and whether defendant's threat to use the knife when confronted by the security guards was a threat of immediate use of physical force immediately after the taking, were questions of fact for the jury.

In People v. Saia, 112 A.D.2d 804, 492 N.Y.S.2d 306 (4th Dept. 1985), the court held that robbery could be committed by threatening physical force for the purpose of retaining property acquired by trick or false pretenses.

An employee of a delicatessen observed the defendant in the store place a package of gum in her purse, then bring another item to the

counter and paid with a dollar bill. The employee deducted the cost of the gum, which the defendant denied taking. An argument ensued during which the defendant knocked over a candy rack and began throwing candy around the store. Another employee threatened to hit the defendant with a nightstick, and the defendant cut him on the forehead with a boxcutter. On appeal from the defendant's conviction of robbery in the first and second degrees, the court reversed, finding that there was no evidence that any effort had been made to retrieve the stolen gum or that the defendant's use of force was directed at retaining it. People v. Walden, 120 A.D.2d 362, 502 N.Y.S.2d 14 (1st Dept. 1986).

(d) Aid of an Accomplice

The forcible stealing of property, third degree robbery (Penal Law §160.05), becomes second degree robbery where there are certain aggravating circumstances, including the aid of another person actually present. Penal Law §160.10(1). Proof that another person was actually present, aiding defendant, is sufficient to sustain a conviction for second degree robbery. The accomplice need not be identified and if he is arrested and tried, his acquittal or the declaration of a mistrial of his case does not necessarily preclude the codefendant's conviction for second degree robbery. See People v. Tucker, 59 A.D.2d 599, 399 N.Y.S.2d 275 (3d Dept. 1977); People v. Timlin, 99 A.D.2d 296, 473 N.Y.S.2d 604 (3d Dept. 1984); People v. Cable, 96 A.D.2d 251, 468 N.Y.S.2d 470 (1st Dept. 1983), rev'd on other grounds, 63 N.Y.2d 270 (1984).

In People v. Hedgeman, 123 A.D.2d 495, 506 N.Y.S.2d 751 (2d Dept. 1986), appeal granted, 69 N.Y.2d 712 (1986), the accomplice, seated in an automobile parked 15 feet from the bank robbed by the defendant, was held

to be "actually present" so as to support the defendant's conviction of robbery in the second degree.

(e) Causing Physical Injury

If a defendant, while committing a robbery or in immediate flight therefrom, causes physical injury to a non-participant in the crime, the robbery is second degree robbery. Penal Law §160.10(2)(a). Proof of physical impairment or substantial pain is required to prove physical injury; see Penal Law §10.00(9). The 81-year-old complainant in People v. Williams, ___A.D.2d ___, 511 N.Y.S.2d 911 (2d Dept. 1987), was grabbed by the collar and thrown to the ground, his arm pinned against the pavement and his wrist rubbed on the concrete causing him great pain. The discomfort persisted for about two weeks. The court held that the issue of substantial pain was properly left to the finder of fact. See also People v. McDowell, 28 N.Y.2d 373, 321 N.Y.S.2d 894 (1971) (mere reference to blackened eye without further evidence held insufficient to establish physical injury). In People v. Almonte, 102 Misc.2d 950, 424 N.Y.S.2d 868 (Sup. Ct. N.Y.Co. 1980), a lacerated upper lip, which bled noticeably and necessitated emergency medical treatment, was held to be an "impairment" and thus an "injury" within the meaning of Penal Law §10.00(9). See People v. Thompkins, 97 A.D.2d 593, 468 N.Y.S.2d 207 (3d Dept. 1983) (evidence that victim fell to ground, hitting her elbow and suffering contusion requiring hospital emergency room treatment and victim continued to feel pain some two months after the incident was sufficient to establish that victim suffered "physical injury"); People v. Fields, 118 A.D.2d 55, 500 N.Y.S.2d 58 (1986) (splitting of lip and damage to dental bridge with dislodged tooth held sufficient to establish

physical injury); and People v. Goico, 122 A.D.2d 576, 505 N.Y.S.2d 14 (4th Dept. 1986) (sharp blow to the complainant's rib cage that caused "a lot of pain" for several weeks, equivalent to pain of fractured rib suffered earlier by the complainant, was sufficient to support finding of physical injury).

By contrast, in People v. Reed, 83 A.D.2d 566, 441 N.Y.S.2d 10 (2d Dept. 1981), the victim's injuries from blows to the side of his head and to the bridge of his nose, resulting in bruises, a headache and "minor pain," were held not to constitute sufficient physical injury within the scope of Penal Law §10.00(9) to convict defendant of robbery in the second degree (Penal Law §160.10[2][a]) and assault in the second degree (Penal Law §120.05[6]). See People v. Cable, supra; People v. Rojas, 61 N.Y.2d 726, 472 N.Y.S.2d 615 (1984); Matter of Pernell M., 98 A.D.2d 776, 469 N.Y.S.2d 795 (2d Dept. 1983).

(f) Causing Serious Physical Injury

If the defendant, in the course of the robbery or in the immediate flight therefrom, causes serious physical injury to a non-participant in the crime, he is guilty of first degree robbery. Penal Law §160.15(1). "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any body organ. Penal Law §10.00(10). Proof of protracted impairment in the functioning of the victim's eye constituted proof of serious physical injury. See People v. Rumaner, 45 A.D.2d 290, 357 N.Y.S.2d 735 (3d Dept. 1974); People v. Guzek, 88 A.D.2d 691, 451 N.Y.S.2d 318 (3d Dept. 1982).

(g) Armed with Deadly Weapon

A defendant who commits a robbery armed with a deadly weapon is guilty of first degree robbery. Penal Law §160.15(2). "Deadly weapon" means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switch-blade knife, gravity knife, dagger, billy, black jack, or metal knuckles. Penal Law §10.00(12). A long, straight knife is a deadly weapon. People v. Blanchard, 55 A.D.2d 968, 390 N.Y.S.2d 660 (3d Dept. 1977). An air pistol is a deadly weapon, although it is not a firearm. People v. Jones, 54 A.D.2d 740, 387 N.Y.S.2d 659 (2d Dept. 1976). Where "there was testimony that, although the cylinder head and stop were not operating on the gun involved, the cylinder could be rotated and aligned manually to operate and discharge the weapon and that the weapon had been test-fired three times, the jury could properly find that the gun qualified as a deadly weapon." People v. Howard, 37 A.D.2d 178, 323 N.Y.S.2d 119, 121 (3d Dept. 1971); see People v. Elfe, 37 A.D.2d 208, 323 N.Y.S.2d 114, 117 (3d Dept. 1971); People v. Amato, 99 A.D.2d 495, 470 N.Y.S.2d 441 (2d Dept. 1984); People v. Burdash, 102 A.D.2d 948, 478 N.Y.S.2d 89 (3d Dept. 1984). A defendant is entitled to a charge that the jury must find beyond a reasonable doubt that the gun that he allegedly used in the robbery was operable at the time of the crime, before it can convict him of first degree robbery, even where defense counsel stipulates that a ballistics expert would testify that the gun allegedly used has been test-fired and is operable. People v. Fwilo, 47 A.D.2d 727, 365 N.Y.S.2d 194 (1st Dept. 1975). Where there is no evidence at trial that the defendant's gun was loaded, fired, or capable of being fired, or that the

defendant did more than point it at the victim, the court found the proof insufficient to sustain the defendant's conviction of first degree robbery based on use or threatened use of a dangerous instrument. People v. Seabrooks, 120 A.D.2d 691, 502 N.Y.S.2d 4 (2d Dept. 1986). By contrast, in People v. Colavito, ___ A.D.2d ___, 510 N.Y.S.2d 678 (2d Dept. 1987), the defendant told the complainant, "I got a gun...If you turn around, you've had it." In sustaining his conviction, the court ruled that the defendant was threatening to use the gun in a dangerous fashion, if not by shooting the complainant then at least as a club, which would qualify it as a dangerous instrument.

A German shepherd dog cannot be a deadly weapon though he could be a dangerous instrument. People v. Torrez, 86 Misc.2d 369, 382 N.Y.S.2d 233 (Sup. Ct. Bronx Co. 1976).

A forcible theft of a deadly weapon is not theft with a deadly weapon. See People v. Williams, 63 A.D.2d 1035, 406 N.Y.S.2d 341 (2d Dept. 1978), where the court reduced defendant's conviction for first degree robbery to second degree robbery where the proof established that defendant forcibly stole a police officer's service revolver, causing physical injury to the officer.

1. Accessorial Conduct (Aider and Abettor)

In People v. Dorsey, 112 A.D.2d 536, 491 N.Y.S.2d 473 (3d Dept. 1985), the defendant and victim met another individual at a bar, who subsequently assaulted and took property from the victim while the threesome was walking toward defendant's prospective apartment. Defendant was convicted of accessorial conduct, as he orchestrated the trip and discouraged escape or resistance by his presence behind the

victim during the taking of the victim's money, watch and wristband.

Defendant's conviction as an aider and abettor of first degree robbery was modified to second degree robbery where it was proved that he fled before his accomplice displayed a knife, a deadly weapon under Penal Law §10.00(12), and where in addition there was no chain of evidence connecting the exhibit of the knife to the accomplice or the defendant, as the officer who allegedly found the knife was never called as a witness. People v. Walker, 64 A.D.2d 540, 406 N.Y.S.2d 811 (1st Dept. 1978).

(h) Use or Threatening Immediate Use of a Dangerous Instrument

If a defendant, in the course of committing a robbery, or in immediate flight therefrom, uses or threatens the immediate use of a dangerous instrument, he is guilty of first degree robbery. Penal Law §160.15(3). "Dangerous instrument" means any instrument, article, or substance, including a "vehicle," which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury. Penal Law §10.00(13).

In People v. Cephas, 110 Misc.2d 1075, 443 N.Y.S.2d 558 (Sup. Ct. N.Y. Co. 1981), the court found that a subway train constituted a dangerous instrument and found sufficient evidence to support the charges of robbery in the first degree where the defendant, while he was riding between the cars of a moving subway train, snatched and made attempts to snatch purses from women standing on the subway platform. In Cephas, the defendant had unsuccessfully moved to dismiss the indictments on the ground that the statutory definition of a dangerous instrument excludes a

subway train. Although a "vehicle" is included as a dangerous instrument pursuant to Penal Law §10.00 (13), Vehicle & Traffic Law §159 defines a vehicle as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks."

The court, in denying the defendant's motion to dismiss, held that while a subway train used exclusively on stationary tracks does not fall within the statutory definition of a vehicle, nevertheless the use to which it is put determines whether or not it is a dangerous instrument. Furthermore, where danger is reasonably forseeable, given the use of the train, it is not necessary that actual harm be done to find that the train was a dangerous instrument.

In People v. Brown, 103 Misc.2d 871, 427 N.Y.S.2d 200 (Sup. Ct. Kings Co. 1980), the court held that a stick which the defendant raised over the head of complainant during the course of a robbery was not a "dangerous instrument." The court stated that:

> [A dangerous instrument] is defined in the Penal Law, not in terms of specific items or attributes, but in terms of temporary use. The essence of a dangerous instrument is the manner in which the item is used, and inasmuch as the definition refers to any instrument, article or substance, even ordinary items are included within its scope whenever they are "readily capable of causing death or other serious physical injury." [Citations omitted.]

Id. at 872-3, 427 N.Y.S.2d at 202.

A baseball bat is a dangerous instrument if the defendant strikes the victim on the head with it. People v. Ozarowski, 38 N.Y.2d 481, 381 N.Y.S.2d 438 (1976). See also People v. Santiago, 61 A.D.2d 801, 401

N.Y.S.2d 987 (2d Dept. 1978), where the court held that while a baseball bat is a dangerous instrument, its mere possession is not a crime absent proof of intent to use it unlawfully. A German shepherd dog can be a dangerous instrument (People v. Torrez, supra). Even an ordinary handkerchief can be a dangerous instrument, if it is used to gag an elderly person. People v. Cwikla and Ford, 60 A.D.2d 40, 400 N.Y.S.2d 35 (1st Dept. 1977), rev'd on other grounds, 46 N.Y.2d 434, 414 N.Y.S.2d 102 (1979). See People v. Brown, 100 A.D.2d 879, 474 N.Y.S.2d 139 (2d Dept. 1984) (evidence in prosecution for attempted first degree robbery sustained jury's finding the stick used by defendant was readily capable of causing serious physical injury in the way in which it was used to threaten victim; defendant moved the stick above victim's head in a downward motion as if to strike).

A charge of robbery in the first degree was not sufficiently proved where "[t]he evidence adduced at trial was insufficient to establish that the object partially displayed by defendant during the robbery was an instrument 'readily capable of causing death or other serious physical injury.'" People v. Green, 56 A.D.2d 610, 391 N.Y.S.2d 655 (2d Dept. 1977). See People v. Smith, 55 N.Y.2d 888, 449 N.Y.S.2d 19 (1982), where the Court of Appeals reversed the Appellate Division and ordered a retrial following defendant's conviction of first degree robbery on the grounds that the trial court erroneously failed to charge the jury on the lesser included offense of second degree robbery because there was evidence that the defendant's weapon was only a toy gun, not capable of producing death or serious injury, as required by Penal Law §160.15(4). See also People v. Holmes, 71 A.D.2d 904, 419 N.Y.S.2d 614 (2d Dept. 1979), aff'd, 52 N.Y.2d 976, 438 N.Y.S.2d 284 (1981) (evidence did not

establish that the gun that defendant allegedly brandished was either loaded or used; accordingly, there was insufficient proof to support a first degree robbery conviction based upon the use or threatened use of a dangerous instrument; People v. Bonefont, 84 A.D.2d 844, 444 N.Y.S.2d 173 (2d Dept. 1981) (defendant's conviction of robbery in the first degree reversed and that count dismissed for insufficiency of evidence where at trial there was proof that defendant only put the gun next to the complainant's face -- a gun never recovered -- and there was no evidence that the gun was loaded or operable); People v. Castaldo, 72 A.D.2d 568, 420 N.Y.S.2d 742 (2d Dept. 1979) (where the capability of an unloaded sawed-off rifle to inflict death or serious physical injury was not proved).

Mere possession of a dangerous instrument, without use or threatened immediate use, is insufficient to support a conviction of first degree robbery. People v. Iglesias, 40 A.D.2d 778, 337 N.Y.S.2d 740 (1st Dept. 1972). See People v. Sollars, 91 A.D.2d 909, 457 N.Y.S.2d 792 (1st Dept. 1983)

The threatened use of a dangerous instrument was adequately proved when the evidence showed that the defendants, in an effort to silence their victim, told her to "shut up" while brandishing a knife for her to see. People v. Bullock, 73 A.D.2d 1006, 424 N.Y.S.2d 61 (3d Dept. 1980).

In People v. Brown, 103 Misc.2d 871, 427 N.Y.S.2d 200 (Sup. Ct. Kings Co. 1980), the court set forth the distinction between a "dangerous instrument" and a "deadly weapon."

> A dangerous instrument is distin-- guished from a "deadly weapon" in that a "deadly weapon" is defined in the Penal

> Law by listing a few specific lethal instruments of a kind that ordinarily are manufactured or designed as "weapons" and have virtually no other purpose. In contrast to a "deadly weapon" a "dangerous instrument" is not necessarily designed as a weapon, and ordinarily may have a perfectly legitimate function.

Id. at 872, 427 N.Y.S.2d at 202.

1. Evidence of Threatened Use

For there to be a "threaten[ed] immediate use" of a dangerous instrument, there need be "no correspondence between the content of [a robber's] verbal threat and the instrumentality behind it." People v. Pena, 50 N.Y.2d 400, 429 N.Y.S.2d 410 (1980). In Pena, defendant held a knife inside a brown paper bag during a robbery, but told the victim that the bag concealed a gun. The Court stated that a jury could have found "that a threat brought home, as in this case, by [defendant's] thrusting his hand, which held the concealed instrument, toward the victim, in fact represented the imminent use of force by means of an instrument 'readily capable of causing death or other serious physical injury' [citations omitted]." Id. at 400, 408, 429 N.Y.S.2d 410, 414. See People v. Mitchell, 99 A.D.2d 609, 472 N.Y.S.2d 166 (3d Dept. 1984).

(i) Displaying Firearm

A defendant is guilty of first degree robbery, when in the course of the robbery or the immediate flight therefrom, he displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that it is an affirmative defense that such firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Penal Law §160.15(4). However, if a defendant proves this affirmative defense, he

may still be convicted of second degree or third degree robbery. Penal Law 160.15(4). Simply displaying what appears to be a firearm in the course of a robbery or in immediate flight therefrom is second degree robbery. Penal Law §160.10(2)(b). For example, in People v. Knowles, 79 A.D.2d 116, 436 N.Y.S.2d 25 (2d Dept. 1981), the court held that "where an unarmed robber holds his hand in his pocket so as to give the impression that he is holding a gun, he has '[d]isplay[ed] what appears to be a... firearm' within the meaning of our second degree robbery statute." Id., 436 N.Y.S.2d 25 at 29. In Knowles, defendant held his hand in his pocket during the course of a holdup in such a manner as to make the victim believe that he had a gun. The court stated:

> We perceive no distinction between an instance where [a] belief [that the robber is armed] is induced by a plainly displayed, though inoperable, gun, and an instance where this belief is induced by a concealed hand which a frightened victim understandably believes to be a gun. Both are harmless, but both are terrifying.

Id. at 28.

In People v. Baskerville, 60 N.Y.2d 374, 378, 469 N.Y.S.2d 646, 648 (1983), the Court of Appeals held that a robber who holds and uses a black object covered by a towel in such manner as to give his victims the impression that he is threatening them with a gun "[d]isplays what appears to be a 'firearm' within the meaning of subdivision 4 of section 160.15 of the Penal Law, and an instruction to the jury to that effect is not erroneous." See also People v. Bynum, 125 A.D.2d 207, 509 N.Y.S.2d 321 (1st Dept. 1986).

A defendant who demanded money from employees of a store, while telling them he had a gun and patting his waist area as he spoke, was

found not to have displayed something that could reasonably have been perceived as a firearm. Thus the trial court properly modified the verdict convicting the defendant of first degree robbery to robbery in the third degree. People v. Copeland, 124 A.D.2d 669, 507 N.Y.S.2d 914 (2d Dept. 1986). In People v. Carrington, ___ A.D.2d ___, 511 N.Y.S.2d 673 (2d Dept. 1987), the court found that, although the complainant saw what appeared to be the outline of a gun under the defendant's shirt, she did not actually see a gun. The defendant did not refer to the gun or threaten her with it. Since there was thus no evidence that the defendant had consciously displayed what appeared to be a firearm, the defendant's conviction of first degree robbery under Penal Law §160.14(4) was reversed.

See also People v. Jenkins, 118 Misc.2d 699, 461 N.Y.S.2d 699 (Sup. Ct. N.Y. Co. 1983). It is no defense to second degree robbery that the firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury could be discharged. Therefore, if the gun allegedly displayed in the robbery is recovered and examination proves that it is inoperable or an imitation, the defendant may only be charged with second degree robbery since the affirmative defense has been proved by direct evidence. If the gun allegedly displayed in the robbery is not recovered, the defendant may be charged with first degree robbery which will be reduced to second degree robbery if he proves by a preponderance of the evidence that the gun was not loaded or was inoperable. It must appear to the victim by sight, touch or sound that he is threatened by a firearm. See People v. Stephens, 97 A.D.2d 523, 468 N.Y.S.2d 31 (2d Dept. 1983) (evidence did not establish that the gun alleged to have been used was loaded and operable; there-

fore, the evidence was insufficient to sustain convictions of robbery and attempted first degree robbery).

A defendant's conviction of first degree robbery must be reduced to third degree robbery where there was no proof that he had used or even possessed any weapon or dangerous instrument. People v. Early, 59 A.D.2d 912, 399 N.Y.S.2d 145 (2d Dept. 1977). Similarly, a defendant's conviction on his plea of guilty to first degree robbery was modified, with the consent of the district attorney, to a conviction of second degree robbery since there was no proof that defendant had possessed a deadly weapon or used or threatened the immediate use of a dangerous instrument. People v. Williams, 55 A.D.2d 687, 390 N.Y.S.2d 206 (2d Dept. 1976); see People v. Walker, supra.

(j) Affirmative Defense

The affirmative defense to first degree robbery -- that the firearm displayed was not loaded and operable -- was challenged as unconstitutional in People v. Felder, 39 A.D.2d 373, 334 N.Y.S.2d 992 (2d Dept., 1972), aff'd without opinion, 32 N.Y.2d 747, 344 N.Y.S.2d 643 (1973), app. dism'd sub nom. Felder v. New York, 414 U.S. 948 (1973). In Felder, the defendant, charged with first degree robbery, argued that this affirmative defense unconstitutionally (1) creates a presumption of guilt and (2) compels him to be a witness against himself, since he had to testify that the gun was not operable and thus convict himself of second degree robbery. The Appellate Division disagreed, holding that the presumption created is constitutional since it is both rebuttable and rational. It gives defendant the burden of proving a fact peculiarly within his knowledge and therefore does not unconstitutionally shift the burden of

proof. The court further held that this affirmative defense does not compel a defendant to testify. He can claim total innocence and produce evidence by others that the gun was not operable or was unloaded at the time of the crime. The fact that these defenses are inconsistent does not render the affirmative defense unconstitutional. The propriety of raising inconsistent defenses is a principle firmly embedded in criminal law. In accord with Felder, see People v. Coleman, 42 N.Y.2d 837, 397 N.Y.S.2d 378 (1977); People v. Clark, 41 N.Y.2d 612, 394 N.Y.S.2d 593 (1977), cert. denied, 434 U.S. 864 (1977).

In People v. Lockwood, 52 N.Y.2d 790, 436 N.Y.S.2d 703, 417 N.E.2d 1244 (1980), defendant claimed that he effected a robbery by means of a toothbrush held to the back of the victim's neck while threatening to shoot him. There was testimony at trial that defendant committed the robbery with a gun. Defendant requested a jury charge based on the affirmative defense to robbery in the first degree which provides that "it is an affirmative defense that [defendant's display of what appeared to be a] pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged."

The Court of Appeals held that the trial court's failure to charge the jury concerning the affirmative defense constituted reversible error, since "the jury may well have believed that defendant had committed the robbery with a toothbrush, yet also believed that it was their duty to find him guilty of robbery in the first degree since the toothbrush which he displayed appeared to be a pistol." Id. 436 N.Y.S.2d at 704. See also People v. Kranenburg, 89 A.D.2d 509, 453 N.Y.S.2d 9 (1st Dept. 1982); People v. Baskerville, 60 N.Y.2d 374, 378; 469 N.Y.S.2d 646 (1983).

In People v. Edwards, 121 A.D.2d 254, 503 N.Y.S.2d 40 (1st Dept. 1986), the court held that the weapon used by the defendant was not capable of firing a real bullet. The court then modified the defendant's conviction from robbery in the first degree to robbery in the second degree, despite his failure to either request a charge to the jury on the affirmative defense or object to its omission.

B. Lesser Included Offenses In Robbery

(1) Larceny

If a defendant is convicted of robbery, his conviction of larceny for the theft he accomplished by the robbery must be dismissed by the trial court, since in such a case larceny is a lesser included offense. See People v. Grier, 37 N.Y.2d 847, 378 N.Y.S.2d 37 (1975); People v. Williams, 50 A.D.2d 911, 377 N.Y.S.2d 183 (2d Dept. 1975); People v. Cambridge, 54 A.D.2d 765, 387 N.Y.S.2d 880 (2d Dept. 1976); People v. Owens, 58 A.D.2d 898, 396 N.Y.S.2d 893 (2d Dept. 1977). See People v. Williams, 63 A.D.2d 1035, 406 N.Y.S.2d 341 (2d Dept. 1978); People v. Batista, 113 A.D.2d 890, 493 N.Y.S.2d 608 (2d Dept. 1985).

"It is settled that grand larceny in the third degree, i.e., a taking from the person of another, is a lesser included offense of robbery in the first degree [citations omitted]." People v. Greenfield, 70 A.D.2d 662, 416 N.Y.S.2d 830, at 831 (2d Dept. 1979).

Thus, if a defendant forcibly steals an automobile and is convicted of robbery, charges of third degree grand larceny and unauthorized use of a motor vehicle must be dismissed. People v. Ysrael, 54 A.D.2d 676, 387 N.Y.S.2d 852 (1st Dept. 1976).

However, the trial court's refusal to charge the jury as to petty

larceny as a lesser included crime of robbery in the first degree was upheld in People v. Heath, 120 A.D.2d 746, 502 N.Y.S.2d 526 (2d Dept. 1986), because under no reasonable view of the evidence could the defendant have been found to have committed the petit larceny without also having committed the robbery.

(2) Assault

In People v. Miguel, 53 N.Y.2d 920, 440 N.Y.S.2d 923 (1981), the Court of Appeals held that where the defendant was charged with robbery in the second degree (Penal Law §160.10[1], [2][a]) and felony assault (Penal Law 120.05[6]), assault in the third degree (Penal Law §120.00[1][2]) was not a lesser included offense of those crimes. The Court reiterated the principle that before an offense can be a lesser included offense, two criteria must be met. First, the lesser offense must meet the statutory definition of "lesser included offense" contained in CPL §1.20(37):

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense."

In addition, there must be a reasonable view of the evidence which would support a finding that the defendant committed the lesser offense but did not commit the greater. CPL §300.50(1)(2). Applying this two-pronged test, the Court pointed out that both robbery in the second degree and felony assault can be committed even if the perpetrator does not act recklessly or with a specific intent to cause physical injury, while by contrast, assault in the third degree requires that the defendant act recklessly or with specific intent to cause the injury. Penal

Law §120.00(1)(2). Therefore, in Miguel the Court found that the first criterion was not met, since it is possible to commit both the crime of robbery in the second degree and felony assault without concomitantly committing assault in the third degree; therefore, assault in the third degree was not a lesser included offense of either robbery in the second degree (Penal Law §160.10[1], [2][a]) or felony assault (Penal Law §120.05[6]).

Earlier Court of Appeals decisions including People v. Lett, 39 N.Y.2d 966, 387 N.Y.S.2d 106 (1976), and People v. Warren, 43 N.Y.2d 852, 403 N.Y.S.2d 215 (1978), on facts similar to those in Miguel, had held that assault in the third degree was a lesser included offense of robbery in the second degree. These cases were explained by the Court in Miguel as resulting from inadequate consideration to the first criterion of CPL 300.50(1). Accordingly, the Court stated in a footnote to its opinion that the holdings of those decisions "cannot be considered accurate indications of the law in this area." Id. at 925, n.3.

Assault in the second degree (Penal Law §120.05[6]) is a lesser included offense of robbery in the first degree (Penal Law §160.15[1]). People v. Strawder, 78 A.D.2d 810, 433 N.Y.S.2d 112 (1st Dept. 1980).

Assault in the third degree is not a lesser included offense of second degree robbery charged under Penal Law §160.10(1) (robbery with an accomplice). People v. Ellis, 60 A.D.2d 736, 400 N.Y.S.2d 899 (3d Dept. 1977). A charge of assault in the second degree for causing injury during the commission of a felony under Penal Law §120.05(6) was held to be an inclusory concurrent count of another count of the indictment charging robbery in the second degree under Penal Law §160.10(2)(a) in People v. Dantzler, 123 A.D.2d 327, 506 N.Y.S.2d 220 (2d Dept. 1986).

Conviction on the robbery count thus required dismissal of the assault conviction.

(3) Lower Degree of Robbery

Where there was a serious factual issue as to the severity of the injury inflicted on the victim of a robbery, the defendant was entitled to a jury instruction of second degree robbery as a lesser included offense of the first degree robbery with which he was charged. People v. Jones, 59 A.D.2d 538, 397 N.Y.S.2d 126 (2d Dept. 1977). Similarly, where the victim testified that he "blacked out" when the defendant assaulted him and there was evidence that a crowd gathered during the melee, other persons besides defendant had the opportunity to steal the victim's wallet, so the trial court's failure to charge attempted robbery and third degree assault as lesser included offenses of robbery in the first degree was error. People v. Moss, 60 A.D.2d 751, 400 N.Y.S.2d 603 (4th Dept. 1977). Where there was no evidence other than complainant's testimony that defendant was armed with a knife and complainant also testified that defendant grabbed him by the shoulders when committing the robbery, the trial court should have granted defendant's request to charge robbery in the third degree as a lesser included offense in the charge of first degree robbery. People v. Jenkins, 67 A.D.2d 932, 413 N.Y.S.2d 153 (2d Dept. 1979).

In People v. Amato, 99 A.D.2d 495, 470 N.Y.S.2d 441 (2d Dept. 1984), defendant's conviction of robbery in the first degree was based upon use of a deadly weapon, but there was no proof that a loaded and operable gun was used. Consequently the appellate court reduced the charge to the lesser included offense of robbery in the third degree

based on forcible stealing of property. See People v. Sollars, 91 A.D.2d 909, 457 N.Y.S.2d 792 (1st Dept. 1983)

Where the appellate court finds insufficient evidence to sustain a conviction for attempted first degree robbery, defendant's acquittal of attempted third degree robbery precludes that court from reducing the conviction to third degree robbery. People v. Johnson, 64 A.D.2d 613, 406 N.Y.S.2d 361 (2d Dept. 1978).

Robbery in the second degree based on the causing of physical injury is a lesser included offense of robbery in the first degree based upon the causing of serious physical injury . People v. Rivera, 123 A.D.2d 295, 506 N.Y.S.2d 569 (1st Dept. 1986). However, robbery in the second degree, based on a charge of stealing and causing physical injury during the commission of a crime (Penal Law §160.10[2][a]), is not a lesser included offense of robbery in the first degree, based on a charge of forcible stealing while armed with and using or threatening the immediate use of a dangerous weapon (Penal Law §160.15[3]), because of the injection of an additional element: the causation of physical injury. See People v. McFadden, 100 A.D.2d 520, 473 N.Y.S.2d 210 (2d Dept. 1984) (second degree robbery was not a lesser included offense of first degree robbery which was charged in the indictment, thus the trial court lacked jurisdiction to convict defendant of second degree robbery). See also People v. Simon, 117 A.D.2d 980, 499 N.Y.S.2d 285 (4th Dept. 1986) (where evidence existed indicating possibility that weapon was not loaded, lesser included offense of robbery, second degree was properly charged).

By contrast, robbery in the third degree was held to be a lesser included offense of robbery in the first degree in People v. Marr, 70 A.D.2d 573, 417 N.Y.S.2d 70 (1st Dept. 1979), rev'd on other grounds, 50

N.Y.2d 456, 429 N.Y.S.2d 579 (1980). But see People v. Rice, 81 A.D.2d 515, 446 N.Y.S.2d 47 (1st Dept. 1981), where the same court ruled that since no reasonable view of the evidence would support a finding that defendant committed robbery in the third degree but did not commit robbery in the first degree, defendant was not entitled to have jury instructed on robbery in the third degree. In Rice several prosecution witnesses had testified that the robber had a gun. The fact that no gun was found on defendant when he was apprehended several blocks from the scene after a chase was held an insufficient reason for the jury to reject the prosecution witnesses' testimony that defendant displayed what appeared to be a pistol [Penal Law §160.15 (4)] but accept their testimony that a robbery was committed. See People v. Everett, 103 A.D.2d 978, 479 N.Y.S.2d 825 (3d. Dept. 1984) (trial court's refusal to charge robbery in the second degree as a lesser included offense of robbery in the first degree was sustained; no reasonable view of the evidence could have supported commission of any offense less than that of robbery in the first degree).

(4) Possession of a Weapon

A charge of possession of a weapon is not a lesser included offense of robbery in the first degree. People v. Perez, 45 N.Y.2d 204, 408 N.Y.S.2d 343 (1978); People v. Cramer, 85 A.D.2d 832, 446 N.Y.S.2d 442 (3d Dept. 1981). In People v. Perez, supra, the defendant was charged with first degree robbery, second degree assault, and possession of a weapon as a misdemeanor based on the commission of a robbery during which the defendant was armed with a knife and stabbed the victim twice. In holding that the robbery conviction should not have automatically

resulted in the dismissal of the weapons charge, the Court reasoned that the crimes of robbery and possession of a weapon constitute separately cognizable and statutorily proscribed crimes as to conduct, result, and the mental state of the actor. Thus, robbery cannot be considered to be merely possession of a weapon with certain aggravating factors. In view of the serious danger to the public posed by individuals who possess weapons, the court further found as a matter of policy that the Legislature could not have intended that a weapons possession charge merge with the greater crime of robbery, notwithstanding the absence of evidence of the defendant's possession of the weapon independent of defendant's conduct during the commission of the robbery. The court noted that while a conviction of both first degree robbery and the weapon possession charge may appear harsh, its effect is mitigated by Penal Law §70.25(2) which proscribes the imposition of an additional sentence of imprisonment for the latter crime.*

C. Double Jeopardy

In People v. Mayo, 48 N.Y.2d 245, 422 N.Y.S.2d 361 (1979), defendant was charged with first degree robbery but after the presentation of the case, the trial court stated that it would only submit the lesser included offense of second and third degree robbery as there was no proof that defendant had possessed a dangerous instrument. The jury was unable to reach a verdict. At defendant's second trial on the original indictment charging first degree robbery, defendant's motion to dismiss

* Penal Law §70.25(2) provides that when a defendant is convicted of two offenses as a result of "an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences, except if one or more of such sentences is for a violation of section 270.20 of this chapter, must run concurrently."

the indictment was denied, but the same trial court again stated that it would only submit the lesser included counts of second and third degree robbery to the jury. Defendant contended that double jeopardy barred his second prosecution for first degree robbery, which resulted in his conviction for second degree robbery, a lesser included offense. The appellate court in Mayo agreed that double jeopardy barred defendant's retrial for first degree robbery, but found the error nonprejudicial because the count of first degree robbery was never submitted to the jury and the references to first degree robbery in the trial were fleeting. However, the Court of Appeals disagreed, holding that:

> Although the jury in the first trial was not permitted to consider [the] charge [of first degree robbery], the trial court's decision to withdraw the first degree robbery count from the jury's consideration on the ground of insufficient evidence was equivalent to an acquittal and therefore operated as a bar to any further prosecution of that charge [citation omitted].

Id. at 364.

In People v. Cramer, 84 A.D.2d 8, 446 N.Y.S.2d 443 (3d Dept. 1981), the court held that the defendant's guilty plea to a weapon possession charge in Franklin County did not bar his subsequent plea of guilty to attempted robbery in Clinton County under the constitutional or statutory provisions prohibiting double jeopardy where both charges arose out of a single robbery of an individual at gunpoint. Upon entering his plea of guilty the defendant waived the statutory double jeopardy provisions based on CPL §40.20 and §40.40. Although it may be raised for the first time on appeal, the defendant's constitutional double jeopardy claim was also rejected on the grounds that the crime of possession of a weapon has been clearly established not to be a lesser included offense of robbery

in the first degree.

D. Sufficiency of Evidence

(1) Identification

In People v. Gonzalez, 61 A.D.2d 666, 403 N.Y.S.2d 514 (1st Dept. 1978), aff'd 46 N.Y.2d 1011, 416 N.Y.S.2d 239 (1979), the appellate court sustained a robbery conviction although complainant could not identify defendant at the trial, as complainant had identified defendant as one of three men who robbed him at a non-suggestive showup conducted shortly after the robbery, and defendant had admitted to being in the car with the two other robbers. See People v. Crudup, 100 A.D.2d 938, 474 N.Y.S.2d 827 (2d Dept. 1984) (where the court found that where identification evidence submitted by the prosecution was extremely weak, and defendant presented a credible alibi defense, the evidence was insufficient to sustain a conviction for robbery in the third degree); People v. Yip, 118 A.D.2d 472, 499 N.Y.S.2d 752 (1st Dept. 1986) (where the court held the lack of identification was not fatal to sufficiency of the indictment where there is other circumstantial evidence).

While recognizing that the jury is responsible for deciding issues of identification, the court in People v. Desmond, 125 A.D.2d 865, 510 N.Y.S.2d 220 (3d Dept. 1986), reversed the defendant's conviction due to insufficient evidence even though he had confessed to the crime, where another person had also confessed and been identified by two witnesses.

(a) Credibility of Witnesses

The credibility of witnesses is the province of the jury unless the witnesses are incredible as a matter of law. Therefore, in People v. Gruttola, 43 N.Y.2d 116, 400 N.Y.S.2d 788 (1977), the New York Court of

Appeals affirmed defendant's robbery conviction despite his lack of a prior record, his defense of misidentification, and his character witnesses, because four civilians and three police officers had identified defendant as the robber. Similarly in People v. Thomas, 53 N.Y.2d 983, 441 N.Y.S.2d 664 (1981), the Court of Appeals affirmed the defendant's conviction for robbery in the first degree and held that where the evidence was not insufficient as a matter of law, the Court had no power to assess the credibility of witnesses or the weight of the evidence. Such questions are to be considered by the trier of the facts. See also People v. Augustave, 123 A.D.2d 323, 506 N.Y.S.2d 280 (2d Dept. 1986); People v. Lewis, 124 A.D.2d 680, 508 N.Y.S.2d 53 (2d Dept. 1986); People v. Felder, 124 A.D.2d 674, 508 N.Y.S. 49 (2d Dept. 1986); and People v. Taylor, 98 A.D.2d 269, 470 N.Y.S.2d 153 (1st Dept. 1984).

(2) Circumstantial Evidence

Circumstantial evidence must exclude to a moral certainty every reasonable hypothesis except that defendant is guilty.* Consequently, in People v. Walker, 62 A.D.2d 1025, 403 N.Y.S.2d 549 (2d Dept. 1978), the court dismissed the robbery charge based on the fact that defendant appeared and fired a gun after a man shouting racial epithets started to chase defendant's friend, the alleged robber, down the street. The court ruled that the circumstantial evidence was insufficient as a matter of law, since it was reasonably possible that defendant was just coming to the aid of his friend.

* But see People v. Gonzalez, 54 N.Y.2d 729, 442 N.Y.S.2d 980 (1981), holding that trial court's failure to give a circumstantial evidence charge was not error since the jury was adequately informed as to the burden of proof. In a concurring opinion, Judge Fuchsberg stated that the jury charge in cases involving circumstantial evidence is discredited and should no longer be used because the standard of proof in all criminal cases, circumstantial or non-circumstantial, is the same: proof of guilt beyond a reasonable doubt.

The complainant's testimony that the defendant threatened to cut her and held a "cold hard object" next to her body was sufficient to sustain the defendant's first degree robbery conviction in People v. Lawrence, 124 A.D.2d 597, 507 N.Y.S.2d 739 (2d Dept. 1986), despite the fact that the complainant did not see the weapon.

People v. Burdick, 66 A.D.2d 459, 414 N.Y.S.2d 410 (4th Dept. 1979), involved a gas station robbery. Defendant had worked there and the victim attendant testified that the robber's teeth, which he saw through a ski mask, were discolored and crooked like defendant's although defendant introduced testimony by his dentist that his teeth had been fixed prior to the robbery. The attendant admitted that the robber did not speak or walk like defendant. Another attendant found black gloves and a green army jacket in defendant's car several days after the robbery. These were similar to those worn by the robber. The appellate court reversed the conviction, finding insufficient circumstantial evidence as a matter of law. See also People v. Barnes, 99 A.D.2d 877, 472 N.Y.S.2d 471 (3d Dept. 1984) (possession of and attempt to sell stolen goods is circumstantial evidence that defendant committed robbery); People v. Sasso, 99 A.D.2d 558, 471 N.Y.S.2d 390 (3d Dept. 1984) (possession of clothes, gun and stolen money was sufficient circumstantial evidence to sustain defendant's conviction as an accessory to first degree robbery); see also People v. Way, 59 N.Y.2d 361, 465 N.Y.S.2d 853 (1983).

E. Joinder and Severance

Several hours after the charged robbery, defendant in People v. Connors, 83 A.D.2d 640, 441 N.Y.S.2d 523 (2d Dept. 1981), was arrested in front of a pool hall two miles away, not as the robbery suspect, but for

possessing a handgun. He was subsequently identified in a lineup as one of the robbers. Since there was no connection proved between the possession of the gun and the robbery, the appellate court ruled that the trial court improperly granted the People's motion to consolidate the two indictments, and reversed defendant's conviction, ordering a new trial.

In People v. Simpkins, 110 A.D.2d 790, 487 N.Y.S.2d 857 (2d Dept. 1985), the defendant was originally charged with robbery under two distinct indictments arising from two unrelated incidents. The trial court granted the People's motion to consolidate the indictments given the existence of a witness common to both cases and the fact that some of the evidence in chief in one case would also be material evidence in the other. The Appellate Division held the consolidation did not constitute reversible error, even though the underlying incidents were dissimilar, absent a showing that it was necessary for defendant to testify with respect to one incident and to refrain from testifying as to the other. CPL §200.20(2)(b, c)(4).

F. Sentencing

(1) Robbery in the Third Degree

Robbery in the third degree, any act of forcible stealing, is a class D felony. See Penal Law §160.05. The range of sentences for a person found guilty of robbery in the third degree varies under certain conditions:

(a) The basic felony sets a maximum term of not more than seven years and a minimum term of one-third the maximum term imposed, if fixed by the court in its

discretion, setting forth the reason therefore in the record. Penal Law §70.00(3)(b). Or, the court need not specify a minimum term of imprisonment, but may leave it to the discretion of the State Board of Parole, in accordance with the provisions of the Correction Law. Penal Law §70.00(3).

In the alternative, where the defendant is neither a second nor persistent felony offender, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less. Penal Law §70.00(4).

(b) The subsections of the Penal Law which deal with the class D felony for second felony offenders requires that a maximum term of not less than four and not more than seven years be imposed. The minimum term of imprisonment must be one-half of the maximum sentence imposed and must be

specified in the sentence. See Penal Law §70.06(3), (4)(b).

(c) A persistent felony offender sentenced for a class D felony is subject to the same sentencing guidelines as under subheading (b). The court can, however, impose the same sentence as that proscribed for an A-I felony if it feels this action would best serve the public interest. See Penal Law §70.10(2). The authorized minimum sentence of imprisonment for a class A-I felony is fifteen to twenty-five years. Penal Law §70.00(3)(a)(i).

(2) Robbery in the Second Degree

If the perpetrator, during the commission and/or flight from the forcible theft of a person's property, is aided by another, causes physical injury to a nonparticipant, or displays what appears to be firearm (a pistol, rifle, etc.), he is guilty of robbery in the second degree. See Penal Law §160.10. Robbery in the second degree is a Class C violent felony. Penal Law §70.02.

The violent felony classification results in consequences more severe than those encountered under the standard felony statutes:

(a) A class C violent felony mandates a maximum term of not less than four and one-half years nor more than fifteen years.

The minimum period of imprisonment must be a specified term of one-third the maximum sentence. No determinate sentences may be given under this section. See Penal Law §70.02(2)(a). A sentence to a term of probation is not permitted. See Penal Law §60.05(4).

(b) A maximum sentence of more than eight and less than fifteen years is proscribed for a second violent felony offender convicted of a class C violent felony. The minimum is one-half the maximum sentence. See Penal Law §70.04 (3)(b),(4).

(c) A persistent violent felony offender sentenced upon conviction of a class C felony offense receives a maximum term of life imprisonment with a minimum sentence of between eight and twenty-five years. The sentence under this subsection must be indeterminate. See Penal Law §70.08(2).

(3) Robbery in the First Degree

If during the commission or fleeing from the scene of a theft of property, the perpetrator or accomplice, causes serious injury to a nonparticipant, is armed with a deadly weapon, uses or threatens the immediate use of a dangerous instrument, or displays what appears to be a firearm, that perpetrator or accomplice is guilty of robbery in the first

degree. See Penal Law §160.15. Robbery in the first degree is a class B violent felony. Penal Law §70.02(1)(a).

(a) A class B violent felony offense sets a maximum indeterminate sentence of between six years and twenty-five years with a minimum sentence ranging from one-third to one-half the maximum sentence. See Penal Law §70.02(3)(a), (4).

(b) Second violent felony offenders receive a maximum term of not less than twelve nor more than twenty-five years and a minimum period of one-half the maximum under a B classification. See Penal Law §70.04 (3), (4).

(c) The maximum term for a persistent violent felony offender is life imprisonment. Penal Law §70.08(2). The minimum period must be between ten and twenty-five years. See Penal Law §70.08(3)(a).

CONTROLLED SUBSTANCE AND MARIHUANA OFFENSES

By
Naomi Werne,
BPS Senior Staff Attorney

July 1987 Revision
By
John E. Carter, Jr.
Director, Bureau of Prosecution Services

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TABLE OF CONTENTS

PAGE

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Director, Bureau of Prosecution Services

Introduction

Substantive violations of the drug laws are governed by two statutes in the Penal Law: Article 220, Controlled Substances Offenses, enacted in 1973, and Article 221, the Marijuana Reform Act of 1977. See People v. Prator, 93 Misc.2d 303, 402 N.Y.S.2d 739 (Dist. Ct. 1st Jud. Dist. Nassau Co. 1978). Marihuana offenses were formerly classified as controlled substance offenses, but with the passage of the Marihuana Reform Act the Legislature sought to lessen penalties for use, possession, and sale of marihuana on the grounds that the existing penalties were unduly harsh and a waste of law enforcement resources. Hashish, referred to in the statute as "concentrated cannabis" and defined in Public Health Law §3302(5)(a) as "the separated resin, whether crude or purified, obtained from a plant of the genus Cannabis," remains a controlled substance. All former references to marihuana in those sections of Article 220 which define degrees of controlled sub- stances offenses have been replaced by a reference to concentrated cannabis (hashish) only. Prior to 1973, offenses involving marihuana and all drugs now referred to as "controlled substances" were governed by former Article 220 of the Penal Law and classified as "dangerous drug" offenses. For the most part, decisions interpreting the current law will be

discussed in this chapter. However, certain "dangerous drug" cases and several cases decided under the former Penal Law of 1909 which interpret the meaning of concepts such as constructive possession and "unlawfully" selling will be included here since the principles involved are still applicable.

A. Definitions

(1) Controlled Substances

Penal Law §220.00 gives the definitions of the various terms used in Article 220. These definitions also apply where the same terms are used in Article 221, unless that statute specifically provides otherwise; see Section A(2).

1. "Sell" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.

   Example:

   A gives B a glassine envelope containing heroin without receiving payment or consideration of any kind. Is A guilty of selling heroin? Yes. A gift and a sale have the same consequences for purposes of charging a crime although for sentencing or plea bargaining purposes the fact that A received no payment might well be considered in his favor. Gift and sale are, however, distinguished in certain instances in the Marihuana Reform Act, Article 221, for purposes of determining the degree of the crime charged, which shall be discussed in Section A(2).

2. "Unlawfully" means in violation of Article 33 of the Public

Health Law, that is, without a license to manufacture or sell, or without a physician's prescription to obtain the drugs listed in the Public Health Law or to obtain a hypodermic needle.

3. "Ounce" means an avoirdupois ounce as applied to solids or semisolids and a fluid ounce as applied to liquids.

4. "Pound" means an avoirdupois pound.

5. "Controlled substance" means any substance listed in schedule I, II, III, IV or V of §3306 of the Public Health Law. These are:

Schedules I and II

(a) opiates.

(b) opium derivatives, the most common of which is heroin.

(c) hallucinogenic substances, the most common of which are LSD, mescaline and concentrated cannibis (hashish);

(d) marihuana.

(e) depressants.

Schedule II only

(a) cocaine.

(b) amphetamines.

(c) dronabinol, hallucinegenic synthetic drug in sesame oil and encapsulated in a soft gelatin tablet.

Schedule III

(a) codeine.

(b) specified depressants (barbiturates).

(c) specified stimulants.

Schedule IV

(a) specified barbiturates.

Schedule V

List of preparations containing limited amounts of narcotics, including codeine, ethylmorphine and opium.

6. "Concentrated cannibis" means "concentrated cannabis" as defined in Public Health Law §3302(5)(a): "the separated resin, whether crude or purified, obtained from a plant of the genus Cannabis" (hashish).

7. "Narcotic drug" means the following controlled substances:

(a) opium.

(b) opium derivatives, including heroin.

(c) cocaine. (opium poppy and poppy straw)

8. "Narcotic preparation" means the following controlled substances:

(a) barbiturates.

(b) codeine.

9. "Hallucinogen" means specified uncommon hallucinogenic drugs, such as psilocybin, listed in Public Health Law §3306 Schedule I(d)(5), (18), (19), (20), (21), and (22).

10. "Hallucinogenic substance" means all other hallucinogenic controlled substances except:

(a) those listed as hallucinogens.

(b) concentrated cannabis.

(c) LSD.

11. "Stimulant" means amphetamine.

12. "Dangerous depressant" means:

(a) methaqualone (commonly known as "qualudes").

(b) barbiturates.

(c) phencyclidine.

13. "Depressant" means certain specified depressant controlled substances listed in Public Health Law §3306 Schedule IV(c), except (c)(2), (31), (32), (40).

14. "Prescription for a controlled substance" means a direction or authorization, by means of an official New York State prescription form, a written prescription form or an oral prescription, which will permit a person to lawfully obtain a controlled substance from any person authorized to dispense controlled substances.

15. "School Grounds" means in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or within 1000 feet of the real property boundary line comprising any such school.

A defendant charged with a violation of Article 220 must be charged with criminal possession or sale of a controlled substance as defined in the Public Health Law. Therefore an information, which charged a defendant with unlawful possession of "a quantity of controlled substances to wit: one vile [sic] containing eight blue pills and one vile [sic] containing twenty-nine purple pills," was dismissed as fatally defective since Public Health Law §3306 does not list "blue pills" or "purple pills" as controlled substances. See People v. Crisofulli, 91 Misc.2d

424, 398 N.Y.S.2d 120 (N.Y.C. Crim. Ct. N.Y. Co. 1977).

The Appellate Division in People v. Ayers, 55 A.D.2d 783, 389 N.Y.S.2d 481 (3d Dept. 1976), held that the trial court properly permitted the People to reopen their case, after the defendant had moved to dismiss, to offer proof that the drug that defendant was charged with criminally selling, dihydromorphinone, had been derived from opium. The defendant was not prejudiced because he had not put in any evidence. The People's expert had based his conclusion that dihydromorphinone was a controlled substance on his erroneous belief that the Public Health Law so defined it and not upon chemical analysis. Chemical analysis was necessary since dihydromorphinone could be either derived from opium or synthesized from other chemicals.

The Supreme Court, New York County, in People v. Hoffman, 76 Misc.2d 564, 351 N.Y.S.2d 87 (1973), rejected the defendant's contention that the classification in the Penal Law of cocaine as a "narcotic drug" violated the constitutional rights to due process of law and the equal protection of the laws as well as the constitutional prohibition against cruel and unusual punishment. The defendant contended that cocaine scientifically is not a narcotic; that it is not an opium derivative, and is not physically addictive but rather has the effect of a stimulant, like an amphetamine. He therefore claimed that its classification in the Penal Law as a narcotic was unconstitutional. The court, holding otherwise, quoted the findings of the Temporary State Commission to Evaluate Drug Laws:

> The abuse patterns and potential [of cocaine and narcotics] are somewhat different; however, the differences are not sufficient to warrant separate or different treatment of cocaine in the

penal provisions.

Id., 351 N.Y.S.2d at 89.

The court in Hoffman refused to hold an evidentiary hearing to rule on the constitutional issues that the defendant raised. The court stated:

> To hold an evidentiary hearing on this question would put this court in the position of deciding between different opinions by scientific experts on both sides. It would require a rather extensive inquiry and investigation. This is a function more suited to a legislature than to an individual judge in a limited courtroom hearing.

Id., 351 N.Y.S.2d at 92.

The court further noted, after citing the hearings conducted by the Temporary State Commission to Evaluate the Drug Laws and reported to the Legislature, that the strong presumption of constitutionality accorded to statutes involves a "presumption that the Legislature has investigated and found facts necessary to support the legislation." Hoffman, 351 N.Y.S.2d at 93. See also People v. Scatena, 63 A.D.2d 687, 404 N.Y.S.2d 655 (2d Dept. 1978); People v. Piccoli, 62 A.D.2d 1078, 403 N.Y.S.2d 820 (3d Dept. 1978); People v. Cecchini, 58 A.D.2d 713, 396 N.Y.S.2d 708 (3d Dept. 1977); People v. Molinares, 110 Misc.2d 1079, 443 N.Y.S.2d 593 (Sup. Ct. N.Y. Co. 1981).

The power of the Legislature to define dangerous substances and impose criminal liability for their possession and use was upheld by the Court of Appeals in People v. Shepard, 50 N.Y.2d 640, 431 N.Y.S.2d 363 (1980). In Shepard, defendant was convicted of criminal possession of marihuana. On appeal, defendant contended that the conviction violated his constitutional right of privacy. While noting that the use and effect of marihuana was indeed a controversial matter, the Court rejected

defendant's arguments. The Court stated:

> It is the business of the court to apply the law, and while we have the power, we clearly lack the right to substitute our own sense of what is a dangerous substance for the considered judgment of the Legislature.

Id., 431 N.Y.S.2d at 366.

(2) Marihuana

Penal Law §221.00 provides that, unless the context otherwise requires, the terms used in Article 221 shall have the same meaning ascribed to them as in Article 220, which governs controlled substance offenses. These definitions are set forth in Penal Law §220.00 and are discussed in Section A(1), of this chapter.

Two other definitions are provided in Article 221 which are relevant to marihuana offenses but not to controlled substances offenses. Penal Law §221.10 proscribes the knowing and unlawful possession of any amount of marihuana in a public place where such marihuana is burning or open to public view. "Public place" under that statute means "public place" as defined in Penal Law §240.00, which provides:

> 1. "Public place" means a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residences.
>
> 2. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes

aircraft, watercraft, railroad cars, buses and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

With respect to a controlled substance, the term "sale" includes a gift. See Penal Law §220.00(i), discussed in Section A(1) Article 221 does not adopt the same broad approach. Penal Law §221.35 (criminal sale of marihuana in the fifth degree) proscribes only a gift of two grams or less of marihuana or of one cigarette containing marihuana while Penal Law §221.40 (criminal sale of marihuana in the fourth degree), proscribes the sale for consideration of any amount of marihuana. See section D(2) for discussion of these provisions.

B. Degrees Of Possessory Offenses

(1) Controlled Substances

(a) Possession in the Seventh Degree (Class A Misdemeanor - Penal Law §220.03).

Knowing and unlawful possession of a controlled substance.

[i] Authorized Sentence

As this offense is a Class A misdemeanor, any sentence of imprisonment must be for a definite term, fixed by the court, which must not exceed one year. Penal Law §70.15(1). A fine may be imposed, at an amount to be fixed by the court which must not exceed $1,000. Penal Law §80.05(1). The defendant can be sentenced to a conditional discharge, with conditions set for one year. Penal Law §65.05(3)(b).

(b) Possession in the Fifth Degree (Class) D Felony - Penal Law §220.06).

Knowing and unlawful possession of:

1. a controlled substance with intent to sell it; or
2. a substance of an aggregate weight of one-half ounce or more containing a narcotic preparation; or
3. fifty milligrams or more of phencyclidine ("Angel Dust"); or
4. a substance of an aggregate weight of one-quarter ounce or more containing concentrated cannabis.

[i] Authorized Sentence

An indeterminate sentence of imprisonment may be imposed for this crime, to be fixed by the court with the maximum set at three to seven years (Penal Law §70.00[2][d]). The minimum period shall be specified in the sentence and shall not be less than one year nor more than one-third of the maximum term imposed. (Penal Law §70.00[3][b]). The defendant is eligible for probation if he is a first offender. See Penal Law §65.00. A court also has the option, under certain circumstances (see Penal Law §70.00[4]) of imposing a definite sentence of imprisonment and may fix a term of one year or less.

If defendant is a second felony offender, the maximum term must be fixed by the court at between four and seven years (Penal Law §70.06[2]) and the minimum term must be specified by the court in the sentence at one-half the maximum term imposed (Penal Law §70.06[4][b]). If the defendant is a persistent felony offender, the court may impose the sentence authorized for a Class A-I felony. See Penal Law §70.10(2).

(c) Possession in the Fourth Degree (Class C Felony - Penal Law §220.09).

Knowing and unlawful possession of:

1. a substance of an aggregate weight of one-eighth ounce or

more containing a narcotic drug; or

2. a substance of an aggregate weight of one-half ounce or more containing methamphetamine ("speed"); or
3. a substance of an aggregate weight of two ounces or more containing a narcotic preparation; or
4. one gram or more of a stimulant; or
5. one milligram or more of LSD; or
6. twenty-five milligrams or more of a hallucinogen; or
7. one gram or more of a hallucinogenic substance; or
8. ten ounces or more of a dangerous depressant; or
9. two pounds or more of a depressant; or
10. a substance of an aggregate weight of one ounce or more containing concentrated cannabis; or
11. 250 milligrams or more of phencyclidine ("Angel Dust"); or
12. 360 milligrams or more of methadone; or
13. 50 milligrams or more of phencyclidine with intent to sell and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense.

[i] Authorized Sentence

The authorized sentence of imprisonment for this offense is an indeterminate term fixed by the court at a maximum term of no more than fifteen years (Penal Law §70.00[1][c]) and a minimum term fixed by the court specified in the sentence as a period of not less than one year nor more than one-third the maximum term (Penal Law §70.00[3][b]). Penal Law §70.00(4) also authorizes the imposition on a first offender by the court

in its discretion in the interests of justice of an alternative definite sentence of imprisonment of one year or less. The defendant is not eligible for probation. See Penal Law §60.05(4).

If defendant is a second felony offender, his indeterminate sentence must be fixed by the court at a maximum term of between six and fifteen years (Penal Law §70.06[3]) and a minimum term specified in the sentence of one-half the maximum term imposed (Penal Law §70.06[4][c]). If defendant is a persistent felony offender, he may be sentenced to the sentence authorized for a Class A-I felony.

[ii] Aggregate Weight Standard

For the purpose of determining the amount of narcotic drugs (generally heroin), narcotic preparations, methamphetamine ("speed") and concentrated cannabis (hashish) on which the degree of the offense is based, the aggregate weight of all of the substance containing any of these controlled substances is considered.

Example: A person knowingly and unlawfully possesses 1/8 of an ounce of a white powder which upon chemical analysis is determined to be half heroin and half sugar. Only 1/16 of an ounce of the substance he possesses is actually heroin. Can he be charged with criminal possession of a controlled substance in the 4th degree? Yes. The aggregate weight of the total substance is used to determine the degree of crime charged if the controlled substance is a narcotic drug (or narcotic preparation, "speed," or hashish). The contention that the use of the "aggregate weight" concept for certain drugs in the Penal Law and not others (the "hard" drugs versus the "soft" drugs) irrationally discriminates against unlawful possession and sellers of the "hard" drugs in violation of the Fourteenth Amendment guarantee of the equal protection

of the laws, has been rejected by the courts. See People v. Morales, 63 A.D.2d 935, 406 N.Y.S.2d 83 (1st Dept. 1978); People v. LaPorta, 56 A.D.2d 983, 393 N.Y.S.2d 118 (3d Dept. 1977); People v. Riley, 50 A.D.2d 823, 376 N.Y.S.2d 185 (2d Dept. 1975); People v. Daneff, 37 A.D.2d 918, 325 N.Y.S.2d 902 (1st Dept. 1971), aff'd, 30 N.Y.2d 793, 334 N.Y.S.2d 897 (1972), motion for rehearing denied but motion to amend remittitur granted, 31 N.Y.2d 667, 336 N.Y.S.2d 903 (1972), cert. denied, 410 U.S. 913 (1973); United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974).

The Second Circuit Court of Appeals, in denying a petition for a writ of habeas corpus on the ground that the "aggregate" weight concept had violated the prisoner's constitutional right to the equal protection of the laws, declared:

> No doubt the New York legislature, when it adopted the statutory scheme here in question in 1965, had in mind a more flexible pattern of handling drug offenses than that used by the United States or other states at that time, considering that possessors of greater quantities of drugs should be punished more seriously because they are more likely to be dealers or to be capable of becoming such than possessors of smaller quantities, or because the greater quantities present a greater threat to society. Certainly to this extent the legislation cannot be treated as irrational. Taking the additional knowledge that heroin and cocaine at least are generally marketed in a diluted or impure state, the rationale of striking at the mixture or compound rather than at the pure quantity involved becomes evident: the possessor of 50 "bags" of five percent pure heroin should arguably be punished no differently from a possessor of 50 bags with 10 percent pure heroin. The State cannot be expected to make gradations and differentiations and draw distinctions and degrees so fine as to treat all law violators with the precision of a

computer; at the time the New York scheme of punishment was initially proposed in the mid 1960's, it represented probably the most advanced thinking in the country on the difficult and complex question of penalizing trafficking in narcotic drugs in an urban society.

Id.

(d) Possession in the Third Degree (Class B Felony - Penal Law §220.16).

Knowing and unlawful possession of:

1. a narcotic drug with intent to sell it; or
2. a stimulant, hallucinogen, hallucinogenic substance, or LSD with intent to sell by a person with a prior conviction for any violation of Article 220; or
3. one gram or more of a stimulant with intent to sell it; or
4. one milligram or more of LSD with intent to sell it; or
5. twenty-five milligrams or more of a hallucinogen with intent to sell it; or
6. one gram or more of a hallucinogenic substance with intent to sell it; or
7. a substance of an aggregate weight of one-eighth ounce or more containing methamphetamine ("speed") with intent to sell it; or
8. five grams or more of a stimulant; or
9. five milligrams or more of LSD; or
10. 125 milligrams of hallucinogen; or
11. five grams or more of a hallucinogenic substance; or
12. one-half ounce or more of a narcotic drug; or
13. 1,250 milligrams or more of phencyclidine.

[i] Authorized Sentence

The mandatory maximum sentence of life imprisonment no longer applies to convictions under Penal Law §220.16 since the 1979 amendment to this section subjects the defendant to the same sentencing range as for other class B felonies. The previous classification of a class A-III felony has been eliminated.

Accordingly, the defendant may be sentenced by the court to an indeterminate sentence of imprisonment for a maximum term of no more than twenty-five years (Penal Law §70.00[2][b]) and a minimum term fixed by the court specified in the sentence at not less than one year nor more than one-third the maximum term imposed (Penal Law §70.00[3][b]).

A person convicted of one such offense only who has no undischarged sentence with more than a year to run is eligible for life-time probation where the prosecutor so recommends on the ground that such person is providing material assistance as an informant. See Penal Law §65.00. Otherwise a defendant convicted of this offense is not eligible for probation. See Penal Law §60.05(3).

A second felony offender convicted of this offense must be sentenced to an indeterminate term of imprisonment, fixed by the court, at a maximum of nine to twenty-five years (Penal Law §70.06[3][b]) and a minimum of one-half the maximum term imposed, which must be specified in the sentence (Penal Law §70.06[4][b]). If defendant is a persistent felony offender, the court may, in its discretion, sentence him to the term of imprisonment authorized for a Class A-I felony. Penal Law §70.10(2).

(e) Possession in the Second Degree (Class

A-II Felony - Penal Law §220.18).

Knowing and unlawfully possessing:

1. a substance of an aggregate weight of two ounces or more containing a narcotic drug; or
2. a substance of an aggregate weight of two ounces or more containing methamphetamine ("speed"); or
3. ten grams or more of a stimulant; or
4. twenty-five miligrams or more of LSD; or
5. 625 milligrams of a hallucinogen; or
6. twenty-five grams or more of a hallucinogenic substance; or
7. 2,880 milligrams or more of methadone.

[i] Authorized Sentence

Since this crime is a Class A-II felony, a defendant may be sentenced to an indeterminate sentence of imprisonment, for a maximum term of his lifetime (Penal Law §70.00[2][a]) and a minimum term of not less than three years nor more than eight years four months (Penal Law §70.00 [3][a][ii]). If he is an informant who is providing material assistance to the People, a defendant is eligible, on the recommendation of the prosecutor, to be sentenced to lifetime probation under Penal Law §65.00 (1)(b). If defendant is a second felony offender, his minimum term of imprisonment must be fixed by the court at between six and twelve and one-half years and must be specified in the sentence. Penal Law §70.06(4)(b).

(f) Possession in the First Degree (Class A-I Felony - Penal Law §220.21).

Knowing and unlawfully possessing:

1. a substance of an aggregate weight of four ounces or more containing a narcotic drug; or
2. 5,760 milligrams or more of methadone.

[i] Authorized Sentence

A defendant convicted of this Class A-I felony must be sentenced to an indeterminate sentence of imprisonment for a maximum term of life (Penal Law §70.00[2][a]) and a minimum term, fixed by the court and specified in the sentence, of between fifteen and twenty-five years (Penal Law §70.00[3][a][i]).

(g) Limits on Plea Bargaining

There are limits on plea bargaining for persons convicted of Article 220 Class A-I or Class A-II felonies or attempts to commit these offenses. A person charged with an Article 220, Class A-I felony or an attempt to commit such a felony may, with the permission of both the court and the consent of the People, plead to a lesser charge which must be (or include) at least a plea of guilty to a Class A-II felony. CPL §220.10(5)(a)(i). An eligible youth charged with an A-I offense, however may plead down to a Class B felony. CPL §220.10(5)(a)(i). A person charged with an Article 220 Class A-II felony or an attempt to commit such a felony may, with the permission of both the court and the consent of the People, plead guilty to a lesser charge which must be (or include) at least a plea of guilty to a Class B felony. CPL §220.10 (5)(a)(ii). Article 220 Class B felonies can be reduced by plea to the D felony range. CPL §220.10(5)(a)(iii).

(2) Constitutional Challenges to Sentencing under the Former "Rockefeller Drug Laws" Unsuccessful

The constitutionality of the imposition of a sentence of imprisonment for a maximum term of life for specified possessory felonies as well

as for specified sale felonies, prior to the 1979 amendments to the Penal Law, was challenged in People v. Broadie, 37 N.Y.2d 100, 371 N.Y.S.2d 471 (1975), cert. denied, 423 U.S. 950 (1975), on the ground that it violated the Eighth Amendment prohibition against cruel and unusual punishment in that the sentences imposed in such cases are grossly disproportionate and excessive. This contention was rejected by the New York Court of Appeals in Broadie, which held that drug trafficking was a serious evil, and therefore the Legislature could constitutionally impose severe sentences to accomplish the legitimate penal purposes of isolation and deterrence. In reply to the one defendant sentenced to life for a possessory felony (the others were sentenced for sale offenses), who contended that her sentence was cruel and unusual punishment, the Court declared:

> Defendant McNair, who was arrested in premises that were a veritable heroin "factory" with over an ounce of the drug in her constructive possession, is hardly less culpable or dangerous than the appellants who made "street sales."

Id., 371 N.Y.S.2d at 478.

Subsequent challenges to the authorized sentences for possessory felonies on the ground that they violate the Eighth Amendment were rejected by the New York courts, on the authority of Broadie. People v. Ortiz, 64 N.Y.2d 997, 489 N.Y.S.2d 46 (1985); People v. Jones, 39 N.Y.2d 694, 385 N.Y.S.2d 525 (1976); People v. Arroyave, 63 A.D.2d 127, 407 N.Y.S.2d 15 (1st Dept. 1978), mdf'd, 49 N.Y.2d 264, 425 N.Y.S.2d 282 (1980); People v. Merriman, 53 A.D.2d 633, 384 N.Y.S.2d 477 (2d Dept. 1976); People v. Johnson, 53 A.D.2d 777, 384 N.Y.S.2d 551 (3d Dept. 1976); People v. Barton, 51 A.D.2d 1044, 381 N.Y.S.2d 329 (2d Dept. 1976).

In Carmona v. Ward, 436 F.Supp. 1153 (S.D.N.Y. 1977), rev'd, 576

F.2d 405 (2d Cir. 1978), two persons sentenced to life imprisonment for first degree possession (cocaine) and third degree sale (cocaine) were ordered discharged after they had served the minimum period of incarceration by United State District Judge Constance Baker Motley, who upheld their claims that the imposition of the maximum sentence of life imprisonment for their offenses violated the Eighth Amendment prohibition against cruel and unusual punishment. However, the United States Court of Appeals for the Second Circuit reversed and rejected the District Court's holding that imposing life imprisonment for drug offenders failed to provide for consideration of aggravating and mitigating circumstances in individual cases and the life sentences imposed for the crimes of the two petitioners were grossly disproportionate to the seriousness of their offenses. See also Bellavia v. Fogg, 613 F.2d 369 (2d Cir. 1979). Prior to the reversal of Carmona, New York courts had refused to follow that holding of the District Court. See People v. Perez, 61 A.D.2d 817, 402 N.Y.S.2d 51 (2d Dept. 1978); People v. Strong, 93 Misc.2d 170, 402 N.Y.S.2d 508 (Sup. Ct. Monroe Co. 1977). The Appellate Division stated in Perez, 402 N.Y.S.2d at 52, that "[i]t is well settled that the decisions of lower federal courts are not binding on state courts."

At least one court has held that if the government chooses to prosecute a defendant for a controlled substance offense in the State court rather than in the federal court, where the sentencing law is more lenient, solely on the ground that defendant has refused to cooperate and become an informer, the defendant is entitled to a hearing on his constitutional claim that he is thus being subjected to a selective and discriminatory prosecution. See 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) (defendant is not entitled to a hearing on this question unless his motion papers contain sworn allegations of fact supporting his claim).

(a) Provision for Resentencing in Specified Drug Cases

For purposes of determining degrees of criminal possession and sale of methadone, the "pure weight" standard now applies. Since prior to August 9, 1975, there was an aggregate weight standard for methadone, persons sentenced to at least one year to life for criminal possession and/or sale of methadone under the old law can apply for resentencing pursuant to the provisions of the amended current law, after notice to the appropriate District Attorney. They will also receive credit for jail time incurred pursuant to the sentence originally imposed if they are resentenced. Upon resentencing, if there is not reliable proof before the court as to the amount of methadone criminally possessed or sold by the applicant, it is a rebuttable presumption that every ounce of the substance contains sixty milligrams. See Penal Law §60.08.

Similarly, Penal Law §60.09 provides for the retroactive resentencing of persons convicted of A-II and A-III drug felonies under the harsher 1973 drug laws. Those convicted after September 1, 1973, but prior to September 1, 1979, may make use of this procedure. However, it should be noted that the resentencing provisions of this statute are not available in situations where the applicant is a predicate felon. People v. O'Neal, 102 Misc.2d 166, 423 N.Y.S.2d 119 (Sup. Ct. Suffolk Co. 1979); appeal dismissed, 87 A.D.2d 599, 450 N.Y.S.2d 410 (2d Dept. 1981). Additionally, it should be noted that an application for

resentencing should be made to Criminal Term. People v. Bowe, 73 A.D.2d 971, 424 N.Y.S.2d 248 (2d Dept. 1980). A defendant might also apply for executive clemency. See People v. Mansell, 79 A.D.2d 582, 434 N.Y.S.2d 352 (1st Dept. 1980). There is no appeal from a denial of an application for resentencing. People v. De Jesus, 54 N.Y.2d 447, 446 N.Y.S.2d 201 (1981). See also People v. Campolo, 92 A.D.2d 872, 459 N.Y.S.2d 826 (2d Dept. 1983).

(3) Marihuana

(a) Violation of Unlawful Possession (Penal Law §221.05).

Knowing and unlawful possession of marihuana. The amount is not specified, but since Penal Law §221.10 creates the Class B misdemeanor of possession of more than twenty-five grams (seven-eighths of an ounce) of marihuana or possession of any amount of marihuana in a public place while smoking or displaying it (discussed, infra), impliedly Penal Law §221.05 applies to private possession of twenty-five grams (seven-eighths of an ounce) or less.

The violation of knowing and unlawful possession of marihuana is punishable only by a fine of not more than $100, provided that the defendant was not previously convicted of any offense defined by Article 220 or Article 221 within three years preceding his conviction under Penal Law §221.05. If the defendant was previously convicted once of such an offense within three years preceding his conviction under Penal Law §221.05, he may be punished only by the imposition of a fine of not more than $200. If the defendant was previously convicted of two such offenses during such period, he may be punished by the imposition of a fine of not more than $250 or a term of imprisonment of not more than

fifteen days or both.

[i] Penal Law §221.05; Unresolved Questions

There is a defect in Penal Law §221.05. If a defendant is arrested only for violating Penal Law §221.05, which is merely a violation, the defendant would not be fingerprinted. Therefore, there would be no record of the conviction for that offense. There will be no way of ascertaining, for purposes of applying the more severe penalties, whether the defendant was charged with a violation of §221.05 within the preceding three-year period. There would, of course, be a record of a defendant's previous conviction for any other controlled substance offense or for a violation of any of the subsequent sections of Article 221 (discussed, infra), since these offenses are crimes for which a defendant is fingerprinted.

A provision of Penal Law §221.05 raises a problem which could be answered by strict construction of that statute in light of its stated legislative purpose to minimize punishment for marihuana possession. Section 221.05 provides that a first or second time drug offender convicted of a violation of §221.05 shall be punished "only" by a fine. CPL §240.10(2) authorizes the court to impose a sentence of imprisonment if the defendant fails to pay the fine. Certainly an indigent defendant convicted of violating Penal Law §221.05, if unable to pay the fine, could apply for resentence pursuant to CPL §420.10(5), which establishes procedures for the collection of court-imposed fines. The court has discretion under CPL §420.10(5)(d) to impose only a sentence to pay a fine in an amount which the defendant is able to pay. It does not appear from the language of Penal Law §221.05 that a court could imprison a first or second offender under CPL §420.10(3) for wilful refusal to pay

a fine imposed upon his conviction for violating Penal Law §221.05.

(b) Possession in the Fifth Degree (Class B Misdemeanor - Penal Law §221.10).

1. the knowing and unlawful possession of marihuana in a public place where such marihuana is burning or open to public view, or
2. the knowing and unlawful possession or more than twenty-five grams of marihuana.

Note: "Public place" under Penal Law §221.10 means "public place" as defined in Penal Law §240. This definition is set forth in Section A(2), supra.

[i] Authorized Sentence

The authorized sentence of imprisonment for this Class B misdemeanor is a definite sentence, to be fixed by the court, which must not exceed three months. Penal Law §70.15(2). Defendant may be sentenced to probation (Penal Law §65.00[1]) or to a sentence of conditional (Penal Law §65.05[1]) or unconditional (Penal Law §65.20) discharge. A fine of up to $500 may be imposed by the court. Penal Law §80.05(2).

(c) Possession in the Fourth Degree (Class A Misdemeanor - Penal Law §221.15).

Knowing and unlawful possession of more than two ounces of marihuana.

[i] Authorized Sentence

As this crime is a Class A misdemeanor, the authorized sentence is the same as for criminal possession of a controlled substance in the 7th degree; see Section B(1)(a)[i], supra.

(d) Possession in the Third Degree (Class E

Felony - Penal Law §221.20).

Knowing and unlawful possession of more than eight ounces of marihuana.

[i] Authorized Sentence

As this crime is a Class E felony, the punishment is the same as for criminal possession of a controlled substance in the sixth degree; see Section B(1)(b)[i], supra.

(e) Possession in the Second Degree (Class D Felony - Penal Law §221.25).

Knowing and unlawful possession of more than sixteen ounces of marihuana.

[i] Authorized Sentence

As this crime is a Class D felony, the punishment is the same as for criminal possession of a controlled substance in the fifth degree; see Section B(1)(c)[i], supra.

(f) Possession in the First Degree (Class C Felony - Penal Law §221.30).

Knowing and unlawful possession of more than ten pounds of marihuana.

[i] Authorized Sentence

As this crime is a Class C felony, the punishment is the same as for criminal possession of a controlled substance in the fourth degree; see Section B(1)(d)[i], supra.

(g) Aggregate Weight Standard

The 1979 amendments to Article 220 returned the "aggregate weight" standard to convictions for the possession or sale of marihuana after the "pure weight" standard had been implemented in 1977. For a discussion focusing upon the difficulties with the "pure weight" formulation,

see People v. Pierce, 112 A.D.2d 527, 490 N.Y.S.2d 932 (3d Dept. 1985); People v. Houston, 72 A.D.2d 369, 424 N.Y.S.2d 726 (2d Dept. 1980); People v. Davis, 95 Misc.2d 1010, 408 N.Y.S.2d 748 (Dutchess Co. Ct. 1978); see also People v. Ferguson, 81 A.D.2d 1020, 440 N.Y.S.2d 138 (4th Dept. 1981) (erroneous application of aggregate weight standard when pure weight standard was in effect held harmless error in view of overwhelming evidence that defendant possessed marihuana; conviction of criminal possession in the fifth degree modified to unlawful possession of marihuana as a violation).

C. Proof of Possession

(1) Intent and Conduct

No one can be punished for being an addict. The United States Supreme Court in Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417 (1962), struck down a California statute penalizing narcotics addiction with a sentence of imprisonment of up to ninety days, on the ground that the statute violated the Eighth Amendment proscription against cruel and unusual punishment. It would be cruel and unusual, declared the Court, to penalize the "illness" of narcotics addiction. Possession of a narcotic, however, can be penalized, since possession is an act, provided that the penal sanction imposed for the act of possession is accompanied by mens rea. The elements of the offenses involving possession of various amounts of controlled substances are intent ("knowingly" possessing), and conduct (unlawfully possessing a specified amount of a controlled substance). A person acts "knowingly" with respect to conduct or a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

Penal Law §15.05(2).

(a) Mens Rea; Knowledge

The New York Court of Appeals in People v. Reisman, 29 N.Y.2d 278, 285, 327 N.Y.S.2d 342, 348 (1971), cert. denied, 405 U.S. 1041 (1972), held:

> The crime of possessing dangerous drugs requires a physical or constructive possession with actual knowledge of the nature of the possessed substance... Generally, possession suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is in his hands, on his person, in his vehicle, or on his premises [citations omitted]. Knowledge, of course, may be shown circumstantially by conduct or directly by admission, or indirectly by contradictory statements from which guilt may be inferred [citations omitted].

In Reisman, an airline employee and the California police at the Los Angeles airport had searched packages designated for Kennedy Airport addressed to one George Carlton, in care of the defendant Reisman, and found that the packages contained marihuana. The California police gave this information to the New York police who arrested the defendant after he signed the receipt, claimed the packages, and carried them to his car. The Court rejected the defendant's contention that the People had failed to prove his knowledgeable possession beyond a reasonable doubt because proof of his transitory manual possession of the packages was as consistent with innocence as with guilt. The Court stated that "it is an ancient rule of inference or rebuttable presumption of fact

that the recent and exclusive possession of the fruits of any crime warrants the inference of guilt, including, when material, knowledgeable possession [citations omitted]." Id., 327 N.Y.S.2d at 348-49. The Court further declared that "[i]n the case of contraband its possession is a crime per se, and hence the inference of guilt, that is, knowledgeable possession, is as strong as is the case, for instance with stolen goods [citations omitted]." Id., 327 N.Y.S.2d at 349.

There is a statutory presumption, in Penal Law §220.25, with certain exceptions, of knowledgeable possession by occupants of an automobile in which a controlled substance is found, or by occupants of private rooms where a narcotic drug and/or narcotic preparation and/or marihuana are found in open view in a room under circumstances evincing an intent to prepare it for sale. See Section (4), infra, for further discussion of these statutory presumptions. However, the statutory rebuttable presumption, which shifts the burden of proof to the defendant, must be distinguished from the "rebuttable presumption" of knowledge which is simply an inference which the jury may draw from possession. The burden of proving knowledge beyond a reasonable doubt is on the prosecution. 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 (3d Dept. 1974).

In Reisman, a search of the defendant's car following his arrest revealed small quantities of marihuana and on his person was a personal check endorsed over and payable to the person who sent the package. In addition, a footnote in Reisman, 327 N.Y.S.2d at 346, n.1, indicates that while the defendant was in custody two more packages arrived, addressed to Carlton in care of the defendant, which contained 270 pounds of

marihuana. This evidence was not offered at trial even though the suppression court had allowed its introduction. The Court of Appeals did note that "[t]he probabilities justifying the inference of knowledge in this case are unusually impressive." Id., 327 N.Y.S.2d at 350.

These facts and this quote were cited by the Appellate Division, Second Department, in People v. Patello, 41 A.D.2d 954, 344 N.Y.S.2d 33 (2d Dept. 1973), as distinguishing Reisman from Patello. In that case, the appellate court held that the defendant's guilty knowledge had not been proved beyond a reasonable doubt because the evidence established only that the defendant had signed a receipt and acknowledged delivery of two packages containing hashish mailed to one Marjorie Lord, in care of the defendant Patello. Customs agents had discovered the hashish in the packages sent from India and had made arrangements for normal mail delivery except that two customs agents, a postal inspector, and three New York City police officers accompanied the mail carrier. After the defendant had signed the receipt and acknowledged delivery, the officers emerged from hiding and arrested the defendant. The defendant denied to the police that he had any knowledge of the contents of the packages and stated that he had received other packages from India on behalf of his acquaintance, Marjorie Lord, which he claimed contained cloth, some of which he exhibited to the police and agents. The Appellate Division found that, unlike Reisman:

> [I]n the case at bar...the logical impact of the evidence failed to establish that defendant had any knowledge that the package contained anything but artifacts from India. All the evidence showed is that defendant received a package in the course of normal mail delivery and signed a receipt therefor. Such evidence has no more probative

> value than the evidence of the discovery of the hashish in the post office. (See People v. Ackerman, 2 Ill. App.3d 903, 274 N.E.2d 125).

People v. Patello, supra, 344 N.Y.S.2d at 35.

Since the crime of unlawful possession of a controlled substance or marihuana is not established without proof that the defendant knowingly and unlawfully possessed the controlled substance or marihuana, an indictment was dismissed as fatally defective by a lower court in People v. Tripp, supra, where it only charged that the defendant "did possess" marihuana. Since an allegation that the defendant possessed the marihuana (or controlled substance) knowingly and unlawfully is essential to charge the offense of criminal possession of marihuana (or a controlled substance), the court held that this defect could not be cured by a bill of particulars or by amendment. However, the court gave the district attorney permission to resubmit the charges to the grand jury.

The determination as to whether possession is knowledgeable is a factual question. In People v. Gaddy, 94 A.D.2d 892, 463 N.Y.S.2d 644, (3d Dept. 1983) the court affirmed the defendant's drug possession conviction despite the fact that he was absent from the apartment where the drugs and co-defendants were seized. Circumstantial evidence that the defendant exercised dominion and control over the drugs seized was sufficient to support the jury's verdict. See also People v. Rodriquez, 104 A.D.2d 832, 480 N.Y.S.2d 155 (2d Dept. 1984). In People v. Campbell, 55 A.D.2d 688, 389 N.Y.S.2d 146 (3d Dept. 1976), the Appellate Division refused to reverse a conviction simply because the defendant denied knowledge that the marihuana was on his premises. The court found that the jury could properly find knowledgeable possession since the defendant's testimony conflicted with the arresting officer's. Similarly, in

People v. Martin, 52 A.D.2d 988, 383 N.Y.S.2d 425 (3d Dept. 1976), the Appellate Division found that the trier of the facts could properly convict a defendant of criminal possession of heroin where a police officer saw him throw glassine envelopes containing heroin to the ground, although the defendant denied possession. Citing People v. Reisman, supra, the court declared that "when a substance or object is seen in the hands of a defendant, it 'is an elemental inference based on common experience' that the possessor knows what he possesses." Martin, 383 N.Y.S.2d at 427. See People v. Cummins, 108 A.D.2d 962, 485 N.Y.S.2d 135 (3d Dept. 1985); People v. Georgens, 107 A.D.2d 820, 484 N.Y.S.2d 657 (2d Dept. 1985).

However, in People v. Offunniyin, 114 A.D.2d 1049, 495 N.Y.S.2d 487 (2d Dept. 1985), the Appellate Division reversed defendant's conviction because the trial court excluded evidence of co-defendant's flight from being admitted. "The fact that [the co-defendant] absconded was evidence tending to establish the co-defendant's guilt and thus relevant to defendant's defense of his lack of knowledge as to the presence of the marihuana." Id. at 1049, 495 N.Y.S.2d at 487. (Marihuana was found in suitcases being used by co-defendant, but owned by defendant.)

(b) Unlawful Possession

"Unlawful" possession means possession not pursuant to a prescription in accordance with the provisions of the Public Health Law; see Section A(1), supra. Nevertheless, there are exceptions to the requirement of a prescription in Public Health Law §3305. Under Public Health Law §3305(1)(c), the provisions of the Public Health Law restricting the possession and control of controlled substances do not apply to temporary incidental possession by employees or agents of persons lawfully entitled

to possession or by persons whose possession is for the purpose of aiding public officers in performing their official duties. This exception was applied in People v. Stone, 80 Misc.2d 536, 364 N.Y.S.2d 739 (Sup. Ct. Kings Co. 1975), where the court in a non-jury trial acquitted the defendant of criminal possession of methadone on the ground that he had no criminal intent but was the "agent" of a lawful possessor, his common-law wife, within the meaning of the Public Health Law exception. The facts indicated that the defendant's common-law wife, authorized to possess a bottle of methadone as she was enrolled in a methadone program, was fighting with another person in the street and dropped her bottle of methadone. The defendant, at her request, had picked it up and put it in his pocket.

In People v. Rodriguez, 58 A.D.2d 612, 395 N.Y.S.2d 222 (2d Dept. 1977), the Appellate Division, Second Department, held that the unlawfulness of possession of a controlled substance or marihuana is a statutory rebuttable presumption created by the fact of possession. That court further held that if there is some evidence that the possession is lawful under an applicable exception set forth in the Public Health Law to the prohibition against possession, the defendant's burden of coming forward with proof of lawful possession is satisfied and the People must prove that the possession is unlawful. Accordingly, the court found that the defendant's unlawful possession of methadone was not proved beyond a reasonable doubt where the vials of methadone that the defendant was charged with criminally possessing were labeled with the defendant's name and the name of a methadone maintenance program and the defendant produced a card from that program which identified him as a registered patient therein. In accord, see People v. Amorosa, 55 A.D.2d 621, 389

N.Y.S.2d 138 (2d Dept. 1976).

(c) Possession; Actual or Constructive

The act of possession of a controlled substance or marihuana is the conduct proscribed by Penal Law Articles 220 and 221. The possession need not be actual; proof of constructive possession beyond a reasonable doubt will suffice to sustain a conviction (provided that such possession is knowing and unlawful; see discussion, supra). It is hornbook law that a person has constructive possession of a substance or object where he exercises dominion and control over it. For example, the Appellate Division, First Department, in People v. Tirado, 47 A.D.2d 193, 366 N.Y.S.2d 140 (1st Dept. 1975), aff'd, 38 N.Y.2d 955, 384 N.Y.S.2d 151 (1976), found that proof of a defendant's constructive possession was established where police seized cocaine from the pockets of defendant's bathrobe in defendant's presence. They had found the robe in defendant's apartment during a search pursuant to a valid warrant. Similarly, constructive possession was established in People v. Thomas, 42 A.D.2d 1019, 348 N.Y.S.2d 244 (3d Dept. 1973), where the People proved that the police had observed the defendant emerge from an elevator on the tenth floor of the hotel where he resided, place a brown paper bag containing heroin in an ashtray, and go to his apartment. The police searched the apartment pursuant to a valid warrant, and seized drug paraphernalia. The Appellate Division, Third Department, held that the fact that no officer was watching the ashtray for a brief period after the bag was left there, was not a sufficient basis for a reversal of the defendant's conviction.

The Appellate Division, First Department, in People v. Bryant, 60 A.D.2d 810, 401 N.Y.S.2d 76 (1st Dept. 1978), appeal dism'd, 44 N.Y.2d 790, 406 N.Y.S.2d 40 (1978), found that the People had presented a prima

facie case of constructive possession where two police officers testified that (1) they saw the defendant descend a stairwell, reach to an unseen point under the front steps, take out a brown paper bag into which he transferred something and then return the bag to its place beneath the steps, and (2) they then approached and detained him, seizing the bag, which they found contained about forty glassine envelopes of heroin. The court found from this evidence that "knowledge and control were being exercised in respect of [sic] the brown paper bag." Bryant, 401 N.Y.S.2d at 77.

In People v. Brown, 71 A.D.2d 918, 419 N.Y.S.2d 732 (2d Dept. 1979), the People presented a sufficient case of constructive possession where police officers testified that they saw the defendant toss a white bag containing heroin from his car during a high speed chase and a resident of the neighborhood testified that he had picked up a white bag from the street and brought it to police.

Generally, proof of ownership and occupancy of premises where a controlled substance or marihuana is found is sufficient to establish constructive possession. See People v. West, 42 A.D.2d 635, 345 N.Y.S.2d 186 (3d Dept. 1973), where the court held that documentary proof of a defendant's ownership of the premises where hashish was found in a dog-house was not necessary to sustain an indictment for possession of hash-ish. The police investigator's testimony to the grand jury that the defendant owned the premises where the hashish was found was legally sufficient evidence upon which to base an indictment.

Evidence of constructive possession, if circumstantial, must be weighed by the test applied to all circumstantial evidence: it must exclude to a moral certainty every other reasonable hypothesis but that

of guilt and be inconsistent with innocence. (But note People v. Gonzalez, 54 N.Y.2d 729, 442 N.Y.S.2d 980 [1981], concurring opinion of Justice Fuchsberg to the effect that the burden of proof in a case involving only circumstantial evidence is the same as that in any other case, that is, proof beyond a reasonable doubt). In People v. Harris, 47 A.D.2d 385, 366 N.Y.S.2d 697 (4th Dept. 1975), the court held that the defendant's guilt of criminal possession of heroin was not proved beyond a reasonable doubt where the record established that: (1) the drugs were concealed in an unused convertible couch and under a floor board in the storage space at the end of the third floor attic of a house which defendant occupied; (2) defendant's brother-in-law and his family of four children lived on the first floor; (3) defendant's mother and her four adult daughters and one adult granddaughter lived on the second floor; and, (4) all had access to the attic storage space. Similarly, People v. Taggert, 51 A.D.2d 863, 380 N.Y.S.2d 168 (4th Dept. 1976), held that a defendant could not be convicted of criminal constructive possession of heroin where the heroin was found in a closet outside the door of a bedroom shared by two of the three other persons who occupied the house with the defendant. Further, the closet was "locked" for all practical purposes, since the doorknob was missing. See also People v. Cicero, 106 A.D.2d 901, 483 N.Y.S.2d 545 (4th Dept. 1984).

See also People v. Rodriquez, 104 A.D.2d 832, 480 N.Y.S.2d 155 (2d Dept. 1984), where evidence that a bag containing cocaine was found in the same room as defendant; defendant had been partying in the room; defendant had smelled the contents of the bag; and over $500 in cash was found in defendant's possession, was held insufficient to establish beyond a reasonable doubt that defendant physically or constructively

possessed the cocaine.

It is important to note that if a defendant is near a controlled substance or marihuana under circumstances which do not permit him to exercise dominion or control over it, he does not constructively possess it. Therefore the New York Court of Appeals in People v. Russell, 34 N.Y.2d 261, 357 N.Y.S.2d 415 (1974), ruled that there was no proof of constructive possession where the record established only that: (1) a confidential informant told police that the defendant was in a certain area dealing in narcotics; (2) the police went there to surveil, saw the defendant talking to occupants of a car and saw his hand, which was empty at all times, make a motion; and (3) when the police went to question the defendant after the car had departed, in the general area on the street they found an envelope containing heroin. The Court reversed the defendant's conviction on the ground that there was no proof of the defendant's dominion or control over the heroin. Similarly, in People v. Torres, 45 A.D.2d 1042, 357 N.Y.S.2d 902 (2d Dept. 1974), the defendant was seated on the third or fourth step of a staircase, leading from the top floor of an apartment building to a roof, at the bottom of which another person was seated "cutting" and packaging heroin, but the heroin was out of the defendant's reach. Accordingly, the court found that the defendant's constructive possession of the heroin was not proved beyond a reasonable doubt.

If all the evidence establishes that a defendant is only near another who possesses a controlled substance or marihuana, there is no proof of constructive possession beyond a reasonable doubt. People v. Ortiz, ___ A.D.2d ___, 510 N.Y.S.2d 908 (2d Dept. 1987); People v. Ballejo, 114 A.D.2d 902, 495 N.Y.S.2d 75 (2d Dept. 1985); People v.

Sanabria, 73 A.D.2d 696, 423 N.Y.S.2d 223 (2d Dept. 1979); People v. Guzman, 51 A.D.2d 1046, 381 N.Y.S.2d 286 (2d Dept. 1976); People v. Camacho, 47 A.D.2d 527, 362 N.Y.S.2d 578 (2d Dept. 1975). In Camacho, the Appellate Division, Second Department, reversed a defendant's conviction for criminal possession of heroin where defendant's companion standing approximately ten feet from the defendant, dropped a bag containing heroin when police officers, who suspected the two of an attempted burglary, approached and asked them to identify themselves. The court applied the circumstantial evidence test and found that the defendant's "acts were as consonant with innocence as with guilt...." Id., 362 N.Y.S.2d at 580. Subsequently in Guzman the Appellate Division, Second Department, held that the evidence was insufficient to sustain the defendant's conviction for criminal possession of marihuana where the record established that: (1) defendant and his codefendant, were illegally inside a bungalow standing a foot or two from a table on which there were two locked suitcases; (2) the police unlocked one suitcase with a key taken from a key-chain belonging to the codefendant and found marihuana inside; (3) the codefendant had heroin and cocaine on his person; and (4) the defendant had no physical possession of any marihuana or controlled substance. The court found that "[h]ere there was a failure of proof as to appellant's control or possession of the drugs. He was merely present in the room when the marihuana was found in a locked suitcase. The codefendant had control of the drugs by virtue of his possession of the key to that locked suitcase...." People v. Guzman, supra, 381 N.Y.S.2d at 286. In Sanabria, the defendant answered the door to her apartment admitting the undercover agent in for the purpose of the sale. She was present during the sale and there was evidence that she had received a $100 tip from buyers for her role in the transaction. However, the

the Second Department found that this was insufficient to establish that defendant was in constructive possession of the contraband. People v. Sanabria, supra, 423 N.Y.S.2d at 224.

Compare People v. Holmes, 104 A.D.2d 1049, 480 N.Y.S.2d 956 (2d Dept. 1984), where defendant was present at the scene of a drug sale and vouched for the quality of the drugs sold, leading to an inference that he had some interest in the transaction and some dominion over the contraband. The Appellate Division, Second Department, held that the jury's conclusion that defendant had joint dominion and control over the contraband was not against the weight of the evidence. Id., 480 N.Y.S.2d at 957.

The Appellate Division, First Department, in People v. Robertson, 61 A.D.2d 600, 403 N.Y.S.2d 234 (1st Dept. 1978), aff'd, 48 N.Y.2d 993, 425 N.Y.S.2d 545 (1980), affirmed the defendant's conviction for criminal possession of a controlled substance in the first degree and criminally using drug paraphernalia in the second degree, holding that the circumstantial evidence presented by the People "conclusively link[ed] defendant with the exercise of dominion and control over the apartment and as such justifies the jury's finding that defendant had constructive possession of the drugs discovered therein." Id., 403 N.Y.S.2d at 240. In Robertson, a landlord, investigating an apartment on the complaint of neighbors, found drugs and drug paraphernalia therein, and reported this fact to police, who staked it out and awaited the occupant's return.

> Defendant entered the secured premises and evinced familiarity with the surroundings by immediately turning on the lights and expressing verbal and facial surprise upon seeing the cigarette ashes deposited by the officers in the sink in the kitchen. He possessed the keys to the apartment, the rent

> receipts and a business card from the realty agent who rented the dwelling. The business card had inscribed on it the name and address of the landlord and a mailing address for the rent. The real estate agent's files list "Roosevelt Anderson's" address as the same given by the defendant when his pedigree was taken by the police. The dwelling was virtually devoid of furniture. A business record of Osborne Realty bears a phone number and the legend - "Ask for J.J." Defendant's companion, Jeffrey Jones, admitted that he was referred to by the nickname "J.J.".

Id., 403 N.Y.S.2d at 237.

See also People v. Hines, 62 A.D.2d 1067, 403 N.Y.S.2d 795 (3d Dept. 1978), where the court found sufficient proof of constructive possession as the evidence established that although the room was not registered to the defendant, he possessed a key, he kept clothing there, and his fingerprints were on the packages of heroin found there. Similarly, see People v. Torres, 68 N.Y.2d 677, 505 N.Y.S.2d 595 (1986); People v. Lopez, 112 A.D.2d 739, 492 N.Y.S.2d 234 (4th Dept. 1985).

A defendant cannot be convicted of criminal possession of a controlled substance or marihuana where he simply agrees to supply undercover police officers with the drugs, and accepts money but delivery is made by a third party, although he can be convicted of criminal sale. People v. Dilan, 58 A.D.2d 655, 396 N.Y.S.2d 65 (2d Dept. 1977). For a discussion of the requisite intent and conduct involved in a criminal sale and the defenses of agency and entrapment, see Sections E(1) and (2), infra. It should be noted that the defense of agency to a charge of criminal sale of a controlled substance or marihuana is no defense to a charge of possession of the drug; see discussion in Section E(2)(a) 5., infra.

When a defendant is charged with criminal possession of a controlled substance with intent to sell it, the trial court may properly allow a

prosecution witness to testify to sales of controlled substances by the defendant preceding his arrest on the possession charge, since this testimony is relevant and material on the question of intent to sell. People v. Duncan, 57 A.D.2d 638, 393 N.Y.S.2d 219 (3d Dept. 1977).

(2) Chain of Custody

One of the problems which sometimes arises in the prosecution of drug cases involves the presentation and identification of the evidence. There is a "chain of custody" rule, governing the admissibility of items of evidence which are not patently identifiable or are capable of being replaced or altered. Before such an item can be admitted into evidence, the prosecution must call all persons who had custody of that item after it was seized to testify to its custody and unchanged condition. People v. Connelly, 35 N.Y.2d 171, 359 N.Y.S.2d 266 (1974); People v. Heiss, 113 A.D.2d 953, 493 N.Y.S.2d 850 (2d Dept. 1985); People v. Deacon, 78 A.D.2d 554, 432 N.Y.S.2d 18 (2d Dept. 1980). Since controlled substances and marihuana are, almost invariably, not patently identifiable and are capable of being replaced or altered, the prosecution is generally required to establish the "chain of custody." See People v. Bennett, 47 A.D.2d 322, 366 N.Y.S.2d 639 (1st Dept. 1975), where the defense persuaded the court to reverse the defendant's conviction because the chain of custody had been broken.* Accord People v. Gamble, 94 A.D.2d 960, 464 N.Y.S.2d 93 (4th Dept. 1983) (prosecution's failure to establish

* The court in Bennett first reversed defendant's conviction on the authority of People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975), on the ground that the stop of the car for a license and registration check was arbitrary. The court in Bennett also reversed on the ground that the record before it established that the chain of custody had been broken because the prosecution failed to call the police officer who had driven the defendant's car to the police station where it was searched.

chain of custody was fatal to defendant's conviction). In People v. Bennett, supra, the defendant was arrested for possession of one burning marihuana cigarette while he was driving. The defendant was handcuffed and driven in a police car to the station house while another officer, whose name was never entered in the arresting officer's memo book and whom the prosecution never called, drove the defendant's car to the police station, where it was searched.

Allegedly, more marihuana was found. The court in Bennett stated:

> The testimony of this officer [who drove the defendant's car to the station] was a necessary link and the failure to produce him broke the chain of custody. The People failed to show that the defendants were in the vehicle at the time the substance was found or that the vehicle's contents were substantially unchanged from the time defendants occupied it until the subsequent search at the station house.

Id., 366 N.Y.S.2d at 643-644.

Sometimes, defense attorneys have challenged the adequacy of the preservation and the accuracy of identification of drug evidence based on weight loss during the period from the time the drugs were seized until their introduction at the trial. It should be noted that such a challenge did not prevail in People v. Julian, 50 A.D.2d 760, 376 N.Y.S.2d 174 (1st Dept. 1975), aff'd, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977). The Appellate Division, First Department, ruled that a ten percent weight loss in marihuana seized from the defendant in 1970 and stored by police in two suitcases until his trial in 1973 was not a basis for finding a break in the chain of custody. An expert had testified that a 10 or 15 percent weight loss from dehydration was possible over such a period of time, there was no evidence that the seals to the

suitcases had been tampered with, and there was no testimony regarding any inconsistent or inexplicable notations on the seals. The court noted:

> We must keep in mind that analysis of a chain of custody must be kept within reasonable limits. If for example an exhibit is mailed, its identification by each postal employee handling the item cannot be considered as a necessary link in that chain (People v. Jamison, 29 A.D.2d 973, 289 N.Y.S.2d 299). Similarly, in the case at bar, the chain of police custody was adequately proven by testimony as to its deposit in the police laboratories and the office of the property clerk (People v. Malone, 14 N.Y.2d 8, 247 N.Y.S.2d 641, 197 N.E.2d 189).

Id., 376 N.Y.S.2d at 175.

The defendant in Julian contended in the Court of Appeals that the chain of custody had been broken because sometime between March 4, 1970, and February 7, 1973, the drugs were transferred by an unknown individual from the property clerk's safe to the chemical laboratory. The Court of Appeals rejected this argument, holding that chain of custody is only one way to establish the identity of a fungible item, and that failure to establish a chain of custody may be excused where the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence. The Court held that the proof in Julian amply demonstrated that these were the same drugs since, throughout the period of police custody, the drugs seized were stored in the same suitcases into which they had been initially placed, as established by the identification seals. The Court found that therefore the gap in the chain of custody was adequately bridged. Similarly, in People v. Piazza, 121 A.D.2d 573, 503 N.Y.S.2d 623 (2d Dept. 1986), it was held that the prosecutor need not produce each physical custodian as a witness where "the circumstances

provide reasonable assurances of identification and unchanged condition and it would be impossible or an unreasonable requirement" to produce each witness.

(3) Identification of Evidence

An attack on marihuana evidence was rejected as frivolous in People v. Gilmour, 78 Misc.2d 383, 354 N.Y.S.2d 52 (N.Y.C. Crim. Ct. Queens Co. 1974), where the defense contended there was a failure to connect the evidence with the crime. Three envelopes containing equal amounts of marihuana were confiscated, and the People could not identify which two of the three were the envelopes that the defendant was charged with criminally possessing and which one of the three was the subject of the alleged criminal sale. The court quoted a treatise entitled "Geometry for the Practical Man" to support its reasons for denying the defendant's motion to dismiss the complaint and holding the defendant for the grand jury:

> Euclidean mathematics contains a number of general postulates -- statements which are admitted to be true without the need for proof, such as is required to demonstrate the validity of a theorem.
>
> Among such postulates is one frequently referred to as the postulate of equality. It states: "Things which are equal to the same thing or to equal things are equal to each other."
>
> Another postulate is the substitution postulate - "In any mathematical operation any thing may be substituted in the place of its equal." (Geometry for the Practical Man, by J. E. Thompson, 3rd ed. New York, 1962). These formulas are not limited to mathematics. Their self-evident logic is applicable to other fields of knowledge - law for example....
>
> [T]he inability of the People's

> witnesses to identify precisely the envelope which was the subject of the alleged sale might compel dismissal, if its contents differed from the contents of the other two envelopes, either as to the nature of the substance or where weight of the contents had a significant bearing on the degree of the crime.
>
> But neither of these considerations are involved here.
>
> * * *
>
> In summary, the contents of all three envelopes meet the requirements governing admissibility of real evidence stated in 1 Bender's New York Evidence, 806 -- they are relevant to the issue and they are substantially in the same condition in material respects as at the time or event to which they relate. As to the remaining requirement, that of identification, logic as embodied in the postulates of identity and substitution, satisfies that test and compels admissibility of the exhibits.

Id., 354 N.Y.S.2d at 57.

See also People v. Hentschel, 80 A.D.2d 943, 438 N.Y.S.2d 32 (3d Dept. 1981), aff'd, 54 N.Y.2d 740, 442 N.Y.S.2d 995 (1981) (the existence of the marihuana was adequately established by the chemist's report, although the drug itself had been inadvertently destroyed); People v. Dezimm, 112 Misc.2d 753, 447 N.Y.S.2d 585 (Tompkins Co. Ct. 1981), aff'd, 102 A.D.2d 633, 479 N.Y.S.2d 859 (3d Dept. 1984) (People's failure to preserve chemist's test graphs was not reversible error since the substance itself was available for analysis). But see People v. Wagstaff, 107 A.D.2d 877, 484 N.Y.S.2d 264 (3d Dept. 1985), where marihuana was inadvertently destroyed before the defendants were indicted or had the opportunity to test the substance, the Appellate Division held that the County Court had properly granted defendants' motion to suppress the chemist's report. Yet, the Second Department, in People v.

Henderson, 123 A.D.2d 883, 507 N.Y.S.2d 662 (2d Dept. 1986), held that defendant was not prejudiced when evidence was destroyed prior to trial. The court found that the assistant district attorney had sufficiently explained the circumstances of the destruction, that defense counsel conceded that the destruction was not in bad faith, and that while the one month earlier defense had moved for an inspection but counsel had made no attempt to analyze it. Further, the chemist's tests showed the substance was heroin, and at trial the defense never disputed that the substance was heroin; indeed, a defense witness testified that the substance was heroin.

There was insufficient evidence as a matter of law to convict defendant of criminal possession in the second and third degree where the only evidence seized were test tubes containing cocaine residue and weighing scales. People v. Fleary, 85 A.D.2d 742, 445 N.Y.S.2d 805 (2d Dept. 1981).

(4) Presumptions

Penal Law §220.25 provides two statutory presumptions designed to aid the prosecution of persons possessing controlled substances in cars, or persons involved in preparing drugs for unlawful sale (participants in a narcotics "mill"):

(1) The presence of a controlled substance in an automobile other than a public bus is presumptive evidence of knowing possession by every person in the automobile at the time the substance was found; except the presumption does not apply:

(a) to a cabdriver operating the automobile in the course of his business, or

(b) to any person lawfully possessing such substance if he is not under duress and the substance is in the same container as it was when he received it; or

(c) when the controlled substance is concealed on the person of one of the occupants.

(2) The narcotics "mill" presumption, under which the presence of a narcotic drug, narcotic preparation, or marihuana in open view in a room other than a public place under circumstances evincing an intent to unlawfully mix, compound, package, or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found; except that such presumption does not apply to any such persons if:

(a) one of them has lawful possession, is not under duress, and the controlled substance is in the same container in which it was when such person obtained lawful possession of it; or

(b) one of them has the controlled substance on his person.

The reference to marihuana in Penal Law §220.25(2) was not deleted by the Marihuana Reform Act of 1977 (Article 221). The presumption, therefore, still applies to marihuana, but of course the offenses proscribing possession of specified amounts of marihuana and providing for lighter penalties are now set forth in new Article 221, discussed in Section B(2), supra.

(a) The Automobile Possession Presumption

In 1975, the New York Court of Appeals in People v. Leyva, 38 N.Y.2d 160, 379 N.Y.S.2d 30 (1975), held that the statutory presumption in Penal Law §220.25(1) did not unconstitutionally shift the burden of proof to the defendant. The Court ruled that the statutory presumption merely permits a highly probable factual inference to be drawn by the trier of fact from facts which the prosecution is required to prove beyond a reasonable doubt before the presumption applies. The court found that the statutory presumption in Penal Law §220.25 satisfied the test of constitutionality applied to such statutes by the United States Supreme Court. There is "'substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. (Leary v. United States, 395 U.S. 6, 36; 89 S.Ct. 1532, 1548; 23 L.Ed.2d 57; see also Turner v. United States, 396 U.S. 398, 407, 90 S.Ct. 642, 24 L.Ed.2d 610).'" Id., 379 N.Y.S.2d at 43. The Court further found that this statutory presumption met the even higher standard of rational connection required by the New York Court of Appeals in People v. McCaleb, 25 N.Y.2d 394, 404, 306 N.Y.S.2d 889, 897 (1969), in that the connection assured "'a reasonably high degree of probability' that the presumed fact follows from those proved directly [citations omitted]." People v. Leyva, supra, 379 N.Y.S.2d at 35.

In Leyva, a police informer gave information to police officers which led to the arrest of defendants Low, Garcia, and Leyva in an automobile with a quantity of cocaine in an evelope under the front seat. The defendants were convicted of criminal possession after a joint jury trial. Defendant Low had testified that he was in the car by accident,

claiming that he had come from Florida in a friend's car, had met an acquaintance in New York who agreed to loan Low his car if he would drive two strangers, Garcia and Leyva, to Brooklyn. Low testified that he knew nothing about the cocaine. Defendants Leyva and Garcia put in no evidence. On appeal, all three defendants, besides attacking the constitutionality of the presumption and the trial court's charge thereon, contended that the facts in their case should have operated to rebut the presumption as a matter of law. Defendant Low claimed that his testimony conclusively rebutted the presumption and defendants Garcia and Leyva claimed that inconsistencies in police testimony rebutted the presumption in their case. The New York Court of Appeals, after rejecting the argument that the statutory presumption shifted the burden of proof and was therefore unconstitutional (see discussion, supra), found that the trial court's charge was proper since it "conveyed the requisite permissiveness with respect to the use of a presumption...." Id., 379 N.Y.S.2d at 39. The Court ruled that the jury could properly find that the evidence did not rebut the inference that it could draw from the presence of the defendants in a car with cocaine, noting that it was reasonable for the jury to disbelieve defendant Low's testimony that he would make a long trip out of his way for total strangers and that this mere acquaintance, who had concealed cocaine in his car, would then entrust the car to Low. See also People v. Hunt, 116 A.D.2d 812, 497 N.Y.S.2d 194 (3d Dept. 1986).

In Lopez for and on behalf of Carmen Garcia* v. Curry, 583 F.2 1188 (2d Cir. 1978), the United States Court of Appeals for the Second

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* Carmen Garcia was the defendant Garcia in Leyva.

Circuit upheld the constitutionality of Penal Law §220.25(1) which provides for the presumption that controlled substances found in an automobile are knowingly possessed. The appellate panel rejected the finding by the United States District Court for the Southern District of New York that the statute was unconstitutional on its face. However, the Court of Appeals affirmed the District Court's grant of a writ of habeas corpus. It found that the trial judge's charge to the jury that mere proof of possession in the automobile established knowledge which the defendants could rebut, impermissibly shifted the burden of proof to the defendants, violating due process. See also Cederbaums v. Harris, 473 F.Supp. 1238 (S.D.N.Y. 1979).

New York courts have stated that the presumption is merely a permissive inference and not one which the jury is required to draw. See People v. Jenkins, 55 A.D.2d 657, 390 N.Y.S.2d 135 (2d Dept. 1976), where the Appellate Division found proper the instruction of the trial court which so charged. See also People v. Williams, 93 A.D.2d 948, 463 N.Y.S.2d 64 (3d Dept. 1983); People v. Roque, 108 Misc.2d 965, 437 N.Y.S.2d 527 (Sup. Ct. N.Y. Co. 1981).

Applying one of the three statutory exceptions, the trial court in People v. Dingle, 70 Misc.2d 840, 335 N.Y.S.2d 233 (Sup. Ct. N.Y. Co. 1972), held that there was insufficient evidence to hold defendant Early for the Grand Jury on charges of criminally possessing a controlled substance in an automobile because the controlled substance was concealed n the person of another occupant of the automobile, codefendant Dingle. Further, where a defendant driver testifies that the drugs, seized from a dark bag belonging to a passenger, were brought into his car without his knowledge, a factual issue has been raised which requires the court to

give the requested jury instruction on the concealment exception under Penal Law §220.25(1)(c). People v. Goodhope, 79 A.D.2d 957, 435 N.Y.S.2d 10 (1st Dept. 1981).

[i] Defendant's Presence in Automobile

In People v. Bennett, supra, the Appellate Division held that the presumption in Penal Law §220.25(1) did not apply to marihuana found in a defendant's car, which was searched at the police station, because the defendant had been removed from the car after he was arrested but before the marihuana was discovered. The court ruled that the presumption only applies when a person is in the car at the time the controlled substance is found. This rule was also applied in Robey v. State, 76 Misc.2d 1032, 351 N.Y.S.2d 788 (N.Y. Ct. of Claims 1973), aff'd, 46 A.D.2d 1015, 363 N.Y.S.2d 319 (3d Dept. 1973), a civil suit for damages for false arrest, where the amphetamines allegedly seized from the unlocked glove compartment of plaintiffs' unlocked van were seized by police while plaintiffs were on a beach more than one hundred yards away. Even though plaintiffs had admitted to police that they had been in the van, the court in Robey held that the presumption was inapplicable since plaintiffs' admission did not place them in the van at the time the contraband was found.

[ii] Instructions to the Jury

In People v. Sears, 86 A.D.2d 879, 447 N.Y.S.2d 289 (2d Dept. 1982), the trial court judge improperly charged the jury that the "presence of a controlled substance in a car is presumptive evidence of knowing possession thereof by each and every person in the car at the time such controlled substance was found and that this presumption is overcome only when defendant produces substantial evidence to the contrary." This

charge had the effect of shifting the burden of proof to the defendant because it did not clarify that the defendant had no burden to come forward with any evidence in order for the jury to reject the presumption.

(b) The Narcotics Mill Presumption

[i] Constitutionality

The constitutionality of the narcotics "mill" presumption in Penal Law §220.25(2) was attacked in People v. Caban, 90 Misc.2d 43, 393 N.Y.S.2d 303 (Sup. Ct. Kings Co. 1977). Police officers, investigating a burglary in an apartment building hallway, came upon an apartment, the door of which was ajar, revealing three people seated around a kitchen table on which was spread heroin, dilutants, and packaging materials. The apartment was rented and occupied by the Suarez family. The twenty-one-year-old son, defendant Hector Suarez, was arrested by police in the foyer, about twelve to thirteen feet from the kitchen. Defendant Maria Caban, a sixteenyear-old girl, not a member of the Suarez family but a resident at the Suarez apartment, was arrested in a doorway between the living room and the bedroom, approximately ten to twelve feet from the kitchen. Both defendants contended that: (1) Penal Law §220.25(2) was unconstitutional because there was no rational connection between the facts to be proved and the one to be inferred by the operation of the presumption; and (2) they were not in the same room with the narcotics and therefore they were not in "close proximity" to them so the presumption was inapplicable. The court rejected both contentions. First upholding the constitutionality of the presumption in Penal Law §220.25(2), the court stated there was a reasonably high degree of probability that the presumed fact followed from those proved directly. The court then declared that Penal Law §220.25(2) was certainly

constitutional in light of the fact that the automobile possession presumption in Penal Law §220.25(1) had recently been upheld by the New York Court of Appeals in People v. Leyva, supra. Citing Leyva, the court stated that "few would argue that knowing possession of a controlled substance concealed in an automobile is more likely than knowing possession of a controlled substance in open view in a non-public room." People v. Caban, supra, 393 N.Y.S.2d at 305. The court rejected the defendants' second argument, that the presumption was inapplicable to them because they were not found in the very same room where the narcotics were in open view. The court cited the application of the narcotics "mill" presumption by the New York Court of Appeals in People v. Daniels, 37 N.Y.2d 624, 376 N.Y.S.2d 436 (1975), where three defendants were arrested leaving an apartment in which narcotics were present in open view and two defendants were arrested in other rooms in the apartment, one of whom was undressed in bed. However, in Caban, the court set aside the verdict against defendant Maria Caban, holding that in her case the distance from the contraband, coupled with the fact that she was only sixteen years old and had only recently taken up residence in the Suarez apartment, rebutted the presumption that she knowingly exercised any dominion and control over the narcotics. Defendant Hector Suarez's motion to set aside the verdict against him was denied on the ground that he was a mature member of the family that occupied the apartment and his approval must have been given for the conspicuous preparation of narcotics for sale in that apartment.

Similarly, in People v. Lopez, 85 A.D.2d 568, 445 N.Y.S.2d 702 (1st Dept. 1981), the appellate court reversed defendant's conviction for

criminal possession of a controlled substance in the first degree and dismissed the indictment, since defendant proved beyond a reasonable doubt that he was a temporary guest on the "narcotics mill" premises, although he admitted that he was there to buy $10.00 worth of cocaine. See also People v. Casanova, 117 A.D.2d 742, 498 N.Y.S.2d 471 (2d Dept. 1986). But see People v. Staley, 123 A.D.2d 407, 506 N.Y.S.2d 469 (2d Dept. 1986) where the court found the presumption applicable to defendants caught leaving the room where drugs were present even when the drugs were not in a state of being procesed or packaged.

[ii] Scope of Narcotics Mill Presumption

Narcotics seen in "open view in a room" does not include a plastic bag of cocaine, seen on the outside sill of a paneless window, behind the bottom wooden frame of that window, hidden from ordinary sight, but allegedly observed by the police officer conducting the search from two feet away. People v. Diaz, 108 Misc.2d 213, 437 N.Y.S.2d 253 (Sup. Ct. N.Y. Co. 1981).

[iii] Narcotics Mill Presumption May Be Applied to Corroborate Accomplice Testimony

The "narcotics mill" presumption in Penal Law §220.25(2) was held sufficient to corroborate accomplice testimony in People v. Daniels, supra. James, one of the defendants in Daniels who was arrested leaving the apartment where the narcotics were present in open view, pleaded guilty and testified for the prosecution. The New York Court of Appeals, after upholding the defendants' convictions on the grounds that the application of the statutory presumption was sufficient to corroborate the accomplice James' testimony, also held that the presence of the

defendants in the apartment with the drugs was sufficient to corroborate James' testimony even without the application of the presumption.

See also People v. Donovan, 59 N.Y.2d 834, 464 N.Y.S.2d 745 (1983), (corroborative testimony of accomplice sufficient for jury consideration).

[iv] Instructions to the Jury

The Appellate Division, Second Department, in People v. Lopez, 59 A.D.2d 767, 398 N.Y.S.2d 718 (2d Dept. 1977), found no reversible error in the trial court's "unfortunate" statement during the charge that the narcotics "mill" presumption was rebuttable and permissive, and that "there are 'situations when it is not necessary for the People to prove knowing and unlawful possession.'" Id. 398 N.Y.S.2d at 720. The court so held because (1) the trial court had stated to the jury that the "narcotics mill" presumption was not one which they were required to draw; (2) the trial court had charged twice on the presumption of innocence; and (3) there was overwhelming proof of defendant's guilt.

D. Degrees of Sale Offenses

(1) Controlled Substances

(a) Sale in the Fifth Degree (Class D Felony - Penal Law §220.31).

Knowingly and unlawfully selling a controlled substance.

[i] Authorized Sentence

As this offense is a Class D felony, the authorized punishment is the same as that for criminal possession in the fifth degree; see Section B(1)(c)[i], supra.

(b) Sale in the Fourth Degree (Class C Felony - Penal Law §220.34).

Knowingly and unlawfully selling:

1. a narcotic preparation;
2. ten ounces or more of a dangerous depressant or two pounds or more of a depressant;
3. concentrated cannabis (hashish);
4. methadone;
5. 500 milligrams or more of phencyclidine ("angel dust");
6. any amount of phencyclidine and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense; or
7. a controlled substance in violation of P.L. §220.31 of this chapter to a person less than 19 years old, when such sale takes place upon school grounds.

[i] Authorized Sentence

The punishment for this Class C felony is that authorized for the Class C felony of criminal possession in the fourth degree; see Section B(1)(d)[i], supra.

(c) Sale in the Third Degree (Class B Felony - Penal Law §220.39).

Knowingly and unlawfully selling:

1. a narcotic drug;
2. a stimulant, hallucinogen, hallucinogenic substance or LSD and by a person who has previously been convicted of any controlled substance offense or of an attempt or a conspiracy to commit any controlled substance offense;
3. one gram or more of a stimulant;
4. one milligram or more of LSD;
5. twenty-five milligrams or more of a hallucinogen;

6. one gram or more of a hallucinogenic substance;
7. a substance of an aggregate weight of 1/8 ounce or more containing methamphetamine ("Speed");
8. 250 milligrams or more of phencyclidine ("Angel Dust");
9. a narcotic preparation to a person less than twenty-one years old.

It should be noted that under Penal Law §15.20(3) it is no defense to a prosecution of a crime in which the age of a child is an element that the defendant did not know the age of the child or believed that it was greater than the age statutorily specified.

[i] Authorized Sentence

The punishment for this Class B felony is the same as that authorized for the Class B felony of criminal possession in the third degree; see Section B(1)(e)[i], supra.

(d) Sale in the Second Degree (Class A-II Felony - Penal Law §220.41).

Knowingly and unlawfully selling:

1. a substance of an aggregate weight of one-half ounce or more containing a narcotic drug;
2. a substance of an aggregate weight of one-half ounce or more containing methamphetamine;
3. five grams or more of a stimulant;
4. five milligrams or more of LSD;
5. 125 milligrams or more of a hallucinogen;
6. five grams or more of a hallucinogenic substance; or
7. 360 milligrams or more of methadone.

[i] Authorized Sentence

The punishment for this Class A-II felony is the same as that

authorized for the Class A-II felony of criminal possession in the second degree; see Section B(1)(f)[i], supra.

(e) Sale in the First Degree (Class A-I Felony - Penal Law §220.43)

Knowingly and unlawfully selling:

1. a substance of an aggregate weight of two ounces or more containing a narcotic drug; or
2. 2,880 milligrams or more of methadone.

[i] Authorized Sentence

The authorized punishment for this Class A-I felony is the same as that authorized for the Class A-I felony of criminal possession in the first degree; see Section B(1)(e)[i], supra.

(f) Constitutional Challenges to Prior Sentences Under "Rockefeller Drug Laws" Unsuccessful

The constitutionality of the stringent penalties formerly imposed by Article 220 for criminal sale and possession of controlled substances was upheld in People v. Broadie, supra. The Court rejected the argument that the imposition of a sentence with a maximum term of life imprisonment was grossly disproportionate to the offenses of "street" sales of heroin and cocaine and possession of a large quantity of cocaine. It found no violation of the Eighth Amendment prohibition against cruel and unusual punishment, made applicable to the states through the due process clause of the Fourteenth Amendment; see discussion in Section B(1), supra. The Court held that, based on sociological studies, the punishments imposed were not grossly disproportionate to the offense of drug trafficking:

> Summarizing the various factors and comparisons pertinent to gross dispro-

> portionality, the Legislature could reasonably conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible, would serve, at least, to isolate and deter. Compared both "internally," to punishments for other crimes under the Penal Law, and "externally," to punishments imposed elsewhere for the same or similar offenses, the narcotics laws are relatively severe, but not irrationally so, given the epidemic dimensions of the problem.

Id, 371 N.Y.S.2d at 480-481.

The District Court for the Southern District of New York had ruled that the former authorization in Article 220 of mandatory maximum sentences of imprisonment for life for sale of an individual "dose" of cocaine and for possession of three and three-eighths ounces of cocaine violated the Eighth Amendment prohibition against cruel and unusual punishment but the Court of Appeals for the Second Circuit reversed this decision. Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), reversing 436 F.Supp. 1153 (S.D.N.Y. 1977), also discussed in Section B(1), supra.

The Court of Appeals stated that the District Court should have considered the fact that petitioners were eligible for parole at the expiration of their mandatory minimum terms in assessing whether their sentences were disproportionate. The court found that

> [T]he purposes of the Drug Law of 1973 were isolation and deterrence, rehabilitation having failed. The law was enacted after thorough study and investigation. Drug trafficking and its attendant evils posed an imminent threat to the community which the legislature could reasonably consider to be comparable to or of greater import than arson, kidnapping, manslaughter, or rape. We cannot sensibly characterize that determination as arbitrary or irrational. It

> is also conceded that New York punishes drug trafficking more harshly than other jurisdictions.... If the punishment must fit the crime, the legislature must look at the crime as found in its own borders and the action of the states faced with drug problems of lesser magnitude are of little relevance.

Id. 414-15.

Prior to the decision of the Second Circuit in Carmona, the New York courts refused to follow the decision of the District Court; see discussion in Section B(1), supra.

The constitutionality of the sentences formerly imposed by Article 220 for drug sales has also been upheld in People v. Robinson, 73 A.D.2d 954, 424 N.Y.S.2d 13 (2d Dept. 1980); People v. Foggie, 57 A.D.2d 964, 395 N.Y.S.2d 68 (2d Dept. 1977); People v. Lynch, 50 A.D.2d 948, 375 N.Y.S.2d 665 (3d Dept. 1975); People v. Venable, 46 A.D.2d 73, 361 N.Y.S.2d 398 (3d Dept. 1974), aff'd sub nom. People v. Broadie, supra; People v. Demers, 42 A.D.2d 634, 345 N.Y.S.2d 184 (3d Dept. 1973); People v. Ellison, 78 Misc.2d 652, 357 N.Y.S.2d 773 (Sup. Ct. Westchester Co. 1974).

(g) Limitations on Plea Bargaining

The limitations on plea bargaining for the Class A-I and Class A-II controlled substances possession offenses, discussed in Section B(1), supra, apply to Class A-I and Class A-II controlled substances sale offenses (CPL §220.10[5][a] and [b]).

(h) Life-Time Probation

Penal Law §65.00, as amended in 1979, permits a prosecutor to recommend life-time probation for a defendant charged with a Class A-II felony or a Class B felony as defined in Article 220, the former Class A-III felony. This statute applies to criminal sale A-II and B felonies

as well as criminal possession A-II and B felonies.

1. Constitutional Challenge to Life-Time Probation

Penal Law §65, as it appeared prior to the 1979 amendments, was challenged on due process grounds in People v. O'Neill, 85 Misc.2d 130, 379 N.Y.S.2d 244 (Sup. Ct. N.Y. Co. 1975). The court rejected the defendant's contention that due process was violated because the statute gave the prosecution the power to initiate the proceeding and to determine independently whether the defendant is providing assistance that is sufficiently material to warrant a recommendation of probation:

> Admittedly the definition of "material assistance" is imprecise. That, however, the court finds irrelevant.
>
> The legal issue is the ultimate question of whether or not there is a forthcoming recommendation by the prosecutor. We are not dealing with the discretion of a court but the discretion of a District Attorney in whom the Legislature has reposed an option.
>
> At the threshold, one can consider the practical application of the "cooperation" provision. A defendant is charged with an offense whereby, if convicted, he must receive a life sentence. The prospect of a life sentence is ameliorated by a "carrot on a stick" if he will "cooperate" with police authorities. It is an overture and easily grasped by one who may be aboard a sinking ship. At the outset, it is entirely a matter of supposition on both sides whether or not "material assistance" can be provided. Should a defendant be permitted to enlist in such an effort and then regardless of what he may deem to be "material assistance" call the shots and get his sought-for relief? If so, he is in a position to "hold back" or end up having "cold feet" and still try to secure his "bite of the apple." The court thinks not. It is analogous to a defendant who initially

> waives a right to a speedy trial and after conviction seeks to assert that right. He will not be permitted to play "fast and loose" in that situation....
>
> A District Attorney or other prosecuting official is given considerable statutory discretion. Even at common law, the power to criminally charge and to control the same was reposed in the prosecutor.... It lies within his province to chart the course of a prosecution....
>
> Any interference with the performance of a District Attorney's office should be sanctioned only under the most unusual and compelling circumstances.... His office is a public trust. There is a legal presumption that he will do his duty. In this confidence he has been endowed with a large discretion, the exercise of which is, in its nature, a judicial act, over which the courts have

Id., 379 N.Y.S.2d at 248-249.

Similarly, in People v. Kaufman, 77 A.D.2d 924, 431 N.Y.S.2d 102 (2d Dept. 1980), the appellate court reinstated the indictment charging defendants with criminal sale and criminal possession of a controlled substance and marihuana. The trial court had dismissed the indictment in the interest of justice on the ground that defendants' alleged cooperation with the District Attorney's office mandated a recommendation of lifetime probation for both defendants. Since it was undisputed that no explicit outright promise of leniency had been made, the exercise in this case of the District Attorney's broad discretion to recommend a sentence did not warrant the drastic measure of outright dismissal of an indictment.

> Unbridled or not ... we cannot gainsay the prosecutor's judgment in declining to recommend probation for a particular middle-level drug dealer to whom he has offered other leniency in return for the

> extensive cooperation proferred in various criminal investigations.

Id., 431 N.Y.S.2d at 104.

(i) Discretionary Discharge From Parole

Chapter 904 of the Laws of 1977 repealed Article 8 of the Correction Law, which in §212(8) had excepted Class A drug felons from discretionary discharge from parole pursuant to Executive Law §259-j. Since Correction Law §212(8) has been repealed, Executive Law §259-j applies to Class A drug felons. That statute provides:

> If the board of parole is satisfied that an absolute discharge from parole or from conditional release is in the best interests of society, the board may grant such a discharge prior to the expiration of the full maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years. A discharge granted under this section shall constitute a termination of the sentence with respect to which it was granted.

(j) Aggregate Weight Standard

The argument that the measurement of the amount of "hard drugs" by aggregate weight for the purposes of determining the degree of the sale offense denies equal protection was rejected by the Appellate Division, Second Department, in People v. Rosa, 54 A.D.2d 722, 387 N.Y.S.2d 476 (2d Dept. 1976), citing People v. Riley, 50 A.D.2d 823, 376 N.Y.S.2d 185 (2d Dept. 1975). In People v. Daneff, 37 A.D.2d 918, 325 N.Y.S.2d 902 (1st Dept. 1971), aff'd, 30 N.Y.2d 793, 334 N.Y.S.2d 897 (1972), remittitur amended, 31 N.Y.2d 667, 336 N.Y.S.2d 903 (1972), cert. denied, 410 U.S. 913 (1973), parallel challenges to the constitutionality of the use of an "aggregate weight" measurement to determine the degree of possessory offenses were rejected. For a discussion of Riley and Daneff,

see Section B(1), supra.

See also People v. Konyack, 99 A.D.2d 588, 471 N.Y.S.2d 699 (3d Dept. 1984) (non-prohibited substances mixed with narcotic can be included in determining aggregate weight of controlled substances for purposes of defining degree of crime. See P.L. §220.00).

Prior to August 9, 1975, the quantities of methadone sold or possessed were measured by aggregate weight for the purpose of determining the degree of the sale or possession offense. Chapter 786 of the Laws of 1975 amended Article 220 to measure methadone by pure weight. The retroactive resentencing provisions in Penal Law §60.08, discussed in Section B(1), supra, apply to persons convicted for criminal sale of methadone under the prior law as well as persons convicted of criminal possession of methadone.

A defendant was charged in one count in an indictment with an attempted transfer of two packages of heroin, the combined weight of which exceeded one ounce, and only the attempted sale offense charged in the indictment was attempted criminal sale in the first degree. The trial court committed reversible error when it charged the jury that if they did not find a continuing single sale transaction, they could find that each attempted transfer was an attempted sale in the second degree. "When crimes are independently committed and are separate and distinct from one another, they must be charged in separate counts of the indictment." See People v. Brannon, 58 A.D.2d 34, 394 N.Y.S.2d 974, 981 (4th Dept. 1977).

(2) Marihuana

(a) Sale in the Fifth Degree (Class B Misdemeanor - Penal Law §221.35).

Knowingly and unlawfully selling without consideration:

1. Two grams or less of marihuana; or

2. One cigarette containing marihuana.

[i] Authorized Sentence

The authorized sentence for this crime, as it is a Class B misdemeanor, is the same as that authorized for possession of marihuana in the fifth degree; see Section B(3)(a)[i], supra.

(b) Sale in the Fourth Degree (Class A Misdemeanor - Penal Law §221.40).

Knowingly and unlawfully selling marihuana except as specified in Penal Law §221.35.

[i] Authorized Sentence

As this crime is a Class A misdemeanor, the authorized punishment for this offense is the same as that for criminal possession of a controlled substance in the seventh degree; see Section B(1)(a)[i], supra.

(c) Sale in the Third Degree (Class E Felony - Penal Law §221.45).

Knowingly and unlawfully selling more than twenty-five grams of marihuana.

[i] Authorized Sentence

As this crime is a Class E felony, the authorized punishment is the same as for criminal possession of a controlled substance in the sixth degree; see Section B(1)(b)[i], supra.

(d) Sale in the Second Degree (Class D Felony - Penal Law §221.50).

Knowingly and unlawfully selling:

1. more than four ounces of marihuana; or

2. marihuana to a person less than eighteen years old.

[i] Authorized Sentence

As this crime is a Class D felony, the punishment is the same as that authorized for criminal possession of a controlled substance in the fifth degree; see Section B(1)(c)[i], supra.

(e) Sale in the First Degree (Class C Felony - Penal Law §221.55).

Knowingly and unlawfully selling more than sixteen ounces of marihuana.

[i] Authorized Sentence

As this crime is a Class C felony, the authorized punishment is the same as for criminal possession of a controlled substance in the fourth degree. See Section B(1)(d)[i], supra.

Penal Law §221.00 provides that the terms used in Article 221 shall have the same meaning as that ascribed to them in Article 220, unless the context otherwise clearly requires. Penal Law §220.00(5) provides that "sell" means to sell, exchange, give, or dispose of to another or to offer or agree to do the same. Therefore the term "sell" used in Penal Law §§221.40 to 221.55 includes giving or agreeing to give marihuana. However, Penal Law §221.35 specifies that the selling, without consideration, that is the giving of a single marihuana cigarette or the giving of two grams or less of marihuana is a class B misdemeanor, the lowest class of the crime of selling marihuana. But the sale for consideration of a single marihuana cigarette or less than two grams is a class A misdemeanor under Penal Law §221.40. In addition, the gift of a greater amount than two grams or a single cigarette is legally a "sale" under Penal Law §§221.40 to 221.55.

The court in People v. Davis, 95 Misc.2d 1010, 408 N.Y.S.2d 748, 754

(Dutchess Co. Ct. 1978), modified, 72 A.D.2d 369, 424 N.Y.S.2d 726 (2d Dept. 1980), discussed in Section B(2), supra, sustained the defendant's conviction for criminal sale of maraihuana because the statutory prohibition against a "sale" includes an offer to sell. The court found, citing numerous cases involving sales of non-narcotic substances and sales where the drug corpus was proved circumstantially (discussed in Section E(1), infra), that a conviction of criminal sale by offer of a specified amount of marihuana could be based on proof of (1) an offer to sell that amount; (2) defendant's specific criminal intent to sell that amount; and (3) defendant's reasonable belief that he could sell that amount.

It should also be noted that a defendant's lack of knowledge that the person to whom he gave or sold marihuana was less than eighteen years old would not constitute a defense to a charge of violating Penal Law §221.50. People v. Wenzel, 77 A.D.2d 715, 430 N.Y.S.2d 431 (3d Dept. 1980). Penal Law §15.20(3) provides that where the age of a child is an element of the crime, lack of knowledge as to the child's age on the part of a defendant is not a defense notwithstanding the use of the term "knowingly" in the statute defining such offense unless the statute specifically provides that a mistake as to age constitutes a defense.

(f) Aggregate Weight Standard Note:

The 1979 amendments to Article 220 returned the "aggregate weight" standards to prosecutions for the sale of marihuana after the "pure weight" standard had been implemented in 1977. For a discussion focusing upon the difficulties in enforcing the "pure weight" standard see People v. Davis, supra. In People v. Woods, 89 A.D.2d 1054, 454 N.Y.S.2d 764 (4th Dept. 1982) the jury was erroneously charged with the "aggregate weight" standard of measurement for a transaction which occurred on

November 27, 1978. The Penal Law amendment adopting the aggregate weight standard was not effective until September 1, 1979, and thus the "pure weight" standard was in effect at the time of this transaction.

E. Proof of Sale

(1) Intent and Conduct

(a) Intent; Knowingly

The element of criminal intent -- mental culpability or mens rea -- in the offense of criminally selling a controlled substance or marihuana is established by proof beyond a reasonable doubt that the defendant acted knowingly when he made the sale, the same type of mental culpability which must be proved beyond a reasonable doubt to convict a defendant of criminal possession of a controlled substance. See section (C)(1), supra. "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." Penal Law §15.05(2). Evidence of such awareness, that is, that the defendant acted knowingly when he made the unlawful sale, is presented if there is evidence of a consummated unlawful sale since "[i]n the case of an 'intent' crime involving physical action, proof of the performance of a physical act is itself evidence of the intention to perform such act." People v. Lawson, 84 Misc.2d 24, 374 N.Y.S.2d 270 (Sup. Ct. N.Y. Co. 1975). However, if the defendant only offers or agrees to sell a controlled substance, a form of conduct included in the definition of "sell" set forth in Penal Law §220.00(1) (see Section A(1), supra), the People must prove specific intent to transfer the drug which is the subject of such offer or agreement. Factors relevant in proving such

specific intent could be the terms of the agreement or offer, the prior or subsequent dealings of the defendant, the efforts of the defendant to obtain the controlled substance and the reason for the failure to transfer. Mere verbalization of an offer to sell a controlled substance is not sufficient evidence to establish the element of intent in the crime of knowingly and unlawfully selling a controlled substance.

An undercover police officer had a single conversation with an individual who asked the officer if he would like to buy a kilogram of heroin for about $25,000. The officer testified that the sale never occurred and that he never saw the other individual again until after he was indicted. Is there sufficient evidence to convict the other individual of selling heroin since "sale" includes an offer or agreement to sell? In Lawson, the court answered no. "In the context of the officer's inconclusive testimony and the absence of any showing of other other conduct by the defendant which would indicate an ability or attempt to obtain and deliver the drugs, this slight evidence is legally insufficient to support the indictment." Id., 374 N.Y.S.2d at 273.

[i] Non-Controlled Substance Sold as Narcotic

An undercover police officer, arranged to buy methamphetamine from the defendant, to whom he delivered $3,800. The defendant delivers hay fever medicine. Is defendant criminally liable for sale of a controlled substance?

> [A] man's intent [is] to be ascertained through assessment of his deeds.... [T]he actual sale of a non-narcotic simply contradicts the concept of "knowing offer".... [K]nowledge must extend to each and every part of the transaction alleged to have been criminal....

> [T]he knowledge by defendants that the substance sold was non-narcotic (hay fever medicine) coupled with the delivery of that non-narcotic substance militates against a finding of such knowledge.... It is well settled that knowledge of the harmful character of the material transferred -- even where a narcotic drug has in fact been delivered or possessed -- is an absolute requisite to a finding of guilt.... It therefore follows that where there is nothing more than the transfer of an innocuous substance the People have failed in proving their case.

People v. Rosenthal, 91 Misc.2d 750, 398 N.Y.S.2d 639, 641-642 (Sup. Ct. Kings Co. 1977).

Furthermore, the Eighth Amendment prohibition against cruel and unusual punishment was cited by the court in People v. Boscia, 83 Misc.2d 501, 373 N.Y.S.2d 309 (Sup. Ct. Bronx Co. 1975), as applicable to preclude a defendant's conviction for criminal sale of eight ounces of cocaine. Although the defendant had offered to sell that amount of cocaine to and had accepted $5,500 from an undercover police officer, he had never delivered or arranged for the delivery of the cocaine to the officer or to any other officer, and there was no evidence that the defendant had ever illegally possessed or attempted to illegally possess any drugs.

> It is well established that penal statutes must be strictly and narrowly construed. [Citations omitted]. Our Legislature clearly intended to prohibit the trafficking in drugs in this state by punishment more severe and inflexible than for almost any other offense in the State (People v. Broadie, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338). However, the threat of such severe and inflexible punishment should not be applied to mere conversation about drugs. To subject this speech alone to a criminal penalty of 15 years to life imprisonment (as great a penalty as for

> the delivery of the actual controlled chemical substance) would be so grossly disproportionate as to constitute cruel and unusual punishment in violation of constitutional limitations.

Id., 373 N.Y.S.2d at 311.

1. Attempted Sale Charged Where Non-Controlled Substance Sold

A defendant may be charged with attempted sale of a controlled substance if he sells a non-controlled substance mistakenly believing that he is selling a controlled substance. Thus in People v. Rosencrants, 89 Misc.2d 721, 392 N.Y.S.2d 808 (Broome Co. Ct. 1977), the defendant moved to dismiss the indictment charging him with attempted sale of methamphetamine. Although the defendant had told the undercover officers that he was selling "speed" (methamphetamine), he had in fact sold another a white powder, ephedrine, a non-controlled substance. The court denied the defendant's motion, noting that Penal Law §110.00 and §110.10 when read together, provide that a person may be charged with an attempt to commit a crime when, with intent to commit that crime, the person engages in conduct which tends to effect its commission. This is so even though the crime is, under the attendant circumstances, factually or legally impossible to commit, if such crime could have been committed had the attendant circumstances been as the person believed them to be. The court then found that there was legally sufficient evidence to support the indictment since there was evidence that the defendant had the requisite mental culpability and "the defendant's activity, which [went] beyond mere conversation about drugs...is of the type covered by the attempt sections of our Penal Law." Id., 392 N.Y.S.2d at 810. See also People v. Culligan, 79 A.D.2d 875, 434 N.Y.S.2d 546 (4th Dept. 1980); and People v. Reap, 68 A.D.2d 964, 414 N.Y.S.2d 775 (3d Dept.

1979) (a sale or offer to sell a non-controlled substance, while representing such substance to be a controlled substance, is a crime).

In People v. Duprey, 98 A.D.2d 110, 469 N.Y.S.2d 702 (1st Dept. 1983), the Appellate Division held that, if it is shown that defendant believed that he was buying drugs from undercover police officers, defendant may be convicted of attempting to possess narcotics, even if the officers had no drugs to sell to defendant.

It should be noted that in this situation, it is the defendant's intent which is controlling. The court in People v. Rosencrants, supra, distinguished People v. Van Heffner, N.Y.L.J. Feb. 10, 1977, p.14, col.2 (Sup. Ct. Kings Co.), where "the trial court, at the conclusion of the People's case, dismissed a charge of attempted possession of a controlled substance (cocaine) with the intent to sell the same. The evidence had shown the defendant in possession of a substance which was discussed with a prospective purchaser as 'cocaine', but which was, in fact, lidocaine (a non-controlled substance). The trial court found that the People failed to prove that (1) defendant thought the substance to be cocaine; and (2) the defendant performed an act which would advance the consummation of the crime charged. In summary, the trial court felt that the necessary element of criminal intent to sell could not be inferred from merely possessing a substance which was discussed as being a controlled substance." People v. Rosencrants, supra, 392 N.Y.S.2d at 810.

2. Knowledge of Specific Nature of Substance

The Appellate Division, Fourth Department, in People v. Carelock, 58 A.D.2d 996, 396 N.Y.S.2d 941 (4th Dept. 1977), held that a defendant must have actual knowledge of the specific nature of the controlled substance

before the trier of the facts can find that he had the requisite criminal intent. In Carelock, the testimony adduced at the trial presented a factual question as to whether the defendant knew that the substance which he allegedly sold and which was referred to at the time of the sale as "mesk" (mescaline) was, in fact, LSD. The court found that it was reversible error for the trial court to instruct the jury that "[t]he fact that a defendant believed the substance to be mescaline when in fact it was lysergic acid diethlmide, is of no consequence to your deliberations." The appellate court stated:

> The scienter requirement of Penal Law §220.39, must be read to extend to knowledge of the content or nature of the substance sold (see, Penal Law, §15.15, subd. [1]; Hechtman, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 39, Penal Law, §15.15, p. 34; see also People v. Vargas, 86 Misc.2d 1018, 384 N.Y.S.2d 643). Accordingly, the court should have charged the jury that to find defendant guilty of criminal sale in the third degree (Penal Law, §220.39 [4]), it had to find beyond a reasonable doubt that defendant knew that the substance which he sold was LSD.

Id., 396 N.Y.S.2d at 942.

Accord, People v. Tramuta, 109 A.D.2d 765, 486 N.Y.S.2d 82 (2d Dept. 1985). See also People v. Gonzalez, 66 A.D.2d 828, 411 N.Y.S.2d 632 (2d Dept. 1978), wherein the court held that a defendant who sold lidocaine (a non-controlled substance) could not be convicted of attempted sale of cocaine absent affirmative evidence that he intended to sell cocaine but mistakenly sold lidocaine.

(b) Unlawfully Selling

The conduct proscribed in the offense of criminally selling a controlled substance or marihuana is "unlawfully selling." "Unlawfully" is

defined in Penal Law §220.00(2) and means selling without a license issued in accordance with the provisions of Article 33 of the Public Health Law (see Section A(2), supra). "'Sell' means to sell, exchange, give, or dispose of to another or to offer or agree to do the same." Penal Law §220.00(1), as discussed in Section A(1), supra, and Section D(2), supra. Indeed, an individual may lawfully possess a controlled substance by obtaining such drugs through a valid prescription, yet violate the law through the unauthorized sale of those same drugs. People v. Garthaffner, 103 Misc.2d 671, 426 N.Y.S.2d 955 (N.Y.C. Crim. Ct., N.Y. Co. 1980), affd, 115 Misc.2d 93, 454 N.Y.S.2d 583 (Sup. Ct. App. Term. 1982). The marihuana sale offenses proscribed in Penal Law §§221.35 and 221.55 distinguish in certain instances between sale without consideration (a gift) and a sale with consideration, for purposes of determining the degree of the marihuana sale offense. However, in both sales of controlled substances and marihuana, it is evident from the statutory language that "sell" is given an expansive meaning much broader than that in common day usage. People v. Milom, 75 A.D.2d 68, 428 N.Y.S.2d 678 (1st Dept. 1980); People v. McGrath, 115 A.D.2d 128, 496 N.Y.S.2d 95 (3d Dept. 1985).

The Supreme Court, New York County, held in People v. Vargas, 86 Misc.2d 1018, 384 N.Y.S.2d 643 (Sup. Ct. N.Y. Co. 1976), that "unlawfully" does not modify "knowingly" but modifies "selling." The court therefore denied the defendant druggist's request to charge the jury that a mistake of fact on his part leading him to believe that he had received a prescription for the diazepam (valium) and the barbiturate that the defendant sold to an undercover police officer constitutes a defense, holding that "the seller acts at his peril when he sells controlled

substances." Id., 384 N.Y.S.2d at 645. The court added that "[c]onsidering the Legislature's concern with the illegal dispensing of drugs, it is neither harsh nor cruel to require a drug store owner to actually have a prescription before selling drugs and not to allow him to claim that he thought he had a prescription." Id. However, the court also refused the People's request to charge the jury that, under Public Health Law §3396(1), the burden of proof as to the existence of a prescription rests with the defendant, holding that the burden of proof that the sale is unlawful is on the People. The court quoted Public Health Law §3396(1), relied on by the People, which provides:

> 1. In any civil, criminal, or administrative action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negate or disprove any exception, excuse, proviso or exemption contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the person claiming its benefit.

The court concluded that the clause "brought for the enforcement of any provision of this article" does not include Article 220 of the Penal Law. In the court's opinion the "criminal" proceedings referred to are the criminal provisions of Article 33 of the Public Health Law. The court's rationale was based on an analysis of subdivision 2 of §3396:

> 2. Violation of any provision of this article for which a penalty is specifically provided herein shall be punishable as provided herein. Violation of any provision of this article for which no penalty is provided herein shall be punishable as provided in section twelve-b of article one of this chapter or in the penal law.

The court stated that the specific reference to "the penal law" in

contradistinction to "this article" means that references to "this article" in §3396 do not include the Penal Law.

The court noted that:

> other tribunals which have interpreted the statute have not adopted this holding and have placed the burden of proof upon the defense (People v. Strong, 47 A.D.2d 798, 365 N.Y.S.2d 310 [4th Dept. 1975]; People v. Stone, 80 Misc.2d 536, 364 N.Y.S.2d 739 [Sup. Ct. Kings Co. 1975]; People v. Gray, 68 Misc.2d 280, 327 N.Y.S.2d 201 [Dist. Ct. Nassau Co. 1971]; People v. Saul, 12 Misc.2d 356, 176 N.Y.S.2d 405 [Co. Ct. Columbia Co. 1958]).

Id., 384 N.Y.S.2d at 646.

People v. Stone, supra, involved alleged criminal possession of methadone and is discussed in Section C(1), supra. The other cases involved alleged criminal possession of a hypodermic instrument and are discussed in Section F(1), infra. The court in Vargas found that:

> People v. Stone, supra, cannot be reconciled with the case at bar. The other opinions can be distinguished from the instant matter. In Stone the prosecution charged possession of a hypodermic instrument in violation of both the Penal Law and the Public Health Law. As to the latter enactment, of course, section 3396 applied. The Gray case quoted that statute but no testimony concerning a prescription was presented, so the underlying issue confronting the court was the burden of going forward. Finally, People v. Saul, supra, addressed itself to whether a prima facie case had been established where the People's sole witness testified that the defendant told him he had obtained a prescription to purchase the hypodermic instrument in Florida. The court held that such testimony imposed no duty of proof upon the People. In its decision, the court relied upon the

> former Penal Law, not the Public Health Law section 3396 or its predecessor (§3393), which first became effective in 1966 (L.1965, ch. 323)... [I]ssuing or selling an illegal prescription with an indifference towards whether the person who obtains them from the pharmacy subsequently sells them to others is an insufficient basis for imposing liability upon a physician under Article 220 of the Penal Law.

Id.

In People v. Lipton, 54 N.Y.2d 340, 445 N.Y.S.2d 430 (1981), defendant physician was not liable for criminal sale even though he knowingly issued prescriptions for a controlled substance to one Raia, who then obtained them and sold them, because there was no proof that the defendant physician knew that Raia would sell the drugs to others.

Compare In the Re S. & J. Pharmacies, Inc. v. Axelrod, 91 A.D.2d 1131, 458 N.Y.S.2d 728 (3d Dept. 1983), where evidence sufficiently established that a pharmacy violated Public Health Law §3396 based on: 1) an unaccounted for shortage of over 2,100 pills and capsules constituting controlled substances; 2) overages of 189 other pills and capsules within five-month audit period; 3) a filling of 24 oral and/or written prescriptions for controlled substances with each missing required information; and 4) a failure to notify the Bureau of Narcotics Enforcement of alleged theft of controlled substances.

An indictment stating that a defendant "did sell" marihuana but which omitted the words "knowingly and unlawfully" was dismissed as defective in 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 (3d Dept. 1974). Since knowledge and unlawfulness are essential elements of the offense of criminal sale of a controlled substance or marihuana, an indictment which omits allegations of these elements cannot be cured by a bill of particulars. By contrast it is not necessary for an indictment charging criminal sale of a controlled substance or marihuana to name the buyer or designate the date on which the illicit drugs are alleged to have been sold. This information may be obtained by a defendant by means of a demand for a bill of particulars. See People v. Taylor, 70 Misc.2d 970, 335 N.Y.S.2d 324 (Dutchess Co. Ct. 1972).

1. Sufficient Evidence That Drug Was Sold

The physical corpus of the drug allegedly sold need not be in evidence before the grand jury has legally sufficient evidence to indict the defendant for criminal sale of a controlled substance or marihuana, when a certified laboratory report attests that the drug is or contains a controlled substance or marihuana. CPL §190.30(2). See People v. Lynch, 85 A.D.2d 126, 447 N.Y.S.2d 104 (4th Dept. 1982) (the court asserted the following test for permitting purchaser-users to testify as to the specific drugs purchased when the illegal substance is not available for analysis: the experience of the witness and the nature of his qualifications to identify the substance at issue.) See also People v. Jones, 63 A.D.2d 582, 404 N.Y.S.2d 622 (1st Dept. 1978) (criminal sale of drugs by offer can be established without introducing into evidence the actual subject matter of the offer); People v. Peluso, 29 N.Y.2d 605, 324 N.Y.S.2d 404 (1971) (an indictment must be reinstated where the undercover police officer had testified to the grand jury that (1) the defendant had offered to sell him "purple acid"; (2) the defendant had

sold him a drug; (3) the laboratory certificate presented to the grand jury established that the drug obtained was LSD; and (4) the drug had been turned over to the laboratory by that undercover police officer).

2. Identification of Narcotic

In People v. Gilmour, 78 Misc.2d 383, 354 N.Y.S.2d 52 (N.Y.C. Crim. Ct. Queens Co. 1974), the court held that marihuana which was the alleged subject of a sale was sufficiently identified when introduced into evidence, applying mathematical theories of logic and substitution. Two equal and identical quantities were the subject of possession charges and another equal, identical quantity had allegedly been sold, but it was not clear exactly which specific quantity of the three had been sold. See Section C(3) for a more detailed discussion of Gilmour.

Narcotics purchaser-users may be qualified as experts, if a proper foundation is laid, to testify that the substance they purchased was a narcotic. People v. Jewsbury, 115 A.D.2d 341, 496 N.Y.S.2d 164 (4th Dept. 1985); People v. Lynch, 85 A.D.2d 126, 447 N.Y.S.2d 549 (4th Dept. 1982).

3. No Need to Prove Potential for Abuse

The People are not required to prove, in a prosecution for sale of a controlled substance, that the controlled substance has a potential for abuse since its designation as a controlled substance by the Legislature in the Penal Law conclusively establishes this fact. People v. Thomson, 49 A.D.2d 999, 374 N.Y.S.2d 153 (3d Dept. 1975). Nor can a defendant charged with selling methamphetamine argue that the Penal Law provisions proscribing its sale without authorization under the Public Health Law are unconstitutional on the ground that there are non-narcotic, non-stimulant salts of methamphetamine when concededly the defendant

sold narcotic methamphetamine. Ibid.

4. Presence at Situs of Sale Not Basis For Criminal Liability

D shared an apartment with S. B testified that he approached D and asked where he (B) could get some marihuana; D told him to go to D's apartment. B further testified that he went to the apartment, and saw two plastic bags containing marihuana on a table. He took the bags, placed $40 on the table, and left. D testified that B merely asked where S could be found and D had told B to come to the apartment. S testified that the marihuana was his and that he kept the $40. Is D guilty of criminal sale of marihuana beyond a reasonable doubt? No. "There is no direct evidence of the defendant making a sale and whatever inferences or circumstantial evidence there may be, it is not sufficient to satisfy the rule of reasonable doubt." People v. Reagan, 45 A.D.2d 773, 356 N.Y.S.2d 128, 130 (3d Dept. 1974).

See also People v. Reyes, 82 A.D.2d 925, 440 N.Y.S.2d 674 (2d Dept. 1981) (the defendant, bodyguard to a narcotics seller, was merely present in the apartment where the narcotics sale was transacted; accordingly, defendant cannot be criminally liable as an aider and abettor).

5. Circumstantial Evidence of Sale

The Appellate Division, First Department in People v. Rivera, 59 A.D.2d 874, 399 N.Y.S.2d 662 (1st Dept. 1977), dismissed an indictment charging criminal sale of a controlled substance because at the trial, the informant became hostile and would not testify to the sale. The undercover policeman had received the radio transmission from the "wired" informant at a point from which he could not observe the sale. The officer had admitted at trial that he could not testify to the details of

the sale and that there were many voices on the tape recording of the transmission. The court stated that to convict the defendant on circumstantial evidence requires "positive proof of the facts from which the inference of guilt may be drawn, and that the inference of guilt is the only one which can reasonably be drawn [citation omitted]." Id., 399 N.Y.S.2d at 664. See also People v. Cohen, 43 N.Y.2d 872, 403 N.Y.S.2d 463 (1978) (guilt was not established circumstantially where the only proof of defendant's alleged participation in the narcotics sale was evidence that he received money from the seller shortly after the transaction).

Police officers observed defendants A and B meet with S. S later testified for the prosecution at the trial of A and B that they had given him heroin, and that they left and returned with another one-half ounce when he told them that he wanted more. The officers observed A and B leave their meeting place with S, and return shortly thereafter in an automobile, from which a napkin was thrown. The officers arrested S just before arresting A and B and found heroin in the napkin. The officers' observations were held to sufficiently corroborate accomplice S's testimony. People v. Brannon, 58 A.D.2d 34, 394 N.Y.S.2d 974 (4th Dept. 1977). See also People v. Cunningham, 48 N.Y.2d 938, 425 N.Y.S.2d 59 (1979).

6. Evidence of Prior Sales

If a defendant is charged with criminal sale of a controlled substance or marihuana, evidence of prior dealings in drugs to show a common scheme or plan is only admissible if the evidence of the prior sales is sufficiently specific to permit refutation. People v. Brannon, supra. Generally, such information is admitted to demonstrate the method

of operation. However, such information should be received cautiously. In its charge to the jury, the court should caution them to utilize such information solely for the limited purpose justifying its admission, and reinforce the jury's responsibility to determine the question of guilt or innocence solely on those charges found in the indictment. People v. Williams, 50 N.Y.2d 996, 431 N.Y.S.2d 477 (1980).

Where the defendant was convicted of one criminal sale to an undercover police officer, CPL §40.20(2) does not preclude his prosecution for a second criminal sale to the same officer at the same place transacted forty-eight hours later. People v. Robinson, 65 A.D.2d 896, 410 N.Y.S.2d 409 (3d Dept. 1978).

(2) Defenses

(a) Agency

1. Origin of the Agency Defense

In the 1960's, appellate courts ruled that a person who procures dangerous drugs (now classified as controlled substances or marihuana) from a third party at a buyer's request and who intends to confer a benefit on the buyer and not himself, acts as "agent" for the buyer rather than as a seller and is, therefore, not criminally liable for the sale. See People v. Ivory, 27 A.D.2d 844, 277 N.Y.S.2d 925 (2d Dept. 1967); People v. Fortes, 24 A.D.2d 428, 260 N.Y.S.2d 716 (1st Dept. 1965); People v. Miller, 24 A.D.2d 1023, 267 N.Y.S.2d 170 (2d Dept. 1965); People v. Silverman, 23 A.D.2d 947, 260 N.Y.S.2d 43 (3d Dept. 1965); People v. Lindsey, 16 A.D.2d 805, 228 N.Y.S.2d 427 (2d Dept. 1962), aff'd, 12 N.Y.2d 958, 238 N.Y.S.2d 956 (1963); People v. Branch, 13 A.D.2d 714, 213 N.Y.S.2d 535 (4th Dept. 1961). In Branch and Lindsey, the courts, in reversing the defendants' convictions for selling

dangerous drugs, noted that defendants had not realized any personal or financial benefit from the sales.

Prior to 1978, the New York Court of Appeals had tacitly recognized the agency defense primarily by affirming, without opinion, several Appellate Division decisions where the agency defense was at issue. See People v. Harris, 24 N.Y.2d 810, 300 N.Y.S.2d 589 (1969), aff'g 28 A.D.2d 1174, 284 N.Y.S.2d 638 (3d Dept. 1967). People v. Lindsey, supra; People v. Wright, 15 N.Y.2d 555, 254 N.Y.S.2d 368 (1964), aff'g, 20 A.D.2d 652, 246 N.Y.S.2d 250 (2d Dept. 1964); People v. Bray, 15 N.Y.2d 637, 255 N.Y.S.2d 862 (1964), aff'g 21 A.D.2d 696, 251 N.Y.S.2d 930 (2d Dept. 1964). In People v. Carr, 41 N.Y.2d 847, 393 N.Y.S.2d 708 (1977), the New York Court of Appeals indirectly approved the agency defense by reversing a conviction upheld by the Appellate Division on the dissenting memorandum of that court. The Appellate Division had affirmed the refusal of the trial court, in a prosecution for sale of a controlled substance, to charge possession of a controlled substance as a lesser included offense. The dissent to that Appellate Division opinion was based on the premise that since the jury could have found that the defendant was the agent of the buyer, it could have convicted him of criminal possession and acquitted him of criminal sale and therefore criminal possession should have been charged as a lesser included offense. However, the New York Court of Appeals never specifically considered the scope of the agency defense until 1978.

2. The Agency Defense: Definition and Scope

In 1978, the New York Court of Appeals decided four cases in which it recognized the agency defense and set forth the principles governing its application, clarifying the earlier precedents. See People v. Roche,

45 N.Y.2d 78, 407 N.Y.S.2d 682 (1978), cert. denied, 439 U.S. 958 (1979); People v. Lam Lek Chong, 45 N.Y.2d 64, 407 N.Y.S.2d 674 (1978), cert. denied, 439 U.S. 935 (1979); People v. Argibay, 45 N.Y.2d 45, 407 N.Y.S.2d 664 (1978), cert. denied, 439 U.S. 930 (1979); People v. Sierra, 45 N.Y.2d 56, 407 N.Y.S.2d 669 (1978). In Roche, the Court stated that "the underlying theory of the agency defense in drug cases is that one who acts as procuring agent for the buyer alone is a principal or conspirator in the purchase rather than the sale of the contraband. Since the thrust of our statutes, as consistently construed, is not directed against purchasers, an individual who participates in such a transaction solely to assist a buyer and only on his behalf, incurs no greater criminal liability than does the purchaser he aids and from whom his entire standing in the transaction is derived." People v. Roche, supra, 407 N.Y.S.2d at 685. The Court declared that the reason for the evolution of the agency defense and its acceptance by the Legislature, which has not seen fit to eliminate the defense, is a recognition of the sociological fact that not all who aid in procuring drugs are predators motivated by profit; they "may include persons as diverse as impressionable students, victims of contributing socioeconomic or medical problems, and others who have been seduced by exposure to drugs to fall into a state of dependency on them." Id. Thus, in Roche, defendant was approached several times by the undercover police officer, who after several attempts, succeeded in inducing Roche to arrange a drug sale. The officer saw Roche take the narcotics from a third party at a certain discotheque. When the officer later complained about the quality of the drug that he bought, Roche did not offer to make any adjustment. The Court of Appeals affirmed the Appellate Division's finding that defendant

Roche was entitled to a jury charge on the agency defense.

By contrast, a broker or middleman is not entitled to an agency charge. See People v. Argibay, supra, and People v. Lam Lek Chong, supra. The Court of Appeals found that a defendant who arranged major narcotics sales without payment in order to induce investment in his businesses, was a broker. Therefore the Court ruled that the defendant was not entitled to have the jury instructed that they could find him to be an agent of the buyer and must acquit him if they so found. People v. Lam Lek Chong, supra.

3. Determination of Agency - Burden And Standard of Proof

Agency, unlike entrapment, is not an affirmative defense. It is a defense, which the People have the burden of disproving beyond a reasonable doubt. See People v. Roche, supra; People v. Berge, 103 A.D.2d 1041, 478 N.Y.S.2d 433 (4th Dept. 1984). Since the burden of proof is on the People to disprove agency beyond a reasonable doubt once the defense is raised, a trial court's charge to the jury that if they found beyond a reasonable doubt that the defendant acted as the buyer's agent, they must acquit him, was erroneous since it shifted the burden of proof to the defendant. See People v. Rodriguez, 56 A.D.2d 545, 391 N.Y.S.2d 591 (1st Dept. 1977).

People v. Gonzalez, 66 A.D.2d 828, 411 N.Y.S.2d 632, 633 (2d Dept. 1978), sets forth a number of questions to be weighed by the jury in determining agency.

> (1) Did the defendant act as a mere extension of the buyer throughout the relationship, with no independent desire to promote the transaction?

(2) Was the purchase suggested by the buyer?

(3) Did the defendant have any previous acquaintance with the seller?

(4) Did the defendant exhibit any salesman-like behavior?

(5) Did the defendant use his own funds?

(6) Did the defendant procure from many sources for a single buyer?

(7) Did the buyer pay the seller directly?

(8) Did the defendant stand to profit?

(9) Was any reward promised in advance?

See People v. Walton, 119 A.D.2d 889, 500 N.Y.S.2d 844 (3d Dept. 1986); People v. Jones, 107 A.D.2d 714, 484 N.Y.S.2d 69 (2d Dept. 1985) (evidence that defendant demonstrated salesmanship and a familiarity with narcotics trafficking procedures and slang, that defendant's first two sales of narcotics were in response to undercover officer's request -- but that defendant initiated the third transaction, and received a "tip" for the first two transactions -- sustained finding that defendant was not solely an agent of the officer and was guilty of selling or intending to sell narcotics.) See also People v. Mauras, 100 A.D.2d 557, 473 N.Y.S.2d 262 (2d Dept. 1984); People v. Jeffrey, 78 A.D.2d 768, 433 N.Y.S.2d 649 (4th Dept. 1980); People v. Bethea, 73 A.D.2d 920, 423 N.Y.S.2d 244 (2d Dept. 1980).

Even if a defendant receives financial gain from having participated in a transaction, he is not precluded from being an agent of the buyer. See, e.g., People v. Sanders, 111 A.D.2d 525, 489 N.Y.S.2d 398 (3d Dept. 1985). The Appellate Division held that the trial court's charge to the contrary was error, but that the error was harmless since no reasonable

view of the evidence to supported defendant's contention that he was acting as an agent. See also People v. Feldman, 50 N.Y.2d 500, 429 N.Y.S.2d 602 (1980). Defendant must request the instruction, and take exception to the court's charge, or at least mention the defense of agency in his summation to preserve the error for appellate review. Failure to preserve closes all channels for review except that the Appellate Division has the discretion to review in the interests of justice. See also People v. Darrisaw, 49 N.Y.2d 786, 426 N.Y.S.2d 728 (1980); People v. Bryant, 106 A.D.2d 650, 483 N.Y.S.2d 117 (2d Dept. 1984); People v. McKinney, 82 A.D.2d 895, 440 N.Y.S.2d 285 (2d Dept. 1981); People v. Henn, 79 A.D.2d 852, 434 N.Y.S.2d 496 (4th Dept. 1980); People v. Rodriguez, 76 A.D.2d 937, 432 N.Y.S.2d 859 (2d Dept. 1980).

For examples of the use of the agency instruction, see People v. Cotrofeld, 86 A.D.2d 940, 448 N.Y.S.2d 578 (3d Dept. 1982) (the existence of an agency relationship should be submitted to the jury with appropriate instructions if a reasonable view of the evidence reveals that the defendant acted as a mere instrumentality of the buyer.) See People v. Argibay, supra; People v. Echols, 75 A.D.2d 531, 426 N.Y.S.2d 776 (1st Dept. 1980); People v. Darrisaw, 68 A.D.2d 822, 414 N.Y.S.2d 316 (1st Dept. 1979), rev'd on other grounds, 49 N.Y.2d 786, 426 N.Y.S.2d 728 (1980) (defendant received no money for his participation in the sale but only a "taste" of the drugs); People v. Turner, 66 A.D.2d 904, 412 N.Y.S.2d 627 (2d Dept. 1978); People v. Coleman, 59 A.D.2d 690, 399 N.Y.S.2d 1 (1st Dept. 1977) (defendant received only two $10 tips for arranging the sale); People v. Melendez, 57 A.D.2d 522, 393 N.Y.S.2d 567 (1st Dept. 1977) (defendant testified that he procured the drugs without payment as a favor to his addict friend, the informant); and People v.

Johnston, 47 A.D.2d 897, 366 N.Y.S.2d 198 (2d Dept. 1975) (the officers actively induced defendants, who had no history of selling narcotics, to arrange the sale to have a charge against them to provide inducement for their penetration of a district attorney's office as informants to get evidence of alleged corruption). But see People v. Sundholm, 58 A.D.2d 224, 396 N.Y.S.2d 529 (4th Dept. 1977), where the court held that even though drugs were abandoned by another in defendant's room, as a matter of law defendant had assumed ownership by selling them, and therefore he was not entitled to an agency charge.

In People v. Argibay, 45 N.Y.2d 45, 407 N.Y.S.2d 664 (1978), cert. denied, 439 U.S. 930 (1979), the Court of Appeals held that where the evidence establishes only that defendant was the seller's agent (broker), he is not entitled to an agency instruction. See also People v. Fortner, 78 A.D.2d 661, 432 N.Y.S.2d 222 (2d Dept. 1980), where defendant's salesmanlike conduct was the basis for the court's affirming his conviction and People v. Windley, 78 A.D.2d 55, 434 N.Y.S.2d 211 (1st Dept. 1980), where the court affirmed the conviction, citing the defendant's lack of a prior relationship with the buyer and his acquaintance with the seller for ten years. Further, in Windley the facts clearly established that defendant took the initiative in the drug transaction and gave the overall appearance of being an integral part of a two-person drug operation.

Lack of personal and financial gain from the transaction is not essential to establish agency; therefore, it is error for the trial court to charge the jury that if they find that the defendant received some personal or financial gain, they cannot find that he acted as the buyer's agent. See generally People v. Mauras, 100 A.D.2d 557, 473 N.Y.S.2d 262

(2nd Dept. 1984) (jury may properly conclude that defendant acted solely as agent for buyer even though he received benefit or profit). See People v. Satloff, 82 A.D.2d 896, 441 N.Y.S.2d 96 (2d Dept. 1981), aff'd, 56 N.Y.2d 745, 452 N.Y.S.2d 12 (1982) (an instruction that the defendant could be an agent and receive personal or financial gain from the principal was proper). See People v. Lee, 79 A.D.2d 641, 433 N.Y.S.2d 610 (2d Dept. 1980); People v. Jenkins, 77 A.D.2d 912, 431 N.Y.S.2d 77 (2d Dept. 1980); People v. Rivera, 74 A.D.2d 882, 426 N.Y.S.2d 515 (2d Dept. 1980); People v. Peters, 71 A.D.2d 641, 418 N.Y.S.2d 472 (2d Dept. 1979); People v. Mercado, 64 A.D.2d 530, 406 N.Y.S.2d 487 (1st Dept. 1978); People v. Callahan, 61 A.D.2d 1015, 402 N.Y.S.2d 621 (2d Dept. 1978); People v. Rios, 61 A.D.2d 911, 403 N.Y.S.2d 2 (1st Dept. 1978); People v. Adams, 60 A.D.2d 811, 401 N.Y.S.2d 1 (1st Dept. 1978); People v. Brown, 60 A.D.2d 917, 401 N.Y.S.2d 572 (2d Dept. 1978); People v. Rodriguez, 56 A.D.2d 545, 391 N.Y.S.2d 591 (1st Dept. 1977); People v. Valentine, 55 A.D.2d 585, 390 N.Y.S.2d 3 (1st Dept. 1976). In People v. Lee, supra, the court found that the issue of the accused's profit from the narcotics transaction is but one factor to be considered by the jury in evaluating the agency defense. Although the Appellate Division has reversed "in the interests of justice" where defense counsel failed to object to such an erroneous charge (see People v. Brown, supra; People v. Callahan, supra), the New York Court of Appeals has held that a failure to object to this charge precludes review in that Court. See People v. Argibay, supra. In People v. Jones, 107 A.D.2d 714, 484 N.Y.S.2d 69 (2d Dept. 1985) the court held that although it would have been preferable for the trial judge to have provided the jury with more detailed guidance

concerning the application of factors which may be used to determine whether an agency relationship exists, the issue would not be considered for the first time on appeal where the charge was not objected to.

It has been held that even if the undercover officer testifies that there were two sales but defendant testifies that he facilitated only one sale and acted in that transaction as the officer's agent, defendant is still entitled to an agency charge on both since a jury may believe any portions of the evidence presented by the prosecution and the defense. See People v. Rankin, 55 A.D.2d 826, 390 N.Y.S.2d 304 (2d Dept. 1976).

Appellate courts have held that agency was not disproved beyond a reasonable doubt as a matter of law in cases where the officers or informant went to great length to induce a sale; in such cases, the agency defense seems to overlap with the affirmative defense of entrapment. See People v. Garay, ___ A.D.2d___, 512 N.Y.S.2d 807 (1st Dept. 1987) (defendant's testimony alone was sufficient to have warranted an agency charge to the jury; further, reliance on an entrapment defense does not preclude submission to the jury of an agency charge). People v. Munoz, 54 A.D.2d 844, 388 N.Y.S.2d 307 (1st Dept. 1976) (defendant, a patient in a methadone program, was induced by his supervisor in the program, who acted as the informant for the police, to arrange a drug sale); People v. Gonzales, 66 A.D.2d 828, 411 N.Y.S.2d 632 (2d Dept. 1978) (officers threatened defendant, who had no history of drug selling, to induce him to arrange a sale); see also People v. Whitter, 54 A.D.2d 987, 388 N.Y.S.2d 661 (2d Dept. 1976) (defendant, who realized no profit, was motivated by compassion for the allegedly "sick" addicted buyer).

Where the only proof of agency is defendant's testimony, and the jury rejects it, appellate courts have refused to reverse a conviction

for criminal sale, since credibility is the province of the jury. See People v. Belknap, 57 A.D.2d 970, 394 N.Y.S.2d 94 (3d Dept. 1977). See also People v. DeZimm, 102 A.D.2d 633, 479 N.Y.S.2d 859 (3d Dept. 1984), where the Appellate Division held again that evidence of whether defendant acted solely as agent of buyer, including evidence that defendant purchased more cocaine from his supplier than he sold to buyer, presented a jury question. See also People v. Caban, 118 A.D.2d 957, 500 N.Y.S.2d 183 (3d Dept. 1986) where that court held that evidence that defendant possessed a quantity of marihuana at the time of his arrest (several months later) was properly received by the jury for purposes of discrediting the entrapment and agency defenses. However, it is not harmless error where defendant was not allowed to testify as to why he obtained drugs for an undercover officer. The court held that this effectively precluded the jury from determining defendant's intent to sell. People v. Ellison, ___ A.D.2d ___, 513 N.Y.S.2d 213 (2d Dept. 1987).

4. Admissibility of Evidence of Prior Drug Activity Where Agency Defense Is Raised

Evidence of prior convictions of violations of the law governing controlled substances or marihuana is admissible on the People's direct case as evidence of motive and intent. People v. Heffron, 59 A.D.2d 263, 399 N.Y.S.2d 501 (4th Dept. 1977); People v. O'Keefe, 87 Misc.2d 739, 386 N.Y.S.2d 934 (Sup. Ct. Westchester Co. 1976). Similarly, a defendant may be cross-examined about prior drug-related convictions but not about pending indictments or withdrawn guilty pleas. See People v. Heffron, supra; see also People v. Darrisaw, 68 A.D.2d 822, 414 N.Y.S.2d 316 (1st Dept. 1979), rev'd on other grounds, 49 N.Y.2d 786, 426 N.Y.S.2d 728

(1980).

5. Inapplicability of Agency Defense to Criminal Possession

Agency is no defense to a charge of criminal possession of a controlled substance or marihuana. In People v. Sierra, 45 N.Y.2d 56, 407 N.Y.S.2d 669 (1978), the New York Court of Appeals approved a trial court's refusal to charge the jury that if they found that the defendant barmaid, who had received $20 for passing $195 worth of cocaine to an undercover officer, had acted as an agent in arranging the sale, she should be acquitted on a charge of criminal possession. The Court of Appeals also rejected defendant's argument that she could not be convicted of criminal possession because she did not own the cocaine and her possession of it was brief and transitory. See also People v. Henderson, 64 A.D.2d 906, 407 N.Y.S.2d 888 (2d Dept. 1978), and People v. Lauder, 65 A.D.2d 520, 409 N.Y.S.2d 222 (1st Dept. 1978), citing Sierra and the similar, earlier case of People v. O'Keefe, 87 Misc.2d 739, 386 N.Y.S.2d 934 (Sup. Ct. Westchester Co. 1976).

6. Repugnant Verdicts

A verdict of guilty of criminal possession with intent to sell is repugnant to a verdict of acquittal of sale based on a finding of agency. People v. Lucas, 80 A.D.2d 836, 436 N.Y.S.2d 334 (2d Dept. 1981); People v. Rodriguez, 74 A.D.2d 858, 425 N.Y.S.2d 372 (2d Dept. 1980) aff'd, 53 N.Y.2d 991, 441 N.Y.S.2d 672 (1981); People v. Cintron, 67 A.D.2d 1007, 413 N.Y.S.2d 745 (2d Dept. 1979); People v. Perez, 60 A.D.2d 656, 400 N.Y.S.2d 559 (2d Dept. 1977).

7. Criminal Facilitation

Penal Law §§115.00, 115.01, 115.05, and 115.08 proscribe various

degrees of "criminal facilitation," i.e., engaging in conduct which provides someone with the means or opportunity to commit a felony (or any crime if the person committing the crime is under sixteen), believing it probable that one is thus enabling a person to commit a crime. A charge of criminal facilitation in the second degree -- the facilitation of a class A felony with the belief that one is probably facilitating a class A felony (Penal Law §115.05) -- might under certain circumstances be applied to an agent who arranges a major drug sale. Although merely telling an undercover officer where to purchase drugs is insufficient to support a conviction for criminal facilitation (People v. Gordon, 32 N.Y.2d 62, 343 N.Y.S.2d 103 [1973]), the court in People v. Volante, 75 Misc.2d 400, 347 N.Y.S.2d 836 (Sup. Ct. N.Y. Co. 1973), dismissed an indictment for criminal sale for insufficient evidence without prejudice to the filing of new charges of criminal facilitation where the defendant had accompanied the undercover officer to the seller's apartment and gave the seller his car keys so the latter could get the narcotics. See also People v. Kiser, 63 A.D.2d 707, 404 N.Y.S.2d 1005 (2d Dept. 1978), where the court held that a defendant who had arranged a sale but not profited from it and who had no prior dealings with the seller could have been charged as a facilitator, citing Volante. The defendants in Volante and Kiser arguably acted as buyer's agents, yet the courts held, though finding insufficient evidence of sale, that they could be charged with criminal facilitation. Evidence that defendant cut up her stockings to use as masks and gave gloves to her husband established a prima facie case of criminal facilitation. People v. Letizia, 122 A.D.2d 555, 504 N.Y.S.2d 945 (4th Dept. 1986).

However, criminal facilitation is not a lesser included offense of

sale. People v. Luther, 61 N.Y.2d 724, 472 N.Y.S.2d 614 (1984); People v. Glover, 57 N.Y.2d 61, 453 N.Y.S.2d 660 (1982); People v. Parks, 99 A.D.2d 537, 471 N.Y.S.2d 327 (2d Dept. 1984); People v. Fischer, 94 A.D.2d 706, 462 N.Y.S.2d 64 (2d Dept. 1984).

(b) Entrapment (Affirmative Defense)

Where the record established that police arranged for defendant to purchase heroin after considerable persuasion and did so to "have something" to induce him and others to "penetrate" a District Attorney's office by attempting to bribe the staff there, the defendant was entitled to a charge to the jury on the affirmative defense of "entrapment." People v. Johnston, 47 A.D.2d 897, 366 N.Y.S.2d 198 (2d Dept. 1975). This defense is proved if the defendant establishes by a preponderance of the evidence that, but for the inducement of a government agent, he would not have committed the crime; it is a question of fact (Penal Law §40.05). See People v. Singer, 101 A.D.2d 606, 474 N.Y.S.2d 854 (3rd Dept. 1984). A defendant was entitled to a charge to the jury on entrapment where the record established that an informant, who was "cooperating" with the police in an effort to obtain a favorable disposition in his own criminal sale case, repeatedly importuned the defendant to sell him a quantity of a controlled substance, abandoned in the defendant's apartment by another, and the defendant, after refusing several times, finally capitulated. People v. Sundholm, 58 A.D.2d 224, 396 N.Y.S.2d 529 (4th Dept. 1977). A defendant is also entitled to a charge of entrapment where defendant acted because he claims the undercover officer promised to help defendant move his family from a drug infested neighborhood. People v. Navarro, 104 A.D.2d 958, 480 N.Y.S.2d 575 (2d Dept. 1984).

Similarly, it was reversible error for the trial court to refuse to charge the jury on entrapment where there was evidence that defendant repeatedly refused to arrange a drug sale for two months, that defendant had not dealt with drugs since his release from prison, and that he owed a debt of gratitude to the informant who persuaded him to arrange the sale. See People v. Lauder, 65 A.D.2d 520, 409 N.Y.S.2d 222 (1st Dept. 1978).

Guilt must be established beyond a reasonable doubt before a jury may even consider the affirmative defense of entrapment. People v. Fusaro, 77 A.D.2d 627, 430 N.Y.S.2d 125 (2d Dept. 1980); People v. Lawson, 75 A.D.2d 607, 426 N.Y.S.2d 791 (2d Dept. 1980); People v. Morris, 68 A.D.2d 893, 413 N.Y.S.2d 757 (2d Dept. 1979); People v. Johnston, supra. Therefore, it is error for a court to instruct the jury that it must first determine whether the defendant has proved his defense by a preponderance of the evidence and if they find that he has not, then consider whether the People have proven his guilt beyond a reasonable doubt. In People v. Aharonowicz, ___ A.D.2d ___, 509 N.Y.S.2d 869 (2d Dept. 1986), the court held that a defendant has an "absolute and unqualified" right, whether or not he takes the stand, to adduce evidence of good character in order to raise an inference of entrapment. The court found that defendant's good character was particularly probative as he had no prior convictions. Also, it is reversible error to refuse to allow defendant to testify as to statements made to him by an informant. The Court of Appeals held that the informant's statements were admissible to show inducement and defendant's state of mind, thus showing entrapment. People v. Minor, 69 N.Y.2d 779, 513 N.Y.S.2d 107 (1987).

(c) Police Conduct Amounting to a Denial of Due Process

Even if a defendant's entrapment defense is rejected by a jury, a court may dismiss the indictment if police conduct is so outrageous as to deny defendant due process under the New York State Constitution. In People v. Isaacson, 44 N.Y.2d 511, 406 N.Y.S.2d 714 (1978), the New York Court of Appeals ruled that, in determining whether due process had been denied by police conduct, the following illustrative factors should be considered: (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime was overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

> No one of these submitted factors is in itself determinative but each should be viewed in combination with all pertinent aspects and in the context of proper law enforcement objectives--the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness. As a bare minimum, there should be a purposeful eschewal of illegality or egregious foul play. A prosecution conceived in or nurtured by such conduct, as exemplified in these guidelines, so as to cast aside and mock "that fundamental fairness essential to the very concept of justice" should be forbidden under traditional due process principles.

Id., 406 N.Y.S.2d at 719-720.

Accordingly, the Court found that the record established that (1) the police arrested one Breniman for possession of "amphetamine" which, upon chemical analysis, proved to be caffeine; (2) the police beat Breniman and threatened him with a prosecution for possession of a controlled substance, although they knew the substance he had possessed was caffeine, unless he arranged for them to make an arrest for the sale of at least two ounces of cocaine; (3) Breniman contacted an acquaintance, defendant, a Pennsylvania resident and casual user of drugs, and importuned him to make the sale because Breniman needed money for his defense; (4) defendant contacted a friend of a friend of his girlfriend, and procured the cocaine; and (5) defendant met Breniman in a bar, which Breniman told defendant was in Pennsylvania, but which was actually just over border in New York, whereupon the police arrested defendant. The Court stated:

> Applying...[the illustrative] factors to this case, first we find the manufacture and creation of crime. At most, and over his denial, the record shows that defendant had made small and rather casual sales of drugs. Indeed, it was established that he did not himself have access to the quantity of drugs sought by Breniman and for which he was arrested but was only directed to the source by one who testified against him. Doubtless, a crime of this magnitude would not have occurred without active and insistent encouragement and instigation by the police and their agent.
>
> Turning to the second component, serious police misconduct repugnant to a sense of justice is revealed. Initially, there was conceded abuse of Breniman at the substation. While this harm was visited upon a third party, it cannot be overlooked, for to do so would be to accept police brutality as long as it was not pointed directly at defendant

himself. Not only does the end not justify the means, but one should not be permitted to accomplish by indirection that which is prohibited by direction. More importantly, these actions set the pattern for further disregard of Breniman's rights in failing to reveal to him that the material he possessed on December 5 would not subject him to criminal charges (cf. Brady v. Maryland, 373 U.S. 83). This was deceptive, dishonest, and improper; it displayed a lawless attitude and, if countenanced, would suggest that the police are not bound by traditional notions of justice and fair play.

The third factor embraces a persistent effort to overcome defendant's reluctance to commit the crime. Breniman, as informant, played upon defendant's sympathy, their past relationship, and persevered in his request despite defendant's obvious unwillingness. Moreover, even if defendant was motivated by expectation of profit, the lure of exorbitant gain is not a proper basis to create crime for the purpose of obtaining convictions. With resistance so undermined, even a person not predisposed to crime may be enticed to violate the law.

Finally, there is the overriding police desire for a conviction of any individual. In this respect, one is immediately shocked by an incredible geographical shell game--a deceit which effected defendant's unknowing and unintended passage across the border into this State. While this outright fraud was ostensibly accomplished by an informant, he was acting at the behest of the police, who emphasized that the sale must take place in New York, and thus are chargeable with the tactics employed by their agent (citations omitted).

Of course, in a particular case it may be necessary for the police to apprehend a criminal who operates outside our borders, but this is not such a situation. There is no suggestion that defendant had previously sold great quantities of cocaine. In short, the police wanted a conviction and simply set two specifications--a large amount

> of the substance to denote a high grade of crime and a situs of sale in New York. There was no indication of any desire to prevent crime by cutting off the source and, thus, the conviction obtained became little more than a statistic.
> In sum, this case exposes the ugliness of police brutality, upon which was imposed a cunning subterfuge employed to enlist the services of an informant who, deceived into thinking he was facing a stiff prison sentence, desperately sought out any individual he could to satisfy the police thirst for a conviction, even of a resident of another state possessed of no intention to enter our confines. Separately considered, the items of conduct may not rise to a level justifying dismissal but viewed in totality they reveal a brazen and continuing pattern in disregard of fundamental rights.

Id., 406 N.Y.S.2d at 720.

By contrast see People v. Paccione, 99 Misc. 2d 1027, 417 N.Y.S.2d 850 (Nassau Co. Ct. 1979), a burglary prosecution where the court, applying the standards set forth in Isaacson, found no due process violation, although it condemned the police conduct in "bugging" the office of an investigator hired by defendants' attorney.

F. Other Drug Related Offenses

(1) Criminal Sale of a Controlled Substance in or near School Grounds - (Class B Felony - Penal Law 220.44)

Knowingly and unlawfully sells:

(a) controlled substance in violation of PL §220.34(1) through (6) to a person under 19 years old, when sale takes place on school grounds; or

(b) controlled substance in violation of PL §220.39(1) through (8) to a person under 19 years old, when sale takes place

on school grounds. PL §220.44

The maximum sentence for this offense shall be fixed by the court at no less than six years, and no more than 25 years. The minimum sentence must be fixed at one-third of the maximum term imposed and must be specified in the sentence. PL §70(2)(b).

(2) Criminally Possessing a Hypodermic Instrument (Class A Misdemeanor - Penal Law §220.45).

Knowingly and unlawfully possessing or selling a hypodermic syringe or hypodermic needle.

(a) Proof of Offense: Intent and Conduct

The elements of knowledge and unlawfulness in this offense are the same as those elements in criminal possession or sale of a controlled substance or marihuana; see discussion in Sections C(1) and E(1), supra. There is a conflict in the lower courts as to what constitutes a sufficient allegation of these elements in an information charging the offense of criminal possession of a hypodermic instrument. In People v. Cianciulli, 59 Misc.2d 187, 298 N.Y.S.2d 217 (Dist. Ct. Nassau Co. 1969), the court, on motion during the trial, dismissed an information which charged that "the defendant did wilfully, wrongfully, and unlaw- fully, violate the provisions of Section 220.45 of the Penal Law of the State of New York, in that at the time and place aforesaid, the said defendant did criminally possess hypodermic instruments...," id., 298 N.Y.S.2d at 218. The court found no allegation that the defendant had a culpable mental state, that is, that he knowingly unlawfully possessed the hypodermic instrument. Nevertheless, the court permitted the prosecutor to later file a sufficient information even though the jury had been sworn and the People's first witness had given some evidence. The court held that the

defendant was not thereby subjected to double jeopardy since "[t]he People's first information in this case was deficient to the point where it could not support a conviction, and when the defendant was tried upon such an information he was not placed in jeopardy...." Id., 298 N.Y.S.2d at 220. This view was rejected as "hypertechnical and unacceptable" by an appellate court in People v. Jinks, 63 Misc.2d 653, 313 N.Y.S.2d 158, 160 (Sup. Ct. App. Term 1970). In Jinks, the court found that an information charging a defendant with "wilfully, wrongfully, and unlawfully" possessing a hypodermic instrument was sufficient as it fairly apprised the defendant of the charge against him.

There is a line of cases involving possession of hypodermic instruments which holds that the burden of proving lawfulness of possession (or sale) by a preponderance of the evidence is on the defendant. People v. Strong, 47 A.D.2d 798, 365 N.Y.S.2d 310 (4th Dept. 1975), aff'd, 42 N.Y.2d 868, 397 N.Y.S.2d 779 (1977); People v. Gray, 68 Misc.2d 280, 327 N.Y.S.2d 201 (Dist. Ct. Nassau Co. 1st Dist. 1971); People v. Saul, 12 Misc.2d 356, 176 N.Y.S.2d 405 (Columbia Co. Ct. 1958); People v. Saul, supra, relied on the former Penal Law while People v. Gray, supra, and People v. Strong, supra, were based on the Public Health Law provisions which preceded and were substantially the same as the currently effective Public Health Law §3396(1):

> In any civil, criminal or administrative action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negate or disprove any exception, excuse, proviso or exemption contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the person claiming its benefit.

In Saul, the defendant unsuccessfully contended that the People had the burden of disproving his bald statement that he had lawfully obtained the hypodermic instrument pursuant to a prescription in Florida. In Gray and Strong, the defendants did not introduce any evidence concerning the lawfulness of their possession but unsuccessfully moved to dismiss on the ground that the People had not proved unlawfulness. In Saul, the court analogized the lawfulness of possession of a hypodermic needle to a license to carry firearms or operate a vehicle: the burden is on the defendant. The courts in Gray and Strong adhered to this principle. It should be noted that in People v. Vargas, 86 Misc.2d 1018, 384 N.Y.S.2d 643 (Sup. Ct. N.Y. Co. 1976), a case involving criminal sale of a controlled substance by a druggist who mistakenly believed he was selling pursuant to a valid prescription, the court held that the burden is on the People to disprove lawfulness. It distinguished Saul on the ground that it was decided under the former Penal Law and Strong and Gray involved charges of violations of the Public Health Law as well as the Penal Law. See Section C(1) supra for a detailed discussion of Vargas.

But cf. People v. Williams, 97 A.D.2d 491, 468 N.Y.S.2d 12 (2d Dept. 1983), where the Appellate Division, Second Department, held that in order to prove guilt beyond a reasonable doubt, the prosecution must establish defendant's knowledge of the presence of a hypodermic instrument in the vehicle in which he was apprehended.

The People are not required to prove that the hypodermic instrument that the defendant is charged with criminally possessing or selling is functional. People v. Strong, 42 N.Y.2d 368, 397 N.Y.S.2d 779 (1977), aff'g, 47 A.D.2d 798, 365 N.Y.S.2d 310 (4th Dept. 1975); People v. Jinks,

63 Misc.2d 653, 313 N.Y.S.2d 158 (Sup. Ct. App. Term 1970).

Circumstantial evidence supported the defendant's conviction for criminal possession of a hypodermic needle where the needle was found in the pocket of the defendant's jacket and the defendant never denied ownership of the jacket, which fit him. People v. Strong, supra.

(3) Criminal Injection of a Narcotic Drug (Class E Felony - Penal Law §220.46).

Knowingly and unlawfully possessing a narcotic drug and intentionally injecting by means of a hypodermic syringe or hypodermic needle all or any portion of that drug into another person's body with his consent.

(a) Proof of Offense: Intent and Conduct

There are two elements of both intent and conduct in this offense. The first is knowing and unlawful possession of a narcotic drug; the second is the intentional injection of that narcotic drug. The elements of "knowing and unlawful possession" are the same as those in the knowing unlawful possession of a controlled substance or marihuana. See Section C(1), supra, for a discussion of these elements of intent and conduct. The second element of intent and conduct in the offense of criminal injection of a narcotic drug is the intentional injection by means of a hypodermic syringe or a hypodermic needle of any portion of that drug into the body of another person with the latter's consent. "Injection" has its ordinary meaning and must be done "intentionally." Penal Law §15.05(1) defines "intentionally" as follows:

> A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is

to cause such result or to engage in such conduct.

(4) Criminally Using Drug Paraphernalia

(a) Degrees of Offenses

1. Criminally Using Drug Paraphernalia in the Second Degree (Class A Misdemeanor - Penal Law §220.50).

Knowingly possessing or selling:

1. Diluents, dilutants, or adulterants, including but not limited to, any of the following: quinine hydrochloride, mannitol, mannite, lactose or dextrose, adapted for the dilution of narcotic drugs or stimulants under circumstances evincing knowledge that some person intends to use the same for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant; or

2. Gelatine capsules, glassine envelopes or any other material suitable for the packaging of individual quantities of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use the same for the purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant.

2. Criminally Using Drug Paraphernalia in the First Degree (Class D Felony - Penal Law §220.55)

Criminal use of drug paraphernalia in the second degree by a person with a prior conviction for criminal use of drug paraphernalia in the second degree.

(b) Proof of Offense: Intent and Conduct

The elements of "knowledge," "possession," and "selling" in the

offense of criminally using drug parphernalia are the same as those involved in criminal possession and criminal sale of a controlled substance or marihuana; see discussion of these elements in Sections C(1) and E(1), supra.

The constitutionality of proscribing the criminal use of drug paraphernalia was challenged in 1972 in People v. Taylor, 70 Misc.2d 970, 335 N.Y.S.2d 324 (Dutchess Co. Ct. 1972). The defendant was charged, inter alia, with the crime of criminally using drug paraphernalia as proscribed by Penal Law §220.50(2) in that he "knowingly possessed material suitable for packaging individual quantities of narcotic drugs, to wit: a quantity of plastic bags, under circumstances evincing an intent to use the same for the purposes of unlawfully packaging and dispensing a narcotic drug, to wit: marihuana."* Id., 335 N.Y.S.2d at 326. The defendant moved to dismiss this count in the indictment on the ground that it failed to state a crime, or in the alternative, that Penal Law §220.50(2) was unconstitutional. The court disagreed, noting the strong presumption of validity accorded legislative enactments and stated that Penal Law §220.50 was a legitimate legislative effort to conquer the growing problem of the illegal distribution of narcotics. The court stated:

> The conduct proscribed is not the possession of a harmless innocuous "plastic bag" which can be used for many legitimate purposes so obvious as not to require recitation, but rather the taking of such an instrumentality "under circumstances" which clearly indicate a

Id., 335 N.Y.S.2d at 328.

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* This case arose prior to the Marihuana Reform Act of 1977 so marihuana was under the existing law a "controlled substance," loosely termed "narcotic."

> criminal purpose and objective, namely, unlawfully packaging and dispensing a narcotic drug contrary to the purposes for which the statute was enacted.

The court added that "[w]hile the burden upon the People to prove beyond a reasonable doubt that conduct is intended which violates the statute may be a heavy one, this fact alone is insufficient to declare unconstitutional a legislative enactment which is definite, precise and reasonable under modern living conditions existing in a society faced with the drug plague." Id. 335 N.Y.S.2d at 328-29.

The same principles which apply to determine possession of a controlled substance or marihuana apply to determine whether a defendant possesses drug paraphernalia; see Section C(1), supra. For example, in People v. Tirado, 47 A.D.2d 193, 366 N.Y.S.2d 140 (1st Dept. 1975), aff'd, 38 N.Y.2d 955, 384 N.Y.S.2d 151 (1976), the Appellate Division, First Department, held that the defendant's criminal possession of drug paraphernalia was proved beyond a reasonable doubt where the adulterants were found in the kitchen of the premises that defendant leased and the defendant was on the premises at the time that a lawful search under a warrant was conducted.

A defendant's guilt of criminally using drug paraphernalia may be proved by circumstantial evidence, provided that it excludes, to a moral certainty, every other reasonable hypothesis except guilt. See People v. Robertson, 61 A.D.2d 600, 403 N.Y.S.2d 234 (1st Dept. 1978), aff'd, 48 N.Y.2d 993, 425 N.Y.S.2d 545 (1980), discussed in Section C(1), supra, where the court concluded that "[t]he circumstantial evidence herein above summarized serves to conclusively link defendant with the exercise

of dominion and control over the apartment and as such justifies the jury's finding that defendant had constructive possession...." Id., 403 N.Y.S.2d at 240.

(c) Narrowly Drawn Civil Sanctions Against "Head Shops" Are Constitutional

In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186 (1982), the United States Supreme Court upheld the constitutionality of a village ordinance which requires a business to obtain a license costing $150 if it sells any items that are "designed or marketed for use with" illegal drugs. The village attorney prepared and distributed to the public licensing guidelines defining terms such as "pipes," "roach clips" and "paraphernalia." The ordinance made it unlawful to sell these items without the license or to sell any item to a minor. The business was required to file affidavits stating that the licensee and its employees had not been convicted of a drug-related offense. Further, the business was required to record all sales of these items, with names and addresses of all purchasers, and make these records available for police inspection. Finally, the manner of sale was regulated - for example, pipes must be covered if displayed within the proximity of "literature encouraging illegal use of cannabis or illegal drugs." The ordinance set fines at ten dollars to five hundred dollars; each day that a violation continued gave rise to a separate offense.

The Flipside, Hoffman Estates, Inc., an Illinois "head shop" (a store selling these items as well as tobacco, novelties, jewelry, magazines and phonograph records), sued for declaratory and injunctive relief, contending that the ordinance was unconstitutional on its face.

The Seventh Circuit Court of Appeals agreed. The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d 373 (1980), rev'd, 455 U.S. 489, 102 S.Ct. 1186 (1982), reh. denied, 456 U.S. 950 (1982).

In reversing the decision below and upholding the constitutionality of the ordinance, the United States Supreme Court rejected the contention that "designed or marketed for use" were impermissibly vague terms:

> Whatever ambiguities the "designed...for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Id., 102 S.Ct. at 1195.

New York State had a comprehensive legislative scheme, General Business Law, Article 39, adopted from a model drafted by the United States Drug Enforcement Administration, designed to impose civil penalties on any person, firm or corporation who possesses with intent to sell, offer for sale, or purchase "drug-related paraphernalia under circumstances evincing knowledge that the paraphernalia is possessed, sold, or purchased for [a drug-related purpose]." General Business Law §851. The drug-related paraphernalia and purposes are defined in General Business Law §850 (e.g., kits to grow marihuana, hypodermic needles, devices for cleaning marihuana, etc.) The proscribed conduct is declared to be a nuisance (General Business Law §852[3]). The person who sells

these specific drug-related items may have his selling license revoked (General Business Law §852[2]). The State Attorney General or any state or local health officer, town, village or city attorney, or the chief executive officer of a municipality may institute an action in a court of competent jurisdiction to enjoin any activity prohibited by §851. See General Business Law §853. If the court finds a violation, it may assess civil penalities in the amount of $1,000 to $10,000 for each violation.

However, the Appellate Division Courts for the second and first departments agree that county and town drug paraphernalia laws are preempted by comprehensive and detailed state statutes (General Business Law §850-853) in the field of drug-related paraphernalia. People v. Gless, 107 A.D.2d 607, 483 N.Y.S.2d 715 (1st Dept. 1985), aff'd, 65 N.Y.2d 669, 491 N.Y.S.2d 622 (1985); People v. Dougal, 102 A.D.2d 531, 477 N.Y.S.2d 381 (2d Dept. 1984), aff'd, 65 N.Y.2d 668, 491 N.Y.S.2d 622 (1985). On July 17, 1981, the United States District Court for the Southern District of New York in Franza v. Carey, 518 F.Supp. 324, 326 (1981), ruled that Article 39 of the General Business Law was unconstitutionally vague. The court found that the phrase in §850 requiring that the proscribed items be "designed for the purpose [of illegal drug use]" refers to the subjective intent of the alleged violator rather than the physical characteristics of a particular item." Id. at 335. The court found that the statute, unlike the Model Act on which it was based, contains no enforcement guidelines to aid officials in assessing the seller's actual intent. Would the sale of cigarette rolling paper, unaccompanied by a sale of tobacco, without more, establish a drug-related purpose? Although the statute gives notice of the prohibited conduct, a violation depends upon undefined circumstances,

with no guidance to law enforcement officials and courts. Accordingly, the court granted plaintiff "headshop" owners the declaratory and injunctive relief sought.

General Business Law Article 39 differs substantially from the ordinance upheld in Flipside. That ordinance provided guidelines for restricting the sale and display of items that could aid illegal drug use without prohibiting it outright. For example, under the ordinance, the drug-related item "paper," (rolling paper) if white, may be openly displayed; colored paper must be covered. The court in Flipside clearly ruled the Constitution requires that statutes and ordinances imposing penalties on the sale of drug-related paraphernalia must be drafted narrowly with very specific guidelines.

However, in Franza v. Carey, 102 A.D.2d 780, 478 N.Y.S.2d 873 (1st Dept. 1984), appeal dismissed, 64 N.Y.2d 886 (1985), the Appellate Division held, on the "clear" (id., at 780, 478 N.Y.S.2d at 873) authority of the Flipside decision, that Article 39 was not impermissibly vague. The court agreed that a "violation of Article 39 occurs only if the violator is shown to have a culpable intent.... The phrase in §851 of the General Business Law of -- under circumstances evincing knowledge' -- seems ... reasonably construed to require a showing that a retailer has reason from the circumstances to know... that the buyer of drug paraphernalia intends to use it for a proscribed purpose." Id. at 780, 478 N.Y.S.2d at 873.

(5) Criminal Possession of Precursors of Controlled Substances (Class E Felony - Penal Law §220.60).

Possession of the following accompanied by a present intent to manufacture a controlled substance unlawfully:

(a) carbamide (urea) and propanedioc and malonic acid or its derivatives; or

(b) ergot or an ergot derivative and diethylamine or dimethylformamide or diethylamide; or

(c) phenalacetone (1-phenyl-2 propanone) and hydroxylamine or ammonia for formamide or benzaldehyde or nitroethane or methylamine; or

(d) pentazocine and methyliodide; or

(e) phenylacetonitrile and dichlorodiethyl methylamine or dichlorodiethyl benzylamine; or

(f) diephyenylacetonitrile and dimethylaminoisopropyl chloride; or

(g) piperidine and cyclohexanone and bromobenzene and lithium or magnesium; or

(h) 2, 5-dimethoxy benzaldehyde and nitroethane and a reducing agent.

(a) Proof of Offense: Intent and Conduct

The element of possession is the same as that involved in criminal possession of a controlled substance or marihuana (see Section C[1], supra) that is, exercising dominion and control over these substances. There must be an accompanying intent to manufacture a controlled substance "unlawfully," that is, without a license to manufacture such a substance in accordance with the provisions of Article 33 of the Public Health Law.

(6) Criminal Sale of a Prescription for a Controlled Substance (Class C felony - Penal Law §220.65

A person is guilty of criminal sale of a prescription for a

controlled substance when, being a practitioner (Public Health Law §3302) he knowingly and unlawfully sells a prescription for a controlled substance. "Unlawfully" for the purposes of this section, means other than in good faith in the course of his professional practice. Criminal sale of a prescription is a class C felony.

(7) Drug Loitering Law; Loitering in the First Degree (Class B Misdemeanor - Penal Law §240.36).

Loitering or remaining in any place with one or more persons for the purpose of unlawfully using or possessing a controlled substance as defined in Article 220.

(a) Proof of Offense: Intent and Conduct

The conduct proscribed is "loitering" with the intent (the statute says "purpose") of unlawfully using or possessing a controlled substance.

Loitering has been construed by the courts to mean "to consume time idly, to linger, to delay, to spend time in a place in an idle manner, to travel indolently." People v. Nowak, 46 A.D.2d 469, 363 N.Y.S.2d 142, 145 (4th Dept. 1975); see also People v. Bell, 306 N.Y. 110 (1953).

Mere loitering on a public street cannot constitutionally be proscribed since it is innocent activity. People v. Diaz, 4 N.Y.2d 467, 176 N.Y.S.2d 313 (1958); see also Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211 (1965). A New York statute, former Penal Law §240.35(6), penalized any person who loitered under circumstances which justified only suspicion that he was about to commit a crime, but did not establish probable cause to believe that he was about to commit a crime, and who failed to identify himself or give a reasonably credible

account of his conduct and purpose to a peace officer upon inquiry. This statute was struck down as unconstitutional in People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33 (1973). The Court held that:

(1) this statute was so vague as to deny due process since it failed to give fair notice as to what conduct was proscribed;

(2) this statute gave the police unfettered discretion to arrest, violating the constitutional requirement that arrests are lawful only where there is probable cause to believe that a crime is, will be, or has been committed;

(3) this statute violated the "privileges and immunities" clause of the Fourteenth Amendment by restricting the free movement of citizens of the United States through the State of New York (citing Edwards v. California, 314 U.S. 160, 62 S.Ct. 164 [1941]).

A state can only constitutionally proscribe loitering if the loitering proscribed is:

(1) loitering in a restricted area such as a school or schoolgrounds or waterfront where the right to be present in the area is limited (People v. Merolla, 9 N.Y.2d 62, 211 N.Y.S.2d 155 [1961]; People v. Johnson, 6 N.Y.2d 549, 190 N.Y.S.2d 694 [1955]); or

(2) loitering for the purpose of committing, that is, with the intent to commit, another separate offense, such as loitering for the purpose of prostitution (People v. Smith, 89 Misc.2d 754, 393 N.Y.S.2d 239 [Sup. Ct. App. T. 1st Dept. 1977], aff'd, 44 N.Y.2d 613, 407 N.Y.S.2d 462

[1978]; People v. Barton, 105 Misc.2d 469, 432 N.Y.S.2d 312 [Buffalo City Ct. 1980]); or for the purpose of unlawfully using or possessing a controlled substance (People v. Pagnotta, 25 N.Y.2d 333, 305 N.Y.S.2d 484 [1969]).

The defendant in People v. Pagnotta, supra, challenged the constitutionality of former Penal Law §1533(5), the statute from which present Penal Law §240.36 was derived. The New York Court of Appeals ruled that former Penal Law §1533(5) was constitutional. The reasons given by the Court for upholding that statute are applicable to Penal Law §240.36, as the two statutes are substantially the same. The Court held that:

(1) the statute was a reasonable exercise of the police power since it was an attempt to protect persons from encountering dangerous addicts and had a connection with the commission of a crime.

(2) the statute gave persons fair notice of the conduct proscribed since it did not proscribe mere innocent loitering but required some overt act relating to unlawful use or possession of narcotics.

The Court added that since the defendants in the case before it possessed narcotics paraphernalia when they were arrested, they were not unconstitutionally penalized for a mere state of mind but had committed the constitutionally required overt act.

The constitutionality of present Penal Law §240.36 was challenged in a lower court in People v. L., 66 Misc.2d 191, 320 N.Y.S.2d 456 (Dist. Ct. Nassau Co. 1971). The court upheld the statute, stating that "a violation [of this statute] can only arise when the evidence discloses a pattern of behavior which transcends mere desire or intent."

Id., 320 N.Y.S.2d at 459. The court further declared that where the evidence of the overt act was circumstantial, it must establish "to a moral certainty" that the defendants are guilty. The information charging loitering with intent to unlawfully use or possess a controlled substance was dismissed because the evidence established only that there was a pipe containing a small amount of hashish on the table in a backyard where the defendants had gathered to play musical instruments.

The general loitering statute, Penal Law §240.35, proscribes various loitering offenses as a violation if they are committed in a public place. "Public place" is defined in Penal Law §240.00. This definition is set forth in Section A(2), supra, since it is applicable to certain marihuana offenses in Article 221. However, loitering in the first degree is proscribed in Penal Law §240.36 if it is committed in any place. This has been held not to include an apartment (People v. Nowak, 46 A.D.2d 469, 363 N.Y.S.2d 142 [4th Dept. 1975]), but to include the backyard of a private home (People v. Loehr, 65 Misc.2d 633, 318 N.Y.S.2d 544 [Dist. Ct. Nassau Co. 1971]). In People v. Nowak, supra, the Appellate Division, Fourth Department, dismissed an information charging first degree loitering where the defendants were caught with marihuana in a private apartment, which the sheriff's deputies had searched pursuant to a search warrant. The Appellate Division stated:

> [I]t is difficult to relate the concept of loitering to conduct within the privacy of an apartment. When applied to such an exclusive area the statute does not serve either of the fundamental purposes of loitering statutes by insulating members of the public from injury to their person or property or by materially assisting the police in maintaining the peace. A

> policeman on his rounds may well observe the type of loitering upon the street or in semi-public areas which suggests the need for further investigation or even apprehension. But conduct within the privacy of the home will rarely offend the public peace or be observable to a police officer for purposes of frustrating unlawful conduct by summary action. The application of the loitering statute to the facts at bar only invites questionable intrusions into personal privacy and makes the law an instrument of harassment. Furthermore, it would be a rare occasion indeed when a police officer would obtain a warrant solely to apprehend an offender for the crime of loitering anywhere, to say nothing of an offense in a private apartment or home. The loitering offense thus becomes little more than an excuse for warrantless intrusions or an "add-on" to multiply existing charges, as it was here.

Id.,

This case clearly conflicts with People v. Loehr, supra, where the District Court of Nassau County held that a defendant could be convicted for loitering for the purpose of unlawfully using or possess- ing dangerous drugs in the backyard of a private home because the Legislature proscribed such loitering in "any place" and not only in a "public place." The court in Loehr stated:

> The gravamen of the conduct sought to be controlled is the congregating for the purpose of using or possessing dangerous drugs. There is no logical basis for excluding private property from the application of this statute, and it is clear that the legislature did not intend such exclusion. Had it so intended, it would have said so.

Id., 318 N.Y.S.2d at 545.

G. Lesser Included Offenses in Drug Possession and Sale Cases

A verdict of guilty as to a greater count of an indictment or infor-

mation is deemed a dismissal of a lesser included count. CPL §300.40(3)(b). Therefore a defendant convicted of both criminal possession of a controlled substance in the seventh degree and higher degrees of criminal possession is entitled to have the judgments of conviction against him modified by a dismissal of the charge of seventh degree criminal possession. People v. Nickens, 121 A.D.2d 199, 503 N.Y.S.2d 25 (1st Dept. 1986); People v. Reid, 58 A.D.2d 611, 395 N.Y.S.2d 224 (2d Dept. 1977); People v. Miles, 58 A.D.2d 634, 395 N.Y.S.2d 678 (2d Dept. 1977). Similarly, where a defendant criminally sells drugs and incident thereto commits the crime of possession of drugs in a lower degree, conviction of the sale count requires dismissal of the possession count as an inclusory concurrent count. CPL §300.40(3)(b). People v. Teixeira, 101 A.D.2d 818, 475 N.Y.S.2d 453 (2d Dept. 1984); People v. Wheeler, 79 A.D.2d 622, 433 N.Y.S.2d 470 (2d Dept. 1980); People v. Fortner, 78 A.D.2d 661, 432 N.Y.S.2d 222 (2d Dept. 1980); People v. Cruzado, 65 A.D.2d 695, 409 N.Y.S.2d 742 (1st Dept. 1978); People v. Harley, 56 A.D.2d 660, 392 N.Y.S.2d 50 (2d Dept. 1977). However, criminal sale in the first degree and criminal possession in the first degree are both A-I felonies and neither is a lesser offense or inclusory offense of the other. Consequently, it is a question of judicial discretion as to whether both will be submitted. People v. Lopez, 77 A.D.2d 287, 433 N.Y.S.2d 569 (1st Dept. 1980).

A verdict of guilty of criminal sale of a controlled substance or marihuana is not repugnant to a verdict of acquittal for possession of such drug where it was proved beyond a reasonable doubt that the defendant accepted money from an undercover police officer as payment for supplying drugs but a third party actually delivered the

drugs and there was no evidence that defendant ever possessed the drugs. People v. Dilan, 58 A.D.2d 655, 396 N.Y.S.2d 65 (2d Dept. 1977).

H. Duty of a Prosecutor to Disclose an Informant's Identity

As is obvious from even a cursory reading of cases involving controlled substances and marihuana, a confidential informant is often the means by which the police apprehend the criminal seller or possessor. Therefore this section will focus on:

(1) basic policy considerations supporting the information privilege;

(2) an analysis of the difference in procedure between the New York Court of Appeals and the United States Supreme Court cases regarding suppression hearings where the issue involved is the prosecutor's duty to disclose an informant's identity; and

(3) an analysis of the law on the duty to disclose an informant's identity at trial, where there is no divergence between the two courts.

(1) Policy Considerations

Those who furnish to prosecutorial agencies information relating to the commission of crime enjoy a privilege of confidentiality. See Wigmore, Evidence §2374 (McNaughten rev. 1961); Colorado v. Nunez, 465 U.S. 324, 104 S.Ct. 1257 (1984); McCray v. Illinois, 386 U.S. 300, 308, 87 S.Ct. 1056, 1061 (1967). This privilege is "in reality" one accorded to the government to withhold the disclosure of the informant's identity. Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627 (1959). See also Ronuelly, Judicial Control of Informant, Spies, Stool Pigeons, and

Agent Provacateurs, 60 Yale L.J. 1091 (1951). The privilege benefits the government as well as the informant, since the practice of nondisclosure prevents the drying up of sources of information to law enforcement agencies, and protects informants from "social stigma" and "physical and other reprisals." People v. Pena, 37 N.Y.2d 642, 644, 376 N.Y.S.2d 452 (1975).

A countervailing consideration arises, however, where an arrest results solely from a "reliable" informant's information and a question is raised by the defense as to the actual existence of the informant. (This issue is discussed in "The Perjury Routine," by Younger, in The Nation, May 8, 1967, pp. 596-97). At a hearing on a motion to suppress evidence, a defendant may seek the identity of the informant whose information provided the basis for the issuance of a search warrant or for a warrantless arrest. People v. Darden, 34 N.Y.2d 177, 356 N.Y.S.2d 582 (1974); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1964); United States v. Robinson, 325 F.2d 391 (2d Cir. 1963); Model Code for Pre-arraignment Procedure §240.4, Commentary p.572. It is argued that "unless the identity of the informant is disclosed, the policeman, himself, conclusively determines the validity of his own arrest." People v. Durr, 28 Ill.2d 308, 192 N.E.2d 379, 384 (1963) (Shoeffer J., dissenting).

As stated by Justice Douglas, dissenting in McCray v. Illinois, supra, 386 U.S. at 316: "There is no way to determine the reliability of Old Reliable, the informer, unless he is produced at trial, and cross-examined. Unless he is produced, the Fourth Amendment is entrusted to the tender mercies of the police [footnote omitted]."

(2) Duty to Disclose at a Suppression Hearing

In the leading case of People v. Darden, supra, the New York Court

of Appeals established guidelines for a judge at a suppression hearing. Where there is "insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer, when the issue of identity of the informer is raised at the suppression hearing," the hearing judge is to conduct an in camera inquiry to prove that the police had not fabricated the informant's existence or communications.

> The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer. The Judge should take testimony, with recognition of the special need for protection of the interests of the absent defendant, and make a summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify. That report should be made available to the defendant and to the People, and the transcript of testimony should be sealed to be available to the appellate courts if the occasion arises. At all stages of the procedure, of course, every reasonable precaution should be taken to assure that the anonymity of the informer is protected to the maximum degree possible.

Id., 356 N.Y.S.2d at 586.

The Supreme Court had previously addressed this issue in McCray v. Illinois, supra, where it analyzed the Illinois informant privilege raised at a suppression hearing. As in Darden, the police are not required to disclose an informant's identity unless the hearing judge is convinced by evidence submitted in open court and subject to cross-

examination that the officer relied in good faith upon credible information supplied by a reliable informant. The Supreme Court deemed the hearing judge to be the sole arbiter of the officer's veracity.

In McCray v. Illinois, supra, the defendant had argued that the due process clause of the Fourteenth Amendment nullifies an informant's privilege and requires disclosure of his identity in every preliminary hearing where it appears that an officer made an arrest or search solely in reliance upon facts supplied by an informant he had reason to trust. The Supreme Court rejected defendant's argument, stating, "Nothing in the Due Process clause of the Fourteenth Amendment requires a state court judge in every hearing to assume the arresting officers are committing perjury." Id., 386 U.S. at 313.

It is observed that on a motion to suppress evidence, a defendant seeks to escape "'the inculpatory thrust of evidence in hand'" Id., at 307, and if the motion to suppress is denied, defendant will still be judged at the trial upon the "'untarnished truth.'" Since an informant is a "'vital part of society's defensive arsenal'", the court should endeavor to protect his identity.

(3) Difference between New York Court of Appeals and United States Supreme Court Decisions on Duty to Disclose at a Suppression Hearing

New York's procedure for informant disclosure, as set forth in Darden, differs from that of Illinois, sanctioned by the Supreme Court in McCray. Under McCray, if the judge is not convinced that the officer relied in good faith upon credible information supplied by an informant, he may require a disclosure of the informant's identity. The fact that there is no evidence apart from the testimony of the arresting officer as to the reliable informant's existence and communications is immaterial,

if the judge believes the officer. This places a premium on a judge's evaluation of police witnesses. In New York, however, the judge's credence or lack of credence in the officer's testimony is of no materiality. Under Darden whenever there is insufficient evidence apart from that of the police officer regarding the informant and his communications, the court must hold an in camera hearing, at which the defendant is not present, to verify the existence of the informant and his communications to the police. The judge makes a summary report which is made available to the defendant and to the People, and the transcript of the testimony taken is sealed, but made available to the appellate court, if necessary. The anonymity of the informer is protected. (See Krenner, Disclosure of the Informant's Identity, 48 New York State Bar J. 36 [1976].) The in camera hearing provides a balance between the competing interests of the State and the defendant. State sources of information are preserved, informants are protected, but courts are allowed to confront the informant to determine whether he actually exists and made the communications alleged by the police. People v. Goggins, 34 N.Y.2d 163, 168, 356 N.Y.S.2d 571, 574 (1974), cert. denied, 19 U.S. 1012 (1974).*

* See also People v. Singletary, 37 N.Y.2d 310, 372 N.Y.S.2d 68 (1975), in which a student-defendant was precluded from eliciting the identity of a student-informant at a hearing. No in camera hearing of the informant was requested by the defendant nor conducted by the court. Darden had not yet been decided at the time of the hearing. The Court found on the facts of the case that the informant was reliable. It cited People v. Huggins, 36 N.Y.2d 827, 370 N.Y.S.2d 904 (1975), which had held that the refusal by the judge to conduct an in camera examination was not an abuse of discretion "'especially since at the time the hearing court did not have the benefit of the guidelines subsequently announced in our opinion in People v. Darden.'" Singletary, 37 N.Y.2d at 312, 372 N.Y.S.2d at 70, quoting from Huggins, supra, 36 N.Y.2d at 827, 370 N.Y.S.2d at 904.

In People v. West, 56 A.D.2d 955, 392 N.Y.S.2d 930 (3d Dept. 1977), rev'd on other grounds, 44 N.Y.2d 656, 405 N.Y.S.2d 29 (1978), an in camera hearing was held to protect a defendant's rights even when the government could not locate and produce an informant since several witnesses "emphatically" established his [the informant's] existence and reliability, and it was also clearly shown that the informant's life would be endangered by identification. Where a defendant is aware of an informant's identity and location at the time of the suppression hearing, he is not denied a fair hearing when the suppression court does not require an in camera hearing. See People v. Peterson, 47 A.D.2d 431, 367 N.Y.S.2d 325 (3d Dept. 1975).

Prior to Darden and the institution of in camera hearings, the duty to disclose an informant's identity at a suppression hearing turned on the role of "independent corroboration." See Model Code for Pre-arraignment Procedure §290.4, Commentary pp. 574-75. Under this rule, disclosure was required when there was insufficient evidence "apart from the arresting officer's testimony as to the informer's communications, to establish probable cause," but was not required where "such separate evidence exists;" i.e., objective verification of details supplied by an informant. See, e.g., People v. Verrecchio, 23 N.Y.2d 489, 297 N.Y.S.2d 573 (1969); People v. Smith, 21 N.Y.2d 698, 287 N.Y.S.2d 425 (1967); and People v. Malinsky, 15 N.Y.2d 86, 94, 262 N.Y.S.2d 65, 73 (1965). In People v. Coffey, 12 N.Y.2d 443, 240 N.Y.S.2d 721 (1963), disclosure of the informant's identity was not required where there was independent testimony* as to the informant's existence as well as substantiating information from other sources of the principal elements of the informant's story. See also People v. Clark, and People v. Wilson, 54 N.Y.2d

* The Assistant District Attorney swore that he had talked to the informant.

941, 445 N.Y.S.2d 142 (1981); People v. Castro, 29 N.Y.2d 324, 327 N.Y.S.2d 632 (1971); People v. Cerrato, 24 N.Y.2d 1, 298 N.Y.S.2d 688 (1969); People v. Ingram, 79 A.D.2d 1088, 435 N.Y.S.2d 826 (4th Dept. 1981). Federal courts have consistently used the same rationale as these state cases and have held that disclosure need not be compelled where an informant's reliability and communications are corroborated by independent police investigation. See, e.g., Mapp v. Warden, 531 F.2d 1167 (2d Cir. 1976), cert. denied, 429 U.S. 982; United States v. Commission, 429 F.2d 834 (2d Cir. 1970); United States v. Tucker, 380 F.2d 206 (2d Cir. 1967). After Darden, the disclosure requirement under prior cases was supplanted by an in camera proceeding.

(4) Disclosure at Trial

The issue of disclosure is not limited to a suppression hearing, which determines whether an informant's information justified the search and arrest, but is an even more important consideration at trial, where a defendant's guilt or innocence is at stake. There is no divergence between the Court of Appeals and the United States Supreme Court cases on the issue of disclosure of the informant's identity at trial. The Court of Appeals in People v. Goggins, supra, 34 N.Y.2d at, 168, 356 N.Y.S.2d at 574 (1974), cert.denied, 419 U.S. 1012 (1974), stated that the issue at trial "involves constitutional and policy considerations related to the right to confrontation, due process and fairness. Most important, it is related to the risk of wrongfully convicting the innocent."

In Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623 (1959), which involved a federal narcotics charge, a sale of narcotics by the defendant to an informant was observed and testified to by narcotics agents. Subsequently, at the police station, when the two confronted each other,

the informant denied that he knew the defendant. The defense claimed that the informant was an active participant in the illegal activity and that his disclosure was therefore mandatory. The Court agreed.

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action....
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> * * *
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> Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.
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> * * *
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> Doe [the informer] had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's lack of knowledge of the contents of the package that he "transported" from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.
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> * * *
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> This is a case where the Government's informer was the sole participant, other than the accused in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses.

Id., 77 S.Ct. at 627, 629.

The Court in People v. Goggins, 356 N.Y.S.2d at 576, stated that

"the strongest case for disclosure" of an informant's identity "is made out when it appears that the informant was an eyewitness [to] or a participant in the alleged crime." See also People v. Todaro, 52 A.D.2d 611, 382 N.Y.S.2d 98 (2d Dept. 1976); People v. Woods, 48 A.D.2d 708, 368 N.Y.S.2d 62 (2d Dept. 1975), rev'd on other grounds, 39 N.Y.2d 852, 386 N.Y.S.2d 101 (1976); People v. Banks, 45 A.D.2d 1024, 358 N.Y.S.2d 201 (2d Dept. 1974). And where there is any doubt that the defendant is the culprit, or where he presents "specific evidence which supports a plausible theory of innocence to which an informant can give relevant testimony," disclosure will be mandated. People v. Lamar, 86 A.D.2d 751, 447 N.Y.S.2d 772 (4th Dept. 1982); People v. Taylor, 83 A.D.2d 595, 441 N.Y.S.2d 116 (2d Dept. 1981); Santucci v. Rubin, 81 A.D.2d 872, 439 N.Y.S.2d 43 (2d Dept. 1981) (writ of prohibition will not lie to preclude trial court from ordering District Attorney to disclose identity of the confidential informant, as this is within the trial court's jurisdiction; further, the person accused of the illegal drug sale had demonstrated a basis in fact for disclosure). People v. Canales, 75 A.D.2d 875, 427 N.Y.S.2d 879 (2d Dept. 1980); People v. Simone, 59 A.D.2d 918, 399 N.Y.S.2d 154, (2d Dept. 1977). See also People v. Rogers, 59 A.D.2d 916, 399 N.Y.S.2d 151 (2d Dept. 1977); People v. Hawkins, 49 A.D.2d 181, 374 N.Y.S.2d 182 (4th Dept. 1975); People v. Simpson, 47 A.D.2d 665, 364 N.Y.S.2d 198 (2d Dept. 1975); Thus, in Simone, supra, the defendant claimed that "he merely 'sold' to the officers the cocaine which they had fed to him through the informant" and consequently in law "no sale occured." People v. Simone, supra, 399 N.Y.S.2d at 155. In People v. Hawkins, supra, where an informant was sent to the defendant's apartment to establish the presence of the defendant and of drugs, the court held

that his testimony was relevant to the guilt or innocence of the defendant since it may establish the presence of another man in the apartment prior to the entry by the detective.

In People v. Singleton, 42 N.Y.2d 466, 398 N.Y.S.2d 871 (1977), the trial judge directed the disclosure of the informant's identity. The informant had been an eyewitness to the transaction in his automobile. "Thus, whether defendant was merely a bystander or an active participant in the sale of the heroin depended entirely on acceptance of the undercover officers' testimony with respect to the events of the hat.* This evidence was first elicited on the witness stand and had not been contained in either of the contemporaneous written police reports." Id., 398 N.Y.S.2d at 873. The Court held that "[d]isclosure of the identity of the informer was essential to a fair trial." Id., 398 N.Y.S.2d at 874. Since, however, the People elected not to make such disclosure, the trial court had properly dismissed the indictment in the interest of justice. See also People v. Peltak, 45 N.Y.2d 905, 411 N.Y.S.2d 4 (1978) (trial judge should have ordered disclosure of informant's identity where the latter's present location was unknown and defendant had presented a defense of alibi and misidentification); People v. Tranchina, 64 A.D.2d 616, 406 N.Y.S.2d 523 (2d Dept. 1978) (where the officer testified that he and informant had transacted the sale in defendant's apartment but defendant testified that he had refused to admit them, and the back-up

* At trial much controversy focused on the undercover officer's testimony that defendant had removed his hat, and held it out to one Bruce, who then withdrew the heroin package from the hat. The police notes made no mention of a hat.

team could only testify to having seen the officer and informant enter and leave the building, defendant was entitled to disclosure and production of the informant in camera); People v. Castro, 63 A.D.2d 891, 405 N.Y.S.2d 729 (1st Dept. 1978) (defendant was entitled to disclosure of informant's identity where, at hearing in the precinct, the informant claimed that he had witnessed the sale but the officer testified that the informant had not been present and the defense was misidentification).

On the other hand, in People v. Colon, 39 N.Y.2d 872, 386 N.Y.S.2d 220 (1976), an informant's identity was protected when he "was not a material witness to the actual drug transactions" and his role was thus marginal. See also People v. Lozada, 104 A.D.2d 663, 480 N.Y.S.2d 117 (2d Dept. 1984). Similarly, in People v. Lee, 39 N.Y.2d 388, 390, 384 N.Y.S.2d 123, 124 (1976), the informant introduced the officer to the defendant on the street. However, the sale took place indoors in the absence of the informant. The court properly denied the application to produce the informant as the latter's testimony would be irrelevant to the guilt or innocence of the accused. Likewise, in People v. Leyva, 38 N.Y.2d 160, 379 N.Y.S.2d 30 (1975), an informant gave a tip but did not set up a drug sale or participate in any events which were the gravamen of the charged crime, was not present at the arrest, and was in no position to give testimony bearing on the guilt or innocence of the defendants. There, the informant's privilege against disclosure did not give way at trial. There was no need for disclosure in People v. Pena, 37 N.Y.2d 642, 376 N.Y.S.2d 452 (1975), where the defendant was positively identified to the arresting officers by an undercover officer who had made two purchases, where the informant was not shown to have

observed or have been present during the narcotics transactions, and where, in addition, defendant's alibi witnesses' testimony was not convincing. In People v. Brooks, 34 N.Y.2d 475, 358 N.Y.S.2d 395 (1974), where the defendant had been charged with larceny, the prosecutor had no duty to disclose the identity of an informant, who had led the police to the defendant's "fence," but who was neither a participant in nor a witness to the crime of larceny. In People v. Garcia, 51 A.D.2d 329, 381 N.Y.S.2d 271 (1st Dept. 1976), aff'd, 41 N.Y.2d 861, 393 N.Y.S.2d 709 (1977), an informant accompanied a police officer to the defendant's apartment to buy heroin, but the informant waited in another part of the apartment while the police officer made the purchase, unwitnessed by the informant. The court held on these facts that disclosure was not called for. See People v. Martinez, 79 A.D.2d 661, 433 N.Y.S.2d 841 (2d Dept. 1980), aff'd 54 N.Y.2d 723, 442 N.Y.S.2d 994 (1981); People v. Lozada, 104 A.D.2d 663, 480 N.Y.S.2d 117 (2d Dept. 1984) (indictment not subject to dismissal for a failure to produce the informant although the informant had introduced the undercover officer to the seller, he did not witness or otherwise participate in the drug sale); People v. Amarante, _ 120 A.D. 538, 502 N.Y.S.2d 43 (2d Dept. 1986); People v. Gilmore, 106 A.D.2d 399, 482 N.Y.S.2d 317 (2d Dept. 1984); People v. LaPorta, 50 A.D.2d 1007, 376 N.Y.S.2d 698 (3d Dept. 1975); People v. Wills, 48 A.D.2d 935, 370 N.Y.S.2d 22 (2d Dept. 1975).

People v. Goggins, supra, 356 N.Y.S.2d at 574, the cases of defendants Goggins and Brown, which raised a common issue concerning a defendant's right to disclosure of the identity of a police informant and were consolidated on appeal, do not involve the informant's role but pinpoint a different issue, namely, that arising when "the identity of

the culprit rests upon evidence which is equally balanced." People v. Goggins, supra, 356 N.Y.S.2d at 576. In both cases the informant introduced the undercover officer to the defendant and left before the alleged transaction.

As to defendant Brown, the two sales took place in the defendant's apartment. On the night of the arrest, the undercover officer waited in his car and identified the defendant to the arresting officers by a prearranged signal as the defendant left his apartment. The officer reconfirmed his initial identification by viewing the defendant again from a distance of about thirty feet at the police station. In addition, "no significant defense" was presented. "Significantly, the defendant has failed to focus on any weak point in the prosecutor's case or closely contested issue of fact which might be resolved by disclosure of the informant's identity." Id., 356 N.Y.S.2d at 578. Based on these facts, the Court held that disclosure was not mandated and affirmed the lower court's denial of disclosure. See also People v. Lloyd, 55 A.D.2d 171, 390 N.Y.S.2d 172 (2d Dept. 1976), aff'd, 43 N.Y.2d 686, 401 N.Y.S.2d 27 (1977); People v. Welch, 82 A.D.2d 899, 440 N.Y.S.2d 283 (2d Dept. 1981).

As to defendant Goggins, the two sales took place in a bar. Neither sale involved a face-to-face confrontation of more than two minutes. The undercover officer gave but a sketchy description of the seller to his backup team preceding the arrest, "and except for a fleeting glance at the defendant made under less than favorable conditions, more than a year elapsed between the sale and the corporeal identification of defendant by Barnes (the undercover officer).... This informer could clearly play a decisive role in resolving the very colorable factual dispute between

Barnes and Goggins." Id., 356 N.Y.S.2d at 577. The Court pointed out that "the defendant might become entitled to disclosure not by showing weaknesses in the prosecution case but by the development of his defense." Thus, Goggins had no arrest record, was gainfully employed, gave a "creditable explanation for his presence in the bar when arrested," denied presence at the bar at the time of the sale, a claim corroborated by his now estranged wife. The case, therefore, presented "both a plausible issue as to guilt and less than trouble-free identification testimony, and either would have been enough." Id., 356 N.Y.S.2d at 578. In view of the close identity question, the Court mandated disclosure. "Of course, if the prosecution concludes that conviction of the defendant is less important than the risks of disclosure, it will have to forego pursuing the case against the defendant." Id.

An initial showing by the defendant of necessity either on a pre-trial motion or during the development of testimony at the trial must be made before the informant privilege yields to disclosure, and that issue is in the province of the trial judge's sound discretion. See Roviaro v. United States, 353 U.S. at 56 (1957). "Bare assertions or conclusory allegations by a defendant that a witness is needed to establish his innocence will not suffice. Instead he must show a basis in fact to establish that his demand does not have an improper motive and is merely an angling in desperation for possible weaknesses in the prosecution's investigation...." People v. Goggins, supra, 356 N.Y.S.2d at 575. See also People v. Perez, 48 N.Y.2d 744, 422 N.Y.S.2d 660 (1979); People v. Pena, 37 N.Y.2d 642, 376 N.Y.S.2d 452, 454 (1975); People v. Jones, 58 A.D.2d 657, 396 N.Y.S.2d 61 (2d Dept. 1977). Defendant's burden is met "when a weakness is found in the case against him, whether manifested

during the People's or the defendant's case, or when the issue of identification appears to be a close one." People v. Pena, supra, at 454

The obligation to produce an informant, however, does not necessarily flow from the right to disclosure. People v. Jenkins, 41 N.Y.2d 307, 392 N.Y.S.2d 587 (1977); People v. Law, 48 A.D.2d 228, 368 N.Y.S.2d 627 (4th Dept. 1975), aff'd in part and rev'd in part with Jenkins, 41 N.Y.2d 307, 392 N.Y.S.2d 587 (1977). See also United States v. Super, 492 F.2d 319 (2d Cir. 1974): "The Government need only identify its informant, it need not produce him." In Super, the present whereabouts of the informant were unknown and the fact was unrebutted in the record. "Informants in drug cases are not Brahmins, nor are they noted for long-term occupancy of well-tended premises. Their disappearance, voluntary or otherwise, is not extraordinary." Id. at 322. In Jenkins, the authorities provided funds which enabled the informant, whose name they disclosed, to leave Rochester because of the alleged threats made against her and the burglary of her apartment. On her own initiative, she moved to Florida. She ultimately disappeared. The People made diligent, good-faith but unsuccessful efforts to locate her. In order to warrant dismissal of the action on these facts, the Court held that "the defendant must meet a higher burden and demonstrate that the proposed testimony of the informant would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case...." People v. Jenkins, supra, 392 N.Y.S.2d at 589. It was held insufficient that the informant might give relevant testimony on a material issue. Jenkins claimed through a codefendant's testimony that he had no knowledge of the contents of the package he turned over to the undercover officer. "However, there was only minimal contact between Jenkins and

the informer and it is not alleged in what manner the testimony of [the informer] could have assisted him in demonstrating his lack of knowledge of the nature of the transaction in which he was concededly engaged." There was nothing but speculation that "maybe somehow, in some way, or in some fertile imagination, her testimony might provide something." Id., 392 N.Y.S.2d at 590-91.

In People v. Law, supra, the informant, Pat Adams,* was present during some of the transactions. The defendant admitted knowing the informant from seeing her around. The People detailed their efforts to locate her. Distinguishing this case from Goggins, the court said: "Defense counsel in the instant appeal points to no weakness in the prosecution's case. The identification of defendant Law is certain and all but overwhelming.... No significant question of fact was presented by any weakness in the People's case or by defendant's development of a plausible defense, notwithstanding the fact that the informant Pat Adams observed the buy on October 23. Defense counsel makes no attempt to establish how her testimony could help defendant's cause...." Id., 368 N.Y.S.2d at 633. Cf. 48 New York State Bar Journal, supra, p.37; People v. Hawkins, 49 A.D.2d 181, 374 N.Y.S.2d 182 (4th Dept. 1975); People v. Jones, 85 Misc.2d 220, 379 N.Y.S.2d 301 (Sup. Ct. New York Co. 1976).

A similar situation exists when the whereabouts of the informant are unknown and defendant asserts that the informer may possess information which would prove favorable to him at trial. In People v. Maneiro, 49 N.Y.2d 769, 426 N.Y.S.2d 471 (1980), the New York Court of Appeals stated that in the above-described situation defendant was not entitled to automatic dismissal of the charges against him. Citing to its holding in

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* The same informant involved in Jenkins.

People v. Jenkins, 41 N.Y.2d 307, 392 N.Y.S.2d 587 (1977), the Court refused to penalize the People in their case where the unavailability of the informant is in no way attributable to the People. The Court did indicate, again relying on Jenkins, that there may exist some situations where dismissal might be mandated despite the good faith of the people. Specifically, in those situations where a defendant can demonstrate affirmatively that the informant's testimony would be relevant, favorable and likely to exculpate the defendant. In Maneiro, it was determined that defendant's story failed to meet this "higher burden of persuasion." People v. Maneiro, supra, 426 N.Y.S.2d at 473. See People v. Watson, 120 A.D.2d 866, 502 N.Y.S.2d 303 (3d Dept. 1986); People v. Denson, 106 A.D.2d 894, 483 N.Y.S.2d 499 (4th Dept. 1984).

Where an informant under the People's control was present at the sale of narcotics to a police officer, and the record presented two diametrically opposed stories, an unfavorable inference may arise when the government fails to call the informant when it is shown that he is in a position to give material evidence. The court's refusal to so charge the jury was held to be reversible error. People v. Douglas, 54 A.D.2d 515, 386 N.Y.S.2d 477 (3d Dept. 1976). To the same effect, see People v. Anderson, 112 A.D.2d 782, 492 N.Y.S.2d 281 (4th Dept. 1985); People v. Ramirez, 73 A.D.2d 567, 422 N.Y.S.2d 963 (1st Dept. 1979); People v. Alamo, 63 A.D.2d 6, 406 N.Y.S.2d 787 (1st Dept. 1978); People v. Samuels, 59 A.D.2d 574, 397 N.Y.S.2d 457 (3d Dept. 1977). In People v. Gonzalez, 68 N.Y.2d 995, 510 N.Y.S.2d 564 (1986), the Court of Appeals set out 3 prerequisites that are to be met before a missing witness charge is necessary: (1) the missing witness had knowledge about the issue in evidence; (2) the witness could provide non-commulative

testimony favorable to the requesting party; and (3) the witness is available. Also see People v. Dianda, 124 A.D.2d 307, 508 N.Y.S.2d 92 (3d Dept. 1986).

In People v. Simone, 59 A.D.2d 918, 399 N.Y.S.2d 154 (2d Dept. 1977), the defendant subpoenaed one Holliman as a witness. Defendant alleged that (1) Holliman was a police informant who had initiated the transaction on behalf of the police, and therefore defendant maintained that he was the agent of Holliman, the seller; and (2) Holliman had entrapped him by telling him that the substance Holliman gave him to sell to police was "garbage" to be sold in revenge to these people (the police) who, Holliman claimed, had "burned" (cheated) his brother in a previous drug sale. Since the prosecution had refused to disclose the identity of the informant, and Holliman stated that he could not remember the events on the date of the sale and pleaded the Fifth Amendment when asked if he was the confidential informant, defense counsel requested the trial court to declare Holliman a hostile witness. The trial court refused and the Appellate Division found that "[w]hile this ruling alone might not have denied defendant a fair trial, when it was combined with the court's prior refusal to order the disclosure of the informant's identity, the defendant was prevented from presenting the substance of his defense, namely, that Holliman was the informant, and that he had initiated the transaction." Id., 399 N.Y.S.2d at 156. The court concluded that "[t]his constitutes a denial of the due process right to afair trial [citation omitted]." Id.

(5) No Obligation of Prosecutor to Immunize Informant If Informant Is Not Active Participant

A prosecutor has no obligation, after identifying and producing an informer, to grant him immunity when, in the exercise of his privilege against self-incrimination, "the informer refused to give what, assumedly, would have been exculpatory testimony." People v. Sapia, 41 N.Y.2d 160, 391 N.Y.S.2d 93, 94 (1976), cert. denied, 434 U.S. 823 (1977). See also People v. Chin, 67 N.Y.2d 22, 499 N.Y.S.2d 638 (1986); People v. Owens, 63 N.Y.2d 824, 482 N.Y.S.2d 250 (1984). In People v. Sapia, supra, one Fodderell, convicted on federal narcotics charges, agreed to help the New York City police in further investigations and was registered as a confidential informant. He participated in the formulation of plans to buy narcotics from the defendant and was present at one of the encounters where he witnessed a heroin sale. Produced from a federal prison, Fodderell declined to testify for the defense unless he would be granted immunity. The prosecutor rejected the trial court's suggestions that Fodderell be granted immunity. Defendant asserted that his Sixth Amendment right of confrontation was violated since the People failed to grant Fodderell immunity and call him as a witness. The Court rejected the defendant's claim that the People should have called the informant, Fodderell, to the witness stand. "We know of no instance...in which a court has dictated to a prosecutor whom he shall call to the witness stand...." Id., 391 N.Y.S.2d at 95. A defendant's right to compulsory process for obtaining witnesses in his favor, "like so many other rights, whether of constitutional sanction or of lesser stature, is not absolute." Id., 391 N.Y.S.2d at 96. Furthermore, the prosecution did not

suppress evidence favorable to the defendant as "defendant was apprised of the identity of the informer and afforded an opportunity to interview him." Sapia, 391 N.Y.S.2d at 97. Where an informant is an active participant in the criminal transaction, as an agent of the law enforcement authorities, refusal by the prosecutor to grant immunity may constitute an improper suppression of evidence. In this case, however, the court noted that the informer was not an active participant in the criminal transaction but merely "a facilitator and an observer" -- "he was not an actor in the criminal transactions." Id.. Accordingly, the prosecutor was not obligated to grant him immunity and his failure to do so did not entitle the defendant to a reversal of his conviction.

(6) Conclusion

Public policy dictates that prosecutorial agencies shall not divulge the source of information upon which they act in the investigation of crimes. This privilege maintains and keeps government channels of communication open and it shields the identity of its informers from those who would have cause to resent their conduct and resort to reprisals. A countervailing consideration arises, however, where an arrest results solely from an informant's information and serious questions arise as to the actual existence of the informant.

In the leading case of People v. Darden, supra, the New York Court of Appeals established guidelines for a suppression judge at a hearing and provided for an in camera examination of the informant by the judge, in the absence of the defendant, when there is insufficient evidence to establish probable cause apart from the officer's testimony as to communications received from an informant. The United States Supreme Court in

McCray v. Illinois, supra, held that at a hearing, the judge is the sole arbiter of the police officer's veracity and the People need not be required to disclose an informant's identity if the judge is convinced that the officer relied in good faith upon credible information supplied by a reliable informant. Under McCray, a judge will require disclosure of the informant's identity if unconvinced by the officer's testimony. Under Darden, however, if there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer," an in camera hearing will be conducted at which the informant will testify, without a disclosure to the defense of his identity. The judge will make available to the defendant and the People "a summary report as to the existence of the informer and with respect to the communications made by the informer to the police...." People v. Darden, supra, 356 N.Y.S.2d at 585-586.

The issue of disclosure of an informant's identity is not limited to a suppression hearing, which determines whether an informant's information justified a search, but may be crucial at trial, where a defendant's guilt or innocence is at stake. There is no divergence between the Court of Appeals and the United States Supreme Court cases in this area. In Roviaro v. United States, supra, 353 U.S. at 60, the United States Supreme Court held that where "the disclosure of an informer's identity or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, the privilege must give way." In People v. Goggins, supra, the Court of Appeals determined that the informant privilege must yield where a defendant's guilt or innocence is at stake at trial. Factors that are weighed to determine whether a prosecutor must disclose an informant's

identity are the following: (1) whether the informant was an eyewitness to or a participant in the alleged crime; and (2) whether the informant has information which may establish a defendant's innocence.

If the defendant does not request a ruling by the trial judge on the issue of the disclosure of an informant's identity, he is precluded from challenging the failure to disclose on appeal. People v. Medina, 53 N.Y.2d 951, 441 N.Y.S.2d 442 (1981).

I. Adjournment in Contemplation of Dismissal ("A.C.D."); An Alternative to Prosecution of Certain Marihuana Offenses

Criminal Procedure Law §170.56 and §210.46 have been amended to provide for adjournments in contemplation of dismissal in local criminal courts and superior courts, respectively, where the sole remaining count or counts charge a violation or violations of Penal Law §§221.05, 221.10, 221.15, 221.35 or 221.40 The remainder of these statutes is unchanged. Formerly, a defendant could only be granted an A.C.D. under CPL §170.56 if he has been charged with criminal possession in the seventh degree (possession of any substance weighing less than one-quarter ounce containing any marihuana, or less than twenty-five marihuana cigarettes in violation of Penal Law §220.03, a class A misdemeanor), or a violation of Penal Law §240.36 (loitering with intent to possess marihuana, a class B misdemeanor). Now, however, a defendant may receive an A.C.D. for:

(1) unlawful possession of twenty-five grams or less of marihuana (Penal Law §221.05), a violation;

(2) possession of marihuana in the fifth degree (Penal Law §221.10), a class B misdemeanor, which involves either possession in a public place while smoking or displaying the marihuana or possession of more than twenty-five grams

and less than two ounces;

(3) possession in the fourth degree (Penal Law §221.15), a class A misdemeanor which is possession of more than two but less than eight ounces;

(4) sale in the fifth degree, a sale without consideration of two grams or less or one cigarette (Penal Law §221.35); and

(5) sale in the fourth degree: sale of less than twenty-five grams of marihuana (Penal Law §221.40 - this includes a gift of any amount greater than two grams or more than a single cigarette as noted above).

The procedure for an A.C.D. in marihuana cases is as follows:

1. The defendant must move, prior to trial or entry of a plea of guilty for an A.C.D. (unlike the A.C.D. for other offenses under CPL §170.55, the District Attorney's consent is only required in two situations, discussed infra).

2. The court may then either:

   (a) dismiss the charge(s) in the interests of justice without setting an adjourned date, if it finds that an adjournment would not be necessary and sets forth the reason for dismissal in the record; or

   (b) order the action adjourned, specifying appropriate conditions with which the defendant must comply which may include placement under the supervision of any public or private agency. The court may modify the conditions and extend or reduce the period of adjour-

nment except that the total period of adjournment may not exceed twelve months. If the defendant violates a condition the court may revoke its order of adjournment, restore the case to the calendar and the prosecution must proceed. If the case is not restored to the calendar, the charge is deemed dismissed in the furtherance of justice upon the expiration of the period of adjournment.

(1) Conditions Precluding A.D. or Dismissal

CPL §170.56(1) provides that the court may not order an A.C.D. nor dismiss the accusatory instrument in the interests of justice under that statute if: (a) the defendant has previously been granted such an adjournment under CPL §170.56;

(b) the defendant has previously been granted a dismissal under CPL §170.56;

(c) the defendant has previously been convicted of any offense involving controlled substances;

(d) the defendant has previously been convicted of a crime and the District Attorney does not consent; or

(e) the defendant has previously been adjudicated a youthful offender on the basis of any act or acts involving controlled substances and the District Attorney does not consent.

It has been held that a defendant who has previously received an A.C.D. pursuant to CPL §170.55 is not precluded from receiving an A.C.D. pursuant to CPL §170.56 without the consent of the District Attorney. In People v. Ford, 104 Misc.2d 458, 428 N.Y.S.2d 612 (N.Y.C. Crim. Ct.

Kings Co. 1980), the court found that as a matter of statutory construction, those provisions contained in CPL §170.56(1)(a)(b) refer only to an A.C.D. or dismissal obtained under that section. Consequently, the defendant was found to be eligible for an A.C.D. even though he had recently received an A.C.D. pursuant to CPL §170.55 on a similar drug charge.

(2) Consequences of Dismissal r the

CPL §170.56 provides that after the dismissal pursuant to that statute of charges against a defendant not previously convicted of a crime:

(a) the court is required to order that all official records and papers relating to such a defendant's arrest and prosecution, whether on file with the court, a police agency, or the New York State Division of Criminal Justice Services, be sealed and not made available to any person or public or private agency; except the records must be made available under order of a court for the purpose of determining whether, in subsequent proceedings, such person qualifies under CPL §170.56 for a dismissal or adjournment in contemplation of dismissal of the accusatory instrument [see CPL §160.50(1)(d)];

(b) after the granting of such a sealing order, the arrest and prosecution shall be deemed a nullity and the defendant must be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

J. Provision for the Issuance of an Appearance Ticket for Marihuana Violation

The Marihuana Reform Act of 1977 also added new §150.75 to the Criminal Procedure Law, entitled "Appearance ticket; certain cases." That statute provides that where a defendant is arrested without a warrant and charged only with a violation of Penal Law §221.05 (possession of twenty-five grams or less of marihuana, where the marihuana is not displayed or smoked in a public place),* an appearance ticket shall promptly be issued and served upon him. The issuance and service of the appearance ticket may be made conditional upon the posting of pre-arraignment bail, but only if the appropriate police officer:

(a) is unable to ascertain the defendant's identity or residence address;

(b) reasonably suspects that the identification or residence address given by the defendant is not accurate; or

(c) reasonably suspects that the defendant does not reside within the State.

No warrant of arrest shall be issued unless the defendant has failed to appear in court as required by the terms of the appearance ticket or by the court.

(1) Pre-arraignment Bail

A desk officer in charge at a police station, county jail, or police headquarters or any of his superior officers may fix pre-arraign- ment bail (CPL §150.30[1]) in an amount not to exceed $100 where the person arrested is charged only with a petty offense (CPL §150.30 [2][c]), and upon accepting such bail may issue and serve an appearance ticket on the arrested person, give him a receipt for the bail, and release him from custody CPL §150.30[1]).

* Open possession of any amount of marihuana in a public place is a class B misdemeanor under Penal Law §221.10.

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WARRANTLESS SEARCH AND SEIZURE

By

Naomi Werne and
Edward Saslaw,
BPDS Staff Attorneys,
June 1979

Revised July 1987

By

Valerie Friedlander
Director
Criminal Justice
Appellate Reference Service

WARRANTLESS SEARCH AND SEIZURE

TABLE OF CONTENTS

PAGE

WARRANTLESS SEARCH AND SEIZURE

Introduction

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment, United States Constitution. It is hornbook law that a warrantless search is unreasonable unless it is made under circumstances which are encompassed within an exception to the warrant requirement recognized by the courts. However, the definitions of the various exceptions are constantly evolving and the courts have recognized the legality of seizures after certain kinds of police conduct amounting to less than a full-blown search.

The Fourth Amendment applies solely to government activity. Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 576 (1921); Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372 (1949); United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984). Thus the exclusionary rule does not apply to searches and seizures by private individuals. People v. Horman, 22 N.Y.2d 378, 292 N.Y.S.2d 874 (1968) (store detectives): Sackler v. Sackler, 15 N.Y.2d 40, 255 N.Y.S.2d 83 (1964) (evidence obtained by private persons was not excluded in civil litigation as the product of illegal search and seizure); People v. Laurence (and Farmer), 100 Misc.2d 612, 420 N.Y.S.2d 65 (N.Y.C. Crim Ct. Queens Co. 1979) (hearing ordered on defendants' motion to suppress to determine if department store guard was special patrolman at the time he made the

search).

Note: A search of premises in which there is no reasonable expectation of privacy, such as the area outside the stalls in a public urinal, cannot violate the Fourth Amendment. See People v. Anonymous, 99 Misc.2d 289, 415 N.Y.S.2d 921 (Justice Ct. Town of Greenburgh, Westchester Co. 1979); People v. Milom, 75 A.D.2d 68, 428 N.Y.S.2d 678 (1st Dept. 1980). "The protection against unreasonable searches and seizures... does not extend to property knowingly exposed to the public, even in a person's home or office (Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507 (1967)." Salob v. Ambach, 73 A.D.2d 756, 423 N.Y.S.2d 305, 306 (3d Dept. 1979), cert. denied 449 U.S. 829, 101 S.Ct. 95 (1981), reh'g denied, 449 U.S. 1026, 101 S.Ct. 594 (1981). Ibid. Similarly, the seizure by government officials of automobiles from parking lots and the public streets was outside the scope of the Fourth Amendment. G.M. Leasing Crop. v. United States, 429 U.S. 351, 97 S.Ct. 619 (1977). And in People v. Guerre, 65 N.Y.2d 60, 489 N.Y.S.2d 718 (1985) the Court of Appeals, adopting the United States Supreme Court's holding in Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577 (1979) ruled that a person does not have a legitimate expectation of privacy in the pen register records maintained by the telephone company. Materials taken from the area of a chiropractor's office exposed to the public were not seized in violation of the Fourth Amendment. There is no reasonable expectation that the air surrounding luggage and the odor apparent in that surrounding air would remain private. Therefore, defendant's Fourth Amendment rights were not violated when a trained dog sniffed the air surrounding the luggage and detected the odor of a controlled substance. People v. Price, 54 N.Y.2d 557, 446 N.Y.S.2d 906 (1981). Price held that a search warrant

predicated on the dog's reaction was valid. 54 N.Y.2d 564, 446 N.Y.S.2d at 909. At least one court has held that persons living in an abandoned building have no reasonable expectation of privacy therein. People v. Sumlin, 105 Misc.2d 134, 431 N.Y.S.2d 967 (Sup. Ct. N.Y. Co. 1980); but see People v. Smith, 113 Misc.2d 176, 448 N.Y.S.2d 404 (Sup. Ct. N.Y. Co. 1982). The same court held that there is no reasonable expectation of privacy in the airshaft of an apartment building. Also, a police officer does not violate the Fourth Amendment when he puts his ear against an apartment wall while in the common hallway to overhear a conversation. People v. Volpe, 89 A.D.2d 510, 452 N.Y.S.2d 609 (1st Dept. 1982), aff'd, 60 N.Y.2d 803, 469 N.Y.S.2d 688 (1983); People v. Clark, 103 Misc.2d 498, 426 N.Y.S.2d 692 (Sup. Ct. N.Y. Co. 1980). Nor does a defendant have a reasonable expectation of privacy in "open fields." See Hester v. United States, 265 U.S. 57, 44 S.Ct. 445 (1925). See also, People v. Mercado, 68 N.Y.2d 874, 508 N.Y.S.2d 419 (1986) (expectation of privacy in a public restroom stall is reasonable but where a police officer had probable cause to believe criminal activity was taking place inside the stall the defendant's Fourth Amendment rights were not violated when the officer entered the adjoining stall and looked over the partition).

The law governing the determination of what type of police conduct is a "search and seizure" under the Fourth Amendment, when a search is "reasonable," and the legal effect of these determinations is discussed herein.

A. The Exclusionary Rule

"[A]ll evidence obtained in violation of the Constitution is, by that same authority, inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, 655; 81 S.Ct. 1684, 1691 (1961). However, the exclusionary

rule does not apply to a grand jury proceeding. United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613 (1974). See People v. McGarth, 46 N.Y.2d 12, 412 N.Y.S.2d 801 (1978); People v. Estenson, 101 A.D.2d 687, 476 N.Y.S.2d 39, 40 (4th Dept. 1984); People v. Doe, 89 A.D.2d 605, 452 N.Y.S.2d 643, 644 (2d Dept. 1982). The defendant cannot use the exclusionary rule to commit perjury. If a defendant testifies and perjuriously denies ever possessing contraband or fruits of a crime, the prosecution may introduce evidence that such articles were seized from defendant's premises even if that search and seizure were found to have violated the Fourth Amendment. Walder v. United States, 347 U.S. 62, 74 S.Ct. 354 (1954); see also United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912 (1980), rehearing denied, 448 U.S. 911, 101 S.Ct. 25 (1980) (defendant took the stand and denied that he had altered a T-shirt with his accomplice to facilitate smuggling, therefore the prosecution was properly permitted to impeach defendant by introducing a cut up t-shirt which had been illegally seized from his baggage).

"[W]here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force [footnotes omitted]." Stone v. Powell, 428 U.S. 465, 494; 96 S.Ct. 3037, 3052-53 (1976), rehearing denied sub. nom. Wolff v. Rice, 429 U.S. 874, 97 S.Ct. 197 (1978).

B. Fruit of the Poisonous Tree

Evidence obtained as an indirect product of an illegal search and seizure is subject to the exclusionary rule. Such evidence includes verbal statements which are the "fruit of the poisonous tree" -- the illegal search. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407 (1963). There the United States Supreme Court held that the "apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." Wong Sun, 371 U.S. at 488. See also People v. Rodriguez, 11 N.Y.2d 279, 229 N.Y.S.2d 353 (1962).

The Supreme Court has held that a confession which follows an illegal arrest is not necessarily the fruit of the poisonous tree if the defendant's confession is an act of will unaffected by the illegal search. The giving of the required Miranda warnings is one factor to be considered in determining if the confession was induced by the illegal search or was the product of free will. See Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). Additional relevant factors to be considered are the "temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct" People v. Conyers, 68 N.Y.2d 982 at 983, 510 N.Y.S.2d 552 at 553 (1986). See also, People v. Borges, Slip Op. No. 159 (New York Court of Appeals June 11, 1987) (where defendant claimed his consent to search was the direct result of an illegal arrest other factors to be considered in the court's determination of attenuation are "whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered

or requested, whether the defendant was aware he could decline to consent"). If evidence discovered as an indirect result of an illegal search is the testimony of a live witness, the degree of attenuation required to admit the evidence is less than that required to admit physical evidence illegally seized; the degree of free will on the part of the witness is the decisive factor. United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054 (1978).

The U.S. Supreme Court has held that the exclusionary rule will not be extended to evidence which would "inevitably have been discovered" even absent a constitutional violation. Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984). People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 797 (1973), cert. denied, 414 U.S. 1033. See also People v. Sciacca, 45 N.Y.2d 122, 408 N.Y.S.2d 22 (1978); People v. Pollaci, 68 A.D.2d 71, 416 N.Y.S.2d 34 (2d Dept. 1979) (weapons found after limited search of automobile admissible on ground, inter alia, of inevitable discovery exception to exclusionary rule since automobile would have been taken into custody and weapons found in routine inventory search; see Section D (7)(a), infra, Inventory Search).

Note: The Court of Appeals held in People v. Stith, 69 N.Y.2d 313, 514 N.Y.S.2d 201 (1987), that the inevitable discovery doctrine applies only to secondary evidence, i.e., the fruits of leads gleaned from primary evidence. In Stith the defendants were charged with criminal possession of a weapon when police discovered a gun during a concededly unlawful search of the cab of a truck tractor following a traffic stop. Granting the defendant's motion to suppress the gun and dismissing that count of the indictment, the Court held that using the inevitable discovery doctrine to save primary evidence "amounts to an after the fact purging of the initial wrongful conduct."

C. Pretrial Motion to Suppress

(1) Assertion of Fourth Amendment Rights: Standing

CPL §710.20 authorizes a person aggrieved by an unlawful search and seizure to move to suppress evidence on the ground that it was directly obtained by an illegal search and seizure or that it is "the fruit of the poisonous tree."

A person is aggrieved by an unlawful search when he has a legitimate expectation of privacy in the place or area searched. United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978), reh'g denied, 439 U.S. 1122 (1978).

Formerly, under the Fourth Amendment a person was aggrieved by an unlawful search and seizure if he was charged with a crime an element of which was possession of the property seized. This was the "automatic standing" rule established in Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960). However, the United States Supreme Court in United States v. Salvucci, supra, specifically and expressly overruled Jones and abolished automatic standing. In Salvucci, defendants lacked standing to challenge the seizure of checks they were charged with unlawfully possessing from an apartment rented by the mother of one of them.

Similarly, a person no longer establishes standing by asserting ownership of the property seized. Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556 (1980) (alleged ownership of drugs in female companion's purse did not give defendant standing); see also Rakas v. Illinois, supra; United States v. Salvucci, supra. Arcane concepts of property law do not control the applications of the protection of the Fourth Amendment. Rakas, 439 U.S. at 149-50, n. 17, 99 S.Ct. at 434, n. 17.

Note: A federal court does not have the discretion to suppress on

due process grounds evidence seized from a person other than the defendant by government agents who committed burglary and theft to effect the seizure. United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439 (1980), reh'g denied, 448 U.S. 911 (1980).

In People v. Ponder, 54 N.Y.2d 160, 445 N.Y.S.2d 57 (1981), the Court of Appeals held that defendant had no standing under the Fourth Amendment of the United States Constitution to challenge the warrantless search of his grandmother's home. The Court expressly abrogated the "automatic standing" rule under Article I, Section 12 of the New York State Constitution; see also People v. Johnson, 105 Misc.2d 561, 432 N.Y.S.2d 608, 611-12 (Sup. Ct. N.Y. Co. 1980), where the court held that defendant had no standing to challenge the seizure of evidence from another on the authority of Salvucci: "The new test to be applied in New York is whether or not the defendant has a legitimate expectation of privacy so that his own Fourth Amendment rights were violated by the search" (emphasis in orignal). Accord, United States v. Snyder, 668 F.2d 686 (2d Cir. 1982), cert. denied, 458 U.S. 1111, 102 S.Ct. 3494 (1982), where defendant who was convicted of embezzlement failed to prove that inspection of union business records, required to be kept by law, violated his personal Fourth Amendment rights.

The legitimate expectation of privacy required may be established by demonstrating a possessory interest. See People v. Sutton, 91 A.D.2d 522, 456 N.Y.S.2d 771 (1st Dept. 1982). Where the record indicated that the lawful owner of the car in which defendant was a passenger when it was stopped by the police had entrusted it to the defendant's possession several days previously for needed repairs, the defendant had a possessory interest sufficient to accord him standing to challenge the

reasonableness of the search. People v. Castrechino, 105 A.D.2d 1089, 482 N.Y.S.2d 191 (4th Dept. 1984). See also People v. Gonzalez, 68 N.Y.2d 950, 510 N.Y.S.2d 86 (1986) (defendant, passenger who stated he had borrowed vehicle from a friend and produced vehicle's registration from glove compartment had standing to challenge the search and seizure of a bag resting on the front seat.) Surrendering possession to another or merely living as a transient for an extended period or overstaying in a hotel room without paying rent can defeat the claim of reasonable expectation of privacy. People v. Graham, 90 A.D.2d 198, 457 N.Y.S.2d 962 (3d Dept. 1982), cert. denied, 104 S.Ct. 246 (1983); reh'g denied 104 S.Ct. 519 ; People v. Lerhinan, 90 A.D.2d 74, 455 N.Y.S.2d 822 (2d Dept. 1982); People v. VanBuren, 87 A.D.2d 900, 449 N.Y.S.2d 366 (3d Dept. 1982). See also People v. Rodriguez 69 N.Y.2d 159, 513 N.Y.S.2d 75 (1987) (no standing where defendant drug purchaser was found in drug supplier's apartment as to plastic bag containing white powder found under the bed sheet of sofa bed where defendant was sleeping).

Note: Although the rule established in Rakas v. Illinois, supra, is that a passenger in an automobile has no standing to challenge the search of the car, the Court of Appeals has held that where guilt of criminal possession of a weapon is premised solely on the statutory presumption of possession contained in Penal Law §256.15(3), the defendant passenger has standing to challenge the search and stop of the vehicle. See People v. Millan 69 N.Y.2d 514, 516 N.Y.S.2d 168 (1987).

Fourth Amendment rights may not be vicariously asserted. Thus a defendant lacks standing to contest a search of a codefendant's car. People v. Graham, supra. Evidence seized from a third party as a result of defendant's statements after he was unlawfully arrested are inadmis-

sible against him but not against a codefendant whose rights were not violated. Wong Sun v. United States, supra. Similarly, evidence obtained in the course of unlawful electronic surveillance is admissible against a codefendant who is not the subject of the unlawful surveillance. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961 (1969), rehearing denied sub. nom. Ivanov v. United States, 394 U.S. 939, 89 S.Ct. 1177 (1969). See also Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565 (1973); People v. Cefaro, 21 N.Y.2d 252, 287 N.Y.S.2d 371 (1967). See CPL §710.60(4a).

(2) Burden of Proof

"The People, in order to prevail [on defendant's motion to suppress] are under the necessity of going forward in the first instance with evidence to show that probable cause existed both in obtaining a search warrant and in sustaining the legality of a search made, without a warrant, as incident to an arrest [citations omitted]." People v. Malinsky, 15 N.Y.2d 86, 91, 262 N.Y.S.2d 65, 70 (1965). See also People v. Pettinato, 69 N.Y.2d 653, 511 N.Y.S.2d 828 (1986). "While the ultimate burden of proof is on the defendant, the People must, in order to make out a prima facie case at the suppression hearing, come forward with some evidence to show probable cause. They may not simply assert that the defendant was under arrest and that the search was conducted pursuant to that arrest." People v. Baldwin, 25 N.Y.2d 66, 70-71; 302 N.Y.S.2d 571, 574 (1969). Cf. People v. Havelka, 45 N.Y.2d 636, 412 N.Y.S.2d 345 (1978).

If the People allege consent as the legal basis for the search and seizure, a heavy burden is on the People to prove the fact of consent. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1964); People v.

Whitehurst, 25 N.Y.2d 203, 351 N.Y.S.2d 649 (1973); United States v. Viera, 569 F.Supp. 1419 (D.C.N.Y. 1983); People v. Saglimbeni, 95 A.D.2d 141, 465 N.Y.S.2d 182 (1st Dept. 1983), appeal dismissed, 62 N.Y.2d 798, 477 N.Y.S.2d 330 (1984). In cases not involving consent, the ultimate burden is on the defendant. People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971). The People have not sustained their burden of going forward when the police testimony is patently incredible. People v. Martinez, 71 A.D.2d 905, 419 N.Y.S.2d 612 (2d Dept. 1974), citing Berrios. In a case where the testimony was directly in conflict, and only one officer was called to testify, although six or seven actually participated in the search, a court found as a matter of law that the People failed to sustain its "heavy burden" to prove consent:

> In light of the sharp facutal dispute engendered by the testimony of the parties' witnesses, the People should have called one or more of the six or seven officers who participated in the search.
> People v. Goldsmith, 76 A.D.2d 843, 428 N.Y.S.2d 327, 328 (2d Dept. 1980).

Note: Hearsay is admissible at a suppression hearing. See CPL §710.60(4), see also United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974).

(3) Appeals

The People may take an interlocutory appeal after a motion to suppress evidence has been granted on the ground that the evidence was unlawfully seized. CPL §§450.20(8); 450.50. Note, however, that such an appeal must include a statement that without the suppressed evidence the People's case is so weak that the prosecution has been effectively destroyed. Moreover, unless the suppression order is reversed on appeal, the People are barred from proceeding with the prosecution. CPL

§450.50(2). The defendant may appeal a denial of the motion to suppress after a judgment of conviction, even if the conviction is upon a plea of guilty. See CPL §710.70(2).

D. Exceptions to Warrant Requirement

(1) Exigent Circumstances

The Fourth Amendment warrant requirement pertains only to unreasonable searches and seizures. When a Fourth Amendment search or seizure occurs, its reasonableness must be determined by balancing the "need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 537; 87 S.Ct. 1727, 1735 (1967); B.T. Productions v. Barr, 44 N.Y.2d 226, 405 N.Y.S.2d 9 (1978). The exigent circumstances exception to the warrant requirement is the result of such balancing. Exigent circumstances are those that necessarily require immediate action at a time when a search warrant cannot be obtained. Such an exigency may convert an otherwise unreasonable search into a reasonable one. The following examples are illustrative, not comprehensive.

When government agents act in an emergency to preserve life or health, they may enter onto premises without a warrant and without probable cause to believe either that a crime has been committed or that contraband will be found. Such an entry, however, must be linked closely in time to the exigency that gave rise to it. See Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641, (1984), reh'g denied, 104 S.Ct. 1457, wherein a nonconsensual, warrantless search of a fire-damaged private residence conducted six hours after the fire had been extinguished and after the owners had taken steps to secure the building was held violative of the Fourth Amendment. See also Michigan v. Tyler,

436 U.S. 499, 98 S.Ct. 1942 (1978)

In People v. Mitchell, 39 N.Y.2d 173, 177; 383 N.Y.S.2d 246, 248 (1976), cert. denied, 426 U.S. 953, 96 S.Ct. 3178 (1976), the New York Court of Appeals held that in order to sustain a warrantless search on the basis of the emergency doctrine, the following basic elements must be present:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and there is an immediate need for their assistance for the protection of life or property.
>
> (2) The search must not be primarily motivated by intent to arrest and seize evidence.
>
> (3) There must be some reasonable basis approximating probable cause, to associate the emergency with the area or place to be searched.

See also People v. Gallmon, 19 N.Y.2d 389, 280 N.Y.S.2d 356 (1967); People v. Lenart, 91 A.D.2d 132, 457 N.Y.S.2d 878 (2d Dept. 1983); People v. Cruz, 89 A.D.2d 526, 452 N.Y.S.2d 616 (1st Dept. 1982), aff'd, 59 N.Y.2d 984, 466 N.Y.S.2d 661(1983).

Police may also enter premises to prevent a criminal's escape. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298-99; 87 S.Ct. 1642, 1646 (1967). See also United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976); People v. Etcheverry, 39 N.Y.2d 252, 383 N.Y.S.2d 292 (1976); People v. Coles, 104 Misc.2d 333, 428 N.Y.S.2d 412 (Sup. Ct. N.Y. Co. 1980) (citizen informant told police defendants had arsenal of illegal weapons); People v. Rios, 105 Misc.2d 303, 432 N.Y.S.2d 63 (Albany Co. Ct. 1980) (police had probable cause to

believe infant kidnap victim was in apartment). But see People v. Thomas, 72 A.D.2d 910, 422 N.Y.S.2d 188 (4th Dept. 1976) (where police had arrested defendant robbery suspect at the back of his house, their subsequent entry into his house on the pretext of looking for a possible accomplice, and their seizure of stolen goods discovered there was unreasonable); People v. Matta, 76 A.D.2d 844, 428 N.Y.S.2d 491 (2d Dept. 1980) (evidence suppressed because no basis to find that the warrantless search of defendant in seller's apartment would have had any effect on condition of drug overdose victim who had left that apartment and lost consciousness in his parents' home).

In addition, police may conduct a warrantless entry where there is probable cause to believe evidence is being or will be destroyed. United States v. Martino, 664 F.2d 860, 870 (2d Cir. 1981) cert. denied, 458 U.S. 1110, 102 S.Ct. 3493 (1982); Kwok T. v. Mauriello, 43 N.Y.2d 213, 401 N.Y.S.2d 52 (1977); People v. Cunningham, 71 A.D.2d 559, 418 N.Y.S.2d 780 (1st Dept. 1979), aff'd, 52 N.Y.2d 923, 437 N.Y.S.2d 668 (1981) (search of apartment was reasonable where officers were investigating report that shots were just fired on premises and, after observation, had probable cause to believe an occupant was disposing of narcotics). However, the mere fact that a homicide occurred in a particular house does not free investigators from the requirement that they obtain a warrant before searching the premises in a case where suspects have already been taken into custody. In rejecting a homicide scene exception to the warrant requirement, in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978), the Supreme Court held that police may nevertheless make a "prompt warrantless search" in order to determine if there are other victims or if a killer is still on the premises." "And [they] may seize

any evidence that is in plain view during the course of their legitimate emergency activities." Id. 437 U.S. at 392, 98 S.Ct. at 2413. See also Katz v. United States, 389 U.S. 347, 357; 88 S.Ct. 507, 514 (1967) (warrantless searches and seizures are per se unreasonable subject to "a few specifically established and well-delineated exceptions"). See People v. Hodge, 44 N.Y.2d 553, 406 N.Y.S.2d 736 (1978), where the Court of Appeals held that the emergency doctrine sanctions a limited search in order to discover the perpetrator of the crime, or locate the scene of the crime or the victim. See also People v. Taper, 105 A.D.2d 813, 481 N.Y.S.2d 745 (2d Dept. 1984) (evidence was properly seized pursuant to the "emergency" doctrine where police while investigating a fatal stabbing discovered a trail of blood leading from the victim's body to defendant's private social club, the police observed blood in premises and initial intrusion lasted only twenty minutes); People v. Gaudet, 115 A.D.2d 183, 495 N.Y.S.2d 253 (3rd Dept. 1985). But see People v. Cohen, 87 A.D.2d 77, 450 N.Y.S.2d 497 (2d Dept. 1982), aff'd, 58 N.Y.2d 844, 460 N.Y.S.2d 18 (1983), cert. denied, 461 U.S. 930 (1983) (warrant required after preliminary investigation ends).

(2) Warrantless Search Incident to Lawful Arrest

(a) The Right to Search

In making a lawful custodial arrest, an officer has the right to search the arrestee's person even if there is no probable cause to believe that a search would reveal a weapon or evidence of a crime. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973). This right to search, however, may be limited by state law. In contrast to some states, which have interpreted their state constitutions differently, New York has followed the Robinson rationale. People v. Weintraub, 35 N.Y.2d

351, 361 N.Y.S.2d 897 (1974). Where there was probable cause to arrest defendant -- he had admitted that he owned the illegal drugs seized from his companion's purse -- it is immaterial that the search of his person immediately followed rather than preceded his formal arrest. Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556 (1980).

However, the right to search incident to arrest does not extend to all arrests. In People v. Troiano, 35 N.Y.2d 476, 478; 363 N.Y.S.2d 943, 945 (1974), the Court of Appeals noted that "[t]here is, perhaps, an area of traffic violation 'arrest' where a full blown search is not justified, but it might seem to be confined to a situation where an arrest was not necessary because an alternative summons was available...." However, even though a summons may be issued where the offense is a violation, the police may arrest individuals for disorderly conduct and search them incident thereto, where the individuals refused to identify themselves after the police ordered them to cease their disorderly conduct. People v. Hazelwood, 104 Misc.2d 1121, 429 N.Y.S.2d 1012 (N.Y.C. Crim. Ct. Queens Co. 1980).

(b) Probable Cause as a Requirement of Lawful Arrest

The validity of a search incident to arrest is predicated on the validity of the arrest itself. The propriety of an arrest for a crime is not affected by the absence of an arrest warrant. CPL §140.10. However, a police officer may not make a warrantless entry into a home to arrest where there are no exigent circumstances to preclude obtaining a warrant. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 639 (1980),

rev'g 45 N.Y.2d 300, 408 N.Y.S.2d 395 (1978), on remand, 51 N.Y.2d 169, 433 N.Y.S.2d 61 (1981).* See also United States v. Reed, 572 F.2d 412 (2d Cir. 1978), cert. denied sub. nom. Goldsmith v. United States, 439 U.S. 913, 99 S.Ct. 283 (1978); Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587 (1981) (warrant to search for contraband implicitly carries with it the limited authority to detain the occupants of the premises while the search is conducted). Payton applies retroactively to cases on direct appeal as of the date of the decision. United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579 (1982). But see People v. Coles, 104 Misc.2d 333, 428 N.Y.S.2d 412 (Sup. Ct. N.Y. Co. 1980), where the court expressed doubt that Payton applied to the warrantless search of a hotel room registered to a person other than defendant. See also, People v. Minley 68 N.Y.2d 952, 510 N.Y.S.2d 87 (1986) where the Court found no violation of the Payton rule where police before arresting defendant approached his home, saw defendant whom they did not know peeking through a window and directed him to come out. Although the officers had their guns drawn there was no indication that defendant was threatened or that he saw the guns before he exited his house and was arrested.

In the absence of probable cause to arrest, a subsequent warrantless search is illegal. People v. Bryant, 37 N.Y.2d 208, 371 N.Y.S.2d 881 (1975). In People v. Valentine, 17 N.Y.2d 128, 132; 269 N.Y.S.2d 111, 114 (1966), motion to amend remittitur granted, 17 N.Y.2d 869, 271 N.Y.S.2d 299 (1966), the Court of Appeals held that "[t]he standard of probable cause to be applied in a situation where a police officer makes

* See also Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981) (absent exigent circumstances police could not search for subject of arrest warrant in home of third party).

an arrest without a warrant is the standard of what would be probable cause to 'a reasonable, cautious and prudent police officer' [citations omitted]." Reasonableness of action depends not on "inchoate and unparticularized suspicion or 'hunch', but [on] specific reasonable inference which [the officer] is entitled to draw from facts in light of his experience" (citing Terry v. Ohio, 392 U.S. 1, 27; 88 S.Ct. 1868, 1883 (1968)). People v. Arthurs, 24 N.Y.2d 688, 692; 301 N.Y.S.2d 614, 618 (1969). See also People v. West, 44 N.Y.2d 656, 405 N.Y.S.2d 29 (1978); People v. Loewel, 41 N.Y.2d 609, 394 N.Y.S.2d 591 (1977); People v. Oden, 36 N.Y.2d 382, 368 N.Y.S.2d 508 (1975); People v. Davis, 36 N.Y.2d 280, 367 N.Y.S.2d 256 (1975), cert. denied, 423 U.S. 876, 96 S.Ct. 149 (1975); People v. Brown, 24 N.Y.2d 421, 301 N.Y.S.2d 18 (1969); People v. Cohen, 23 N.Y.2d 674, 295 N.Y.S.2d 927 (1968); People v. Corrado, 22 N.Y.2d 308, 292 N.Y.S.2d 648 (1968); People v. White, 16 N.Y.2d 270, 266 N.Y.S.2d 100 (1965).

Formerly, the furtive transfer of glassine envelopes was deemed activity susceptible of an innocent interpretation which would not alone support a finding of probable cause. People v. Brown, 24 N.Y.2d 421, 301 N.Y.S.2d 18 (1979). However, the Court of Appeals found probable cause to arrest existed where the narcotics transaction took place in an area which had developed a reputation as a drug marketplace. People v. McRay, 51 N.Y.2d 594, 435 N.Y.S.2d 679 (1980), rev'g People v. Hester, 71 A.D.2d 121, 421 N.Y.S.2d 569 (1st. Dept. 1979). The Court reasoned that the march of time had altered the minimum requirement for establishing probable cause under these circumstances.

> We have witnessed in recent years a virtual explosion in drug trafficking in our society.... [T]he number of heroin users or addicts in New

> York City alone rose from 65,000 in 1967 to 150,000 in 1971.... The character of the community known to the arresting officer provides the supplemental element-the additional requisite assurance that the observer has witnessed an illicit dealing rather than an innocent encounter.
>
> McRay, 51 N.Y.2d at 602-04, 435 N.Y.S.2d at 683-84.

See also People v. Alexander, 37 N.Y.2d 202, 371 N.Y.S.2d 876 (1975) (after defendant threw down glassine envelopes when approached by a police officer, there was probable cause to arrest him); People v. Valentine, supra (experienced police officer, an expert on the game of policy and familiar with its modus operandi, had probable cause to arrest defendant for violation of the laws against gambling after observing six unknown persons approach the defendant and hand him money, after which defendant made notations on a slip of paper); People v. Holman, 90 A.D.2d 746, 455 N.Y.S.2d 808 (1st Dept. 1982).

Where there was a high rate of burglaries in the neighborhood, the Appellate Division found the character of the area to weigh in support of probable cause to arrest. People v. Thurmon, 81 A.D.2d 548, 438 N.Y.S.2d 312 (1st Dept. 1981) (defendants, whom the police found examining contents of plastic bag containing credit cards, jewelry box and calculator, were very evasive upon stop and inquiry); see also People v. Valos, 92 A.D.2d 1004, 461 N.Y.S.2d 507 (3d Dept. 1983).

Equivocal activity, which in some cases, might justify a stop and frisk (see discussion in Section D(3), supra), is not sufficient probable cause to arrest. See People v. Carrasquillo, 54 N.Y.2d 248, 445 N.Y.S.2d 97 (1981) (although stop and inquiry were justified, police had no probable cause to arrest defendant who gave the wrong brand name of a radio in the brown paper bag he was carrying and claimed that he found

the items in a garbage heap). Compare People v. Moore, 47 N.Y.2d 911, 419 N.Y.S.2d 495 (1979). See also People v. Batista, 68 A.D.2d 515, 417 N.Y.S.2d 724 (1st Dept. 1979), aff'd, 51 N.Y.2d 996, 435 N.Y.S.2d 980 (1980) (defendants' act of buying a holster in a high crime area did not permit the officers, who might have lawfully stopped and frisked defendants, to arrest).

A pretext arrest will not justify a search and seizure. See People v. Adams, 32 N.Y.2d 451, 346 N.Y.S.2d 229 (1973), where the Court of Appeals held that the trial court properly suppressed the marihuana seized from the defendant's person after his lawful arrest for a Vehicle and Traffic Law violation (his identification number did not match his automobile in the National Auto Checkbook).

> A search may not of course be exploratory in nature but must be specific in its initiation and scope [citations omitted] and the lawfulness of an arrest will not always justify an otherwise illegal search....
>
> * * *
>
> As noted, the defendant's person was first subjected to a search which was the predicate for and led to the subsequent search of the car. It is generally accepted that, based on reasonable grounds, the legitimate objective (sic) of a warrantless search incident to arrest are to permit the "(1) seizure of fruits, instrumentalities and other evidence of the crime for which the arrest is made in order to prevent its destruction or concealment; and (2) removal of any weapons that the arrestee might seek to use to resist arrest or effect his escape [citations omitted]." None of the grounds is here present.
>
> Adams, 32 N.Y.2d at 454-45, 346 N.Y.S.2d at 231-32.

See also People v. Howell, 49 N.Y.2d 778, 426 N.Y.S.2d 477 (1980), a memorandum opinion invalidating the search incident to defendant's

arrest for the misdemeanor of "reckless" (erratic) driving.

> The trial court was in error in its conclusion that merely because reckless driving is a misdemeanor rather than a traffic violation, the arrest was inevitable. An arrest in a situation such as was presented in this case was neither called for nor the preferred procedure [citations omitted].
> Howell, 49 N.Y.2d at 779, 426 N.Y.S.2d at 478.

Similarly, in In re Robert M., 99 Misc.2d 462, 416 N.Y.S.2d 679 (Fam. Ct. N.Y. Co. 1979), the court suppressed the seizure of a gun on the ground that its only justification could be an arrest for a marihuana misdemeanor, which concededly the officer did not make and never intended to make.

Note: The fact that a statute is subsequently declared unconstitutional does not invalidate a prior arrest under the statute and the search and seizure incident thereto. Michigan v. DeFillipo, 443 U.S. 31, 99 S.Ct. 2627 (1979).

[i] Informant's Tip

Probable cause to search and seize or to make an arrest and search incident thereto is frequently based on an informant's tip that a person possesses contraband or is committing or has just committed a crime. Three cases decided by the United States Supreme Court [Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969); Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959)] set forth a two-pronged test, known as the Aguilar-Spinelli test or the Aguilar-Spinelli-Draper test, for determining whether an informant's tip furnished sufficient probable cause for a search and seizure. Although Aguilar and Spinelli involved the use of search warrants, basically the same test used to be applied in

determining whether an informant's tip justifies a warrantless search: (1) was the informant credible; and (2) was his information reliable. The Supreme Court, however, overruled the two-pronged test and replaced it with a totality-of-the-circumstances test in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), reh'g denied, 104 S.Ct. 33 (1983). In Gates, an anonymous note informed police that defendants sold drugs from their house and that large quantities could be found in their basement and the trunk of their car. The note also detailed how they bought the drugs and told of precise dates the pair would travel to and return from Florida. Police investigation established that one of the defendants flew to Florida, met the other and left in his car to drive back to Chicago. A warrant was obtained and, upon defendants' return, it was executed and drugs were seized. The Court used this set of facts to declare that, although they did not satisfy the Aguilar-Spinelli criteria; the warrant would nonetheless be upheld, and the test would be abandoned. The Court reaffirmed the relevance of the informant's basis of knowledge and his reliability, but declared that they should not be separate and independent requirements. Instead, one prong could make up for a deficiency in the other, or some other indicia of reliability may be utilized. The Court eschewed an excessively technical dissection of tips, "with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts..." Id. at 2330, in favor of a commonsense, practical approach based on probability, not hard certainties or rigid tests. The informant's reliability can be established by his past performance, by statements against penal interest or his information can be independently corroborated by police investigation. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972); People v. Escalante, 89

A.D.2d 1091, 454 N.Y.S.2d 465 (2d Dept. 1982); People v. Restrepo, 87 A.D.2d 320, 451 N.Y.S.2d 144 (1st Dept. 1982). The fact that the informant was motivated to receive a reward did not render the informant unreliable where the Aquilar-Spinelli reliability test was otherwise met. People v. Cantre, 65 N.Y.2d 790, 493 N.Y.S.2d 127 (1985). The officer's knowledge of the suspect's reputation is also relevant. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075 (1971). The reliability of a disinterested citizen-informant is not measured by as stringent a standard as the reliability of a paid informant. People v. Bruce, 78 A.D.2d 169, 434 N.Y.S.2d 338 (1st Dept. 1980); People v. Coles, 104 Misc.2d 333, 428 N.Y.S.2d 412 (Sup. Ct. N.Y. Co. 1980). But note People v. Early, 76 A.D.2d 335, 430 N.Y.S.2d 641 (2d Dept. 1980) (tip of citizen informant that defendant was in the habit of carrying weapons, where basis of information was not elicited, was inadequate to support a finding of probable cause). See also People v. Dinkins, 76 A.D.2d 655, 431 N.Y.S.2d 535 (1st Dept. 1980), where the court found that probable cause to search was insufficient where predicated on an anonymous 911 call from a concerned citizen.

Based on Article I, §12 of the New York State Constitution, the Court of Appeals in People v. Elwell, 50 N.Y.2d 231, 234-35; 428 N.Y.S.2d 655, 657 (1980), held that in cases where probable cause was based on the tip of an informant "who has not revealed the basis of his knowledge, it is not enough that a number, even a large number, of details of noncriminal activity supplied by the informer be confirmed. Probable cause for such an arrest or search will have been demonstrated only when there has been confirmation of sufficient details suggestive of or directly related to the criminal activity informed about to make

reasonable the conclusion that the informer has not simply passed along rumor, or is not involved (whether purposefully or as a dupe) in an effort to 'frame' the person informed against." In Elwell, the Court of Appeals invalidated a seizure of a gun after a search of an automobile based on a tip received from a professional informant, who had been reliable in the past, that defendants Elwell and another, occupants of a described car in a described vicinity, possessed a pistol. The informant had not given the basis of his information nor did the officers observe the defendants and his companion engaging in any suspicious behavior prior to the search. Accord, People v. Cook, 85 A.D.2d 672, 445 N.Y.S.2d 199 (2d Dept. 1981). See also, People v. Edwards, 69 N.Y.2d 8114, 513 N.Y.S.2d 960 (1987).

There is no presumption that the informer speaks from personal knowledge. Elwell, supra. The Court of Appeals distinguished Draper as clarified by Aguilar; in Draper police received a tip from a past reliable paid informant that a described narcotics seller would be alighting from a certain train from Chicago where he had obtained heroin carrying a tan zipper bag and walking very fast. Although in Draper, the United States Supreme Court did not discuss whether the police verified the criminal activity, it stated in Aguilar that the specific, detailed nature of the tip made the conclusion inevitable that the informant had personal knowledge of the narcotics selling.

In People v. Johnson, 66 N.Y.2d 398, 497 N.Y.S.2d 618 (1985), the Court of Appeals expressly ruled as a matter of state constitutional law, that it would not apply the Gates totality of the circumstances standard to warrantless searches and seizures, noting that Gates involved a search pursuant to a warrant. In People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d

630 (1985), the Court of Appeals declined to abandon the Aquilar-Spinelli rule in a case involving a search pursuant to a warrant, where the Court found no probable cause under either Aquilar-Spinelli or Gates. See also, People v. P.J. Video Inc., 68 N.Y.2d 296, 508 N.Y.S.2d 907 (1986) where the New York Court of Appeals rejects the federal totality of the circumstances test to establish probable cause with respect to allegedly obscene material. Article I §12 of the New York constitution is held to require that probable cause be established as to each element of obsenity.

(c) The Requirement of a Contemporaneous Search

A search incident to a lawful arrest must also be substantially contemporaneous with the arrest; otherwise, the rationale for allowing such a search does not apply. People v. Farrell, 89 A.D.2d 987, 454 N.Y.S.2d 306 (2d Dept. 1982). A warrantless search of premises which was the scene of a homicide was not reasonable four days after the homicide, especially when the suspects had been taken into custody. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978); see People v. Cohen, 87 A.D.2d 77, 450 N.Y.S.2d 497 (2d Dept. 1982), aff'd, 58 N.Y.2d 844, 460 N.Y.S.2d 18 (1983), cert. denied, 103 S.Ct. 2092 (1983). While the revelations of a search incident to arrest cannot justify an arrest for which there is not probable cause, nevertheless, where probable cause exists to arrest before a search, a search may slightly precede the actual arrest. See Sibron v. New York and Peters v. New York, 392 U.S. 40, 88 S.Ct. 1889 (1968).

(d) Search Must Be Near In Place To Arrest

A search incident to arrest requires nearness in place as well as in time. Thus a search incident to arrest is unreasonable where it

extends beyond defendant's person and the area from which he might obtain either a weapon or something that could have been used as evidence against him. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969), reh'g denied, 396 U.S. 869, 90 S.Ct. 36 (1969). People v. Williams, 37 N.Y.2d 206, 371 N.Y.S.2d 880 (1975); Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970); People v. Lewis, 26 N.Y.2d 547, 311 N.Y.S.2d 905 (1970); In the Matter of Robert E.D., 80 A.D.2d 613, 436 N.Y.S.2d 56 (2d Dept. 1981), appeal dismissed, 54 N.Y.2d 717, 442 N.Y.S.2d 990 (1981).

[i] The Luggage Cases

In United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476 (1977), railroad officials observed two of the defendants loading a heavy footlocker leaking talcom powder (often used to disguise the odor of marihuana) onto a train bound for Boston. Federal agents in Boston were notified. When the train arrived in Boston, the agents observed these same defendants load the footlocker into defendant Chadwick's car. The agents arrested all three individuals and seized the footlocker. Ninety minutes later, after the suspects were in custody and separated from the footlocker, the agents searched the footlocker without a warrant at the Federal Building and found marihuana. The United States Supreme Court found this search unreasonable. See also Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586 (1979), where the Court held that in the absence of exigent circumstances, the police must obtain a search warrant before searching luggage seized from an automobile properly stopped and searched for contraband (here, a suitcase containing marihuana seized from the trunk of the taxicab in which defendant was a passenger); to the same effect Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 2400 (1980) (right to take possession of package of obscene films did not give

officials the right to take the films from the package and screen them without a warrant; "an officer's authority to possess a package is distinct from his authority to examine its contents"); see also Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983), in which the permissible brief detention of defendant, who fit a drug courier profile in an airport, did not give rise to a lengthy interrogation procedure and seizure of defendant's driver's license and airline ticket.

[ii] Search of a Vehicle Incident to Arrest

Police may search a vehicle incident to the occupant's lawful arrest, where there is probable cause to believe it may contain fruits, instrumentalities or evidence of a crime. United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), cert. denied, 456 U.S. 989, 102 S.Ct. 2269 (1982) (following defendant's lawful arrest in front of his home, DEA agents were justified in conducting a warrantless search of defendant's car, where the agents knew that the automobile was carrying heroin); People v. Cabral, 91 A.D.2d 944, 458 N.Y.2d 559 (1st Dept. 1983), appeal dismissed, 59 N.Y.2d 704, 463 N.Y.S.2d 439 (1983); People v. Ellis, 93 A.D.2d 657, 462 N.Y.S.2d 867 (1st Dept. 1983) (locked glove compartment), aff'd 62 N.Y.2d 393, 477 N.Y.S.2d 106 (1984); People v. Stinson, 92 A.D.2d 676, 460 N.Y.S.2d 182 (3d Dept. 1983), cert. denied, 104 S.Ct. 532 (1984); People v. Escalante, 89 A.D.2d 1019, 454 N.Y.S.2d 465 (2d Dept. 1982) (trunk); People v. Hadley, 67 A.D.2d 259, 415 N.Y.S.2d 719 (4th Dept. 1979) (troopers at toll booth who made arrest were notified by surveilling officers that defendants had just stolen equipment and that this stolen property was in the van defendants were driving when the troopers arrested defendants)

In Belton v. New York, 453 U.S. 454, 101 S.Ct. 2860 (1981), reh'g

denied, 453 U.S. 950, 102 S.Ct. 26 (1981), rev'g 50 N.Y.2d 447, 429 N.Y.S.2d 574 (1980), the Supreme Court held that the warrantless search of defendant's jacket, after he was arrested, was reasonable because the jacket was inside the passenger compartment of defendant's automobile and "within the arrestee's immediate control" as defined in Chimel v. California, supra. "When a policeman has made a lawful arrest of the occupant of an automobile, he may as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. [T]he police may also examine the contents of any containers found within the passenger compartment.... whether the container is opened or closed." Belton v. New York, supra, 101 S.Ct. at 2864. On remand, the New York Court of Appeals ruled on defendant's challenge to the reasonableness of the search under Article 1, §12 of the State Constitution.* The Court sustained the validity of the search under the "automobile exception" to the State's warrant requirement. People v. Belton, 55 N.Y.2d 49, 447 N.Y.S.2d 873 (1982). See discussion of United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982), under Automobile Exception, Section D(7), infra. See also People v. Gokey, 60 N.Y.2d 309, 469 N.Y.S.2d 618 (1983) and People v. Smith, 59 N.Y.2d 454, 465 N.Y.S.2d 896 (1983). People v. Langen, 60 N.Y.2d 170, 469 N.Y.S.2d 44 (1983) considerably broadened the "automobile exception" rule of the Belton case and held that once the police have made a valid arrest for a crime, (as opposed to a mere traffic infraction), they may without a warrant, search the entire

* The first unnumbered paragraph of Article I, §12 reads: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

vehicle, including locked containers and the trunk despite the fact that the containers or the car and its contents, could have been retained by the police until a warrant was obtained. But see Oklahoma v. Castleberry, 471 U.S. 146, 105 S.Ct. 1859 (1985), where the Supreme Court affirmed in a 4-4 decision the holding of the Oklahoma Court of Criminal Appeals that applied United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982), to hold unconstitutional the search of all the locked containers in a vehicle when the police had probable cause as to only two of them. The Oklahoma Court had ruled that as to those two containers, the police should have obtained a warrant. The court also found under the circumstances the search of the entire vehicle exceeded the scope of a permissible search incident to an arrest because the defendants were handcuffed and the police had drawn their guns.

(3) Stop and Frisk

(a) The Stop

Stopping an individual on the street may constitute a "seizure" within the meaning of the Fourth Amendment. People v. Cantor, 36 N.Y.2d 106, 111, 365 N.Y.S.2d 509, 515 (1975) ("seizure" of the person defined for constitutional purposes as a significant interruption of an individual's liberty of movement). Therefore, a state (Texas) statute which makes it a crime simply to refuse to identify oneself when requested by a police officer violated the Fourth Amendment as it did not provide that there be a basis for suspicion on the part of the police officer that the individual stopped is engaged in or about to engage in criminal activity. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979).

In People v. Morales, 65 N.Y.2d 997, 494 N.Y.S.2d 95 (1985), the Court of Appeals held that a person who is frisked is not to be consid-

ered in custody as a matter of law so as to require the police to administer Miranda warnings, citing Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), the Court said "there is a clear distinction between a stop and frisk inquiry and a forceable seizure which curtails a person's freedom of action to the degree associated with a formal arrest."

The principles for evaluating a "stop" on the high seas are the same as those applied to a stop on land. United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). In Streifel, the court found that although the Coast Guard's "stopping" of defendant's ship constituted a "seizure" within the meaning of the Fourth Amendment, the officials had reasonable, articulable grounds for suspecting that the ship was being used to smuggle drugs into the United States. Therefore, the stop and boarding of the ship were not unreasonably intrusive.

The amount of justification for the stop depends on the degree to which the individual's right to travel is impeded. Compare, for example, People v. Green, 57 A.D.2d 183, 394 N.Y.S.2d 216 (2d Dept. 1977) (officer grabs defendant) and People v. Cantor, supra (blocking defendant), with Matter of Eugene J., 42 N.Y.2d 1058, 399 N.Y.S.2d 208 (1977) and People v. Valo, 92 A.D.2d 1004, 461 N.Y.S.2d 507 (3d Dept. 1983) (wholly non-violent stops to request information). In People v. Debour and People v. LaPene, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976), the New York Court of Appeals held that where a stop constitutes a forcible seizure, a greater degree of justification is required than when the stop is non-violent for relatively nonintrusive questioning. See also People v. Jennings, 45 N.Y.2d 998, 413 N.Y.S.2d 117 (1978).

Where officers have reason to fear for their safety (for example,

where they suspect that the persons of whom they wish to make inquiry are the perpetrators of a recent, violent crime), they are justified in making the initial stop at gunpoint. People v. Chestnut, 51 N.Y.2d 14, 431 N.Y.S.2d 485 (1980), cert. denied, 449 U.S. 1018 (1981); see People v. Acevedo and Douglas, 102 A.D. 336, 476 N.Y.S.2d 901 (1st Dept. 1984); People v. Olsen, 93 A.D.2d 824, 460 N.Y.S.2d 828 (2d Dept. 1983); People v. Dominguez, 84 A.D.2d 820, 444 N.Y.S.2d 120 (2d Dept. 1981); People v. Finlayson, 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dept. 1980), cert. denied, 450 U.S. 931 (1981); see also People v. Casado, 83 A.D.2d 385, 444 N.Y.S.2d 920 (1st Dept. 1981) (police officer's initial stop and inquiry of defendant was justified in light of defendant's suspicious behavior; the officer's subsequent chase and seizure of the defendant was valid where upon initial stop, defendant said "Oh, God," threw a bag at the officer and ran away). People v. Jackson, 72 A.D.2d 149, 423 N.Y.S.2d 173 (1st Dept. 1980) (police justified in conducting stop and inquiry with their guns drawn as they had reason to believe that defendant was the recent caller who had threatened to shoot someone); compare In the Matter of Darrick C., 72 A.D.2d 768, 421 N.Y.S.2d 391 (2d Dept. 1979) (arresting officers had only received radio run direction to investigate report of auto tampering; when the officers saw juveniles carrying a tool box, the permissible scope of intrusion was limited to that necessary to gain explanation; therefore, the seizure of defendant juvenile at gunpoint was unreasonable); People v. Carney, 58 N.Y.2d 51, 457 N.Y.S.2d 776 (1982) (police must corroborate tip or conduct inquiry absent facts that provide a basis that individual is armed).

> The primary issue [in determining the reasonableness of a stop and frisk] is whether or not the police possessed sufficient knowledge at

> the outset to sustain the subsequent intrusions on the privacy of the individuals accosted. (People v. DeBour, 40 N.Y.2d 210, 224, 386 N.Y.S.2d 375, 385, 352 N.E.2d 562, 572, supra; People v. Lypka, 36 N.Y.2d 210, 366 N.Y.S.2d 622, 326 N.E.2d 294).
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> In light of the principles articulated in LaPene (supra) it is clear that where an anonymous phone tip giving a general description and location of a "man with a gun" is the sole predicate, it will generate only a belief that criminal activity is afoot (People v. Cantor, 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872; People v. DeBour, supra). That type of information will not of itself constitute reasonable suspicion thereby warranting a stop and frisk of anyone who happens to fit that description (People v. LaPene, supra; CPL 140.50). In that situation, the police have only the common-law power to inquire for purposes of maintaining the status quo until additional information can be acquired (Adams v. Williams, 407 U.S. 143, 145; 92 S.Ct. 1921, 32 L.Ed. 612).
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> People v. Stewart and People v. Williams, 41 N.Y.2d 65, 69; 390 N.Y.S.2d 870, 873; 359 N.E.2d 379 (1976).

The New York Court of Appeals decided the cases of Stewart and Williams together, both involving the use by police of anonymous telephone information that described persons who allegedly possessed weapons as a predicate for stopping individuals on the street. The Court concluded that the stop and frisk conducted by the police officer in Williams was reasonable, in that the defendant was named and described, was recognized by the officer as a person whom the officer had questioned on several occasions a few days ago, and the officer, experienced in weapons' arrest, had determined that the bulge in defendant's pocket was a gun. By contrast, in Stewart the Court found that while the officer was justified in approaching defendant who met the description, the officer exceeded his authority when he reached into defendant's

pocket, as he admittedly could not see the outline of a gun and knew from the frisk that there was no gun in the pocket (as indeed there was not). The Court ruled that "the patrolman in Stewart would have been justified if he had made a verbal and visual inquiry while taking due precaution for his own safety [citations omitted]." Stewart, 41 N.Y.2d at 69, 390 N.Y.S.2d at 873.

Police were justified in stopping defendant pursuant to an anonymous 911 call reporting a man with a gun meeting defendant's description, but a search of defendant's automobile was unreasonable as defendant was not in the vehicle at the time of the stop. People v. Dinkins, 76 A.D.2d 655, 431 N.Y.S.2d 535 (1st Dept. 1980).

See also People v. Benjamin, 51 N.Y.2d 267, 434 N.Y.S.2d 144 (1980) (anonymous tip that men with guns were at streetcorner was sufficient to justify inquiry only, not frisk, but the action of one of these men, defendant, in stepping backwards and reaching under his jacket when the officers approached, justified the frisk). In Benjamin, the Court stated that an anonymous tip may be corroborated by circumstances that were "rapidly developing or observed at the scene." Benjamin, 51 N.Y.2d at 270, 434 N.Y.S.2d at 146. Similarly in People v. Samuels, 68 A.D.2d 663, 418 N.Y.S.2d 607 (1st Dept. 1979), aff'd, 50 N.Y.2d 1035, 431 N.Y.S.2d 694 (1980), the Court found (1) that the defendant's act of buying a holster in the Times Square (high crime) area was a justifiable reason for the observing officer to approach defendant, identify himself, and ask why defendant had made the purchase; (2) that when the defendant failed to answer this question but instead put his hand in his pocket and failed to comply with an order to remove it, the officer was justified in grabbing defendant's hand from the outside; and (3) that when the officer

in so doing felt what seemed to be a gun, he was justified in seizing the gun. Accord, People v. Reyes, 91 A.D.2d 935, 457 N.Y.S.2d 829 (1st Dept. 1983); People v. Lambert, 84 A.D.2d 849, 444 N.Y.S.2d 168 (2d Dept. 1981); People v. Johnson, 79 A.D.2d 936, 434 N.Y.S.2d 996 (1st Dept. 1980), aff'd, 54 N.Y.2d 958, 445 N.Y.S.2d 146 (1981).

Given justification for a stop, the right to inquire is well - established. "[T]he common law has long recognized the right of law officers... to make the limited intrusion of asking one for an explanation of his actions." People v. Peters, 18 N.Y.2d 238, 242-43, 273 N.Y.S.2d 217, 220-21 (1966). See People v. Hutchinson, 47 N.Y.2d 823, 418 N.Y.S.2d 574 (1979) (defendant's frantic attempts to stop passing cars and taxi cabs at a busy intersection, while repeatedly looking back in the direction from which they had just come, gave police the right to stop and inquire, as this behavior was a reason to suspect that defendants were either perpetrators or victims of a recent crime); see also People v. Rivera, 14 N.Y.2d 441, 252 N.Y.S.2d 458 (1964); CPL §140.50; compare People v. Williams, 79 A.D.2d 147, 436 N.Y.S.2d 15 (1st Dept. 1981) (fact that defendants were sitting in a parked car in a high crime area did not justify stop and inquiry); People v. Green, 35 N.Y.2d 193, 360 N.Y.S.2d 243 (1974); People v. Dean, 79 A.D.2d 555, 433 N.Y.S.2d 803 (1st Dept. 1980) (information from a citizen informant with whom police were slightly acquainted, and whose full name they learned afterward, that defendant who was on the street nearby, had a gun in her handbag, justified a stop and frisk of defendant at gunpoint); Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979), rehearing denied, 444 U.S. 1049 (1980) (police had no right to frisk defendant bar patron, who was empty-handed and who had made no threatening moves, simply because they

had a search warrant for the premises based on an affidavit that the bartender was selling heroin); People v. Walker, 70 A.D.2d 828, 417 N.Y.S.2d 694 (1st Dept. 1979) (although the fact that defendant repeatedly looked over his shoulder as he walked toward the patrol car may have justified a stop and inquiry, the fact that defendant failed to respond when asked if he had a gun and had a concededly unrecognizable bulge under his belt was not sufficient probable cause for the frisk and seizure at gunpoint); People v. Mitchell, 75 A.D.2d 626, 426 N.Y.S.2d 833 (2d Dept. 1980) (lateness of the hour, character of area, and unfavorable ratio of officers to burglary suspects justified frisk).

(b) The Frisk

The right to frisk for weapons may be justified as incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Rivera, 14 N.Y.2d at 447, 252 N.Y.S.2d at 463. The scope of the search is limited to a search for weapons. Unlike a search incident to an arrest, however, it is not a reasonable search per se. The officer may only frisk if he reasonably believes that he is in danger of physical injury because the detainee may be armed. CPL §140.30(3); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). A reasonable suspicion that an individual has committed or is about to commit a crime does not give a police officer the right to frisk without additional information to support an independent belief that the individual is presently dangerous. People v. Carney, supra; People v. Mack, 26 N.Y.2d 311, 319; 310 N.Y.S.2d 292, 298 (1970), cert. denied, 400 U.S. 960 (1970); People v. Sanchez, 38 N.Y.2d 72, 378 N.Y.S.2d 346 (1975).

But in People v. King, 65 N.Y.2d 702, 492 N.Y.S.2d 521 (1985), the

Court of Appeals held that defendant's suspicious and uncooperative conduct after being ordered to stop by the police justifies a limited pat down for concealed weapons. And the Court of Appeals in People v. Brooks, 65 N.Y.2d 1021, 494 N.Y.S.2d 103 (1985), has further held that where a valid stop and frisk is being carried out, the police are not limited to a pat down of the suspect's person but may also examine personal items capable of concealing a weapon within the suspect's "grabbable reach" as an incident to an inquiry upon grounds of safety and precaution.

[i] Case Law Limiting Right to Stop

In People v. Howard, 50 N.Y.2d 538, 430 N.Y.S.2d 578 (1980), cert. denied, 449 U.S. 1023 (1981), the New York Court of Appeals ruled that there is no duty on the part of a citizen to respond to the police inquiry; he may walk or run away; this flight per se, even in a high crime area, does not give the police the right to detain that individual forcibly or to stop and frisk him. But see People v. Smarr, 77 A.D.2d 854, 431 N.Y.S.2d 40 (1st Dept. 1980) (in area of high incidence of robberies and narcotics sales, facts that police officer observed defendant watching passing senior citizens and that defendant fled when they approached him would justify a stop and inquiry although these facts did not justify a stop and frisk).

In People v. McNatt, 65 N.Y.2d 1046, 494 N.Y.S.2d 297 (1985), the Court of Appeals held it was permissible for the police to approach the defendant and inquire when they observed him leaving an abandoned hotel and when defendant, upon observing the police, he dropped a packet of envelopes into a plastic bag. However the seizure of the envelopes was not justified even though defendant answered falsely to a police inquiry

as there was no evidence of their criminal nature. See also, People v. Leung, 68 N.Y.2d 734, 506 N.Y.S.2d 320 (1986) where the Court of Appeals held defendant's passing of a manila envelope which resembled a "three dollar bag" in a neighborhood known for drug activity constituted "objective credible reason" sufficient to justify a police approach of a citizen. Defendant's immediate flight upon the officers approach together with the passing of the envelope established reasonable suspicion justifying the officer's pursuit and recovery of defendant's gun discarded during his flight was also lawful. See also, People v. Mosley, 68 N.Y.2d 881, 508 N.Y.S.2d 931 (1986) (where defendant and two companions followed an elderly woman around three sides of a block and began to follow her across the street but had continued on their way when police stopped them on the sidewalk such conduct was "equivocal a best" and did not constitute the type of specific articulable facts necessary to justify a stop and frisk).

In Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752 (1980), the United States Supreme Court held in a per curiam opinion that an investigatory stop could not be based on fact that defendant and another in airport (1) had no luggage other than their shoulder bags; (2) appeared to be trying to conceal the fact that they were travelling together by walking apart and exchanging surreptitious glances; and (3) had arrived from a city from which much cocaine originated. In People v. Mitchell, supra, one factor justifying the frisk was that the two suspects' explanations contradicted each other; People v. Rivera, 74 A.D.2d 653, 425 N.Y.S.2d 132 (2d Dept. 1980), a forcible stop and detention were justified by the suspect's answer to an inquiry that he had found in the garbage the bag with coins which he was carrying when stopped.

In People v. Hutchinson, discussed in Section D(3)(a), supra, the seizure of a handgun was upheld where a police officer on reasonable suspicion had stopped defendants in a moving gypsy cab to make inquiry; the officer's frisking of the pocket of defendant's jacket, was reasonable because the officer had seen defendant attempt to throw the jacket from the cab and, on visual inspection, the jacket appeared to be weighted. See also People v. Lathigee, 84 A.D.2d 918, 446 N.Y.S.2d 655 (4th Dept. 1981) (stop and frisk of defendants in a moving vehicle predicated upon reasonable suspicion that the occupants of the car had committed a burglary less than thirty minutes earlier, was valid, in spite of police officer's failure to make inquiries prior to frisking the defendants).

Where the police officer has a reasonable suspicion that an individual is possibly armed and dangerous based on personal observation, he may "stop and frisk." Terry v. Ohio, supra. See also People v. Harris, 48 N.Y.2d 208, 422 N.Y.S.2d 43 (1979) (police officer had the right to stop three men, carrying sticks and a television set, who fled when the officer approached and identified himself; the seizure of the sticks and television was upheld, although the defendants' conviction was reversed on the ground that the admission of their statements violated the rule in Miranda). Furthermore, a police officer may lawfully stop and frisk a person who meets the description of an armed robbery suspect received by the officer over the police radio. People v. Spivey, 46 N.Y.2d 1014, 416 N.Y.S.2d 534 (1979); People v. Havelka, 45 N.Y.2d 636, 412 N.Y.S.2d 345 (1978). He may also frisk a defendant's companion upon arrest to assure his own safety and to prevent interference with the arrest. People v. Jenkins, 87 A.D.2d 526, 448 N.Y.S.2d 9 (1st Dept. 1982). Where a reason-

able suspicion is acquired by a tip from an informer known to the officer who has provided reliable information in the past and whose tip has been verified at the scene, a "stop and frisk" may also be permissible. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921 (1972). See also People v. Havelka, supra (where reasonable cause is furnished to police by police radio communication, the officer who sent the communication must be present at suppression hearing). But see People v. Corales, 86 A.D.2d 551, 446 N.Y.S.2d 274 (1st Dept. 1982), aff'd, 56 N.Y.2d 767, 452 N.Y.S.2d 22 (1982) (absence of communicating officers from suppression hearing did not constitute reversible error where defendant neither requested their presence nor contested the information they transmitted upon which the search and seizure was predicated). Furthermore, if a police officer is informed by a citizen eyewitness to an armed robbery that has just occurred in the vicinity, he may stop and frisk the person identified by the citizen; corroboration of the information is not mandated nor does the failure of the officer to obtain the citizen eyewitness' name and address require the suppression of the gun seized. People v. Brace, 78 A.D.2d 169, 434 N.Y.S.2d 338 (1st Dept. 1980).

Where the street search for a weapon results from a stop and frisk based on the officer's personal observation, the reviewing court must consider specific factors:

> At least three aspects of each individual transaction should be considered. Was there proof of a describable object or of describable conduct that provides a reasonable basis for the police officer's belief that the defendant had a gun in his possession? Was the manner of the officer's approach to the defendant and the seizure of the gun from him reasonable in the circumstances? Was there evidence of probative worth that there had been a pretext stop and frisk or that the police were otherwise

> motivated by improper or irrelevant purpose? There will be other material considerations, too, in individual cases. Because the totality of the circumstances in each case is necessarily unique, there should be no expectation that comparable significance will always attach to the same or similar factors in different cases.
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> People v. Prochilo, People v. Goings and People v. Bernard, 41 N.Y.2d 759, 761-62; 395 N.Y.S.2d 635, 636, 363 N.E.2d 1380 (1977) (three cases decided together).

In Prochilo, an experienced officer on routine patrol, from a distance of seven or eight feet, saw Prochilo watching other officers interviewing pedestrians, while at the same time defendant was making continuous hand motions toward his right side. As the officer approached, he saw a bulge in the outline of a gun on the defendant's right side, whereupon the officer removed a gun from defendant's waistband. The Court affirmed the denial of Prochilo's motion to suppress. Similarly, the seizure of a gun after a frisk from defendant Goings' pocket by an officer on patrol in the Times Square area was reasonable because the officer saw the configuration of a handgun. The seizure of a gun from the defendant Bernard was unreasonable where the hearing only established that Bernard was in the company of a pimp, whom the officer knew and with whom the officer was casually conversing, that defendant during this conversation appeared nervous and stood slouched forward with his hands in his pockets, and that when defendant was told to remove his hands, he did so very slowly, at which time the officers saw a heavy object slide against the material of defendant's right pocket:

> Were there no more we might conclude that the revolver should not have been suppressed. In this instance it was defendant and his companion, not the police, who initiated the encounter. In this circumstance the police

> officer might naturally have been apprehensive for his safety when approached by a known lawbreaker with another man in his company who was slouched over, and who kept his hands in the pockets of his long coat as the conversation progressed. The inferences thus naturally to have been drawn must be deemed, however, to have been negated on this record. The officer testified that before he reached into defendant's pocket, defendant had done nothing
>
> wrong, thus he could not tell what the heavy object appeared to be by looking at the pocket, and that until he had reached into the pocket he had not seen "any part of what appeared to be a gun, a handle, a barrel, or anything like that." Nor is there anywhere in his testimony any suggestion that at any time he was apprehensive for his own safety. On this state of the record there was nothing in defendant's standing behind the pimp, in his nervousness or his sloched stature, or the fact that he had his hands in his coat pockets and removed them very slowly when requested to do so, or that a heavy object slid against the material of defendant's pocket which can be said to be reasonably referable to or indicative of the presence of a revolver.
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> Bernard, 41 N.Y.2d at 763, 395 N.Y.S.2d at 637.

See also People v. Fripp, 85 A.D.2d 547, 445 N.Y.S.2d 3 (1st Dept. 1981), aff'd, 58 N.Y.2d 907, 460 N.Y.S.2d 505 (1983) (police erred when they forcibly seized the defendant without first making an inquiry to confirm or deny their naked suspicions that defendant was armed and involved in criminal activity); In re Robert M., 99 Misc.2d 462, 416 N.Y.S.2d 679 (Fam. Ct. N.Y. Co. 1979) (there were no exigent circumstances and officer did not fear for his safety; therefore, the officer's viewing of a bulge in defendant's pocket did not justify a stop and frisk).

Note: A frisk is not a search because the police made defendant lie on the ground while they frisked him. People v. Chestnut, 51 N.Y.2d 14, 431 N.Y.S.2d 485 (1980); cert. denied, 449 U.S. 1018 (1980).

[ii] Investigative Detention

In Hayes v. Florida, 105 S.Ct. 1643 (1985) the United States Supreme Court reaffirmed its holding in Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394 (1969) concluding that the Fourth Amendment is violated where the police transported a suspect for fingerprinting without his consent and without probable cause or prior judicial authorization. The Supreme Court refused to apply a "stop and frisk" analogy under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) to justify the investigative detention which occurrred in Hayes. Nevertheless the Court went on to say, "there is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting if there is a reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." See Matter of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6 (1982), where the Court of Appeals set forth the criteria for judicial authorization for prearrest, investigative detention to secure evidence from the defendant's person.

In United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568 (1985) the Supreme Court in reconsidering the requirements of "brevity" in determining when an investigative stop is transformed into a de facto arrest requiring a showing of probable cause, held that while brevity of the detention is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, it is also clear that the "...need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes" must be taken into account in determining whether the

Fourth Amendment has been violated. In People v. Hicks, 68 N.Y.2d 234 508 N.Y.S.2d 163 (1986) the non-arrest detention of defendant including transportation to the crime scene for possible identification was upheld as a permissible incident of a lawful stop and not a defacto arrest, nor was probable cause required. The Court applying the reasonableness of United States v. Sharpe, supra found the factors which justified the search were: police knew a crime had been committed; period of detention was less than ten minutes; crime scene to which defendant was transported was very close; eyewitnesses were present; no significantly less intrusive means were avaliable to confirm reasonable suspicion quickly.

(4) Consent Searches

A search predicated upon voluntary consent is not prohibited by the Fourth Amendment. Consent is not considered voluntary if it is given in submission to a false claim of lawful authority. Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968). Voluntariness of consent must be determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1975). If a police officer obtains "consent" to enter and search by threatening to knock down a door, or by forcing his way in with his gun drawn, or by threatening prosecution, such "consent" is not voluntary. See People v. Lewis, 94 A.D.2d 44, 462 N.Y.S.2d 884 (1st Dept. 1983); People v. Driscoll, 87 A.D.2d 996, 449 N.Y.S.2d 809 (4th Dept. 1982); People v. Benitez, 76 A.D.2d 196, 430 N.Y.S.2d 287 (1st Dept. 1980); People v. Brown, 77 A.D.2d 537, 430 N.Y.S.2d 303 (1st Dept. 1980); see also People v. Litt, 71 A.D.2d 926, 419 N.Y.S.2d 726 (2d Dept. 1979) (seven police officers in defendant's house when he "consented" to search). But the fact that a defendant was in custody at the time that he gave his consent does not in

and of itself mandate a finding that the consent was involuntary. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976), rehearing denied, 424 U.S. 979, 96 S.Ct. 1488 (1976) (the Court noted that the defendant while in custody received Miranda warnings); People v. Munro, 86 A.D.2d 683, 446 N.Y.S.2d 511 (3d Dept. 1982). See United States v. Marin, 669 F.2d 73 (2d Cir. 1982) (police officer's search of defendant's car and paper bag found therein was valid where defendant had consented to the search while in police custody). But see People v. Loria, 10 N.Y.2d 368, 223 N.Y.S.2d 462 (1961) (entry gained by submission to authority after a threat to kick down the door is not entry gained by consent). See also People v. Meredith, 49 N.Y.2d 1038, 429 N.Y.S.2d 555 (1980), where the New York Court of Appeals held in a memorandum opinion that the courts below did not err when they concluded that defendant consented to a search of his person by police officers ("you can check it if you want"); the fact that defendant attempted to conceal the gold pin securing a package of cocaine to his underwear which the police discovered during their search did not mandate a finding that defendant's consent was not voluntary. See also People v. Bowers, 92 A.D.2d 669, 461 N.Y.S.2d 900 (3d Dept. 1983).

There is no requirement that a consenting defendant actually knew that he has a right to refuse as long as he is not coerced. See United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980), rehearing denied, 448 U.S. 908, 100 S.Ct. 3051 (1980); United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974); Schneckloth v. Bustamonte, supra; see also United States v. Watson, supra, where the Supreme Court found that the mere fact that police officers identified themselves as such before asking permission to search does not mandate a finding that the

defendant's will was over-borne when he consented. This is only one factor to be considered in determining whether the consent was voluntary. See also People v. Phiefer, 43 N.Y.2d 719, 721; 401 N.Y.S.2d 483, 484 (1977); People v. Springer, 92 A.D.2d 209, 460 N.Y.S.2d 86 (2d Dept. 1983)

A defendant who calls the police and asks them to enter his apartment cannot successfully challenge the admissibility of evidence in plain view seized therefrom on the ground that he did not consent to its seizure. People v. Danziger, 41 N.Y.2d 1092, 396 N.Y.S.2d 354 (1977). See also People v. Hodge, 44 N.Y.2d 553, 406 N.Y.S.2d 736 (1978). A defendant who asks a doctor to examine him cannot object to the admission into evidence of heroin which fell from his sock when his clothes were removed for the examination. People v. Capra, 17 N.Y.2d 670, 269 N.Y.S.2d 451 (1966).

Another person can only consent to a search of the defendant's premises if he has lawful authority to consent. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889 (1964), rehearing denied, 377 U.S. 940, 84 S.Ct. 1330 (1964) (hotel clerk may not consent to search of guest's room); People v. Lerhinan, 90 A.D.2d 74, 455 N.Y.S.2d 822 (2d Dept. 1982) (hotelkeeper may consent to search after rental period expires); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776 (1961) (landlord, in most cases, may not consent to search of tenant's room); People v. Petrie, 89 A.D.2d 910, 453 N.Y.S.2d 725 (2d Dept. 1982) (sibling who shares house may not consent to search of brother's private room). But see United States, v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974) (mistress may consent to search of bedroom she shares with defendant); People v. Moore, 58 A.D.2d 878, 396 N.Y.S.2d 698 (2d Dept. 1977) (mother may consent to

search of her son's room in her house); People v. Cosme, 48 N.Y.2d 286, 422 N.Y.S.2d 652 (1979) (defendant's live-in girlfriend could consent to search of his apartment, though he refused). The husband-wife privilege does not preclude the admissibility of evidence seized by police during a search of the marital abode where the defendant's wife requested the search. People v. Kemp, 59 A.D.2d 414, 399 N.Y.S.2d 879 (1st Dept. 1977). Where a beeper has been placed in a container with the consent of the original owner, the transfer of the container to a person suspected of criminal activity and the subsequent discovery of contraband violates no Fourth Amendment rights, United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296 (1984)

A kidnap victim has the authority to consent "impliedly" to a warrantless search of the premises where he is being held prisoner. People v. Rios, 105 Misc.2d 303, 432 N.Y.S.2d 63 (Albany Co. Ct. 1980).

(5) Abandoned Property

The Fourth Amendment does not apply to the seizure of abandoned property. Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 668 (1960), rehearing denied, 362 U.S. 984, 80 S.Ct. 1056 (1960); People v. Pittman, 14 N.Y.2d 885, 252 N.Y.S.2d 89 (1964). The defendant's intent to abandon the property must be manifest from the facts and circumstances. People v. Anderson, 24 N.Y.2d 12, 298 N.Y.S.2d 698 (1969).

> Whether there was an abandonment is partly a matter of property law but essentially a question of constitutional law. There is a presumption against the waiver of constitutional rights. It is the People's burden to overcome that presumption by evidence of "an intentional relinquishment or abandonment of a known right or privilege" (Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 1247, 16 L.Ed.2d 314; Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461; People v.

> Whitehurst, 25 N.Y.2d 389, 391, 306 N.Y.S.2d 673, 254 N.E.2d 905). The proof supporting abandonment should "reasonably beget the exclusive inference of the throwing away" (Foulke v. New York Cons. RR. Co., 228 N.Y. 269, 273, 127 N.E. 237, 238 quoted with approval in United States v. Cowan, 2 Cir. 396 F.2d 83, 87).
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> People v. Howard, 50 N.Y.2d 583, 430 N.Y.S.2d 578, 585 (1980), cert. denied, 449 U.S. 1023 (1980).

In Howard, the Court held that as a matter of law defendant did not abandon the woman's vanity case which he threw down as he fled from a police officer who sought to stop him and make inquiry because he thought it suspicious that a man would be carrying a woman's luggage in an area where there was a high incidence of burglary. But see People v. Hogya, 80 A.D.2d 621, 436 N.Y.S.2d 62 (2d Dept. 1981), appeal dismissed, 56 N.Y.2d 602, 450 N.Y.S.2d 472 (1982) (court found that defendant abandoned his jacket because after the police officers called him over, he threw it toward his friend who did not retrieve it when it fell on the ground).

An abandoned article is admissible despite preceeding illegal police conduct if it results from an independent act involving a calculated risk. People v. White, 92 A.D.2d 1033, 461 N.Y.S.2d 515 (3d Dept. 1983).

(6) Plain View

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967), held that the Fourth Amendment protects individual expectations of privacy so long as they are reasonable. Subject to this qualification, what a police officer observes in plain view from a lawful vantage point is generally not considered a search within the context of the Fourth Amendment. See Texas v. Brown, 92 U.S. 1033, 103 S.Ct. 1535 (1983); People v. Brosnan,

32 N.Y.2d 254, 344 N.Y.S.2d 900 (1975); People v. Robustelli, 77 A.D.2d 764, 431 N.Y.S.2d 193 (3d Dept. 1980) (police officers' entry on to defendant's driveway did not violate legitimate expectation of privacy). In Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778 (1985), the Supreme Court held that entry by the police into a store to purchase obscene magazines on public display was not a search within the Fourth Amendment. See also Salob v. Ambach, 73 A.D.2d 756, 423 N.Y.S.2d 305 (3d Dept. 1979), cert. denied, 499 U.S. 829 (1981), rehearing denied, 449 U.S. 1026 (1981), where the court held that the petitioner, a chiropractor suspended from practice for unauthorized use of x-rays, could not challenge the seizure of pamphlets from his office which were deliberately exposed to the public.

> The protection against unreasonable searches and seizures, however, does not extend to property knowingly exposed to the public, even in a person's own home or office (Katz v. United States, 389 U.S. 347, 351; 88 S.Ct. 507, 19 L.Ed.2d 576). The materials in question were taken from the area of petitioner's office open to the public and accordingly, they were properly admitted.
> Salob, 423 N.Y.S.2d at 306.

Where police are not justifiably present, plain view observations cannot later make such presence lawful. People v. Williams, 37 N.Y.2d 206, 371 N.Y.S.2d 880 (1975); see also People v. Engle, 74 A.D.2d 583, 424 N.Y.S.2d 306 (2d Dept. 1980) (unjustified arrest without probable cause rendered instrusion into defendant's car unlawful and therefore seizure of gun in plain view in car was unreasonable). Furthermore, plain view observations from a lawful vantage point may violate a reasonable expectation of privacy, if assisted by some kind of mechanical aid. People v. Smith, 42 N.Y.2d 961, 398 N.Y.S.2d 142 (1977) (flashlight); but see also

People v. John BB, 56 N.Y.2d 482, 453 N.Y.S.2d 158 (1982), cert. denied, 459 U.S. 1010 (1982); People v. Alvarez, 86 A.D.2d 807, 452 N.Y.S.2d 576 (1st Dept. 1982).

The right to see does not alone give rise to the right to seize an object discovered in plain view. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971), rehearing denied, 404 U.S. 874. There must be probable cause that the items to be seized are contraband or evidence of an offense. In People v. Roth, 66 N.Y.2d 688, 496 N.Y.S.2d 413 (1985) the plain view exception was found inapplicable to the seizure of a packet of papers bound with an elastic band removed from defendant's jacket pocket during a permissible frisk for a weapon. The Court of Appeals held that while the removal of the papers for a weapon search was permissible, the seizure of the papers was not since there was no basis for the police to assume the papers were gambling records. There is conflicting case law on what kinds of objects are apparently evidence or contraband which would justify their seizure. The Fourth Department has ruled that a "hash pipe" is clearly subject to seizure when discovered in plain view [People v. Jenkins, 77 A.D.2d 353, 432 N.Y.S.2d 956 (1980)]; the Second Department disagrees [People v. Richie, 77 A.D.2d 667, 430 N.Y.S.2d 154 (1980)]; see People v. Martinelli, 117 Misc.2d 310, 458 N.Y.S.2d 785 (Sup. Ct. Kings. Co. 1982).

In addition, the discovery of objects in plain view must be inadvertent. See, e.g., People v. Jackson, 41 N.Y.2d 146, 391 N.Y.S.2d 82, 359 N.E.2d 677 (1976); People v. Lemmons, 40 N.Y.2d 505, 387 N.Y.S.2d 97, 354 N.E.2d 836 (1976); People v. Spinelli, 35 N.Y.2d 77, 358 N.Y.S.2d 743 (1974). See also Arizona v. Hicks, ___ U.S. ___, 107 S.Ct. 1149 (1987) (plain view analysis not applicable where police moved stereo

speakers to examine serial numbers). Finally, if seizure requires an entry, e.g. where the object is plainly visible in a house from without, such entry must first be justified by either a warrant or by one of the warrant exceptions. But see Hester v. United States, 265 U.S. 57, 44 S.Ct. 445 (1924) ("open fields" exception). Hester was reaffirmed in Oliver v. United States and Maine v. Thornton, 466 U.S. 170, 104 S.Ct. 1735 (1984), the Court noting that the open fields doctrine does not extend to the curtilage, "the area around the home to which the activity of home life extends." Nor does the fact that the fields are fenced, or signed with "no trespassing signs" create an expectation of privacy which warrants Fourth Amendment protections. Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861, 94 S.Ct. 2114 (1974) (administrative inspection resulting in trespass onto privately owned open fields did not violate the Fourth Amendment); People v. Cruz, 89 A.D.2d 526, 452 N.Y.S.2d 616 (1st Dept. 1982), affirmed, 59 N.Y.2d 984, 466 N.Y.S.2d 661 (1983) (investigation of reported shooting); People v. Caizzo, 71 A.D.2d 715, 419 N.Y.S.2d 203 (3d Dept. 1979).

In California v. Ciraolo, ___ U.S. ___, 105 S.Ct. 1809 (1986), the Supreme Court extended the holding in Oliver v. United States, supra, and ruled that the Fourth Amendment is not violated by observation of a fenced in backyard from public airspace even when the area observed is within the curtilage. In Ciraolo, the police responded to an anonymous telephone tip that marijuana was growing in respondent's backyard. In upholding the warrantless aerial search, the Supreme Court noted that although the observed area was within the curtilage of the home and was surrounded by high double fences, "the officer's observations took place within public navigable air space and any member of the public flying in

the airspace could have seen everything that [the] officers observed." The fact that the defendant had taken some measures to restrict observation of his activities from ground level by the construction of a high fence did not "preclude the officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible ..."

Similarily in Dow Chemical Co. v. United States, ___ U.S. ___, 106 S.Ct. 1819 (1986), the Supreme Court upheld aerial surveillance of an industrial manufacturing complex without an administrative warrant where the search was conducted by a government agency, the Enviornmental Protection Agency, pursuant to its authority to conduct on site inspections. The Court noted that an industrial complex is not analogous to the curtilage of a dwelling but rather is "more comparable to an open field."

In United States v. Dunn ___ U.S. 107 S.Ct. 1134 (1987), the Supreme Court established a four factor analysis to determine whether a particular area is within the residential curtilage. The factors to be considered are: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

(7) Automobile Searches

A vehicle containing contraband or instrumentalities of a crime can be quickly moved out of the jurisdiction in which a warrant to search is issued. Because of this exigency, a warrantless search of a moving vehicle or vehicle parked on a public street is consistent with the Fourth Amendment if there is probable cause to believe the vehicle

contains contraband or evidence of crime. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925); Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42 (1980); People v. Ciaccio, 45 N.Y.2d 626, 412 N.Y.S.2d 131 (1978); People v. Marner, 47 N.Y.2d 982, 419 N.Y.S.2d 963 (1979), cert. denied, 444 U.S. 971 (1979); People v. Hadley, 67 A.D.2d 259, 415 N.Y.S.2d 719 (4th Dept. 1979). The Supreme Court expanded on the permissible scope of a search pursuant to the "automobile exception" in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982). The Court held in Ross that where the police have probable cause to search an entire vehicle, that search extends to any containers or packages found within the vehicle which may contain the object(s) of the search.

> When a legitimate search is under way, and when its purposes and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.
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> [T]he scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant.
> Ross, 102 S.Ct. at 2170-2172.

See also People v. Ellis, 62 N.Y.2d 393, 477 N.Y.S.2d 106 (1984); People v. Langen, 60 N.Y.2d 170, 469 N.Y.S.2d 44 (1983), cert. denied, 104 S.Ct. 1287 (1984).

Automobiles are not treated identically with houses or apartments for Fourth Amendment purposes. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), rehearing denied, 439 U.S. 1122, 99 S.Ct. 1035 (1979). The police may therefore make a warrantless search of a car

parked on a public street where they observe that it contains instrumentalities of a robbery-murder [People v. Singleteary, 35 N.Y.2d 528, 364 N.Y.S.2d 435 (1974)], or where they have reason to believe that the car parked on the street was used by the defendant in the commission of a crime for which he has just been lawfully arrested [People v. Clark, 45 N.Y.2d 432, 408 N.Y.S.2d 463 (1978)]. See also People v. Kreichman, 37 N.Y.2d 693, 376 N.Y.S.2d 497 (1977); People v. Cabral, 91 A.D.2d 944, 458 N.Y.S.2d 559 (1st Dept. 1983), appeal dismissed, 59 N.Y.2d 704, 463 N.Y.S.2d 539 (1984).

In addition, since an automobile may be lawfully searched on a street where there is probable cause to believe that it contains contraband or the fruits of instrumentalities of a crime, it may therefore be searched subsequently at a police station without a warrant. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970), rehearing denied, 400 U.S. 856 (there is a constitutional difference between houses and cars); Texas v. White, 423 U.S. 67, 96 S.Ct. 304 (1975), rehearing denied, 423 U.S. 1081, 96 S.Ct. 869 (1976); People v. Milerson, 51 N.Y.2d 919, 434 N.Y.S.2d 980 (1980); People v. Fustanio, 35 N.Y.2d 196, 360 N.Y.S.2d 245 (1974); People v. Brosnan, 32 N.Y.2d 254, 344, N.Y.S.2d 900 (1973); People v. Brown, 28 N.Y.2d 282, 321 N.Y.S.2d 573 (1971); People v. Montgomery, 15 N.Y.2d 732, 256 N.Y.S.2d 942 (1965), aff'g without opinion, 21 A.D.2d 904, 252 N.Y.S.2d 194 (2d Dept. 1964). However, an automobile may not be searched without a warrant when it is parked in a private driveway, absent an exigent circumstance such as the likelihood of its speedy removal. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971), rehearing denied, 404 U.S. 874; People v. Sciacca, 45 N.Y.2d 122, 408 N.Y.S.2d 22 (1978); People v. Spinelli, 35 N.Y.2d 77, 358

N.Y.S.2d 743 (1974). Cf. People v. Gleeson, 36 N.Y.2d 462, 369 N.Y.S.2d 113 (1975); People v. Gravano, 67 A.D.2d 988, 413 N.Y.S.2d 429 (2d Dept. 1979), aff'd, 49 N.Y.2d 1016, 429 N.Y.S.2d 634 (1980). But see People v. Orlando, 56 N.Y.2d 441, 452 N.Y.S.2d 559 (1982) (wherein search of parked automobile upheld in view of closeness in time and place to defendant's arrest and probable cause to believe contraband would be found.) Warrantless seizure of a car from a public parking lot does not violate the Fourth Amendment where there is probable cause to believe it was used in the crime as only the exterior of the car (tires and paint) was examined for evidence that might connect the defendant with the crime and an officer's testimony established the possibility that the car might be removed. Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1974). See also People v. Buggenhagen, 57 A.D.2d 466, 395 N.Y.S.2d 119 (4th Dept. 1977).

In California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985) the Supreme Court extended the automobile exception to a mobile trailer home designed for occupancy. The court pointed out that the mobile home, even though stationary (but unattached to blocks to elevate it from the ground and not connected to utilities), was parked in a place not regularly used for residential purposes, and further, concluded there is a reduced expectation of privacy because the motor home must be registered and is subject to regulation. The court also stressed that "...motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity." Carney leaves unresolved the applicability of the automobile exception where the motor home is fixed to blocks and attached to utilities.

(a) Inventory Search

When police lawfully arrest a defendant in a car or are called to the scene of a car accident where the driver is disabled, they may lawfully take temporary possession of the car. While they are holding the vehicle they may, for their own protection as bailees, pursuant to standard police procedure, search the car to inventory the contents. Any contraband or evidence or instrumentalities of crime discovered during such an inventory search is admissible in a criminal prosecution. Cooper v. California, 386 U.S. 58, 87 S.Ct. 788 (1967), rehearing denied, 386 U.S. 998, 87 S.Ct. 1283 (1967); South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976); Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523 (1973); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992 (1968); People v. Roman, 53 N.Y.2d 39, 439 N.Y.S.2d 894 (1981); People v. Brnja, 50 N.Y.2d 366, 429 N.Y.S.2d 173 (1980); People v. Sullivan, 29 N.Y.2d 69, 323 N.Y.S.2d 945 (1971) (inventory search of a car towed for parking violations); People v. Gonzalez, 92 A.D.2d 512, 459 N.Y.S.2d 281 (1st Dept. 1983), aff'd, 62 N.Y.2d 386, 477 N.Y.S.2d 103 (1984); People v. Zollo, 114 Misc. 2d 1032, 453 N.Y.S.2d 332, (Nassau Co. Ct. 1982) (search of closed containers authorized). But see People v. Allocco, 59 A.D.2d 895, 399 N.Y.S.2d 54 (2d Dept. 1977) (inventory search of defendant's car impounded by police after defendant was arrested for driving with a suspended license was based on a pretext arrest; therefore, the motion to suppress was granted and indictment was dismissed).

Note: In People v. Roman, (53 N.Y.2d 39, 439 N.Y.S.2d 894, supra), the Court of Appeals declined to extend the scope of an inventory search of a vehicle to include a closed cigarette case within the vehicle. However, the Court of Appeals has subsequently extended the scope of such

a search to include a closed bag within the vehicle. People v. Gonzalez, 62 N.Y.2d 386, 477 N.Y.S.2d 103 (1984). The Court in Gonzalez upheld the search on the basis of the decision of the U.S. Supreme Court in Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605 (1983), where the Court held that the search of a shoulder bag taken from an arrestee was reasonable as part of a routine inventory of property. See also Colorado v. Bertine, ___ U.S. ___, 107 S.Ct. 738 (1987) (routine inventory search of closed containers discovered in an impounded vehicle upheld where conducted pursuant to established routine police procedure and in good faith even though less intrusive means are available).

[i] Inventory of Personal Effects at Place of Dentention

The police may inventory the personal effects of a person whom they have lawfully arrested at the place of dentention. "The reason searches of a person and his immediate effects at a place of dentention are permissible lies not in the fiction that they are incident to arrest but because of the maximum intrusion aleady effected by an arrest and detention pending arraignment [citation omitted]". People v. Perel, 34 N.Y.2d 462, 358 N.Y.S.2d 383, 389 (1974); see People v. Greenwald, 90 A.D.2d 668, 455 N.Y.S.2d 865 (4th Dept. 1982). As noted above the United States Supreme Court has held that the search of a shoulder bag taken from an arrestee's person is reasonable as part of a routine inventory of property. Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605 (1983).

(b) Traffic Stop; Automobile Search

An arbitrary stop of a moving vehicle for an alleged "routine traffic check" violates the Fourth Amendment unless the officer has a reasonable suspicion of a violation of the Vehicle and Traffic Law. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979); People v. Ingle,

36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); People v. Singleton, 41 N.Y.2d 402, 393 N.Y.S.2d 353 (1977); People v. Sobotker, 43 N.Y.2d 559, 402 N.Y.S.2d 993 (1978) (car may not be stopped on less than probable cause to believe that a crime is, has been, or will be committed unless it is a routine, nonarbitrary stop to enforce an automobile regulation).

However, a roadblock check which applies uniformly to all passing vehicles where the purpose is to apprehend a fleeing felon or to prevent a crime is permissible under the Fourth Amendment. See Delaware v. Prouse, supra; People v. John BB, 56 N.Y.2d 482, 453 N.Y.S.2d 158 (1982), cert. denied, 459 U.S. 1010 (1982) (roving patrol in sparsely populated area). In People v. Scott, 63 N.Y.2d 518, 483 N.Y.S.2d 649 (1984), the Court of Appeals upheld the use of a roadblock holding that individualized suspicion is not a prerequisite to stopping a vehicle for the purpose of detecting and deterring driving while intoxicated or while impaired, provided that the stopping of the vehicle was carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' [quoting from Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979)]. The court held that the permissibility of roadblocks, including those which shift and change location, is "...determined by balancing its intrusion on the Fourth Amendment interests of the individual involved against its promotion of legitiate governmental interests." The court found that "...the DWI checkpoint procedure in question is a valuable component of the program to control drunk driving, we conclude that it is a sufficiently productive mechanism to justify the minimal intrusion involved." 63 N.Y.2d at 529, 483 N.Y.S.2d at 654. A police officer may order a driver out of his car to issue him a valid traffic summons and the officer also has the right to frisk that driver after

observing a bulge in his waistband. Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1977). The United States Supreme Court here stated that as the police practice of ordering a driver out of his car to issue him a summons reduced the likelihood of assault on the officer, considerations of officer safety outweighed the de minimus inconvenience to the citizen.

CPL §140.10(2) authorizes a warrantless arrest for a traffic infraction. Compare People v. Erwin, 42 N.Y. 1064, 399 N.Y.S.2d 637 (1977) (while the police officer had reasonable cause to stop the defendant for driving through a red light, that fact did not give rise to a right to search where no arrest was made and there was no independent probable cause to search) with People v. Pollaci, 68 A.D.2d 71, 416 N.Y.S.2d 34 (2d Dept. 1979) (after arresting defendants in their car for having invalid license plates and registration, the police officers had the right to search the car for weapons because they had observed the defendants near a supermarket engaging in behavior which could reasonably be described as "casing" in preparation for a robbery). See also People v. Kittrell, 75 A.D.2d 548, 426 N.Y.S.2d 787 (1st. Dept. 1980) (driver was stopped by police after making an unsignaled left turn, and arrested for criminal impersonation when his license did not match the registration and he admitted he was not the licensee; accordingly, police had the right to seize gun from floor when driver reached toward floor), accord, Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523 (1973); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992 (1968).

Note: Suspicious circumstances surrounding the conduct of occupants of an automobile justify a stop and inquiry by police just as it would were the occupants pedestrians. See People v. DeJesus, 92 A.D.2d

521, 459 N.Y.S.2d 430 (1st Dept. 1983); People v. Finlayson, 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dept. 1980), cert. denied, 540 U.S. 931 (1981) (officer could stop automobile where he suspected occupants were fleeing felons and make inquiry at gunpoint); see also People v. Duncan, 75 A.D.2d 823, 427 N.Y.S.2d 472 (2d Dept. 1980) (police officer could reasonably make inquiry because the car was parked in front of a bar and its occupant and his companion resembled two robbery suspects and the companion, who had just entered the bar, fled out the back door when the officers approached; accordingly, seizure of gun in plain view in car was lawful); cf. People v. Hutchinson, 47 N.Y.2d 823, 418 N.Y.S.2d 574 (1979). In People v. Class, 63 N.Y.2d 491, 483 N.Y.S.2d 181 (1984), the Court of Appeals held that where the police stop a vehicle solely for a traffic infraction, where there was no probable cause or exigent circumstances, the examination of the Vehicle Identification Number (VIN) on the inside of the vehicle on the dashboard constituted an unreasonable search violative of the federal and State constitution. The Supreme Court reversed holding that a pervasive State interest in easy visibility of the VIN number requires a finding that there is no reasonable expectation of privacy in the VIN number. New York v. Class, 475 U.S. 106, 106 S.Ct. 960 (1986). On remand, the Court of Appeals reaffirmed its decision noting that it had plainly rested its earlier decision on State constitutional grounds. People v. Class, 67 N.Y.2d 431, 503 N.Y.S.2d 313(1986).

(8) Border, Customs, and Airport Searches

(a) Border Searches

Federal regulations providing for warrantless searches of any automobile simply because it is traveling within one hundred miles of the

Mexican-American border violate the Fourth Amendment. Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535 (1973). "[A]t traffic checkpoints removed from the border or its functional equivalent, officers may not search private vehicles without consent or probable cause." United States v. Ortiz, 422 U.S. 891, 896-97; 95 S.Ct. 2585 (1975).

A police officer near a border may stop and inquire if he reasonably suspects although he has less than probable cause to believe, that a vehicle is carrying illegal aliens, just as police officers may stop and frisk. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975); see also United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981). Stops for brief questioning at permanent checkpoints at or near the border do not violate the Fourth Amendment, although a fullblown search at such checkpoint must be based on probable cause or consent. United States v. Martinez-Fuerte, 428 U.S. 543, 566-67; 96 S.Ct. 3074, 3087 (1976); see also People v. Fisher, 97 A.D.2d 651, 469 N.Y.S.2d 187 (3rd Dept. 1983).

[i] International Mail Searches

19 U.S.C. §482 authorizes the search on reasonable suspicion of imported merchandise. Federal regulations [19 CFR §145.2 (1976); 39 CFR §16.1 (1975)] construe this authorization for a warrantless search to apply to international mail. This does not violate the Fourth Amendment nor chill the exercise of the First Amendment: mailed letters, like travelers, may be searched without a warrant at the border. United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972 (1977).

(b) Customs and Airport Searches

Although customs officials can search without probable cause for contraband coming into the country under Federal law, this is a limited

right which "does not extend to searches of baggage going out of the country on which no duty is payable and on which no prohibitions are placed." People v. Esposito, 37 N.Y.2d 156, 371 N.Y.S.2d 681 (1975). Puerto Rico is part of the United States and, therefore, that Commonwealth's legislation authorizing airport searches of all baggage coming into Puerto Rico from the United States violated the Fourth Amendment and could not be justified as analogous to a customs search. Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425 (1979).

Note: A metal detector at an airport is not an intrusion which violates the Fourth Amendment. People v. Kuhn, 33 N.Y.2d 203, 351 N.Y.S.2d 649 (1973). When a trained dog sniffs the area surrounding the luggage in order to detect odors emanating from that luggage, there is no intrusion or search of the luggage. People v. Price, 54 N.Y.2d 557, 446 N.Y.S.2d 906 (1981).

(c) Courthouse Searches

Limited searches are permissible at courthouse and courtroom entrances if they are part of a uniform screening system, analogous to the roadblock approved in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979). The Court found that defendant gave an "implied consent" to a search of his briefcase because he was in a courthouse in which signs were posted indicating that all persons could be subject to a search. People v. Alba, 81 A.D.2d 345, 440 N.Y.S.2d 230 (1st Dept. 1981), appeal dismissed, 56 N.Y.2d 642, 450 N.Y.S.2d 787 (1982).

(9) Administrative Searches

Inspections for violations of municipal codes and ordinances are not searches in the sense that the inspectors are seeking evidence to be used

in a criminal prosecution. Nevertheless, inspections to determine if a municipal code is being violated [Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967); See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967); Michigan v. Tyler, 436 U.S. 493, 98 S.Ct. 1942 (1978)] or if the Occupational Safety and Health Act is being violated [Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978)] are lawful only if a warrant is obtained, absent an emergency situation [see Section D(10), supra Exigent Circumstances]. The Court created an exception to this general rule of law where the government had a strong interest in the field subject to regulation, the occupation was inherently dangerous, and the inspection program in terms of certainty and regularity of its application provided a constitutionally adequate substitute for a search warrant. Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534 (1981) (inspection to insure compliance with health and safety standards required by the Federal Mine Safety and Health Act of 1977). The search must be carefully limited in time, place and scope. People v. Hedges, 112 Misc.2d 632, 447 N.Y.S.2d 1007 (Dist. Ct. Suffolk Co. 1982). The application for the administrative warrant need only establish that a reasonable legislative or administrative standard requires inspection of the particular premises; this is less than probable cause in the criminal law sense. Marshall v. Barlow's Inc., supra; Michigan v. Tyler, supra. Evidence seized under an administrative warrant is admissible in a criminal prosecution. Michigan v. Tyler, supra.

Note: Two ordinances which subjected owners of real property to penalties for failure to permit a warrantless search were recently struck down as violating the Fourth Amendment. In Sokolov v. Village of Freeport, 52 N.Y.2d 341, 438 N.Y.S.2d 257 (1981), the Court of Appeals

(citing Camera, supra, and Marshall v. Barlow's Inc.), held that the Village of Freeport could not condition the granting of a permit to let real residential property on "consent" to inspection. Similarly, in People v. Northrop, 106 Misc.2d 440, 432 N.Y.S.2d 45 (App. T. 9th and 10th Jud. Dists. 1980), modified, 53 N.Y.2d 689, 439 N.Y.S.2d 108 (1981) (modified by reversing the conviction of defendant, remitting the fine and dismissing accusatory instrument against defendant and, as so modified affirmed), the Court, also citing those cases, held a City of Long Beach ordinance unconstitutional in that it imposed criminal penalties on a grantee of real property who failed to consent to a building inspection. However, fire marshalls, who are administrative officials, may conduct a warrantless search of burned premises to ascertain the cause of fire within a reasonable time after the blaze is extinguished. People v. Calhoun, 49 N.Y.2d 398, 426 N.Y.S.2d 243 (1980).

Note: A nonconsensual, warrantless search of a fire-damaged private residence conducted six hours after the fire had been extinguished and after the owners had taken steps to secure the building is unreasonable and violative of the Fourth Amendment. Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984), reh'g denied, 104 S.Ct. 1457 (1984).

In People v. Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986), the Court of Appeals struck down as violative of the Fourth Amendment Vehicle and Traffic Law §415-a(5)(a) which authorizes warrantless inspections of vehicle dismantling businesses, and New York City Charter §436 which authorizes warrantless searches of junkyards and other businesses storing used, discarded or secondhand merchandise. The Court held the statutes impermissibly authorized administrative searches solely to uncover evidence of criminality rather than to enforce administrative, regulatory

scheme and that they were "designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." The Supreme Court reversed holding that the State's substantial interest in regulating the vehicle dismantling industry limits the owner's expectation of privacy and the regulatory scheme which provides for inspection on a regular basis, in view of the increase in vehicle thefts and the State's interest in regulating the junkyard industry, is constitutional, New York v. Burger, ___ U.S. ___, 107 S.Ct. 2336 (1987).

(10) School Custodial Searches

New York has held that officials in a school act in loco parentis, and as such they may "exercise such powers of control, restraint and correction over pupils as is reasonably necessary to facilitate the educational functions of a school." Matter of Ronald B., 61 A.D.2d 204, 401 N.Y.S.2d 544, 545 (2d Dept. 1978). See also Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401 (1977). In so acting, private individuals in the school system become quasi-governmental officials and in the absence of sufficient cause to search, the exclusionary rule will apply in any subsequent criminal prosecution. People v. Scott D., 34 N.Y.2d 483, 358 N.Y.S.2d 403 (1974).

However in New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985), the Supreme Court held that the Fourth Amendment applies to school searches, but under a "reasonableness" analysis, the Court applying a dynamic view of the school environment, concluded that the requirement of a warrant to conduct the search was not necessary, and also, the level of suspicion required for school personnel to initiate a search should be lowered. Thus, the Supreme Court in holding that school personnel are

governmental agents for Fourth Amendment purposes rejected the analysis of the Court of Appeals in People v. Overton, 20 N.Y.2d 360, 283 N.Y.S.2d 22 (1967) and Matter of Ronald B, 61 A.D.2d 204, 401 N.Y.S.2d 544 (2d Dept. 1978), which held that school officials act in loco parentis, and as such may "exercise such powers of control, restraint and correction over pupils as is reasonably necessary to facilitate the educational functions of a school." The T.L.O. test of reasonableness articulates the standard as whether the school official has reasonable grounds to suspect that the search will produce evidence to show that the student is either violating the law or a school rule, and, whether "the measures adopted are reasonably related to the objectives of the search and note excessively instrusive in light of the age, and sex of the student and the nature of the infraction."

(11) Searches of Government Employees in the Workplace

In O'Connor v. Ortega, 41 Crl 3001, the Supreme Court held that a warrantless search of a government employee's desk and file cabinets is justified when based upon reasonable suspicion of employee misconduct or a work related need.

In the Matter of Patchogue - Medford Congress of Teachers v. Board of Education of the Patchogue - Medford Union Free School District, et al, Slip Op. No. 156 (New York Court of Appeals June 9, 1987) the Court of Appeals struck down as unconstitutional a school district policy requiring all probationary teachers to submit to urinalysis to detect potential drug abuse. The Court held compulsory drug testing of government employees constitutes a search and seizure within the ambit of the Fourth Amendment and requires reasonable suspicion under federal and New York constitutional standards.

(12) Search of Prisoner, Parolee or Probationer

Prisoners, whether serving sentences upon convictions or as pre-trial detainees, have no legitimate expectation of privacy. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984); Block v. Rutherford, 465 U.S. 1064, 104 S.Ct. 1411 (1984). Therefore, body cavity searches and room shakedowns of such incarcerated persons are not violative of the Fourth Amendment. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979); rev'g 573 F.2d 118 (2d Cir. 1978); People v. Griffith, 94 A.D.2d 850, 463 N.Y.S.2d 322 (3rd Dept. 1983). The Court in Bell further found that these prison security measures, when applied to pretrial detainees, did not unconstitutionally deprive those persons of the presumption of innocence, as that presumption was a rule applicable to a criminal trial and not to the administration of prison security.

A person on parole or probation is entitled to some protection against unreasonable searches and seizures but his status as such must be considered in determining whether the search and seizure was reasonable. Thus where a parole officer conducts a search rationally and reasonably related to the performance of his duty [People v. Huntley, 43 N.Y.2d 175, 401 N.Y.S.2d 31 (1977)], or where there exists "reasonable cause to believe that [a probationer] has violated a condition of the sentence," [CPL §410.50(4)], the search may be sustained. However, absent exigent circumstances, the search of a probationer can only occur upon a court order obtained pursuant to CPL §410.50(3). See People v. Jackson, 46 N.Y.2d 171, 412 N.Y.S.2d 884 (1978).

The warrantless search of a parolee's apartment was not justified where there was no indication that the search was related to the parole officer's duty to detect and prevent parole violations but was instead a

search to obtain evidence in furtherance of a criminal investigation with the parole officer acting as a mere "conduit" for the police. But see Giffin v. Wisconsin, ___ U.S. ___, 107 S.Ct. 3164 (1987) where the Supreme Court held probation officers may pursuant to a state regulation search probationer's home without a warrant provided there are "reasonable grounds" rather than probable cause to believe contraband is in the house.

(13) Search Pursuant to Warrant: Good Faith Exception

In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) and its companion case, Massachusetts v. Sheppard, the Supreme Court enunciated a "good faith" exception to the exclusionary rule holding that where the officers act in reasonably good faith in the execution of a search warrant which is later found constitutionally defective, the evidence will not be barred by the Fourth Amendment. It was held that the exclusionary rule would be invoked in cases of constitutionally defective warrants only in those situations where "the magistrate abandoned his detached and neutral role... [or in cases where] the officers were dishonest, or reckless in preparing their affidavit or could not have harbored an objectively reasonably belief in the existence of probable cause." Id. 104 S.Ct. at 3423. Thus in Leon, where the seized evidence was ruled inadmissible only because of the application of the Aguilar-Spinelli rule, rather than the "totality of the circumstances rule", set forth in Gates v. Illinois, 462 U.S. 213, 103 S.Ct. 2317 (1983) the court applied the "good-faith" exception under an objective test of the reasonableness of the officer's mistake in executing the warrant. And again, in Sheppard, where the police had obtained the warrant on adequate constitutional grounds, but the magistrate had failed

to correct technical errors in the warrant, thereby invalidating it, the Supreme Court held that the "good-faith" exception would be invoked to receive the evidence since the police were reasonable in relying on the magistrate's statement of intention to correct the deficiencies in the warrant.

However when presented with the issue of the application of the Leon good faith exception, the Court of Appeals, in People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985) declined to apply the doctrine on state constitutional grounds.

APPELLATE PRACTICE

by

Karen Fisher McGee

Former Director, New York State Criminal Justice
Appellate Reference Service

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Updated by

Valerie Friedlander

Director, New York State Criminal Justice
Appellate Reference Service

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By: Karen Fisher McGee
Former Director, New York State Criminal Justice Appellate Reference Service
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The particular venue for appeals arising from judgments or orders of the various trial courts in this State is described in CPL §450.60. Appeals from a Supreme or County Court are determined by the Appellate Division of the judicial department in which the trial court is situated. New York City Criminal Court cases are reviewed by the Appellate Terms of the First or Second Department; appeals from a local criminal court outside the City of New York are taken to the County Court. However, in the Second Department the Appellate Term--not the County Court--reviews these local criminal court appeals.

Under CPL §450.10, a defendant may appeal as a matter of right to those intermediate appellate courts from:

a) a judgment other than one including a sentence of death;*

b) a sentence** other than one of death;* or

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* Appeals in capital cases are taken directly to the Court of Appeals. CPL §§450.70; 450.80.

** The Court of Appeals struck down as unconstitutional an amendment to CPL §450.10 which attempted to limit a defendant's appeal as of right to the Appellate Division where the sole issue raised is the excessiveness of a negotiated sentence imposed by a judgment rendered upon a guilty plea. See People v. Pollenz, 67 N.Y.2d 264, 502 N.Y.S.2d 417 (1986).

c) an order granting the People's motion to set aside a sentence as invalid pursuant to CPL §440.40.

"Judgment" is defined by subdivision 15 of CPL §1.20 as being "comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence." Thus, a defendant may not appeal intermediate or interlocutory orders, such as denial of bail applications [People v. Ford, 40 A.D.2d 983, 338 N.Y.S.2d 381 (2d Dept. 1972)], motions to suppress [People v. Adler, 70 A.D.2d 59, 416 N.Y.S.2d 79 (2d Dept. 1979)], or motions to dismiss indictment [People ex rel. McLaughlin v. Monroe, 44 A.D.2d 575, 353 N.,Y.S.2d 33 (2d Dept. 1974)], during the course of the ordinary proceeding itself. See also People v. Santos, 64 N.Y.2d 702, 485 N.Y.S.2d 524 (1984), where determination of a motion to quash a subpoena was held not reviewable. Such challenges must await appeal from the conviction. Moreover, a defendant whose post-conviction motion to vacate the judgment (CPL §440.10) or to set aside the sentence (CPL §440.20) is denied by the trial court, must seek leave to appeal from the intermediate appellate court pursuant to CPL §460.15; he is not entitled to appellate review of the denial of those motions as a matter of right. See CPL §§450.15 and 460.15; People v. Ramsey, 104 A.D.2d 388, 478 N.Y.S.2d 714 (2nd Dept. 1984); People v. Kruk, 52 A.D.2d 969, 383 N.Y.S.2d 102 (3d Dept. 1976); People v. Lavender, 54 A.D.2d 947, 388 N.Y.S.2d 334 (2d Dept. 1976). However, orders transferring a case from the family court to a criminal court are deemed final orders and are consequently appealable. People v. Hopkins, 49 A.D.2d 682, 370 N.Y.S.2d 744 (4th Dept. 1975); People v. Bell, 41 A.D.2d 583, 340 N.Y.S.2d 194 (4th Dept. 1973). Even if the

appeal is otherwise wholly proper, the courts of this State will not review the appeal of a defendant who has fled since he is unavailable to obey the mandate of the court in the event of an affirmance. People v. Moses, 59 N.Y.2d 667, 463 N.Y.S.2d 436 (1983); People v. Sullivan, 28 N.Y.2d 900, 322 N.Y.S.2d 730 (1971); accord, Whitely v. Cioffi, 74 A.D.2d 230, 427 N.Y.S.2d 23 (1st Dept. 1980). Of course, the defendant's death following conviction renders the appeal moot. People v. Coscia, 26 A.D.2d 649, 272 N.Y.S.2d 416 (2d Dept. 1966).

The People's rights to an appeal are delineated in CPL §450.20:

> An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court:
>
> 1. An order dismissing an accusatory instrument or a count thereof, entered pursuant to section 170.30, 170.50 or 210.20;
>
> 2. An order setting aside a verdict and dismissing an accusatory instrument or a count thereof, entered pursuant to paragraph (b) of subdivision one of section 290.10 or 360.40;
>
> 3. An order setting aside a verdict, entered pursuant to section 330.30 or 370.10;
>
> 4. A sentence other than one of death, as prescribed in subdivisions two and three of section 450.30;
>
> 5. An order, entered pursuant to section 440.10, vacating a judgment other than one including a sentence of death.
>
> 6. An order, entered pursuant to section 440.20, setting aside a sentence other than one of death;
>
> 7. An order denying a motion by the people, made pursuant to section 440.40, to

> set aside a sentence other than one of death;
>
> 8. An order suppressing evidence, entered before trial pursuant to section 710.20; provided that the people file a statement in the appellate court pursuant to section 450.50.

Note that unless a trial court reserves decision on a motion for a trial order of dismissal based on insufficiency of evidence until after a verdict is rendered an appeal from the order of dismissal is unavailable to the People. See People v. Harding, 101 A.D.2d 221, 475 N.Y.S.2d 611 (3rd Dept. 1984).

Section 450.50 describes the statement which must be filed by the People in order to obtain review of an unfavorable suppression order. In essence, the district attorney must aver that, by virtue of the suppression, the People's case is now either insufficient as a matter of law or so weak that any reasonable possibility of conviction has been destroyed. CPL §450.50(1). However, filing of this statement precludes further prosecution of the charge unless and until the suppression order is reversed upon appeal and vacated. CPL §450.50(2). Nor may a superseding indictment be used to prosecute the accused after the People have lost the appeal from a suppression order entered in the original proceeding, absent "extraordinary circumstances." Forte v. Sup. Ct. of Queens Co., Crim'l Term, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979).

The intermediate appellate courts are authorized to consider questions of both law and fact. CPL §470.15(1). CPL §470.05(2) provides:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding

> is presented when a protest thereto was registered, by the party claiming error, at the time such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court or if in response to a protest by a party the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

A defendant who takes no exception to the trial court's charge to the jury has failed to preserve the alleged error for review. See, e.g., People v. Thomas, 50 N.Y.2d 467, 429 N.Y.S.2d 584 (1980), People v. Vercruysse, ___ A.D.2d ___, 513 N.Y.S.2d 50 (4th Dept. 1987), People v. White, 72 A.D.2d 913, 422 N.Y.S.2d 193 (3d Dept. 1979); People v. Kruk, 52 A.D.2d 969, 383 N.Y.S.2d 102 (3d Dept. 1976). However, a defendant's failure to protest at trial a ruling which he then alleges on appeal to be an error or defect does not mean that the intermediate appellate court is foreclosed from examining the issue. The intermediate appellate court may reverse or modify the judgment below "as a matter of discretion in the interest of justice" on the ground that defendant was deprived of a fair trial. CPL §470.15(6). Certainly, respondent in such an appeal should argue that defendant's failure to object below renders the issue waived for appellate review. However, an argument should also be advanced as to why the appellate court should refuse to exercise its discretion and should affirm the judgment even if it does decide to

review the question presented.

It should be noted however that the Court of Appeals has established "one very narrow exception to [the] requirement of a timely objection. A defendant ... cannot waive or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law" [citations omitted]. People v. Patterson, 39 N.Y.2d 295, 296, 383 N.Y.S.2d 573, 577 (1976). In Patterson, the Court of Appeals held defendant's claim that the trial court's charge erroneously placed the burden of proof on the issue of extreme emotional disturbance on defendant in a murder prosecution was reviewable notwithstanding defendant's failure to object at trial. The Court held the charge regarding the burden of proof was of such a fundamental nature as not to require preservation by objection. See also People v. Branch, 71 A.D.2d 103, 426 N.Y.S.2d 291 (2d Dept. 1980) (a jurisdictional defect may be raised for the first time on appeal). And, it is now established that an alleged deprivation of defendant's right to counsel during police questioning is also subject to appellate scrutiny, even if not asserted below. People v. Samuels, 49 N.Y.2d 218, 424 N.Y.S.2d 892 (1980); People v. Cullen, 50 N.Y.2d 168, 428 N.Y.S.2d 456 (1980); accord, People v. Parker, 432 N.Y.S.2d 564 (4th Dept. 1980).

The dispositions available to an intermediate appellate court are not limited to reversal or affirmance. CPL §470.15(2) also authorizes the court to modify the trial court judgment by:

> a) changing it to a conviction for a lesser included offense should it find the trial evidence was insufficient to establish defendant's guilt of crime for which he was

convicted but nevertheless sufficient to support the lesser offense; or

b) reversing those counts for which insufficient evidence was adduced at trial but affirming convictions on the remaining counts; or

c) reversing an illegal sentence and remanding for resentence or modifying the sentence imposed on the ground that it was unduly harsh or severe.

The appellate process is triggered by the filing of a notice of appeal, in duplicate, with the trial court within thirty (30) days after the sentencing date. (See People v. Coaye, 68 N.Y.2d 857, 508 N.Y.S.2d 410 (1986) where the Court of Appeals held the People's time to appeal an order modifying the defendant's conviction pursuant to CPL §330.30 starts to run on the date of imposition of sentence, not the date the written order is entered or served.) The second copy is endorsed by the clerk of the trial court and then forwarded to the clerk of the intermediate appellate court. CPL §460.10(1). Defendant-appellant must also serve the district attorney with a copy of the notice of appeal. Conversely, if the People are appealing, a copy of the notice must be served by the district attorney upon either defendant or the attorney who last appeared on his behalf. Ibid. See People v. Duggan, 69 N.Y.2d 931, ___ N.Y.S.2d ___ (1987) (where proceedings in the justice court were stenographically recorded and transcribed People must comply with §460.10 which requires the filing of a notice of appeal with the local criminal court from which the appeal is taken. Thus, the filing of an affidavit of errors, the

stenographic transcript and a memorandum of law with the County Judge's chambers failed to comply with the statute).

Only the defendant has the opportunity to move for an extension of time in which to file the notice of appeal or an application for leave to appeal. This motion must be made "with due diligence after the time for the taking of such appeal has expired, and in any case not more than one year thereafter." CPL §460.30(1). This motion is only available to those defendants who can establish that their failure to timely take the appeal was due to "improper conduct of a public servant," "improper conduct, death or disability" of defense counsel, or the unavoidable inability of an incarcerated defendant and his attorney to have previously communicated concerning an appeal. Ibid. See People v. Kaczynski, 507 A.D.2d 946, 507 N.Y.S.2d 946 (1986) (general allegations are insufficient to establish defendant's right to extention of time to appeal). The intermediate appellate court's order, granting or denying the extension motion, may be appealed to the Court of Appeals in rare situations described by CPL §460.30(6).

The judgment may be stayed or suspended pending defendant's appeal. CPL §460.50(1). If stay or suspension is ordered, the defendant may be released on his own recognizance or bail may be fixed in accordance with CPL §530.10 et seq. Some judge shopping is available to defendants by virtue of CPL §460.50(2), but only one application may be made, and the People must be notified and given the opportunity to oppose the issuance of a stay or suspension order. Note that a defendant convicted of a class A felony may not be given a stay. CPL §530.50; Rogers v. Leff, 45 A.D.2d 630, 360 N.Y.S.2d 652 (1st Dept. 1974), appeal dism'd for mootness, 38 N.Y.2d 903, 382 N.Y.S.2d 753 (1976).

The perfection of appeals, and the attendant formalities and requirements, are only generally governed by the Criminal Procedure Law. CPL §§460.70; 460.80. The rules of each appellate court are far more specific. These rules are not uniform among the departments and, of course, are subject to change. So it is essential that you check the rules in order to ensure that you, and your adversary, have acted properly.

Inevitably, the decision of the intermediate appellate court will be unsatisfactory to one party, or possibly both parties in the case of modification. CPL §450.90(1) essentially authorizes the appeal of any criminal case to the Court of Appeals, provided that leave to appeal has been obtained. This general rule is qualified by subdivision 2 which states that an appeal can be taken only if

> (a) The court of appeals determines that the intermediate appellate court's determination of reversal or modification was on the law alone or upon the law and such facts which but for the determination of law, could not have led to reversal or modification; or
>
> (b) The appeal is based upon a contention that corrective action, as that term is defined in section 470.10, taken or directed by the intermediate appellate court was illegal.

Prior to the enactment of paragraph (a) [effective January 1, 1980), reversal or modification by the intermediate appellate court "on the law and facts" automatically foreclosed the possibility of an appeal to the Court of Appeals. People v. Tomlin, 2 N.Y.2d 758, 157 N.Y.S.2d 578 (1956). Even an order expressly stating that reversal or modification was "on the law alone" provided no guarantee that the case would reach the Court of Appeals, for the Court would frequently look behind the face

of such an order to determine if such a recital were indeed warranted. See, e.g., People v. Johnson, 47 N.Y.2d 124, 417 N.Y.S.2d 46 (1979); People v. Mackell, 40 N.Y.2d 59, 386 N.Y.S.2d 37 (1976). By virtue of the 1979 amendment, CPL §450.90 now permits appeals "where there is a controlling legal question combined with incidental but nondispositive factual issues." People v. Albro, 52 N.Y.2d 619, 623, 439 N.Y.S.2d 836 (1981).

One ordinarily may seek leave to appeal from either a Judge of the Court of Appeals or a justice from the Appellate Division which entered the adverse or partially adverse order. Only one application for leave to appeal may be made. For example, if leave is denied by the Appellate Division justice, a second application cannot be made to another justice or to a Judge of the Court of Appeals. People v. McCarthy, 250 N.Y. 358, (1929); Rule 500.10 of the Court of Appeals. If either a County Court or Appellate Term was the intermediate appellate court, only a Judge of the Court of Appeals may grant leave. CPL §460.20(2).

Unlike the intermediate appellate courts, the Court of Appeals may only review questions of law. N.Y. Const., art. VI, §3; CPL §470.35. Where no objection is taken to the trial court's charge or the prosecutor's summation, for example, no question of law is preserved for review. People v. Thomas, 50 N.Y.2d 467, 429 N.Y.S.2d 584 (1980); People v. Darrisaw, 49 N.Y.S.2d 786, 426 N.Y.S.2d 728 (1980); People v. Utley, 45 N.Y.2d 908 411, N.Y.S.2d 6 (1978). Similarly, an Appellate Division reversal of a conviction with interest of justice, based on an unpreserved issue, may not be appealed by the People to the Court of Appeals, for no question of law is raised by such an exercise of discretion. People v. Cona, 49 N.Y.2d 26, 33, 424 N.Y.S.2d 146 (1979).

And see People v. Nieves, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986) (the Court of Appeals held that the People could not rely on an alternative theory (the excited utterance doctrine) to sustain an affirmance of the Appellate Division which had erroneously held the statements admissible as a dying declaration. But error of a "fundamental nature" even though not preserved will be reviewable. See People v. Patterson, supra. The Court also has no power to review factual determinations (e.g., probable cause for search) unless they are unsupported as a matter of law. People v. Farrell, 59 N.Y.2d 686, 463 N.Y.S.2d 416 (1983); People v. Hopkins, 58 N.Y.2d 1079, 462 N.Y.S.2d 639 (1983); People v. Rizzo, 40 N.Y.2d 425, 386 N.Y.S.2d 878 (1976); People v. Albro, supra. Nor will appeals concerning sentences within statutory limits be heard by the Court unless they involve a question of constitutional dimension. See People v. Miles, 61 N.Y.2d 635, 471 N.Y.S.2d 849 (1983); People v. Thompson, 60 N.Y.2d 513, 470 N.Y.S.2d 551 (1983); People v. Gittleson, 18 N.Y.2d 427, 276 N.Y.S.2d 596 (1966); People v. Broadie, 37 N.Y.2d 100, 371 N.Y.S.2d 471, cert. denied, 423 U.S. 950, 96 S.Ct. 372 (1975) (defendant's challenge of mandatory sentence imposed following conviction for narcotics offenses on ground that it constituted cruel and unusual punishment was considered but rejected by Court which upheld sentence); People v. Jones, 39 N.Y.2d 694, 385 N.Y.S.2d 525 (1976) (Court refused to modify defendant's sentence, rejecting defendant's contention that he had been denied equal protection when co-defendants received lesser sentences).

PRACTICE POINTERS

When the record arrives in your office, examine it carefully, check the contents against both appellant's brief and your files to ensure

that all relevant papers and transcripts have been included. While a supplemental record can later be filed, it is certainly more expeditious to transmit as complete a record as necessary to the court in the first instance. Information and papers not properly presented to the trial court may not be included in the record on appeal or in either party's briefs or appendices as the reviewing court is limited to the record made before the trial court. People v. Walrath, 52 A.D.2d 961, 382 N.Y.S.2d 844 (3d Dept. 1976); People v. Mann, 42 A.D.2d 587, 344 N.Y.S.2d 516 (2d Dept. 1973).

Know your record! A mastery of the record is absolutely essential to fine appellate advocacy. You should not rely on appellant's statement of facts; even if you prosecuted the case below, do not assume that you need not carefully review the record. Nor is simply skimming the record sufficient in anything other than the most perfunctory kind of appeal or the skimpiest of records. Before digesting the brief, read appellant's brief in order to ascertain the questions raised and alert yourself to those facts which consequently may be significant. It is then advisable to prepare a digest of the record by summarizing the proceedings or testimony on a page-by-page basis. By using a form of shorthand (e.g., "W" for witness, "D" for defendant, "tfied" for testified) a record encompassing even thousands of pages can be reduced to manageable size, particularly if typed. It may seem tedious but, in fact, the actual writing of the brief will go more quickly since you will not have to flip through numerous pages to find that critical fact you just know is there "somewhere." Moreover, should you be unable to argue a case, your substitute will greatly appreciate not having to read and take notes on volumes of testimony the night before oral argument.

Next, read opponent's cases before beginning your own independent legal research. If you read the cases as reported in the New York Supplement, rather than the official reports, you can glean relevant key numbers from the head notes there. But do not rely simply on those key numbers. The same issues may appear under key numbers far removed from those you have started with, or even under other annotations. For example, cases concerning the "insanity defense" may be found under Criminal Law key numbers 47-51, 354, 361, 421, 448, 452, 456, 474, 570, 740, 763, 773, 778, 782, 841, 1144, 1159 and 1172, and cases arising out of the search of a motor vehicle are classified under the "Criminal Law," "Search and Seizure" and "Automobiles" annotations. So use the "Descriptive Word Index" of West's New York Digest 3rd* and scan the key numbers numbers in related annotations. Do not utilize only West's Digest or just McKinney's Consolidated Laws of New York Annotated. One source may list cases, particularly trial court opinions, not to be found in the other. Next, read the opinions themselves; do not rely on the case notes alone. The case may actually stand for a proposition contrary to that indicated by the note because a "not" was inadvertently dropped by the printer. Moreover, the notes do not, nor were they intended to, serve as an exegesis of the court's reasoning which can only be determined from the opinion itself. Finally, the court's dicta, which may prove most useful, are infrequently incorporated into these decision notes.

Of course, you will want to Shepardize the cases you have gleaned from your initial sources. Remember that if you are interested in pursuing only one particular aspect of a case, you need not pull every case

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* Note that West's New York Digest 3rd dates back only to 1965. Earlier cases may be found in Abbott's Digest (the red series).

cited under the Shepard's listing; confine yourself to those citations bearing the tiny headnote number, raised to the right of the reporter, of the principle you are researching.

The brief itself should be arranged as follows:

Cover page

Table of Contents*

Preliminary Statement

Questions Presented

Statement of Facts

Legal argument divided into captioned points

Conclusion

The Preliminary Statement need not be lengthy. It is usually a paragraph briefly describing the disposition below, defendant's present status and how the case reached the appellate court.

The Statement of Facts should be clear and concise so that a reader wholly unfamiliar with the case (i.e., the appellate judge and law secretary) will be able to understand fully what happened below. While it certainly should catch and hold the reader's attention, your Statement of Facts should not be argumentative or overly dramatic. It is highly inappropriate, for example, to call attention here pointedly to opposing counsel's misrepresentations of fact or to characterize snidely defendant's testimony as patently incredible. At the same time, one can certainly "shade" the Statement of Facts and still be entirely accurate.

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* A Table of Authorities, after the Table of Contents, is required only by the Court of Appeals.

As respondent on appeal you are not limited to only responding to appellant's arguments. Your role is that of an advocate for the People. Thus, you need not order your brief so that your Point I answers appellant's Point I; feel free to construct your brief in a fashion most likely to enhance your position. Clearly, it is not enough merely to distinguish those cases relied upon by opposing counsel. But neither is it necessary to belabor the obvious. An issue which has been well established for the past fifty years may be disposed of quickly, leaving you free to devote your attention to those issues which require fuller discussion and argument. While you may be tempted to cite every case unearthed, string cites should be sparingly, if ever, used, and a "cut and paste" brief consisting of lengthy quotations strewn together will impress, or persuade, no one.

Above all, be truthful. Neither you or your office's reputation nor the People's cause is enhanced by omitting or misrepresenting facts or case law. And while our appellate system is an adversarial one, there may be occasions when you should alert the court to issues not raised by opposing counsel. As to confessions of error, this appears to be largely a matter of office policy which you should discuss with your supervisors. Some offices occasionally will confess error arising out of prosecutorial oversight, but will never concede trial court or police error; other offices will never confess. It should be pointed out that appellate courts do speak glowingly of those district attorneys who "with commendable candor" concede error. In those exceedingly rare, truly hopeless cases, you may indeed want to consider taking this approach rather than trying to piece together a wholly fallacious argument. Of course, a confession of error need not lead inevitably to reversal. A confession

is not binding on the appellate court. More important is the doctrine of harmless error whereby the appellate court determines whether the error may be deemed inconsequential. The landmark decision in this area is People v. Crimmins, 36 N.Y.2d 230, 367 N.Y.S.2d 213 (1975). There, the Court of Appeals enunciated the criteria for review of errors. A finding of constitutional error must result in reversal unless the error was harmless beyond a reasonable doubt in that there is no reasonable possibility that the error might have contributed to defendant's conviction. Id. at 237, 367 N.Y.S.2d at 218; see Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). But if the error is of non-constitutional dimensions, reversal will not be ordered unless there is a significant probability that defendant would have been acquitted but for the claimed error. Crimmins, 36 N.Y.2d at 242, 367 N.Y.S.2d at 222; see also CPL §470.05.

Including an appendix, containing the pages of transcript cited in your brief and other relevant papers and exhibits, is highly recommended even in cases where it is not required because, for example, the defendant-appellant has served and filed multiple copies of the record. All pertinent parts of the record are thereby readily accessible to the reader of your brief -- a convenience for the reviewing court which you too will appreciate as you prepare for oral argument. In passing, it should be noted that your brief and appendix need not be professionally typeset or printed; photocopied, typewritten briefs are accepted by every court in this State, including the Court of Appeals. A lucid brief without typographical errors and containing accurate citations in proper form will do more for your cause than the slickest cover ever can.

As the date for oral arugment approaches, review the briefs, the

record digest, cited authorities, and then the advance sheets and slip opinions to locate any pertinent opinions which may have been rendered since you filed your brief. Having done this, you are now ready to prepare your argument. Do not plan to read, or just rehash, your brief. And do not take a word-for-word prepared speech with you to the podium. The judges' questions -- which you should welcome -- never correspond to your anticipated order. Anyone who has ever sat in an appellate courtroom can attest to the pall that descends as an attorney leafs through reams of paper in an effort to find his/her place after answering a question from the bench. Furthermore, oral argument is not a lecture, but rather an erudite conversation with the judges. By keeping your eyes fixed on the papers in front of you, you will lose not only the judges' interest but also the opportunity to assess their reactions to your argument. Accordingly, outline your argument on either a single piece of paper or several note cards. The outline need consist only of significant words or phrases (sufficient to jog your memory), and key citations to your brief and the record or your appendix. However, you may well want to write out, in their entirety, your opening and closing sentences.

Until you gain confidence in your abilities, you should practice your argument in front of others. This type of "moot court" practice is exceedingly useful even after you have had numerous appellate arguments for it highlights the strengths and weaknesses of your oral advocacy and the merits of the argument itself. Do not just stand up in front of your mock judges and announce "Well, first I'm going to talk about the probable cause issue, you know, Dunaway, and then I'll move into the search incident to arrest...." To be effective, this practice argument

must be as much like "real life" as possible. Your practice argument thus should be conducted in a courtroom or in an office with you standing some distance (8-10') from your "judges." If possible, have more than one "judge" present in order to simulate more accurately the give-and-take and the variety of questions and styles often found among appellate judges. Provide your "judges" with copies of both sides' briefs beforehand so that they have some idea of the nature of the case before you begin. You should conduct this argument several days ahead of your scheduled argument to provide you with time to rectify any glaring problems of substance or style.

Concerning style, rest assured that you do not have to alter dramatically your usual courtroom demeanor in order to be an effective appellate advocate. If you visit the court before your argument you will observe a variety of personalities and mannerisms. Of course, some of these should not be emulated. The atmosphere of the appellate courtroom is above all one of respectful and courteous professionalism. High histrionics which may be tolerated in the trial setting are taboo in the appellate court. Thus, you should not make deprecatory faces or gestures to the audience or the judges while appellant counsel is speaking or rise and object to some aspect of his/her argument. Similarly, the grieving mother of your murder victim should not accompany you to court. Jokes and sarcasm, even of the mildest nature are practices to be scrupulously avoided. But most importantly, never interrupt the judges.

On the day of argument, sign in at the clerk's office; in the Court of Appeals, you will be met at the front door by the rotunda. Check the calendar to see if the time you requested for oral argument has been reduced. From there, go to the attorney's waiting room where you can

hang your coat and deposit excess baggage. Drinking fountains and rest-rooms are located there or nearby. It is courteous to introduce yourself to opposing counsel and exchange a few pleasantries. However, you should not allow yourself to become embroiled in a heated argument of the case.

When you enter the courtroom, try to find a seat on the right-hand side for, as respondent, you will be moving to the chair at counsel's table to the right of the podium when the case is called. As appellant is speaking, note on your outline those issues which the court appears to find most interesting or troublesome so you can more effectively tailor your argument. Rise to your feet when appellant counsel is finished speaking; the presiding justice may not always signal you to begin. While the time honored "May it please the Court" is still the most common introduction, you may also begin with "If the Court pleases" or simply "Good morning (afternoon), your Honors...." Do not be distressed by your inability to address each member of the court by name, as some of your more experienced colleagues do. There is often a seating chart taped to the podium, but there is no need to feel embarrassed if, under the stress of oral argument, you find you cannot put it to good use. "Your Honor" is quite sufficient -- but do remember to preface your responses with it.

There are a few differences between law school moot court and the actual appellate courtroom. Unlike moot court where you may have attempted to impress the judges by rattling off case or record citations, the use of such citations should be kept to a minimum. If a case does merit attention in oral argument, simply state the case name with a reference to where it may be found in your brief or describe it, for example, as "a 1967 decision of the Appellate Division, Second

Department." Landmark decisions such as Miranda v. Arizona require no such description.

You may also find that appellate judges seem to be less attentive than their moot court counterparts. They may whisper or pass notes to each other, swivel in their chairs or even leave the bench while you are speaking. This is not necessarily cause for alarm. Panic-stricken, you may think they are deciding where to meet for lunch. Most likely, they are discussing some aspect of the case. In any event, do not pause and wait for their attention as this may be interpreted as presumptuous irritation on your part. Do not hesitate to continue with your argument, looking at the judge or judges who appear to be listening. However, actions may speak louder than words. A low persistent murmuring from the bench or a host of vacant stares cast upwards may well be your cue to bring the argument to a quick, succinct conclusion, thank the court and sit down. This is particularly true if you have made your most telling points; you should not drag out your argument just to fill the time allotted or to discuss every issue briefed.

The court's decision is usually rendered within four to six weeks. Most clerk's offices now telephone the attorneys for both sides before the slip opinions are released to the public. Whether counsel for the winning party prepares the order or not is a matter of that particular court's practice.

Generally, applications for leave to the Court of Appeals should be made to the Court itself. The application to the Court is made in simple letter form; in contrast, an application to a justice (judge) of the intermediate court must usually consist of formal motion papers. However, if there were dissenters at the intermediate court level, you may

want to consider seeking leave from one of them. Many intermediate court judges hesitate to send cases to the Court of Appeals, believing that the Court itself should decide which cases it will hear. Consequently, they will deny leave even though they took the time to pen a dissenting opinion. To avoid making such a futile application, telephone the judge's chambers, ask to speak to his/her law secretary and inquire as to whether Justice X will "entertain" your application for leave to appeal. Most judges are sensitive to the dilemma you face and will cue you accordingly. Remember that in the case of a modification order, you will need to file your own cross-appeal leave application regarding that part of the intermediate court opinion with which you disagree. You cannot ride into the Court of Appeals on the defendant's coattails.

Should a leave hearing be held, pay close attention to the focus of the Judge's questions as they are often indicative of what he and the Court perceive to be the most interesting questions, although some Judges forthrightly state why they are granting leave. If you are the appellant, your brief and argument should obviously concentrate on that particular issue. Leave to the Court of Appeals is granted in only approximately 6% of the criminal cases in which it is sought. However, reversal of the intermediate appellate court follows in about one-third of the criminal appeals heard by the Court.

Should you lose in the New York Court of Appeals, further review may be available in the United States Supreme Court either by direct appeal or on a writ of certiorari. Stern and Grossman's book, Supreme Court Practice, (5th ed. 1978) is truly invaluable to any attorney who has, or is contemplating having, a case before the Supreme Court. Written by a former Acting Soliciter General and a former law clerk to Justice Frank

Murphy, this text of over 1,000 pages provides sample forms and briefs for all motions and actions, a thorough explication of Supreme Court jurisdiction (with case law annotations), and other essential information.

Other references which should prove useful to appellate attorneys are:

Appellate Courts and Lawyers, Thomas B. Marvell (Greenwood Press, Inc., Westport, Conn. 1978)

> An interesting study of the appellate process within our adversary system, including a survey of what appellate attorneys, judges and law clerks believe are critical or helpful factors in the disposition of an appeal and an analysis of whether their perceptions are accurate.

Brief and Arguing Federal Appeals, Frederick B. Wiener (BNA, Inc., Washington, D.C. 1961)

> Certain procedural sections are now outdated, but the chapters on brief writing and oral argument (which comprise the bulk of the book) are excellent. The last chapter is an annotated critique of an oral argument actually presented in the United States Supreme Court.

Brief Writing and Oral Argument, Edward D. Re (Oceana Publications, TransMedia Publishing Co., Dobbs Ferry, NY 1974)

The Elements of Style, William Strunk, Jr. & E. B. White (MacMillan Publishing Co., Inc., New York, NY 1972)

> A short, but outstanding, guide to clear and concise composition and the proper use of the English language.

Practitioner's Handbook for Appeals to the Appellate Division, New York State Bar Association (Albany, NY 1979)

> A handy reference to intermediate appellate practice in New York, with an emphasis on civil appeals and the differences and similarities among the four Departments. Note that some of the courts' rules have been

changed since this was published.

Practitioner's Handbook for Appeals to the Court of Appeals, New York State Bar Association (Albany, NY 1981)

Complementing the earlier Appellate Division handbook, supra, this volume ably guides its reader through the Court's procedure and appellate practice in general. Given the inexpensive price of these paperback handbooks, they should be a part of every New York attorneys library.