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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 (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 two-part standard for determining legitimate privacy expectations is (1) did the defendant manifest a subjective expectation of privacy in the area searched and (2) is his subjective expectation of privacy one that society accepts as objectively reasonable. See California v. Greenwood, ___ U.S. ___, 108 S.Ct. 1625 (1988); O'Connor v. Ortega, ___ U.S. ___, 107 S.Ct. 1492 (1987); California v. Ciraolo, 476 U.S. 207, 211, 105 S. Ct. 1809 (1986); Oliver v. United States, 466 U.S. 170, 177, 104 S.Ct. 1735 (1984); Katz v. United States, 38 U.S. 347, 361 88 S.Ct. 507 (1967). In California v. Greenwood, supra, the Supreme Court held that the Fourth Amendment allows warrantless searches and seizures of garbage placed in opaque plastic bags and left for collection at the curb outside the curtilage of a residence. The majority of the court (two justices dissented) determined there is no reasonable expectation of privacy in trash disposed of in this manner.

"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. 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). 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 were not violated when the officer entered the adjoining stall and looked over the partition).

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 (1924). Hester was reaffirmed in Oliver v. United States and Maine v. Thorton, 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." See United States v. Dunn ___ U.S. ___, 107 S.Ct. 1134 (1987), where the Supreme Court outlined the four factors to be considered by the Court in determining whether a particular area is within the residential four curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; (4) the steps taken by the resident to protect the area from observation by people passing by. The fact that the fields are fenced, or signed with "no trespassing signs" does not create an expectation of privacy which warrants Fourth Amendment protection. See 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).

In California v. Ciraolo, 476 U.S. 207, 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 [which] any member of the public flying in [that] airspace could have seen...". 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 Enviromental 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." Recently in People v. Reynolds, 71 N.Y.2d 552, 528 N.Y.S.2d 15 (1988) the Court of Appeals upheld warrantless police surveillance of a defendant's property from a helicopter and subsequent entry of defendant's farm on foot to look for evidence of a "commercial marijuana operation." The searches yielded marijuana plants found in a greenhouse structure on defendant's property and in the area surrounding it. Upholding the search, the Court "declined to declare as a matter of State constitutional law, that an owner has a reasonable expectation of privacy in open fields and woods where no precautions have been taken to exclude

the public from entry", citing People v. Ponder, 54 N.Y.2d 160, 445 N.Y.S.2d 57 (1981); People v. Mercado, 68 N.Y.2d 874, 508 N.Y.S.2d 419 (1986). The Court noted "[w]here ground-level police intrusion is not unreasonable under our State Constitution, police overflight in navigable airspace is similarly permissible.

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). See also People v. Drain, 135 A.D.2d 1137, 523 N.Y.S.2d 274 (4th Dept. 1987).

"[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, 69 N.Y.2d 1031, 517 N.Y.S.2d 914 (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) (defendant drug purchaser who was found in drug supplier's apartment had no standing to contest search of 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 firmly established that where guilt of criminal possession of contraband is premised solely on the statutory presumption of possession contained in Penal Law §256.15(3), the defendant passenger has standing to contest the search and stop of the vehicle. See People v. Millan 69 N.Y.2d 514, 516 N.Y.S.2d 168 (1987); see also People v. Knight, ___ A.D.2d ___, 526 N.Y.S.2d 102 (1st Dept. 1988).

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 inadmissible 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.

(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

* 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).

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 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.

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.2d630 (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. In People v. Griminger, No. 96, slip op. (New York Court of Appeals April 28, 1988) the Court answering the question left open in Bigelow, held as a matter of state constitutional law that New York's courts should continue to apply the two-pronged Aguilar-Spinelli test in determining whether there is sufficient probable cause to issue a search warrant. 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.

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.

(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 no 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 foot-

locker 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").

[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

* 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."

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 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). Note: Recently in Michigan v. Chesternut, 43 Crim. L. Rep. BNA 3077 (June 15, 1988) the Supreme Court held that police officers' "investigatory pursuit" of a suspect does not constitute a seizure under the Fourth Amendment unless a reasonable person, viewing the circumstances in their entirety, would have concluded he was not free to leave. In Chesternut, the respondent began to run after seeing a police car. The police followed him "to see where he was going"; after catching up with him they drove along side him and observed him discard a number of packets. The police used no siren or flashers, displayed no weapons, did not order defendant to halt or attempt to block his way. The Court determined that a reasonable person would not believe the police were attempting to capture him or restrict his freedom of movement. Under these circumstances, the police were not required to have a particularized and objective basis for suspecting him of criminal activity in order to pursue him.

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 considered 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 gun-point 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).

* * *

> 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. Compare People v. Salaman, 71 N.Y.2d 869, 527 N.Y.S.2d 751 (1988) (Pat down search of defendant permissible where officer received an anonymous tip that individual resembling defendant and wearing similar clothing would be standing with gun at exact location in high crime area where officer found defendant). 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.2d803 (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. Compare, 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); and People v. Knight, ___ A.D.2d ___, 526 N.Y.S.2d 102 (1st Dept. 1988) (defendant's innocuous behavior did not justify search).

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 reasonable 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); and see People v. Newsome, ___ A.D.2d ___, 526 N.Y.S.2d 6 (2d Dept. 1988) (computer printouts could not replace testimony of sending officer and could not establish content or basis of information received by arresting officer). 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; see also Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (1983), in which the permisible 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.

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). But see People v. Sawyer, ___ A.D.2d ___, 523 N.Y.S.2d 303 (4th Dept. 1987). (Wife who shares premises with defendant, may not consent to a search of the defendant's personal effects absent a common right of control over the items searched or unless the defendant has abandoned the property or premises.) 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).

(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 instrumen-talities 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, 479 U.S. 367, 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 Detention

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 modi-

fied 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."

Note: Police have authority to detain juveniles suspected of truancy. See Matter of Shannon B., 70 N.Y.2d 458, 522 N.Y.S.2d 488 (1987).

(11) Searches of Government Employees in the Workplace

In O'Connor v. Ortega, ___ U.S. ___, 107 S.Ct. 1492 (1987), 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., 70 N.Y.2d 57, 517 N.Y.S.2d 456 (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, 463 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.

VOIR DIRE PROCESS AND PROCEDURES

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June 1988 Revision

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VOIR DIRE PROCESS AND PROCEDURES

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VOIR DIRE PROCESS AND PROCEDURES

A. Formation of Jury

1. On the trial of an indictment, the jury consists of twelve jurors, and at the court's discretion, from one to four alternate jurors may be selected. CPL 270.05(1), 270.30.

2. If the defendant is charged in an information, the jury consists of six jurors and, at the court's discretion, one or two alternates. CPL 360.10(1), 360.35(1).

3. Jury is formed and selected as prescribed in the Judiciary Law. CPL 270.05(2), 360.10(2).

4. It has been held that the Commissioner of Jurors cannot be compelled to disclose the names and addresses of persons selected and sworn as jurors in a highly publicized trial, and that §509(a) of the Judiciary Law protects information in records used in or created by the juror selection process from unrestricted disclosure. See Matter of Newsday, Inc. v. Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182 (2d Dept. 1986), aff'd, 71 N.Y.2d 146, 524 N.Y.S.2d 35 (1987).

   However, disclosure will be granted to defense counsel as part of trial preparation for the valid purpose of advancing the right to a fair trial. People v. Perkins, 125 A.D.2d 816, 509 N.Y.S.2d 441 (3d Dept. 1986).

B. Composition of Jury

1. Every defendant is guaranteed the right to a trial by an impartial jury, absent any systematic, deliberate dis-

crimination or exclusion with respect to the compilation of a general list from which jurors are drawn. People v. Chestnut, 26 N.Y.2d 481, 311 N.Y.S.2d 853 (1970), petition for writ of habeas corpus denied, United States ex rel. Chestnut v. Criminal Court of the City of New York, 442 F.2d 611 (2d Cir. 1971), cert. denied, 404 U.S. 856, 92 S.Ct. 111 (1971). See also New York State Constitution, Article 1, Section 2, and United States Constitution, Sixth Amendment.

2. "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." Brown v. Allen, 344 U.S. 443, 474, 73 S.Ct. 397 (1953).

3. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975), which held that a statutory procedure automatically exempting women from jury service violated defendant's right to be tried by a fair cross-section of community. [Note: The defendant, a male, had standing to assert this claim.] See also Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664 (1979), holding unconstitutional the automatic granting of requests for exemption by prospective female jurors.

4. Juries need not mirror the community and defendants are not entitled to a jury of any particular composition.

a. People v. Shedrick, 104 A.D.2d 263, 482 N.Y.S.2d 939 (4th Dept. 1984), aff'd, 66 N.Y.2d 1015, 1017, 499 N.Y.S.2d 388 (1985) ("there is no unequivocal requirement that juries be drawn from a pool of residents from throughout the entire county wherein the court convenes");

b. People v. Marrero, 110 A.D.2d 784, 487 N.Y.S.2d 853 (2d Dept. 1985) (defendant's claim that the jury did not consist of a cross section of the community because jury selection took place during the Jewish holiday of Succoth, which allegedly prevented Orthodox Jews from serving on the jury, lacked merit).

c. People v. Henderson, 128 Misc.2d 360, 490 N.Y.S.2d 94 (Buffalo City Ct. 1985) (defendants were not entitled to jury panel drawn only from residents of city rather than from the entire county where, although blacks and Hispanics were seriously underrepresented in the present county-based pool system, such under-representation was the inadvertent effect of an effort to set up central jury pool for entire county rather than a deliberate discriminatory attempt to exclude minorities).

d. In order for a defendant to be entitled to a hearing on the issue of discrimination, he must prove an intentional and systematic pattern of discrimination. Mathematical disparities alone were insufficient

to raise the issue. See People v. Chestnut, supra; People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976).

Assertions of a discriminatory process concerning the selection of jury panels are insufficient without proof of any facts in support of such assertions. People v. Liberty, 67 A.D.2d 776, 412 N.Y.S.2d 699 (3d Dept. 1979); People v. Tucker, 115 A.D.2d 175, 495 N.Y.S.2d 244 (3d Dept. 1985) (whether a challenge to the jury selection process is based on the equal protection clause or the due process clause, it must be supported by a demonstration of the demographic breakdown of the jury panels selected in order to show some systematic discrimination).

e. See also Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272 (1977):

> [In] order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied [citations omitted]. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a signficant period of time [citations omitted]. This method of proof, sometimes called the 'rule of exclu-

> sion', has been held to be available as a method of proving discrimination in jury selection against a delineated class.... Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Id. at 494-95. (Footnote omitted.)

People v. Robinson, 114 A.D.2d 120, 125, 498 N.Y.S.2d 506 (3d Dept. 1986) (college students do not fall into any distinctive group within the meaning of the "fair cross section of the community requirement" for prospective jurors).

C. Challenge to Panel - CPL 270.10, 360.15

1. Available only to defendant.
2. Systematic exclusion must be alleged. See Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664 (1979); People v. Guzman, 60 N.Y.2d 403, 469 N.Y.S.2d 916 (1983); cert. denied, 466 U.S. 951, 104 S.Ct. 2155 (1984); People v. "ZZ", 134 A.D.2d 814, 521 N.Y.S.2d 873 (3d Dept. 1987).
3. Made in writing, before selection starts. If not made, it is deemed waived. People v. Prim, 47 A.D.2d 409, 366 N.Y.S.2d 726 (4th Dept. 1975), modified on other grounds, 40 N.Y.2d 946, 390 N.Y.S.2d 407 (1975).
4. If prosecutor denies the existence of the alleged facts, the court must conduct a hearing at which witnesses may be called and examined.
5. The defendant has the burden of proving prima facie that a

defect exists. In order to substantiate a charge of systematic exclusion of a particular class of persons, the defendant must adduce evidence that the group allegedly excluded constitutes a distinct class. See Brown v. Harris, 666 F.2d 782 (2d Cir. 1981) (insufficient evidence that persons between the ages of 18 and 28 constitute a distinct class; further, as persons under 21 were not eligible to serve as jurors until recently, the alleged exclusion could not be systematic); see also People v. Bartolomeo, 126 A.D.2d 375, 513 N.Y.S.2d 981 (2d Dept. 1987) (young black adults ranging in age from 18 to 21 years are not a distinctive group in the community). Once established the burden is on the government to show that the pool of jurors did not systematically exclude certain groups. Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221 (1971); Taylor v. Louisiana, supra; Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993 (1979).

6. Court determines issues of law and fact.

7. If the challenge is allowed, the panel must be discharged.

D. Challenges for Cause to Individual Jurors - CPL 270.20, 360.25

1. Not qualified under the Judiciary Law. See Judiciary Law §§509, 510, 511 (as amended, Ch. 316, L.1977).

   a. A juror must be a U.S. citizen and a resident of the county. Judiciary Law §510(1).

   b. A juror must not be less than eighteen years of age. Judiciary Law §510(2).

   c. A juror must not have a mental or physical condition,

or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror. Judiciary Law §510(3).

d. A juror must be able to read and write English. Judiciary Law §510(5). People v. Guzman, 125 Misc.2d 457, 478 N.Y.S.2d 455 (N.Y. Sup. Ct. 1984) (prospective juror who was otherwise qualified and who communicated in signed English, could not be challenged for cause).

e. A juror must not have been convicted of a felony. Judiciary Law §510(4).

f. Certain government officials, as well as persons in active service in the Armed Forces, are automatically disqualified. Judiciary Law §511(1), (2), (3), (4).

g. A person who has served on a grand or petit jury within the State, including in a federal court, within two years of the proposed service is automatically disqualified. Judiciary Law §511(5). People v. Foster, 69 N.Y.2d 1144, 490 N.Y.S.2d 726 (1985) (co-defendants waived any objection based on juror's prior service where they failed to join in third co-defendant's peremptory challenge after his challenge for cause was denied); see also People v. O'Hare, 117 A.D.2d 757, 498 N.Y.S.2d 478 (2d Dept. 1986).

h. See Carter v. Jury Comm., 396 U.S. 320, 90 S.Ct. 518

(1970). State is free to confine selection of jurors to citizens, to persons meeting specified qualifications of age and educational attainment, and to those in possession of good intelligence, sound judgment and fair character.

2. Prospective juror has a state of mind likely to preclude him from rendering an impartial verdict based on the evidence adduced at the trial.

   a. Prospective juror has an opinion as to the defendant's guilt or innocence. People v. Brown, 111 A.D.2d 248, 489 N.Y.S.2d 91 (2d Dept. 1985) (the trial court was in error in denying defendant's challenge for cause of a prospective juror who stated, during voir dire, that "if the police arrest [defendant] he has done something" and reiterated that belief twice during subsequent questioning); see also People v. Johnson, 113 A.D.2d 900, 493 N.Y.S.2d 618 (2d Dept. 1985) (prospective juror's assumption that the complainant was a victim of some wrongdoing was a natural assumption to make and trial court properly denied defense counsel's request to discharge for cause); People v. Culhane, 33 N.Y.2d 90, 350 N.Y.S.2d 381 (1973); People v. Biondo, 41 N.Y.2d 483, 393 N.Y.S.2d 944 (1977). In such a case, the juror will be qualified provided he makes an expurgatory oath and declares to the satisfaction of the court that he can put aside his bias and render

render an impartial verdict according to the evidence.

Sufficiency of juror's expurgatory oath must be judged within the context of juror's entire voir dire testimony. Compare People v. Taylor, 120 A.D.2d 325, 502 N.Y.S.2d 1 (1st Dept. 1986) (juror's willingness to do "everything within [her] power" to be fair and impartial did not dispell taint of implied bias); People v. Butts, ___ A.D.2d ___, 527 N.Y.S.2d 880 (3d Dept. 1988) (prospective juror who acknowledged that newspaper accounts of crimes made "it sound as if defendant was guilty", but she was nevertheless willing to listen to defendant's "side of the story" before forming an opinion, was properly seated).

b. Juror states that she has strong views about the type of crime with which the defendant is charged and no expurgatory oath is administered. People v. Morrer, 77 A.D.2d 575, 429 N.Y.S.2d 913 (2d Dept. 1980).

c. Bias implied from juror's past history. People v. Oddy, 16 A.D.2d 585, 229 N.Y.S.2d 983 (4th Dept. 1962); People v. Sellers, 73 A.D.2d 697, 423 N.Y.S.2d 222 (2d Dept. 1979).

d. Juror familiar with media accounts of the crime or of defendant, not excused solely for that reason. People v. Culhane, supra; People v. Genovese, 10 N.Y.2d 478, 225 N.Y.S.2d 26 (1962); see also People v. Butts, supra.

> There is no requirement "that the jurors be totally ignorant of the facts and issues involved" (citations omitted) or the defendant's other involvements with the law (citations omitted). What is generally condemned is the "trial by newspaper" or other media in which a substantial portion of the community has been exposed to inflammatory reports purportedly establishing defendant's guilt (citations omitted).

People v. Moore, 42 N.Y.2d 421, 432, 397 N.Y.S.2d 975, 982 (1977).

People v. Knapp, 113 A.D.2d 154, 495 N.Y.S.2d 985 (3d Dept. 1985) (voir dire examination of jurors for defendant's second trial on a charge of reckless murder was not improperly conducted on the ground that the media and public were not excluded while jurors were questioned regarding publicity as to prejudicial matters). See also People v. Hardwick, ___ A.D.2d ___, 524 N.Y.S.2d 798 (2d Dept. 1988); People v. Privott, 133 A.D.2d 528, 520 N.Y.S.2d 90 (4th Dept. 1987).

e. Prospective juror has actual bias caused by a highly unfavorable impression of the defendant's over-all reputation or character and there appears to be a possibility that such impressions of the defendant will influence juror's verdict. People v. Torpey, 63 N.Y.2d 361, 482 N.Y.S.2d 448 (1984).

3. Prospective juror is related within the sixth degree of consanguinity or affinity to the defendant, victim, prospective witness, or counsel; has been an

adverse party to such a person in a civil action, or has accused or been accused by such a person in a criminal action; or has some other relationship with such a person which is likely to prevent the juror from reaching an impartial verdict. CPL 270.20(1)(c); see also People v. Butts, ___ A.D.2d ___, 527 N.Y.S.2d 880 (3d Dept. 1988).

a. Juror may be in a disqualifying relationship to defendant if he holds a professional or occupational position similar to the victim's. People v. Culhane, 33 N.Y.2d at 105, 350 N.Y.S.2d at 394-95; People v. Smith, 110 A.D.2d 669, 487 N.Y.S.2d 585 (2d Dept. 1985) (in a case involving the murder of an off-duty police officer trial court acted properly in denying defendant's challenge for cause of a prospective juror whose son was a police detective where juror indicated he did not see his son often; did not discuss police matters with him; believed that his son could make mistakes; and indicated he could be impartial). Fact that victim is a homosexual and crime was one of many assaults on homosexuals did not per se disqualify a homosexual juror. People v. Viggiani, 105 Misc.2d 210, 431 N.Y.S.2d 979 (N.Y. Crim. Ct. 1980).

b. Juror who had worked as a part-time police officer in the district attorney's office and had close personal and professional relationship with the prosecutor who tried the case should have been

excluded for implied bias. People v. Branch, 46 N.Y.2d 645, 415 N.Y.S.2d 985 (1979). The Court in Branch further held that where a suspect relationship is the basis for the implied bias, the expurgatory oath is not available [as it is when the juror has an opinion as to the guilt or innocence of the defendant; see People v. Biondo, supra].

> We would add that the trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service. Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury. The presumption of innocence, the prosecutor's heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias.

People v. Branch, 46 N.Y.2d at 651-52, 415 N.Y.S.2d at 988.

c. People v. Rentz, 67 N.Y.2d 829, 501 N.Y.S.2d 643 (1986) (juror was acquainted with two prosecution witnesses. The relationship with one was essentially professional but with respect to the other witness, according to the juror's own assessment, somewhat intimate as well. Under the circumstances, the court should have found this juror unqualified to serve). See People v. Hernandez, 122 A.D.2d 856, 505 N.Y.S.2d 908 (2d Dept. 1986) (prospective juror's former

employment as a police officer was insufficient to support a challenge for cause). See also, People v. Barnes, 129 A.D.2d 249, 517 N.Y.S.2d 589 (3d Dept. 1987). Following his conviction for robbery defendant moved to vacate the judgment of conviction when he learned that he had been previously arrested on an unrelated charge with the brother of one of the jurors. The Appellate Division affirmed defendant's conviction on the ground that defendant failed to establish that at the time of trial the juror was aware of the previous contact between his brother and defendant and the mere existence of such a relationship would not automatically render the juror unqualified.

d. What makes a relationship suspect is determined by a consideration of all facts and circumstances. See, e.g., People v. Provenzano, 50 N.Y.2d 420, 429 N.Y.S.2d 562 (1980), wherein the Court held that neither the juror's nodding acquaintance with the district attorney trying the case or the fact that the juror had campaigned for the party slate on which the prosecutor was elected was sufficient to constitute implied bias.

See also People v. Smith, 111 A.D.2d 883, 490 N.Y.S.2d 277 (2d Dept. 1985) (merely because the murder took place in a subway station and one of the People's witnesses was the token booth clerk on duty

at the time, there was no merit to defendant's claim that because two prospective jurors were employed by the New York City Transit Authority they would be incapable of rendering an impartial verdict); People v. Downs, 77 A.D.2d 740, 431 N.Y.S.2d 197 (3d Dept. 1980); People v. Harris, 84 A.D.2d 63, 445 N.Y.S. 530 (2d Dept. 1981), aff'd, 57 N.Y.2d 335, 456 N.Y.S.2d 694 (1982), cert. denied, 460 U.S. 1047, 103 S.Ct. 1448 (1983) (trial court did not err in refusing to grant a challenge for cause to a sworn juror, where although the prosecutor had previously dismissed a charge against that juror's daughter, there was no evidence that the juror knew this. Further, when the prosecutor revealed this fact during voir dire before the juror was sworn, defense counsel failed to ask for further examination and later in the trial, defense counsel opposed a proposed substitution of an alternate). See also Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982), (juror while sitting on case submitted an application for a position as an investigator to the district attorney's office; the trial court's refusal to set aside the verdict after a hearing into the juror's possible bias did not deny defendant due process); People v. Clark, 125 A.D.2d 868, 510 N.Y.S.2d 223 (3d Dept. 1986) (denial of challenge for cause based on juror's close personal relationship with District Attorney required

reversal).

4. Prospective juror was a witness at the preliminary hearing or grand jury, or is to be a witness at the trial. CPL 270.20(1)(d).

5. Prospective juror served on grand jury which indicted defendant or served on prior trial jury where defendant was on trial. CPL 270.20(1)(e).

6. It is constitutional error to foreclose inquiry about a juror's possible racial prejudice; racial prejudice is a ground for challenge for cause. In People v. Blyden, 55 N.Y.2d 73, 447 N.Y.S.2d 886 (1982), the Court ordered a new trial and held that a prospective juror who stated that he "had feelings against minorities", should have been disqualified for cause since his shallow incantation -- "I think I could [be impartial]" -- did not overcome the clear indication of the juror's bias. See also St. Lawrence v. Scully, 523 F.Supp. 1290 (S.D.N.Y. 1981), aff'd, 697 F.2d 296 (1982) (notwithstanding prospective juror's expurgatory statement, the court did not err in disqualifying juror, who indicated that although it would "definitely be difficult" for him to keep the question of race out of his mind during deliberations of the facts, "he would try", since racial issues were inextricably bound up with the trial).

   Note: The United States Supreme Court has held that state trial courts are required, under the United States Constitution, to inquire about the possible racial biases

of prospective jurors when racial issues are inextricably bound up with the trial [see Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848 (1973) (defendant, a black civil rights worker, claimed that police had framed him on a drug charge)]. In addition, the Supreme Court has held that federal courts must also inquire about racial bias where a crime of violence is involved and the victim and perpetrator are of a different race. Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017 (1976); Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629 (1981).

The trial court, however, is vested with discretionary power and accordingly may limit the voir dire examination into the alleged racial bias of prospective jurors to prevent irrelevant and repetitious questioning. St. Lawrence v. Scully, supra.

E. Peremptory Challenges - CPL 270.25, 360.30

1. An objection to juror for no specific reason.

2. In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), the Supreme Court reaffirmed that portion of Swain v. Alabama, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-827, reh'g. denied, 381 U.S. 921 (1965) which recognized that a "state's purposeful or deliberate denial of [blacks] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause".

In Batson, supra, a black man was indicted in Kentucky on charges of second degree burglary and receipt of stolen

goods. After the court had excused a number of jurors the prosecutor used his peremptory challenges to strike all four black persons on venire and a jury composed only of white persons was selected and ultimately convicted the black defendant. Under Swain, supra, the defendant would have had to make out a prima facie showing of a pattern of systematic discrimination against blacks by the prosecutor in his use of peremptory challenges before the prosecutor would have been required to explain his exercise of the peremptories.

Batson, supra, however, overrules the Swain evidentiary requirement. Now a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial (emphasis added). Batson, 476 U.S. at 79, 106 S.Ct. at 1712.

3. Batson was given retroactive application to all cases on direct review or not yet final in Griffin v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987).

   a. People v. Scott, 70 N.Y.2d 420, 522 N.Y.S.2d 94 (1987). Defendant, a black prostitute, was accused of murdering and robbing a white customer, a retired police officer. The venire of potential jurors for defendant's trial included five blacks who were all excluded from the jury by the prosecutor's exercise of peremptory challenges. After the jury was

empaneled but before the trial commenced, defense counsel moved for a mistrial asserting that the prosecutor used his peremptory challenges to systematically exclude blacks from the jury. The People did not dispute counsel's claim, offer additional facts, or try to explain the peremptory challenges. The trial court, citing People v. McCray, 57 N.Y.2d 542 (1982), denied the motion. Defendant was convicted of manslaughter and grand larceny. The Appellate Division affirmed.

Citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), which was decided while defendant's appeal was pending, the Court of Appeals reversed. Batson held that to establish a prima facie showing of purposeful discrimination by the prosecutor the defendant must demonstrate that "(1) he or she is a member of cognizable racial group and that the prosecutor exercised peremptory challenges to remove venire members of defendant's race from the jury and (2) facts and other relevant circumstances sufficient to raise an inference that the peremptory challenges were used for discriminatory purposes". Here the Court concluded that defendant had demonstrated that the blacks excluded from the jury were a "heterogeneous group which included different sexes, different occupations and different social backgrounds. None of the jurors exhibited signs of

bias favoring defendant. To the contrary, their backgrounds and knowledge of the case suggested that any bias they might have had would favor the prosecution. Under the circumstances, the prosecutor's 'pattern of strikes against black jurors...[gave] rise to an inference of discrimination'."

b. See also People v. Ford, 69 N.Y.2d 775, 513 N.Y.S.2d 106 (1987); People v. Hockett, 128 A.D.2d 393, 512 N.Y.S.2d 679 (1st Dept. 1987), holding that prosecutor's use of 12 of 17 peremptory challenges to remove potential black jurors required granting of new trial, although jury included two black members; and People v. Harper, 124 A.D.2d 593, 507 N.Y.S.2d 874 (2d Dept. 1986), sustaining the prosecutor's use of peremptory challenges that left four black jurors and at least two black alternate jurors, where prosecutor did not exhaust his available peremptories.

c. The "neutral explanation" requirement of Batson was satisfied in People v. James, ___ A.D.2d ___, 526 N.Y.S.2d 417 (4th Dept. 1988); People v. "ZZ", 134 A.D.2d 814, 521 N.Y.S.2d 873 (3d Dept. 1987); People v. Cartagena, 128 A.D.2d 797, 513 N.Y.S.2d 497 (2d Dept. 1987); People v. Simpson, 121 A.D.2d 881, 504 N.Y.S.2d 115 (1st Dept. 1986).

4. Court must excuse person challenged.

5. Number of challenges depends on the nature of the crime charged. CPL 270.25(2), 360.30, 360.35.

   a. Class A felony - twenty challenges for regular jurors, two for each alternate.

   b. Class B or C felony - fifteen challenges for regular jurors, two for each alternate.

   c. Class D or E felony - ten challenges for regular jurors, two for each alternate.

   d. Misdemeanor - three challenges for regular jurors, one for each alternate.

6. Joint trial of two or more defendants does not increase the number of challenges. Challenges must be exercised jointly by a majority decision. CPL 270.25(3), 360.30(2). See also State v. King, 36 N.Y.2d 59, 364 N.Y.S.2d 879 (1975), and People v. Anthony, 24 N.Y.2d 696, 301 N.Y.S.2d 961 (1969), where the Court of Appeals allowed defendant no more challenges than statute afforded.

7. No prejudice if court allows less than the statutory number of peremptory challenges unless defendant exhausted all challenges allowed. People v. DiPalma, 23 A.D.2d 853, 854, 259 N.Y.S.2d 264, 266 (2d Dept. 1965), aff'd, 17 N.Y.2d 455, 266 N.Y.S.2d 813 (1965), cert. denied, 385 U.S. 864, 87 S.Ct. 120 (1966).

8. A trial court committed reversible error when it refused to grant to defense counsel, as promised, an extra peremptory challenge, after defense counsel, in reliance on that promise, peremptorily challenged a juror who had seen

the defendant in handcuffs. People v. Dixon, 81 A.D.2d 620, 438 N.Y.S.2d 6 (2d Dept. 1981); People v. Hines, 109 A.D.2d 893, 487 N.Y.S.2d 86 (2d Dept. 1985); but see People v. Gantz, 104 A.D.2d 692, 480 N.Y.S.2d 583 (3d Dept. 1984).

9. Reversible error to wrongly deny a challenge for cause if defendant then peremptorily challenges juror and defendant's peremptory challenges are exhausted before the conclusion of jury selection. People v. Culhane, supra; see also People v. Moorer, 77 A.D.2d 575, 429 N.Y.S.2d 913 (2d Dept. 1980).

10. It has been held that number of peremptory challenges is determined by the highest crime charged for which there is legally sufficient evidence. Thus, if the evidence before the Grand Jury was insufficient to support the charge contained in the indictment but would support a lesser included charge, the number of challenges applicable to the lower offense would be permitted. People v. McGee, 131 Misc.2d 770, 501 N.Y.S.2d 1002 (1986).

F. Procedure for Examination of Jurors-CPL 270.15, 360.10

1. Twelve jurors (or six in local criminal court) are drawn and seated in jury box.

2. Seated jurors must be immediately sworn to answer truthfully all questions concerning their qualifications.

3. The court, in its discretion, may require prospective jurors to complete a questionnaire concerning their ability to serve as fair and impartial jurors.

a. An official form for such questionnaire shall be developed by the Chief Administrator of the courts in consultation with the Administrative Board of the courts. See Judiciary Law §513.

b. A copy of each completed questionnaire shall be given to the court and each attorney prior to examination of prospective jurors.

4. The court shall initiate the examination of prospective jurors by identifying the parties and counsel and briefly outlining the case to the prospective jurors. The court then shall question sworn members of the panel regarding their qualifications to serve as jurors in the action.

5. Both parties may question the prospective jurors concerning their qualifications.

a. The prosecutor commences the examination.

b. The scope of the examination is in the discretion of the court.

(i) Questioning is limited to unexplored matter affecting prospective juror qualifications. See Ackley v. Goodman, 131 A.D.2d 360, 516 N.Y.S.2d 667 (1st Dept. 1987) wherein plaintiff challenged the constitutionality of Judiciary Law §513, claiming it required him to disclose personal information (i.e., about his spouse, marital status, prior last names used, educational background, employment, place of birth, and prior election registration) which

was unrelated to his qualifications as a juror and thus violated his rights of liberty and privacy under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, section 6 of the New York State Constitution. Rejecting plaintiff's arguments, the court held that he had no constitutionally protected privacy right to nondisclosure of the information requested on the juror qualification questionnaire. "[T]here is a valid governmental interest in propounding the questions complained of which outweighs any legitimate privacy interests plaintiff may possess and the questionnaire, including the objected to portions, is reasonable and rationally intended to fulfill the purposes of the statute."

(ii) Repetitious or irrelevant questioning shall not be permitted.

(iii) Questions regarding a juror's knowledge of rules of law shall not be permitted. See People v. Bouleware, 29 N.Y.2d 135, 324 N.Y.S.2d 30 (1971), cert. denied, 405 U.S. 995, 92 S.Ct. 1269 (1972).

c. After the parties conclude their questioning, the court may ask any further questions it deems proper regarding the qualifications of the prospective jurors.

6. The court may regulate for a stated period the disclosure of juror's addresses, either business or residence, upon a showing of good cause by any party or affected person or upon its own initiative. Such protective order, however, will not be applicable to counsel for either side.
7. The Court in its discretion, may, without the consent of counsel, direct that all sworn jurors be removed from the jury box. Such sworn jurors who are removed from the jury box shall be seated elsewhere in the courtroom separate and apart from the unsworn members of the panel.
8. Upon the consent of both parties, the sworn jurors may be removed from the courtroom to the jury room during the remainder of the jury selection process.
9. After examination by both parties is completed, both sides, commencing with the People, may exercise challenges for cause.
10. Following the determination of challenges for cause, both sides, commencing with the People, may exercise peremptory challenges.
11. Remaining jurors are then sworn and the procedure begins again until the full jury is impaneled.
12. If before twelve jurors are sworn, a juror already sworn becomes unable to serve by reason of illness or other incapacity, the court must discharge him. See People v. Wilson, 106 A.D.2d 146, 484 N.Y.S.2d 733 (4th Dept. 1985) (the discharge of a sworn juror for work related duties does not qualify as an incapacity within the meaning of

CPL 270.15).

G. Discharge of a Sworn Juror - CPL 270.35

1. The court must discharge a juror if after the trial jury has been sworn but before the verdict has been rendered, a juror is unable to continue to serve by reason of illness, or other incapacity or for any reason is unavailable for continued service.

2. Prior to discharging a sworn juror, however, the trial court must conduct an inquiry in order to ascertain the juror's continued availability or capacity to serve. See People v. Hewlett, 133 A.D.2d 417, 519 N.Y.S.2d 555 (2d Dept. 1987) (reversible error for trial court to summarily discharge sworn juror who failed to return during defendant's trial without first determining whether juror was unavailable or incapacitated).

3. Appellate courts have split regarding the scope of the trial court's inquiry. Compare People v. Brewer, 136 A.D.2d 831, 523 N.Y.S.2d 670 (3d Dept. 1988); People v. Washington, 131 A.D.2d 118, 520 N.Y.S.2d 151 (1st Dept. 1987); People v. Pierce, 97 A.D.2d 904, 470 N.Y.S.2d 737 (3d Dept. 1983); People v. Rial, 25 A.D.2d 28, 266 N.Y.S.2d 426 (2d Dept. 1965).

4. The court must also discharge a juror when it finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial.

a. "[T]he standard for disqualifying a sworn juror over defendant's objection (i.e., 'grossly unqualfied') is satisfied only 'when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict'". People v. Buford, 69 N.Y.2d 290, 298, 514 N.Y.S.2d 191 (1987). See also People v. Cargill, 70 N.Y.2d 687, 518 N.Y.S.2d 792 (1987); People v. Gallina, ___ A.D.2d ___, 524 N.Y.S.2d 725 (2d Dept. 1988); People v. Benson, 123 A.D.2d 470, 506 N.Y.S.2d 480 (3d Dept. 1986).

b. People v. Galvin, 112 A.D.2d 1090, 492 N.Y.S.2d 836 (3d Dept. 1985) (sworn juror was properly dismissed as grossly unqualified where prior to opening statements juror indicated she had seen a personal friend sitting with defendant's grandmother in courtroom and juror stated she would "feel certain pressure" in continuing to serve under those circumstances).

c. But see People v. Ivery, 96 A.D.2d 712, 465 N.Y.S.2d 371 (4th Dept. 1983) (it was reversible error for trial court judge to discharge sworn juror as grossly unqualified where the juror told trial court during prosecutor's cross-examination of a defense witness that he considered a question "irrelevant" and juror later refused to answer the prosecutor's question regarding whether he had made up his mind on the

defendant's guilt).

d. People v. Sims, 110 A.D.2d 214, 494 N.Y.S.2d 114 (2d Dept. 1985) (discussion among jurors regarding a newspaper article about the case did not amount to substantial misconduct warranting their discharge where only one juror had actually read the headline and all jurors stated that they could confine their deliberations to the evidence).

e. People v. Russell, 112 A.D.2d 451, 492 N.Y.S.2d 420 (2d Dept. 1985) (trial court properly protected both defendant's and the People's right to a fair trial by dismissing a juror as grossly unqualified where the juror was alleged to have slept through various portions of the trial testimony).

f. People v. Pascullo, 120 A.D.2d 687, 502 N.Y.S.2d 275 (2d Dept. 1986) (jurors, sitting on the trial of a white defendant who was charged with assaulting an off-duty black police officer, who witnessed a demonstration in front of the court house against the trial judge's use of a racial reference in an unrelated case should have been questioned individually and not as a collective body regarding whether they could remain impartial after observing the demonstration).

g. People v. Anderson, 123 A.D.2d 770, 507 N.Y.S.2d 246 (2d Dept. 1986) (trial court erred in not permitting defense counsel to fully discuss with jurors the

impact of their contact with trial spectators, including one who identified himself as the defendant's cousin).

See also People v. Konigsberg, ___ A.D.2d ___, ___ N.Y.S.2d ___ (3d Dept. 5/12/88) (trial court did not abuse its discretion in denying defendant's motion for mistrial where, upon examination of several jurors who were contacted by a third-party about defendant's case, the court was satisfied that the jurors would not allow the caller to influence their verdict and could remain impartial).

h. Indecisive and wishing to be excused, a deliberating juror revealed during inquiry by the trial court, at which the prosecution and defense were present, that after selection she had been accosted on a subway by a Hispanic male and that she was holding this incident against the Hispanic defendant. In People v. Rodriguez, 71 N.Y.2d 263, 525 N.Y.S.2d 24 (1988), the Court of Appeals held that the juror should have been discharged as "grossly unqualified" under CPL 270.35. Distinguishing the present factual circumstances from its earlier rulings in the companion cases of People v. Buford and People v. Smitherman, 69 N.Y.2d 290, 514 N.Y.S.2d 191 (1987), where the prosecution secured the discharge of jurors who were troubled by relatively insignificant matters and gave unequivocal assurances that they could

deliberate fairly after explanation that their concerns were groundless, the Court noted that here it was the defendant who sought removal of a juror who forthrightly expressed racial bias and, while indicating she knew it was wrong, could only state she would "try" to put it aside in deliberations. Resort to speculation to ascertain the existence of partiality was not needed in this case and no unequivocal assurance was given that the juror would or could put her state of mind aside in rendering a verdict solely on the facts. Since the request for her discharge and the resulting mistrial motion should have been granted, the Court reversed defendant's conviction for the possession and sale of a controlled substance and directed a new trial.

i. A juror who deliberately makes an unauthorized visit to a crime scene becomes an unsworn witness against the defendant, in violation of the defendant's Sixth Amendment right to confrontation. People v. Crimmins, 26 N.Y.2d 319, 310 N.Y.S.2d 300 (1970); People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526 (1967). However, when the juror coincidentally views the crime scene on the way to and from home, no misconduct is committed. People v. Mann, 125 A.D.2d 711, 510 N.Y.S.2d 196 (2d Dept. 1986).

At issue, in People v. Suraci, ___ A.D.2d ___, 524 N.Y.S.2d 307 (2d Dept. 1988), was the accuracy of

the defendant's identification by a witness who observed the defendant's reflection in the side-view mirror of a van in which the defendant was sitting. After the jury returned a guilty verdict, the defendant made a motion to set aside his conviction for burglary on the ground that misconduct by one of the jurors denied him his constitutional right to confrontation and cross-examination. At the hearing on the motion, the juror in question testified that one morning, before boarding the minibus to be transported to the courthouse, he glanced at the driver of the van through the side-view mirror of the bus. Thereafter, during the jury's deliberations, he mentioned his observation to the other jurors which resulted in a five or ten minute discussion. Following the discussion, the eleven other jurors retained their previously held views, except the challenged juror who, due in part to his observation, changed his mind to conform with the rest of the panel.

Affirming the denial of defendant's motion, the Appellate Division held that the juror's conduct was not a conscious, contrived, experiment intended to taint the jury's verdict since the juror's conduct was nothing more than the 'application of everyday experience' to the issues presented at trial. Also the court noted that the juror's observation did not

create a 'substantial risk of prejudice' to the rights of the defendant, inasmuch as, following their discussion of the juror's observation, none of the other jurors changed their opinion about the defendant's guilt.

5. Each case must be evaluated on its individual facts to determine if a juror is "grossly unqualified." The alleged unqualified juror should be questioned in chambers in the presence of counsel and the defendant. Counsel should be permitted to participate in the inquiry. In excusing a juror, the court may not speculate on the possible partiality of a witness based on equivocal responses, but must be convinced that the juror will be prevented from reaching an impartial verdict. People v. Buford, 69 N.Y.2d 290, 514 N.Y.S.2d 191 (1987). See also People v. Tufano, 124 A.D.2d 688, 507 N.Y.S.2d 920 (2d Dept. 1986) (trial court's failure to make inquiry of juror who expressed concern during deliberations about her ability to reach a just decision required reversal of conviction).

6. The Court of Appeals has declined to apply harmless error analysis in cases where a trial court has improperly discharged a sworn juror. See People v. Anderson, 70 N.Y.2d 729, 519 N.Y.S.2d 957 (1987).

In Anderson, supra, a juror informed the trial court during presentation of the People's evidence that his judgment might be affected by the racial composition of

the jury. In brief questioning outside the hearing of the other jurors, his equivocal response was interrupted by the trial court, which, after hearing argument on the issue discharged the juror. The Appellate Division affirmed.

The Court of Appeals reversed and declined to apply harmless error analysis based on the proof of defendant's guilt or based on the fact that defendant participated in selecting the alternate who replaced the discharged juror. The Court held that the defendant had a constitutional right to a trial by a particular jury which the defendant had participated in selecting. Harmless error analysis was therefore not available, since the improper denial of a chosen jury constituted a deprivation of defendant's constitutional right to a jury trial.

7. The discharged juror must be replaced with an available alternate. If no alternate juror is available, the court must declare a mistrial pursuant to CPL 280.10(3). People v. Burns, 118 A.D.2d 864, 500 N.Y.S.2d 545 (2d Dept. 1986) (defendant failed to preserve for appellate review his contention that his right to a jury trial was violated when the trial court replaced a juror with an alternate so that the juror could go on vacation).

8. If the trial jury has not begun its deliberations, the consent of the defendant is not required. However, once the trial jury has begun its deliberations, defendant's written consent to the replacement must be obtained in open court and in the presence of the court. People v.

create a 'substantial risk of prejudice' to the rights of the defendant, inasmuch as, following their discussion of the juror's observation, none of the other jurors changed their opinion about the defendant's guilt.

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Cannady, 127 Misc.2d 783, 487 N.Y.S.2d 294 (N.Y. Sup. Ct. 1985) (once a jury has begun deliberations in a trial in absentia, an alternate juror may not be substituted for a discharged juror, even if defense counsel consents, because defendant's written consent cannot be obtained).

H. Preliminary Instruction by the Court - CPL 270.40

1. After the jury has been sworn and before the People's opening address the court must instruct the jury concerning its basic functions, duties and conduct.

2. The preliminary instructions must include the following admonitions:

   (a) jurors may not converse among themselves or with anyone else upon any subject connected with the trial;

   (b) jurors may not read or listen to any accounts or discussion of the case reported by newspapers or other news media;

   (c) jurors may not visit or view the premises or place where the offense or offenses charged were allegedly committed;

   (d) jurors may not visit or view any other premises or place involved in the case;

   (e) jurors must promptly report to the court any incident within their knowledge involving an attempt by any person to improperly influence any member of the jury.

3. In the companion cases, People v. Owens and People v.

Boon, 69 N.Y.2d 585, 516 N.Y.S.2d 619 (1987), the Court of Appeals held that it was reversible error for the trial judge to distribute in writing selected portions of the oral charge to the jury for use during its deliberations, over the objection of defense counsel.

In Owens, the defendant was found guilty of drug related offenses as a result of his purchase and sale of cocaine to an undercover police officer. At trial, defendant raised the defense of agency, alleging that he acted as an agent of the officer in purchasing the drugs. Thereafter, in its oral instructions to the jury, the court gave an extensive agency charge. However, over defense counsel's objections, the court gave the jury elaborate written instructions on the elements of the charges, but failed to mention the agency defense. In Boon, the defendant was convicted of attempted robbery. At trial, despite the defense counsel's objections, the judge distributed written copies of the oral charge to the jury which emphasized certain aspects of the charge, but which failed to mention the presumption of innocence or the reasonable doubt standards.

The Court of Appeals determined that in the absence of a request from the jury for further instructions, submission of only a portion of the charge to the jury created a risk that the written instructions would be regarded by jurors as having greater importance than those recited orally. Moreover, the Court concluded that since

the trial court had no legitimate reason for distributing only selected portions of the charge, which were unfavorable to the defendants, the defendants were deprived of a fair trial, which could not be considered harmless error.

4. See also People v. Townsend, 111 A.D.2d 636, 490 N.Y.S.2d 201 (1st Dept. 1985), aff'd, 67 N.Y.2d 815, 817, 501 N.Y.S.2d 638 (1986). Trial court's distribution to the jury of a written outline of the elements of the charges constituted error "by permitting even encouraging, the jurors to refer to the written outline during trial, the court invited piecemeal, premature analysis of the evidence. The court's outline in effect served as a checklist against which jurors could measure the evidence as it came in, with the attendant danger that jurors would conclude defendant was guilty even before he could present evidence or argument. That danger was heightened here by the fact that the issues of voluntariness and credibility, both central to the defense, were not part of the outline".

5. People v. Compton, 119 A.D.2d 473, 474, 500 N.Y.S.2d 685, 686 (1st Dept. 1986). Although it may not be per se reversible error in all cases for the trial court to provide the jury written instructions relating to the specific elements of the crime charged, such practice was error where the submission to the jury resulted in an "unbalanced charge that highlighted certain legal

principles and omitted any reference to presumption of innocence, reasonable doubt, burden of proof and the critical issue of credibility".

6. People v. Koschtschuk, 119 A.D.2d 994, 500 N.Y.S.2d 895 (4th Dept. 1986). A verdict sheet on which the possible verdict of not guilty is conspicuously absent and which not only lists the offenses submitted to the jury, but provides facts alleged and sought to be proved by the People is improper and its use deprived defendant of a fair trial.

VOIR DIRE

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VOIR DIRE IN NEW YORK

A. INTRODUCTION

The trial of a criminal case begins in almost every instance with the selection of a jury. Since the decision to accept a particular person as a member of the jury is at best an educated guess, the need for preparation is obvious.

Before the selection process begins, each lawyer should have an idea of the type of person he wants on the jury and, equally important, an idea of the type of person he wants to avoid. This profile of a prospective juror is prepared by a thorough knowledge of the facts and from value judgments which counsel must make as to the impact of those facts upon certain types of people. For example, a prospective juror who has strong ties to law enforcement should be avoided in any prosecution where the defendant, a police officer, has been charged with police brutality. While many of the evaluations made are more subtle, the need for this type of preparation is extremely important and absolutely essential if counsel is to achieve his objectives in this process.

In addition to preparing the juror profile, there are other practical suggestions which should help. First, and foremost, counsel would be well advised to follow their instincts in making the decision concerning the suitability of a potential juror's service. If deep reservations exist, it is my opinion the better choice is to remove the juror. Even if ultimately you are wrong,

it is better to have the juror off the jury than having to look at him throughout the trial and worry about whether leaving him on the jury was a mistake.

The decision to accept or reject a potential juror is under the best of circumstances a difficult one and is made easier only if there has been a meaningful exchange during the voir dire. The existence of such an exchange is facilitated by asking questions which call for extensive answers or explanations on the part of the prospective juror. There is nothing so unproductive as a voir dire in which the lawyer does all of the talking and the juror is simply left with giving simple one word responses. Questions asked during the voir dire should be tailored to make the juror talk, and talk freely. You will be amazed how much you can learn by sitting back and listening to the juror's responses.

Finally, counsel should avoid at all cost being repetitious. Not only does this serve to alienate prospective jurors, but it also can create significant problems with the trial judge.

B. OTHER OBJECTIVES

The primary purpose of the voir dire, although not necessarily the goal of the attorneys, is to insure that a fair and impartial jury is ultimately impanelled to decide guilt or innocence.

Additional objectives that counsel should have in mind while participating in this process are:

(1) Obtain information about a particular juror's background.

Prior to the commencement of jury selection counsel should have an idea as to the type of juror he is looking for and, equally important, the type of juror he is looking to avoid. The voir dire should be used to elicit information which counsel feels is of assistance in allowing him to make this decision correctly and intelligently.

(2) Educate the jury about the particular case.

The selection process often represents an excellent opportunity to expose and, hopefully, soften the impact of weaknesses in the prosecution's case. A witness' criminal record, the fact that an accomplice has received immunity from prosecution in return for his cooperation, and the lack of an eyewitness to the crime are examples of issues which may be covered during the voir dire and should be discussed with potential jurors to insure that their importance is not grossly exaggerated during the trial.

(3) Establish a rapport with the jury.

The voir dire provides the unique opportunity for trial counsel to converse on a one-to-one basis with prospective jurors and, hopefully, develop a feeling of respect and trust by the manner in which his questioning is conducted.

C. PEOPLE v. BOULWARE (29 NY2d 135[1971])

An essential prerequisite to the proper preparation for jury selection is counsel's familiarity with the Court of Appeals opinion in People v. Boulware. This opinion sets forth

guidelines which describe the respective rights of the trial judge and counsel in the conduct of the voir dire. While the trial court is given broad discretion in this area, the opinion sets forth in clear and unequivocal language the right of counsel to actively participate in the questioning of the jury.

> "The judge presiding necessarily has broad discretion to control and restrict the scope of the voir dire examination. To that end, he may, in order to prevent inordinate interruptions and undue delay in the proceedings, question prospective jurors at the opening of the voir dire, during the course thereof or after counsel has conducted their examinations. The only condition imposed is that fair opportunity be accorded counsel to question about matters, not previously explored, which are relevant and material to the inquiry at hand." (Boulware, at p. 140).

See also People v. Brown (131 AD2d 582) where the trial court was found to have authority to limit voir dire to fifteen minutes per side.

While there has been considerable activity within the State Legislature during recent legislative sessions urging the adoption of Federal rules concerning the conduct of the voir dire, the law in the State of New York and the rights accorded to counsel pursuant to People v. Boulware remain intact (See also CPL 270.15[1]; Turner v. Murray, #84-6646, United States Supreme Court, wherein it was found that a defendant had the constitutional right to inform jurors during jury selection of the victim's race and inquire about possible racial prejudice where the underlying crime involved allegations of interracial violence).

D. CHALLENGES

I. Introduction

The most important procedural device available during a voir dire is the challenge. By their educated and constructive use, counsel can have a profound impact upon the ultimate makeup of the trial jury and, hopefully, tailor it to one which would be sympathetic to his ultimate position in the law suit.

There are three types of challenges: A challenge to the entire panel (CPL 270.10); a challenge for cause (CPL 270.20); and the peremptory challenge (CPL 270.25).

II. Challenge to the Panel

The defendant may challenge the manner in which the entire jury panel was selected. He must allege, to be successful, that the procedure used to form the panel -

a. did not conform to the requirements of the judiciary law; and

b. as a result, caused him substantial prejudice (CPL 270.10).

There are certain procedural requirements which are unique to the challenge to the panel. They are:

a. the application can only be made by the defendant;

b. it must be made prior to the commencement of jury selection;

c. it must be in writing (but see People v. Parks, 41 NY2d 36 [1976]); and

d. it must set forth grounds upon which the challenge is based.

III. Hearing

The defendant is not automatically entitled to a hearing on his motion to challenge the panel. The application may be summarily denied if it fails to set forth more than mere naked assertions that the panel was improperly constituted (People v. Lanahan, 96 AD2d 675 [1983]; People v. Davis, 57 AD2d 1013 [1977]).

IV. Burden of Proof

The burden of proof initially rests with the defendant and requires him to make a prima facie showing that the panel has been formed in violation of the Judiciary Law. Once that showing has been made, the prosecution must then demonstrate that the manner of selection and return in this particular case is valid and conforms to the Judiciary Law; or, if a violation exists that the defendant has not been substantially prejudiced (Alexander v. Louisiana, 405 US 625 [1971]; People v. Guzman, 60 NY2d 403, 409 [1983]; People v. Waters, 123 Misc.2d 1057; affd. 125 AD2d 615 [1987]).

V. Constitutional Violation

Under the Sixth Amendment, the source from which prospective jurors are drawn and the manner in which they are selected must reasonably reflect an attempt to involve a cross section of the entire community (Brown v. Allan, 344 US 443 [1953]; Glasser v.

United States, 315 US 60, 85-86; Peters v. Kiff, 407 US 493, 500-504 [1971]). However, simple mathematical disparity is not sufficient to establish a constitutional violation; instead, it must be demonstrated that the method used to prepare the panel involved the intentional or systematic discrimination of a identifiable group of people (Buron v. Missouri, 439 US 357 [1979]). Additionally, the Constitution has not been found to require that the trial jury itself must actually mirror the community or reflect the various distinctive groups in the population (Fay v. New York, 322 US 261 [1947]; Apodacha v. Oregon, 406 US 404 [1972]; see also Smith v. Texas, 311 US 128 [1940]; Ballard v. United States; 329 US 187 [1946]; Taylor v. Louisiana, 419 US 522).

VI. Grand Jury

While the right to voir dire the grand jury has been abolished by enactment of the Criminal Procedure Law, the defendant can still attack the manner in which the grand jury was impanelled if he can establish that the procedures used violated the provisions of the Judiciary Law (CPL 210.35, 210.20; People v. Huffman, 41 NY2d 29 [1976]).

It should be noted that in most jurisdictions the procedures used to impanel a jury have been tested and have been found to be valid. As a result, the motion to challenge the panel is rarely used, is almost never successful, and, as a result, has become almost extinct from criminal practice within this State.

VII. Challenge for Cause

This challenge, which is addressed to a particular juror, in essence alleges that during the voir dire it has been demonstrated that the juror should not serve because:

a) the juror does not possess the qualifications required by the Judiciary Law (CPL 270.20[1][a]); or

b) the juror has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial (CPL 270.20[1][b]); or

c) the juror is related in some degree to one of the parties or witnesses at the trial, or he is an adverse party to any such person in a civil or criminal action, or bears some relationship to any such person of such nature that is likely to preclude him from rendering an impartial verdict (CPL 270.20[1][c]); or

d) the juror is a witness at the preliminary examination or before the grand jury, or is to be a witness at the trial (CPL 270.20[1][d]); or

e) the juror has served on the grand jury which found the indictment, or served on a trial jury in a prior civil or criminal action involving the same conduct charged in the indictment (CPL 270.20[1][e]); or

f) there is a possibility that the crime charged is punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of the death

penalty as to preclude him from rendering an impartial verdict (CPL 270.20[1][f]).

VIII. Judiciary Law

Under Section 509 of the Judiciary Law, each prospective juror must complete a questionnaire which the Commissioner of Jurors will use to evaluate their qualifications. Generally, that questionnaire is confidential and is subject to discovery only upon some specific showing that it would contain evidence relevant to a claim attacking the composition of the jury panel (People v. Gugman, 60 NY2d 403; cert. den. 466 US 951 [1983]; People v. Gissendanner, 48 NY2d 543, 549-550).

As to the specific qualifications of a particular juror, the Judiciary Law is divided into three parts: the first deals with the qualifications that are necessary for a prospective juror to be eligible to serve (Judiciary Law Section 510); the second deals with conditions which will automatically disqualify a prospective juror from jury service (Judiciary Law Section 511); and, finally, conditions which would entitle a prospective juror to be exempt from jury service (Judiciary Law Section 512).

IX. Qualifications (Section 510, Judiciary Law)

The minimum qualifications for the prospective juror are:

a) be a citizen of the United States and a resident of the County;

b) be not less than eighteen years of age;

c) not have a mental or physical condition or combination thereof which causes the person to be incapable of performing in

a reasonable manner the duties of a juror;

d) not have been convicted of a felony; and

e) be intelligent, of good character, able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire, and to be able to speak the English language in an understandable manner.

X. Disqualifications (Section 511, Judiciary Law)

The following would disqualify a person from prospective jury service:

a) he is a member in active service in the armed forces of the United States;

b) an elected Federal, State, City, County, Town or Village Officer;

c) head of a civil department of the Federal, State, City, County, Town or Village government; members of a public authority or State Commission or board and the Secretary to the Governor;

d) a federal judge or magistrate or a judge of the unified court system;

e) a person who has served on a grand or petit jury within the State, including in a Federal Court, within two years of the date of his next proposed service.

XI. Exemptions

The following would entitled the juror, if he choose, to be exempt from jury service:

a) he is a member of the clergy or Christian Science Practitioner officiating as such and not following any other calling;

b) a licensed physician, dentist, pharmacist, optometrist, psychologist, podiatrist, registered nurse, practical nurse, embalmer or a Christian Science nurse exempt from licensing by subdivision G of Section 6908 of the Education Law regularly engaged in the practice of his profession;

c) an attorney regularly engaged in the practice of law as a means of livelihood;

d) a police officer as defined in Section 1.20 of the Criminal Procedure Law; or an official or correction officer of any State correctional facility or of any penal correctional institution which is defined as a peace officer in subdivision 25 of Section 2.10 of the Criminal Procedure Law; or a member of a fire company or department duly organized according to the laws of the State or any political subdivision thereof and performing duties therein; or an exempt volunteer fireman as defined in Section 200 of the General Municipal Law;

e) a sole proprietor or principal manager of a business, firm, association or corporation employing fewer than three persons, not including such proprietor or manager who is actually engaged full time in the operation of such business as a means of livelihood;

f) a person 70 years of age or older;

g) a parent, guardian or other person who resides in the same household with a child or children under 16 years of age and whose principal responsibility is to actually and personally engage in the daily care and supervision of such child or children during a majority of the hours between 8:00 a.m. and 6:00 p.m., excluding any period of time during which such child or children attend school for regular instruction;

h) a person who is a prosthetist or an orthotist by profession or vocation;

i) a person who is a licensed physical therapist regularly engaged in the practice of his or her profession.

It is important to note that the existence of an exemption is a matter of choice for the prospective juror to exercise and cannot be used by counsel to disqualify the juror from jury service. The failure to possess the requisite qualifications or the existence of a condition disqualifying a juror from prospective service may be used by counsel as a challenge for cause and, if found to exist, mandate that the challenge be granted. But see People v. Foster (100 AD2d 200; modified on other grounds, 64 NY2d 1144; cert. den. 106 S. Ct. 166) where disqualification would not serve to reverse conviction where there was no showing or allegation that the juror lacked fairness or ability to perform his duties intelligently.

XII. Bias and Prejudice

In recent years, no area of the voir dire has become more troublesome for a prosecutor than the challenge for cause based

upon bias or prejudice. Recent litigation has put prosecutors on notice that any questions in this area should, for the integrity of any conviction subsequently obtained, be resolved in favor of consenting to the challenge for cause. As the Court of Appeals has stated "... the Trial Court should lean towards disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. It is precisely for this reason that so many veniremen are made available for jury service. Even if through such caution the court errs and removes an impartial juror, the worst the court will have done ... is to replace one impartial juror with another impartial juror" (People v. Branch, 46 NY2d 645, 651-652 [1979]).

A challenge for cause based upon bias and prejudice essentially falls into two categories:

a) State of Mind:

If during the voir dire it is demonstrated that a prospective juror's state of mind is such as to likely preclude him from rendering an impartial verdict based upon the evidence, he should be excused (CPL 270.20[1][b]; People v. Blyden, 55 NY2d 73 [1982]; People v. Torpey, 63 NY2d 361 [1984], reargument denied 64 NY2d 885).

b) Relationship:

If some relationship exists between a prospective juror and some participant in the law suit, whether that be defendant, attorney, witness, et al., the nature of that relationship will be

closely examined to determine if it alone is likely to preclude a juror from rendering an impartial verdict (People v. Branch, 46 NY2d 645; People v. Provenzano, 50 NY2d 420). The existence of this relationship will, if appropriate, create an implied bias which will override any oath that a prospective juror may be prepared to take to assure the Court of his neutrality (People v. Torpey, 63 NY2d 361; reargument denied, 64 NY2d 885 [1984]; People v. Rentz, 67 NY2d 829 [1986]; People v. Clark, 125 AD2d 868 [1986]; People v. Taylor, 120 AD2d 325 [1986]).

c) Other grounds:

The remaining grounds are fairly obvious and do not require extensive comment. Of interest, however, is recent litigation concerning the eligibility of persons suffering from physical handicaps to serve on juries (see People v. Guzman, 125 Misc. 2d 457 [1984] where a prospective juror who was deaf understood sign language and was found qualified to serve on a jury). In addition, the Supreme Court has recently found that no constitutional violation of due process is committed by excluding from jury service in capitol cases those persons who morally object to the imposition of capitol punishment. In New York, by statute and case law, simply because a prospective juror entertains strong beliefs about the death penalty does not in an of itself mean that they must be disqualified from jury service. Only if that belief has manifested itself in such a way as to raise a question about the juror's ability to be fair will removal be

warranted (People v. Fernandez, 301 NY 302 [1950]; cert. den. 340 US 914; hearing denied 340 US 940; see also CPL 270.20[1][f]).

Finally, reversible error is only committed in improperly denying a challenge for cause if, after the challenge has been made, the party exercising it is forced to use a peremptory challenge to remove the juror. Even then, the error will not be preserved unless that party subsequently exhausts all of the peremptory challenges to which he is entitled (CPL 270.20[2]; See also People v. Foster, 100 AD2d 200; affd. 64 NY2d 1144 [1984], cert. den. 106 S. Ct. 166).

IV. Peremptory Challenges

Until recently, a peremptory challenge was properly defined as "... an objection to a prospective juror for which no reason need be assigned" (CPL 270.25[1]). Now, as a result of the United States Supreme Court's ruling in Batson v. Kentucky (#84-6263 [decided April 30, 1986] 54 L. W. 4425) a prosecutor's use of these challenges is subject to judicial scrutiny and, if found to have been used in a racially discriminate manner, can constitute a violation of either the Equal Protection clause of the United States Constitution or the fair cross section requirement of the Sixth Amendment (See Practice Comm., Section 270.25 CPL).

While announcing that this was a firmly established principle, the court went on to define the threshold requirements necessary for such a denial of due process claim to be made. It

held that a defendant may establish a prima facie case for such a violation by showing:

a) he is a member of a cognizant racial group;

b) his group members have been excluded from service on the jury; and

c) the facts and circumstances of the particular case raise an inference that exclusion was based upon race.

Even if the defendant is not a member of an identifiable racial group that has been systematically excluded, he may still challenge the manner in which the peremptory challenges have been exercised by claiming that the Sixth Amendment guarantees that the jury will come from a fair cross section of the community has been violated (Roman v. Abrams, 822 F2d 214 [2d Cir. 1987]).

Once the prima facie case is established, the burden rests upon the prosecution to demonstrate that in fact a neutral explanation not related to race exists for the exercise of the challenge. This justification cannot rest upon the assumption or the intuitive judgment that the particular juror would be partial to the defense because of their shared race. And the explanation offered must be more than a bald assertion that the use of the peremptory challenges was not motivated by racial considerations (People v. Howard, 128 AD2d 804 [2d Cir. 1987]).

Left specifically unanswered by this decision is what the trial judge should do in the face of such a violation. The obvious remedy would be the disallowance of the exercise of the

peremptory challenge with the result that the juror would be sworn and would be allowed to serve on the jury over the prosecutor's objection.

Some trial courts have interpreted Batson to apply to the prosecution as well and have allowed inquiry into the motive behind defendants exercise of peremptories. Obviously, these rulings will be subject to further review.

The most obvious result of Batson is that the right to exercise peremptory challenges is no longer absolute and that the prosecution should be prepared to justify their exercise in any case where a prospective juror and defendant share the same racial background.

V. Procedure for Exercising Peremptory Challenges

Each side, depending upon the most serious charge for which the defendant is on trial, is accorded a specific number of peremptory challenges. The statutory scheme allots the number of challenges as follows:

> A felony equals 20 challenges; two for each alternate;
>
> B or C felony equals 15 challenges; two for each alternate;
>
> D or E felony equals 10 challenges; two for each alternate;
>
> Indicted misdemeanors equals 10 challenges; two for each alternate;
>
> Justice Court or Criminal Court trials equals 3 challenges; one for alternate. (CPL 270.25[2])

If there are two or more defendants on trial, the total number of peremptory challenges assigned to them is the same as

if only a single defendant is on trial; if a disagreement exists regarding the exercise of a particular peremptory challenge in a multiple defendant trial the majority rules; otherwise, if there can be no agreement, the challenge is disallowed (CPL 270.25[3]).

Questioning of Prospective Jurors

If a challenge to the panel has not been made or has been denied, jury selection may finally begin. The following represents an outline of the procedure that must be followed during the questioning process:

a) the trial judge directs that the names of at least twelve prospective jurors be drawn from the panel for the purpose of being interviewed. Of note is the fact that no limit is placed on the trial judge on the number of prospective jurors that he may initially call and could conceivably result in some trial judges calling substantially more than twelve prospective jurors for this initial interview. Should a trial court decide to call substantially more than twelve, certain tactical considerations must come into play in deciding how to exercise one's peremptory challenges; (270.15[1][a])

b) the trial judge may have each juror at this point complete a questionnaire, a copy of which is then provided to the court and to the attorneys; (270.15[1][a]

c) the trial judge must initiate the questioning of prospective jurors by identifying the parties, briefly outlining

the nature of the action, and then questioning the jurors concerning their qualifications; (270.15[1][b]

d) the trial court, when it completes its interview, must afford counsel, beginning with the prosecution, a fair opportunity to question prospective jurors as to any unexplored matter affecting their qualifications. However, the trial court shall not permit questions which are repetitious or irrelevant, or involve matters of law, and the scope of this examination rests solely within the sound exercise of its discretion; (270.15[1][c]; see People v. Brown, 131 AD2d 582).

e) prior to the questioning, the trial court for good shown cause, upon the motion of either party or any affected person, or upon its own initiative, may issue a protective order for a stated period regulating the disclosure of the business or residential address of any prospective or sworn juror to any person or persons other than counsel for either party. Good cause is found to exist where the court determines that there is a likelihood of bribery, jury tampering, or of physical injury or harassment to the prospective juror (CPL 270.15[1][a]).

Exercise of Challenges

After the questioning of prospective jurors has been completed, the respective parties must exercise whatever challenges they feel are appropriate. If either party requests, the court must entertain the exercise of any challenge inside the courtroom, but outside the hearing of any of the prospective jurors. (270.15[2])

The challenges are exercised in the following order:

- the prosecution, if it has any, must exercise its challenge for cause; the defense must then exercise its challenge for cause; the prosecution then exercises its peremptory challenges; the defense, after the prosecution has completed and has informed it of what peremptory challenges it has exercised, must then exercise its peremptory challenges. Once the defense has made its decision known concerning the exercise of its peremptory challenges, the remaining prospective jurors must be sworn. The prosecution is precluded at this point and is found to have waived any peremptory challenge regarding those jurors. (270.15[2] Those jurors sworn must then remain in the jury box and jury selection continues. However, with the consent of the prosecution and defense, the sworn jurors may be removed from the jury box to the jury room for the remainder of the selection process. This becomes tactically significant, for without the consent of either party, the trial court is limited to the number of prospective jurors it may call for questioning to the number of vacant seats available in the jury box. The decision to give consent should take into account the number of peremptory challenges each side has remaining. If one side has considerably more peremptory challenges left than the other, that party has a significant tactical advantage in that it receives a full look at what prospective jurors could be called and is given the opportunity to fully implement and utilize peremptory challenges it has remaining to its advantage. (270.15[3])

Alternate Jurors

The decision to impanel alternate jurors is one left to the sound exercise of the trial court's discretion. If it decides that alternate jurors are necessary, it may impanel up to four jurors to serve on an alternate basis.

The first alternate juror sworn for service is the first alternate to be used to replace a regular juror should the need arise.

Under the Criminal Procedure Law, counsel is provided with two challenges for each alternate to be seated. This provision has been the subject of varying interpretations in that some courts have read it to mean that counsel if provided with a total of four challenges that it may use as it sees fit, while others have interpreted the provision to provide that counsel is given two challenges for each seat to be occupied by a prospective alternate juror.

After the trial jury has been sworn, but before rendition of verdict, a regular juror, under certain circumstances, may be replaced by an alternate. However, if the jury has begun its deliberations, the alternate may be seated only with the written consent of the defendant. Should the defendant refuse to consent, the trial court must order a mistrial.

SUGGESTED AREAS FOR INTERVIEWW

Since much of what transpires during the voir dire is under the control of the trial judge, counsel should become aware of

the specific judge's habits to insure that he can conduct his questioning in a manner that does not irritate the judge or create problems for him with respective jurors.

In every case, there are general questions which concern sensitive matters which counsel must explore with the jury. It is advisable at the outset to explain to the prospective jurors that should there be any areas which they would like to discuss with the court in private, they should notify the court so that the questioning can take place at the bench. In addition, questions concerning prior arrests of prospective jurors or members of their family, possible drug or alcohol use, etc., should be discussed in a general way so as to put all of the jurors on notice that these are areas of concern during the voir dire. A suggested method is to indicate that it is not your intention to embarrass any particular juror, but that you would have to ask the entire panel whether or not anyone has ever had anyone in their family who has been adversely affected by drugs or alcohol. Should that question receive an affirmative response, counsel should invite the juror to the bench so that they can discuss the matter in more detail with the court. The same technique should apply to arrests and prior confrontations with the Criminal Justice System.

The following represents a sample list of areas and questions which counsel should consider using during the voir dire:

1. Family Status:
   - marital status
   - number and age of children

2. Occupation:
   - job description
   - length of service

3. Residence:
   - home ownership
   - length
   - other occupants
   - other property, such as rental property

4. Prior Jury Service:
   - civil
   - criminal
   - number of criminal cases
   - types of criminal cases
   - result
   - grand jury service
   - military court-martial boards

5. Military Service:
   - branch
   - dates of service
   - job description
   - court-martials served
   - membership and veterans groups

6. Law Enforcement Contact:
   - Any members of family employed as police officer, correction officer, attorneys

7. Crime Victim:
   - number
   - types of crimes
   - locations
   - circumstances
   - membership in crime victims association
   - investigating agency
   - experience as a witness

8. Educational Background:
   - types of degrees
   - names of schools
   - job related training

9. Clubs and Organizations:
   - veterans groups
   - groups which are politically active, such as NRA, RID, MADD, etc.

10. Hobbies and Special Interests:
   - reading material
   - sports and activities

OPENING STATEMENTS

The opening statement represents the first time either side can talk about the facts of the case with the jury in some detail. Since the prosecution must go first, this statement represents an excellent opportunity to make a positive and, hopefully, lasting impression on the jury regarding the merits of the case (CPL 260.30).

The prosecution has no choice - it must make an opening statement and even with the defendant's consent, this obligation cannot be waived in a trial by jury (People v. Kurtz, 51 NY2d 380 [1980]). The defendant, on the other hand, is not obligated to make such a statement. It is his right and can be waived. While the Criminal Procedure Law seems to clearly mandate that this statement, if the defendant chooses to make it, must be made immediately after the prosecution's opening. Authority exists for the proposition that the defendant can wait and give the statement after the prosecution has rested its case (People v. Theriault, 75 AD2d 971 [1980]).

Technically, the opening is supposed to contain a statement of the facts which the prosecution hopes to prove through the introduction of evidence during the trial. Such a requirement does

not mean that the opening cannot be constructed in such a way as to be an interesting, imaginative and, if possible, exciting recitation of the facts. This statement can provide the prosecution with an enormous tactical advantage by focusing the jury's attention at the outset of the trial on the strengths of the prosecution's case. It should be prepared and rehearsed much like a summation. If executed properly, it can set the tone for the entire trial and greatly enhance the prosecution's chances for success.

Finally, failure to make a legally sufficient opening statement which sets forth facts supporting each and every element of the crimes charged in the indictment will not lead to dismissal of the charges. Where a defendant moves to dismiss on the grounds that the opening is insufficient, the trial court can either deny the motion or it can grant leave to the prosecution to supplement the opening to cure any defect that might have previously existed (People v. Brown, 104 AD2d 696 [1984]; People v. Parker, 97 AD2d 620[1983]; People v. Kurtz, 51 NY2d 380 [1980]; certiorari denied 451 US 911).

It should be noted that the opening statement should be used to identify only that evidence which the prosecution knows will be received into evidence during the trial. Inclusion of facts and circumstances which clearly would be inadmissible could lead to the declaration of a mistrial or, if a conviction is subsequently obtained, appellate reversal (People v. Wallace, 267 App. Div. 838 [1944]; People v. Gonzalez, 24 AD2d 989 [1965]).

APPENDIX

I. QUESTIONNAIRE

The State Legislature has amended Section 270.15 CPL to authorize the preparation of a questionnaire by the Office of Court Administration to be used in the discretion of the trial court at the outset of the voir dire. If it is utilized in a given case, the trial court must provide copies of the completed document to counsel for both sides prior to examination of prospective jurors.

A copy of the form prepared by OCA for this purpose has been attached and is being utilized in some jurisdictions within the State.

II. REPETITIOUS QUESTIONS

The trial court is now obligated by law to restrict counsel's questioning to those areas not previously covered during the voir dire and must specifically prohibit "...questioning that it repetitious or irrelevant, or questions as to a jurors knowledge of rules of law." CPL Section 270.15(1)(c).

III. PROTECTIVE ORDER

Upon application of either party or on its own initiative, the trial court for good cause shown may regulate disclosure of a prospective juror's business or residential address. Good cause is deemed to exist where the trial court determines that there is

a likelihood of bribery, jury tampering or physical injury or harassment of the prospective juror. CPL Section 270.15(1)(a).

Such an order does not apply to counsel for either party. As such, counsel for the defendant is under an obligation as an officer of the court not to disclose this information to his client. Whether such a restriction may violate a defendant's right to counsel has not yet been decided.

JUROR QUESTIONNAIRE

YOU HAVE BEEN SELECTED TO SERVE AS A PROSPECTIVE JUROR. THIS QUESTIONNAIRE IS DESIGNED TO ASSIST COUNSEL AND THE COURT IN SELECTING FAIR AND IMPARTIAL JURORS. PLEASE ANSWER ALL OF THE FOLLOWING QUESTIONS ON THE FORM: HOWEVER, IF THERE IS INFORMATION THAT YOU WOULD PREFER TO KEEP CONFIDENTIAL, ASK TO SPEAK PRIVATELY TO THE JUDGE. THANK YOU FOR YOUR COOPERATION.

1. Name _____
2. Sex _____
3. Place of birth _____
4. Current address _____
5. How long have you lived at your current address? _____
   How long have you lived in this county? _____
6. Marital status _____
7. Years of education or highest degree obtained _____
8. Occupation _____
9. Are you presently employed? _____
10. Spouse's occupation _____
11. Is your spouse presently employed? _____
12. Number and ages of children _____
13. Are any of your children presently employed? _____
14. Occupations _____
15. Have you ever served on a state or federal grand jury? ____ yes ____ no
    Have you ever served on a state or federal trial jury? ____ yes ____ no
    If yes, state type of case (criminal or civil) _____
    Did case reach a verdict? ____ yes ____ no
    Most recent date of jury service _____
16. Have you, any relative or close friend ever been any of the following:
    a. The victim of a crime ____ yes ____ no
    b. Witness to a crime ____ yes ____ no
    c. Accused of a crime ____ yes ____ no
    d. Convicted of a crime ____ yes ____ no
    e. Party to a civil case ____ yes ____ no
17. Have you, any relative or close friend ever been employed by any law enforcement agency or criminal justice agency?
    ____ yes ____ no
18. Do you have any mental or physical condition that would prevent you from serving as a juror? _____
19. Do you have any difficulty reading, understanding or speaking the English language? _____
20. There is a possibility you may be required to stay overnight in a hotel during deliberations. Is there any reason why you feel you could not stay overnight if required and if you are given a day's advance notice? _____

If after completing this questionnaire you feel you should not sit on this case for any other reason, please bring it to the judge's attention when your name is called.

AFFIRMATION

I AFFIRM THAT THE STATEMENTS MADE ON THIS QUESTIONNAIRE ARE TRUE AND I UNDERSTAND THAT ANY FALSE STATEMENTS MADE ON THIS QUESTIONNAIRE ARE PUNISHABLE UNDER ARTICLE 210 OF THE PENAL LAW.

_____
Signature of Prospective Juror

Dated: _____

UCS-133

OPENING STATEMENTS:

Win it in the Opening*

-by-

Robert J. Jossen
Shereff, Friedman, Hoffman & Goodman
New York, New York

* Reprints may be obtained by calling toll free: 1-800-NITA.

OPENING STATEMENTS:

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Since some studies show that approximately 80% of jurors decide who should win the case during the opening statements, the importance of the opening cannot be overstated. Clarity and logic are the goals; when you finish the opening, the jury should have a clear understanding of the case, your theory, and why you should win.

A. Overview

1. Clearly Explain Your Theory so the Jury will be Able to Integrate the Evidence into the Overall Picture.

The opening statement should be used to put before the jury your client's story and theory of the case. In the preparation of any trial, every step of counsel's preparation must be geared to what you will ask the jury to find in summation; toward this end, the opening statement is the first effective opportunity (apart from voir dire where permitted) to set that theory before the jury.

2. Tie in the Opening statement to the Planned Closing Argument.

If you have done your job properly in the opening statement (and throughout the trial) you will be able to begin the closing argument by referring back to the opening statement itself. On the other hand, if the opening statement has promised more than you can deliver, or if it is based on a misconception or faulty analysis of the case, it will later become a disastrous liability. Extreme caution must be used not to promise evidence or a theory that you will be unable to substantiate in the course of the trial. Moreover, the opening statement must be prepared only after a complete and exhaustive analysis of the case.

3. Diffuse the juror's Feelings of Intimidation; Tell a Clear Story.

As the jurors hear the opening remarks, remember that they are in a "foreign" environment and may find it uncomfortable, intimidating, and confusing. Your job is to overcome this discomfort and nervousness. One way to accomplish this is to make the opening statement clear, simple, and uncomplicated. Generally, the opening should be a narrative form -- tell a story, bearing in mind that most people are unaccustomed to learning through hearing, as opposed to seeing or reading. Use simple words and visual aids, and avoid legalistic phrases (except to the extent a phrase is critical to your case and you want to begin to familiarize the jury to the concept, e.g., "reasonable doubt", etc). A disjointed or confusing opening statement will lose the jury and often create an insurmountable hurdle.

4. Quickly Catch the Jury's Attention.

During the preparation, you should devote considerable energy to finding some way to immediately grasp the jurors' attention. Long prefactory remarks will lose their attention. Tell the jury as quickly as possible what the case is about. Find something dramatic, or something with which the jurors are likely to be able to identify or in which they are likely to be interested, as the means for starting your remarks. This is particularly difficult in cases involving cut and dried commercial transactions, but even here the effort must be made to catch the jurors' attention. For example, consider the contrast between the following two ways of starting an opening statement:

(a) "This is a commercial breach of contract case between the Plaintiff and the Defendant in which the defendant failed to perform its contractual obligations of performance as legally required."

(b) "This case is about a broken promise. In October, 1983, A made a deal with B: A sold B 100 boxes of nuts and bolts. This was a simple deal, no different than the kinds of situations each of you has experienced when you've sold something to someone else. B promised to pay; but after getting the nuts and bolts, B didn't do it, and that's why B has been sued. My client wants B to live up to its promise, just as anyone else would expect if they had made

such a deal, and that's what this case is all about."

5. Use the Opening to Develop Rapport and Confidence with the Jury.

Remember that in your opening statement, as in every other aspect of trial, you are on "display" to the jury. Jurors will react well to, and identify with, a lawyer who exudes nonarrogant confidence and professionalism. For this reason, using your communication skills will be of the greatest importance in making the opening statement.

6. Be Brief.

An opening need not be, and shouldn't be, prolonged in order to be effective. What points you make and how you make them are what count, not the length of your opening or the fact that you have covered every conceivable point. If you are properly selective, you will be assured that your opening is brief enough. This approach also highlights what you believe are the most important points.

7. Win It in the Opening.

There are those who belittle the importance of an opening statement and who think that cases are not won or lost in openings. They are wrong; some recent studies show that 30% of jurors make up their minds during opening and never change their opinions. The opening sets the pace and tone for the rest of the case. It's the only opportunity until summation to speak to the jury directly. Don't minimize this opportunity; use it for all its worth to win your case.

B. Structure of the Opening.

1. Introduction.

Begin the opening statement by introducing yourself and your client. This should be done even though it will already have been done in the course of jury selection; remember, it often takes jurors a while to acclimate to the courtroom setting and to the various parties' identities.

It is extremely important to tie your own introduction to that of your client. You want the jury to identify you with your clients: you can walk over and stand behind them or have them stand up. You should also personalize clients so that the jurors can more easily identify with them; refer to them by their first names unless that would seem affected.

2. Quickly Get to the Matter at Hand.

Once your introduction has been made don't delay getting to the point of telling the jury what the case is about. Some lawyers feel tne need to go into a long exposition about the purpose of an opening statement, about the functions of jurors in the judicial system, about matters concerning the course of the trial, and the like. The vast majority of these explanations are unnecessary (and already will have been given to the jury by an effective trial judge); generally, they accomplish little other than to confuse the jury and to sound like "speeches".

3. Give the Jury Enough Information to Understand the Case Without Overwhelming Them with Details.

Perhaps the most difficult part of preparing the opening statement is the determination of how much information to give the jury. This raises countervailing considerations: on the one hand you want the jury to have a clear and complete understanding of the case; on the other hand, the jury is unlikely to follow numerous details (in particular, dates, places and names). Too much detail will lose the jury -- a cardinal sin to be avoided. A rule of thumb suggestion: by the end of your opening the jury should have enough information to understand the case, recognize the critical events involved, identify the parties, and understand your client's position. This will enable the jury to return a favorable verdict.

4. Use Visual Aids When Permissible.

An opening statement can be made all the more effective if you use visual aids to help the jury grasp the nature of the case and the critical events. Charts, photographs, and blackboards are some of the most effective tools, and in many jurisdictions, it is proper to use them even though they have not yet been introduced in evidence. The use of visual aids, however, must be well planned; they should be used only at critical parts in the opening and then put out of the jury's view. You don't want to conduct your entire opening statement with these aids because eventually they will detract from the jury's concentration on you and on your presentation of the case.

5. Confront Problems and Weaknesses in the Case.

If there are fundamental probems in your case which the other side will likely dwell upon (or already has mentioned), it is a mistake to overlook these problems in the opening. It is better to "draw the teeth" on these weaknesses by directly addressing the matters and attempting to diffuse them.

This general principle extends, as well, to matters of sensitivity which which may affect your client. For example, if your client has had marital difficulties which you know are likely to come out in the trial, tell the jury about this in your opening: "You will hear that Mary has been divorced; I know that you will not permit that fact to be used as a means of diverting your attention from the true questions in this case." (The same is true about matters like criminal records, prior bad acts, inconsistent statements, or damaging admissions --provided you know that such evidence will be adduced and received.) To ignore these questions means that the only opportunity you will have to address them openly will be in summation; and, summation is often too late to diffuse an issue which, if properly considered and handled with good taste, would have been put to one side in the opening statement.

6. Emphasize the Weakness in Your Adversary's Case.

You should point out any fundamental flaw or weakness in your adversary's case. However, avoid the temptation simply to flag some unattractive fact which truly is of no consequence to the outcome of the case.

If there is a vital weakness in your adversary's case, point it out to the jury. And, when you do so, be direct about the manner in which you are making the attack. For example, "In addition to all these things concerning

the care which my client used in driving his truck on the night of the accident, I ask you to pay particularly close attention when you hear about how much beer Mr. Jones had to drink before he started driving his car that night."

7. Emphasize Vital Pieces of Evidence or Witnesses on Which You Want the Jury to Focus.

In most cases there will be a particular witness, or a particular document, which will be a focal point for your position. The jury should hear about that witness or that document in your opening statement. You may not want to tell the jury the significance of this testimony or the significance of the document; nevertheless, you do want to make sure that the jury will be paying very close attention when you get to that point of the trial where this evidence will be covered. For example: "During the trial you will see a letter dated October 12, 1983 from Robert; read tnat letter carefully and listen to the testimony about that letter; then, ask yourself now that letter shows that Robert lived up to his part of the deal."

8. Forewarn the Jury About Conflicts in the Testimony.

If you know that your case will involve contradictions or conflicts in testimony between witnesses, candidly tell the jury about this. It is a mistake to make an opening which suggests there is only one version of the events when you know that the jury will hear conflicting versions. Tell the jury that there will be such conflicts and explain why the evidence will support your client's version. (As with all matters which suggest that the opening statement is to be used for argument, attention should be drawn to the next chapter heading concerning the proper use of an opening).

9. Finish Your Opening Statement Expressing Confidence that the Jury will Return the Verdict You Want.

The opening should be delivered confidently and without any doubt as to your view of the case and your expectation of the outcome. Tell the jury at the conclusion of your opening that you are "confident that they will return a verdict in favor of Robert" and explain just what the verdict will be. For example, in a criminal case representing the defendant, tell the jury that you are "confident they will return a not guilty verdict"; in a personal injury case representing the plaintiff, tell the jury that you are "confident they will return a verdict for Mary in the amount of $_____", and give them the dollar amount of damages you expect to recover, unless it a case where you believe it will be better to see how the trial goes before setting an amount.

C. Problem Areas to Keep in Mind.

1. Argument in the Opening Statement is Improper; Let the Facts Argue for You.

It is the general rule of law that argument in an opening statement is improper. This does not mean, however, that you may not (or should not) explain your theory of the case or set out the facts from an advocate's point of view. Generally, if your statement explains what you expect to prove (or what you expect the evidence will show), you will be on firm ground. There is a subtle difference between what is a proper opening statement and what is an improper argumentative opening statement, and inexperienced trial lawyers often have trouble making this distinction. Be careful to avoid expressions of your opinion, direct statements why a

particular piece of evidence is not credible, or any kind of prolonged or extensive direct attack on your adversary's case. Labels and characterizations are unnecessary; let your argument come through with a compelling and creative statement of the evidence you expect to prove in the light most favorable to your client. This is perhaps the greatest skill to be developed in an opening statement.

Example:

"The evidence will show that on the night of July 12, 1980 Robert was maimed when he was struck in a crosswalk by a car driven by Mr. Howard. You will hear from the bartender of the E-Z bar and grill that only a few moments before the accident, Mr. Howard left the bar after having four scotches and three beers. You will hear from the bystanders that Mr. Howard drove his car at 60 miles per hour down Main Street, ran a red light, and struck Robert as he stepped into the crosswalk. You will see from medical records and from the testimony of Dr. X that Robert spent 10 weeks in Merch Hospital, underwent three operations, and will never be able to use his withered arm. We will show you that a verdict of three million dollars is the very least that can be done to allow Robert to begin to lead as normal a life as is possible."

2. Dealing with Evidence of Questionable Admissibility.

In may cases, you must wrestle with the difficult problem of how to handle evidence which you know may not be admitted at the trial -- either for legal reasons or because the opposition will decide not to produce evidence (the latter being a particular problem in criminal case). If you

refer to evidence which ultimately is not admitted, the jury will remember that you promised to produce evidence and then did not do so. Also, it is improper to refer to evidence which you know will not be admitted (for example, evidence which the court has ordered excluded on a motion in limine), and doing so may subject you to sanctions, or, at the very least, to the active displeasure of the trial judge.

On the other hand, to avoid any reference to evidence which may or may not be admitted is to relinquish the opportunity to put that evidence before the jury in the context of the theory of the case as explained in your opening statement. There is no easy rule of thumb to apply here. You must exercise your best judgment as to the likelihood of the evidence being admitted and the consequences to the overall case if you refer to evidence which later is not admitted.

3. Avoid Detailed Instructions on the Law.

With respect to the opening statement (as with the summation), instruction on the law is the exclusive province of the judge. Any attempt to thoroughly summarize the law governing the case will meet with objections from your adversary and possible interruption by the judge. Notwithstanding this, it is generally proper -- and often essential -- to refer briefly to the legal principles which are vital to your case. The obvious example is the opening for the defense in a criminal case where emphasis must be put on the Government's burden of proof and the concept of reasonable doubt. While this will vary from jurisdiction to jurisdiction, most trial judges will permit brief references to legal principles, provided they are accurate and don't become unduly involved. An effective way to resolve this dilemma

is to make a statement along the following lines: "In my summation, when discussing the evidence, I will ask you to pay particular attention to his Honor's instructions on the law concerning the Government's burden of proof and the concept of reasonable doubt."

4. Cover Expert Witnesses.

If your case involves expert witnesses, it is important to explain what an expert witness is in general, who your expert will be, and why the expert will be testifying. By contrast, if your adversary's case will rely heavily upon experts, care should be taken to explain that a jury is not required to follow what an expert says.

5. Deal with Complicated or Technical Matters.

If your case involves complicated or technical matters, use the opening to make sure that the jury will not be afraid of these matters and that they will not "tune out" to such evidence. This problem may be dealt with in a number of different ways: you might suggest that an expert witness will explain the technical information; you should attempt, wherever possible, to simplify this information in your opening; you might say that you too were confused by these matters at first, but that they weren't as complicated as they seemed after hearing an explanation.

6. Sensitize the Jury to Particularly Explicit or Gory Demonstrative Evidence.

If your case involves explicit or gory facts, and if these facts will be demonstrated either by physical or demonstrative evidence, the jury should be informed about this. In a personal injury action, for example, if the

evidence will include photographs showing your client's gory physical injuries at the time of the accident, the jury should be told this in your opening so that they won't be caught up with the "shock" of such evidence. By the same token, to prevent any backlash to such matters, the jury should be told why such evidence will be shown in the course of your case.

D. Special Problems in Criminal Cases.

1. Whether and When to Open.

In a criminal case, the defense does not have to make an opening statement. In many jurisdictions, if the defendant chooses to make an opening, this can be done either immediately after the prosecution's opening or, in the discretion of the judge, after the close of the prosecution's direct case. The difficulty with the decision whether and when to open for a defendant in a criminal case is simply that you may decide at the conclusion of the prosecution's case not to put on a defense at all, and to rely upon the failure of the Government's evidence. If an opening statement has been made immediately after the prosecution's opening, and then no defense case is put in, you risk the possibility that the jury will believe that, since no case was put in, the defendant in fact has no defense.

2. Maintain Flexibility.

Since it is often difficult to anticipate whether a defense case will be presented and, in particular, whether the defendant will testify, it is

frequently necessary for the defense to make an opening statement in a manner which preserves the flexibility to go either way. In doing so, however, you must not suggest that whether the defendant will testify, or put in a defense, will turn on how strong the Government's case may be. If you are truly in doubt whether the defense will present a case, don't promise one.

E. Mode of Communication.

1. Don't Read.

There is nothing more lackluster than to have an opening statement read to the jury. If you read, your opening may be delivered flawlessly and in beautiful prose, but it will all be for naught. It is far more important to show the jurors your interest, concern, and familiarity with your case by speaking without the use of notes -- even if it comes across unpolished or with occasional incomplete thoughts. You may, however, use notes in outline form if you find it is necessary to refer to them between pauses. It is also helpful to write your opening statement completely in advance, and to practice delivering it. But when it comes to making he opening itself, put the written material away.

2. Maintain Eye Contact

Look at the jurors when you are making an opening and show them tnat you care about them as well as about your case. It is important to look at as many different jurors as possible in the course of your opening statement; do not devote all of your attention to one or two individuals. You will

find that the jurors will appreciate your attention and interaction and they will be more receptive to your presentation.

3. Maintain a Friendly Confidence.

Whether out of nervousness or aloofness, some lawyers forget such friendly but important gestures as a smile. Let the jurors know that you are a human being, that you have a sense of humor, and that no matter how important your client's case is to you, you still can remember the basic courtesies which people should extend to one another. Don't be afraid to laugh at your own mistakes, and above all don't be self-conscious of what you are doing. Your preparation and professional skills will assure the ultimate outcome of your trial, provided you have not "turned off" the jury by appearing too distant or condescending. Most importantly, be yourself; what works for a flamboyant and experienced trial lawyer can make a fool out of someone who does not have the same courtroom presence. Experiment with the styles with which you think you will be most comfortable, and when you find one that works for you, stick with it.

4. Be Courteous to Your Adversary.

Jurors, like most people, generally do not like hostility or anger. The trial lawyer who demeans, insults, or baits and adversary is inviting the jury to dislike him and to extend sympathy to the other side. Even in the most hostile of litigations, there is room for courtesy and basic decency before the jury. Your efforts to prevent any hostility or ill feelings from coming out in front of the jury will normally be rewarded.

F. Use of Defensive Tactics.

1. Respond to Your Adversary's Opening.

Well developed skills in handling an opening statement include a well considered response to the opening statement by your adversary. Many inexperienced trial lawyers prepare for an opening without giving adequate thought the way they will respond to their adversary's opening; this is a major mistake and may leave you flustered if your adversary takes advantage of the situation.

2. Making Objections During the Opening.

As one is developing experience with trial work, it is necessary to become familiar with the circumstances when objections are proper as a matter of law and as a matter of tactics. As a matter of law, there are four fundamental types of objections to remember

(a) The opposition is engaging in argument;

(b) The opposition is making reference to a matter which is inadmissible;

(c) The opposition is making reference to a matter which is prejudicial and/or not relevant;

(d) The opposition is engaging in detailed instructions on the law.

Once you recognize the grounds for these objections, the next step to consider is when, as a tactical matter, an objection should be made. Many lawyers do not want to interrupt an adversary's opening remarks with objections because they are concerned that the jury will regard this as discourteous, or because they want to avoid inviting similar objections at appropriate points is to give your adversary an unfair advantage and potentially to place before the jury matters which will be highly damaging to your client's case. As with other areas, discretion is critical. But, when in doubt, if you think that your adversary is gaining an unfair advantage, do not hesitate to get up on your feet to make an objection.

3. Motions Based on the Opening Statement.

Occasionally, a motion for a mistrial following your adversary's opening is appropriate. Such a motion is in order if your adversary has made a particularly prejudical comment which you fear may not be cured by an instruction from the trial judge. In some jurisdictions, and particularly in criminal cases, a motion by defendant for dismissal will be in order if the party with the burden of proof has failed to set forth in its opening statement a prima facie case. Finally, even if you believe the mistrial motion will not prevail, it is often a useful motion to make (obviously, out of the jury's hearing) to establish a point for a record on appeal if you are ultimately unsuccessful in the case, or to sensitize the judge to a particular position which you want to take throughout the course of the trial. Bear in mind, however, that you should never make a mistrial motion if you do not really want it to be granted; if the judge is inclined to grant the motion, either you will be stuck with your original position, or

you will incur the trial judge's unending displeasure, and distrust by stating you didn't truly want the motion granted.

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DIRECT EXAMINATION

and

CROSS-EXAMINATION

June, 1988

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DIRECT EXAMINATION

I. Purpose of Direct Examination

A. Direct examination is the heart of a trial.

B. Coherent statement of the facts by your witnesses is essential to the jury's understanding and acceptance of your position.

C. Basic obstacles

1. Witnesses themselves.

2. Q and A format is a strained device for obtaining information.

3. Rules of evidence limit the form of questions, as well as their content.

4. Objections break up the testimony, diverting the attention of the jury.

5. Cross-examination chops the progression of witnesses.

II. Basic Rules Governing Direct Examination

A. Leading questions are generally not permitted.

B. Questions calling for a narrative are within the discretion of the court.

1. When witness has been properly prepared, they are very effective.

C. Miscellaneous Improper Questions

1. Asked and Answered
2. Assumes facts not in evidence
3. Misstates evidence
4. Confusing
5. Speculative
6. Compound
7. Argumentative

III. Conducting Direct Examination

A. KISS principle

B. Internal organization

1. Accreditation phase a/k/a "who the hell is this witness" phase

2. Transition sentence

3. Heart of direct in chronological order

4. Incorporate a portion of witness answer into next question

5. Use of exhibits

6. Finish on a high

C. Use of topic sentences

D. Repetitive use of key phrases

E. Look and listen to witness

F. Use of simple words and sentences - avoid sounding like a lawyer

G. Logical/chronological organization

H. Let witness tell it in his/her own words

I. LISTEN and HEAR what <u>your</u> witness says

J. Proper place

K. Non-leading, open-ended questions

L. Avoid objections

IV. Preparation For Direct Examination

A. Prepare Yourself

1. Outline what witness has to say

2. Organize examination of what witness has to say, using chronological or logical organization or combination of both

B. Prepare Witness

1. Review with witness the questions you are going to ask.

2. Prepare for cross-examination (see Cross Examination Outline at V, K).

3. Review briefly the hearsay doctrine and other related "do's" and "don'ts" and the reasons why.

4. Prepare the witness for contradictions in a previous deposition or statement by encouraging him to admit that he may have made that statement, rather than denying it and then have him explain the statement is contradictory now as opposed to then; i.e., he didn't understand it; it wasn't a complete answer; it is no different than what he testified to then; he was confused. Encourage him not to be worried about contradictory statements relative to trivia. Example, the car was going 40 miles an hour and in the prior statement to police he said it was going 42.

C. Prepare outline of a proof checklist for each witness who will testify

D. Prepare for proper pace of examination

CROSS-EXAMINATION

I. Purpose of Cross-Examination

A. To explain, add to, or qualify the testimony given on direct, or compel admission of facts inconsistent with or contradictory of it.

B. To elicit new matter favorable to your case.

C. To discredit or weaken the effect of the story told by the witness:

1. Show witness has lack of knowledge of the facts.

2. Show inadequacy of perceptive faculties.

3. Inaccurate recollection.

4. Inability to accurately express what he has perceived or remembered.

5. Tendency to exaggerate.

D. To discredit or destroy the witness by showing him unworthy of credence.

1. Show interest of witness direct or indirect.

a. Interest in party for whom he appears.

b. Interest in income.

c. Motives for testifying.

d. Relationship - associations, friendship, hostility, bias or prejudice.

2. Basic Impeachment techniques.

a. Conviction of crime.

b. Bad acts.

II. Deciding To Cross-Examine

A. When To Cross-Examine

1. When testimony has significantly harmed your case.

2. Where witness has held back information of value.

3. When you feel strongly that you must.

4. Where there is reasonable expectation of some success.

B. When Not To Cross-Examine

1. Where witness has not testified to anything that hurts your case or the theory of defense.

2. Where there is little to be gained by cross-examination.

a. Where there is doubt that witness' testimony has hurt your case.

b. Where there is minor or insignificant harm to your case by testimony.

c. Where emphasis of witness' testimony by repetition outweighs harm done by his testimony.

3. Never ask a question on cross-examination merely on basis that it has been suggested by your client.

4. Never cross-examine where direct examination of witness has been illogical, confusing, rambling and unclear.

5. Do not cross-examine a witness unless you have a definite objective in mind.

III. How To Cross Examine

A. Manner and Technique

1. Clear, simple, short leading questions.

2. Keep control of witness:

a. Avoid questions that are so broad that witness is allowed to elaborate.

b. Whenever possible, confine witness by questions which can be answered "yes" or "no."

3. Be a gentleman/gentlewoman at all times.

4. Work towards a fitting climax.

5. Prepare in advance for cross-examination of known witnesses as much as possible.

6. Stand as close to witness as possible and look him squarely in the eye.

7. Carefully appraise the witness' type, capability and disposition in addition to any special circumstances which requires special treatment of the witness.

8. Suit type and style of cross-examination to the particular witness.

9. Springing a trap -- importance of timing in cross-examination so that witness is unable to extricate himself.

10. Accent improbabilities and contradictions.

11. Test witness' memory and faculties.

12. End examination on making a dramatic and telling point.

B. Phases of Cross-Examination

Cross-examination, like many other applied sciences, consists of separate and distinct phases, which ordinarily (and with some exceptions) should be undertaken in the following order:

1. Phase One: Fleshing out of the witness' knowledge, including negative knowledge -- closing the doors. Commitment.

2. Phase Two: Establishing favorable points.

3. Phase Three: IMPEACHMENT.

C. What To Avoid

1. Never give appearance of being slick, smooth, tricky or harsh.

2. Never shout at witness.

3. Never argue with the witness.

4. Never show disrespect for the witness unless it is clear that jury feels he deserves it.

5. Never appear to merely confuse the witness by trickery.

6. After making a telling point, don't beat it to death by unnecessary repetition.

7. Know when to be cautious -- don't dive into areas where you may be hurt -- be cautious where exploring unknown.

8. Avoid calling a witness a liar.

9. Avoid asking questions where call for or permit an explanation.

10. Avoid "nit picking" and making use of immaterial or inconsequential errors made by witness.

11. Never press for an answer to questions unless you are positive the answer will be favorable to your case.

12. Know when to stop.

IV. Preparation For Cross-Examination

A. Visit scene of alleged crime.

1. Know the physical layout, lighting conditions, and note any possible obstructions in the vision of the witness.

B. Make a list of witnesses.

1. Know the witness --

a. Private life.
b. Prejudice of witness.
c. Prior criminal record.
d. Prior statements to Grand Jury or other documents or statements used to refresh witness' recollection.
e. Obtain transcripts of all sworn statements such as testimony at the preliminary hearing, etc.

C. Master the facts of the case.

1. Know the strength and weaknesses of case.

2. All known witnesses, both favorable and unfavorable should be interviewed.

3. Know contents of all letters and documents.

4. List subject of witness' testimony.

5. List objective of cross-examination of this witness.

6. List known details of testimony.

7. List probable admissions of witness.

8. List all items or information which tends to discredit witness.

9. List all documents or prior inconsistent statements of witness.

10. List improbabilities of witness' testimony.

D. Master the law of the case.

1. Know what you/defense must prove.

2. Know how you/defense must prove case.

3. Know when burden of proof or burden to come forth with evidence shifts.

V. Preparing Your Witness for Cross-Examination

A. Explaining What Cross-Examination Is All About.

The best method is to use actual examples, and explain the purpose of cross-examination, to wit: to change the direction of direct examination; to change the position of the witness as to a particular point; to create doubt; to cause annoyance to the witness; to place the witness ill at ease; and to attack his credibility.

B. Dissect The Case For The Witness.

Differentiate the main issues of his testimony as opposed to the minor insignificant trivia. Example: In a case having to do with a homicide -- how the death occurred and the specific details are the key issues for the prosecution; and not how many times he was married, the exact address where he lived six years ago, etc. Most witnesses have difficulty separating the important from the unimportant.

C. Answering The Questions.

Prepare the witness to answer the questions by repeating part of the question. For example:

"Q. Is you name John Smith?"

"A. My name is John Smith?"

This will eliminate the double-barrelled question and the tendency to answer "yes" and "no" and thereby fall into the cross-examiner's trap. Example: "Your name is John Smith and you weren't really at State Street, were you?" The tendency for the witness who has not been used to answering with the use of a question as a prelude to his answer might be to answer "yes" or "no," and both answers would be wrong. The correct answer would be:

"Yes, my name is John Smith; and no, it is not true that I was not at State Street."

Simple demonstrations like this to the witnesses will relax the witness and confirm that he is smart enough to handle the cross-examiner.

D. The Contradictory Statement.

Prepare the witness for contradictions in a prior statement by encouraging him/her to admit that he/she may have made that statement, rather than denying it and then have him/her explain the statement is contradictory now as opposed to then; i.e., he/she didn't understand it; it wasn't a complete answer; it is no different than what he/she testified to then; he/she was confused. Encourage him/her not to be worried about contradictory statements relative to trivia. Example, the car was going 40 miles an hour and in a statement he/she said it was going 42.

E. Avoidance Of The Self-Serving, Non-Responsive Answer.

The problem witness should be encouraged, if an introvert, to explain his/her answers; if an extrovert, to keep his/her answers to a minimum and avoid self-serving, long-winded, unresponsive answers. Wait for the question.

F. A Trial Is Not A Play.

There are no scripts, no memory answers, and the answers have to come from the witness and not from any other person or prepared text. Explain that answers can be different. Eliminate the fears:

1. that they are committing perjury if they don't answer a question just right

2. the fear of the court, i.e., contempt, punishment, et al.

3. fear of the opposing attorney

There is nothing wrong with an answer such as, "I don't remember," "I didn't know," "I don't understand the question," "Please repeat the question."

G. Cross-Examination Is Not A Guessing Game.

Explore with the perspective witness all the reasons why he/she should not guess, estimate, or speculate.

H. Rules of Evidence.

Explain briefly the hearsay doctrine and other related "do's" and "don'ts" and THE REASONS WHY.

I. Let The Witness Ask You Questions.

Procedure, issues in the case, pitfalls, dress, demeanor.

J. Sample Questions.

Go into depth on sample questions, pointing out the differences between the easy ones, the hard ones, and the ones that will be used for the purpose of attacking credibility -- prior convictions and/or skeletons.

K. Eliminating All Fears.

A heart-to-heart talk with the witness as to anything that the witness could be hiding and would not want to have known, and an in-depth explanation as to the advantages that the law has for the witness in such situations and that the court will restrain the cross-examiner from getting into irrelevant, incompetent, and immaterial issues. Most lay witnesses believe that when they are on the stand their lives from the womb to the tomb are open books. You must explain the fallacy of this belief.

GENERAL CONSIDERATIONS

FOR BOTH DIRECT AND CROSS

I. Echoing

Often a nervous trial lawyer, particularly the novice, repeats the answers he elicits before putting the next question. This practice swells the record with useless words. It distracts the listening audience and later the reviewing court, and conveys a hesitancy and unease which tend to undermine the cause which the attorney seeks to advance. No doubt the practice gives the attorney a moment of breathing room between questions, but the real reason is not so much the need for reflection as discomfort with the surroundings. Consider this example:

Q. Were you present in the operating room?

A. Yes I was.

Q. You were. And who made the incision?

A. Dr. Young made the incision, and Dr. Hansen closed and cleaned up afterwards.

Q. Dr. Young made the incision, and Dr. Hansen closed. Very good. And were any other physicians in attendance?

II. Numbers, Names and Big Words

When a witness recites a number in her testimony, her spoken word may be susceptible of many different interpretations. What does a witness mean when she says "thirty-four 0 seven"? She could mean 3,407, 34.07, or ever 30,407. Context may make one or another interpretation by far the more probable: "Thirty-four 0 seven" likely means "$3,407" (rather than either of the other two possibilities) if the witness had been asked how much it cost to rebuild the engine of the car, but the context will not always make clear the intended meaning of the answer, and the trial lawyer is well advised to clarify the record on such points.

Q. By "thirty-four 0 seven" do you mean three thousand four hundred seven dollars?

A. Yes, that's right.

In every day experience, names present spelling difficulties. Witnesses named "Meyer," "Myer," "Meier,"

"Mayer," "Meir," or "Maier" may utter the very same sound when asked their last name. What is the reporter to do? In fact, he may interrupt the proceedings and ask for a spelling then and there, but if the pace of questioning is hectic there may be no chance, and the problem may go unnoticed until the transcript appears. Sometimes the witness spells her name on her own, recognizing the problem. A thoughtful lawyer provides a list of names to the reporter in advance, so the reporter will know the spelling already.

Difficult or uncommon words, especially technical medical terms, create difficulties for the reporter. The witness who uses them should be asked first to spell them for the reporter, then explain them to the jury:

Q. Doctor, what did the abdominal incision reveal?

A. Acute secondary peritonitis caused by bacterial invasion from the biliary system, entering through a perforation in the viscus brought on by acute cholecystitis.

Q. Doctor, would you be kind enough to assist the reporter by spelling those technical terms? Then I'll ask you to explain your answer in lay terms, as best you can, so that the jury and I can understand you.

III. Pantomime, Nonverbal Cue, Gesture, Internal Reference

From time to time the witnesses follow the conventions of everyday conversation, conveying information by use of nonverbal cues or words whose significance depends entirely on reference to the immediate physical surroundings. Here the meaning is likely clear to the observer at trial, but lost completely to readers of the written transcript.

For example, the witness may give his answer in pantomime: Holding arm to his side with shoulder raised, elbow out and hand turned inward, he might say, "He was carrying the book this way." Here the trial lawyer conducting the questioning would be wise to state, "Let the record show that the witness is indicating that the subject carried the book at his side in one hand at about waist level." (If the lawyer on the other side disagrees, she should say so, and either the witness must convey his meaning in words or the parties must agree as to what the witness in fact indicated.)

Or the witness may answer by nonverbal cue: A nod or shake of the head, a shrug of the shoulders. Usually such a response evokes a gentle reminder from trial judge or

questioning lawyer: "Please give an audible response. The reporter can write down only what you say."

Sometimes the witness answers by gesture, indicating a direction or object or identifying a person by pointing. Again usually the lawyer fills the gap: "Let the record show that the witness pointed to the defendant, northward" (or "up" or "at his right knee"), or "Let the record show that the witness pointed to the defendant, Leon Hall." Once again, if opposing counsel disagrees, she should so state, and silence is likely to be taken as assent.

Sometimes the witness answers by making reference to objects in the courtroom, and again a clarifying remark by counsel helps, with an express or tacit stipulation by opposing counsel, or an additional answer by the witness:

A. The hammer I saw was about as big as her honor's gavel.

Q. Let the record show that the gavel has a handle about eight inches long and a head about an inch in diameter and about two inches long. That's about right, isn't it?

A. (Ms. Dreeves): Yes, I think that's the burden of his testimony.

Q. Thank you counsel--

A. Yes, that's about what it was.

Q. Thank you.

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 May 1988, by
Donna L. Mackey,
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PRACTICAL EVIDENTIARY PROBLEMS

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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. Williams, 70 N.Y.2d 946, 524 N.Y.S.2d 669 (1988); People v. Fleming, 70 N.Y.2d 947, 524 N.Y.S.2d 670 (1988); People v. DeJesus, 132 A.D.2d 564, 517 N.Y.S.2d 427 (2d Dept. 1987); People v. Stokes, 132 A.D.2d 718, 518 N.Y.S.2d 195 (2d Dept. 1987); People v. Butler, 132 A.D.2d 771, 517 N.Y.S.2d 580 (3d Dept. 1987); People v. Peterkin, 133 A.D.2d 472, 519 N.Y.S.2d 570 (2d Dept. 1987); 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, CPLR 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. <u>No real purpose is served by having a record that is textbook perfect.</u>

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 wrath of the judge and, irrespective of the ruling on the particular 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 convincingly) 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 overruled 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.

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 the form of trial objections.

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 pretrial 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 adversary 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 related 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 legitimate 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 improper 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 unwill-

ing 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, <u>do not</u> 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, <u>carefully pick your spot</u>, 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 <u>your</u> 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 <u>waiting</u> 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. <u>And</u>, 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 femininity 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 that 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, 126 A.D.2d 788, 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); People v. Haddad, 133 A.D.2d 124, 518 N.Y.S.2d 656 (2d Dept. 1987) (tapes were sufficiently audible and distinct and officers testified that the conversations were accurately and fairly reproduced); People v. Hughes, 124 A.D.2d 344, 507 N.Y.S.2d 285 (3d Dept. 1986).

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.

See also People v. Godley, 130 A.D.2d 791, 515 N.Y.S.2d 122 (3d Dept. 1987) (portions of the tape were unclear, but the tape was admissible because defendant's voice was clearly identified on tapes which demonstrated he sold drugs to an informant, and the transcript of the tape was accurate).

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). See also, People v. Luke, 136 Misc.2d 733, 519 N.Y.S.2d 316 (Sup. Ct. Bronx Co. 1987) (tape recording of conversation that an eyewitness had with a 911 operator, concerning her observations of a burglary in progress, was held admissible under the present sense impression exception to hearsay rule).

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. See People v. Warner, 126 A.D.2d 788, 510 N.Y.S.2d 292 (3d Dept. 1987) (trial court has

discretion to admit transcripts of a tape recording as an aid to the jury). 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

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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).

(3d Dept. 1986). See also, People v. Branch, 128 A.D.2d 950, 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, 126 A.D.2d 982, 511 N.Y.S.2d 758 (4th Dept. 1987) aff'd, 70 N.Y.2d 816, 523 N.Y.S.2d 489 (1987) where the trial court properly admitted tape recordings to establish defendant's knowledge and intent in a possession of cocaine prosecution. See also People v. Putnam, 130 A.D.2d 52, 518 N.Y.S.2d 239 (3d Dept. 1987) (tape recordings which discussed defendant's participation in uncharged crimes were admissible to prove defendant's intent).

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. Alvino, 71 N.Y.2d 233, 241, 525 N.Y.S.2d 7, 11 (1987); People v. Lewis, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987); People v. Vails, 43 N.Y.2d 364, 401 N.Y.S.2d 479 (1977). It should be noted that evidence tending to establish that a defendant did not commit uncharged crimes is not admissible on the defendant's direct case to establish that he did not commit the crime(s) charged. People v. Lawson, No. 104, slip. op. (N.Y.C.A. April 28, 1988).

In People v. Kampshoff, 53 A.D.2d 325, 385 N.Y.S.2d 672 (4th Dept. 1976) the court noted that the five traditional Molineux "categories are merely illustrative and not exclusive". See also People v. Beckles, 128 A.D.2d 435, 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. Douglas, 128 A.D.2d 718, 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);

People v. Gilmore, 134 A.D.2d 653, 520 N.Y.S.2d 962 (3d Dept. 1987) (evidence of a prior similar crime held admissible to rebut defendant's affirmative defense); People v. Satiro, 132 A.D.2d 717, 518 N.Y.S.2d 194 (2d Dept. 1987) (evidence of an uncharged crime admissible to establish defendant's dominion and control over the seized contraband); People v. Simpson, 132 A.D.2d 894, 518 N.Y.S.2d 453 (3d Dept. 1987) (evidence of uncharged crimes is admissible when it is "inextricably interwoven" with admissible evidence). 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. Alvino and People v. Hernandez, 71 N.Y.2d 233, 525 N.Y.S.2d 7 (1987); People v. Ingram, 7 N.Y.2d 474, 527 N.Y.S.2d 363 (1988). People v. Rodriguez, 135 A.D.2d 586, 521 N.Y.S.2d 800 (2d Dept. 1987); People v. Stanzione, 131 A.D.2d 895, 517 N.Y.S.2d 250 (2d Dept. 1987); People v. Putnam, 130 A.D.2d 52, 518 N.Y.S.2d 239 (3d Dept. 1987); see also, People v. Castrechino, 134 A.D.2d 877, 521 N.Y.S.2d 960 (4th Dept. 1987) (proof of defendant's prior acts of violence against his girlfriend was admissible to show intent and motive in charged crimes); People v. Patterson, 135 A.D.2d 883, 522 N.Y.S.2d 281 (3d Dept. 1987) (evidence of defendant's past business dealings and bleak financial condition was relevant to the issue of intent to establish that defendant was neither a novice businessman or able to meet his financial obligation); People v. Bailey, 133 A.D.2d 462, 519 N.Y.S.2d 676 (2d Dept. 1987) (evidence that

defendant forced complainant into prostitution following her rape was relevant to the issue of motive and intent); 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); People v. Volcipello, 128 A.D.2d 911, 513 N.Y.S.2d 838 (2d Dept. 1987) (an employee of the defendant was properly permitted to testify about the defendant's criminal conduct to establish intent and a pattern of check manipulation); People v. Caruso, 135 A.D.2d 550, 521 N.Y.S.2d 771 (2d Dept. 1987) (evidence of defendant's checks, returned for insufficient funds, were admissible to show defendant's knowledge that his account was overdrawn). 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); 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 was 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. Tuckerman, 134 A.D.2d 732, 521 N.Y.S.2d 553 (3d Dept. 1987); 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). Note: In People v. Lewis, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987) the Court of Appeals reversed the defendant's conviction for incest where the victim, in an attempt to establish defendant's "amorous design", was permitted to testify about prior incestuous acts allegedly committed by the defendant. Pointing out that "mutual disposition is the basis for the "amorous" design" exception, the Court held that evidence of the prior crimes was erroneously admitted since in an incest prosecution it was not necessary to establish specific intent, corroboration, or non-consent of the victim, the factors generally relied upon in applying the "amorous design" exception.

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. Negron, ___ A.D.2d ___, 523 N.Y.S.2d 836 (1st Dept. 1988) (trial court erred in allowing testimony about uncharged drug sales since that evidence was not essential to prove defendant had made the instant sale).

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. Maggio, ___ A.D.2d ___, 524 N.Y.S.2d 511 (2d Dept. 1988) (testimony that items in defendant's vehicle were stolen was probative of defendant's motive and intent in engaging in shooting with the police); People v. Carter, 130 A.D.2d 757, 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. There must be 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations' (citation omitted).
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> People v. Fiore, 34 N.Y.2d 81, 85-86; 356 N.Y.S.2d 38, 42-44 (1974).

Compare People v. Washpun, 134 A.D.2d 858, 521 N.Y.S.2d 915 (4th

Dept. 1987) (defendant's prior uncharged crimes were admissible because they were motivated by his animosity towards his girlfriend and the charged crimes involved defendant's girlfriend which indicated defendant's common plan).

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); 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); People v. Robinson, 114 A.D.2d 120, 498 N.Y.S.2d 506 (3d Dept. 1986); Compare People v. Sanza, 121 A.D.2d 89, 509 N.Y.S.2d 311 (1st Dept. 1986).

Note: To introduce evidence of prior uncharged arsons 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

* 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.

> 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).

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).

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).

Both Federal and State 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, 577 F.2d at 191-92 (1978); 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." 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). See also 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. Bines, ___ A.D.2d ___, 524 N.Y.S.2d 212 (1st Dept. 1988) (absent a unique modus operandi it was an abuse of discretion for the trial court to admit evidence of prior robbery attempts to establish defendant's identity); People v. Neu, 124 A.D.2d 885, 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). See also, People v. Salas, ___ A.D.2d ___, 523 N.Y.S.2d 810 (1st Dept. 1988) (where identity is not an issue in the case, it was improper for prosecutor to introduce evidence of prior crimes to establish defendant's identity).

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. See also People v. Crandall, 67 N.Y.2d 111, 500 N.Y.S.2d 635 (1986).

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. See People v. Lowrance, 65 A.D.2d 531, 409 N.Y.S.2d 227 (1st Dept. 1978); People v. Castronova, 44 A.D.2d 765, 354 N.Y.S.2d 250 (4th Dept. 1974); People v. Latham, 35 A.D.2d 759, 314 N.Y.S.2d 825 (3d Dept. 1970).

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 is 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. See People v. Lewis, 69 N.Y.2d 321, 325, 514 N.Y.S.2d 205, 207 (1987). 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. Alvino, 71 N.Y.2d 233, 242, 525 N.Y.S.2d 7, 11 (1987). 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

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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 and from making that difference of opinion, in the difficult and ineffable 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.

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; People v. Alamo, 23 N.Y.2d 630 (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, supra, at 201.)

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

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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). 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. Note: Recently the Court of Appeals held "that a defendant does not, by testifying, automatically and generally waive the priviledge against self-incrimination with respect to questions concerning pending unrelated criminal charges." People v. Betts, 70 N.Y.2d 289, 520 N.Y.S.2d 370 (1987). The court further held, however, that this rule does not preclude prosecutors from inquiring about pending criminal charges if the defendant takes the stand and makes assertions that open the door for this line of questioning. Id. 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).

> 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 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. Sandoval, 34 N.Y.2d at 376, 357 N.Y.S.2d at 854-855.

See People v. Alling, 69 N.Y.2d 637, 511 N.Y.S.2d 225 (1986); People v. Bowles, 132 A.D.2d 465, 517 N.Y.S.2d 155 (1st Dept. 1987); People v. Miller, 132 A.D.2d 848, 518 N.Y.S.2d 59 (3d Dept. 1987); People v. Burroughs. 127 A.D.2d 843, 511 N.Y.S.2d 947 (2d Dept. 1987) People v. Burke, 127 A.D.2d 842 511 N.Y.S.2d 946 (2d Dept. 1987); People v. Norman, 127 A.D.2d 799, 512 N.Y.S.2d 196 (2d Dept. 1987); People v. Caudle, 128 A.D.2d 629, 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 send the case for retrial to another judge). But see People v. Moreno, 70 N.Y.2d 403, 521 N.Y.S.2d 663 (1987) wherein Court of Appeals held that knowledge acquired by judge during Sandoval hearing does not mandate recusal in a non-jury trial.

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. See People v. Jefferson, ___ A.D.2d ___, 523 N.Y.S.2d 887 (2d Dept. 1988). 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); see also People v. Samuels, 133 A.D.2d 785, 520 N.Y.S.2d 172 (2d Dept. 1987) (where the prosecutor's violation of the Sandoval ruling was considered harmless error in light of the trial court's prompt curative instructions). 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, supra. "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. Sandoval Procedure

Effective November 1, 1987, pursuant to the 1987 N.Y. Laws ch. 222, Criminal Procedure Law section 240.43 was enacted to provide that:

> Upon a request by a defendant, the prosecutor shall notify the defendant of all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant. Such notification by the prosecutor shall be made immediately prior to the commencement of jury selection, except that the court may, in its discretion, order such notification and make its determination as to the admissibility for impeachment purposes of such conduct within a period of three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection.

Thus, under this new section, CPL 240.43, a defendant can require the People to disclose, before the jury selection begins, those prior **uncharged** criminal vicious or immoral acts of defendant which the prosecutor intends to use at trial to impeach defendant's credibility. The purpose of this section is to prevent undue surprise and prejudice to a defendant on cross-examination, who may be unaware of an uncharged pending crime. The defendant, however, still has the burden of informing the court of his **prior** convictions which might unduly prejudice him on cross-examination, since, a defendant who has been charged with or convicted of crimes cannot claim surprise if he is asked about such criminal acts on cross-examination. See Preiser, Practice Commentary, McKinney's Cons. Law of NY, Book 11A, Criminal Procedure Law 240.43,

p. 142 (1987).

C. 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 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

* 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.

** 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").

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. People v. Filpo, 133 A.D.2d 129, 518 N.Y.S.2d 664 (2d Dept. 1987) (an eleven year arson charge was 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 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 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).

*Note: 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.

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, 126 A.D.2d 857, 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, 128, A.D.2d 796, 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).

Surprisingly, 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-examination 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, supra, 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.
> People v. Bennette, 56 N.Y.2d at 148, 451 N.Y.S.2d at 650.

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 upheld 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 (3d 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 (3d 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 impeach-

> ed 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. Hampton, 126 A.D.2d 744, 511 N.Y.S.2d 328 (2d Dept. 1987) (the court did not abuse its discretion by allowing the prosecution to

* 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).

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). But see People v. Bowles, 132 A.D.2d 465, 517 N.Y.S.2d 155 (1st Dept. 1987) (where the court improperly permitted the prosecution to cross-examine defendant about thirteen prior convictions; many of which were similar to the instant offense).

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).

D. 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). People v. Johnson, ___ A.D.2d ___, 524 N.Y.S.2d 802 (2d Dept. 1988) (the trial court properly permitted the prosecutor to ask defendant about his previous convictions without going into the underlying facts); People v. Jones, ___ A.D.2d ___, 524 N.Y.S.2d 79 (2d Dept. 1988); People v. Rivera, 135 A.D.2d 669, 522 N.Y.S.2d 245 (2d Dept. 1987).

However, in People v. Towsend, 134 A.D.2d 730, 521 N.Y.S.2d 550 (3d Dept. 1987) the Appellate Division ruled that while it was proper to permit cross-examination of defendant regarding the fact that defendant had been convicted of an undescribed class A misdemeanor, the prosecutor erred in eliciting testimony that the misdemeanor convicton had been plea-bargained down from a felony and that defendant had originally pleaded not guilty to that charge. Id. The court held that even though defendant's misdemeanor conviction was relevant to the issue of his credibility, the fact that the conviction was plea bargained down from a felony was prejudicial, and infringed on defendant's constitutional right to plead not guilty. Id.

(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.

It should be noted, however, that the new statute, CPL 240.43, does not specify when the defendant must request the prosecutor to disclose his uncharged pending crimes. As noted in the practice commentary to

this section, since the Sandoval procedure is not considered to be a pre-trial motion governed by article 255 of the criminal procedure law, a request made by a defendant under CPL 240.43 does not have to be made prior to trial. See Preiser, Practice Commentary, McKinney's Cons. Law of NY, Book 11A, Criminal Procedure Law 240.43, p. 143 (1987).

II. PROCEDURES FOR IMPLEMENTING THE SANDOVAL RATIONALE

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 at 856.

Significantly, the burden of proof is upon the defendant to demonstrate that "the prejudicial effect of the admission of evidence (of

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* 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); People v. Jones, ___ A.D.2d ___, 524 N.Y.S.2d 79 (2d Dept. 1988); People v. Griffin, 131 A.D.2d 779, 517 N.Y.S.2d 67 (2d Dept. 1987); People v. Olmstead, 131 A.D.2d 196, 521 N.Y.S.2d 192 (3d Dept. 1987).

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.* Except under criminal procedure law section 240.43, upon demand by the defendant, the prosecutor must disclose prior to the commencement of the jury selection all of the defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial.

Note: The Court of Appeals held in People v. Matthews, 68 N.Y.2d 130, 506 N.Y.S.2d 154 (1986) 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 conviction at trial. 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). People v. Hill, 133 A.D.2d 780, 520 N.Y.S.2d 65 (2d Dept. 1987) (defense counsel's failure to object, request a mistrial or curative instructions after the prosecutor improperly asked defendant about a prior conviction waived defendant's right to appellate review).

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

* 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).

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 403 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 609(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 (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 cases, 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 mere use 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 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).

* 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. Amoot, 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 witnes 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 sex 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), infra.

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:

> National 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.

THE USE OF EXPERT TESTIMONY

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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.

APPELLATE PRACTICE

by

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March, 1982

Revised June 1988

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APPELLATE PRACTICE

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.
>
> 9. An order entered pursuant section 460.30 of the penal law setting aside or modifying a verdict of forfeiture.

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, 127 A.D.2d 982, 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, 516 N.Y.S.2d 633 (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, 119 A.D.2d 927, 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.

THE POLICE OFFICER AS A WITNESS: A PRACTICAL PERSPECTIVE

DEFENSE VIEW

by

MARTIN B. ADELMAN, ESQ.

Revised June 1988

by

Terrence B. O'Neill

Senior Attorney

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THE POLICE OFFICER AS A WITNESS: A PRACTICAL PERSPECTIVE

DEFENSE VIEW - MARTIN B. ADELMAN, ESQ.

Revised June 1981, by
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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 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; and

(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; and

(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 a defense counsel at a lineup has been 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), has 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; and

(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 preceding 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 as 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 preliminary 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), cert. denied, 368 U.S. 866 (1961). Such reports and statements must be produced at preliminary hearings. Failure to produce such material constitutes per se error. People v. Jones, 128 A.D.2d 405, 512 N.Y.S.2d 691 (1st Dept. 1987); 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). In People v. Malinsky, 15 N.Y.2d 86, 255 N.Y.S.2d 850 (1965), the Rosario disclosure requirement was held to apply to notes made by a police officer witness made in connection with the defendant's arrest. See also, People v. Gilligan, 39 N.Y.2d 769, 384 N.Y.S.2d 778 (1976). 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 as 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). The People, however, have no obligation to produce all police officers who had contact with the defendant from the time of arrest. People v. Witherspoon, 66 N.Y.2d 973, 498 N.Y.S.2d 789 (1986). Calling other officers 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.* 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].

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. CPL §240.20(1)(a)-(j), 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 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

*For an extensive discussion, see Criminal Discovery, 1982 by Hon. D. Bruce Crew, III, published by BPDS.

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. See also, People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1986) (police precinct complaint report is Rosario material although its contents were consistent with witness's testimony.)

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. But see, People v. Ranghelle, supra, where the Court of Appeals reversed defendant's conviction due to the failure of the prosecution to disclose a police precinct complaint report made by the complaining witness. "Although the description of the incident contained in the police precinct complaint report was consistent with the witness's testimony, it lacked essential details to which she later testified at trial, omissions which might have constituted important material for cross-examination." Id. at 60.

(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 be 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. However, a statistical or factual tabulation of data of the number of days and dates during a particular time period during which an officer was absent from his scheduled employment is not exempt from disclosure under the Civil Rights Law and may be obtained by invoking the Freedom of Information Law (Public Officers Law, Article 6). Capital Newspapers v. Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576 (1986).

Counsel should be aware that police personnel records not specifically exempted from disclosure by statute may be obtained by invoking the Freedom of Information Law (Public Officers Law, article 6); Capital Newspapers v. Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576 (1986).

(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. Berrio, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971); 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) (testimony "patently tailored to nullify constitutional objections"); 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 lineups, obtaining confessions, etc. 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); 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; 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, prior to the conclusion of the hearing, though prudent counsel will invariably make the request at the outset of the hearing. People v. Sanders, 31 N.Y.2d 463, 341 N.Y.S.2d 305 (1973); 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, as evidenced by the filing of an accusatory instrument or comparable process, does this right indelibly attach. People v. Coleman, 43 N.Y.2d 222, 401 N.Y.S.2d 57 (1977). Note that not all identification cases involve the right to counsel which 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). See also People v. Esposito, 68 N.Y.2d 961, 510 N.Y.S.2d 542 (1986). 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). The defendant must be shown to have waived his rights beyond a reasonable doubt. People v. Valerius, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972). 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 501, 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.) If the police are aware of facts that might lead them to believe that a defendant is represented by counsel in another unrelated matter, they have a duty to inquire. People v. Rosa, 65 N.Y.2d 380, 492 N.Y.S.2d 542 (1985). Further a defendant has a right to counsel which attaches when an accusatory instrument or comparable process 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. Howard, 106 A.D.2d 663, 482 N.Y.S.2d 917 (2d Dept. 1984); People v. Muccia, 83 A.D.2d 687, 442 N.Y.S.2d 312 (3rd Dept. 1981).

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 the 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. Rosa, 65 N.Y.2d 380, 492 N.Y.S.2d 542 (1985); People v. Kazmarick, 52 N.Y.2d 322, 438 N.Y.S. 247 (1981); People v.

Servidio, 77 A.D.2d 191, 433 N.Y.S.2d 169 (2d Dept. 1980), aff'd., 54 N.Y.2d 951, 445 N.Y.S.2d 143 (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 People's burden of proof of voluntariness). Cf. People v. Morton, 116 A.D.2d 925, 498 N.Y.S.2d 874 (3d Dept. 1986). 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. 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. Esposito, 68 N.Y.2d 961, 510 N.Y.S.2d 542 (1986); 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).

(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); 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. Torres, 72 A.D.2d 754, 421 N.Y.S.2d 275, 277 (2d Dept. 1979); 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; and

(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?; and

(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. Hicks, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986); 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).

However, 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, 230 (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 officer's 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 it's 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) Gratuitous material - Officer-witnesses frequently use the prosecutor's questions to launch into extraneous and damaging facts. Insist that the 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 669,341 N.Y.S.2d 127 (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 generally CPL §710.30.

(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), which 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 summarizing 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 Gilmore v. Henderson, 646 F.Supp. 1528 (E.D.N.Y. 1986); 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 necessary 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 prosecution's 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 the jury to understand, but it is also easier for the 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 consistent statement. People v. Singer, 300 N.Y. 120 (1949). But examine the rule closely; a prior consistent 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 consistent 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 the 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 facts 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); and

(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); 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. Cousart, 74 A.D.2d 877, 426 N.Y.S.2d 295 (2d Dept. 1980); People v. Boyd, 59 A.D.2d 558, 397 N.Y.S.2d 150 (2d Dept. 1977).

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; and

(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 from suggestions by police;

(4) accomplice receiving special benefits from police; and

(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. Spencer, 79 Misc.2d 72, 361 N.Y.S.2d 240 (Sup. Ct. Erie Co. 1974); People v. Courtney, 40 Misc.2d 541, 243 N.Y.S.2d 457 (Sup. Ct. N.Y. Co. 1963).

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 stipula-

ting 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; and

(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) had 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. The predicate for an admission is clear and convincing proof that the evidence is genuine and has not been tampered with or altered. People v. Ely, 68 N.Y.2d 520, 510 N.Y.S.2d 532 (1986). 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 (3d 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 People'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 whether the defendant or the officer is lying; or that an acquittal is tantamount to a finding that the officers committed perjury. United States v. Richter, 826 F.2d 206 (2d Cir. 1987); United States v. Praetorius, 622 F.2d 1054 (2d Cir. 1979); United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); People v. Bryant, 77 A.D.2d 603, 430 N.Y.S.2d 101 (2d Dept. 1980); People v. Ingram, 49 A.D.2d 865, 374 N.Y.S.2d 327 (1st Dept. 1975);

(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); or

(3) involve the prosecutor personally vouching for credibility of officers. People v. McKutchen, 76 A.D.2d 934, 429 N.Y.S.2d 460 (2d Dept. 1980). People v. Figueroa, 38 A.D.2d 595, 328 N.Y.S.2d 514 (2d Dept. 1971).

XII - REQUEST TO CHARGE

A defendant is entitled to have a court charge that 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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BASIC COURSE FOR PROSECUTORS
BUREAU OF PROSECUTION AND DEFENSE
SERVICES OF THE DIVISION OF
CRIMINAL JUSTICE SERVICES

PRESENTATION ON

"PROSECUTION OF SEX OFFENSE CASES"

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THE PURPOSE OF THIS PRESENTATION IS TO DISCUSS THE PROSECUTION OF SEX OFFENSE CASES INCLUDING THOSE INVOLVING CHILDREN.

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OUTLINE OF PRESENTATION:

I. ADULT VICTIM SEX CRIME CASE

A. INTERVIEWING VICTIM

1. Explain the purpose of a felony hearing to the victim and what her role will be. Indicate for her that the defendant will be present and that she will be cross-examined by defendant's attorney.

2. Do not judge victim, listen to her relate events of crime. - Obtain an overview. Phase into details of crime with victim.

3. If victim was injured, determine from victim if photographs were taken of her injuries. If not, contact local police department immediately for photographer.

4. Determine if victim went to the hospital as a result of rape - good testimony for felony hearing purposes, actual medical records not necessary.

5. Allow victim time to read her police statement before felony hearing.

6. Be familiar with agencies that counsel adult rape victims, may become an issue for victim(i.e. local Rape Crisis Volunteers).

B. PRELIMINARY OR FELONY HEARING

1. Take time to discuss case and court procedure with victim. Frequently, victim will want an order of protection from court.

2. Hearing should be brief - simply cover elements of Article 130.00 charge - should restrict Defense Attorney on cross-examination.

3. If have other felony charges along with sex crime charge (i.e. Assault Second Degree), consider conducting hearing on that one charge (Assault, Second Degree); will be much easier for victim and less likely to have inconsistent testimony at trial.

4. If your office does not have a special unit to vertically prosecute sex crime cases, order transcript of felony hearing and forward it along with your notes to Grand Jury and Trial sections.

5. Protect the victim on cross-examination with appropriate objections (i.e., objection: question beyond scope of direct examination.)

6. Indicate problems you perceived with case or victim for Grand Jury and Trial Assistants (i.e. victim has a very soft voice - difficult to hear).

7. Be professional and sensitive to victim. Always explain next step in legal process once hearing completed and case held for Grand Jury.

C. PROSECUTION EVIDENCE

1. Medical records - Extremely helpful for presentation but not absolutely necessary. Look for presence of sperm, acid phosphetase (component of seminal fluid), patient's "history" to doctor (account of sex crime), injuries, photographs of victim, hair samples and finger nail scrapings. Even if medicals negative, fact that victim went to the hospital for an internal examination because she was raped is a strong argument on summation that rape did indeed occur. Corroborates victims testimony.

2. Torn or stained clothing - Chain of custody important. If clothes seized at hospital they will probably be forwarded to local forensic lab or to police officer at hospital, determine early on for trial months later. Corroborates victims testimony.

3. Weapons or objects/instruments - Used by defendant during commission of crime. (i.e. gun, knife, stick, rope, etc....).

4. Other witnesses including recent outcry witness - Other witnesses, eyewitnesses a luxury - not common; recent outcry witness common - legally admissible (see Baccio v. The People, 41 N.Y.265). The fact that a sex crime victim made a complaint shortly after crime is competent, admissible evidence. Must talk with police and victim early on to determine if other witnesses exist. Corroborates victim's testimony.

5. Statement by defendant (CPL §710.30) - Any statement by a defendant can be significant at trial, always talk with arresting officers early on to determine this. Defendant may also call victim from jail to apologize, offer money to drop charges, etc. - victim can testify to these admissions against penal interest at trial. People vs. Brown, 26 N.Y.2d 88, 257 N.E.2d 16,308 N.Y.S. 2d 825(1970). Corroborates victim's testimony.

6. Fingerprint evidence - Obviously very helpful in an "identification" rape case, request from police officers early on. Corroborates victim's testimony. Be sure the crime scene is checked and don't be afraid to call the "no fingerprint" witness - jurors are very concerned about fingerprints.

7. Bitemark evidence - Accepted scientifically, legally admissible, common in sex crimes. Almost as conclusive as fingerprint evidence. Photographs of victim's bitemark must be taken and an order to show cause prepared by ADA to obtain mouth impression from defendant (need qualified police detective for photographs and local forensic dentist to obtain defendant's mouth impression for analysis). Particularly helpful on identification and consent rape cases). People vs. Middleton, 54 N.Y.2d 42, 444 N.Y.S.2d 581, 429 N.E. 100(1981). Corroborates victim's testimony.

8. Victim's belongings/items found on person of defendant - rape, robbery, burglary situation. Corroborates victim's testimony.

9. Rape Trauma syndrome - Expert testimony

   a) Now admissible in New York State, People v. Reid, 123 Misc. 2d 1084, 475 N.Y.S. 2d 471 (1984), allowing Assistant District Attorney to present an expert witness on their direct case or as a rebuttal witness. Corroboration victim's testimony.

b) RTS - Quoting from the leading authority in this area, Dr. Ann Burgess, her text - Rape Crisis and Recovery, pp. 33-47 (1979):

"A rape victim suffers an invasion of her bodily privacy in an intensely personal and unsettling manner, triggering a number of emotional and psychological reactions running the gamut from shock, fear, distrust, and anger to guilt, shame and disgust. As victims of this violent crime are now finally beginning to receive some of the recognition and professional attention that has been so long denied to them, the term "rape trauma syndrome" has developed to encompass the recurring pattern of post-rape symptoms".

c) RTS - has received wide acceptance in the scientific community, it is a recognized example of a "post-traumatic stess disorder" - important: because "post-traumatic stress disorder" is defined in the third edition of Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, 1980.

d) Recent case law, including "Reid" indicates that: "Since the reaction to rape is unique and so complex as to warrant scientific investigation, it follows that an understanding of those reactions is not within the common understanding or experience of the persons of ordinary intelligence and experience who may be expected to sit on a jury (475 N.Y.S. 2d at 742).

e) Arguments for admissibility:

1) Knowledge of RTS and its influence on the victim is not accessible to the community or to the average juror - expert testimony is warranted to educate jurors.

2) The expert testimony offered on RTS will only explain the general patterns of behavior and will not attempt to categorize the individual behavior of the victim in the instant case.

3) The expert will offer no opinion on the credibility of the witness. The traditional province of the jury will not be invaded concerning the witnesses" credibility, weight to be given the expert testimony is for the jury to determine.

4) RTS is reliable scientific evidence documented and accepted by the medical community.

f) RTS expert testimony could be crucial on a "one-on-one consent defense rape case" or a case involving unusual or bizarre behavior on behalf of the sex crime victim and also in sex crime cases involving young children (comparison of victim's behavior before and after crime.

g) Ultimate hypothetical question asked of RTS expert: "based upon your expertise in this area, do you have an opinion, within reasonable medical certainty as to whether the victim's behavior is consistent with RTS. (Basically, expert is telling jury that this victim was sexually assaulted).

D. TWO DEFENSES

1. IDENTIFICATION

A. Defense attorney sympathizes with the victim, indicates to jury that clearly a violent sexual assault occurred, a rape, but my client did not do it. ("stranger rape").

B. Counter with:

1. All faces are distinct.

2. Trauma of crime burned defendant's face in victim's mind.

3. In Court identification of defendant by victim (middle of direct examination or at end).

4. Victim's opportunity to observe defendant during crime.

5. 710.30 statement of defendant - (.e., defendant tells officer upon arrest that victim was ex-girlfriend or a prostitute who didn't get paid).

6. Identification of defendant at crime scene, hospital, show-up by police officers.

7. Line up identification of defendant by victim - line-up photos admissible. (C.P.L. §60.30)

8. Thorough trial preparation of victim witness as to testifying at trial. Victim should be prepared to tell jury why she is positive that the defendant is the perpetrater.

2. CONSENT

A. Sexual contact occurred, but consensual, not forcible (i.e. victim and defendant knew each other, or defendant claims they knew each other.

B. COUNTER WITH

1) Medical records - injuries, goes to "forcible".

2) Photos - depicting injuries.

3) 710.30 Statement, (i.e. - defendant gave an alibi to police officers upon arrest or alibi to judge at arraignment) Inconsistent or alternative defense.

4) Expert testimony - Rape Trauma Syndrome.

5) Through trial preparation of victim/witness as to testifying. Victim should be prepared to tell jury that the sexual contact was forible, an act against her will. (i.e. victim may explain her acquiesance was through fear of defendant or threat made by defendant).

E. MARITAL RAPE -PEOPLE v. LIBERTA

1. Marital exemption was deleted (by case law, not statutory charge) from section 130.35 and 130.50 of the Penal Law on December 20, 1984.

> "It is now the law in New York State that any person who engages in sexual intercourse or deviate sexual intercourse with any other person by forcible compulsion is guilty of either Rape in the First Degree or Sodomy in the First Degree". (People v. Liberta, 64 N.Y.2d 152, 172).

2. Definition of "female" in Article 130.00 is no longer applicable.

3. According to "Liberta", husbands are criminally responsible for raping their wives and vice-versa.

II. CHILD VICTIM SEX CRIME CASE

A. Interviewing Child Victim

1. Must spend time when interviewing children, should not be interrupted. May need to meet with child more than once.

2. If possible, interview child alone. Frequently, it is easier for a child to talk about a sex crime if their parents are not present.

3. Talk with parents initially and explain your role and steps in legal system.

4. If case involves an intra-familial sexual abuse, consult Child Protective Caseworker assigned to case - may be able to assist you in interview with child.

5. Do not lead child - allow child victim to explain to you in his/her own words what happened.

6. Key-in on child's terminology so you may communicate with child.

7. Use of anatomically correct dolls in interview with child witness can be very helpful. (Particularly useful with a very young child that is having a difficult time explaining sex crime verbally).

7. Make it clear to child victim that what happened was not their fault, they did nothing wrong.

8. Determine crime date from child. New York case law allows a thirty (30) day time period as legally sufficient in child sexual abuse cases. People v. Morris, 94 AD2d 959, 464 N.Y.S. 2d 87(1983). Important when drafting indictment. (i.e. sexual abuse occurred on, about or between, August 1, 1985, and August 31, 1985.)

9. Be familiar with local agencies and clinics that counsel children that have been sexually abused. Parents will ask for this information.

B. PROSECUTION EVIDENCE

1. Medical Records - Extremely helpful but not absolutely necessary. Particularly conclusive with a young child victim (i.e. female-hymen not intact, semen present in mouth or vaginal area). Corroborates child victim's testimony.

2. Torn, Stained or Unusual Clothing - Not unusual for a defendant to dress child in adult-like clothes and use facial make-up before sexual abuse. Corroborates child victim's testimony.

3. Weapons, Objects/Instruments or Lubricants - used by defendant in commission of crime (i.e. foam, jellies and lubricants are commonly used by defendants involved in sexually abuse of children.- particularly in intra-familial situations). Corroborates child victim's testimony.

4. Other Witnesses Including Recent Outcry - Child victim will eventually tell someone of abuse - determine first person victim told (i.e. friend, teacher, priest, sister, brother, etc.). In addition, may be other child witnesses to the crime itself, particularly in intra-familiarl cases. Corroborates child victim's testimony.

5. Statement by Defendant (P.L. §710.30) - Child molesters frequently make statements upon arrest (i.e., I am receiving counseling in family court for this). Corroborates child victim's testimony.

6. Statement by Defendant to Victim - Defendant frequently will contact victim and apologize or intimidate victim. (i.e. - Defendant will guilt-trip victim, if you testify, Daddy will never get out of jail or come home). Corroborates child victim's testimony.

7. Statement by Defendant/Respondent to Child Protective Caseworker - Assistant District Attorney allowed to use this admission in Criminal Court Trial. Caveat: do not order Child Protective Caseworker to talk with defendant and get a statement, "Miranda" would then come into play. Caseworker has no obligation to Mirandize defendant unless they become an agent of DA. Corroborates child victim's testimony.

8. Fingerprint Evidence - Particularly useful in extra - familial sexual abuse case. Corroborates victim's testimony.

9. Bitemark Evidence - Common in sex crime cases, although more common with adult victims. Corroborates child victim's testimony.

10. Familial Sexual Abuse Expert Testimony

a) New York case law now allows expert testimony on People's Direct Case, or as rebuttal testimony, to explain behavioral charcteristics of sexually abused children, People v. Benjamin, 481 N.Y.S. 2d 827 (4th Dept. 1984).

b) The Fourth Department's rationale in "Benjamin" is as follows:

"Crimes involving sexual abuse, particularly when committed in a family setting, are complex because they often involve young victims who are unable or unwilling to articulate the sordid details of the criminal acts. The victims may suffer a wide range of emotional reactions resulting from the violence and breach of family trust. The average juror does not have a general awareness of a young victim's reaction to Sodomy or sexual abuse". (481 N.Y.S. 2d at 832).

c) Expert testimony essential in case involving recanting or delayed reporting on part of victim (expert will testify that this is common, not uncommon).

d) Arguments for admissibility:

1. Behavorial reactions to familial sexual abuse are not within the knowledge and life experience of the average jury - expert testimony is warrant to educate jury.

2. Expert testimony offered on familial sexual abuse will only explain general characteristics and symptoms of a child who has been sexually abused by a family member. The expert will not categorize the individual behavior of the victim in the instant case.

3. The expert will offer no opinion on the credibility of child victim. Credibility is an issue for the jury.

4. General characteristics and symptoms of a child that has been sexually abused by a family member is generally accepted and documented in the field.

e) Ultimate hypothetical question asked of familial sexual abuse expert: "Based upon your expertise in this area, are the general characteristics and symptoms you just explained to the jury consistent with a child that has been sexually abused by a family member."

C. THREE DEFENSES

1. Identification

A) Extra-familial child abuse case. Defense counsel will sympathize with young child/victim, no question that he or she was sexually assaulted; but a young child cannot be positive as to the identification.

B) May also be used in intra-familial child abuse case. (i.e. child victim living with mother and her boyfriend, defendant is child's natural father, defense: boyfriend sexually assaulted child.)

C) Counter With:

1. All faces are distinct.

2. Trauma of crime, particularly a child victim of a sex crime, burned defendant's face in victim's mind.

3. In court identification of defendant by victim (middle of direct examination or at end.)

4. Victim's opportunity to observe defendant during crime.

5. 710.30 statement of defendant (i.e. I was with child on that day but she is lying.) - Rebuttal.

6. Defendant/Respondent's statement to Child Protective caseworker (i.e. I perceived child as an adult and the sexual contact was voluntary.)

7. Line-up identification of defendant by victim use photos of line-up at trial - (C.P.L. 60.30).

8. Identification of defendant at crime scene, hospital, - "Show-up" by police officers.

9. Thorough preparation of victim as to testifying at trial.

   a) Particularly important with a child witness.

   b) Before trial or Grand Jury, show victim the Grand Jury room and courtroom, explain to child where they will sit, where the defendant will be seated and where the jurors will sit. (will be less traumatic for child when actually testifies).

2. CONSENT

A. Not applicable to any case involving a child less than eleven years old (statutory).

B. Not applicable to cases involving victims less than fourteen (14) years old and seventeen (17) years old if defendant is eighteen (18) or twenty-one (21) years older or more, respectively.

C. Counter with:

1) Medical Recods - document injuries.

2) Photos - depicting injuries.

3) Expert testimony - familial sexual abuse.

4) Thorough trial preparation of victim. Child victim should be prepared to tell jurors that the sexual contact was forcible or against his or her will.

a) i.e. - I did not want to have the sexual contact, but the defendant is my father and I did what he told me to do.

b) "forcible" does not require injuries; can be an express or implied threat.

3. FABRICATION

A. Sexual abuse was planted in child's mind by another person - (i.e. victim's mother is involved in a hotly contested divorce with defendant).

B. Child victim feels defendant/father is too strict and makes up charge to get back at him. Particularly strong argument if child victim is older, teenage years.

C. Counter with:

1) Other child family members that have been sexually abused by defendant/father/rebuttal).

2) Courage it requires for a child victim to testify in open court.

3) Medical records and photos indicating injuries.

4) Recent outcry witness.

5) Detailed nature of child victim's testimony concerning sexual acts (can't be made-up).

D. RECENT CHANGES IN THE LAW CONCERNING CHILD ABUSE CASES

1. 130.16 P.L. Sex Offenses; Corroboration - Penal Law No longer requires corroboration of a child witness in a non-forcible sex crime case.

a) Effective November 1, 1984.

b) Child must be a sworn witness for 130.16 to apply. If child is unsworn, corroboration still necessary (C.P.L. §60.20).

2. 190.32 C.P.L. - Allows Video taping of child witnesses for Grand Jury purposes.

1) Effective November 1, 1984.

2) Video tape not admissible at trial.

3. 65.00 C.P.L. - Use of Close Circuit Television for Child Witnesses at Trial.

a) Allows a child to testify in a separate room, other than courtroom, at trial. Testimony and child is heard and seen in courtroom via close circuit T.V.

b) Child witness means a person twelve (12) years old or less.

c) Charge must be an Article 130 crime or 255.25 P.L. (Incest).

d) "Testimonial Room" - any room separate and apart from the courtroom from which the testimony of a vulnerable child witness can be transmitted to the courtroom by means of live, two-way closed-circuit television.