BASIC COURSE

FOR

PROSECUTORS XIII

VOLUME I

DIVISION OF CRIMINAL JUSTICE SERVICES

NEW YORK STATE

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1988

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GOVERNOR

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August 9, 1988

Dear Participant:

On behalf of John J. Poklemba, Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services, welcome to the thirteenth annual Basic Course for Prosecutors, conducted by the Bureau of Prosecution Services.

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

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

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

Very truly yours,

Gloria Herron Arthur

Gloria Herron Arthur
Director, Bureau of
Prosecution Services

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New York State Division Of Criminal Justice Services

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TABLE OF CONTENTS

VOLUME I

BASIC COURSE FOR PROSECUTORS XIII

TABLE OF CONTENTS

VOLUME II

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The Prosecution Function

By

Hon. Thomas R. Sullivan,
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Revised in June, 1988

By

Shawn M. Brown
Law Student Intern

THE PROSECUTION FUNCTION

(Lecture Outline)

I. The changing role of the Prosecutor

A. An historical perspective:

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

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

B. Constitutional and statutory authority:

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

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

C. The role and duties of the DA today:

1. Advocate;

2. Investigator;

3. Legal Scholar;

4. Advisor to police agencies;

5. Chief law enforcement officer,

a. Coordinator of criminal justice agencies,

b. Aid in improving criminal justice legislation;

6. Administrator.

D. Apparent paradoxes:

1. Advocate - "Minister of Justice";

2. Attorney - but no client;

3. Politically - apolitical in operations.

II. Prosecutorial Discretion

A. General - The power to prosecute crime and control the prosecution after formal accusation has been made reposes in the District Attorney. McDonald v. Sobel, 272 App. Div. 455, 72 N.Y.S.2d 4 (2d Dept. 1947), aff'd, 297 N.Y. 679, 77 N.E.2d 3 (1947); see People v. DiFalco, 44 N.Y.2d 482, 406 N.Y.S.2d 279, 377 N.E.2d 732 (1978).

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

January 1979 Grand Jury of the Albany County Supreme Court v. Doe, 50 N.Y.2d 14, 427 N.Y.S.2d 950, 405 N.E.2d 194 (1980) (dissent of Fuchsberg, J.).

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

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

2. Specific Discretionary acts not reviewable;

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

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

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

d. To submit a case to grand jury: People v. DiFalco, supra.

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

f. To resubmit a case to grand jury: Kerstanski v. Shapiro, 84 Misc.2d 1049, 376 N.Y.S.2d 844 (Sup. Ct. Orange Co. 1975); but see People v. Wilkins, 68 N.Y.2d 269, 508 N.Y.S.2d 893, 501 N.E.2d 542

(1986).

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

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

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

1. Official misconduct (Penal Law §195.00); Hindering prosecution (Penal Law §205.50); Criminal facilitation (Penal Law §115.00); Tampering with physical evidence (Penal Law §215.40); Conspiracy (Penal Law §105.05); People v. Muka, 72 A.D.2d 649, 421 N.Y.S.2d 438 (3d Dept. 1979); People v. Mackell, supra.

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

D. Plea bargaining:

1. Lesser plea cannot be accepted without the consent of the DA. McDonald v. Sobel, supra.; CPL §220.30.

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

3. Legislative Controls:

a. Drug Law;

b. Predicate felony law;

c. Violent felony law.

E. Dismissals - Practically without control by court.

F. Voluntary control standardization through use of policy manuals.

III. Ethical responsibilities and considerations:

A. Dealings with witnesses:

1. Don't give "the lecture";

2. Responsibility to correct material misstatements.

B. Dealings with lawyers:

1. Professional manner;

2. Scrupulously honest;

3. Avoiding appearance of impropriety.

C. Dealings with the court:

1. Respectful but not fawning;

2. Cooperative but not subservient.

D. Dealing with the media:

1. Fair press-free trial guidelines.

E. Forensic Impropriety:

1. Appeals to prejudice;

2. Characterization of defendant;

3. Misrepresenting or misstating facts;

4. Ad hominem attacks on defense counsel.

F. What are the causes of ethical impropriety:

1. Ignorance

2. "They do it too.";

3. "White hat" syndrome.

G. Problems of part time DA's.

IV. Civil Liability:

A. The limited scope of absolute immunity for quasi-judicial activities. Imbler v. Pachtman, 96 S.Ct. 984, 424 U.S. 409, 47 L.Ed.2d 128 (1976); see also Levy v. State, 86 A.D.2d 574, 446 N.Y.S.2d 85 (1st Dept. 1982), aff'd, 58 N.Y.2d 733, 459 N.Y.S.2d 27 (1982).

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

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

VICTIMS' RIGHTS AND THE ROLE OF THE PROSECUTOR

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Revised

May, 1988

I. BACKGROUND

A System Out of Balance

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

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

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

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

II. Victim Assistance Education and Training

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

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

III. General Prosecutor's Responsibilities

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

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

played poster. (9NYCRR 6170.4(c)(1); Exec. L. §625-a(1))

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

3. Protective Orders - Prosecutors should assist victims/witnesses in obtaining protective orders and

other protective services where appropriate. (9NYCRR 6170.4(3))

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

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

C. Prompt Property Return - Unless there are compelling reasons for retaining property relating to proof at

trial prosecutors should insure prompt property return.

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

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

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

4. Property shall not include unlicensed weapons or those used to commit crimes, marihuana, controlled substances, contraband, or items the ownership or

legality of possession of which is disputed. (Exec. L. §642(3); and 9NYCRR 6170.4(g)(1)); See also, P.L. Article 450 - Disposition of Stolen Property)

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

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

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

Pursuant to 9NYCRR 6170.3(b) and (c) the prosecutor's office should keep a list of programs in their jurisdiction which provide such services to crime victims. The list shall include the location and telephone number of the program, the services provided by each program and the hours of operation. Prosecutors shall disseminate necessary information and otherwise assist crime

victims in obtaining information on the availability of appropriate public or private programs that provide counseling, treatment or support for crime victims, including but not limited to the following: rape crisis centers, victim/witness assistance programs, elderly victim services, victim assistance hotlines and domestic violence shelters.

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

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

A. Arraignment

1. The prosecutor must insure notification of victims, witnesses, relatives of those victims and witnesses who are minors, and relatives of homicide victims, if such persons provide the appropriate official with a current address and telephone number, either by phone or by mail, if possible, of judicial proceedings relating to their case, including:

    1. the arrest of an accused;

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

    3. the release of the accused pending judicial proceedings.

    (Exec. L. §641(3); 9NYCRR 6170.4(d)(1-2))

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

a. Prosecutors, as the process goes forward, shall be responsible for informing the crime victim of that office's particular responsibilities in the criminal justice process and how the crime victim will be asked to assist the prosecutor in discharging these responsibilities. Where appropriate, this explanation shall include specific information regarding the conduct of proceedings at which the victim may be asked to assist, including but not limited to identification procedures, testimony and sentencing.

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

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

d. The stages of a criminal proceeding about which the crime victim may be informed, where appropriate and of significance to that victim, include, but are not limited to: the arrest of an accused; identification proceedings; the initial appearance of an accused before a judicial officer; the release of an accused pending judicial proceedings; mediation; preliminary hearing; grand jury proceedings; pre-trial hearings; disposition, including trial, dismissal, entry of a plea of guilty; and sentencing, including restitution.

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

B. Grand Jury and Other Pre-trial Proceedings - At this stage of the prosecution a crime victim and/or other persons may be needed as prosecution witnesses. The prosecutor should inform all subpoenaed witnesses that they are entitled to witness fees. (CPL §610.50)(1)) Prosecutors should also inform witnesses that if they qualify as an eligible crime victim they may be entitled to reimbursement from the Crime Victims Board for the reasonable cost of transportation to and from courts in connection with the prosecution of the crime

upon which the claim is based. (Exec. L. §631(10)) As a matter of courtesy witnesses should be notified of cancelled proceedings. When requesting adjournments or consenting to a defense request for same, any adverse impact on crime victim should be considered.

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

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

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

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

1. To minimize the number of times a child victim is called upon to recite the events of the case and to foster a feeling of trust and confidence in the child victim, whenever practicable, a multidisciplinary team involving a prosecutor, law enforcement agency personnel, and social services agency personnel should be used for the investigation and prosecution of child abuse cases.

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

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

potential adverse impact the delay or continuance may have on the well-being of the child.

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

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

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

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

Under §50-b of the Civil Rights Law, victims of sex offenses under the age of 18 have the right to have

their identity kept confidential. Therefore prosecutors must insure that no portion of any police report, court file or other document which tends to identify such a victim is disclosed.

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

C. Disposition - Prosecutors have an obligation to bring the views of violent crime victims to the attention of the court. Pursuant to Section 642(1) of the Executive Law, the victim of a violent felony offense, a felony involving physical injury to the victim, a felony involving property loss or damage in excess of two hundred fifty dollars, a felony involving attempted or threatened physical injury or property loss or damage in excess of two hundred fifty dollars or a felony involving larceny against the person should be consulted by the district attorney in order to obtain the views of the victim regarding dispostion of the criminal case by dismissal, plea of guilty or trial. In such a case in which the victim is a minor child,

or in the case of a homicide, the district attorney should consult for such purpose with the family of the victim. In addition, the district attorney should consult and obtain the views of the victim or family of the victim, as appropriate, concerning the release of the defendant in the victim's case pending judicial proceedings upon an indictment, and concerning the availability of sentencing alternatives such as community supervision and restitution from the defendant. The failure of the district attorney to so obtain the views of the victim or family of the victim shall not be cause for delaying the proceedings against the defendant nor shall it affect the validity of a conviction judgment or order.

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

Where appropriate prosecutors should advise the sentencing court that the victim seeks restitution to the extent of the injury or economic loss or damage of the

victim and the amount of restitution sought by the victim (P.L. §60.27) See also, CPL §390.50(2) And, upon imposition of a fine, restitution or reparation by the sentencing court, prosecutors shall also be directed to file a certified copy of the court's order with the county clerk. This order is entered in the same manner as a judgement in a civil action and wherever appropriate prosecutors should also file a transcript of the docket of the judgement with the clerk of any other county of the State. Prosecutors may in their discretion and upon order of the court institute the necessary proceedings to collect such judgement. (C.P.L. §420.10(6))

PREPARATION FOR TRIAL

by

CHARLES J. HEFFERNAN, JR.

Reprinted 1988

I. INTRODUCTION:

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

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

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

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

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

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

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

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

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

II. PREPARATION: THE FIRST STEPS

A. The Essentials:

1. Trial Preparation involves these basic functions:

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

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

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

(d) Formulating a trial preparation plan

(e) Organizing for trial

B. Organizing For Trial Preparation

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

2. The Case File:

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

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

(i) Prosecution Summary:

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

(ii) Chronology of the Prosecution:

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

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

(iii) The Motion List

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

(iv) Correspondence File

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

(v) Preparation Tasks

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

(vi) Pleadings

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

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

(vii) Witness Statements (or Rosario Material)

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

(viii) Minutes File

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

filed. Copies will be needed for discovery by counsel.

(ix) Grand Jury Slips and Exhibits

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

(x) Trial Exhibits

Three components comprise this file:

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

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

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

(xi) Tape Transcripts

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

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

(xii) Scientific Reports

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

(xiii) Media File

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

(xiv) Criminal History: Prosecution Witnesses

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

(xv) Criminal History: Defendant

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

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

(xvi) Photos

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

(xvii) Miscellaneous

3. The Trial Notebook

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

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

(i) Preparation

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

(ii) Voir Dire

Among the components found here are:

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

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

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

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

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

(iii) Opening Statement

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

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

(iv) Direct Case: People

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

(v) Cross Examination of People's Witnesses

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

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

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

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

(vi) Direct Examination of Defense Witnesses

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

(vii) Cross Examination of Defense Witnesses

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

(viii) Summation

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

(ix) Applicable Law

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

(x) Requested Jury Instructions

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

(xi) Miscellaneous Matters.

III. USE AND DEVELOPMENT OF AVAILABLE INFORMATION

A. General Principles

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

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

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

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

ALWAYS DO THESE essential elements of trial preparation:

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

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

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

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

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

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

B. Sources of Useful Information

1. Police Records:

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

2. Correction Dept. Records:

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

3. Forensic Evidence:

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

4. Judicial Records:

(a) Minutes of Proceedings in:

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

(b) Certificates of Disposition

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

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

(c) Papers of lower and superior courts.

5. Other Criminal Records:

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

6. Premises Records:

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

7. Financial:

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

(b) Credit Records:

(i) Credit cards
(ii) Credit surveys

8. Employment Records:

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

9. Seek cooperation of other prosecutorial agencies:

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

10. Miscellaneous Items:

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

C. Developing Information

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

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

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

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

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

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

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

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

(A) Appear in a lineup.

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

(C) Be fingerprinted.

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

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

(F) Provide specimens of his handwriting.

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

2. By Court Order:

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

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

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

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

(d) To compel participation in a lineup:

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

(ii) In a changed appearance:

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

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

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

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

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

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

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

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

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

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

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

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

(a) See Generally.

(i) CPL Article 610;

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

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

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

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

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

IV. INTERVIEWING WITNESSES

A. Preparation for the Interview:

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

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

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

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

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

(b) Envisioning details of a street scene.

(c) Seeing relationships in conspiracy cases.

B. Some General Considerations:

1. Who to Interview:

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

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

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

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

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

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

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

2. Where to Conduct the Interview:

   (a) Preferably in the prosecutor's office.

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

3. When to interview:

   (a) As soon as possible.

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

4. How to Interview:

   (a) General Considerations:

      (i) Avoid multiple parties questioning the witness.

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

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

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

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

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

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

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

(b) Content of the Interview:

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

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

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

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

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

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

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

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

statements available to him during the interview.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Some Special Problems

(i) Children as Witnesses

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

(ii) Accomplice Witnesses

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

(iii) Expert Witnesses:

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

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

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

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

(c) Summary:

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

E. Taking Statements From Defendants

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

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

2. Before leaving the prosecutor's office, arrangements should have been made for recording the statement in one of the following ways:

   (a) Stenographic machine

   (b) Tape recording

   (c) Videotape

   (d) Verbatim shorthand method.

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

3. Upon arriving at the precinct, the police should fully brief the prosecutor as to:

   (a) Facts of the case

   (b) Full details concerning the suspect's background

   (c) What led police to the suspect

   (d) Any statement police obtained from suspect before the prosecutor's arrival

   (e) The treatment of suspect from apprehension to present, including

      (i) Length of custody.

      (ii) Has suspect slept, eaten, visited bathroom, or been given opportunity to do so?

(iii) Has an attorney entered the case?

(iv) Whom has suspect telephoned?

4. Before questioning begins, the prosecutor should:

(a) Be certain that police have:

(i) Vouchered all relevant evidence.

(ii) Had necessary photos taken.

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

(iv) Preserved all personal effects of the victim.

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

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

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

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

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

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

5. The Interview:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. EXAMINING THE DEPARTING OR ABSENT WITNESS

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

1. Out of State Witness:

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

2. Jailed Witness:

   (a) Within New York State: CPL Article 630

   (b) Outside the State: CPL Article 650

3. The "Material" Witness:

   (a) See CPL Article 620

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

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

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

2. NB:

   (a) Must show a need for this procedure.

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

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

VI. FINALIZING PREPARATION: SOME THOUGHTS

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

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

C. Some questions are in order.

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

13 Has the summation been thought out?

14. Have I left anything out?

D. KNOWING THE PLAYERS - AND THE UMPIRE

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

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

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

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

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

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

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

VII. CONCLUSION:

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

APPENDICES:

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

LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS

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LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS

Table of Contents

LOCAL CRIMINAL COURT ACCUSATORY INSTRUMENTS

A. Introduction

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

B. Categories of Local Criminal Court Accusatory Instruments

[1] Information

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

An information is an accusatory instrument which serves as the basis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2] Simplified Information

The simplified information is a written accusation by a police

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

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

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

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

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

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

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

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

[3] Prosecutor's Information

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

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

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

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

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

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

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

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

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

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

(3) they are similar in law; or

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

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

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

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

At trial, an application for consolidation of joinable offenses may

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

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

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

[4] Misdemeanor Complaint

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

waiver or subsequent thereto. See People v. Colon, 110 Misc.2d 917, 443 N.Y.S.2d 305 (Crim. Ct. N.Y. Co. 1981), rev'd, 112 Misc.2d 790, 450 N.Y.S.2d 136 (Sup. Ct. App. T. 1st Dept. 1982), rev'd, 59 N.Y.2d 921, 466 N.Y.S.2d 319 (1983). Any waiver of the right to be prosecuted by an information must be conscious and knowing. People v. Gittens, 103 Misc.2d 309, 425 N.Y.S.2d 771 (Crim. Ct. Bronx Co. 1980). A defendant has the right to refuse to be tried on a misdemeanor complaint, in which case the district attorney has the option to file supporting depositions containing non-hearsay factual allegations to support the charges or to file an information. See People v. Whetson, 135 Misc.2d 1, 513 N.Y.S.2d 910 (Crim. Ct. N.Y. Co. 1987) (where the failure by the People to properly corroborate the misdemeanor complaint so as to convert it to an information divested the court of jurisdiction); People v. Pinto, 88 Misc.2d 303, 387 N.Y.S.2d 385 (Mt. Vernon City Ct. Westchester Co. 1976). Where the district attorney failed to file supporting depositions and trial commenced, the misdemeanor complaint was dismissed as a jurisdictionally defective accusatory instrument. People v. Redding, 109 Misc.2d 487, 440 N.Y.S.2d 512 (Crim. Ct. N.Y. Co. 1981). Absent defendant's waiver, the misdemeanor complaint must be replaced by an information within a reasonable time after arraignment. People v. Smith, 103 Misc.2d 640, 426 N.Y.S.2d 952 (Crim. Ct. Kings Co. 1980); see also People v. Callender, 112 Misc.2d 28, 448 N.Y.S.2d 92 (Sup. Ct. App. T. 1st Dept. 1981).

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

prosecuted on an information is a nullity. People v. Weinberg, 34 N.Y.2d 429, 358 N.Y.S.2d 357 (1974). A waiver of consent to prosecution by a misdemeanor complaint will never be presumed where the court fails to advise the defendant of his right to be prosecuted on an information as required by CPL §170.10(4). Id. However, where a defendant represented by counsel has expressly waived the reading of his rights pursuant to CPL §170.10(4), including the reading of his right under CPL §170.65(1) and (3) to be prosecuted upon an information, and thereafter proceeds through preparation for trial and trial on a misdemeanor complaint without raising any objection, he may be deemed to have waived prosecution by information and consented to prosecution on the misdemeanor complaint. People v. Connor, 63 N.Y.2d 11, 479 N.Y.S.2d 197 (1984).

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

(1) it substantially conforms to the requirements prescribed in CPL §100.15, discussed in Section B[1], supra; and

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

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

A misdemeanor complaint is basically a form used to charge a misde-

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

342 N.Y.S.2d 864 (Dist. Ct. Suffolk Co. 1973).

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

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

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

jury. In so ruling, the Court noted that CPL §220.10(2) was not designed nor ever intended to allow a defendant not yet indicted:

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

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

[5] Felony Complaint

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

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

its face when:

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

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

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

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

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

[6] Supporting Deposition

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

In People v. Hohmeyer, 70 N.Y.2d 41, 517 N.Y.S.2d 448 (1987), the Court held that a pre-printed supporting deposition form was sufficient to meet the requirements of CPL §100.20. The factual statements in the deposition are communicated by check marks made in boxes next to the applicable conditions and observations signifying the complainant's allegations.

C. Grounds for Motion to Dismiss Accusatory Instrument

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

[1] Defects under CPL §170.35

[a] Accusatory Instrument Defective on its Face

Defense counsel may move to dismiss the accusatory instrument on the ground that it is defective on its face within the meaning of CPL §170.30(1)(a). An accusatory instrument is defective on its face when it fails to allege the necessary non-hearsay allegations which would establish, "if true, every element of the offense charged and the defendant's commission there of" (CPL §100.40[1][c], §100.15[3]). Facial insufficiency of an information is a nonwaivable jurisdictional defect. People v. Alejandro, 70 N.Y.2d 133, 517 N.Y.S.2d 927 (1987). See also People v. Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841 (1977), People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 523 (1979). However, the instrument may not be dismissed as defective but must be amended where the defect or irregularity is of a kind that may be cured by amendment and the People move to so amend. For a discussion of the amendment of the accusatory instrument, see Section D, infra.

[i] Information

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

1974). An information charging endangering the welfare of a child was dismissed where it charged only that the defendant had failed to exercise reasonable diligence in preventing his son from becoming an abused or neglected child or a person in need of supervision or a juvenile delinquent. People v. Dailey, 67 Misc.2d 107, 323 N.Y.S.2d 523 (Yates Co. Ct. 1971). An information charging a defendant, who was a representative of the Department of Social Services, as an aider and abettor in violating an ordinance prohibiting the use of cellars as habitable space, was dismissed where it merely alleged that the defendant "caused and permitted a family to use a boiler room for sleeping purposes." People v. Brickel, 67 Misc.2d 848, 325 N.Y.S.2d 28, (Justice Ct. Spring Valley Rockland Co. 1971). The information was insufficient since it did not describe how the defendant aided and abetted a landlord in permitting a family to inhabit a boiler room. The prosecutor should ensure that the information does not simply parrot the language of the statute. But see, People v. Caraballo, 135 Misc.2d 536, 515 N.Y.S.2d 965 (Crim. Ct. Kings Co. 1987) (where defendant's admission contained in the accusatory instrument fulfilled the nonhearsay requirements for a sufficient misdemeanor information.)

An information is sufficient if it alleges specific acts constituting the offense or offenses charged. An information charging obstructing governmental administration was factually sufficient where it alleged that the defendants encircled a police officer who was attempting to place someone under arrest, thereby enabling that person to flee. People v. Shea, 68 Misc.2d 271, 326 N.Y.S.2d 70 (Yonkers Ct. of Spec. Sess. Westchester Co. 1971). An information charging obstruction of

governmental administration was sufficient where it alleged that the defendant had blocked the doorway to his bar and thus physically prevented a police officer from inspecting the bar as required by the Alcoholic Beverages Control Law. People v. DeMartino, 67 Misc.2d 11, 323 N.Y.S.2d 297 (Dist. Ct. Suffolk Co. 1971). An information charging harassment was deemed insufficient in People v. Hall, 48 N.Y.2d 927, 425 N.Y.S.2d 56 (1979), when it failed to specify that the act was done with intent to harass, annoy or alarm. Accord People v. Maksymenko, 109 Misc.2d 191, 442 N.Y.S.2d 699 (App. T. 2d and 11th Jud. Dists. 1981), aff'g, 105 Misc.2d 368, 432 N.Y.S.2d 328 (Crim. Ct. Queens Co. 1980) (information which failed to contain essential "intent" elements to support harassment and resisting arrest charges was insufficient). See People v. Young, 123 Misc.2d 486, 473 N.Y.S.2d 715 (Crim. Ct. Bronx Co. 1984) (omission of intent is a jurisdictional defect which renders an information invalid).

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

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

[ii] Simplified Information and Supporting Deposition

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

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

If a supporting deposition to a simplified information is requested but not filed in advance of trial, the simplified information must be dismissed. People v. Baron, 107 Misc.2d 59, 438 N.Y.S.2d 425 (2d Dept.

1981); People v. DeFeo, 77 Misc.2d 523, 355 N.Y.S.2d 905 (App. T. 2d Dept. 1974); People v. Zagorsky, 73 Misc.2d 420, 341 N.Y.S.2d 791 (Broome Co. Ct. 1973). The defendant has no obligation to accept an adjournment to allow the People to furnish the supporting deposition. DeFeo, supra. See People v. Hartmann, 123 Misc.2d 553, 473 N.Y.S.2d 935 (Westchester City Ct. 1984) (the People are not entitled to adjournment in order to make timely service of copy of supporting deposition). However, if the defendant fails to request the supporting deposition, he cannot move to dismiss the simplified information on the ground that no supporting deposition was filed. Furthermore, if a defendant receives an inadequate supporting deposition in advance of trial, but waits until jeopardy attaches before moving to dismiss the simplified information, he is deemed to have waived the defense of double jeopardy and the People may refile and serve the simplified information with an adequate supporting deposition. People v. Key,* 87 Misc.2d 262, 391 N.Y.S.2d 781 (App. T. 9th and 10th Jud. Dists. 1976), aff'd, 45 N.Y.2d 111, 408 N.Y.S.2d 16 (1978). If the supporting deposition is inadequate, defense counsel should make a motion to dismiss in writing, upon reasonable notice to the People. People v. Fattizzi, 98 Misc.2d 288, 413 N.Y.S.2d 804 (App. T. 9th and 10th Jud. Dists. 1978). The motion should generally be made before commencement of trial, but in no event can the court entertain the motion after the sentence has been imposed. Id. at 289, 413 N.Y.S.2d at 806. Furthermore, under Key, a simplified traffic information dismissed upon the ground of inadequacy does not preclude the district attorney from filing a subsequent adequate instrument.

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

While a simplified information is not defective if the deponent signs the supporting deposition above the verification instead of subscribing below as directed by CPL §100.20 [People v. Coldiron, 79 Misc.2d 338, 360 N.Y.S.2d 788 (App. T. 9th and 10th Jud. Dists. 1974)], a supporting deposition to a simplified traffic information was dismissed with leave to resubmit where deponent signed above the verification. See People v. Lennox, 94 Misc.2d 730, 405 N.Y.S.2d 581 (Justice Ct. Town of Greenburgh Westchester Co. 1978). Note that at least one court has held that there is no requirement of a verified information in a traffic infraction prosecution commenced by a simplified information. See Tipon v. Appeals Board of Administrative Adjudication Bureau, 82 Misc.2d 657, 372 N.Y.S.2d 131 (Sup. Ct. Monroe Co. 1975), aff'd, 52 A.D.2d 1065, 384 N.Y.S.2d 324 (4th Dept. 1976).

[iii] Felony Complaint

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

[b] Jurisdictional Defect

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

[c] Invalid Statute

An accusatory instrument must be dismissed where the statute defining the offense charged is unconstitutional or otherwise invalid. CPL

§170.35(1)(c). A claim that a statute is unconstitutional is waivable and may not be raised on appeal. People v. Thomas, 50 N.Y.2d 467, 429 N.Y.S.2d 584 (1980), People v. Iannelli, 69 N.Y.2d 684, 512 N.Y.S.2d 150, (1986).

[d] Defective Prosecutor's Information

A prosecutor's information is defective when it is filed at the direction of a grand jury pursuant to CPL §190.70 and the offense or offenses charged are not among those authorized by such grand jury direction. CPL §170.35(3)(a). A prosecutor's information is also defective when it is filed by the district attorney at his own instance pursuant to CPL §100.50(2) and the factual allegations of the original information underlying it and any supporting depositions are not legally sufficient to support the charge in the prosecutor's information. CPL §170.35(3)(b). See People v. Malausky, 127 Misc.2d 84, 485 N.Y.S.2d 925 (Rochester City Ct. 1985).

[2] Defendant Has Received Immunity

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

[3] Prosecution Barred by Reason of Previous Prosecution

Pursuant to CPL §170.30(1)(c), an accusatory instrument must be dismissed where the prosecution is barred by reason of a previous prosecution under CPL §40.20, which provides that a person may not be prose-

cuted twice for the same offense nor separately for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or

(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or

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

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

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

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

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

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

(1) The court lacked jurisdiction.

(2) The defendant procured prosecution for a lesser offense to avoid prosecution for a greater one, without the knowledge of the appropriate prosecutor.

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

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

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

Conviction for possession of obscene material with intent to promote on September 26, 1976, does not bar prosecution for possession of obscene material with intent to promote it on October 2, 1976. Braunstein v. Frawley, 64 A.D.2d 772, 407 N.Y.S.2d 250 (3rd Dept. 1978). However, the

court in Frawley found that petitioner could be charged in a single information for having committed only one such crime on October 2, even though the prosecution was based on his possession of six different allegedly obscene films with intent to promote them on that date. The court stated:

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

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

[4] Untimely Prosecution

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

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

time:

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

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

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

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

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

commenced within three years after the commission thereof. CPL 30.10(3)(d).

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

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

[5] Denial of Right to Speedy Trial

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

prescribed in that statute, which varies according to the charge(s) in the accusatory instrument, subject only to two exceptions set forth in CPL §30.30(3).

(1) The defendant is accused of criminally negligent homicide (proscribed in Penal Law §125.10), second degree manslaughter (proscribed in Penal Law §125.15), first degree manslaughter (proscribed in Penal Law §125.20), murder in the second degree (proscribed in Penal Law §125.25) and murder in the first degree (proscribed in Penal Law §125.27).

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

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

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

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

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

felony;

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

(c) sixty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months;

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

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

(a) a reasonable period of delay resulting from other proceedings concerning the defendant, including but not limited to: proceedings for the determination of competency and the period during which defendant is incompetent

to stand trial; demand to produce; request for a bill of particulars, pre-trial motions; appeals; trial of other charges; and the period during which such matters are under consideration by the court; or

(b) delay resulting from a continuance granted by the court in the interests of justice at the request of, or with the consent of, the defendant or his counsel. Note that a defendant without counsel is not deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent; or

(c) delay resulting from the absence or unavailability of the defendant or, where the defendant is absent or unavailable and has either escaped from custody or has previously been released on bail or on his own recognizance, the period extending from the day the court issues a bench warrant pursuant to CPL section 530.70 because of the defendant's failure to appear in court when required, to the day the defendant subsequently appears in the court pursuant to a bench warrant or voluntarily or otherwise. A defendant must be considered absent whenever his location is

unknown and he is attempting to avoid apprehension or prosecution, or his location cannot be determined by due diligence. A defendant must be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence; or

(d) a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial pursuant to the statute has not run and good cause is not shown for granting a severance; or

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

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

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

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

(ii) the continuance is granted to allow the district attorney additional time to prepare the People's case, justified by exceptional circumstances.

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

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

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

final;

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

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

(d) where a criminal action is commenced by the filing of a felony complaint, and thereafter,

> in the course of the same criminal action, either the felony complaint is replaced with or converted to an information, prosecutor's information or misdemeanor complaint, or a prosecutor's information is filed, the period applicable for the purposes of determining the period during which defendant may be incarcerated pending trial is the period applicable to the charges in the new accusatory instrument, calculated from the date of the filing of such new accusatory instrument, provided, however, that when the aggregate of such period and the period of time (not counting excludable periods) already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds ninety days, the period applicable to the charges in the felony complaint must remain applicable and continue as if the new accusatory instrument had not been filed.

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

> [t]here can be only one criminal action for

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

In People v. Whetson, supra, 135 Misc.2d 1, 513 N.Y.S.2d 910 (Crim. Ct. N.Y. Co. 1987) it was determined that the People failed to properly corroborate a misdemeanor complaint so as to convert it to an information. Defendant, however, also made a motion to dismiss the charges on the ground that the People failed to file an information within 90 days, the statutory time limit prescribed in CPL 30.30(1)(b). The court held that since defendant was never arraigned on a true information, the fact that pretrial motions were made on the misdemeanor complaint could not serve to extend the 90-day period within which the People must be ready for trial. People v. Whetson, Id. at 8-9, 513 N.Y.S.2d at 915-916. Also, in People v. Coleman, 104 Misc.2d 748, 429 N.Y.S.2d 142 (Rockland Co. Ct. 1980), defendant obtained a dimissal of the accusatory instrument pending against him. Defendant was held for the action of a grand jury after a preliminary hearing in local criminal court. In dismissing the charges, the court noted that more than six months had passed in violation of CPL §30.30. It rejected the People's argument that it lacked jurisdiction to grant such an order, noting that the State had the right to make an application with respect to the

identical subject matter pursuant to CPL §180.40 and found that the denial of a similar forum to defendant would be denial of fundamental fairness and justice as well as due process. Coleman, supra, 104 Misc.2d at 749, 429 N.Y.S.2d at 143. See also People v. Mitchell, 84 A.D.2d 822, 444 N.Y.S.2d 118 (2nd Dept. 1981), where the Appellate Division reversed the trial court's granting of defendant's motion to dismiss the indictment for failure to prosecute, holding that a hearing was required to first determine whether the police had exercised due diligence in their efforts to locate the defendant. The court noted that if the defendant could not be located despite diligent efforts by police, there would be good cause for the prosecution's delay in obtaining an indictment. See also People v. Colon, 59 N.Y.2d 921, 466 N.Y.S.2d 319 (1983) (defendant obtained a dismissal of the accusatory instruments filed against him where the People were not ready for trial within the statutory period and defendant's absence was not the cause of the delay); People v. Reid, 110 Misc.2d 1083, 443 N.Y.S.2d 600 (Crim. Ct. N.Y. Co. 1981) (when the People reduced the charge from a felony to a class A misdemeanor, the prosecution's failure to be ready for trial within the shorter period of either ninety days of the reduction of the charge or six months of the filing of the original complaint, resulted in a dismissal of the information). But see People v. McBride, 126 Misc.2d 272, 482 N.Y.S.2d 203 (City Ct. 1984) (time excludable in determining when a defendant must be brought to trial is chargeable to all charges against the defendant, whether made under original accusatory instrument or under any superseding information, including any added charges under a superseding information). See also People v. Arturo, 122 Misc.2d 1058, 472 N.Y.S.2d 998 (Crim. Ct. N.Y. Co. 1984) (none of the exclusions of CPL

§30.30(4) apply until conversion of a misdemeanor complaint into a jurisdictionally sufficient information is completed). When the district attorney announces his readiness for trial on the record, it does not mean that no delay on the part of the People occurring afterwards is to be counted against them in determining whether the readiness requirements of CPL §30.30 have been met. The Court of Appeals in People v. Anderson, 66 N.Y.2d 529, 498 N.Y.S.2d 119 (1985) stated:

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

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

[6] Other Impediment

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

[7] Interests of Justice

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

(1) the nature of the crime;

(2) the available evidence of guilt;

(3) the prior record of the defendant;

(4) the purpose and effect of further punishment;

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

(6) the impact on the public interest of a dismissal

of the charge. Clayton, supra.

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

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

In People v. James, supra, the trial court, applying the Clayton criteria, dismissed in the interests of justice two informations charging two female defendants with the Class B misdemeanor of prostitution, despite the district attorney's office policy of refusing to offer an adjournment in contemplation of dismissal or a plea to a violation in prostitution cases. The court in dismissing, noted that defendants were first offenders and stated that no valid societal purpose would be served by their conviction and incarceration. In People v. Zongone, 102 Misc.2d 265, 423 N.Y.S.2d 400 (Yonkers City Ct. Westchester Co. 1979), the court denied the defendant's motion to dismiss the information in the interests of justice because it was "devoid of facts which would manifest why it should be granted." Id. at 267, 423 N.Y.S.2d at 402. The court did not dismiss the People's charge of disorderly conduct because

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

D. Amendment of the Accusatory Instrument

A court will permit the amendment of a defective accusatory instrument, since CPL §170.35(1)(a) provides that an accusatory instrument which is insufficient on its face may not be dismissed as defective but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment and where the People move to so amend. See also People v. Grosunor, 109 Misc.2d 663, 440 N.Y.S.2d 996 (Crim. Ct. Bronx Co. 1981); People v. Penn. Cent. RR. Co., 95 Misc.2d 748, 417 N.Y.S.2d 822 (Crim. Ct. Kings Co. 1978).

An information may be amended to change an erroneous name or date.

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

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

Pursuant to CPL §100.45(3), the amendment of an accusatory instrument to add any additional charge supported by the factual allegations which is not a lesser included offense must be made before the commencement of the trial or entry of a plea of guilty, and the defendant must be accorded any reasonable adjournment necessitated by the amendment. People v. Harper, 37 N.Y.2d 96, 371 N.Y.S.2d 467 (1975); People v. Davis, 82 Misc.2d 41, 370 N.Y.S.2d 328 (App. T. 2nd and 11th Jud. Dists. 1975). Such an amendment not made in accordance with this statute invalidates the accusatory instrument. Id. For example, in People v. Lamour, 133 Misc.2d 865,866, 508 N.Y.S.2d 867 (Dist. Ct. Nassau Co. 1986), it was held that the People may not make an amendment to the information by annexing an alleged statement of defendant to their affirmation in opposition to defendant's motion to dismiss the information.

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

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

[1] Amendment of Prosecutor's Information

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

> 1. At any time before or during trial, the court may upon application of the people and with notice to the defendant and

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

In People v. Doe, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (Nassau Co. Ct. 1973), the court held that an indictment charging possession and sale of dangerous drugs, which did not describe the physical traits or last known address of the unnamed "John Doe" defendant, was fatally defective and could not be cured by amendment. An indictment, and therefore a prosecutor's information, must allege every element of the crime. If it does not, it is fatally defective and the district attorney's only remedy is resubmission. See People v. Tripp, 79 Misc.2d 583, 360 N.Y.S.2d 752 (Delaware Co. Ct. 1974), aff'd, 46 A.D.2d 743, 360 N.Y.S.2d 1015 (3rd

Dept. 1974), where the court held that an indictment charging criminal possession of marijuana, which failed to allege that the possession was "knowing and unlawful" was fatally defective and that the only remedy was resubmission. Furthermore, an indictment which does not contain a factual statement apprising the defendant of the alleged conduct which is the basis for the charge cannot be cured by amendment; the People's only remedy is resubmission. See People v. Gibson, 77 Misc.2d 49, 354 N.Y.S.2d 273 (Sup. Ct. Bronx Co. 1972), modified on other grounds, 40 A.D.2d 818, 338 N.Y.S.2d 478 (1st Dept. 1972), aff'd, 34 N.Y.2d 575, 354 N.Y.S.2d 945 (1974) (an indictment's charge of official misconduct was defective since it only used the language of the statute and did not specify any facts which would support the charge). However, the Court of Appeals has since held that an indictment which specifically refers to the applicable statute, incorporates by reference, all the elements of the crime charged. The Court noted that although the prosecution failed to allege the element of "wilfullness" in the ten count indictment charging tax evasion, the People's intention to prove wilfullness was clear. People v. Cohen, 52 N.Y.2d 584, 439 N.Y.S.2d 321 (1981). Similarly, in People v. Wright, 67 N.Y.2d 749, 500 N.Y.S.2d 98 (1986), the Court of Appeals reversed the Appellate Division which had reversed defendant's conviction for burglary and dismissed the indictment, because the indictment omitted the word "unlawfully" from the charge. The Court of Appeals concluded that since the indictment charged defendant with burglary in violation of Penal Law §140.20, it sufficiently incorporated the statutory elements, including "unlawfulness." In accord, People v. Ray, 71 N.Y.2d 849, 527 N.Y.S.2d 740 (1988), an indictment which alleged that "on or about and between May 1978 and April 1979," defendant, who

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

An indictment may be amended if it does not change the theory of the prosecution. CPL §200.70(1). Accordingly, in People v. Salley, 72 Misc.2d 521, 339 N.Y.S.2d 702 (Nassau Co. Ct. 1972), the People were permitted, at the pre-trial suppression hearing, to amend an indictment

charging attempted bribery, where the amendment consisted of a statement that the purpose of the alleged bribery attempt was to obtain the release of the already arrested defendant and the indictment had originally stated that the alleged bribe attempt had been made to avoid arrest. The People were permitted to amend a robbery indictment to charge that defendant had stolen drugs rather than jewelry and money since the nature of the property alleged to have been stolen is not a material element of robbery. People v. Spann, 56 N.Y.2d 469, 452 N.Y.S.2d 869 (1982). Accord People v. Barnes, 119 A.D.2d 828, 501 N.Y.S.2d 545 (2nd Dept. 1986). Informations filed in supplement to the prosecutors' informations and charging additional crimes arising from the same incident are not valid "amendments" within the meaning of CPL §200.70. People v. Salley, 133 Misc.2d 447,450, 507 N.Y.S.2d 345, 347 (Dist. Ct. Nassau Co. 1986). In People v. Reddy, 73 A.D.2d 977, 424 N.Y.S.2d 238 (2d Dept. 1980), the court found that an amendment of an indictment to delete a co-defendant's name, who had previously been acquitted of the instant charges, did not alter the theory of the People's case. Conversely, as the district attorney conceded in People v. Taylor, 43 A.D.2d 519, 349 N.Y.S.2d 74 (1st Dept. 1973), it was reversible error to amend an indictment charging burglary, which alleged that the crime the defendant intended to commit during his unlawful entry into a building was larceny, to state that the intended crime was assault, since this amendment changed the theory of the prosecution. The court in Taylor so held despite the fact that there the indictment was endorsed to indicate that the defendant's consent to the amendment had been obtained. See also People v. Jenkins, 85 A.D.2d 265, 447 N.Y.S.2d 490 (1st Dept. 1982) (defendant could not be retried for offenses which the trial court had reduced from first degree

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

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

E. Superseding Accusatory Instruments

At any time before entry of a plea of guilty or commencement of a trial, the People may file a second information or a second prosecutor's information with the same local criminal court charging the defendant with an offense charged in the first instrument. CPL §100.50(1). Upon the defendant's arraignment on the second instrument, the count of the

first instrument charging such offense must be dismissed, but the first instrument is not superseded with respect to any count contained therein which charges an offense not charged in the second instrument. Ibid. However, if a prosecutor's information is followed by additional informations containing different charges, such informations are not deemed to be valid superseding informations under CPL §100.50. People v. Salley, 133 Misc.2d at 450-451, 507 N.Y.S.2d at 347-8 (Dist. Ct. Nassau Co. 1986).

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

A misdemeanor complaint must be superseded by an information, unless the defendant waives prosecution by information and consents to be prosecuted on the misdemeanor complaint. CPL §100.50(3); CPL §170.65(3). Conversely, in the absence of a valid waiver of prosecution by information, a defendant need not plead to a misdemeanor complaint. People v. Ryff, 100 Misc.2d 505, 419 N.Y.S.2d 845 (Crim Ct. Bronx Co. 1979). CPL §100.50(3) provides that the superseding information must comply with CPL §170.65(2) which provides that an information replacing a misdemeanor complaint need not charge the same offense or offenses, but at least one count thereof must charge the commission by the defendant of an offense based upon the conduct which was the subject of the misdemeanor

complaint. In addition, the information may, subject to the rules of joinder, charge any other offense for which the factual allegations or any supporting depositions accompanying it are legally sufficient to support, even though such offense is not based upon conduct which was the subject of the misdemeanor complaint. A superseding information may not be used to consolidate cases. People v. Cunningham, 74 Misc.2d 631, 345 N.Y.S.2d 903 (N.Y. Co. 1973).

F. Motion to Dismiss Accusatory Instrument

A motion to dismiss the accusatory instrument must be made within forty-five days after arraignment and before commencement of trial unless the court in its discretion upon application of the defendant extends the time period. CPL §255.20(1). If the defendant is not represented by counsel and has requested an adjournment to obtain counsel or to have counsel assigned, such forty-five day period commences on the date counsel initially appears on the defendant's behalf. Ibid. If a prosecutor's information does not conform to the grand jury direction, the motion to dismiss the information may be made in the local court, but the motion to dismiss the grand jury direction must be made in the superior court, as the superior court empanels the grand jury. People v. CAI Adjusters, 84 Misc.2d 221, 375 N.Y.S.2d 554 (Crim. Ct. Bronx Co. 1975). See also People v. Senise, 111 Misc.2d 477, 444 N.Y.S.2d 535 (Crim. Ct. Queens Co. 1981), where defendant's motion for an order dismissing the information on speedy trial grounds was denied by the local criminal court because defendant was initially charged with a felony, and the felony complaint was never reduced to a misdemeanor complaint. The court held that it had no jurisdiction to grant defendant's motion since the plenary jurisdiction of the criminal court

extends only to misdemeanors or lesser offenses.

G. Refiling of Accusatory Instrument after Dismissal

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

PRELIMINARY HEARING

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PRELIMINARY HEARING

Table of Contents

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A. Purpose and Conduct of Preliminary Hearing

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

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

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

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

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

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

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

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

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

However, the right to a felony hearing is not constitutionally guaranteed for every defendant. People v. Morano, 111 A.D.2d 273, 489 N.Y.S.2d 108, 109 (2d Dept. 1985). For example, by initially presenting the case to the grand jury the people can entirely bypass the preliminary hearing stage. People v. Hodge, 53 N.Y.2d 313, 441 N.Y.S.2d 231 (1981). In addition, the grand jury may issue an indictment after the filing of the felony complaint but before it is disposed of in the local criminal court. People v. Piccoli, 62 A.D.2d 1078, 403 N.Y.S.2d 820, 821 (1978). See also People v. Brooks, 105 A.D.2d 977, 978, 481 N.Y.S.2d 914, 916 (3d Dept. 1984) where the court concluded that the defendant was not entitled to a preliminary hearing because he was incarcerated as a parole violator prior to his indictment.

(1) Sufficiency of Evidence

CPL §70.10(2) provides that "'[r]easonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it... Since the quantum of evidence required to hold a person for the grand jury is less than that required for an indictment*, the judge at the preliminary hearing may be required to hold a defendant without regard to the probability of a successful prosecution." People v. Anderson, 74 Misc.2d 415, 418; 344 N.Y.S.2d 15, 18 (Crim. Ct. Bronx Co. 1973). See also People v. Soto, 76 Misc.2d 491, 495, 352 N.Y.S.2d 144, 149 (Crim. Ct. Bronx Co. 1974 where the court stated that at a preliminary hearing, "the people are not required to present a prima facie case under the provisions of the Criminal Procedure Law. The mere fact that one or more elements of an offense is not established to the degree required at trial or in the grand jury does not require dismissal of the complaint at this juncture."

Note that a local criminal court may dismiss a case at a preliminary

* A grand jury may indict a person for an offense when
(a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and;
(b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense. See CPL §190.65.
"'Legally sufficient evidence' means competent evidence, which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent." CPL §70.10(1).

hearing if it is one where the law requires corroboration of a witness and such corroboration is absent. See People v. Smith, 45 Misc.2d 265, 256 N.Y.S.2d 422 (New Rochelle City Ct. Westchester Co. 1965), where the trial court dismissed a charge of rape because there was no corroboration of the complainant's testimony at the preliminary hearing (required under the law then in effect). The court in Smith ruled that the proof at a preliminary hearing, while it need not be sufficient to obtain a conviction, must be of such sufficiency that a trial court would not be bound to acquit the defendant as a matter of law. But see People v. Martinez, 80 Misc.2d 735, 364 N.Y.S.2d 338 (Crim. Ct. N.Y. Co. 1975) (defendant held for grand jury after preliminary hearing despite lack of corroboration of accomplice witness); see also People v. Jackson, 69 Misc.2d 793, 331 N.Y.S.2d 216 (Crim. Ct. N.Y. Co. 1972); People v. Scarposi, 69 Misc.2d 264, 329 N.Y.S.2d 850 (Crim. Ct. N.Y. Co. 1972); see also discussion in Section C., infra.

In People v. Gurney, 129 Misc.2d 712, 713, 493 N.Y.S.2d 957 (Crim. Ct. N.Y. Co. 1985) the court stated that while under CPL §60.50 a person may not be convicted of an offense based solely on a confession, a confession alone can provide reasonable cause to believe that a defendant committed a crime for purposes of a preliminary hearing. Id. at 714, 493 N.Y.S.2d at 958. But see, People v. Searles, 135 Misc.2d 881, 517 N.Y.S.2d 370 (Rochester City Ct. Monroe Co. 1987) (16 year old defendant's confession of criminal acts, which was presented at preliminary hearing, and which was uncorroborated by any additional or independent proof, was insufficient to hold him for grand jury action).

Testimony at a preliminary hearing concerning allegedly involuntary statements made by a defendant is proper. The question of voluntariness

must be raised at a Huntley hearing. Mattioli v. Brown, 71 Misc.2d 99, 335 N.Y.S.2d 613 (Sup. Ct. Fulton Co. 1972).

> [Q]uestions concerning the ultimate admissibility of evidence, such as the lawfulness of a search of the defendant or his premises, or of any confession he might have made, are not germane to the purposes of the [preliminary] hearing. While the circumstances surrounding the obtaining of such evidence may eventually be tested, and may lead to their exclusion from the trial, those circumstances do not affect the reliability of the evidence as it relates to guilt [citation omitted] and are thus irrelevant to a determination that it is 'reasonably likely' that the defendant committed a felony. The same is true of the question whether the "seizure" of the defendant was a lawful one.
>
> People ex rel. Pierce v. Thomas, 70 Misc.2d 629, 630; 334 N.Y.S.2d 666, 669 (Sup. Ct. Bronx Co. 1972).

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

(2) Conduct of Hearing

CPL §180.60 governs the conduct of the preliminary hearing on a felony complaint. The district attorney must conduct such a hearing on behalf of the People [subdivision (1)], call and examine witnesses and offer evidence in support of the charge [subdivision (5)]. The defendant

may as a matter of right be present at such hearing [subdivision (2)] and testify in his own behalf [subdivision (6)]. But see, People v. Ludwigsen, 128 A.D.2d 810, 513 N.Y.S.2d 513 (2d Dept. 1987) (defendant can waive his presence at a preliminary hearing). Furthermore, upon the defendant's request, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his own behalf [subdivision (7)]. The court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading [subdivision (3)]. Each witness, whether called by the People or by the defendant, must testify under oath, unless he would be authorized to give unsworn evidence at a trial [subdivision (4)]. Each witness, including any defendant testifying in his own behalf, may be cross-examined. See CPL §180.60(1)-(7).

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

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

and cross-examine witnesses, continually claimed his inability to proceed without the assistance of counsel.

Even though the State may bypass the preliminary hearing stage entirely by immediately submitting the case to the Grand Jury, the error in failing to afford defendant the right to counsel at the preliminary hearing was held to be not cured by the fact that defendant was subsequently indicted by the Grand Jury on the same charges which were the subject of the preliminary hearing. The Court of Appeals found the error in Hodge reversible but noted that in some cases the denial of the right to counsel at the preliminary hearing may be only harmless error. The test determinative of harmless error was held to be ... "not what the hearing did not produce, but what it might have produced if the defendant's right to counsel had not been ignored (citations omitted)." Hodge, supra at 321, 441 N.Y.S.2d at 235.

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

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

(4) Counsel's Right to Cross-Examine

In light of the ruling in People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975), a prosecutor most probably should not object to extensive cross-examination by defense counsel if it appears likely that

the prosecution witness, due to age, illness or foreign residency, will not appear at the trial. The New York Court of Appeals held in Simmons that when a People's witness does not appear at the trial, the transcript of his testimony at the preliminary hearing is not admissible at the trial unless the defense was afforded the right to cross-examine the witness adequately at the hearing. That right would be violated by the admission of the testimony since cross-examination on the correctness of the identification, the extent of the lighting at the scene of the crime, the description of the defendant's clothing and facial features, and the witness' visual acuity had not been permitted. See, e.g., People v. Reed, 98 Misc.2d 488, 414 N.Y.S.2d 89 (Sup. Ct. Kings Co. 1979), where the prosecution was precluded from using the minutes of the preliminary hearing at the trial, which was held after the victim's death from chronic alcoholism, because defense counsel, unaware that the victim was an alcoholic, had no opportunity to cross-examine on that question to impeach the victim's credibility and accuracy of recollection.

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

In addition, the Court held that the unavailable witness' hearing testimony was reliable. In support of its finding of reliability of the former testimony the Court noted the "solemnity" of the hearing itself,

the fact that the hearing was "a virtual minitrial of the prima facie case" which explored substantially the same subject matter as did the trial on which it was later to be used, and that the defense counsel's cross-examination of the witness at the preliminary hearing was not unduly restricted.

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

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

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

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

(5) Right to Rosario* Material

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

(6) Preliminary Hearing and Discovery

Although discovery rights do not statutorily attach at a preliminary hearing, discovery is an outcome of the procedure. See Coleman v. Alabama, 399 U.S. 1, 9, 90 S.Ct. 1999 (1970); People v. Galak supra. Defense counsel might use the subpoena duces tecum as a method of discovering the case against the defendant. Not all courts will be

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

receptive to this procedure at the preliminary hearing stage, however. For example, at a preliminary hearing where prosecution experts testified that the victim's death was the result of a homicide, not suicide, and based their opinions in part on certain x-rays, one court ruled that defense counsel did not have the right to have those x-rays produced. See People v. Mono, 95 Misc.2d 632, 408 N.Y.S.2d 283 (Jefferson Co. Ct. 1978).

(7) Nature and Admissibility of Evidence

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

thereof, may be received in such grand jury proceeding as evidence of the facts stated therein. CPL §190.30(3) provides that a written or oral statement, under oath, by a person attesting to one or more of the following matters, may be received in such grand jury proceeding as evidence of the facts stated therein:

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

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

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

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

Although use of such sworn affidavits at a preliminary hearing does not violate the defendant's Sixth Amendment right to confront the witnesses against him, the complainant's testimony rather than an affidavit may be required if the complainant is already present at the preliminary hearing. See People v. Staton, 94 Misc.2d 1002, 406 N.Y.S.2d 242 (Crim. Ct. Bronx Co. 1978); People v. Campbell, supra. CPL §190.30(2) should be strictly construed to limit it to its intended application.

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

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

(8) Closure of Hearing

At the preliminary hearing, the court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings. CPL §180.60(9). In Gannett Co. v. Weidman, 102 Misc.2d 888, 424 N.Y.S.2d 972 (Sup. Ct. Livingston Co.

1980), the court held that a preliminary hearing judge has authority to exclude the press and public from the hearing if there is a "strong likelihood of public disclosure of prejudicial information." Weidman, 102 Misc.2d at 898, 424 N.Y.S.2d at 978. The Weidman court applied two standards, one substantive and one procedural, which seek to safeguard a defendant's right to a trial untainted by prejudicial publicity, while concomitantly providing the press and public with information concerning the hearing which does not pose a threat of prejudice. The standards applied by the Weidman court were formulated in two cases: Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 401 N.Y.S.2d 756 (1977), aff'd, 433 U.S. 368 (1979); and Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 423 N.Y.S.2d 630 (1979).

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

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

Although the De Pasquale and Leggett decisions considered the issue

of closure of a suppression hearing and a competency hearing, respectively, the opinion of Weidman stated that the same standards respecting closure apply to preliminary hearings because:

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

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

The petitioners who brought the Article 78 proceeding were entitled to a transcript and copies of exhibits only after the defendant was no longer in jeopardy. In reversing the order of the Special Term, which had granted petitioner a motion for an order compelling the Town Justice to provide them with a transcript of the hearing and a copy of the exhibits, the Appellate Division noted that Special Term, in granting the motion, had failed to consider the fact that the charge of murder in the second degree was still pending against the defendant and that it was the

ordering full disclosure of a preliminary hearing that contained a statement allegedly made by the defendant when such statement was not yet subject to a ruling by the trial court as to its ultimate admissibility at trial, citing Gannett Co. v. Weidman, 102 Misc.2d 888, 897; 424 N.Y.S.2d 972, 977 (Sup. Ct. Livingston Co. 1980). Under the circumstances it was held such disclosure would hopelessly jeopardize the defendant's right to a fair trial, citing Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 440; 423 N.Y.S.2d 630, 639 (1979). The Appellate Division also pointed out that the Special Term had failed to strike a balance between the right of the defendant to a fair trial and the interest of the public in granting the press access to the transcript of the preliminary hearing.

In Johnson Newspaper Corp. v. Parker, 101 A.D.2d 708, 709, 475 N.Y.S.2d 951, 952 (4th Dept. 1984), appeal dismissed, 63 N.Y.2d 673, 479 N.Y.S.2d 526 (1984), over the petitioner's objection, the court excluded the press and the public from the defendant's preliminary hearing. The Appellate Division held that it was unreasonable for the court to deny petitioner's request for an open courtroom without first considering opposing counsel's argument either over the telephone or granting a short recess for the attorney to appear. See also Capital Newspapers v. Lee, 136 Misc.2d 494, 499, 518 N.Y.S.2d 900, 904 (Sup. Ct. Albany Co. 1987) where in an Article 78 proceeding brought by the newspaper the court held that failure to afford the newspaper, the right to be heard through counsel prior to determination of the motion for closure was arbitrary and capricious and resulted in denial of due process. Id. See also In the Matter of the Application of the Associated Press v. Howard E. Bell, 128 A.D.2d 59, 515 N.Y.S.2d 432, 433 (1st Dept. 1987), affirmed, 70

N.Y.2d 32, 517 N.Y.S.2d 444 (1987), where the Court held that a preliminary hearing may be closed upon motion by the defendant when there is a showing that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, "when reasonable alternatives to closure cannot adequately protect the defendant's pretrial rights".

(9) Right to Adjournment

The preliminary hearing should be completed at one session. In the interests of justice, however, it may be adjourned by the court but, in the absence of a showing of good cause, no such adjournment may be for more than one day. CPL §180.60(10). For example, a reasonable adjournment may be obtained after a preliminary hearing has commenced to obtain a chemical analysis of allegedly dangerous drugs. People ex rel. Fox v. Sherwood, 73 Misc.2d 101, 341 N.Y.S.2d 161 (Sup. Ct. Orange Co. 1973).

(10) Reopening Hearing

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

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

> It is noted that were the court to dismiss on the basis that its discretion would be improperly exercised if it were to reopen the hearing, the District Attorney could, nonetheless, bring the matter before the Grand Jury. The result, if the presentation warranted,

> would be a direction by the Grand Jury to the District Attorney to file a prosecutor's information, which would, perforce, return the matter to the jurisdiction of the Criminal Court. Failure to allow reopening of the preliminary hearing would initiate a circuitous time consuming procedure that would hardly advance the cause of speedy justice to say nothing of the concomitant burdening of our courts (and specifically the Grand Jury) with proceedings of a misdemeanor nature.
>
> It is further noted that the adjournment of this case was not at the behest of either party but for the court's convenience to allow consideration of the law. The court concludes that the rights of the defendant are best preserved and the interests of justice best served by allowing further testimony to be presented upon reopening of the hearing.
> Rosario, 85 Misc.2d at 37, 380 N.Y.S.2d at 219-220.

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

CPL §180.80 provides:

> Upon application of a defendant against whom a felony complaint has been filed with a local criminal court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than one hundred twenty hours, or in the event that a Saturday, Sunday or legal holiday occurs during such custody, one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance unless:
>
> (1) The failure to dispose of the felony complaint or to commence a hearing thereon during such period of confinement was due to the defendant's request, action or

condition, or occurred with his consent; or

(2) Prior to the application:
(a) The district attorney files with the court a written certification that an indictment has been voted; or
(b) An indictment or a direction to file a prosecutor's information charging an offense based upon conduct alleged in the felony complaint was filed by a grand jury; or

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

CPL §180.80 as amended in 1982 expands the time within which a preliminary hearing must be commenced from 72 hours to 120 hours from the time of arrest. Where a Saturday, Sunday, or legal holiday intervenes the time is increased to 144 hours. A defendant must be released on his own recognizance if he is in custody, or, if he is on bail, he must be released and bail must be exonerated, where the People fail to hold a preliminary hearing within 72 hours from the time a defendant's bail is set or within 120 hours from the time of arrest unless one of the above statutory exceptions applies. People ex rel. Fox v. Sherwood, 73 Misc.2d 101, 341 N.Y.S.2d 161 (Sup. Ct. Orange Co. 1973) (defendant was in custody); People v. Cummings, 70 Misc.2d 1016, 333 N.Y.S.2d 625 (Batavia City Ct. Genesee Co. 1972) (defendant was at liberty on bail); People v. Blank, 127 Misc.2d 89, 90, 485 N.Y.S.2d 691, 692 (Orange Co. Ct. 1985) (preliminary hearing scheduled 11 days after arraignment was

reasonable where defendant, who was released on her own recognizance, failed to appear at the first scheduled preliminary hearing). See also People ex rel. Suddith v. Sheriff of Ulster County, 93 A.D.2d 954, 463 N.Y.S.2d 276 (3d Dept. 1983), lv. to app. den., 60 N.Y.2d 551 (1983); People v. Davis, 118 Misc.2d 122, 460 N.Y.S.2d 260 (Justice Ct. Westchester Co. 1983).

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

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

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

The District Attorney cannot adopt a

program of delay which would in effect deny the accused his statutory right.

Accordingly, in Heredia, the court ordered the district attorney to conduct a preliminary hearing and further ordered that if the hearing were not held, the district attorney would be directed to show cause why he should not be held in contempt. Decisions have held that a defendant is not denied due process if the district attorney refuses to conduct the preliminary hearing since a defendant has no constitutional or statutory right to have such a hearing; a defendant's only remedy is to be released on his own recognizance if the hearing is not conducted within the time period mandated by CPL §180.80. People v. Tornetto, 16 N.Y.2d 902, 264 N.Y.S.2d 557 (1965), cert. denied, 383 U.S. 952 (1966); People v. Lohman, 49 A.D.2d 75, 371 N.Y.S.2d 170 (3rd Dept. 1975); People ex rel. Hunter v. Patterson, 55 A.D.2d 693, 388 N.Y.S.2d 724 (3d Dept. 1976); People v. Anderson, 45 A.D.2d 561, 360 N.Y.S.2d 712 (3d Dept. 1974); People v. Hutson, 28 A.D.2d 571, 280 N.Y.S.2d 478 (3d Dept. 1967); People v. McDaniel, 86 Misc.2d 1077, 383 N.Y.S.2d 998 (Long Beach City Court Nassau Co. 1976); People v. Carter, 73 Misc.2d 1040, 343 N.Y.S.2d 431 (Sup. Ct. Spec. Narc. Ct. N.Y. Co. 1973); People v. Galak, supra. For example, in People v. Lohman, supra, the Appellate Division reversed a lower court judgment in an Article 78 proceeding in which that court had ordered the district attorney to conduct a preliminary hearing and prohibited the presentment of the charge to the grand jury on the ground that the defendant had been in custody for eight days without a preliminary hearing. The Appellate Division held that while the defendant could obtain his release under CPL §180.10(2) on the ground that no hearing had been held within 72 hours from the time he was taken into custody, the district attorney's failure to hold the hearing

affected neither his power to present evidence to the grand jury nor the authority of the grand jury to consider such evidence. See also People ex rel. Hunter v. Patterson, supra; People v. Floyd, 133 Misc.2d 1034, 509 N.Y.S.2d 265 (Utica City Ct. 1986) (the court can dismiss the case in the interest of justice, in light of the people's failure to indict the defendant, or afford him the opportunity of a felony hearing).

The authority of the grand jury to indict felons is in no way dependent upon the existence of a prior felony hearing. See also People v. Phillips, 88 A.D.2d 672, 450 N.Y.S.2d 925 (3d Dept. 1982); People v. Bensching, 105 A.D.2d 1054, 482 N.Y.S.2d 385 (4th Dept. 1986). Once the grand jury has acted, the determination as to whether there exists reasonable cause to hold and prosecute a defendant has been made by the grand jury itself, and the need for the preliminary hearing is obviated. Matter of Vega v. Bell, 47 N.Y.2d 543, 419 N.Y.S.2d 454 (1979). See also People v. McDaniel, 86 Misc.2d 1077, 383 N.Y.S.2d 998 (Long Beach City Ct. Nassau Co. 1976) (court refused to cite district attorney for contempt for failure to hold preliminary hearing, despite the fact that it had directed him to hold hearing or state why he could not on the record); Friess v. Morgenthau, 86 Misc.2d 852, 383 N.Y.S.2d 784 (Sup. Ct. N.Y. Co. 1975) (court in Article 78 proceeding refused either to compel district attorney to conduct hearing or to prohibit him from presenting evidence to the grand jury until after the hearing). See also People v. Galak, supra at 723, 452 N.Y.S.2d at 798, where the court stated:

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

> Attorney from presenting evidence against the defendant-petitioner to the Grand Jury until after a preliminary hearing is held.

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

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

(1) Role of the Prosecutor

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

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

The Commentary on standard 3-3.10, states:

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

(2) Defendant's Waiver

§CPL 180.10(2) provides:

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

The court must inform the defendant of his right to a preliminary hearing, afford him an opportunity to exercise that right, and take such affirmative action as is necessary to effectuate that right. CPL §180.10(4). See People v. Scoralick, supra (since the defendant has a right to a preliminary hearing he does not have to specifically request it). A waiver of a preliminary hearing must be "knowingly, intelligently, and understandingly given with full knowledge of the conse-

quences." People ex rel. Pulver v. Pavlak, 71 Misc.2d 95, 98-99, 335 N.Y.S.2d 721, 726 (Greene Co. Ct. 1972). See also People v. Heredia, supra; People v. Meierdiercks, et. al., 68 N.Y.2d 613, 505 N.Y.S.2d 51 (1986) (defendant must expressly waive any objections to delay of his preliminary hearing). Consequently, a waiver of a preliminary hearing by a 17-year-old defendant who had waived counsel was invalid since "his waiver of a preliminary hearing was without foundation in law in that it was not knowingly, intelligently and understandingly given with full knowledge of the consequences." Pavlak, 71 Misc.2d at 99, 335 N.Y.S.2d at 726. Similarly, in People v. Delfs, 31 Misc.2d 665, 220 N.Y.S.2d 535 (Dist. Ct. Nassau Co. 1st Jud. Dist. 1961), decided under the former Code of Criminal Procedure, the court held that the waiver of a preliminary hearing in 1940 by an insane defendant was invalid and would be striken. Consequently, the court rescinded defendant's commitment to a facility for the criminally insane, ordered by the county court after the waiver, and dismissed the information, since the district attorney conceded that the defendant was insane at the time he committed the murder.

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

"waiver" was invalid, there were no exceptional circumstances tolling the CPL 90-day speedy trial rule. The court in so holding stated:

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

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

People v. Carter, supra, held that if a defendant waives his right to a preliminary hearing in reliance on a district attorney's promise to reduce the charge(s) to a misdemeanor, he cannot withdraw his waiver after he is indicted for a felony on the ground that the district attorney broke his promise. The court in Carter stated that the defendant had not been prejudiced by relying on the district attorney's promise, since a preliminary hearing had been held and the charges against the defendant had been dismissed, the grand jury would still have had the power to indict him if it found that there was legally sufficient evidence.

In People v. Chambliss, 106 Misc.2d 342, 431 N.Y.S.2d 771 (Westchester Co. Ct. 1980), aff'd, 110 A.D.2d 707, 488 N.Y.S.2d 194 (2d Dept. 1985), the court held that any violation of a defendant's right to waive personal presence at a preliminary hearing would render an identification of defendant at the hearing inadmissible at trial. See also People v. Lyde, 104 A.D.2d 957, 958, 480 N.Y.S.2d 734 (2d Dept. 1984), where the court held that defendant had the right to waive his presence at the

preliminary hearing where he was subsequently identified by a witness. Having been denied that right, the defendant was entitled to seek suppression of the identification at a Wade hearing and it was error to deny such suppression. Id. However, where there is no real issue as to the defendant's identity, denial of the defendant's request to waive his appearance at the preliminary hearing will be deemed harmless error as a matter of law. People v. James, 100 A.D.2d 552, 553, 473 N.Y.S.2d 252, 254 (2d Dept. 1984).

C. Disposition of Felony Complaint after Preliminary Hearing or Waiver

(1) Disposition of Felony Complaint after Hearing

CPL §180.70 provides:

> At the conclusion of a hearing, the court must dispose of the felony complaint as follows:
>
> 1. If there is reasonable cause to believe that the defendant committed a felony, the court must, except as provided in subdivision three, order that the defendant be held for the action of a grand jury of the appropriate superior court, and it must promptly transmit to such superior court the order, the felony complaint, the supporting depositions and all other pertinent documents. Until such papers are received by the superior court, the action is deemed to be still pending in the local criminal court.
>
> 2. If there is not reasonable cause to believe that the defendant committed a felony but there is reasonable cause to believe that he committed an offense other than a felony, the court may, by means of procedures prescribed in subdivision three of section 180.50, reduce the charge to one for such

non-felony offense.

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

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

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

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

CPL §70.10(2) provides:

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

consist of hearsay.

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

But see People v. Smith, 45 Misc.2d 265, 256 N.Y.S.2d 422 (New Rochelle City Ct. Westchester Co. 1965), discussed in Section A, supra, where the trial court dismissed a charge of forcible rape after a preliminary hearing because there was no corroboration of the complainant's testimony, as required by the law in effect at that time.

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

A charge will be dismissed after a preliminary hearing if the evidence is insufficient as a matter of law. For example, in People v. Reid, 95 Misc.2d 777, 408 N.Y.S.2d 301 (Crim. Ct. Bronx Co. 1978), a defendant was charged with extortion based on allegations that she had tried to obtain $10,000 from complainant in return for dropping a rape

complaint against complainant's common-law husband. However, Penal Law §155.05(2)(e) (extortion) requires that fear be instilled in the victim and here, the complainant's testimony unequivocally establishes that she had not been afraid. Similarly, a gun possession charge was dismissed after a preliminary hearing where the evidence established only that defendant admitted possessing a gun but the evidence did not establish his actual or constructive possession. People v. Barclift, 97 Misc.2d 994, 412 N.Y.S.2d 991 (Crim. Ct. Queens Co. 1979).

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

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

Note: Since a judge of coordinate jurisdiction may not modify a ruling made by a judge of equal rank in the same case, a defendant held on a misdemeanor after a felony hearing may not apply to another local criminal court judge for a new hearing. People v. Solomon, 91 Misc.2d

760, 398 N.Y.S.2d 643 (Crim. Ct. N.Y. Co. 1977).

(2) Reduction to Non-Felony Offense

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

> A charge is "reduced" from a felony to a non-felony offense, within the meaning of this section, by replacing the felony complaint with, or converting it to, another local criminal court accusatory instrument, as follows:
>
> (a) If the factual allegations of the felony complaint and/or any supporting depositions are legally sufficient to support the charge that the defendant committed the non-felony offense in question, the court may:
>
> (i) Direct the district attorney to file with the court a prosecutor's information charging the defendant with such non-felony offense; or
>
> (ii) Request the complainant of the felony complaint to file with the court an information charging the defendant with such non-felony offense. If such an information is filed, any supporting deposition supporting or accompanying the felony complaint is deemed also to support or accompany [sic] the replacing information; or
>
> (iii) Convert the felony complaint, or a copy thereof, into an information by notations upon or attached thereto which make the necessary and appropriate

changes in the title of the instrument and in the names of the offense or offenses charged. In case of such conversion, any supporting deposition supporting or accompanying the felony complaint is deemed also to support or accompany the information to which it has been converted;

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

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

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

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

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

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

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

CPL §180.30 provides:

> If the defendant waives a hearing upon the felony complaint, the court must either:
>
> 1. Order that the defendant be held for the action of a grand jury of the appropriate superior court with respect to the charge or charges contained in the felony complaint. In such case, the court must

promptly transmit to such superior court the order, the felony complaint, the supporting depositions and all other pertinent documents. Until such papers are received by the superior court, the action is deemed to be still pending in the local criminal court; or

2. Make inquiry, pursuant to section 180.50, for the purpose of determining whether the felony complaint should be dismissed and an information, a prosecutor's information or a misdemeanor complaint filed with the court in lieu thereof.

(4) Application in Superior Court Following Hearing or Waiver of Hearing

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

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

(5) Constitutional Consideration Involved in Reduction and Reconsideration

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

GRAND JURY PROCEDURE

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GRAND JURY PROCEDURE

TABLE OF CONTENTS

GRAND JURY PROCEDURE

I. The Grand Jury and its Proceedings are defined in C.P.L. Article 190.

A. The Grand Jury is an arm and a creature of the superior court impaneled for the purpose of hearing and examining evidence concerning offenses and misconduct, nonfeasance or neglect in public office, and taking action upon such evidence. CPL §190.05.

B. The Grand Jury sits by "terms" of the superior court and remains in existence at least until and including the opening date of the next term of such court. Upon declaration of both the Grand Jury and the District Attorney that its business has not been completed, the Grand Jury can have its term extended. C.P.L. §190.15(1).

II. Actions

A. Indictments - for any offense "prosecutable in the courts of the county." CPL §190.55.

1. Accusations against a defendant or defendants charging the commission of a crime or crimes or a crime and a lesser offense. CPL §200.10.

2. The chief method of prosecuting one or more offenses in the superior court. CPL §210.05. Alternatively, a superior court information may be filed by a District Attorney when the defendant waives indictment under Article 195. See CPL §200.10.

B. Directing the Filing of Prosecutor's Informations

1. Legal effect, standards of content and procedures taken upon these statements of accusation by the prosecutor are the same as for indictments. CPL §100.35

2. Accusatory instruments for offenses in the Criminal Court that are considered by the Grand Jury; therefore, only misdemeanors and violations.

C. Reports [CPL §190.85]

Type (a): Concerning misconduct, nonfeasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action.

Type (b): Stating that after such investigation the Grand Jury finds no such misconduct.

Type (c): Proposing recommendations for legislative, executive or administrative action.

1. Such reports become public records unless:

a. The court finds the report scandalous or prejudicial;

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

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

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

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

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

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

In absence of express authority, DA has no power to resubmit to new Grand Jury matters embodied in sealed report of previous Grand Jury. Matter of Reports of April 30, 1979 Grand Jury, 108 A.D.2d 482 (3rd Dept. 1985). Contra, Matter of Special Grand Jury, 129 Misc.2d 770 (Nassau Co. Ct. 1985) (holding DA does not need court approval to submit to another Grand Jury subject matter of previously sealed, type (a) Grand Jury report).

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

Grand Jury report ordered sealed because Grand Jury only provided with copies of CPL Art. 190 and not given any instructions as to standard of proof to be applied in weighing evidence. Additionally, DA recommended to Grand Jury that it vote to have his office prepare type (a) report without explaining the options available to them (e.g., whether report should be issued at all and types of report possible). Matter of Report of Special Grand Jury, 102 A.D.2d 871 (2nd Dept. 1984).

Type (a) Grand Jury report ordered sealed because Grand Jurors not instructed (1) as to what were appropriate objective standards of the public offices, and (2) that even if they found the defendants' evidence untrue, no inference of guilt was to be drawn from their disbelief of defense witnesses. Matter of Reports of April 30, 1979 Grand Jury, 100 A.D.2d 692 (3rd Dept. 1984).

Type (a) report sealed because Grand Jury not advised as to what duties/responsibilities properly attributable to public servant and minutes did not demonstrate that Grand Jury ever approved actual content of report. Matter of June 1982 Grand Jury, 98 A.D.2d 284 (3rd Dept. 1983).

Type (a) report sealed because Grand Jury held public servant to standard of conduct not established by statute or precedent. Moreover, prosecutor erred in presenting report option as "middle road" between indictment and a "no bill," thereby presenting it as inferior alternative to indictment. Matter of Special Rensselaer Co. GJ Reports, 99 A.D.2d 927 (3rd Dept. 1984)

D. Negative Action: Dismissals

1. Automatic: If the Grand Jury fails to take affirmative action, it is deemed to have dismissed the case put before it.

2. When Mandated: If the Grand Jury finds a failure of proof, it must file a finding of dismissal. CPL §190.75(1).

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

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

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

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

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

E. Removal to Family Court

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

However, a Grand Jury may vote to file a request to remove a charge to the Family Court if it finds that a person thirteen, fourteen, or fifteen years old did an act which if done by a person over sixteen would constitute a crime provided that:

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

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

(3) the evidence before it is legally sufficient to establish that such person did such act, and competent and admissible evidence before it provides reasonable cause to believe that such person did such act. [CPL §190.71(b)].

Upon voting to remove a charge to the Family Court under CPL §190.71(b), the Grand Jury must, through its foreman or acting foreman, file with the court by which it is impaneled its request to transfer such charge to the Family Court. The request must:

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

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

(3) be signed by the foreman or the acting foreman. [CPL §190.71(c); see also CPL §190.60(3)]. The court

must approve the Grand Jury request after it is filed, unless it is improper and insufficient on its face, and order the charge removed to the Family Court in accordance with CPL §725 [CPL §190.71(c)].

III. Powers of the Grand Jury

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

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

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

D. Where a local criminal court judge directs that a case be removed to the Family Court, for example, this does not divest the grand jury of its power and duty to

indict for felonious criminal activity. Absent a clear and explicit constitutional or legislative proscription, the power and duty of the grand jury to indict for criminal activity cannot be curtailed. People v. Rodriguez, 97 Misc.2d 379, 411 N.Y.S.2d 526 (Sup. Ct. Kings Co. 1978).

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

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

F. The offense or offenses for which a grand jury may indict a person in any particular case are not limited

to that or those which may have been designated at the commencement of the grand jury proceeding to be the subject of inquiry. CPL §190.65(2).

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

1. CPL Section 190.65(2) specificially incorporates within its intended scope of application CPL §170.25. Thus it is clear that where a case has

been removed to Superior Court at defendant's instance, in light of §190.65(2), the grand jury may indict the defendant for a felony.

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

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

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

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

IV. Proceedings

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

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

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

B. Proceedings: To hear evidence or take affirmative actions at least 16 of the Grand Jury's members must be present; to take affirmative actions at least 12 members, who, having heard "all essential and critical evidence", must concur. CPL §190.25(1); People v. Brinkman, 309 N.Y. 974 (1956); People v. Collier, 131 A.D.2d 864 (2d Dept. 1987).

1. Any grand juror may, but usually it is the foreman, who administers the oath to all witnesses giving sworn testimony.
2. During deliberations and voting only Grand Jurors may be present in the room. The presence of any other person invalidates any action taken upon such voting or deliberation.
3. During any other proceedings, primarily the giving of evidence, the only persons permitted in the Grand Jury room are:

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

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

c. The official stenographer;

d. A qualified interpreter, where appropriate;

e. a guard;

f. The individual witness giving testimony;

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

h. A video tape operator; and

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

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

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

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

D. Evidence:

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

2. EXCEPTION

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

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

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

A "child witness" is defined as a person 12 years of age or less whom the people intend to call as a witness before the grand jury to give evidence

concerning crimes defined in Penal Law Articles 130 or 225.25 of which the person was a victim.

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

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

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

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

E. Standards of Proof

1. Definitions:

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

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

2. Legal Sufficiency: The statute, its commentary and the Court of Appeals [People v. Peetz, 7 N.Y.2d 147, 196 N.Y.S.2 83 (1959); People v. Haney, 30 N.Y.2d 328, 335-336, 333 N.Y.S.2d 403, 409 (1972)], make

clear that a prima facie case must have been presented to support a charge by the Grand Jury in an indictment or order to file a prosecutor's information. The classical definitions of a prima facie case would make it appear that in a criminal matter the evidence must be such that if believed and uncontradicted by exculpatory evidence it would establish the guilt of the accused beyond a reasonable doubt. The evidence that amounts to this quantum must be competent evidence. The former language concerning the standard of legal sufficiency embraced in CPL §190.65(1): "...legally sufficient to establish that such person committed such offense..." was clarified by an amendment, effective April 5, 1983. The statute now continues to read, "provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent,...". While this language had consistently appeared in CPL §70.10(1), it is now perfectly clear that in presenting to the grand jury cases that require corroboration, that corroborative evidence must be introduced before the grand jury for an indictment to be authorized. CPL §190.65(1), as amended L. 1983, c.28, §1, eff. April 5, 1983.

3. Believability: Under the same CPL §190.65, the Grand Jury, after determining the legal sufficiency of the evidence - a determination that should be made by the legal advisor (see commentary) - must then make a second determination: that "competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense," or, as the Grand Jury might be instructed: that the defendant is probably guilty of this crime. Note that this burden is one for the Grand Jury, not the legal advisor, to make. The Grand Jury is to make this finding after discounting whatever evidence the Grand Jury finds unworthy of belief, by the same subjective, inarticulable weighing and screening that a petit jury uses in making its determination of guilt by the higher standard of "beyond a reasonable doubt;" in doing so, it must use experience and common sense to deduce whether there is "evidence or information which appears reliable (and that) disclosed facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that is reasonably likely

likely that such offense was committed and that such person committed it." CPL §70.10(2). The grand jurors are fact finders, and consider the weight, probative value, and credibility of the testimony.

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

The standard for determining the sufficiency of circumstantial evidence is "whether the facts, if proven, and the inferences that logically flow from those acts supply proof of every element of the charged crimes." People v. Deegan, 69 N.Y. 2d 976, 979 (1987). "Moral certainty" standard is applicable only to the trier of fact. Id.

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

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

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

specificity in the Wade-Gilbert-Stovall line of cases.* In addition to ensuring a fair and honest identification of an individual as the individual who committed a particular crime, such an identification procedure becomes an acceptable, in fact the preferable, means of establishing identification in the Grand Jury. It also will, if conducted fairly, be admissible as evidence in chief at trial, whether or not the witness can make an in-court identification.

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

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

Indeed, instances occur where only a photographic identification has been made prior to the grand jury proceeding. Most recently, the Appellate Division, Second Department, in People v. Brewster, 100 A.D.2d 134, 473 N.Y.S.2d 984 (2d Dept. 1984), aff'd, 63 N.Y.2d 419, 482 N.Y.S.2d 724 (1984), reinstated an indictment that had been dismissed by the lower court because the sole evidence of identity before the grand jury as predicated upon prior photographic identification; and the grand jurors were unaware of this fact. The witnesses before the grand jury were simply asked if they had identified the person who committed the crime; and they responded in the affirmative. The court, in refusing to extend the rule that precludes the use of photographic identification evidence at trial to the grand jury proceedings, found the evidence competent and admissible within CPL §190.65. It is suggested that the current state of the law in this area be reviewed before a presentation involving this issue.

V. Relationship of the Grand Jury to its Legal Advisor

A. District Attorney Submits Evidence: The District Attorney presents the witnesses and elicits the testimony, questions, and cross-examines the

witnesses and carries out Grand Jury requests for additional evidence or witnesses to be subpoenaed before it. CPL §§190.50; 190.55.

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

The defendant may waive, with the District Attorney's consent, felony prosecution by indictment and proceed on prosecution by information. CPL §195.10. However, waiver of indictment and prosecution by Superior Court Information may not be effected after the Grand jury has returned an indictment. People v. Banville, 134 A.D.2d 116 (2d Dept. 1988).

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

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

Grand Jury Instructions

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

People v. Lancaster, 69 N.Y.2d 20 (1986) DA did not err in not instructing Grand Jury as to "insanity defense"; such is properly left for trial jury's resolution. No impediment to presenting case to Grand Jury posed by fact that defendant was not legally competent at the time; CPL §730.40(3) clearly contemplates that Grand Jury presentment be made during defendant's incapacity.

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

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

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

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

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

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

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

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

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

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

1. Where the evidence does not amount to a legally sufficient case on one or more charges against one or more defendants the District Attorney should recommend

a dismissal as to that charge or charges or defendant or defendants. See Commentary, CPL §190.65.

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

D. The District Attorney Presents Evidence Honestly, Without Bias: Since the defendant is not present in the Grand Jury room and since his counsel cannot test the validity of the evidence offered against him, and since there is no Judge present to safeguard the defendant's rights, and since the fact of indictment alone is a serious and perhaps calamitous event in an individual's life, the District Attorney stands in a position of vouching for the truth of the evidence he presents. He has

an obligation to cross-examine witnesses and scrutinize evidence to ensure a just and honest presentation of the evidence. See The Prosecution Function 3-3.6, American Bar Association Project on Standards for Criminal Justice, Approved, 1979, Little, Brown & Co., 1980.

Prosecutorial Misconduct

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

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

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

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

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

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

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

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

A. The Defendant has a Qualified Right to Appear Before a Grand Jury: If the defendant serves written notice on the District Attorney at the time of or prior to a Grand Jury presentation of a case against the defendant, he must be accorded an opportunity to

testify on the matter after waiving immunity pursuant to §190.45 of the CPL (discussed below).

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

People v. Luna, 129 A.D.2d 816, 514 N.Y.S.2d 806 (2d Dept. 1987) - Once defendant has timely served notice of desire to testify, District Attorney must notify defendant of proceeding even if underlying felony complaint has already been dismissed.

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

1. Right to Counsel: CPL §190.52(1) provides that any person who appears as a witness and has signed a waiver of immunity has a right to retain, or, if he is indigent, be assigned, counsel who may be present with him in the Grand Jury room. This attorney may advise the witness, but may not otherwise take part in the proceedings.

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

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

People v. Bey-Allah, 132 A.D.2d 76 (1st Dept. 1987) - When defendant has given notice of intention to testify before Grand Jury, District Attorney may not delay scheduling defendant's testimony until after indictment has been voted.

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

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

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

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

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

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

E. Attorney in Grand Jury

1. Those who waive immunity are entitled to:

   a. presence; and

   b. advice.

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

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

3. Instructions to Grand Jury:

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

   b. Provide the foreman with the script to address problems. I suggest reliance on the Grand Jury

itself for initial "encounters." It will demonstrate to the attorney that the Grand Jury is acting independently, that it will not tolerate interruptions, and that it is not intimidated by the presence of the attorney.

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

4. Problems:

a. What may rise - how to respond

(1) attorney addresses Grand Jury:

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

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

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

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

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

(3) attorney gives witness' answers:

(a) make a record;

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

b. DON'T

(1) engage attorney in colloquy;

(2) argue or debate with attorney;

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

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

VII. Immunity

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

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

witness' testifying) the witness receives immunity. But defendant who pleads guilty and then gives testimony before a Grand Jury concerning the same offense before being sentenced cannot then claim immunity for crime to which he pleaded. People v. Sobotker, 61 N.Y.2d 44 (1984) (Note: Court of Appeals declined to say whether it would reach same result where defendant was convicted at trial, rather than by guilty plea).

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

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

1. denials of committing various offenses may give an individual immunity from prosecuting those offenses.

2. Questions put to a witness about prior bad acts for

the purpose of impeaching the witness give the witness immunity from prosecution for those bad acts.

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

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

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

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

D. Waiver:

1. Written instrument.

2. Subscribed (signed) by the witness.

3. Stipulating that the subscriber waives his privilege against self-incrimination and waives immunity that would otherwise be conferred by CPL §190.40.
4. Enumerating the subject or subjects of the proceeding.
5. Sworn to by the witness before the Grand Jury.
6. Executed only after the witness has been informed of his right to confer with counsel.

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

People v. Higley, 70 N.Y.2d 624 (1987) Where Grand Jury informed that defendant's attorney had provided prosecutor with a waiver of immunity signed by defendant and notarized, but defendant did not swear before Grand Jury that he had executed the waiver or waived immunity, waiver was ineffective and transactional immunity inhered.

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

Note: Lower courts, have divided on whether defendant is entitled to execute "limited" waiver of immunity when he only wants to testify before Grand Jury as to 1st -- but not 2nd -- crime for which he

had been arrested. See, People v. Scott, 124 Misc.2d 357 (Suffolk Co. Ct. 1984) (defendant entitled to execute "limited" waiver of immunity); People v. Goetz, 131 Misc.2d 1, aff'd, 116 A.D.2d 316, rev'd on other grounds, 68 N.Y.2d 96 (prosecutor has discretion to determine whether to deny defendant's request for "limited" waiver of immunity, but court will review decision for abuse); People v. Griffin, 135 Misc.2d 775 (Sup Ct Kings Co 1987) (immunity decisions are within discretionary power of the DA and not subject to judicial review).

VIII. Subpoenas

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

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

C. Material obtained pursuant to subpoena

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

2. May be retained and examined by District Attorney and staff or other investigators to assist Grand Jury in its investigation.

Contents may not be disclosed. NOTE - this retention provision is not part of the rules of evidence section, but part of the secrecy section. CPL §190.25(4).

3. United States v. Dionisio, 410 U.S. 1 (1973), held that the Fourth Amendment does not apply to Grand Jury subpoenas to compel voice exemplars, nor does the compelled production of voice exemplars before the Grand Jury violate the Fifth Amendment. Accord, In the Matter of the Special Prosecutor (Onondaga County), Petitioner v. G.W. (Anonymous), Respondent, 95 Misc.2d 298, 407 N.Y.S.2d 112 (Sup. Ct. Onondaga Co. 1978) but see People v. Perri, 72 A.D.2d 106, 423 N.Y.S.2d 674 (2d Dept. 1980), aff'd, 53 N.Y.2d 957, 441 N.Y.S.2d 444 (1981) (defendant from whom handwriting exemplar was compelled by a subpoena ad testificandum, rather than a subpoena duces tecum or a court order, received immunity). See also Matter of District Attorney of Kings County v. Angelo G., 48 A.D.2d 576, 582, 371 N.Y.S.2d 127, 133 (2d Dept. 1978), appeal dism'd 38 N.Y.2d 923, 382 N.Y.S.2d 980 (1976).

4. Newspaper reporter's qualified privilege must yield to Grand Jury right to investigate where relevant information is unavailable from any other source. People v. Rand, 136 Misc.2d 1034 (Sup Ct Richmond Co 1987).

D. Motion to Quash

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

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

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

LAW GOVERNING INDICTMENTS

AND

BILLS OF PARTICULARS

by

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BPDS Senior Staff Attorney

Revised June 1988

by

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Law Intern

LAW GOVERNING INDICTMENT AND BILLS OF PARTICULARS

Table of Contents

Page

I. LAW GOVERNING INDICTMENTS

Introduction

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

A. Definition

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

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

B. Nature, Purpose and History

"The proper purpose of indictment is to bring defendant to trial upon a prima facie case which, if unexplained, would warrant a conviction." People v. Brewster, 63 N.Y.2d 419, 422, 482 N.Y.S.2d 724, 725 (1984), citing People v. Oakley, 28 N.Y.2d 309, 312, 321 N.Y.S.2d 596, 598 (1971).

The right to be charged by an indictment from a grand jury before being tried for an infamous crime is explicitly guaranteed by Section 6 of Article I of the New York State Constitution. An "infamous" crime is one where punishment might be for more than one year in prison. People v. Bellinger, 269 N.Y. 265 (1935); People v. Van Dusen, 56 Misc.2d 107, 287 N.Y.S.2d 741 (Ontario Co. Ct. 1967). This is exclusive of misdemeanors. People v. Mannett, 154 App. Div. 540, 139 N.Y.S. 614 (1st Dept. 1913); Corr v. Clavin, 96 Misc.2d 185, 409 N.Y.S.2d 334 (Sup. Ct. Nassau Co. 1978).

The right to a grand jury indictment is dependent solely upon the State Constitution since it has been held that the grand jury provision embodied in the Fifth Amendment to the Federal Constitution is not applicable to the States. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111 (1884). However, New York cases continue to construe the right as a fundamental one and a matter of substantive due process. See generally People v. Mackey, 82 Misc.2d 766, 371 N.Y.S.2d 559 (Suffolk Co. Ct. 1975).

The fundamental nature of the right to an indictment by a grand jury completely precluded any possibility of waiver of that right by a defendant prior to 1974. Simonson v. Carin, 27 N.Y.2d 1, 313 N.Y.S.2d 246 (1970). See also, People v. Moore, 132 A.D.2d 776, 517 N.Y.S.2d 584 (3d Dept. 1987). However, Article I, Section 6, has been amended to permit

waiver of the indictment requirement by a defendant, with the consent of the district attorney, except for crimes punishable by death or life imprisonment. Upon waiver, the defendant is prosecuted upon an information filed by the district attorney.

Historically, the requirement of an indictment as a basis for prosecuting infamous crimes was said to be based on the need to protect people from potentially oppressive acts by the government in the exercise of its prosecutorial function. Thus, before an individual may be publicly accused of an infamous crime, the state must convince a grand jury composed of the accused's peers that there exists reasonable cause to believe that the accused is guilty of criminal action.

In more specific terms, an indictment has been considered to be a necessary method of providing the defendant with fair notice of the accusations against him, so that he will be able to prepare a defense. See generally People v. Ray, 71 N.Y.2d 849, 527 N.Y.S.2d 740 (1988); People v. Armlin, 6 N.Y.2d 231, 189 N.Y.S.2d 179 (1959). This function is founded upon the notice requirement of Article I, Section 6, and to achieve this purpose, the indictment has historically been required to charge all the legally material elements of the crime or crimes of which the defendant is accused, and state that the defendant, in fact, committed the acts which comprised these elements. See also People v. Smoot, 112 Misc.2d 877, 447 N.Y.S.2d 575 (Sup. Ct. Kings Co. 1981), aff'd, 86 A.D.2d 880, 450 N.Y.S.2d 397 (2d Dept. 1982) (where defendant never had any reason to believe, either from the indictment or bill of particulars, that at trial he would have to defend against the charge that he possessed a weapon at the time of arrest, the indictment was dismissed). By contrast, see People v. Natoli, 112 Misc.2d 1069, 448 N.Y.S.2d 124 (Sup. Ct. Kings Co. 1982) where the court rejected defen-

dant's argument that he did not know the precise charges against him. The prosecutor's submission to the grand jury of some, but not all of those charges listed in the felony complaint does not warrant the indictment's dismissal when the defendant was on notice at all times of the seriousness of the charges before him. However, the court noted a contrary result would be required where an indictment charges a defendant with more serious offenses than any listed in the felony complaint and where the prosecutor knew at all times that the more serious charges would be presented to the grand jury. Similarly, in People v. Sterling, 113 Misc.2d 552, 449 N.Y.S.2d 574 (Nassau Co. Ct. 1982), the court found that the defendants had adequate constitutional notice of the nature of the charges against them. The defendants had, through pretrial hearings on the wiretaps in this case, obtained adequate notice prior to trial; see also People v. Craft, 87 A.D.2d 662, 448 N.Y.S.2d 847 (3d Dept. 1982) (where the court rejected the defendant's argument that indictment was defective for not alleging essential elements of the crime charged).

A second function of the indictment has traditionally been to provide some means of ensuring that the crime for which the defendant is brought to trial is, in fact, the one for which he was charged, rather than some alternative seized upon by the prosecution in light of new evidence, see People v. Branch, 73 A.D.2d 230, 426 N.Y.S.2d 291 (2d Dept. 1980).

Finally, the indictment has traditionally been viewed as the proper means of indicating the specific crime or crimes for which the defendant has been tried, in order to avoid subsequent attempts to retry him for the same charge or charges. This function is based upon the constitutional prohibition against double jeopardy. (see People v. Branch,

supra.)

The historical development of the form of indictment presently used in New York illustrates a continuing attempt by the legislature to implement a more realistic approach to the basic requirements of a valid indictment. Under the common law, the indictment was an intricate work of art which all too often served to confuse rather than to inform the defendant and his counsel. Utter perfection of form was essential to the validity of the common law indictment.

With the enactment of the Code of Criminal Procedure (C.C.P.) in 1881, the legislature provided an alternate and considerably less complex form of indictment, designed to prevent dismissals for mere technical defects, while ensuring that the accused would be adequately informed of the charges against him. Thus, under C.C.P. §275, an indictment was required to contain a plain and concise statement of facts constituting the crime.

Though considerably less complex than the common-law indictment, the section 275 indictment became known as the "long-form" indictment following the authorization by the legislature in 1929 of the "simplified" indictment, which merely required a statement of the crime charged. C.C.P. §295-b. Presumably, then, the "simplified" indictment was complete by merely citing the section of the law which the defendant was accused of violating. Because of the defendant's right to a bill of particulars on demand under C.C.P. §295-b, this type of indictment usually passed judicial scrutiny. See generally People v. Bogdanoff, 254 N.Y. 16 (1930). Today, the simplified indictment may no longer be used in New York, as it was not retained when the Criminal Procedure Law (CPL) was enacted to replace the Code in 1971. One reason for this change was

that the simplified indictment, as a practical matter, often told the defendant little about the nature of the crime he was accused of committing.

The development of modern discovery rules in criminal cases has diminished the significance of the indictment as a provider of information. See CPL Article 240 et seq. For example, the need to use an indictment as a means of protecting the accused from double jeopardy has been considerably reduced by the modern practice of maintaining full records of criminal proceedings which may be considered by subsequent courts. Similarly, the function of the indictment as a means of assuring that the defendant is tried for the same crime of which he has been accused is of less significance, as a result of permissive examination of grand jury minutes and stenographic notes when a challenge is made on those grounds. CPL §210.30.

Careful consideration of modern criminal procedure in New York leads to the conclusion that the essential function of a grand jury indictment is simply to notify the defendant of the crime of which he has been charged. This purpose is reflected by the present statutory provisions controlling the form of the indictment (CPL §200.50) which are essentially quite similar to the former "long-form" indictment used under the Code of Criminal Procedure.

C. Form and Content of Indictment

CPL §200.50 sets forth the required form and content of an indictment. Under this section the indictment must contain the name of the superior court in which the action is to be filed. CPL §200.50.

(1) Title

The indictment must also contain the title of the action and, where

the defendant is a juvenile offender, a statement in the title that the defendant is charged as a juvenile offender. The title should contain the name of the parties, specifically, "The People of the State of New York" as plaintiff and the name of the defendant, and in addition, any aliases that the defendant is known to use. If the true name is not known, a fictitious one, such as "John Doe" may be used along with a sufficient description of the subject of the indictment. See People v. Doe, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (Nassau Co. Ct. 1973); CPL §200.50(2).

(2) Charging Counts

The indictment must contain a separate accusation or count addressed to each offense charged, if there is more than one. CPL §200.50(3); see also People v. Armlin, 6 N.Y.2d 231, 189 N.Y.S.2d 179 (1959). It must also contain a statement in each count that the grand jury, or where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense. CPL §200.50(4).

(3) Name of County

By case law, the indictment must contain a designation of the county in which the indictable offense occurred. The courts have found that this is necessary to establish the "[s]ufficiency of the indictment and the power of the court to try the defendants." People v. Fien, 292 N.Y. 10 (1944); People v. Bradford, 206 N.Y.S.2d 343 (Ct. of Gen. Sess. N.Y. Co. 1960). However, the designation of the criminal act occurring within the county is not an absolute jurisdictional prerequisite.

(4) Date the Offense Was Committed

The date that the indictable offense was allegedly committed should be stated as accurately as possible. Unless the element of time is material to the crime charged, the courts will not require complete exactness. People v. Player, 80 Misc.2d 177, 362 N.Y.S.2d 773 (Suffolk Co. Ct. 1974). The date is required to ensure that the defendant has sufficient information to aid in the preparation of his defense. However, under modern practices, more specific information may be obtained by a motion for a bill of particulars.

The adequacy of the time period designated by the People was the subject of a Court of Appeals decision in People v. Morris, 61 N.Y.2d 290, 473 N.Y.S.2d 769 (1984). Although the indictment alleged that the crimes took place during the month of November, the People's bill of particulars narrowed the time period to the last 24 days of the month. The Court determined that under the circumstances of this case the time period asserted was a sufficient reasonable approximation. The Court noted that CPL §200.50(6) does not require an exact date and time, but only a statement that the crime occurred "on or on or about a designated date or during a designated period of time." People v. Morris, 61 N.Y.2d at 294. See Bellacosa, Supplementary Practice Commentary (1984) CPL §200.50. See also People v. Willette, 109 A.D.2d 112, 490 N.Y.S.2d 290 (3d Dept. 1985); People v. Cassiliano, 103 A.D.2d 806, 477 N.Y.S.2d 435 (2d Dept. 1984), cert. denied, 105 S.Ct. 1176 (1985); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dept. 1984).

(5) Signatures of the Foreman of the Grand Jury and the District Attorney

In the absence of the foreman, the acting foreman may sign. If the accusatory instrument is a superior court information, this signature is

not required. As to the signature of the district attorney, it is a clear directive of the statute that the instrument contain the signature. This requirement is deemed satisfied if the signature of the assistant district attorney is affixed to the instrument. Whether the absence of this signature is fatal is an open question, but, case law suggests that it is not, the signature being deemed directory, not mandatory. People v. Rupp, 75 Misc.2d 683, 348 N.Y.S.2d 649 (Sup. Ct. Sullivan Co. 1973).

(6) Designation of Offense Charged

Each offense charged must be stated. This is designed to aid the defendant in the preparation of his defense and to avoid future double jeopardy issues. People v. Armlin, 6 N.Y.2d 231, 189 N.Y.S.2d 179 (1959). It is sufficient to name the offense and cite the appropriate statutory section.

(7) Factual Allegations

The indictment must contain in each count a plain and concise factual statement which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to apprise clearly the defendant or defendants of the conduct which is the subject of the accusation. CPL §200.50(7)(a). Where the indictment charges an armed felony offense as defined in CPL §1.20(41), the indictment must state that such offense is an armed felony and must specify the particular implement the defendant or defendants possessed, were armed with, used or displayed or, in the case of an implement displayed, must specify what the implement appeared to be. CPL §200.50(7)(b). The determination of whether the factual allegations in an indictment are sufficient is made on a motion to dismiss the indictment as defective.

This area is discussed in Section I (1), infra.

D. Joinder and Severance of Offenses

(1) Generally

Joinder is the uniting of several distinct offenses into the same indictment. Although only one offense can be charged in each count of an indictment [People v. Brannon, 58 A.D.2d 34, 394 N.Y.S.2d 974 (4th Dept. 1977)], a variety of offenses may be charged in an indictment containing several counts. The rules governing joinder are stated in CPL §200.20(2), which delineates four separate permissible joinder situations:

(1) Joinder is permitted when the multiple offenses are based upon the same act or criminal transaction. CPL §§200.20(2)(a), 40.10(a).

(2) Although not based upon the same act or criminal transaction, offenses may be joined when proof of one offense would be material and admissible as evidence in chief upon a trial of the other. CPL §200.20 (2)(b).

(3) Two or more offenses are joinable to each other if they are defined by the same or similar statutes and, consequently, are "the same or similar in law." CPL §200.20(2)(c).

(4) Any two offenses are joinable to each other, although not joinable under paragraphs (1) to (3) above, if they each are independently joinable with another offense charged under paragraphs (1) to (3). Any other offense joinable with any of these three initial offenses may also be included in the indictment. CPL §200.20(2)(d).

Indictments must charge at least one crime and, unlike the former law as set forth in the Code of Criminal Procedure, an indictment may charge a petty offense (i.e., a violation) provided it also charges at

least one crime. CPL §200.20(1).

Each count of an indictment is separate, distinct, and independent of the other. [People v. Young, 29 A.D.2d 618, 285 N.Y.S.2d 730 (4th Dept. 1967), rev'd on other grounds, 22 N.Y.2d 785, 292 N.Y.S.2d 696 (1968)], and each count is to be regarded as a separate indictment. [People v. Delorio, 33 A.D.2d 350, 308 N.Y.S.2d 131 (3d Dept. 1970); People v. Johnson, 46 A.D.2d 123, 361 N.Y.S.2d 921 (1st Dept. 1974), rev'd on other grounds, 39 N.Y.2d 364, 384 N.Y.S.2d 108 (1976)].

(2) Joinder of Offenses Based upon the Same Act or Criminal Transaction: CPL §200.20(2)(a)

CPL §200.20(2)(a) provides that offenses are joinable when they arise from the same act or "criminal transaction," as that term is defined in CPL §40.10(2).

CPL §40.10(2) states that a criminal transaction is "conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either

(1) so closely related and connected in point of time and circumstances of commission as to constitute a single criminal incident, or

(2) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture."

Thus, when CPL §200.20(2)(a) is read in conjunction with its statutory forerunner, Code of Criminal Procedure §279, and CPL §40.10(2), it appears that the legislative policy of New York is to permit joinder of charges into one indictment in at least two distinct situations:

(1) when more than one offense is committed by a single act, or

(2) when several acts, closely related in time or circumstances so as to constitute a single incident, result in the commission of two or more offenses.

See Waxner, New York Criminal Practice, §9.4(1) (1977). See also People v. Kacee, 113 Misc.2d 338, 448 N.Y.S.2d 1002 (Sup. Ct. N.Y. Co. 1982), where the court held that although the two counts of the indictment charging the defendant with attempted extortion and solicitation of a bribe were legally inconsistent, CPL §200.20(2)(a) allows joinder of offenses based upon the same act or same transaction. Thus, the court rejected the defendant's argument that the two counts could not be based on the same facts.

Although these points are adapted from the language of C.C.P. §279 which is not in effect today, New York cases have incorporated these notions into the present statutory scheme embodied in §200.20(2)(a) of the CPL. These cases are analyzed in the sections below.

(3) Joinder of Multiple Offenses Committed by a Single Act

In People v. Lasko, 43 Misc.2d 693, 252 N.Y.S.2d 209 (Rensselaer Co. Ct. 1964), the defendant's scuffle with an arresting officer resulted in a two-count indictment which charged the felony of assault in the second degree and the misdemeanor of resisting arrest. The court sustained the validity of the indictment by stating:

> [w]hen there are several charges for the same act or transaction, constituting different crimes...the whole may be joined in one indictment...in separate counts.
> Lasko, 43 Misc.2d at 695, 252 N.Y.S.2d at 212.

Similarly, in People v. Hayner, 198 Misc. 101, 97 N.Y.S.2d 64 (Sup. Ct. Broome Co. 1950), joinder of charges of rape and incest, based on the

same act of sexual intercourse between defendant and his daughter, was permitted, and in People v. Rudd, 41 A.D.2d 875, 343 N.Y.S.2d 17 (3d Dept. 1973), the court held that the joinder of counts of driving with a blood alcohol content of more than .15% and of driving while intoxicated, although arising out of a single transaction, did not constitute double jeopardy. But cf. People v. Serrano, 119 Misc.2d 321, 462 N.Y.S. 989 (Sup. Ct. Kings Co. 1983) (where the court held that because separate statutory provisions were violated, separate prosecutions were permissible.)

(4) Joinder of Multiple Offenses Linked by Time or Circumstances

In People v. Morgan, 34 Misc.2d 804, 229 N.Y.S.2d 128 (Westchester Co. Ct. 1962), the court held that charges of burglary and larceny committed on the same day on the same premises, and a charge of felonious possession of a loaded firearm on the same occasion, were properly joined in one indictment. The court particularly noted the defense counsel's failure to affirmatively establish that the several crimes were not in fact connected together.

In People v. Colligan, 9 N.Y.2d 900, 216 N.Y.S.2d 708 (1961), the defendant and another were indicted in a three count indictment which charged that on the same day, the defendants committed three separate crimes in different locations in a four-story residential building in New York City. The charges stemmed from a robbery on the third floor, a robbery on the fourth floor, and a homicide in the basement. The defendants were convicted despite the fact that, as stated in People v. Gibbs, 36 Misc.2d 768, 233 N.Y.S.2d 904 (Oneida Co. Ct. 1962):

> [T]he only items of similarity between the crimes were a common defendant, a

> common day, and a basic intent to rob. In all other respects, the counts differed as to location, time and victim. Gibbs, 233 N.Y.S.2d at 908.

In People v. 80 Main Street Theater, 88 Misc.2d 471, 388 N.Y.S.2d 543 (Nassau Co. Ct. 1976), the defense contested the validity of an indictment in an obscenity prosecution by arguing that joinder was impermissible because the exhibition of one film is an act in itself and the act is complete when the film's exhibition concludes. The court rejected this contention, however, and held that joinder was proper because both films were shown as a single performance on the dates specified in the indictment and, therefore, they were sufficiently related and connected in point of time and circumstance of commission to warrant joinder. See also, People v. Grate, 122 A.D.2d 853, 505 N.Y.S.2d 720 (2d Dept. 1986).

However, joinder of two crimes in one indictment was prejudicial to the defendant in People v. Pepin, 6 A.D.2d 992, 176 N.Y.S.2d 15 (4th Dept. 1958). There, the conviction of the defendant was reversed because the indictment charged him in one count as being a co-perpetrator of a robbery on July 18, 1956, and in a separate count, the sole perpetrator of a robbery on August 8, 1956. The court concluded that both crimes were wholly unrelated. On the other hand, in People v. Ranellucci, 50 A.D.2d 105, 377 N.Y.S.2d 218 (3d Dept. 1975), the appellate court refused to declare invalid an indictment which charged a grand larceny in April, a grand larceny in June, and a grand larceny in July. The prosecution offered the testimony of an accomplice who said that he and the defendant had acted together in carrying out the three thefts. Moreover, the court noted that the defendant was not prejudiced by the indictment in view of the fact that the jury acquitted him on two of the three charges.

(5) Joinder of Offenses Where Proof of One Would Be Material on Proof of Another: CPL §200.20(2)(b)

Even when based on two different criminal transactions and thereby not joinable under CPL §200.20(2)(a), two offenses are joinable under CPL §200.20(2)(b) when proof of one offense would be material and admissible as evidence in chief upon a trial of a second. See generally People v. DeVyver, 89 A.D.2d 745, 453 N.Y.S.2d 915 (3d Dept. 1982). People v. Bongarzone , 69 N.Y.2d 892, 515 N.Y.S.2d 227 (1987); People v. Diaz, 122 A.D.2d 279, 504 N.Y.S.2d 778 (2d Dept. 1986).

Subsection (2)(b) is an adoption of the Molineux doctrine as one of the criteria for joinder of offenses. In People v. Molineux, 168 N.Y. 264 (1901), the Court of Appeals outlined the principle that proof of another crime is competent to prove the specific crime charged only when it tends to establish:

(1) motive;

(2) intent;

(3) the absence of mistake or accident;

(4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other; or

(5) the identity of the person charged at trial.

An illustrative use of the Molineux doctrine in the joinder situation occurred in People v. Yuk Bui Yee, 94 Misc.2d 628, 405 N.Y.S.2d 386 (Sup. Ct. N.Y. Co. 1978) (defendant was charged with thirteen offenses in the indictment); see also People v. Johnson, 48 N.Y.2d 925, 425 N.Y.S.2d 55 (1979) (evidence which was necessary to prove that the defendant was in possession of narcotics was admissible as evidence in chief upon a

burglary count).

For further cases involving joinder under the "common scheme or plan" notion of the old C.C.P. §279, see People v. Kenny, 64 Misc.2d 615, 315 N.Y.S.2d 313 (Wayne Co. Ct. 1970), where a forgery count and a petit larceny charge were joined; see also People v. Trammell, 50 Misc.2d 179, 267 N.Y.S.2d 434 (Sup. Ct. Erie Co. 1966), where two counts of conspiracy and perjury were joined.

Where multiple charges of an indictment occur at distinct times and are not part of a common scheme or plan, and evidence of one can not be used as evidence in chief of another, joinder is not permissible. See People v. Pepin, 6 A.D.2d 992, 176 N.Y.S.2d 15 (4th Dept. 1958) (one count of robbery on July 18 and one count of robbery on August 8); People v. Namolik, 8 A.D.2d 685, 184 N.Y.S.2d 700 (4th Dept. 1959) (one count of theft of an automobile, one count of burglary of a tavern, and one count of theft of a wristwatch); People v. Fringo, 13 A.D.2d 887, 215 N.Y.S.2d 206 (3d Dept. 1961) (one count of possession of obscene prints, and one count of possession of fireworks for sale).

(6) Joinder of Offenses Defined by the Same or Similar Statutory Provision: CPL §200.20(2)(c)

CPL §200.20(2)(c) provides that when two or more offenses are not joinable pursuant to subdivisions (2)(a) or (2)(b), they may nevertheless be charged in the same indictment if they are defined by the same or similiar statutory provisions and consequently are the same or similar in law. See People v. Jenkins, 50 N.Y.2d 981, 431 N.Y.S.2d 471 (1980) (defendant tried jointly for two unrelated, but similiarly executed, gas station robberies).

(7) Joinder of Offenses not Joinable with Each Other but Joinable to Other Offenses Charged: CPL §200.20(2)(d)

CPL §200.20(2)(d) provides that when two counts of an indictment are not joinable to each other pursuant to subsections (a), (b), or (c) of that statute, but are joinable with a third offense contained in the indictment pursuant to those subsections, the joinder of all three offenses is permitted.

> The provision can be illustrated in this way. The first count of the indictment charges an assault committed on January 1st. The second count charges a robbery which occurred on January 15th involving a different victim. The two charges are not joinable. However, the third count charges an assault committed in the course of the January 15th robbery. The second count, therefore, is joinable with the third pursuant to CPL §200.20(2)(a). The first count may also be joined with the third pursuant to CPL §200.20(2)(c). Thus, all of the charges may be recited in one indictment under the authority of CPL §200.20(2)(d) ... [A]ny other offense joinable with the two unrelated counts may be joined in the indictment. Thus, if the assault charged in the first count involved a loaded pistol, a charge of a felonious possession of firearms [Penal Law §265.05(2)] may be joined with it as well as with two other counts charging unrelated offenses.
>
> Waxner, New York Criminal Practice, §9.4(4), Matthew Bender, (1977).

See generally People v. Maldonado, 75 A.D.2d 558, 427 N.Y.S.2d 414 (1st Dept. 1980), where the court held that as a number of counts of assault and attempted murder on three different individuals, two of which involved the use of a gun, were joinable as based on the same statutes, the gun charge was joinable with all of them in the same indictment.

(8) "Super Joinder" and the Case of People v. D'Arcy

In People v. D'Arcy, 79 Misc.2d 113, 359 N.Y.S.2d 453 (Allegany Co. Ct. 1974), the court upheld the joinder of eighty-five separate misde-

meanor counts relating to six separate criminal offenses in a single indictment by resorting to all four permissible joinder situations as set out in CPL §200.20(2). The case is illustrative of the complex joinder situations which can develop when an attempt is made to join charges of multiple offenses into a single indictment. The myriad of joinder situations which are theoretically possible under CPL §200.20(2) become reality in the D'Arcy decision. People v. D'Arcy, 359 N.Y.S.2d at 467-470.

(9) Severance: CPL §200.20(3)

The joining of offenses that have no relationship to each other, except that they are defined by the same or similar statutory provision, can severely prejudice a defendant, especially where joinder is based on CPL §200.20(2)(c), and not the strength of the specific evidence regarding each one. In People v. Babb, 194 Misc. 5, 88 N.Y.S.2d 212 (Gen. Sess. N.Y. Co. 1949), the first count of an indictment charged the defendant with manslaughter resulting from the performance of an abortion. The next two counts related to the same abortion, but the last three counts related to abortions performed on three different persons on separate dates. Upon the defendant's motion, the last three counts were severed and ordered to be tried separately. The court stated that it would be difficult for a jury to hear evidence of death and then disregard it when considering the charges of abortion which were unrelated to the manslaughter.

In People v. Pepin, 6 A.D.2d 992, 176 N.Y.S.2d 15 (4th Dept. 1958), the indictment charged the codefendants with committing a robbery on July 18, but charged only one of the codefendants for a robbery committed on August 8. The court held that a severance motion should have been

granted because the joinder was prejudicial to the defendant who participated in only one of the crimes.

See also People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422 (1980). It was an abuse of discretion as a matter of law (CPL 200.20, subd.3) for the trial court to deny defendant's motion to sever an indictment embracing a total of sixty-four criminal counts charging him with engaging in homosexual sodomitic acts on various occasions over a seventeen month period.

By contrast, in People v. Brownstein, 21 Misc.2d 717, 197 N.Y.S.2d 755 (Ct. of Spec. Sess. N.Y. Co. 1960) the defendants failed to meet their burden of proof to obtain a trial order of severance. They were charged with 251 counts of permitting violations of the Multiple Dwelling Law. They moved to sever these charges, which involved five different buildings, and would have required five separate trials instead of one. The court ruled that severance was unwarranted in the interests of justice, since the five trials would require substantially the same witnesses and the resolution of substantially the same issues of fact.

In determining the possible prejudicial effects of a denial of a severance motion, appellate courts place significant weight on the actual outcome of the trial. For example, in People v. Ranellucci, 50 A.D.2d 105, 377 N.Y.S.2d 218 (3d Dept. 1975), the trial court's refusal to sever a charge of grand larceny in the second degree from two other charges was not reversible error in light of the fact that the jury acquitted the defendant on two of the three charges. Similarly, in People v. Peterson, 42 A.D.2d 937, 348 N.Y.S.2d 137 (1st Dept. 1973), aff'd, 35 N.Y.2d 659, 360 N.Y.S.2d 640 (1974), a denial of a motion to sever various counts of robbery, burglary, larceny and other offenses was

not prejudicial to the defendant because the jury acquitted him on three of the counts and the evidence of guilt on the remaining counts was overwhelming. (see also People v. Lowe, 91 A.D.2d 1100, 458 N.Y.S.2d 357 (3d Dept. 1983).

(10) Consolidation of Indictments: CPL §200.20(4); CPL §200.20(5)

When two or more indictments have been filed charging the same defendant or defendants with separate offenses which are joinable in a single indictment pursuant to CPL §200.20(2), the court may, upon motion of either the district attorney or defense counsel, order that the indictments be consolidated and treated as a single indictment for trial purposes. CPL §200.20(4). As in People v. Godek, 113 Misc.2d 599, 449 N.Y.S.2d 428 (Sup. Ct. Suffolk Co. 1982), cert. denied, 464 U.S. 1047 (1984), where defendant was charged with eighteen separate counts of promoting obscene sexual performance by a child, twelve of those counts were consolidated. The court found no rational distinction between the first twelve counts which relate to materials seized in the motel room. All these materials constituted integral parts of a single criminal venture. However, the remaining six counts were not consolidated as these materials were seized from defendant's vehicle and did not arise from the same fact pattern. In People v. Lane, 56 N.Y.2d 1, 451 N.Y.S.2d 6 (1982), Chief Judge Wachtler writing for the majority, defined and distinguished between consolidation of indictments and severance procedure of an indictment.

> "Consolidation is the procedure by which the prosecutor or defendant attempts to have two or more separate indictments combined for a single trial. To obtain consolidation the applicant must demonstrate to the satisfaction of the

> court not only that the offenses charged in the separate indictments are joinable in accordance with the statutory criteria set forth in CPL 200.20(subd.2) but also that combination for a single trial is an appropriate exercise of discretion (CPL 200.20, subd.4).
>
> By contrast, severance is the converse procedure by which the prosecutor or the defendant attempts to obtain separate trials of two or more counts contained in a single indictment. To effect severance the applicant must either demonstrate that the counts were not joinable under the statutory criteria (CPL 200.20, subd.2) or seek a discretionary severance under CPL 200.20(subd.3). The latter subdivision applies, however, only with respect to counts which are joinable under paragraph (c) of subdivision 2 of the section (offenses defined by same or similiar statutory provisions), and severance will be granted only if he can persuade the court that the severance should be granted 'in the interest of justice and for good cause shown'." People v. Lane, 56 N.Y.2d 1,7, 451 N.Y.S.2d 6, 9 (1982).

(11) Joinder and Severance of Multiple Defendants in a Single Indictment: CPL §200.40(1)

CPL §200.40(1) provides that two or more defendants may be jointly charged in one indictment as long as:

a) all such defendants are jointly charged with every other offense alleged therein; or

b) all the offenses charged are based upon a common scheme or plan or;

c) all the offenses charged are based upon the same criminal transaction as that term is defined in CPL §40.10(2).

d) if the indictment includes a count charging enterprise corruption, [Penal Law Article 460]:

i. all the defendants must be jointly charged with every

count of enterprise corruption alleged in the indictment;

ii. In addition every offense, other than a count alleging enterprise corruption, must be a criminal act specifically included in the pattern of criminal activity on which the charge or charges of enterprise corruption is based; and

iii. each such defendant could have been jointly charged with at least one of the other defendants, absent an enterprise corruption count, under the provisions of paragraphs a, b, and c above in an accusatory instrument charging at least one such specifically included criminal act.*

In New York, prior to 1926, a defendant had an absolute right to a separate trial. Thereafter, the law was amended to permit courts, in their discretion, to jointly try defendants who had been jointly indicted. C.C.P. §391. This provision was the forerunner of CPL §200.40.

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*Note: Subdivision (1)(d) of §CPL 200.40 was added in 1986 as one of the implementing provisions under the "Organized Crime Control Act". The legislation created the new crime of "Enterprise Corruption." (See Penal Law Article 460.)

Under this subdivision, a prosecutor who charges a person with Enterprise Corruption is given the opportunity to prove not only the underlying criminal offenses, but also the person's place in a broader pattern of criminal activity, their relationship to any lawful enterprise they have corrupted, and their relationship to the criminal enterprise in which they are a part. See Preiser, Peter, McKinney's Consolidated Laws of New York, CPL §200.40 (1970).

When filing an indictment which charges enterprise corruption, the prosecutor must submit a statement to the court attesting that he has reviewed the substance of the evidence presented to the grand jury and concurs in the judgment that the charge is consistent with Legislative findings in Penal Law Article 460, Enterprise Corruption. See CPL §200.65.

The justification for a joint trial of multiple defendants is the economy and the expedition of a single trial. See People v. Krugman, 44 Misc.2d 48, 252 N.Y.S.2d 846 (Sup. Ct. Kings Co. 1964). Thus, CPL §200.40(1) permits the court, upon a motion showing good cause by the People or the defendant, to order separate trials of one defendant from others, or to order that two or more defendants be tried separately from two or more other defendants.

It should be noted that an amendment to CPL §200.40(1), enacted in 1974, provides that the severance motion must be made within the time period specified by the omnibus pretrial motion machinery as set forth in CPL §255.20.

The defendant was entitled to a new trial in People v. Potter, 52 A.D.2d 544, 382 N.Y.S.2d 79 (1st Dept. 1976), where the prosecution argued in summation that evidence relating to an offense to which a co-defendant pleaded guilty could be used as evidence against the defendant, and the trial court failed to correct this error by proper jury instructions.

In Bruton v. United States, 391 U.S. 123 (1968), it was held that when two defendants are tried together, a codefendant's extrajudicial confession is not admissable even if the trial court gives a limiting instruction that the confession could only be used against a codefendant, since admitting such a confession violates defendant's right of confrontation. See also, Cruz v. New York, ___ U.S. ___, 107 S.Ct. 1714, (1987) (reaffirming Bruton principle). However, in Richardson v. Marsh, ___ U.S. ___, 107 S.Ct. 1702 (1987), the Supreme Court declined to extend the Bruton rationale to bar admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is

redacted to eliminate not only the defendant's name, but any reference to her existence.

(a) Severance Because Defendant Will Call Codefendant as Witness

> A... problem occurs when a defendant desires to call his codefendant as a witness in his behalf. He may have a constitutional right to do so (People v. Caparelli, 21 A.D.2d 882, 251 N.Y.S.2d 803), but the codefendant has a constitutional right to remain silent even to the extent of not being compelled to claim his privilege in the presence of the jury trying him [citations omitted]. In such a case, separate trials seem essential. Krugman, 252 N.Y.S.2d at 850 (emphasis in original).

(b) Burden and Standard of Proof

A court is not required to sever trials where the possibility of the codefendant's testimony is merely colorable or speculative. People v. Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369, cert. denied sub. nom. Victory v. New York, 461 U.S. 905 (1974). See also People v. Johnson, 124 A.D.2d 1063, 508 N.Y.S.2d 728, (4th Dept. 1986).

(12) Consolidation of Indictments Against Different Defendants: CPL §200.40(2)

CPL §200.40(2) provides that where each of two indictments charges the same offense but against different defendants, the multiple indictments may be consolidated by the court in its discretion upon application of the People. In short, where both defendants could have been jointly charged pursuant to CPL §200.40(1) in a single indictment, but for some reason were not, consolidation may be ordered.

Subdivision 2 also permits consolidation of indictments containing a count or counts in common against different defendants; consolidation is so ordered for the limited purpose of trying the defendants on those

charges which are applicable to all. In such a case, the separate indictments remain in existence with regard to any offenses which are not common to all and may be prosecuted separately.

The offenses contained in the multiple indictments which are the subject of a consolidation order must be identical. In People v. Valle, 70 A.D.2d 544, 416 N.Y.S.2d 600 (1st Dept. 1979) a defendant was indicted on charges of criminal possession of weapons in the third degree and criminal possession of a controlled substance in the seventh degree. From the same incident, two others were indicted on charges of criminal possession of drugs in the first degree and criminal sale of drugs in the third degree. Over objection, consolidation was ordered, but the Appellate Division reversed the conviction on the grounds that the charges contained in the two consolidated indictments were not the same.

It has been held that it is error to consolidate two indictments when only one of the multiple defendants was charged with gun possession in one of the indictments and the charge was not tried separately. People v. Minor, 49 A.D.2d 828, 373 N.Y.S.2d 354 (1st Dept. 1975). However, reversal for misjoinder was not required since the defendant failed to raise the claim prior to trial and counsel for both defendants specifically stated to the court that they had no objection to the joint trial.

Absent a motion for consolidation by the People pursuant to CPL §200.40(2), the trial court was without authority to order consolidation of the indictments. Gold v. McShane, 74 A.D.2d 616, 425 N.Y.S.2d 341 (2d Dept. 1980), appeal dism'd, 51 N.Y.2d 910, 434 N.Y.S.2d 992 (1980).

The provision for consolidation of multiple indictments against different defendants had no counterpart in law prior to the enactment of

the Criminal Procedure Law in 1971; accordingly, case law on the subject is relatively sparse.

(13) Duplicitous Counts Prohibited

Each count of an indictment may charge one offense only. CPL §200.30(1). People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986). When a statute defines, in different subsections, different ways of committing an offense, and the indictment alleges facts which would support a conviction under either subdivision, it charges more than one offense. See CPL §200.30(2). Such an indictment is duplicitous, and accordingly subject to a motion to dismiss [see discussion in Section I. (1)(a)(i), infra)]. See generally People v. Nicholson, 98 A.D.2d 876, 470 N.Y.S.2d 854 (3d Dept. 1983) (where the court determined that duplicity is an objection directed only to the form of an indictment and is therefore waived by a guilty plea.) For example, in People v. Pries, 81 A.D.2d 1039, 440 N.Y.S.2d 116 (4th Dept. 1981), the court held that accepting eight specific dates from the rape victim in satisfaction of the statutory indictment requirements violated the rule that each count of an indictment may charge only one offense; each separate act of rape was a separate and distinct offense. See also People v. James, 98 A.D.2d 863, 471 N.Y.S.2d 158 (3d Dept. 1983) (where the test for duplicity is whether defendant can be convicted of either of crimes charged in the count if the district attorney waives the other; here the charge of second degree sexual abuse against two victims was duplicitous.)

E. Indictment Where There Is a Previous Conviction

(1) Allegation of Previous Conviction Prohibited

When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade

(predicate felony), an indictment for such higher offense may not allege such previous conviction. If a reference to previous conviction is contained in the statutory name or title of such an offense, such name or title may not be used in the indictment, but an improvised name or title must be used which, by means of the phrase "as a felony" or in some other manner, labels and distinguishes the offense without reference to the previous conviction. CPL §200.60(1). This subdivision does not apply to an indictment or a count thereof that charges escape in the second degree under Penal Law §205.10 or escape in the first degree under Penal Law §205.15. Ibid.

(2) Requirement that District Attorney File Special Information

An indictment for such an offense must be accompanied by a special information, filed by the district attorney with the court, charging that the defendant was previously convicted of a specified offense. Except as provided in subdivision three, the People may not refer to such special information during the trial nor adduce any evidence concerning the previous conviction alleged therein. CPL §200.60(2).

Failure to file the special information with the indictment does not render the indictment jurisdictionally defective and a defense motion to dismiss on this ground should be denied where the district attorney filed the special information and served a copy on defense counsel after defense counsel made the motion to dismiss. People v. Briggs, 92 Misc.2d 1015, 401 N.Y.S.2d 984 (Jefferson Co. Ct. 1978).

(3) Subsequent Proceedings

After commencement of the trial and before the close of the People's case, the court, in the absence of the jury, must arraign the defendant upon the special information, and must advise him that he may admit the

previous conviction alleged, deny it or remain mute. Depending upon the defendant's response, the trial of the indictment must then proceed as follows:

(1) If the defendant admits the previous conviction, that element of the offense charged in the indictment is deemed established, no evidence in support thereof may be adduced by the People, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.

(2) If the defendant denies the previous conviction or remains mute, the People may prove that element of the offense charged before the jury as a part of their case. CPL §200.60(3).

Note: Nothing contained in CPL §200.60 precludes the People from proving a prior conviction before a grand jury or relieves them from the obligation or necessity of so doing in order to submit a legally sufficient case. CPL §200.60(4).

F. Amendment

At any time before or during trial, the court may, upon application of the People and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits. Where the accusatory

instrument is a superior court information, such an amendment may be made when it does not tend to prejudice the defendant on the merits. Upon permitting such an amendment, the court must, upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense. CPL §200.70(1). An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it; nor may an indictment or superior court information be amended for the purpose of curing:

(1) a failure of the indictment to charge or state an offense; or

(2) legal insufficiency of the factual allegations; or

(3) a misjoinder of offenses; or

(4) a misjoinder of defendants. CPL §200.70(2).

Where an indictment originally charged the defendant and another with acting in concert in a robbery but the charges against the former defendant were dismissed, the indictment cannot be amended on the eve of trial to charge the defendant as the sole perpetrator. The People's remedy is representment of the case to another grand jury. People v. Hill, 102 Misc.2d 814, 424 N.Y.S.2d 655 (Sup. Ct. Bronx Co. 1980). However, pretrial amendment of an indictment was proper to delete the name of a codefendant, who had been acquitted on the merits, since this did not alter the theory of the People's case or prejudice the defendant in any way. People v. Reddy, 73 A.D.2d 977, 424 N.Y.S.2d 238 (2d Dept. 1980). Similarly, "[a]n indictment may be amended before trial or even during trial with respect to errors concerned with 'names of persons' [citations omitted] provided that upon amendment the court, upon applica-

tion of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense." People v. Robinson, 71 A.D.2d 779, 419 N.Y.S.2d 320, 321 (3d Dept. 1979).

The defendant, under the circumstances of the case, was not prejudiced by an amendment which substituted "a quantity of heroin" for "a quantity of cannabis sativa" in an indictment charging criminal sale of a controlled substance. People v. Heaton, 59 A.D.2d 704, 398 N.Y.S.2d 177 (2d Dept. 1977). Similarly, it was proper to permit an amendment to the indictment charging attempted bribery to change the alleged official misconduct from not arresting the defendant to releasing the already arrested defendant since an examination of the grand jury minutes revealed that this was the evidence adduced; the theory of the prosecution was not changed. See People v. Salley, 72 Misc.2d 521, 339 N.Y.S.2d 702 (Nassau Co. Ct. 1972). See also People v. Lugo, 122 Misc.2d 316, 470 N.Y.S.2d 525 (1983) (where substitution of a new complaining witness who had signed a corroborating affidavit for the original complainant who did not sign such an affidavit and of whom defendant had no prior knowledge, after 165 days from arraignment, was more than a "purely technical change" permissible in amending indictment and could not be allowed.); People v. Renford, 125 A.D.2d 967, 510 N.Y.S.2d 433 (4th Dept. 1986). (The portion of an indictment charging grand larceny was not fatally defective for its failure to allege specifically value of the property stolen and could be amended during trial). People v. Cepedes, 130 A.D.2d 676, 515 N.Y.S. 2d 602 (2d Dept. 1987) (amendment of the indictment was not prejudicial to defendant, nor did it alter People's theory of the case). But see People v. Renna, 132 A.D.2d 981, 518 N.Y.S.2d 511 (4th

Dept. 1987) (court's action of reducing two counts of aggravated sexual abuse to sexual abuse in the first degree was not a proper amendment to the indictment.

The trial court committed reversible error when it refused to grant the People's motion to amend an indictment, which originally charged that one Sabu Ganett sold heroin to Joseph Petronella, to state the defendant's true name Sabu Gary; the indictment was not fatally defective as "[i]t is obvious that the Grand Jury intended to indict the specific person who sold heroin to Petronella on March 12, 1976 ...." People v. Ganett, 51 N.Y.2d 991, 435 N.Y.S.2d 976 (1980).

(a) Indictment May Be Amended on Defendant's Motion

Although CPL §200.70 does not specifically authorize a court to amend an indictment on defendant's motion, nevertheless where such an amendment is necessary to guarantee the defendant his constitutional right to a fair trial, the court must do so. See People v. Cirillo, 100 Misc.2d 527, 419 N.Y.S.2d 820 (Sup. Ct. Bronx Co. 1979) (indictment amended on defendant's motion to strike the prejudicial words, "a narcotics violator," used to describe the alleged recipient of the usurious loan that defendant was charged with arranging).

Note: A defendant may not compel the amendment of an indictment by an Article 78 proceeding. In the Matter of Brown v. Rubin, 77 A.D.2d 608, 430 N.Y.S.2d 112 (2d Dept. 1980).

G. Superseding Indictment

If at any time before entry of a plea of guilty to an indictment or commencement of a trial thereof, another indictment is filed in the same court charging the defendant with an offense charged in the first indictment, the first indictment is, with respect to such offense, superseded by the second and, upon the defendant's arraignment upon the second

indictment, the count of the first indictment charging such offense must be dismissed by the court. The first indictment is not, however, superseded with respect to any count contained therein which charges an offense not charged in the second indictment. A superseding indictment may be filed even when the first accusatory instrument is a superior court information. CPL §200.80.

Any offense contained in a prior indictment must be dismissed in a superseding indictment. In the Matter of Gold v. McShane, 74 A.D.2d 616, 425 N.Y.S.2d 341 (2d Dept.), appeal dism'd, 51 N.Y.2d 910, 434 N.Y.S.2d 992 (1980).

Once a grand jury has heard evidence sufficient to support an indictment, it may vote a superseding indictment without examining the witnesses anew as long as twelve of the original grand jurors vote. On the other hand, it is also proper for the district attorney to call witnesses before the second grand jury that votes the superseding indictment who were not called before the first. People v. Lunney, 84 Misc.2d 1090, 378 N.Y.S.2d 559, 565 (Sup. Ct. N.Y. Co. 1975). Accordingly, where alleged "alibi" witnesses had earlier told police that they were not with defendant at the time of the crime, resubmission to obtain testimony before a second grand jury was not error. People v. Potter, 50 A.D.2d 410, 378 N.Y.S.2d 100 (3d Dept. 1976).

Note: If the People lose their appeal from an order suppressing evidence, they may not obtain a superseding indictment, as their appeal was based on their certification that the granting of the motion to suppress effectively destroyed the People's case. In the Matter of Forte v. Supreme Court, County of Queens, 62 A.D.2d 704, 406 N.Y.S.2d 854 (2d Dept. 1978), aff'd sub nom In the Matter of Forte v. Supreme Court of

State of New York, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979).

H. Defendant's Arraignment on Indictment

(1) Arraignment; Requirement that Defendant Appear Personally

A defendant must appear personally to be arraigned on an indictment. See CPL §210.10.

(2) Securing Defendant's Appearance

(a) Defendant in Custody. If the defendant was previously held by a local criminal court for the action of the grand jury, and if he is confined in the custody of the sheriff pursuant to a previous court order issued in the same criminal action, the superior court must direct the sheriff to produce the defendant for arraignment on a specified date and the sheriff must comply with such direction. The court must give at least two days notice of the time and place of the arraignment to an attorney, if any, who has previously filed a notice of appearance on behalf of the defendant with such superior court, or if no such notice of appearance has been filed, to an attorney, if any, who filed a notice of appearance in behalf of the defendant with the local criminal court. CPL §210.10(1).

(b) Defendant at Liberty. If a felony complaint against the defendant was pending in a local criminal court or if the defendant was previously held by a local criminal court for the action of the grand jury, and if he is at liberty on his own recognizance or on bail pursuant to a previous court order issued in the same criminal action, the superior court must, upon at least two days notice to the

defendant and his surety and to any person other than the defendant who posted cash bail, and to any attorney who would be entitled to notice under circumstances prescribed in CPL §210.10(1), direct the defendant to appear before the superior court for arraignment on a specified date. If the defendant fails to appear on such date, the court may issue a bench warrant and, in addition, may forfeit the bail, if any. Upon taking the defendant into custody pursuant to such bench warrant, the executing police officer must without unnecessary delay bring him before such superior court for arraignment. CPL §210.10(2).

(c) Where Indictment Commences Criminal Action

CPL §1.20 states that a criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court. An accusatory instrument is defined as an indictment, an information, a misdemeanor complaint or a felony complaint. See also McClellan v. Transit Authority, 111 Misc.2d 735, 444 N.Y.S.3d 985, 986 (N.Y.C. Civil Ct. Kings Co..1981); But cf. Snead v. Aegis Security Inc. et. al., 105 A.D.2d 1060, 482 N.Y.S.2d 383 (4th Dept. 1984).

If the defendant has not previously been held by a local criminal court for the action of the grand jury and the filing of the indictment constituted the commencement of the criminal action, the superior court must order the indictment to be filed as a sealed instrument until the defendant is produced or appears for arraignment, and must

issue a superior court warrant of arrest; except that if the indictment does not charge a felony the court may instead authorize the district attorney to direct the defendant to appear for arraignment on a designated date. A superior court warrant of arrest may be executed anywhere in the state. Such warrant may be addressed to any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued. It must be executed in the same manner as an ordinary warrant of arrest, as provided in CPL §120.80, and following the arrest the executing police officer must without unnecessary delay perform all recording, fingerprinting, photographing and other preliminary police duties required in the particular case, and bring the defendant before the superior court. CPL §210.10(3).

There is no authority for sealing an indictment for any period beyond that which is required for the appearance of the defendant for arraignment. People v. Ebbecke, 99 Misc.2d 1, 414 N.Y.S.2d 977, 980 (Sup. Ct. N.Y. Co. 1979).

(3) Defendant's Rights on Arraignment

Upon the defendant's arraignment before a superior court upon an indictment, the court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him, and the district attorney must cause him

to be furnished with a copy of the indictment. CPL §210.15(1).

The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action, and, if he appears upon such arraignment without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to obtain the same. CPL §210.15(2).

If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment.

A defendant who proceeds at the arraignment without counsel does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision two which are necessary to effectuate it, and that he may exercise such rights at any stage of the action. CPL §210.15(5).

(4) Court's Instructions on Arraignment

The court must inform the defendant of all rights specified in CPL §210.15(2). The court must accord the defendant opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them. CPL §210.15(3).

(5) Bail

Upon arraignment, the court, unless it intends to make a final disposition of the action immediately thereafter, must, as provided in CPL §530.40, issue a securing order releasing the defendant on his own recognizance or fixing bail or committing him to the custody of the sheriff for his future appearance in such action. CPL §210.15(6).

I. Grounds for Dismissal of an Indictment

(1) Indictment is Defective Within the Meaning of CPL §210.25

(a) Generally

A defendant may move to dismiss the indictment on the ground that it is defective within the meaning of CPL §210.25. See CPL §210.20(1)(a)

CPL §210.25 sets forth three kinds of defects:

(1) lack of substantial conformity to the requirement of Article 200 (form and content) except where such defect can be cured by amendment and the People so move;

(2) the court does not have jurisdiction of the offense charged;

(3) the statute defining the offense is unconstitutional or otherwise invalid.

[i] Indictment Fatally Defective

The two cases which set forth the criteria of specificity in factual allegations which an indictment must meet are People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978) (indictment charged criminal usury), and People v. Fitzgerald, 45 N.Y.2d 574, 412 N.Y.S.2d 102 (1978) (indictment charged criminally negligent homicide). In Iannone, the indictment charged that defendant on or about specified dates in the County of Suffolk, "not being authorized and permitted by law to do so, knowingly charged, took and received money as interest on a loan of a sum of money from a certain individual at a rate exceeding twenty-five percentum per annum and the equivalent rate for a shorter period." The indictment was held to be sufficient. Iannone, 45 N.Y.2d at 592, 412 N.Y.S.2d at 112.

The Court in Iannone ruled that the sufficiency of an indictment must be considered in light of modern discovery rules and the availability of a bill of particulars. The Court held that the "essential function of an indictment qua document is simply to notify the defendant of the crime of which he stands indicted." Iannone, 45 N.Y.2d at 598, 412 N.Y.S.2d at 116. The Court added that "[w]hen indicting for statutory crimes, it is usually sufficient to charge the language of the statute unless that language is too broad [citations omitted]." Ibid.

In Fitzgerald, the first count of the indictment charged:

> that the defendant [at a named time, date, and place], with criminal negligence, caused the death of one Cara Pollini, while operating a 1967 Ford automobile and striking said Cara Pollini with said automobile.
>
> Fitzgerald, 45 N.Y.2d at 576-77, 412 N.Y.S.2d at 103.

The indictment was held to be sufficient since, under Iannone, it informs the defendant of the basis for the accusation in order that he may

prepare a defense. Fitzgerald, 45 N.Y.2d at 580, 412 N.Y.S.2d at 105. Additionally, the indictment may be coupled with a bill of particulars which sets forth the specific acts underlying the charge. Id.

In People v. Morris, the Court of Appeals upheld an indictment which lacked a precise date for the occurrence of the crime. The bill of particulars provided a reasonable approximation under the circumstances of this case, of the date or dates involved. Significant factors in considering the sufficiency of the dates are the span of time set forth and the knowledge the People have or should have of the exact date or dates of the crime. People v. Morris, 61 N.Y.2d 290, 473 N.Y.S.2d 769 (1984). See People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986); People v. Willette, 109 A.D.2d 112, 490 N.Y.S.2d 290 (3d Dept. 1985); People v. Cassiliano, 103 A.D.2d 806, 477 N.Y.S.2d 435 (2d Dept. 1984), cert. denied, 105 S.Ct. 1176 (1985); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dept. 1984).

See also People v. Jackson, 46 N.Y.2d 721, 413 N.Y.S.2d 369 (1978), where the Court held that an indictment charging sodomy is not fatally defective because it fails to specify the exact nature of the deviate sexual acts allegedly performed, as that information can be supplied in a bill of particulars. See also People v. Nicholas, 70 A.D.2d 804, 417 N.Y.S.2d 495 (1st. Dept. 1979); People v. Setford, 67 A.D.2d 1060, 413 N.Y.S.2d 775 (3d Dept. 1975); People v. Bneses, 91 Misc.2d 625, 398 N.Y.S.2d 507 (Sup. Ct. N.Y. Co. 1977) (failure of burglary indictment to specify object crime not fatal; defect could be cured by a bill of particulars); People v. D'Arcy, 79 Misc.2d 113, 359 N.Y.S.2d 453 (Albany Co. Ct. 1974), distinguishing People v. Thompson, 58 Misc.2d 511, 296 N.Y.S.2d 166 (Saratoga Co. Ct. 1959) [the court in D'Arcy held that the

failure to specify the intended benefit in an indictment charging official misconduct was not fatal].

In People v. Monahan, 114 A.D.2d 380, 493 N.Y.S.2d 898 (2d Dept. 1985), the court held that an indictment was not fatally defective which accused defendant as a principal where the proof adduced at trial established him as an accessory and the prosecutor did not formally move to amend the indictment. See also, People v. Clapper, 123 A.D.2d 484, 506 N.Y.S.2d 494 (3d Dept. 1986) (jury instructions were proper, that defendant charged with a violation of Vehicle and Traffic Law §1192(3) could also be convicted under §1192(2)); People v. Singleton, 130 A.D.2d 598, 515 N.Y.S.2d 307 (2d Dept. 1987) (indictment held sufficient charging defendant with robbery and criminal use of a firearm which alleged only that defendant "displayed what appeared to be a handgun" held sufficient).

An indictment will, of course, be dismissed where the factual allegations per se establish that it does not charge a crime. People v. Motley, 69 N.Y.2d 870, 514 N.Y.S.2d 715 (1987). See People v. Asher, 94 A.D.2d 704, 462 N.Y.S.2d 60 (2d Dept. 1983) (where the court dismissed the indictments for criminal possession of a weapon in the second degree because of failure to charge that weapons were possessed with intent to use them unlawfully against another.) People v. W. D. Boccard & Sons, 74 A.D.2d 654, 425 N.Y.S.2d 130 (2d Dept. 1980) [indictment charging forgery must be dismissed where it alleged that defendant had concealed the markings on a transition piece, (a section of a manhole)]; see also People v. Mohondhis, 86 Misc.2d 800, 383 N.Y.S.2d 824 (Sup. Ct. Queens Co. 1976), where the court granted defendant's motion for a trial order of dismissal because it was proved that the alleged owner of the stolen

property was not the owner on the date of the alleged unlawful possession, as he had been reimbursed by the insurance company. See also People v. Caban, 129 A.D.2d 721, 514 N.Y.S.2d 483 (2d Dept. 1987), appeal denied 70 N.Y.2d 644 (1987).

Note: In People v. Grosunor, 109 Misc.2d 663, 440 N.Y.S.2d 996 (Crim. Ct. Bronx Co. 1981), the court held the prosecutor's failure to file a nonhearsay affidavit corroborating the factual allegations in the prosecutor's information, as opposed to the failure to allege every material element of the crime, did not constitute a jurisdictional defect.

An indictment may employ a fictitious name, provided that it is accompanied by a description sufficient to establish that defendant is the person charged. People v. Brothers, 66 A.D.2d 954, 411 N.Y.S.2d 714 (3d Dept. 1978); People v. Doe, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (Nassau Co. Ct. 1977).

Note: Defendant must state the nature of the defect in his motion papers. People v. Hicks, 85 Misc.2d 649, 381 N.Y.S.2d 794 (Crim. Ct. N.Y. Co. 1976).

1. Duplicitous counts

A count in an indictment may not charge more than one offense [CPL §200.30(1)] and it is void as duplicitous if it does. See discussion in Section D(13), supra. However more than one criminal act may be set forth in a count of an indictment, where the two or more acts constitute a single criminal transaction. People v. Branch, 73 A.D.2d 230, 426 N.Y.S.2d 291 (2d Dept. 1980) (one count of an indictment may charge a bank robbery from three different tellers at one bank); People v. Cianciola, 86 Misc.2d 976, 383 N.Y.S.2d 159 (Sup. Ct. Queens Co. 1976)

(the number of separate counts of criminal contempt under the Penal Law are determined by the separate subject areas of questioning that took place; People v. Barysh, 95 Misc.2d 616, 408 N.Y.S.2d 190 (Sup. Ct. N.Y. Co. 1978).

In People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986), defendant was convicted of twenty counts of sodomy, sexual abuse, and endangering the welfare of a child over a period of approximately three years. The Court upheld those counts accusing defendant of endangering the welfare of a child over an approximate two year period since it may be characterized as a "continuing offense". However, the Court held the sodomy and sexual abuse counts to be duplicitous, since the repeated acts could not be treated as "one continuous crime".

2. Waiver

Failure to timely object to facial defects in an indictment constitutes a waiver on appeal. People v. Brothers, 66 A.D.2d 954, 411 N.Y.S.2d 714 (3d Dept. 1978); People v. Dumblauski, 61 A.D.2d 875, 402 N.Y.S.2d 89 (3d Dept. 1978). People v. Grimsley, 60 A.D.2d 980, 401 N.Y.S.2d 643 (4th Dept. 1978). See also People v. Hunter, 131 A.D.2d 877, 517 N.Y.S.2d 234 (2d Dept. 1987). However, if the indictment is defective because it does not charge a crime, such a defect is not waived by a guilty plea. People v. Adams, 28 A.D.2d 708, 280 N.Y.S.2d 974 (2d Dept. 1967). Similarly, if the indictment is defective because it charges only a lesser included offense than the one the defendant had been originally charged with, that defect may not be waived by a guilty plea. People v. Herne, 110 Misc.2d 152, 441 N.Y.S.2d 936 (Franklin Co. Ct. 1981).

[ii] Jurisdictionally Defective

1. No Jurisdiction in County

An indictment must be dismissed as jurisdictionally defective where it fails to state the county where the alleged crime was committed, and the People concede that they could not prove particulars other than those stated in the indictment. People v. Puig, 85 Misc.2d 228, 378 N.Y.S.2d 925 (Sup. Ct. N.Y. Co. 1976). However, where the agreement to sell drugs was made in Richmond County, the indictment in Richmond County was not jurisdictionally defective, even though the actual transfer took place in New York County, since "sale" in Article 220 (controlled substances) encompasses an agreement to sell. People v. Cousart, 74 A.D.2d 877, 426 N.Y.S.2d 295 (2d Dept. 1980). See also People v. Brill, 82 Misc.2d 865, 370 N.Y.S.2d 820 (Nassau Co. Ct. 1975) (Nassau County had jurisdiction to prosecute the sale in New York County of allegedly obscene films to a Nassau County dealer for resale in Nassau County).

2. No Jurisdiction in Court

An assault and burglary indictment must be dismissed where it resulted from a transfer by a Family Court clerk without the required judicial determination, even though, at the time of the motion to dismiss, the parties were divorced. People v. Reuscher, 89 Misc.2d 160, 390 N.Y.S.2d 568 (Sup. Ct. Suffolk Co. 1976). An attempted grand larceny indictment must be dismissed where the criminal court's plenary jurisdiction extends only to misdemeanors or lesser included offenses. See People v. Senise, 111 Misc.2d 477, 444 N.Y.S.2d 535 (Crim. Ct. Queens Co. 1981) (the court also held that the trial judge's action of reducing the felony charge to a misdemeanor without a factual showing that no felony existed had no effect).

3. Unauthorized Prosecutor

Where a special prosecutor for corruption had no authority to act, the indictment was jurisdictionally defective; he was, in effect, an unauthorized person in the grand jury room. People v. DiFalco, 44 N.Y.2d 482, 406 N.Y.S.2d 279 (1978). However, the presence of unauthorized persons before the grand jury does not automatically require dismissal. Dismissal based on unauthorized persons' presence in grand jury room requires possibility of prejudice to the defendant or impairment of the proceeding's integrity. People v. DiFalco, supra; People v. Hyde, 85 A.D.2d 745, 445 N.Y.S.2d 800 (2d Dept. 1981).

Note: The failure to comply with the waiver of the non-residence requirement does not affect the authority of an appointee to serve as a special assistant district attorney. Therefore, this individual's presentation to grand jury did not impair the proceeding's integrity. People v. Dunbar, 53 N.Y.2d 868, 440 N.Y.S.2d 613 (1981).

[iii] Statute Unconstitutional

A legislative enactment carries a strong presumption of constitutionality. Wasmuth v. Allen, 14 N.Y.2d 391, 397; 252 N.Y.S.2d 65, 69 (1964). Defendants have the burden of proving invalidity beyond a reasonable doubt. People v. Billi, 90 Misc.2d 568, 395 N.Y.S.2d 353 (Sup. Ct. Kings Co. 1977) (even though cocaine is not a narcotic but a stimulant, its classification as such by the Legislature in Article 220 and the Public Health is not per se unreasonable; defendant has a heavy burden of proving that he was singled out for selective prosecution). See People v. Linardos, 104 Misc.2d 56, 427 N.Y.S.2d 900 (Sup. Ct. Queens Co. (1980)) (defendant did not sustain burden).

Note: At least one court has held that a defendant is entitled to

a hearing on his claim that he is being subjected to selective prosecution. People v. Marcus, 90 Misc.2d 243, 394 N.Y.S.2d 530 (Sup. Ct. Spec. Narc. N.Y. Co. 1977). But see People v. Rodriguez, 79 A.D.2d 539, 433 N.Y.S.2d 584 (1st Dept. 1980), aff'd, 55 N.Y.2d 776, 447 N.Y.S.2d 246 (1981) (no right to a hearing on selective prosecution where the motion papers alleged no facts to support such a claim).

The fact that a statute might be unconstitutionally applied to others is not a ground for granting the motion. People v. Valentin, 93 Misc.2d 1123, 404 N.Y.S.2d 66 (Sup. Ct. Bronx Co. 1978). See also People v. M & R Records, 106 Misc.2d 1052, 432 N.Y.S.2d 846 (Sup. Ct. Suffolk Co. 1980).

(2) Legally Insufficient Evidence

A grand jury may only return an indictment when (a) the evidence before it is legally sufficient to establish that the defendant committed the offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense, is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that defendant committed the offense. See CPL §190.65(1). "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent. CPL §70.10(1). Legally sufficient for grand jury purposes, was held to mean "prima facie," not proof "beyond a reasonable doubt." People v. Stevens, 84 A.D.2d 753, 443 N.Y.S.2d 754 (2d Dept. 1981); People v. Rodriguez, 110 Misc. 2d 828, 442 N.Y.S.2d 948 (Sup. Ct. Kings Co. 1981). "Reasonable cause to believe

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

The New York City Criminal Court held in People v. Haskins, 107 Misc.2d 480, 435 N.Y.S.2d 261 (Crim. Ct. N.Y. Co. 1981), that hearsay evidence is admissible only if it satisfies some guarantee of reliability. Thus, the affidavit of the defendant's alleged employer was held inadmissible since it was not prepared regularly in the course of business, but was prepared "upon demand" in the course of the Labor Department's investigation. Therefore, the court rejected defendant's motion to dismiss the charges violating the Labor Law.

The test to be applied on a motion to dismiss an indictment for insufficiency of evidence before the grand jury under CPL §210.20(1)(b) is whether there has been a clear showing that the evidence before the grand jury, if unexplained and uncontradicted, could not warrant conviction by a trial jury. People v. Pelchat, 62 N.Y.2d 97, 476 N.Y.S.2d 79 (1984); People v. Deegan, 69 N.Y.2d 976, 516 N.Y.S.2d 651 (1987); People v. Sabella, 35 N.Y.2d 158, 359 N.Y.S.2d 100 (1974); People v. English, ___ A.D.2d ___, 525 N.Y.S.2d 936 (3d Dept. 1988); People v. Dunleavy, 41 A.D.2d 717, 341 N.Y.S.2d 500 (1st Dept. 1973), aff'd without opinion 33 N.Y.2d 573, 575, 347 N.Y.S.2d 448 (1973); see also People v. Green, 80 A.D.2d 995, 437 N.Y.S.2d 482 (4th Dept. 1981); People v. Ruggieri, 102 Misc.2d 238, 423 N.Y.S.2d 108 (Sup. Ct. Kings Co. 1979).

An indictment cannot be dismissed for insufficient evidence unless the evidence also fails to establish any lesser included offense. People v. Vandercook, 99 Misc.2d 876, 417 N.Y.S.2d 447 (Albany Co. Ct. 1979).

In People v. Sullivan, 68 N.Y.2d 495, 510 N.Y.S.2d 518 (1986),the Court held, "when a grand jury is presented with conflicting versions of a shooting death, it may choose to indict the defendant for second degree manslaughter rather than intentional murder, provided that either charge is supported by sufficient evidence".

The court found the evidence was legally sufficient to affirm the defendant's conviction in People v. Buthy, 85 A.D.2d 890, 446 N.Y.S.2d 756 (4th Dept. 1981). Defendant escaped from the custody of the commissioner of Mental Hygiene, a public servant under whose restraint he had been placed by court order, and the evidence was sufficient to support the offense charging escape in the second degree, since that evidence clearly established the defendant's commission of escape in the third degree. Evidence was also held to be legally sufficient to sustain a robbery conviction in People v. Cephas, 110 Misc.2d 1075, 443 N.Y.S.2d 558 (Sup. Ct. N.Y. Co. 1981). The court held that the evidence sufficiently indicated that force had been used since the bag was either in the hand, or on the arm or shoulder of the victim and the taking was done in a way likely to prevent or overcome resistance. See also People v. Howard, 79 A.D.2d 1064, 435 N.Y.S.2d 399 (3d Dept. 1981) (the loss of two front teeth is a permanent and serious injury, legally sufficient to sustain an assault charge). Similarly, the fact that defendant was seen returning the dirty pillows after having charged the hospital for cleaning them, was a sufficient basis to support an indictment of grand larceny in the third degree. People v. Sobel, 87 A.D.2d 656, 448

N.Y.S.2d 511 (2d Dept. 1982). However, where a shotgun was approximately one-half the height of the defendants and no evidence was presented to the grand jury indicating that the defendants were garbed in a manner to aid, rather than hinder concealment of the weapon, the grand jury minutes were legally insufficient to sustain the charge of criminal possession of a weapon in the third degree. People v. Cortez, 110 Misc.2d 652, 442 N.Y.S.2d 873 (Sup. Ct. N.Y. Co. 1981). See also People v. Kiszenik, 113 Misc.2d 462, 449 N.Y.S.2d 414 (Sup. Ct. N.Y. Co. 1982) (absent any evidence that the defendant participated in or had actual knowledge of certain aspects of a conspiracy, evidence was held insufficient to sustain that portion of the indictment); People v. Alexander, ___ A.D.2d ___, 527 N.Y.S.2d 380 (1st Dept. 1988) (indictment was based on legally insufficient evidence since the arresting officer's testimony could have mislead the grand jury to believe that the officer had made a personal observation of the crime.)

Note: The Court of Appeals in People v. Warner-Lambert Company, 51 N.Y.2d 295, 434 N.Y.S.2d 159 (1980), cert. denied, 450 U.S. 1031 (1980), held that an indictment may be legally sufficient even though reasonable cause to believe that the defendant committed a crime is not shown; the evidence in determining this motion must be viewed in the light most favorable to the People. However, in Warner-Lambert, the Court dismissed the indictment for manslaughter and criminally negligent homicide based on the fact that defendant's factory exploded on the ground that the evidence established that the triggering cause was neither foreseen nor foreseeable. See also People v. Jennings, 69 N.Y.2d 103, 512 N.Y.S.2d 652 (1986); see also, People v. Deegan, 69 N.Y.2d 976, 516 N.Y.S.2d 651 (1987) (the fact that other inferences can be drawn from facts before the

grand jury is irrelevant as long as the evidence can rationally be viewed as legally sufficient.)

(3) Defective Grand Jury Proceeding

A defendant may move to dismiss an indictment on the ground that the grand jury proceeding was defective within the meaning of CPL §210.35. See CPL §210.20(1)(c). The defects set forth in CPL §210.35 are:

(1) the grand jury was illegally constituted;

(2) fewer than sixteen grand jurors were present;

(3) fewer than twelve grand jurors concurred in the finding of the indictment;

(4) defendant was not afforded his right to appear and testify under CPL §190.50. [For example, see People v. Hooker, 113 Misc.2d 159, 448, N.Y.S.2d 363 (Sup. Ct. Kings Co. 1982) (the proper remedy for a defendant who had been denied the right to testify before the grand jury was not dismissal of indictment contingent on defendant's appearing before a grand jury, but rather, outright dismissal of the indictment); see also People v. Willis, 114 Misc.2d 371, 451 N.Y.S.2d 584 (Sup. Ct. Queens Co. 1982)];

(5) the proceeding otherwise fails to comply with the requirements of CPL Article 190 to the defendant's prejudice.

In People v. Wilkins, 68 N.Y.2d 269, 508 N.Y.S.2d 893 (1986), the Court held that a prosecutor may not withdraw a case from the grand jury after presentation of the evidence, and resubmit the case to a second grand jury without the consent of either the first grand jury or the court which impaneled it. See also People v. Grafton, 115 A.D.2d 952, 497 N.Y.S.2d 528 (4th Dept. 1985).

Some defects are technical and require a showing of prejudice. See

generally, People v. Wilson, 77 A.D.2d 713, 430 N.Y.S.2d 715 (3d Dept. 1980) (although mother of infant rape victim was an unauthorized person in the grand jury room, defendant did not show prejudice so his motion to dismiss the indictment would be denied); People v. Baker, 75 A.D.2d 966, 428 N.Y.S.2d 353 (3d Dept. 1980) (motion denied because defendant was not prejudiced by fact that member of indicting grand jury was non-resident of county); People v. Erceg, 82 A.D.2d 947, 440 N.Y.S.2d 726 (3d Dept. 1981) (dismissal was not warranted, although off-the-record conversations were held between the prosecutor and the grand jurors because the court did not find a showing of prejudice to the defendant). However, the grand jury's failure to vote voids the indictment. People v. Collins, 104 Misc.2d 330, 428 N.Y.S.2d 385 (Onondaga Co. Ct. 1979).

(a) Adequacy of Instructions to Grand Jury

The New York Court of Appeals in People v. Calbud Inc., 49 N.Y.2d 389, 426 N.Y.S.2d 238 (1980), an obscenity prosecution, refused to dismiss the indictment even though the district attorney's instructions were incomplete, as he neglected to mention that obscenity was to be judged by the criteria of "State-wide community standards." The court stated that a grand jury need not be instructed with the degree of precision required in instructions for a petit jury. It is sufficient if the district attorney provides the grand jury with enough information to enable it to decide intelligently whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime. See also People v. Goetz, 68 N.Y.2d 96, 506 N.Y.S.2d 18 (1986). In the ordinary case, this standard may be met by reading the appropriate sections of the Penal Law. Calbud, supra. See People v. Loizides, 123 Misc.2d 334, 473 N.Y.S.2d 916 (Suff.

Co. Ct. 1984) (where inadequate or incomplete legal instructions to a grand jury may constitute grounds for dismissal of an indictment as defective). But cf. People v. Darcy, 113 Misc.2d 580, 449 N.Y.S.2d 626 (Yates Co. Ct. 1982) (the grand jury was not provided with sufficient information to decide intelligently whether a crime had been committed; instructions given to grand jury did not include substance of regulations of United States Department of Agriculture).

Note also that where a district attorney gave a grand jury the impression that the rebuttable presumption of possession which could be drawn from the presence of a weapon in an automobile was mandatory, the indictment was dismissed. People v. Garcia, 103 Misc.2d 915, 427 N.Y.S.2d 360 (Sup. Ct. Bronx Co. 1980). The court stated that the case before it was not the typical situation referred to in Calbud. Also in Pegale v. Montalvo, 113 Misc.2d 471, 449 N.Y.S.2d 377 (Sup. Ct. Kings Co. 1982), the court held that the prejudicial procedural error in the presentation required its dismissal. In this case, there was substantial conflict in the eyewitness testimony. The court ruled that the failure to adequately advise the jurors that if they declined to indict the defendant at that time, another panel could reconsider the matter in the future; this could have misled the jury. But note in People v. Rex, 83 A.D.2d 753, 443 N.Y.S.2d 516 (4th Dept. 1981), that failure of the district attorney to instruct grand jurors of the necessity to corroborate the confession of the defendant and her accomplice's written statement did not present a showing of prejudice to the defendant. See also People v. Mayer, 122 Misc.2d 1036, 472 N.Y.S.2d 568 (Nassau Co. Ct. 1984); People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1986) (People are under no duty to charge the grand jury with a potential defense of

mental disease or defect).

(4) Defendant Has Immunity

A defendant who has been granted immunity under CPL §50.20 or CPL §190.40 can move to dismiss the indictment on this ground. See CPL §210.20(1)(d).

CPL §190.40 provides for the conferring of immunity on a person subpoenaed to appear before a grand jury:*

> §190.40 Grand jury; witnesses, compulsion of evidence and immunity
>
> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:
>
> (a) He has effectively waived such immunity pursuant to section 190.45; or
>
> (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.
>
> (c) The evidence given by the witness consists only of books, papers, records or other physical evidence of an enterprise as defined in subdivision one of section 175.00 of the penal law, the production of which is required by a subpoena duces tecum, and the witness does not posess a privilege against self-incrimination with respect to the production of such evidence. Any further evidence given by the witness entitles the witness to immunity except as provided in subparagraphs (a) and (b) of this subdivision.

The New York rule is that full transactional immunity mu

* CPL §50.20 provides for the complusion of evidence by the offer of immunity in legal proceedings other than grand jury proceedings.

conferred on the witness before he can be compelled to waive his privilege against self-incrimination. In Felder v. New York State Supreme Court, 44 A.D.2d 1, 352 N.Y.S.2d 706 (4th Dept. 1974), the court reversed petitioner's criminal contempt conviction, holding that petitioner, who was already indicted for hindering prosecution, had properly refused to answer questions before the grand jury about a murder since he was only offered immunity on any possible murder charge and was not offered the full transactional immunity required by statute.

(a) Prosecutor's Duty to Explain Immunity to Witness

A prosecutor has a duty to explain to the witness that he receives transactional immunity when he answers the questions propounded before the grand jury. People v. Masiello, 28 N.Y.2d 287, 321 N.Y.S.2d 577 (1971); People v. Tramunti, 29 N.Y.2d 28, 323 N.Y.S.2d 687 (1971); see also People v. Franzese, 16 A.D.2d 804, 228 N.Y.S.2d 644 (2d Dept. 1962), aff'd without opinion, 12 N.Y.2d 1039, 239 N.Y.S.2d 682 (1963).

It is not mandated that the prosecutor use the statutory language or even employ the phrase "transactional immunity," "as long as it is brought home to the witness that he has been accorded full and complete immunity and cannot thereafter be prosecuted." People v. Mulligan, 29 N.Y.2d 20, 23; 323 N.Y.S.2d 681, 683 (1971).

If a grand jury witness waives immunity, if such a waiver is obtained in violation of the witness' state constitutional right to counsel, such a waiver is not effective within the meaning of CPL §190.40(2)(6). People v. Chapman, 69 N.Y.2d 497, 516 N.Y.S.2d 159 (1987). In People v. Higley, 70 N.Y.2d 624, 518 N.Y.S.2d 778 (1987) the New York Court of Appeals held there was not substantial compliance with the statute, CPL §190.45, when defendant signed a waiver of immunity

before a notary public. The Court held that the statute warranted strict compliance and the waiver must be sworn to before the grand jury. People v. Higley, supra.

(b) Scope of Immunity

Complete immunity under the CPL may be obtained only by compliance with the immunity statutes [CPL §§50.10, 50.20, and 190.40], each of which requires that the person receiving immunity give testimony as a witness in a legal proceeding. People v. Caruso, 100 Misc.2d 601, 419 N.Y.S.2d 854 (Sup. Ct. Kings Co. 1979), citing People v. Laino, 10 N.Y.2d 161, 173; 218 N.Y.S.2d 647, 657 (1961), and People v. Avant, 33 N.Y.2d 265, 272, 352 N.Y.S.2d 161 (1973). In Caruso, a prosecutor offered defendant immunity if he would submit to an office interview. The court in Caruso ruled that it would enforce the implied bargain and held accordingly, that full transactional immunity had been conferred by this agreement, even though the law did not authorize the prosecutor to give immunity in this manner. See also Brockway v. Monroe, 59 N.Y.2d 179, 464 N.Y.S.2d 410 (1983).

In People v. Kramer, 123 A.D.2d 786, 507 N.Y.S.2d 866 (2d Dept. 1986), the court held that it was within the prosecutor's discretion not to request that a witness receive transactional immunity where the witness stated that, if called to testify, he would assert his privilege against self-incrimination.

Note: Once a defendant pleads guilty to an offense, and then gives grand jury testimony, he cannot claim statutory transactional immunity for the offense to which he plead guilty. People v. Sobotker, 61 N.Y.2d 44, 471 N.Y.S.2d 78 (1984); see Bellecosa, Joseph W., McKinney's Consolidated Laws of New York Practice Commentary, §190.40, p. 56 (1987).

[i] Immunity Does Not Extend to Perjury and Contempt

Immunity does not extend to subsequent perjury charges against a witness based on false answers or contempt charges based on refusal to answer or to a witness who gives answers so patently evasive as to be tantamount to a refusal to answer. CPL §50.10(1); see also People v. Arnette, 58 N.Y.2d 1104, 462 N.Y.S.2d 817 (1983); People v. Rappaport, 47 N.Y.2d 308, 418 N.Y.S.2d 306 (1979), cert. denied, 444 U.S. 964 (1979).

However, In the Matter of Rush v. Mordue, 68 N.Y.2d 348, 350-1, 509 N.Y.S.2d 493,494 (1986), the Court held:

> "Where a witness is called before a Grand Jury and, without having executed a waiver of immunity, gives testimony concerning the truthfulness of a prior sworn statement and disavows that prior statement as having been false when given, transactional immunity resulting from the compelled testimony is acquired with respect to that prior statement, and the witness may not thereafter be prosecuted for perjury based upon the inconsistency between the prior sworn statement and the Grand Jury testimony."

[ii] Future Acts Not Covered

Testimony before the grand jury does not confer immunity as to acts committed in the future. But where proof of the future crimes was so completely intertwined with prior acts for which a defendant has received immunity, immunity must be extended as to them. People v. Conrad, 93 Misc.2d 655, 405 N.Y.S.2d 559 (Monroe Co. Ct. 1976), aff'd, 44 N.Y.2d 863, 407 N.Y.S.2d 694 (1978); People v. Lieberman, 94 Misc.2d 737, 405 N.Y.S.2d 559 (Sup. Ct. Queens Co. 1978).

[iii] Coextensive with Evidence Given; Handwriting Exemplars Covered

A defendant "gives evidence" within the meaning of the immunity statute when he furnishes a handwriting exemplar under a subpoena ad testificandum. People v. Perri, 95 Misc.2d 767, 408 N.Y.S.2d 709 (Sup.

Ct. Kings Co. 1978), aff'd 72 A.D.2d 106, 423 N.Y.S.2d 679 (2d Dept. 1980), aff'd, 53 N.Y.2d 957, 441 N.Y.S.2d 444 (1981). Accordingly, the court in Perri dismissed the indictment, which charged defendant, a businessman, with filing a false application to the Emergency Aid Fund set up after New York City's blackout, because the indictment was based on evidence of a compelled handwriting exemplar. The court, in so holding, stated:

> It is to be noted that defendant in this case was not required to furnish a handwriting exemplar under a subpoena duces tecum with respect to his business enterprises, but rather was brought before the Grand Jury under a subpoena ad testificandum contrary to CPL §190.40(2)(c). Thus the district attorney did not follow statutory requirements in securing these handwriting exemplars. After all, if the exemplars were so necessary to the People's case, the district attorney could have obtained the books and records of defendant's business enterprises including its canceled checks and other signed documents via a subpoena duces tecum. The narrow limitations of CPL §190.40 are balanced by the remedy provided.
>
> Perri, 408 N.Y.S.2d at 714.

[iv] Responsive Answers Covered

Defendant could not be prosecuted for selling narcotics where her admissions to these crimes were not volunteered but were in response to questions asked of her in a grand jury proceeding investigating an unrelated homicide. People v. McFarlan, 89 Misc.2d 905, 396 N.Y.S.2d 559 (Sup. Ct. N.Y. Co. 1975), aff'd, 42 N.Y.2d 896, 397 N.Y.S.2d 1003 (1977), and see Brockway v. Monroe, 59 N.Y.2d 179, 464 N.Y.S.2d 410 (1983).

(5) Prosecution Barred by Reason of a Previous Prosecution

A person may move to dismiss an indictment on the ground that it is barred by reason of a previous prosecution within the meaning of CPL

§40.20. See CPL §210.20(e). Article 40 of the CPL codifies New York State's double jeopardy protections. CPL §40.20(1) states the simple rule that "a person may not be twice prosecuted for the same offense." If a defendant's double jeopardy protections are violated, the indictment must be dismissed. CPL §210.20(1)(e). An offense is defined as any conduct "which violates a statutory provision defining an offense." CPL §40.10(1). When any conduct violates more than one statutory provision, each is defined as a distinguishable separate criminal offense. Ibid. Additionally, if the conduct results in injury, loss, or death to two or more persons, these offenses are deemed to be separate. Ibid.

Indictment of a defendant in New York for second degree murder was barred by his acquittal in Maryland of conspiracy to commit murder based on the same facts. Wiley v. Altman, 76 A.D.2d 891, 431 N.Y.S.2d 826 (1st Dept. 1980) (Article 78 proceeding), aff'd, 52 N.Y.2d 410, 438 N.Y.S.2d 490 (1981). See also, In the Matter of Johnson v. Morgenthau, 69 N.Y.2d 148, 512 N.Y.S.2d 797 (1987); In the Matter of Pemberton v. Turner, 124 A.D.2d 338, 508 N.Y.S.2d 294 (3d Dept. 1986); People v. Harris, 116 A.D.2d 588, 497 N.Y.S.2d 446 (2d Dept. 1986).

(a) When Jeopardy Attaches

Defendant's double jeopardy protection attaches at that point in a criminal proceeding when he is deemed to have been prosecuted. Once this point has been passed, the defendant cannot be retried unless the trial is terminated by the disagreement of the jury, by their discharge pursuant to law, by the consent of the accused or because of extreme necessity such as illness or death. People v. Goldfarb, 152 A.D. 870, 138 N.Y.S. 62 (1st Dept. 1912), aff'd, 213 N.Y. 664 (1914). Pursuant to CPL §40.30(1) a defendant is prosecuted when he is charged by an

accusatory instrument and either (a) the action terminates in a conviction upon a plea of guilty; or (b) proceeds to the trial stage and a jury is impanelled and sworn* or, in the case of a trial by the court without a jury, a witness is sworn. People v. Prescott, 66 N.Y.2d 216, 495 N.Y.S.2d 955 (1985); McGrath v. Gold, 36 N.Y.2d 406, 369 N.Y.S.2d 62 (1975); People v. Scott, 40 A.D.2d 933, 337 N.Y.S.2d 640 (4th Dept. 1972).

(b) Exceptions

Even though the defendant may have been prosecuted, by virtue of CPL §40.30, under specific circumstances, retrial will be proper. Many of these exceptions have been recognized for quite some time; [see People v. Goldfarb, supra], and they are codified in CPL §40.30(2)(4).

Subdivision 2 of CPL §40.30 allows for the retrial of the defendant if the original prosecution occurred in a court which lacked jurisdiction. Steingut v. Gold, 54 A.D.2d 481, 388 N.Y.S.2d 622 (2d Dept. 1976), aff'd, 42 N.Y.2d 311, 397 N.Y.S.2d 765 (1977). Additionally, in subdivision 2, if the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of pleading to a lesser charge, when sufficient facts existed for the prosecution of a greater charge, retrial will be permitted. See People v. Daby, 56 A.D.2d 873, 392 N.Y.S.2d 325 (2d Dept. 1977). This subdivision provides for reprosecution in the event that the defendant, appearing before a friendly judge, induces the judge to allow him to plead to a lesser charge. See Denzer, Richard G., McKinney's Consolidated Laws of New York, Practice Commentary CPL §40.30, pp. 123-124 (1971).

Subdivisions 3 and 4 concern those situations where prosecution has

* This is constitutionally mandated. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156 (1978).

commenced and jeopardy has attached but the criminal proceedings are subsequently nullified by court order. Subdivision 4 permits reprosecution of the defendant if the indictment is dismissed on the basis of some defect but the court authorizes the People to resubmit the charge to a grand jury for the purpose of obtaining a new indictment. People ex rel. Zakrzewski v. Mancusi, 22 N.Y.2d 400, 292 N.Y.S.2d 892 (1968). If there was no court permission for the new accusatory instrument the indictment should be dismissed.

Subdivision 3 deals with prosecutions that have been terminated by a court order nullifying the trial proceeding and directing a new trial in the same court. Under these circumstances the second trial is not truly a second prosecution but merely a continuation. It is important to note that subdivision (3) permits a new trial of the same indictment in the same court, it does not permit trial of a new indictment or in a different court. There, retrial is permitted upon a proper declaration of a mistrial which contemplates further proceedings but not when the proceedings are terminated in defendant's favor. Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141 (1977).

A mistrial may be declared upon defendant's request or upon the court's or prosecutor's initiation without defendant's consent. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075 (1976). A defendant often requests a mistrial when errors have occurred during the trial that are considered so prejudicial as to deprive him of a fair trial. However, the decision of whether to consent to a mistrial is to be made by a defendant's attorney, and personal consent of the defendant is not required. People v. Ferguson, 67 N.Y.2d 383, 502 N.Y.S.2d 972 (1986). A court may order a mistrial without defendant's consent only upon a

showing of "manifest necessity." Examples of "manifest necessity" are lack of readiness of key court personnel, counsel, and witnesses or jurors, and "hung jury" situations. A prosecution is deemed to have terminated in defendant's favor upon acquittal or upon a determination of the court that the evidence advanced at trial was insufficient as a matter of law in the form of a reversal or a trial order of dismissal. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978); Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151 (1978), cert. denied, 104 S.Ct. 718 (1984), reh'g denied, 104 S.Ct. 1431 (1984); Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170 (1978). Note that whether characterized as a "mistrial" or a "trial order of dismissal" by the trial court, an appellate court may look behind the order to the finding to determine whether the proceedings were properly terminated before a decision was rendered by a jury so as to permit retrial and whether the decision was actually on the merits. Lee v. United States, supra. Insofar as a trial order of dismissal is deemed to have been made with defendant's consent, a prosecutor may appeal the dismissal and, if successful, retry the defendant. United States v. Scott, 437 U.S.82, 98 S.Ct. 2187 (1978), reh'g denied, 439 U.S. 883 (1978), reh'g denied, 99 S.Ct. 226 (1978), overruling United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006 (1975). The key question is whether the dismissal "contemplates an end to all prosecution of the defendant for the offense charged." Lee v. United States, 432 U.S. 23, 30; 97 S.Ct. 2141, 2145 (1977).

Note: That if the original charge against the defendant is dismissed at the close of the trial on the ground that the defendant can only be found guilty of a lesser included offense, and thereafter, a mistrial is declared because the jury cannot reach agreement, the prohibition

against double jeopardy precludes reindictment of defendant on the original greater charge. People v. Mayo, 48 N.Y.2d 245, 422 N.Y.S.2d 361 (1979) (a robbery prosecution).

The most difficult aspect of the double jeopardy rule occurs in relation to the prosecution of criminal conduct that is comprised of several offenses which may or may not require joinder. CPL §40.10(1) defines a criminal transaction as "any group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture." Braunstein v. Frawley, 64 A.D.2d 772, 407 N.Y.S.2d 250 (3d Dept. 1978). Theoretically, one would assume that where a group of acts were defined as a criminal transaction, joinder would be required. In fact, this is precisely what CPL §40.40(1) calls for. But the courts have been inconsistent in their enforcement of these rules and CPL Article 40 itself allows for numerous instances where separate prosecutions are permitted. Section 40.20(2) outlines those situations where a person may be prosecuted separately for two offenses based on the same criminal act or transaction: (a) the offenses have different elements and the acts establishing one offense are distinguishable from those establishing the other [People v. Durant, 88 Misc.2d 731, 389 N.Y.S.2d 533 (Suffolk Co. Ct. 1976)]; (b) each of the offenses contains an element which is not an element of the other, and the statutory provision designed to prevent the offenses concern different types of harm [People v. Green, 89 Misc.2d 639, 392 N.Y.S.2d 804 (Dist. Ct. Nassau Co. 1977)]; (c) one of the offenses consists of possession of contraband matter and the other its use [Abraham v. Justices of N.Y. Sup. Ct., Bronx

Co., 37 N.Y.2d 560, 376 N.Y.S.2d 79 (1975); People v. Abbamonte, 43 N.Y.2d 74, 400 N.Y.S.2d 766 (1977); People v. Vera, 47 N.Y.2d 825, 418 N.Y.S.2d 575 (1979) (the fact that federal authorities were unaware of state sale was irrelevant];* (d) the first prosecution is for assault and the second is for murder where the death occurs after a prosecution for assault or other non-homicide offense [People v. Rivera, 90 A.D.2d 40, 455 N.Y.S.2d 801 (1st Dept. 1982), aff'd, 60 N.Y.2d 110, 468 N.Y.S.2d 601 (1983)]; (e) offenses involve death, injury, or loss to more than one person [People v. Dean, 56 A.D.2d 242, 392 N.Y.S.2d 134 (4th Dept. 1977), aff'd, 45 N.Y.2d 654, 412 N.Y.S.2d 353 (1978)]; (f) one of the offenses was prosecuted in another jurisdiction, and was dismissed for failure to state an element required for conviction which element is not required for another offense pursuant to the laws of this state. CPL §40.20(2)(a-f).

Finally, CPL §40.40(2) and (3) discuss those instances where separate prosecution will not be allowed. Subdivision 2 describes a situation where sufficient evidence exists to support a conviction for two or more offenses, but only one indictment is sought. There prosecution on the second charge will be barred since the district attorney could readily have tried them both together. If, on the other hand, the district attorney proceeds to solicit indictments on all charges and then chooses to prosecute only one, paragraph 3 provides a system whereby prosecution on the other counts will be barred. Defendant must first

* Note that the United States Constitution's prohibition against double jeopardy does not preclude prosecutions by two sovereigns, state and federal [Barktus v. Illinois, 359 U.S. 121, 79 S.Ct. 676 (1959), reh'g denied, 360 U.S. 907 (1959)]. This prohibition is statutory and accordingly may be waived on appeal by a plea of guilty. People v. Williams, 103 Misc.2d 256, 425 N.Y.S.2d 762 (Sup. Ct. Kings Co. 1980).

apply for consolidation and then the court must improperly deny the application. Auer v. Smith, 77 A.D.2d 172, 432 N.Y.S.2d 926 (4th Dept. 1980), appeal dismissed, 52 N.Y.2d 1070 (1981); People v. Durant, 88 Misc.2d 731, 389 N.Y.S.2d 533 (Suffolk Co. Ct. 1976).

(c) Collateral Estoppel; Inapplicable to Codefendants

The doctrine of collateral estoppel, or issue preclusion operates in a criminal prosecution to bar litigation of issues necessarily resolved in defendant's favor at an earlier trial. People v. Acevedo, 69 N.Y.2d 478, 484-485, 515 N.Y.S.2d 753, 759 (1987); People v. Goodman, 69 N.Y.2d 32, 37-38, 511 N.Y.S.2d 565, (1986). "Before collateral estoppel may be applied in a subsequent criminal case, there must be an identity of parties and issues and a prior proceeding resulting in a final and valid judgment in which the party opposing the estoppel had a 'full and fair opportunity' to litigate." People v. Goodman, Id. at 38, 511 N.Y.S.2d at 569. The doctrine applies not only to "ultimate" facts, or those facts essential for a conviction in the second trial, but also to "evidentiary" facts as well. People v. Acevedo, 69 N.Y.2d 478, 487, 515 N.Y.S.2d 753, 759 (1987).

Principles of collateral estoppel may never be applied so as to allow the acquittal of one defendant to bar the prosecution of another. People v. Berkowitz, 50 N.Y.2d 333, 428 N.Y.S.2d 927 (1980).

(6) Untimely Prosecution

Under CPL §210.20(1)(f), the superior court, upon the motion of the defendant may dismiss the indictment if the prosecution is untimely. In a criminal case, the actions must be commenced within the prescribed statute of limitations or else it will be time barred. These periods, as set forth in CPL §30.10, vary according to the severity of the criminal

charge. Their purpose is to ensure prompt prosecution of criminal charges.

Pursuant to CPL §30.10(2), prosecution for a class A felony may be commenced at any time. Prosecution for any other felony must be commenced within five years of its commission. Prosecution for a misdemeanor must begin within two years after its commission and prosecution for a violation within one. The length of the sentence which can be imposed determines the classification of the crime, irrespective of any name it might be given. People on Inf. of LaBounty v. County Excavation, Inc., 77 Misc.2d 358, 351 N.Y.S.2d 931 (Justice Ct. Albany Co. 1974). In that case, although the offenses charged the defendants with a misdemeanor, they were in fact only violations and therefore a one-year statute of limitations applied. The indictment was dismissed as untimely.

The statutory period begins to run from the commission of the crime and not from its discovery. Delay in a trial proceeding is often prejudicial to a defendant as it impairs his ability to prove his innocence. Thus, motions to dismiss pursuant to this section will be liberally granted and the People have the burden of showing that the statute is inapplicable under the facts of a particular case. Toussie v. United States, 397 U.S. 112, 90 S.Ct. 858 (1970); People v. McAllister, 77 Misc.2d 142, 352 N.Y.S.2d 360 (N.Y.C. Crim. Ct. Kings. Co. 1974); People v. Fletcher Gravel Co. Inc., 82 Misc.2d 22, 368 N.Y.S. 392 (Onondaga Co. Ct. 1975). The defendant is entitled to a hearing when he alleges that adjournments were improperly granted. People v. Berkowitz, supra.

If the People can show that, during the statutory period, the defendant was continually outside the state's jurisdiction or his

whereabouts were unascertainable through the exercise of reasonable diligence, the statute will be tolled. CPL §30.10(4)(a). However, under no circumstances will the period be extended by more than five years. Ibid. Additionally, if a prosecution is lawfully commenced and subsequently dismissed with leave to resubmit, this period will not be included. CPL §30.10(4)(b).

Finally, CPL §30.10(3) sets out four exceptions to the general rule. A prosecution for larceny committed by a person in violation of a fiduciary duty may be commenced anytime within one year of its discovery. CPL §30.10(3)(a). Also, a prosecution for an offense involving misconduct in public office can commence anytime while the defendant is in office or within five years after termination of said office. CPL §30.10(3)(b). However, in no event can the period be extended more than five years beyond the applicable time period. This subdivision was added from the original Code of Criminal Procedure because of the inherent difficulties involved in discovering crimes of this nature. See Bellacosa, Joseph W., McKinney's Consolidated Laws of New York, CPL §30.10 pp. 115-117 (1981).

(a) Generally

Defendant's motion to dismiss based on a denial of his constitutional right to a speedy trial depends in part on how the delay of the trial is characterized. The Supreme Court draws a distinction between delays prior to indictment and those which occur after the criminal process has begun. Generally, a pre-indictment delay requires a showing of prejudice before the indictment will be dismissed and is governed by the Due Process Clause. See United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 (1971). On the other hand, a post-indictment delay is governed

by the Sixth Amendment and is analyzed on the basis of several different factors: extent of delay, loss of key witnesses, prejudice to the defendant, etc. See Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972).

Under CPL §30.20, general speedy trial relief is prescribed for a defendant. A defendant is entitled to a hearing where he makes factual allegations in his motion to dismiss on this ground. People v. Berkowitz, supra.

The New York Court of Appeals has established a procedure that must be followed by the prosecutor to establish that the People are "ready for trial". Summing up prior decisions, the Court declared that "ready for trial" encompasses two elements - (a) communication of readiness by the People, and (b) present readiness (as opposed to a prediction or expectation of future readiness). It then held that "communication" requires either: (1) a statement of readiness in open court, or (2) written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk to be placed in the original record. Where the statement is made in open court and defense counsel is not present, the prosecutor must notify defense counsel of the statement of readiness. People v. Kendzia, 64 N.Y.2d 331, 486 N.Y.S.2d 888 (1985).

One of the first cases to analyze this statute: People ex rel. Franklin v. Warden, Brooklyn House of Detention, 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973), determined that the words, "the People must be ready for trial," did not mean that the defendant had to be brought to trial within the six-month period. In this case, the defendants had been incarcerated within the Brooklyn House of Detention for more than six months. However, because of court congestion, their cases had not yet

proceeded to trial. The prosecutor was ready to present the case at all times. These circumstances were deemed to be outside the control of the prosecution and the court, and therefore it was not required that either the indictments be dismissed or the defendants released. See People v. Watts, 86 A.D.2d 964, 448 N.Y.S.2d 299 (4th Dept. 1982), aff'd, 57 N.Y.2d 299, 456 N.Y.S.2d 677 (1982). See also People v. Ganci, 27 N.Y.2d 418, 318 N.Y.S.2d 484 (1971), cert. denied, 402 U.S. 924 (1971).

Additionally, the statute allows for other circumstances which will be excluded from the time period. By and large, these factors are deemed to be within the control of the defendant or else circumstances over which the prosecution has no control. Where adjournments are allowed at a defendant's request, those periods of delay are expressly waived in calculating the People's trial readiness without the need for the People to trace their lack of readiness to defendant's actions. People v. Kopciowski, 68 N.Y.2d 615, 505 N.Y.S.2d 52 (1986). See also, People v. Meierdiercks, 68 N.Y.2d 613, 505 N.Y.S.2d 51 (1986).

If the delay is occasioned by pre-trial motions of the defendant or continuances requested by him then the statutory period is not chargeable to the prosecution but will be tolled. People v. Dean, 45 N.Y.2d 651, 412 N.Y.S.2d 353 (1978). CPL §30.30(4)(a) and (b). An indictment which replaces an earlier one in the same criminal action relates back to the original accusatory instrument for the purposes of computing excludable time under CPL §30.30(4). People v. Sinistaj, 67 N.Y.2d 236, 501 N.Y.S.2d 793 (1986). If the delay is caused by the defendant's absence or incarceration in another jurisdiction, the statutory period will not be included, provided that the prosecution makes diligent efforts to locate the defendant. People v. Patterson, 38 N.Y.2d 623, 381 N.Y.S.2d

858 (1976); People v. McLaurin, 38 N.Y.2d 123, 378 N.Y.S.2d 692 (1975); CPL §30.30(4)(c)(e). In those situations where a felony complaint has been filed but a defendant is absent or unavailable, the Court of Appeals has approved a recent Appellate Division, Second Department, decision which allows the prosecutor to delay presenting the cases of absent or unavailable defendants to the grand jury. The Court found that the delay in prosecution "results from" defendant's absence and therefore falls within the statutory exceptions. CPL §30.30(4)(c). People v. Bratton, 65 N.Y.2d 675, 491 N.Y.S.2d 623 (1985), affirming for reasons stated in 103 A.D.2d 368, 480 N.Y.S.2d 324 (2d Dept. 1984). Finally, the prosecution is also permitted delays attributable to exceptional circumstances. See CPL §30.30(4)(q); People v. Goodman, 41 N.Y.2d 888, 393 N.Y.S.2d 985 (1977) (continuances granted because of the unavailability of material evidence); People v. Hall, 61 A.D.2d 1050, 403 N.Y.S.2d 112 (2d Dept. 1978) (stenographer had transcribed unintelligible court notes because of a nervous breakdown).

If the People are not ready for trial within six months of the commencement of criminal proceedings, CPL §30.30 mandates dismissal. People v. Cook, 63 A.D.2d 842, 406 N.Y.S.2d 850 (4th Dept. 1978). Upon a showing by a preponderance of the evidence that the prosecution is not ready, the indictment must be dismissed unless the People establish periods of exclusions which justify the delay. People v. Del Valle, 63 A.D.2d 830, 406 N.Y.S.2d 642 (4th Dept. 1978). See also, People v. Santos, 68 N.Y.2d 859, 508 N.Y.S.2d 411 (1986). Affidavits merely asserting court backlog [People v. Williams, 67 A.D.2d 1094, 415 N.Y.S.2d 155 (4th Dept. 1979)], or unsatisfactory excuses as to why an ongoing narcotics investigation had delayed the trial [People v. Washington, 43

N.Y.2d 772, 401 N.Y.S.2d 1007 (1977)] are insufficient to justify trial delay. See also People v. Rice, 87 A.D.2d 894, 449 N.Y.S.2d 522 (2d Dept. 1982); People v. Gordon, 125 A.D.2d 257, 509 N.Y.S.2d 543 (1st Dept. 1986).

The Court of Appeals has recently held that postreadiness delay is not excused because it is inadvertent, no matter how pure the intention. The "exceptional fact or circumstance" allowance of CPL §30.30(3)(b) evidences that more than good faith is required. People v. Anderson, 66 N.Y.2d 529, 498 N.Y.S.2d 119 (1985).

[i] General Speedy Trial Relief

Under CPL §30.20, general speedy trial relief is still available to the defendant in that this section codifies the right in general terms and specifies in subdivision 2 that, insofar as practicable, criminal cases must be given trial preference over civil, and of all the criminal cases, trial preference must be given to those where the defendant is incarcerated. Prior to the enactment of the new CPL §30.30, with specified time period guarantees, §30.20 was the statutory provision available to protesting defendants. Although use of CPL §30.20 is far less necessary since the enactment of §30.30, it can still be used where (1) post-indictment delays are justified as unavoidable because of court congestion, and (2) where the total excluded time, including authorized adjournments and excludable delays, allegedly prejudiced the defendant. See, e.g., People v. Berkowitz, supra; People v. White, 72 A.D.2d 913, 422 N.Y.S.2d 193 (4th Dept. 1979), aff'd, 81 A.D.2d 486, 442 N.Y.S.2d 300 (4th Dept. 1981), cert. denied sub. nom. Williams v. New York, 455 U.S. 992 (1982).

In People v. Taranovich, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975), the court listed five factors that it considered determinative of the need

to dismiss to effect the guarantee for speedy trial. The court advised a balance between: (1) extent of delay; (2) reasons for the delay; (3) nature of the underlying charge; (4) pre-trial incarcerations; and (5) prejudice to the defendant. In that case, even though there was a one year delay between indictment and trial, since there was no showing of prejudice to the defendant, the court found that he was not entitled to dismissal. Note that this action was commenced prior to the effective date of CPL §30.30.

In People v. Staley, 41 N.Y.2d 789, 396 N.Y.S.2d 339 (1977), the original charges were dismissed without prejudice to the grand jury but thirty-one months later an indictment for the offense was returned. Although the pre-indictment delay was not covered by CPL §30.30, the overwhelming delay in bringing the defendant to trial worked to deny him due process of law.

To reiterate, the outcome of defendant's motion to dismiss will depend on whether the delay is characterized as pre- or post-indictment. There is no absolute rule in this area of the law by which each case will be decided. Perhaps it is best to recognize the restrictions in CPL §30.30, but also to consider the balancing factors of People v. Taranovich, supra. If the commencement of the actions is delayed, the defendant may be entitled to dismissal whether or not there is a showing of prejudice, a violation of the statute of limitations or a violation of CPL §30.30. See People v. Singer, 44 N.Y.2d 241, 405 N.Y.S.2d 17 (1978). Lack of pretrial incarceration as well as lack of prejudice to the defendant's case, can, however, outweigh the claim. People v. Neiss, 81 A.D.2d 599, 437 N.Y.S.2d 460 (2d Dept. 1981), citing Taranovich.

Also note that the Court of Appeals has now made it clear that

motions made pursuant to CPL §210.20(2) must be made prior to commencement of trial. CPL §220.10(2) is not modified by the provision in the omnibus motion procedure section that grants the trial court discretion to entertain untimely made pretrial motions [CPL §255.20(3)]. People v. Lawrence, 64 N.Y.2d 200, 485 N.Y.S.2d 233 (1984).

(7) Motion to Dismiss In Furtherance of Justice

CPL §210.20(1)(i) provides that under CPL §210.40 an indictment may be dismissed in the judge's discretion where some compelling factor renders such a decision just. CPL §210.40 provides that the court must, to the extent applicable, examine and consider, individually and collectively, the following:

(a) the seriousness and circumstances of the offense;

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

(c) the evidence of guilt, whether admissible or inadmissible at trial;

(d) the history, character and condition of the defendant;

(e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

(f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;

(g) the impact of a dismissal upon the confidence of the public in the criminal justice system;

(h) the impact of a dismissal on the safety or welfare of the community;

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;

(j) any other relevant fact indicating that a judgment of convic-

upon the indictment, rather than to defects in the indictment or underlying grand jury proceedings, which are the subject of other paragraphs of this section" (§210.20). People v. Grogh, 97 Misc.2d 894, 412 N.Y.S.2d 760, 762 (Sup. Ct. Queens Co. 1979). While that may represent a logical extension of the Frisbie holding cited above, there has been no definitive ruling as to when this section applies, except to say that such impediments must be substantial. People v. Coppa, 57 A.D.2d 189, 394 N.Y.S.2d 219 (2d Dept. 1977).

J. Motion Practice and Procedure

CPL §210.20 sets forth the procedure for a motion to dismiss an indictment. It must be made generally within the 45 day period for pretrial motions under CPL §255.20 except for motions to dismiss for denial of a speedy trial. Resubmision may be authorized if the indictment was dismissed as defective, for insufficient evidence, for defective grand jury proceedings or in the interests of justice. CPL §210.20(2); see also People v. Hoffer, 77 A.D.2d 911, 431 N.Y.S.2d 79 (2d Dept. 1980). However, resubmission even on these grounds is improper unless authorized by the court. See also In the Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 493 N.Y.S.2d 452 (1985) (trial court lacks the authority to shorten the statutory time period in which to make pretrial motions).

(a) Procedure [CPL §210.45]

[i] Motion Must Be in Writing

A motion to dismiss an indictment pursuant to section 210.20 must be made in writing and upon reasonable notice to the people. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon

tion would serve no useful purpose.

(k) a count alleging enterprise corruption may be dismissed in the interest of justice where prosecution of that count is inconsistent with the stated legislative findings of Penal Law §460. Upon such a motion the court must inspect all of the evidence before the grand jury and any other evidence it deems proper.

An order dismissing an indictment in the interest of justice may be issued upon motion of the People or of the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefore upon the record.

In the Matter of Morgenthau v. Roberts, 65 N.Y.2d 749, 492 N.Y.S.2d 21 (1985), the Court of Appeals made it clear that CPL §210.20 provides only for dismissal of indictments and trial courts may not dismiss a criminal complaint on grounds which the Legislature never authorized; nor is there inherent or supervisory authority for such a dismissal.

(8) Motion to Dismiss for "Some Other Jurisdictional or Legal Impediment" to Conviction of Defendant [CPL §210.20(1)(h)]

An indictment will only be dismissed pursuant to this section if none of the other sections outlined in CPL §210.20 apply. People v. Frisbie, 40 A.D.2d 334, 339 N.Y.S.2d 985 (3d Dept. 1973). The provision was inserted because "of the impossibility of specifying every kind of contention which may properly be raised in an attack upon an indictment." Denzer, Richard, G., McKinney's Consolidated Laws Of New York, Practice Commentary CPL §210.20, pp. 339-340 (1971).

Very few cases have been decided pursuant to this section and thus its scope has not been well defined. A lower court held that subdivision (h) "would appear to apply prospectively to impediments to conviction

personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence supporting or tending to support the allegations of the moving papers. CPL §210.45(1). See People v. Jack, 117 A.D.2d 753, 498 N.Y.S.2d 741 (2d Dept. 1986). But see People v. Jennings, 69 N.Y.2d 103, 512 N.Y.S.2d 652 (1986) (where the People's failure to complain waived their right to receive written notice of the motion).

[ii] Filing and Service

The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers, and may further submit documentary evidence refuting or tending to refute such allegations. CPL §210.45(2) and (7).

After all papers of both parties have been filed, and after all documentary evidence, if any, has been submitted, the court must consider the same for the purpose of determining whether the motion is determinable without a hearing to resolve questions of fact.

[iii] Summary Granting of Motion

The court must grant the motion without conducting a hearing if:

(a) The moving papers allege a ground constituting a legal basis for the motion pursuant to subdivision one of CPL §210.20; and

(b) such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and

(c) The sworn allegations of fact essential to support the motion

are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof. CPL §210.45(4).

The court may deny the motion without conducting a hearing if:

(a) the moving papers do not allege any ground constituting a legal basis for the motion pursuant to subdivision one of CPL §210.20; or

(b) The motion is based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all essential facts; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof. CPL §210.45(5).

[iv] Hearing

If the court does not determine the motion pursuant to subdivision four or five, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present in person at such hearing but may waive such right. CPL §210.45(6).

Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion. CPL §210.45(7).

[v] Dismissal Without Resubmission

When the court dismisses the entire indictment without authorizing resubmission of the charge or charges to a grand jury, it must order that the defendant be discharged from custody if he is in the custody of the sheriff, or if he is at liberty on bail it must exonerate the bail. CPL §210.45(8).

[vi] Dismissal With Resubmission

When the court dismisses the entire indictment but authorizes

resubmission of the charge or charges to a grand jury, such authorization is, for the purposes of this subdivision, deemed to constitute an order holding the defendant for the action of a grand jury with respect to such charge or charges. Such order must be accompanied by a securing order either releasing the defendant on his own recognizance or fixing bail or committing him to the custody of the sheriff pending resubmission of the case to the grand jury and the grand jury's disposition thereof. Such securing order remains in effect until the first to occur of any of the following:

(a) A statement to the court by the People that they do not intend to resubmit the case to a grand jury;

(b) Arraignment of the defendant upon an indictment or prosecutor's information filed as a result of resubmission of the case to a grand jury. Upon such arraignment, the arraigning court must issue a new securing order.

Note: When a prosecutor seeks leave to resubmit a matter to a grand jury, the application for resubmission must be accompanied by facts sufficient to permit a proper exercise of discretion by the reviewing judge. People v. Dykes, 86 A.D.2d 191, 449 N.Y.S.2d 284 (2d Dept. 1982). See also People v. Ladsen, 111 Misc.2d 374, 444 N.Y.S.2d 362 (Sup. Ct. N.Y. Co. 1981) (the district attorney disclosed facts in his affirmation which showed the existence of new evidence justifying resubmission of the case to the grand jury).

(c) The filing with the court of a grand jury dismissal of the case following resubmission thereof;

(d) The expiration of a period of forty-five days from the date of issuance of the order; provided that such period may, for good cause

shown, be extended by the court to a designated subsequent date if such be necessary to accord the People reasonable opportunity to resubmit the case to a grand jury.

Upon the termination of the effectiveness of the securing order pursuant to paragraph (a), (c) or (d), the court must immediately order that the defendant be discharged from custody if he is in the custody of the sheriff, or if he is at liberty on bail it must exonerate the bail. Although expiration of the period of time specified in paragraph (d) without any resubmission or grand jury disposition of the case terminates the effectiveness of the securing order, it does not terminate the effectiveness of the order authorizing resubmission. CPL §210.45(9).

II. BILLS OF PARTICULARS

(a) Generally

A bill of particulars is a written statement by the prosecutor specifying items of factual information not included in the indictment but which pertain to the offense charged. The statement must specify the substance of each defendant's conduct encompassed by the charge which the People intend to prove at trial and whether the People intend to prove that the defendant acted as principal, accomplice, or both. The prosecutor is not required to include matters of evidence relating to the manner in which the People intend to prove the elements of the offense charged or any item of factual information included in the bill of particulars. CPL §200.95(1)(a).

A request for a bill of particulars is a written request served by the defendant upon the people without leave of court. It must be in writing, must specify the items of factual information desired, and must allege that defendant cannot adequately prepare or conduct his defense

without the information sought. CPL §200.95(1)(b).

The request must be made within 30 days after arraignment and before commencement of trial. CPL §200.95(3). The prosecutor must serve the requested bill of particulars within 15 days of service of the request or "as soon thereafter as is practicable" CPL §200.95(2). However, if the People do file a bill late a defendant must show prejudice before the information will be dismissed. People v. Elliott, 65 N.Y.2d 446, 492 N.Y.S.2d 581 (1985). The prosecutor may serve a written refusal to comply with a request where the request is untimely; the defendant seeks factual information which is not authorized to be included in a bill of particulars; the information sought is not necessary to enable the defendant to prepare or conduct a defense; or where it would warrant a protective order. CPL §200.95(4). Where there is a showing of good cause for an untimely request and the information is otherwise properly sought the court must order the prosecutor to comply with the request. CPL §200.95(5)

At any time prior to trial the prosecutor may serve upon defendant and file with the court an amended bill of particulars. At any time during trial, upon application of the prosecutor and with notice to the defendant, the court may, after affording defendant an opportunity to be heard, permit the prosecutor to amend the bill of particulars. The court must find however that the prosecutor has acted in good faith and that no undue prejudice will accrue to the defendant. The court must grant an adjournment to the defendant where such is necessitated by an amendment. CPL §200.95(8).

The court may, upon application of the prosecutor or "any affected person" or on its own initiative issue a protective order denying,

limiting, conditioning, delaying, or regulating the bill of particulars for good cause based upon a number of factors which outweigh the need for a bill of particulars. CPL §200.95(7)(a).

The sanctions for failure to comply with discovery specified in CPL §240.70 are available for a failure to comply with a request for a bill of particulars. CPL §200.95(5).

(b) Nature and Scope of Bill of Particulars

A defendant is not entitled to receive notice of the prosecution's evidence by a bill of particulars. See People v. Davis, 41 N.Y.2d 678, 394 N.Y.S.2d 865 (1977). In a burglary prosecution, the defense was not entitled to obtain in a bill of particulars a specification of the portion of the building that defendant allegedly entered. People v. Raymond G., 54 A.D.2d 596, 387 N.Y.S.2d 174 (3d Dept. 1976). However, where defendants were charged with acting in concert in perpetrating the shooting death of the victim, the defense was entitled to a specification in the bill of particulars as to whether they were charged with hiring an assassin or as direct perpetrators, even though, arguably, this is the "theory" of the People's case. People v. Taylor, 74 A.D.2d 177, 427 N.Y.S.2d 439 (2d Dept. 1980).

A bill of particulars is not a discovery device and may not be used to acquire the records of the composition, attendance and votes of the grand jury. See People v. Davis, supra. See also Cosgrove v. Doyle, 73 A.D.2d 808, 423 N.Y.S.2d 734 (4th Dept. 1979) (petition for writ of prohibition granted to restrain trial judge from enforcing his decision allowing two individuals to obtain in a bill of particulars information about the voting and attendance records of the grand jury).

(c) Defendant Must Show Items Are Necessary to His Defense

The test in determining whether to grant defendant's requests for items in a bill of particulars is not whether such items will be useful to his defense, but whether they are necessary for it. People v. Wayman, 82 Misc.2d 959, 371 N.Y.S.2d 791 (Justice Ct. Town of New Windsor Orange Co. 1975). "The defendant has the burden of satisfying the court that the items sought are necessary." Wayman, 371 N.Y.S.2d at 794. For example, a pharmacist charged with the illegal sale of methaqualone, who had an alibi defense, was entitled to specification in the bill of particulars of the persons to whom he allegedly illegally sold the drug. People v. Einhorn, 75 Misc.2d 183, 346 N.Y.S.2d 986 (Sup. Ct. N.Y. Co. 1973). Similarly, a defendant charged with the depraved indifference homicide of an infant who died after he was hospitalized, is entitled in a bill of particulars to a full and complete statement describing the circumstances leading to the discontinuance of the victim's life support systems and the donation of certain of the victim's organs. People v. Bisconnette, 107 Misc.2d 1049, 436 N.Y.S.2d 607 (Saratoga Co. Ct. 1981). On the other hand, as the state does not have to prove the object crime in a burglary, the defendant was not entitled to a specification in the bill of particulars as to what crime he intended to commit upon the unlawful entry. People v. Mackey, 49 N.Y.2d 274, 425 N.Y.S.2d 288 1980).

Specification of the benefit received by defendant as pleaded in a count of official misconduct was a proper subject for a bill of particulars. People v. D'Arcy, 79 Misc.2d 113, 359 N.Y.S.2d 453 (Allegany Co. Ct. 1974).

SELF-INCRIMINATION EVIDENCE

BY

HON. PATRICK D. MONSERRATE

COUNTY COURT JUDGE

BROOME COUNTY, NEW YORK

Reprinted 1988

SELF-INCRIMINATION EVIDENCE

By: HON. PATRICK D. MONSERRATE
County Court Judge
Broome County, New York
Revised 1988

I) SELF-INCRIMINATION EVIDENCE - Obtaining it

A) Questioning suspects, in general

- When (always) - BEFORE SUSPECT CHARGED (Note 1)*
- Who (DA?)
- Caveat re Grand Jury [CPL §190.40(2)]

B) Custodial interrogation (Note 2)

- vs. investigative detention or during commission of crime
- legality of detention (articulable probable cause) (Note 3)

C) Advice as to rights

- Oral or written "Miranda Warnings"
- Prior to questioning (if no public safety exception) (Note 4)
- Include nature of investigation/circumstances of case (?) (Note 5)
- Multiple warnings re multiple interrogations/crimes (?) (Note 6)

D) Waiver of rights

- Oral or written (Note 7)
- Presence of attorney ("Hobson's choice") (Note 8)
  -- The New York Rule: The constitutional right to the assistance of counsel includes - under certain circumstances (counsel attachment/entry/invocation) - the right to have an attorney present when a person is considering whether to waive his constitutional right against self-incrimination (and if counsel is not present when he should have been, any waiver by the suspect is ineffective).
- Effect of infancy, intelligence, illness, injury, isolation, intoxication, intimidation or inexperience of suspect.
- Effect of promises [CPL §60.45(2)(b)(i)]

E) Preserving statement

- Witness(es) present
- Police reports
- Written statements (signed or unsigned)
- Transcribed by stenographer
- Sound/video recordings

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*Case citations are provided in attached bibliography under corresponding heading.

F) Notice of intent to use [CPL §710.30]

- Service by DA within 15 days after D arraignment (Note 9)
- Adequacy of notice

G) D/Motion to suppress evidence [CPL Article 710]

- Waived if not made [CPL §710.70(3)] (Note 10)

II) SELF-INCRIMINATION EVIDENCE - Determining its admissibility (Huntley Hearing) (Note 11)

A) The issue: Whether, under the totality of circumstances in the particular case, the statements of D intended to be offered in evidence against him/her by the People were obtained in violation of his/her constitutional rights, viz:

-- Right against unreasonable search or seizure
Fed: 4th/14th Amendments; NY:Art. I, §12
-- Right against self-incrimination and to due process
Fed: 5th/14th Amendments; NY:Art. I, §6
-- Right to the assistance of counsel
Fed: 6th/14th Amendments; NY:Art. I, §6

B) The burden of proof on the People to negate the issue beyond a reasonable doubt

C) The circumstances to be considered:

- Whether any/some/all of the statements were made
- Whether the statements were made in response to questions (or were spontaneous or volunteered) (Note 12)
- Whether the questioning was by official/quasi official person ("public servant") or by private person(s) (Note 13)
- Whether the answers of D to questions (by either) were voluntary, reliable, trustworthy in fact [CPL §60.45(2)(a)] (Note 14)
- Whether official questioning was "custodial" in nature (Note 2)
- Whether D was legally detained, either initially or by time statement(s) made (legality of arrest; delay in arraignment) (Note 3)
- Whether, prior to questioning, an accusatory instrument had been filed against D (or other "significant judicial activity") (Note 1)
- Whether D was represented by counsel in matter under investigation or in connection with other pending matters (Note 8)
- Whether, even if D represented by counsel, the particular conversation was part of a "new crime in progress" (Note 15)
- Whether, prior to questioning, D was adequately advised of "rights" (against self-incrimination and to counsel) (Note 2)
- Whether D knowingly and intelligently waived those rights (Note 7)

- Whether, at any time before/during questioning, D indicated desire to remain silent (Note 6)
- Whether, at any time before/during questioning, D indicated desire to talk with attorney - or with anyone (Note 16)
- Whether physical evidence/witness identification was instrumental in questioning (Note 17)
- Whether the particular practices used by the police/prosecution in obtaining the self-incrimination evidence from D were so fundamentally unfair as to constitute a violation of the right of due process of law (Note 18)

D) The determination of the motion

- Findings of fact and conclusions of law ("split decisions") (Note 19)
- Availability of hearing minutes for trial (D testimony?) (Note 20)

E) The conclusiveness of the hearing

- Effect on validity of plea (Note 20-A)
- Effect on trial (statements not included)
- Effect on appeal (supporting evidence not offered) (Note 21)
  -- Waiver of appeal (Note 21-A)

III) SELF-INCRIMINATION EVIDENCE - Using it at trial

A) On People's direct case

- If determined to have been voluntary, in fact and in law

B) On cross-examination of Defendant (Note 22)

- 5th vs 6th Amendment violation?
- If voluntary in fact
- But not re silence
- D testimony at suppression hearing

C) On rebuttal to defense case

- Possible use of D silence (Note 23)

D) Voluntariness of D admissions ultimate question of fact for jury [CPL §710.70(3)] (Note 24)

E) Necessity of separate trials for multiple Ds? (Note 25)

JULY 1988 REVISION

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People v Cole, 41 NY2d 944 (1977
Settles, 46 NY2d 154 (1978)
Samuels, 49 NY2d 218 (1980)
Cullen, 50 NY2d 168 (1980)
Lucas, 63 NY2d 678 (1981)
Pepper-Utter-Torres, 53 NY2d 213 (1981)
Angus, 56 NY2d 549 (1982)
Claudio, 59 NY2d 556 (1983)
Hopkins, 58 NY2d 1079 (1983)
Hauswirth, 60 NY2d 1079 (1983)
Farruggia, 61 NY2d 775 (1984)
Ready, 61 NY2d 790 (1984)
Smith, 62 NY2d 306 (1984)
Ridgeway, 64 NY2d 952 (1984)
Lane, 64 NY2d 1047 (1985)

2. "CUSTODIAL INTERROGATION"

Berkemer v McCarty, 104 S.Ct. 3138 (1984)
Minnesota v Murphy, 104 S.Ct. 1136 (1984)
California v Beheler, 102 S.Ct. 3517 (1983)
Oregon v Mathiason, 97 S.Ct. 711 (1977)
United States v Washington, 97 S.Ct. 1814 (1977)
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Ohio v Gallagher, 96 S.Ct. 1438 (1976)
Beckwith v United States, 96 S.Ct. 1612 (1976)
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United States v White, 91 S.Ct. 1122 (1971)
Miranda v Arizona, 86 S.Ct. 1602 (1966)
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People v Rodney P., 21 NY2d 1 (1967)
Yukl, 25 NY2d 585 (1969)
Huffman, 41 NY2d 29 (1976)
Rodriquez, 39 NY2d 976 (1976)
Greer, 42 NY2d 170 (1977)
Jones, 47 NY2d 528 (1979)
Harris, 48 NY2d 208 (1979)
Johnson, 48 NY2d 674 (1979)
Palumbo, 49 NY2d 928 (1980)
Chestnut, 51 NY2d 14 (1980)
Williamson, 51 NY2d 801 (1980)
Ferrara, 54 NY2d 498 (1981)
Parker, 57 NY2d 815 (1982)
Quarles, (I) 58 NY2d 664 (1982)
Rivera, 57 NY2d 453 (1982)
Hutchinson, 59 NY2d 923 (1983)
Johnson, 59 NY2d 1014 (1983)
Fadale, 60 NY2d 1001 (1983)
Johnson, 61 NY2d 932 (1984)
Bertolo, 65 NY2d 111 (1985)
Matter of Maiello v Board of Parole, 65 NY2d 145 (1985)
People v Morales, 65 NY2d 997 (1985)
Wroblewski, 67 NY2d 933 (1986)
Bastidas, 67 NY2d 1006 (1986)
Bennett, 70 NY2d 891 (1987)
Jacquin, 71 NY2d 825 (1988)

3. LEGALITY OF DETENTION

Hayes v Florida, 105 S.Ct. 1643 (1985)
United States v Sharpe, 105 S.Ct. 1568 (1985)
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Mallory v United States, 77 S.Ct. 1356 (1957)
People v Martinez, 37 NY2d 662 (1975)
Anderson, 42 NY2d 35 (1977)
Morales, 42 NY2d 129 (1977)
Lockwood, 44 NY2d 769 (1978)
Dairsaw, 46 NY2d 789 (1978)
Boodle, 47 NY2d 398 (1979)
Holland, 48 NY2d 861 (1979)
Bouton, 50 NY2d 130 (1980)
Bryant, 50 NY2d 949 (1980)
Batista, 51 NY2d 996 (1980)
Rogers, 52 NY2d 527 (1981)
Miguel, 53 NY2d 920 (1981)
Goodman, 54 NY2d 451 (1981)
Wilson, 56 NY2d 692 (1982)
Hopkins, 58 NY2d 1079 (1983)
King, 61 NY2d 550 (1984)
Fenner, 61 NY2d 971 (1984)
Johnson, 64 NY2d 617 (1984)
VanLuven, 64 NY2d 625 (1984)
Winchell, 64 NY2d 826 (1985)
Crimmins, 64 NY2d 1072 (1985)
Johnson, 66 NY2d 398 (1985)
Wroblewski, 67 NY2d 933 (1986)
Minley, 68 NY2d 952 (1986)
Conyers, 68 NY2d 982 (1986)
Jones, 69 NY2d 853 (1987)

4. WARNINGS BEFORE QUESTIONING

Oregon v Elstad, 104 S.Ct. 1285 (1985)
New York v Quarles, (II) 104 S.Ct. 2626 (1984)
Westover v United States, 86 S.Ct. 1638 (1966)
People v Tanner, 30 NY2d 102 (1972)
Chapple, 38 NY2d 112 (1975)
Johnson, 48 NY2d 674 (1979)
Wright, 58 NY2d 797 (1983)
Quarles, (I) 58 NY2d 664 (1982)
Huffman, 61 NY2d 795 (1984)
Witherspoon, 66 NY2d 973 (1985)
Bastidas, 67 NY2d 1006 (1986)
Bethea, 67 NY2d 364 (1986)
Hager, 69 NY2d 141 (1987)

5. SUBJECT MATTER OF INTERROGATION

Colorado v Spring, 107 S.Ct. 851 (1987)
California v Prysock, 101 S.Ct. 2806 (1981)
Michigan v Tucker, 94 S.Ct. 2357 (1974)
People v Pereira, 26 NY2d 265 (1970)
Johnson, 30 NY2d 882 (1976)
Tarsia, 50 NY2d 1 (1980)

6. MULTIPLE WARNINGS/INTERROGATIONS

Michigan v Mosley, 96 S.Ct. 321 (1975)
People v Gary, 3| NY2d 724 (1979)
Wander, 47 NY2d 724 (1979)
DePasquale, 54 NY2ld 693 (1981)
Kinnard, 62 NY2d 910 (1984)

7. WAIVER OF RIGHTS

Tague v Louisiana, 100 S.Ct. 652 (1980)
North Carolina v Butler, 99 S.Ct. 1755 (1979)
Matter of Lawrence S., 29 NY2d 206 (1971)
People v Valerius, 31 NY2d 51 (1972)
Patrick, C.C., 46 NY 2d 975 (1979)
Wofford, 46 NY2d 962 (1979)
Davis, 55 NY2d 731 (1981)
Love, 57 NY2d 998 (1982)
Williams, 62 NY2d 285 (1984)

8. "COUNSEL ENTRY"

Moran v Burbine, 106 S.Ct. 1135 (1986)
Maine v Moulton, 106 S.Ct. 477 (1985)
Wyrick v Fields, 103 S.Ct. 394 (1982)
People v Donovan, 13 NY2d 148 (1963)
Arthur, 22 NY2d 352 (1968)
HOBSON, 39 NY2d 479 (1976)
Ramos, 40 ny2d 610 (1976)
Townes, 41 NY2d 106 (1976)
Cole, 41 NY2d 944 (1977)
Cardona, 41 NY2d 333 (1977)
Clark, 41 NY2d 612 (1977)
Singer, 44 NY2d 241 (1978)
Pinzon, 44 NY2d 458 (1978)
Carl, 46 NY2d 117 (1978)
Byrne, 47 NY2d 117 (1979)
Garofolo, 46 NY2d 592 (1979)
Ermo, 47 NY2d 863 (1979)
ROGERS, 48 NY2d 167 (1979)
Lynes, 49 NY2d 286 (1980)
Casassa, 49 NY2d 668 (1980)
Marrero, 51 NY2d 56 (1980)
Bell, 50 NY2d 998 (1980)
Cooper, 51 NY2d 24 (1980)
SKINNER, 52 NY2d 24 (1980)
Kazmarick, 52 NY2d 322 (1981)
Albro, 52 NY2d 619 (1981)
Tillman, 52 NY2d 1019 (1981)
Yut Wai Tom, 53 NY2d 225 (1981)
Miller, 54 NY2d 951 (1981)
Smith, 54 NY2d 954 (1981)
Servidio, 54 NY2d 951 (1981)
Ferrara, 54 NY2d 498 (1981)
White, 56 NY2d 110 (1982)
Sanders, 56 NY2d 51 (1982)
Schaeffer, 56 NY2d 448 (1982)
Knapp, 57 NY2d 161 (1982)
Beam, 57 NY2d 241 (1982)
Parker, 57 NY2d 815 (1982)
Ellis, 58 NY2d 748 (1982)
Fuschino, 59 NY2d 9| (1983)
Claudio, 59 NY2d 556 (1983)
Mann, 60 NY2d 792 (10-25-83)
Cunningham, 60 NY2d 930 (1983)
Kinchen, 60 NY2d 772 (1983)
Ready, 61 NY2d 790 (1984)
Lucarano, 61 NY2d 138 (1984)
Farruggia, 61 NY2d 775 (1984)
Bertolo, 65 NY2d 111 (1985)
Colwell, 65 NY2d 883 (1985)
Rosa, 65 NY2d 380 (1985)
Miles, 67 NY2d 920 (1986)
Velasquez, 68 NY2d 533 (1986)
Shavers, 69 NY2d 766 (1987)

9. NOTICE OF INTENTION

People v Briggs, 38 NY2d 319 (1975)
Greer, 42 NY2d 170 (1977)
Spruill, 47 NY2d 869 (1979)
Rivera, 53 NY2d 1005 (1981)
Bennett, 56 NY2d 837 (1982)
Michel, 56 NY2d 1014 (1982)
Goodson, 57 NY2d 828 (1982)
Hoover, 57 NY2d 908 (1982)
Taylor, 57 NY2d 908 (1982)
Peck, 68 NY2d 928 (1986)
O'Doherty, 70 NY2d 479 (1987)
Boughton, 70 NY2d 854 (1987)

10. WAIVER OF MOTION TO SUPPRESS

People v Selby, 43 NY2d 791 (1977)

11. RIGHT TO EVIDENTIARY HEARING

People v Huntley, 15 NY2d 72 (1965)
Weaver, 49 NY2d 1012 (1980)

12. SPONTANEOUS STATEMENTS

Rhode Island v Innis, 100 S.Ct. 1682 (1980)
Brewer v Williams, 97 S.Ct. 1232 (1977)
People v Lynes, 49 NY2d 286 (1980)
Edwards, 47 NY2d 493 (1979)
Roucchio, 52 NY2d 759 (1980)
Kaye, 25 NY2d 139 (1969)
Tompkins, 45 NY2d 748 (1978)
Maerling, 46 NY2d 289 (1978)
Lucas, 53 NY2d 678 (1981)
Stoesser, 53 NY2d 648 (1981)
Burke, 53 NY2d 672 (1981)
Carmine A., 53 NY2d 816 (1981)
Lanahan, 55 NY2d 711 (1981)
Middleton, 54 NY2d 474 (1981)
Rivers, 56 NY2d 476 (1982)
Harris, 57 NY2d 335 (1982)
Boyd, 58 NY2d 995 (1983)
Hopkins, 58 NY2d 1079 (1983)
Harrell, 59 NY2d 620 (1983)
Bryant, 59 NY2d 786 (1983)
Howard, 60 NY2d 999 (1983)
Ready, 61 NY2d 790 (1984)
Huffman, 61 NY2d 795 (1984)
Krom, 61 NY2d 910 (1984)
Kinnard, 62 NY2d 910 (1984)
Ferro, 63 NY2d 316 (1984)
Burr, 70 NY2d 354 (1987)

13. QUESTIONING BY PRIVATE PERSONS

People v Esposito, 37 NY2d 156 (1975)
Jones, 47 NY2d 528 (1975)
Parker, 57 NY2d 815 (1982)
Mitchell, 58 NY2d 368 (1983)
Smith, 59 NY2d 156 (1983)
Ray, 65 NY2d 282 (1985)

14. "INVOLUNTARY" - IN FACT

Colorado v Connelly, 107 S.Ct. 515 (1986)
Rogers v Richmond, 81 S.Ct. 735 (1961)
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People v Anderson, 42 NY2d 35 (1977)
Diaz, 54 NY2d 967 (1981)

15. "EMERGENCY" OR NEW CRIME IN PROGRESS EXCEPTIONS

Maine v Moulton, 106 S.Ct. 477 (1985)
United States v Henry, 100 S. Ct. 2183 (1980)
People v Ferrara, 54 NY2d 498 (1981)
Middleton, 54 NY2d 474 (1981)
Sanders, 56 NY2d 51 (1982)
Mealer, 57 NY2d 214 (1982)
Krom, 61 NY2d 187 (1984)
Bongarzone, 69 NY2d 892 (1987)

16. "COUNSEL INVOCATION"

Arizona v Mauro, 107 S.Ct. 1981 (1987)
Connecticut v Barrett, 107 S.Ct. 828 (1987)
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Shea v Louisiana, 105 S.Ct. 1065 (1985)
Smith v Illinois, 105 S.Ct. 490 (1984)
Solem v Stumes, 104 S.Ct. 1338 (1984)
Oregon v Bradshaw, 103 S.Ct. 2830 (1983)
Edwards v Arizona, 101 S.Ct. 1880 (1981)
Fare v Michael C., 99 S.Ct. 2560 (1979)
People v Lockwood, 44 NY2d 769 (1978)
Buxton, 44 NY2d 33 (1978)
Grant, 45 NY2d 366 (1978)
Munlin, 45 NY2d 427 (1978)
Clark, 45 NY2d 432 (1978)
Tompkins, 45 NY2d 748 (1978)
Bevilaqua, 45 NY2d 508 (1978)
Byrne, 47 NY2d 117 (1979)
John J. R., 47 NY2d 777 (1979)
Stroh, 48 NY2d 1000 (1980)
CUNNINGHAM, 49 NY2d 203 (1980)
Prince, 50 NY2d 883 (1980)
Grimaldi,k 52 NY2d 611 (1981)
Purdy, 53 NY2d 806 (1981)
Mandrachio, 55 NY2d 906 (1982)
Johnson, 55 NY2d 931 (1982)
Taylor, 57 NY2d 729 (1982)
Griswold, 58 NY2d 633 (1982)
Rowell, 59 NY2d 727 (1983)
Krom, 61 NY2d 187 (1984)
Hartley, 65 NY2d 703 (1985)
Esposito, 68 NY2d 961 (1986)
Hicks, 69 NY2d 969 (1987)
Gamble, 70 NY2d 885 (1987)
Fridman, 71 NY2d 845 (1988)

17. POISONED DERIVATIVE FRUIT

New York v Quarles, (II) 104 S.Ct. 2626 (1984)
Smith v United States, 324 F2d 879 (D.C. Cr., 1963)
Wong Sun v United States, 83 S.Ct. 407 (1963)
People v Waymer, 53 NY2d 1053 (1981)
Quarles, (I) 58 NY2d 664 (1982)

18. VIOLATION OF SUSPECT'S RIGHT TO DUE PROCESS

Moran v Burbine, 106 S.Ct. 1135 (1986)
United States v Morrison, 101 S.Ct. 665 (1981)
Mincey v Arizona, 98 S.Ct. 2408 (1978)
People v Isaacson, 44 NY2d 511 (1978)
Eubanks, 108 Misc.2d 108 (1981; rev'd 114 Misc.2d 1097 (1982))

19. FINDINGS OF FACT/CONCLUSIONS OF LAW

People v Harden, 30 NY2d 930 (1972)
Gruttola, 43 NY2d 116 (1977)

20. AVAILABILITY OF HEARING MINUTES FOR TRIAL

People v Peacock, 31 NY2d 907 (1972)
Sanders, 31 NY2d 463 (1973)
Matter of Eric W., et al, 68 NY2d 633 (1986)

20-A. VALIDITY OF PLEA

McMann v Richardson, 90 S.Ct. 1441 (1970)
People v Purdy, 53 NY2d 806 (1981)
Coles, 62 NY2d 908 (1984)
Fernandez, 67 NY2d 686 (1986)

21. CONCLUSIVENESS OF HEARING

People v Havelka, 45 NY2d 636 (1978)
Payton, 51 Ny2d 169 (1980)
Albro, 52 NY2d 619 (1981)
Charleston, 54 NY2d 622 (1981)
Gonzalez, 55 NY2d 720 (1981)
Mandrachio, 55 NY2d 906 (1982)
Mercado, 62 NY2d 866 (1984)
Coles, 62 NY2d 908 (1984)
Anderson, 69 NY2d 651 (1986)

21-A. WAIVER OF APPEAL

People v Williams, 36 NY2d 829 (1975)
Jandrew, 101 AD2d 90 (3rd Dept., 1984)

22. CROSS EXAMINATION OF DEFENDANT

Greer v Miller, 107 S.Ct. 3102 (1987)
United States v Brown, 699 F2d 585 (2 CA, 1983)
Havens, 100 S.Ct. 1912 (1980)
Apfelbaum, 100 S.Ct. 948 (1980)
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Fletcher v Weir, 102 S.Ct. 2124 (1980)
Doyle v Ohio, 96 S.Ct. 2240 (1976)
United States v Hale, 95 S.Ct. 2133 (1975)
Oregon v Hass, 95 S.Ct. 1215 (1975)
Harris v New York, 91 S.Ct. 643 (1971)
People v VonWerne, 41 NY2d 584 (1977)
Arce/Camana, 42 ny2d 179 (1977)
McGrath, 46 NY2d 12 (1978)
Wise, 46 NY2d 321 (1978)
Conyers, 49 NY2d 174 (1980) & 52 NY2d 454 (1981)
Savage, 50 NY2d 673 (1980)
Washington, 51 NY2d 214 (1980)
Ricco, 56 NY2d 320 (1982)
Davis, 61 NY2d 202 (1984)
Maerling, 64 NY2d 134 (1984)
Schiavi, 64 NY2d 704 (1984)
Meadows, 64 NY2d 956 (1985)
Blackwell, 128 Misc.2d 599 (SC, NY Co.)
Moore, 66 NY2d 1028 (1985)
Walker, 67 NY2d 776 (1986)

23. USE OF DEFENDANT'S SILENCE

Wainwright v Greenfield, 106 S.Ct. 634 (1986)
United States v Fairchild, 505 F2d 1378 (CA 5, 1975)
People v Rothschild, 35 NY2d 355 (1974)
Davis, 61 NY2d 202 (1984)
Ford, 69 NY2d 775 (1987)
Laurido-Rodriguez, 70 NY2d 428 (1987)

24. VOLUNTARINESS ULTIMATELY JURY QUESTION

Crane v Kentucky, 106 S.Ct. 2142 (1986)
People v Yarter, 41 NY2d 830 (1977)
Graham, 55 NY2d 144 (1982)

25. SEPARATE TRIALS FOR MULTIPLE DEFENDANTS

Cruz (II) v New York, 107 S.Ct. 1714 (1987)
Richardson v Marsh, 107 S.Ct. 1702 (1987)
Bruton v United States, 88 S.Ct. 1620 (1968)
People v Cruz (I), 66 NY2d 61 (1985)
Cruz (III), 70 NY2d 733 (1987)
Pitts, 71 NY2d 923 (1988)
Brown & Hamlin, ____NY2d ____(1988)

CRIMINAL DISCOVERY

IN

NEW YORK STATE -- SELECTED ISSUES

(Seventh Edition - June 1987)

BY

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SUPREME COURT JUSTICE

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TABLE OF CONTENTS

I N T R O D U C T I O N

The subject of this manual is the status of discovery in criminal prosecutions in the State of New York. Discovery is governed statutorily by Article 240 of the Criminal Procedure Law, and we will examine that statute and selected cases dealing with it. Additionally, we will explore Article 610 of the Criminal Procedure Law dealing with subpoenas as well as recent case law providing extrastatutory discovery in New York.

At the outset it should be noted that prior to 1927 there was no common law recognition of criminal discovery in New York State. In that year Judge Cardozo rendered his oft cited decision in People ex rel. Lemon v Supreme Court, 245 NY 24, which has since been heralded as the cornerstone for criminal discovery "in the furtherance of justice."[1] Interestingly, Lemon made implementation of a statutory scheme of discovery most compelling since the Lemon ruling left the necessity and scope of discovery for determination on an ad hoc basis. As a result, discovery continued to be denied generally or, in those cases where granted the results were remarkably inconsistent. Thus the enactment of

[1] Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U.L.Q. 279 (1963); Comment, 38 Brooklyn L. Rev. 164 (1971).

Article 240. While the Legislature clearly intended to effect uniformity by implementation of the statute, as will be seen, judicial interpretation of its terms has, to a large extent, frustrated that purpose.

While this manual will deal mainly with discovery under Articles 240 and 610 of the Criminal Procedure Law as well as certain selected cases providing for extrastatutory discovery, the reader should recognize that a great deal of discovery is obtained by other means. Although there are no express provisions for examination before trial in criminal practice, in reality there are a number of ways such relief is sought and obtained. Prospective prosecution witnesses are examined and their prior written statements reviewed by defendants at preliminary hearings, Huntley hearings, Mapp hearings, Wade hearings and minimization and audibility hearings to name just a few.[2] Discovery may also be effected pursuant to the provisions of CPL 250.20 (alibi), CPL 660 (pretrial examination of witnesses), and CPL 680 (use of interrogatories outside the state).

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[2]In People v DiMatteo, 80 Misc 2d 1029 (Sup. Ct. Richmond Co. 1975), the court in granting a motion for an audibility hearing expressly recognized the proceeding as one for discovery in stating: "The court strongly believes that justice can best be served, and the rights of a defendant best protected, by permitting a defendant the fullest disclosure possible within the framework of statutory and decisional law."

ARTICLE 240

Article 240 provides for discovery of certain material as a matter of right and is initiated by a demand to produce.[3] The demand must be made within thirty (30) days of arraignment or, where the defendant is not represented by counsel at arraignment, within thirty (30) days of the initial appearance of counsel.[4] The court is vested with the discretionary authority to order compliance with an untimely demand to produce.[5] Compliance with a demand to produce must be made within fifteen (15) days of the service of the demand or as soon thereafter as practicable.[6] It should be noted that the provisions of Article 240 are not limited to superior courts, but are applicable to any court in which a criminal action is pending.[7]

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[3] CPL § 240.10(1); CPL § 240.20(1).

[4] CPL § 240.80(1);

[5] Id.

[6] CPL § 240.80(3). The practitioner should note that the discovery provisions of the CPL are applicable only to a pending criminal action and may not be utilized by a "target" of a grand jury investigation. Matter of Cuccia, 71 Misc 2d 268 (Rockland Co. Ct. 1972); CPL § 240.10(1); CPL § 240.20(1). But see Matter of Ajax, Inc., 127 Misc 2d 534 (Suffolk Co. Ct. 1985), where the prosecutor was directed to furnish counsel for a grand jury target with a memorandum setting forth the present scope of the grand jury's investigation.

[7] CPL § 240.20(1).

The statute provides for discovery, as a matter of right, of the following designated property:

> Any written, recorded or oral statement of the defendant, and of a codefendant to be tried jointly, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him;
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> Any transcript of testimony relating to the criminal action or proceeding pending against the defendant, given by the defendant, or by a co-defendant to be tried jointly, before any grand jury;
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> Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment relating to the criminal action or proceeding and made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial;
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> Any photograph or drawing relating to the criminal action or proceeding made or completed by a public servant engaged in law enforcement activity, or made by a person whom the prosecutor intends to call as a witness at trial;
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> Any photograph, photocopy or other reproduction made by or at the direction of a police officer, peace officer or prosecutor of any property prior to its release pursuant to the provisions of Section 45.10 of the Penal Law, irrespective of whether the People intend to introduce at trial the property or the photograph, photocopy or other reproduction;
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> Any other property obtained from the defendant or a codefendant to be tried jointly;
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> Any tapes or other electronic recordings which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction;

> Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the Constitution of this State or of the United States;
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> The approximate date, time and place of the offense charged and of defendant's arrest.

Finally, the statute requires the prosecutor to provide prior to trial anything required to be disclosed to the defendant pursuant to the Constitution of this State or of the United States, a rather superfluous provision since that has been the law of the land since 1963.[8]

The statute requires that the prosecutor make a diligent, good faith effort to ascertain the existence of demanded property and cause such property to be made available, where it exists, even if it is not within the actual possession of the prosecutor and that requirement is a continuing one. However, the statute specifically provides that the prosecutor shall not be required to obtain demanded property by way of subpoena where the defendant is able to do so by subpoena.

With regard to the mandatory discovery provisions the reader should be aware of an anomaly in two of the subsections. By virtue of CPL 240.20(1)(a) a defendant is entitled to a recorded or oral statement made by the defendant to a public servant engaged in law enforcement so

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[8] Brady v Maryland, 373 US 83 (1963).

long as it was not made in the course of the criminal transaction. Quite clearly, a recorded or oral conversation of a defendant and an undercover officer in a drug transaction would not be discoverable pursuant to the terms of the subsection. However, CPL 240.20(1)(g) provides for discovery of any tapes or other electronic recordings which the prosecutor intends to introduce at trial, irrespective of whether such recording was made during the course of the criminal transaction. The two subsections are obviously inconsistent and in conflict. Also of interest, if a res gestae statement is not recorded it is not discoverable, but if it is recorded it is discoverable.[9]

With regard to CPL 240.20(1)(a) concerning availability of statements made by a defendant to persons engaged in law enforcement there are two recent and interesting cases. The first is People v Christie, 133 Misc 2d 468 (Sup. Ct. N.Y. Co. 1986). In that case defendants sought discovery of statements made by nondefendant employees of the defendant corporation to law enforcement authorities claiming that such statements are statements of the corporate defendant. The court held that only statements made by a person

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[9] People v Johnson, 115 Misc 2d 366 (Westchester Co. Ct. 1982); People v Bissonette, 107 Misc 2d 1049 (Saratoga Co. Ct. 1981); People v Finkle, 103 Misc 2d 985 (Sullivan Co. Ct. 1980).

authorized to speak for the corporation regarding the subject matter are statements of the corporation and that it is the burden of the defendant corporation to demonstrate such authorization. Having failed to do so in the case at bar, the motion for discovery was denied.

In People v Ames, 119 AD2d 755 (2nd Dept. 1986), the defendant requested that the People disclose any statements made by defendant so that voluntariness could be determined prior to use at trial. The People claimed that there were no statements discoverable under the terms of CPL 240.20(1)(a). It developed that a statement concerning the subject matter of the indictment had been made by the defendant to his parole officer. The Appellate Division remanded the case to the trial court for a Huntley hearing holding that a parole officer is a public servant engaged in law enforcement activity.

With regard to CPL 240.20(1)(c) requiring disclosure of any written report or document concerning a scientific test or experiment, defendants' demands are frequently very broad. As an example:

> Any written report or document, or portion thereof, concerning a scientific test or experiment relating to the criminal action or proceeding including any laboratory notes or calculations which were made in connection with the scientific test or experiment.

There are two reported cases dealing with the applicability of CPL 240.20(1)(c) to this rather broad demand. In People v Slowe, 125 Misc 2d 591 (Tompkins Co. Ct. 1984), the defendant sought an order requiring disclosure of laboratory notes made by a serologist who processed a "rape kit". The court, after analyzing the statutory language, concluded that the People were required to disclose any laboratory notes or checklists formalized by protocol as an integral element of a final report, including notes, calculations or impressions routinely made in the course of scientific testing on the basis that these would constitute "documents" concerning a scientific test or experiment as that term is defined in Black's Law Dictionary (4th ed.). The court further concluded that excluded from discovery would be scratch pad notations made purely as personal computation or memory aids in the course of a scientific test. The Appellate Division, Fourth Department, has come to a diametrically opposed conclusion. In People v Christopher, 101 AD2d 504 (4th Dept. 1984), the defendant contended, inter alia, that he was improperly denied discovery of the laboratory notes forming the basis of a firearms identification report with which he was provided. The Appellate Division approved the trial court's characterization of such notes as Rosario material not discoverable pretrial. A careful reading of Christopher

reveals that the court's observations concerning laboratory notes is dicta and therefore not binding on the trial courts of the State. However, the decision clearly indicates how the Fourth Department will rule if and when called upon to do so.

A very interesting judicial application of the written report or document concerning a scientific test requirement is found in People v Delaney, 125 Misc 2d 928 (Suffolk Co. Ct. 1984). In that case an accident reconstruction expert retained by the People investigated the incident but issued no written report. However, he did testify before the grand jury at which time he rendered an opinion as to how the accident occurred and gave his reasoning in reaching that conclusion. The court ordered pretrial release of his testimony reasoning that the transcript of his testimony constituted a written report or document within the meaning of CPL 240.20(1)(c).

Another interesting decision in this area is People v Mondon, 129 Misc 2d 13 (Sup. Ct. N.Y. Co. 1985). In that case the People had obtained polygraph examinations of two witnesses, one an inculpatory witness the People intended to call at trial and the other an exculpatory witness the People did not intend to call. The test results indicated that the former may or may not have been telling the truth while the latter was determined to have been lying. The

issues addressed by the court were whether the polygraph examinations qualified as scientific tests or experiments and, if so, whether they were discoverable inasmuch as they are inadmissible in criminal actions in this State. The court answered both inquiries in the affirmative.

The court noted that the results of polygraph examinations are admissible in State administrative hearings and in civil cases by stipulation. It noted further the increasing use of the device in the private business sector and law enforcement's use of the device as an acceptable investigatory tool. The court concluded that such widespread use and acceptance justifies its inclusion in the phrase "scientific test or experiment". With regard to discoverability the court observed that the statute directs disclosure of any such reports made in connection with the case and not just those that will be introduced at trial.

The statute also provides for discovery as a matter of right by the prosecution.[10] The prosecutor is entitled to any written report or document concerning a physical or mental examination, a scientific test or experiment or comparison made by or at the request of the defendant and any photograph, drawing, tape or other electronic recording which the defendant intends to introduce at trial.

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[10]CPL § 240.30.

Additionally, if the defendant has filed a notice of intent to offer psychiatric evidence at trial the prosecutor is entitled to any report or document relating to such evidence.[11]

Like the prosecutor, the defendant has a continuing duty to disclose and must make a diligent and good faith effort to ascertain the existence of and obtain demanded property.[12]

It has been claimed by some that this section may prove to be illusory in those instances where the defendant has not requested and is therefore not in possession of a written report concerning a psychiatric evaluation. The proposition being that if such a report does not exist it cannot be produced. It has been suggested in the past that in such a case the prosecutor should urge the court to order preparation of such a report and direct that it be given to the prosecution on the ground that such court order would be

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[11]The reader should note that CPL 250.10 has been amended and is much broader than the former provision requiring only notice of the affirmative defense of mental disease or defect. Under the present statute, if defendant intended to proffer psychiatric proof regarding delirium tremens as bearing on his culpable state of mind or intent he would be required to serve a notice and that, in turn, would trigger the prosecutor's right to discovery under CPL 240.30(1)(a).

[12]CPL § 240.30(2).

in keeping with the fair intendment of the statute. There is one appellate decision that has flatly rejected such a proposition.

In Matter of Mulvaney v Dubin, 80 AD2d 566 (2nd Dept. 1981), the statutory defense of mental disease or defect was interposed. A court-appointed psychiatrist examined the defendant and, contrary to his normal practice, reported his findings to defense counsel orally rather than in writing. After defense counsel refused a demand by the District Attorney that he direct his psychiatrist to prepare a written report, the District Attorney sought and obtained a court order compelling defense counsel to secure a written report and furnish it to the District Attorney. Defense counsel then commenced an Article 78 proceeding to prohibit the Justice from enforcing his order. The Appellate Division granted the writ observing that Article 240 must be strictly construed since it is in derogation of the common law. The court pointed out that the definitional section of the article limits discovery to "existing" tangible personal property and imposes a duty upon the defendant to reveal such property where it exists.[13] The Court of Appeals reversed, without reaching the merits, on the ground that

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[13] CPL 240.30(2).

the remedy sought did not lie.[14]

While the procedure utilized by the Queens County District Attorney remains available to the practitioner it is clear how the Second Department will rule when presented with the issue on an appropriate appeal.

The prosecutor or the defendant may refuse to disclose any information which they reasonably believe is not discoverable by demand or for which they reasonably believe a protective order would be warranted.[15] Such a refusal must be in writing and must set forth the grounds on which the practitioner believes he or she need not produce, which writing must be served upon the demanding party and a copy filed with the court. The language of this section should be scrutinized by the practitioner for it presents an interesting problem. It provides for a refusal where the practitioner reasonably believes the property demanded is not discoverable by a demand to produce or for which he or she reasonably believes a protective order would be warranted. If the statute was couched only in terms of that matter for which one reasonably believes a protective order would be warranted it would be thoroughly understandable in

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[14] Matter of Mulvaney v Dubin, 55 NY2d 668 (1981).

[15] CPL § 240.35.

that the grounds for a protective order are extremely broad and provides the court with significant discretionary power to deny discovery even as to those items which are mandatorily discoverable.[16] However, the language providing for refusal to disclose any information which one reasonably believes is not discoverable by a demand is problematical. It suggests that where a demand requests matter clearly not within the purview of CPL 240.20[17] the practitioner must serve a written refusal or be subject to an order compelling disclosure.[18] While this construction of the statute may seem onerous, the statutory language is clearly susceptible of such an interpretation and until there is some case law on the subject it is suggested that the practitioner make a written refusal for any property demanded which is not specifically designated as discoverable under CPL 240.20 or CPL 240.30.[19]

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[16] CPL § 240.50.

[17] Identity of Prosecution Witnesses, Witness' Statements and Police Reports.

[18] CPL § 240.40(a) provides, inter alia, that the court must order discovery as to any material not disclosed upon demand.

[19] CPL § 240.40(1)(a); CPL § 240.40(2)(a). There is one trial level case that holds that failure to make a written refusal will not automatically make discoverable that which is not provided for by statute. People v Larkin, 116 Misc 2d 269 (Nassau Co. Ct. 1982).

Omnibus Motions

Section 240.40(1)(c) provides for discovery by court order as to any other property which the People intend to introduce at the trial upon a showing by the defendant that such discovery is material to the preparation of the defense and that the request is reasonable. This provision creates discretionary authority in the court to order discovery of any material coming within the definition of property.[20] While there is no specific requirement that the defendant specify what property is sought to be discovered, as a practical matter defense counsel will, of necessity, have to specify that which is sought, since there must be a factual statement as to how the property sought is material to the defense. That very issue was raised in People v Johnson, 68 Misc 2d 708 (Dutchess Co. Ct. 1971). There the defendant moved for an order of discovery concerning various items of personal property taken from him at the time of his arrest "in order that he could identify those items". The court denied the motion because the requirements of former Subdivision 3 of Section 240.20 regarding the specific designation of the property and a showing of materiality to the preparation of defendant's defense were not demonstrated

[20]CPL § 240.10(3).

in the moving papers.[21] In addition to the Johnson case, there are a number of Federal cases dealing with the necessity of demonstrating materiality under Federal Rule 16. In United States v Birrell, 276 F Supp 798 (D.C.N.Y.) the motion papers contained the bare assertion that the items sought to be discovered were material to the preparation of the defense. The court, in denying the motion, held that such a statement was not even a minimal showing of materiality. Likewise in United States v Rothman, 179 F Supp 935 (D.C.PA.), the court, in denying a discovery motion, stated that the conclusory averment in the motion that the items sought were material was insufficient.

There are two very salutory reasons why the prosecutor should insist upon compliance with the requirement of a factual showing of materiality, particularly in complicated or sensitive cases. First, if the defendant fails to comply with the requirement, the motion should be denied. Far more importantly, however, is the fact that if the defendant is compelled to make a factual demonstration of materiality in order to obtain discovery, the prosecutor will, of necessity, obtain an insight into the defense of the case.

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[21] It should be noted that even pre-CPL the courts adherred to the rule requiring specificity and materiality before ordering discovery. In People v Foster, 33 AD2d 813 (3rd Dept. 1969), the court stated: "To be entitled to any information from the file of the prosecution there must be some demonstration that it exists and is material and necessary for the defense." (Emphasis added.)

Police Reports

The reader will recall that under the former discovery article there was a plethora of lower court cases on the issue of whether or not police reports were the subject of discovery upon an omnibus motion, despite the fact that such reports were specifically designated as exempt.[22] The new statute contains no provision concerning exempt property and police reports clearly come within the purview of the definition of "property". However, in most instances such property will not be discoverable. While the court has the discretion of ordering discovery of any other property, it may do so only if the People intend to introduce such property at trial.[23] In the main, police reports are hearsay and will not be introduced at trial, therefore they should not be discoverable under the omnibus provisions of the statute.[24] There is a caveat to that observation. While the language of the statute is perfectly clear so was the former definition of "exempt property" and yet cases permitting discovery of police reports abounded. There is probably no reason to believe that the judge in

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[22] E.g. People v Privitera, 80 Misc 2d 344 (Monroe Co. Ct. 1974); People v Rice, 76 Misc 2d 632 (Suffolk Co. Ct. 1974).

[23] CPL § 240.40(1)(c).

[24] People v Finkle, supra.

People v Rice, supra, would alter his holding under the new statute, in spite of its rather clear language.

Names of Prosecution Witnesses

Another area of discovery sought by defense counsel under former Article 240, concerning which there have been numerous decisions, is the identity of prosecution witnesses.[25] Under the revised statute the prior decisions should have no applicability. In the first place the identity of a witness clearly does not come within the definition of "property".[26] In the second place, the timing of witness identification and production of statements and prior testimony is specifically governed by Section 240.45 of the statute, thereby inferentially precluding pretrial revelation.[27] The Appellate Division,

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[25] E.g. People v Barnes, 74 Misc 2d 743 (Suffolk Co. Ct. 1973); People v Bennett, 75 Misc 2d 1040 (Sup. Ct. Erie Co. 1973).

[26] CPL § 240.10(3). "Property" means any existing tangible personal or real property, including, but not limited to, books, records, reports, memoranda, papers, photographs, tapes or other electronic recordings, articles of clothing, fingerprints, blood samples, fingernail scrapings or handwriting specimens, but excluding attorneys' work product.

[27] Statements of prosecution witnesses would clearly come within the definition of property, but may properly be resisted on the grounds that the Legislature in adopting 240.45 did not intend their pretrial discovery and it has been so held in People v Allen, 108 AD2d 601 (1st Dept. 1985).

Third Department held in People v Miller, 106 AD2d 787 (3rd Dept. 1984), that the names and addresses of witnesses are not property and are not subject to pretrial disclosure.[28] However, the court recognized the authority to grant such discovery in exceptional circumstances.

> "This is not to suggest that a trial court is precluded from granting such disclosure. To be entitled to relief, however, a defendant must first demonstrate a material need for such information and the reasonableness of the request * * *. Here, defendant presented no special circumstances, but simply asserted disclosure was necessary to prepare for trial * * *. Nor did he move to compel disclosure under CPL 240.40 (subd 1) or demonstrate any harm resulting from the denial of disclosure. These circumstances prevailing, we perceive no abuse of discretion in the resolution of this matter by the trial court." Id. at p 788.

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[28] In Matter of Molea, 64 NY2d 718 (1984), in a dissenting opinion concurred in by two additional judges, Judge Simons observed: "In New York discovery in criminal cases is governed by statute (CPL arts 240, 250) and generally a defendant is not entitled to pretrial disclosure of the identity of a prosecution witness (see CPL 240.20, subd 1; and see, generally, Pitler, NY Criminal Practice under the CPL, Discovery, pp 459-477). In a few exceptional cases we have permitted inquiry by the trial court to determine if certain witnesses' testimony might be exculpatory and their identity thus discoverable under the rule in Brady v Maryland (373 US 83; see, e.g., People v Andre W., 44 NY2d 179 [eyewitness identification]; People v Goggins, 34 NY2d 163, cert den 419 US 1012 [informant]. Nothing in the statute or in our decisions, however, recognizes a general right in the defendant to discover pretrial not only the identity of the prosecution's witnesses but also the substance of their testimony or grants a defendant a right to a preliminary hearing for that purpose." Id. at pp 723-724.

In spite of the above courts continue to order discovery of the names and addresses of witnesses. In People v Minor, 118 Misc 2d 351 (Westchester Co. Ct. 1983), the court ordered disclosure of the names of the People's witnesses. In justification of its holding the court relied on two occurrences: First, the statement in People v Copicotto, 50 NY2d 222 (1980), that the criminal discovery statute "evinces a legislative determination that the trial of a criminal charge should not be a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial. * * * [P]retrial discovery by the defense and prosecution contributes substantially to the fair and effective administration of justice". Second, the statement in the Practice Commentary to CPL 240.10 (McKinney's Cons Laws of NY, Book 11A) which follows the introductory remark that the emphasis in the definitional portion of the statute is on property as the statute is not a witness or person disclosure device. The sentence relied on and quoted provides that "[t]his must be distinguished from the nonstatutorily created rights of disclosure especially of informant or exculpatory witnesses." The court thereby concludes that in the spirit of expanded disclosure it has the authority to order nonstatutorily governed disclosure. While it is true that

the Supreme Court and the Court of Appeals have provided for a good deal of extrastatutory discovery, in each case where this has occurred it was because the defendant's constitutional rights were implicated.[29] This writer is unable to discern any factors in the Minor case which implicate the Constitution and thus call for discovery broader than that provided for by statute.

Statements of Prosecution Witnesses

Under the old discovery statute the statements of prosecution witnesses were specifically designated "exempt property" and were not discoverable except under the common law theory established by People v Rosario, 9 NY2d 286 (1961), and its progeny. Nevertheless, the official law reports are replete with cases permitting such discovery.[30]

Under new Article 240 discovery of the identity of prosecution witnesses, their statements and grand jury testimony is specifically dealt with in Section 240.45(1)(a). That section provides, inter alia, that after a jury is sworn and prior to the opening address the prosecutor shall make available to the defendant any written

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[29] See Discovery of Informant's Identity and The Brady Doctrine as a Means of Discovery, infra.

[30] E.g. People v Rice, 77 Misc 2d 582 (Suffolk Co. Ct. 1974); People v Nicolini, 76 Misc 2d 47 (N.Y. City Crim. Ct. 1973); People v Inness, 69 Misc 2d 429 (Westchester Co. Ct. 1971).

or recorded statement, including grand jury testimony and a videotaped examination made by a person the prosecutor intends to call as a witness at trial and which relates to the subject matter of the witness' testimony. As in the previous sections referred to it is important for the reader to remember the definition "at trial", because by virtue of that term the prosecution is obligated to turn over such materials concerning witnesses to be called on his or her direct case. The section has no applicability to rebuttal witnesses. Additionally the section requires that the prosecutor provide defendant with the records of convictions of any such witnesses together with the revelation of the existence of any pending criminal actions against any such witnesses. However, there is no requirement that the prosecution undertake to fingerprint any such witnesses.

The above referred to section is nothing more than a codification of the rules established in People v Rosario, supra, and People v Nicolini, supra. As such, the practitioner must be aware of the cases dealing with and enlarging upon the principles established in Rosario. In People v Consolazio, 40 NY2d 446 (1976), a prosecutor compiled certain "worksheets" during his preparation for trial which constituted his notes of the statements of various witnesses he had interviewed. During trial defense counsel requested the prosecutor to turn over all prior

statements made by prosecution witnesses pursuant to the rule enunciated in People v Rosario, supra. The court's language in holding the "worksheets" Rosario material is enlightening on the question of whether or not an "oral" statement is discoverable under 240.45(1).

> "The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature. Thus it has been held that a witness' statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is 'a record of a prior statement by a witness within the compass of the rule in People v Rosario * * * and therefore not exempt from disclosure as a "work product" datum of the prosecutor.' * * * Accordingly, we conclude that the prosecutor's worksheets, containing as they do abbreviated notes capsulizing witnesses' responses to questions relating directly to material issues raised on defendant's trial, fall within the reach of our holding in Rosario. Indeed this was obliquely recognized by the District Attorney, who with commendable candor informed the trial court that the signatures of the witnesses were not affixed to the questionnaire forms when completed in the hope that Rosario disclosure could thereby be obviated."

The Court of Appeals in a later decision has made it quite clear, it seems, that an oral statement is Rosario material and thereby discoverable where a synopsis of the statement has been reduced to writing. In Matter of Kelvin D., 40 NY2d 895 (1976), the Court of Appeals held that the trial court erred in refusing to provide defense counsel with copies of police documents for cross examination of

witnesses, citing Consolazio and Rosario. The documents consisted of interview summaries of the police which had been drawn from prior oral statements of the prosecution witnesses to the initial officers on the scene.[31]

Where notes of a prosecutor contain not only a synopsis of the witnesses' statements, but also the theory or conclusions of the writer, the trial court, upon motion for a protective order, would do well to mark the documents as evidence and then examine them in camera for the purpose of redacting that material claimed to be attorney's work product. In that manner a record will be made which is capable of appellate review.[32]

While Consolazio is now clearly the law in this State, it seems to the writer that the material referred to in that case clearly constituted attorney's work product and should have been nondiscoverable. It seems further evident that the case may have a "chilling effect" on heretofore meticulous trial preparation. This is true of the defense

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[31]A recent First Department case indicates the length that the courts are prepared to go in interpreting and defining Rosario and Consolazio. In that case the court held that the defendants were entitled to any notes on any interview made with the witness, no matter what the form and no matter when made. People v Cavallerio, 71 AD2d 338 (1st Dept. 1979); See also Matter of John G., 91 AD2d 685 (2nd Dept. 1982).

[32]CPL § 240.45(1).

as well as prosecution bar, since Consolazio is clearly not limited to prosecutors.[33]

It seems reasonably clear to this writer that the Legislature by providing for production of witness statements after jury selection and prior to opening statements, has, at least by implication, precluded pretrial revelation of such material. The courts, nevertheless, continue to fashion exceptions to this rather clear mandate. In People v Johnson, 115 Misc 2d 366 (Westchester Co. Ct. 1982), the court was confronted with a defendant who allegedly suffered alcohol related amnesia and as the result he remembered nothing of his actions at the time and place relating to the charges brought against him. For this reason he sought discovery of police reports concerning identifications made of defendant, statements made by defendant to nonpolice personnel, names and addresses of witnesses and their statements and grand jury testimony. The court correctly observed that constitutional requirements supersede statutory limitations and, thus, denial of pretrial discovery in some instances may well result in the denial of constitutional rights (citing Brady v Maryland, infra). Given that proposition, the court went

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[33] See Statements of Defense Witnesses, infra.

on to determine that prosecution witness' statements would undoubtedly be material to the defense and compelling their disclosure not unreasonable. The court ordered disclosure of such statements, but with redaction of the identity of the witness in each case. What the court failed to do was articulate how denial of disclosure would constitute a constitutional deprivation.[34] Assuming, arguendo, that the court was correct in its analysis and holding then it seems that when faced with the defense of alibi it will be compelled to decide in the same manner.

A most instructive case concerning the phrase "which relates to the subject matter of the witness' testimony" is People v Perez, 65 NY2d 154 (1985). In that case, one of the prosecution witnesses had a conversation with members of defendant's family concerning the eventuality of her becoming unavailable as a witness in return for a certain sum of money. She reported the conversation to the prosecutor as a bribe attempt by the family. The family advised defense counsel of the conversation indicating that the witness had requested payment in return for her unavailability. In the meantime the prosecutor had the

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[34]The Supreme Court has made it clear that there is no general constitutional right to discovery. Weatherford v Bursey, infra.

witness phone the family member and engage him in a conversation regarding the bribe which conversation was tape recorded. Prior to trial defense counsel advised the court of the information provided to him concerning the bribery conversation and requested a hearing in that regard. The request was denied. Pursuant to CPL 240.45(1)(a) the prosecution gave defense counsel a copy of the witness' statement given to the police regarding the events leading to defendant's indictment together with a copy of her grand jury testimony. He did not provide the defense with copies of the statements made in connection with the bribery attempts. The Court of Appeals found this to be reversible error.

First, the court found indistinguishable statements made by witnesses to law enforcement officials and private parties. Second, as to the prosecution claim that the withheld statements did not relate to the subject matter of the witness' testimony the court stated:

> "The prosecutor also argues that the statements are not covered by the Rosario rule because they do not relate to the subject matter of the witness' direct testimony, but to the independent crime of bribing a witness. The prosecutor concedes that such statements have some bearing on the witness' credibility but urges that statements relating only to credibility should not be considered subject to disclosure under Rosario. However, the very basis for the rule requiring the prosecutor to disclose a witness' prior statements is to afford the defendant a fair opportunity to test the witness' credibility

> (People v Rosario, supra, at pp 289, 290). Of course not every statement made by a witness which reflects on his credibility should be viewed as relating to the subject matter of his testimony. But the pretrial statements in this case were directly related to the witness' trial testimony because it was that testimony which the bribe discussions were intended to affect. Thus, under People v Rosario (supra), defense counsel was entitled to the statements the witness made relating to the bribery." Id. at p 159.

With regard to statements of witnesses the reader should be aware of Section 240.44. Practically speaking the section is somewhat superfluous in that it codifies People v Malinsky, 15 NY2d 86 (1965). The section provides that prior written or recorded statements and grand jury testimony of witnesses at pretrial hearings must be available to the attorney for the opposing party at the conclusion of such witness' direct testimony at any pretrial hearing. However, the section also provides for production of conviction records and the revelation of criminal actions pending against witnesses testifying at pretrial hearings and, in this regard, the section significantly advances the time for production of impeachment material.

There is a very interesting recent case concerning the interpretation of the language of CPL 240.44. In People v Gross, 130 Misc 2d 963 (Sup. Ct. Queens co. 1986), defendant sought discovery of the complaining witness' grand jury testimony at two separate and distinct grand jury

proceedings. One grand jury proceeding resulted in the indictment which was the subject of the suppression hearing and the other resulted in indictments of another person. The witness' grand jury testimony involved a single street encounter in which both indicted defendants were charged with acting in concert with one another. The court ordered disclosure on the basis that the defendant was entitled to the written or recorded statements of a prosecution witness which related to the subject matter of the witness' suppression hearing testimony and clearly the complaining witness' testimony at a separate grand jury proceeding involving the same street incident against a third person charged with acting in concert with the defendant constitutes such testimony.

The reader should be aware of an important exception to the mandatory requirements of CPL 240.44 and 240.45. There is no obligation on the People to produce statements that are "duplicative equivalents" of statements previously turned over to the defense. What are "duplicative equivalents" is difficult of precise definition. However, the Court of Appeals in People v Ranghelle, 69 NY2d 55 (1986), has given us an apt example of what they are not. In that case one of the defendants was convicted of robbery. The victim was the only witness and the conviction depended entirely upon his eye witness identification. The defense

was misidentification. The incident reports prepared by the investigating officers and given to defense counsel pursuant to CPL 240.44 contained descriptions of the robber that varied from the physical attributes of the defendant. Defense counsel called the two officers and questioned them regarding the descriptions of defendant contained in their incident reports. On cross-examination the District Attorney was permitted to elicit testimony that both officers had kept memo books containing notes of their conversations with the victim and the notes concerning the description of the defendant were consistent with the physical characteristics displayed at trial. The memo books had not been given to defense counsel and he was unaware of their existence until cross-examination. The officers ascribed the discrepancies in the incident reports to their own errors in transcribing the material in their memo books to the incident reports. In the Court of Appeals the People contended that they had no obligation to disclose the memo books since they were "duplicative equivalents" of the incident reports. The court reversed noting:

> "It is sufficient answer to observe that the descriptions contained in the two materials varied. The inconsistencies were minor, to be sure, but they nevertheless may be found, and thus the People cannot claim the descriptions in the memo books were the 'duplicative equivalents' of the descriptions in the incident reports."[35]

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[35] 69 NY2d at p 65.

Regarding this Rosario exception, it would seem the better practice to turn over any statements which come within the Rosario rule without engaging in pedantic analysis as to whether or not the material constitutes a "duplicative equivalent".

Finally, a word as to sanctions in the event of the People are in noncompliance with CPL 240.45. A failure to disclose Rosario material is per se error requiring reversal and a new trial.[36] In the event of a delay in production, the court must ascertain whether the defense was substantially prejudiced by the delay. If not, there will be no sanction. In either case, "good faith" arguments will have no bearing on the court's determination.[37]

Transcripts of Testimony of Witness' Prior Testimony

The next question is whether or not the People are under an obligation to provide the defense with the transcripts of the testimony of witnesses at preliminary, Huntley, Mapp, Wade and like hearings. It has been this writer's experience that such an obligation has been generally assumed over the years and at least one lower

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[36] People v Perez, supra.

[37] People v Ranghelle, supra.

court has expressly so held.[38] However, since that decision at least two trial level courts, in rather well reasoned opinions, have held otherwise and the issue now merits sober consideration and analysis.[39]

In People v Caban, 123 Misc 2d 943 (Sup. Ct. Kings Co. 1984), the court held that the prosecution was under no obligation to supply a defendant with a transcript of the testimony of the People's witnesses given at a pretrial hearing at which the defendant and his attorney were present. The court reasoned that CPL 240.45 requires only that the People make a statement "available" and that does not require the People to order a stenographer to transcribe untranscribed minutes. The court further reasoned that in producing the witnesses at the hearing at which defendant and his attorney were present made the prior statements and the transcript "available". In that regard the court noted:

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[38] People v Ward, 121 Misc 2d 1092 (Sup. Ct. N.Y. Co. 1983).

[39] There is one appellate court memoranda decision which held that the Family court abused its discretion when it refused an adjournment in order to enable the Corporation Counsel to produce the minutes of the complaining witness' preliminary hearing testimony in the criminal court. Matter of Bertha K., 58 AD2d 811 (2nd Dept. 1977). The decision, however, gives no rationale for the holding.

> "It is now well settled that an indigent defendant may apply to the court for a free transcript of the pretrial hearing (People v Montgomery, 18 NY2d 993; People v West, 29 NY2d 728; People v Zabrocky, 26 NY2d 530; Roberts v LaVallee, 389 US 40). By providing defense counsel with an opportunity to obtain a free transcript of the testimony the People have made the same available to him (see Britt v North Carolina, 404 US 226). The court finds that this satisfies the statutory requirement of availability." Id. at p 945.

The court placed great emphasis on the language of the Court of Appeals in People v Kuss, 32 NY2d 436 (1973). The the defendant claimed he was entitled to a transcript of a tape recorded statement given by a witness for the People. The court, in rejecting that argument stated:

> "In our view the trial court fully complied with the Rosario mandate when it allowed an adjournment for more than a day in order to permit defense counsel to hear these tape recorded statements in preparation for cross-examination. There is nothing in Rosario which imposes on the prosecutor the additional obligation of converting his work material into a form which would be most convenient for defense counsel at the trial." Id. at p 446.

The Court reasoned in Caban that if the People are not required to transcribe a tape-recorded statement, then why should they be required to transcribe hearing minutes? Finally, the court observed that the Court of Appeals has acknowledged that Article 240 of our Criminal Procedure Law was adopted in substance from Rule 16 of the Federal Rules of Criminal Procedure (People v Copicotto, supra) and that

the Federal courts have repeatedly held that Rule 16 does not encompass transcripts of prior testimony where defendant and his counsel were present.[40]

The court in People v Grissom, 128 Misc 2d 246 (N.Y. Co. Crim. Ct. 1985), went a step further. There it was held that, irrespective of whether the defendant was or was not present when prior testimony was given, the People are under no obligation to furnish a transcript of such testimony where the defense is aware of it and has equal access to it. The court based its decision on the proposition that access to prior statements and self determination by the defense how to use them are the key elements of the Rosario decision. As the court stated "* * * the Court of Appeals itself defined the purpose of the Rosario decision as follows: 'to afford the defendant a fair opportunity to use a witness' prior relevant statements for impeachment purposes.' (People v Poole, 48 NY2d 144, 150 [1979]; emphasis added.)" While not specifically stated, implicit in the holding is that a defendant aware of prior testimony of a witness has been afforded a fair opportunity

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[40] E.g. United States v Munroe, 421 F2d 644 (5th Cir.1970); United States v Baker, 358 F2d 18 (7th Cir. 1966).

to obtain and use it for impeachment purposes.

There is now appellate authority in accord with the Caban and Grissom cases. In People v Frank, 107 AD2d 1057 (4th Dept. 1985), the defendant complained that he was improperly denied minutes of his first trial prior to retrial. The court held that the transcripts were not discoverable under CPL 240.45. The court observed that the transcript was as available to defendant as to the prosecution and that the defendant had the responsibility to obtain it if he believed it necessary. In the event of indigency the defendant can apply for a court order directing that a transcript be provided free of charge.

The above decisions seem eminently reasonable. The underlying purpose of Rosario was aptly stated in People ex rel. Cadogan v McMann, 24 NY2d 233 (1969). There the Court of Appeals observed that "[t]he Rosario case * * * held merely that the defense was entitled, at the trial, to the prior statements of prosecution witnesses made 'to police, district attorney or grand jury' * * *. The defense was thereby given access to ex parte statements that would otherwise remain undisclosed to him throughout the trial." (Id. at p 236; Emphasis added.) It seems compelling and logical that the court in enunciating Rosario and the Legislature in enacting CPL 240.45 was concerned with providing the defense with materials that it would otherwise

be unaware of. To construe the statute in a way that requires the prosecution to undergo the time and expense of providing the defense with that which is equally accessible to it takes on some of the "sporting" aspect decried by Mr. Justice Brennan.[41]

Statements of Defense Witnesses

Section 240.45(2) provides that after presentation of the People's direct case and before presentation of defendant's direct case, the defendant shall make available to the prosecutor any written or recorded statement made by a person, other than the defendant, whom the defendant intends to call as a witness at the trial. The rationale of Consolazio and Kelvin D. is as applicable to the defense bar as it is to the prosecution.[42] Additionally, the term "at trial" has to do with the defendant's direct case and any such statements would not be discoverable if they involved surrebuttal witnesses.

The reader should also note that Section 240.45(2) compels defense counsel to reveal to the prosecution known criminal convictions of any defense witnesses and the

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[41]See note 1 supra.

[42]People v Allen, 104 Misc 2d 136 (Sup. Ct. Westchester Co. 1980).

existence of any pending criminal action against such witnesses.

Materials Utilized By Expert In Formulating An Opinion

An extremely interesting question was addressed in People v Leon, 134 Misc 2d 757 (Westchester Co. Ct. 1987). In that case the defendant filed a notice of intent to offer psychiatric evidence as a result of which he was examined by a psychiatrist designated by the District Attorney. Thereafter, defense counsel was furnished with a copy of the psychiatrist's report in which the doctor indicated that in formulating his opinion he had, among other things, reviewed police reports and statements of civilians. The defendant moved for discovery of those materials. The People opposed the motion on the ground the statute does not provide for the discovery of the material sought. The court ordered discovery although it had some difficulty in discerning a reason therefor. The court finally concluded that it possessed inherent authority to do so in the interest of fairness, a rationale that the writer does not embrace.[43] The only conceivable basis upon which the court could order discovery pursuant to Article 240 would be pursuant to Section 240.40(1)(c). As observed by the court:

[43]See Names of Prosecution Witnesses, supra.

> "Indeed, a compelling argument can be made that the People have indicated their intent to introduce the content of these documents at trial, albeit indirectly, through the testimony of the psychiatrist. Thus, if the court were to find that defendant has shown that such property is material to the preparation of his defense, discovery would be specifically authorized in any event. * * *"[44]

The problem with this construction of the statute is that the term "at trial" means as part of the People's direct case. Since the psychiatric evidence contemplated by defendant constitutes an affirmative defense, the People would be offering their psychiatric evidence in rebuttal and not as part of their direct case. Accordingly, discovery would not be appropriate under Article 240

Reciprocal Discovery

Article 240 provides, upon motion, for reciprocal discovery by the People of property of the same kind or character as that authorized to be inspected by the defendant, if he intends to introduce such evidence at the trial.[45] Like defendant, the People must demonstrate the materiality of such property to their case and they must

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[44] 134 Misc 2d at p 758.

[45] CPL § 240.40(1)(c).

satisfy the court that the request is reasonable.

While at first blush it may seem problematical to establish materiality and reasonableness, it seems incongruous that a court could make a finding on the one hand that the material requested by the defendant is material and reasonable and on the other hand deny the prosecution's motion for discovery of the same property in the possession of the defendant for lack of those requisites. This very issue was raised in People v Green, 83 Misc 2d 583 (N.Y. City Crim. Ct. 1975), wherein the court granted reciprocal discovery stating:

> "In the matter herein before this court, the defense, in response to the People's motion for discovery, contends that the District Attorney has not met the requirements of CPL 240.20 (subd 4), since he has failed to demonstrate that the information being sought is material to a preparation of the People's case, that the request is reasonable and that the items demanded are within the defendant's control. However, the defendant in previously submitting his own motion made no greater showing of materiality or reasonableness than does the prosecution, and, yet, his requests have been largely granted. * * * The fact is that the courts have seldom construed strictly such requirements in deciding motions for bills of particulars and discovery, in that doing so would place a great, often impossible burden on the parties involved and would, in many instances, work an injustice on the defense. For the defendant now to insist on an overly technical construction is to expect the court to interpret the same words to mean more

where one party is concerned than the other."[46] Id. at p 595-596.

While some authorities have registered concern as to whether mutual disclosure constitutes a violation of the defendant's privilege against self-incrimination, the cases dealing with the problem have uniformly held that a requirement that a defendant disclose in advance of trial materials which he intends to use in his own behalf is not such a violation so long as the statute provides for mutuality. E.g. Wardius v Oregon, 412 US 470 (1973); Williams v Florida, 399 US 78 (1970); People v Lacey, 83 Misc 2d 69 (Suffolk Co. Ct. 1975); People v Gliewe, 76 Misc 2d 696 (Monroe Co. Ct. 1974); People v Green, supra; People v Lopez, 60 Cal.2d 223 (1963).

Although application of the section providing for reciprocal discovery would appear to be reasonably problem free, the reported cases under the former discovery statute suggest that its application is subject to the vagaries of the various judges interpreting it. The first question that arises is whether the relief sought under the section must

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[46] Clearly, however, the prosecution's moving papers should contain some kind of statement concerning materiality and reasonableness. See People v Rexhouse, 77 Misc 2d 386 (Dutchess Co. Ct. 1974), where the court denied the prosecution's motion for reciprocal discovery for "the same kind of scientific reports initiated by the defense" with the additional statement "that this request is reasonable and material to the preparation of the People's case".

be obtained by cross notice of motion on the part of the prosecution or whether it may be obtained at some subsequent time of the granting of an order of discovery in behalf of the defendant. That question was first considered in People v Rexhouse, supra. In that case the defendant applied for discovery of a report regarding the autopsy performed upon the alleged victim, the application was granted and the report was furnished. Thereafter the defendant again moved for discovery of all other scientific reports in the People's possession which motion was granted and complied with. Subsequently, the prosecution made a motion for "the same kind of scientific reports initiated by the defense". The court denied the motion of the prosecution on other grounds, but noted that the application for discovery was untimely since the two prior orders of discovery granted to the defense were made by the court unconditionally.

In People v Green, supra, the court came to an opposite conclusion from the aforementioned dicta in Rexhouse. There the defendant made an application for discovery of the names, addresses and pretrial statements of witnesses whom the prosecution intended to call at the trial, which application was unconditionally granted. Thereafter the People made a motion requesting disclosure of the names, addresses and pretrial statements of witnesses whom the defense intended to call at trial. The court, without

discussing the issue of timeliness, granted the prosecution's motion for the names and addresses of the witnesses the defense intended to introduce at trial.

In People v Lacey, supra, the Suffolk County Court granted the defendant's application for the names and addresses of prosecution witnesses and conditioned that order upon the defendant furnishing the People with a list of the names and addresses of the defendant's witnesses and provided further that either party could make application to the court for a protective order for any particular witness.

It would seem that the statement of the court in Rexhouse concerning the untimeliness of the People's motion was an improper interpretation of the former discovery statute and would constitute an improper interpretation of the present statute. Nevertheless, I see no reason why a prosecutor should not make an appropriate cross notice of motion for reciprocal discovery at the time he is in receipt of the defendant's motion papers and avoid the issue altogether.

With the exception of the Green and Lacey cases, referred to above, there is a paucity of reported cases in New York State dealing with reciprocal discovery of "property" other than psychiatric reports. There are two very interesting reported cases, however, dealing with reciprocal discovery which give the practitioner some

insight as to the potential value of this procedural device.

In People v Catti, 90 Misc 2d 409 (Sup. Ct. Queens Co. 1977), the defendant was charged with larceny and possession of stolen property involving motorcycles. It should be noted that the court ruled the People's motion untimely and summarily denied it on that basis. However, the court went on to state the manner in which it would have disposed of the motion had it considered the matter on its merits. The People requested discovery as follows:

> 1. Original bills of sale for the motorcycles in question.
>
> 2. Original bills of sale for parts on the motorcycles in question.
>
> 3. Original bills of sale for motorcycle engines in question.
>
> 4. Certificates from city and state for license for defendant's doing business as "Mike's Bike Shop".
>
> 5. Certificate from New York State Department of Taxation and Finance for defendant's right to collect sales tax.
>
> 6. Any and all copies of liens on motorcycles in question.
>
> 7. Copies of any and all motor vehicle documents relevant to VIN, including but not limited to application for new vehicle identification numbers.
>
> 8. Copies of canceled checks for purchases of motorcycles in question as well as canceled checks for New York sales tax paid for such items.

The court stated as to reciprocity:

> "Of the items requested, numbers 4, 5, 7 and 8 are not of the same kind or character as requested by the defense in its motion for an order of discovery.
>
> "In Item 29 of his motion for an order of discovery and inspection, defense counsel requested 'state whether any alarms had been issued with regard to the vehicles, and, if so, the date and time of such alarms'. An alarm would indicate the report of a theft. The bills of sale requested (Items 1 thru 3) and copies of liens (Item 6), are related to reports of theft. They would go to rebut such reported thefts. These items are within the definition of 'the same kind or character'. They certainly are items that the defendant would have in his possession, custody and control and would certainly be the kind of material that a defendant is likely to produce at trial, since they go to refute evidence of theft." 90 Misc 2d at p 413.

In People v Copicotti, supra, the Court of Appeals had occasion to discuss the meaning of the term "property of the same kind or character". In that case the defendant was charged with petit larceny at Macy's Department Store. Defense counsel moved for discovery of statements contained in an internal security report of the theft prepared by a store detective, which motion was granted. The People moved for reciprocal discovery of any sales slips allegedly demonstrating the purchase of the merchandise in question. The issue was whether the sales slips were property of the same kind or character as the internal security report. The Court of Appeals upheld the lower court's determination that

reciprocity was appropriate, stating:

> "Notwithstanding the protests to the contrary, an adequate relationship exists between the request for the receipts and defendants' request for the memorandum from the security officer. In opposing disclosure, defendants apparently seek to limit the availability of prosecution discovery to items which are the mirror image of items directed to be disclosed to the defendants. The statutory requirement, however, should not be so narrowly construed. Of course, the prosecution's right to discovery is not an independent right, being triggered only by a defense request for discretionary discovery and restricted to like property. But this restriction does not demand identity of requests (See People v Catti, 90 Misc 2d 409; People v Green, 83 Misc 2d 583). To so construe the statute would defeat unnecessarily the legislative design to increase the availability of information to both sides. Consistent with both the purpose to expand discovery rights and the notion that prosecution discovery is merely reciprocal, it is sufficient if the material sought by the prosecution is of the same general character as that sought by the defendant and touches the same subject matter." 50 NY2d at p 228.

In addition to the above-mentioned provision regarding reciprocal discovery, the statute has a provision with which the practitioner should be particularly familiar. At the time of its proposal, a number of prosecutors were somewhat chagrined that the Legislature was providing, statutorily, for the discovery of matters which were already available to the prosecution under common law. I refer to Section 240.40(2)(b) which provides for a discretionary order compelling the defendant to: appear in a lineup; speak for

identification by a witness; be fingerprinted; pose for photographs; permit the taking of samples of blood, hair, fingernail scrapings or other materials from his body; provide handwriting specimens and submit to a reasonable physical or medical inspection of his body. The reader should take particular note that Section 240.40(1)(b) requires, as a prerequisite to an order, that the prosecution demonstrate materiality and reasonableness. Those requirements are conspicuously omitted from Section 240.40(2)(b) and it is submitted that there is no need for a showing of probable cause, materiality or reasonableness with regard to the items above-mentioned. It would seem that the mere existence of an indictment against the defendant would constitute a sufficient basis for an order under the section.

The reader should note that Section 240.40(2)(b) provides that the subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order before the filing of an accusatory instrument. That language seems to recognize a pre-criminal action right to non-testimonial evidence to aid in a criminal investigation, which has been the source of great controversy and conflicting judicial decisions in the First and Second Departments. The issue has now been resolved by the Court of Appeals in Matter of Abe A., 56 NY2d 288

(1982). There it was held that a court order authorizing the taking of a blood sample from a suspect may issue prior to the filing of an accusatory instrument providing the court finds probable cause to believe the suspect has committed the crime, a clear indication that relevant material information will be found and the method used to secure it as safe and reliable.

The Court of Appeals has gone one step further in People v Mosselle, 57 NY2d 97 (1982). There, in a trilogy of cases, the court held that the taking of blood samples for use in Penal Law prosecutions could be accomplished only by court order, consent or in conformity with Section 1194 of the Vehicle and Traffic Law. The court expressly rejected the proposition that such non-testimonial evidence could be obtained without a court order upon probable cause and given the existence of exigent circumstances. The court in interpreting the above-mentioned language of CPL 240.40(2) has held that the Legislature not only recognized such a pre-criminal action right to an order for such non-testimonial evidence, it has mandated such procedure as the exclusive means by which such evidence may be obtained.[47]

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[47]The reader should note the 1983 amendment to CPL 240.40(2)(b) and the enactment of § 1194-a of the Vehicle and Traffic Law which provides a mechanism to satisfy the obstacles posed by People v Mosselle, supra.

The question that arises is whether the court's holding applies to the other forms of non-testimonial evidence delineated in CPL 240.40(2). It would seem that it does and at least one court has so held. In People v Mott, 118 Misc 2d 90 (Sup. Ct. Monroe Co. 1983), the court held that a court order was required to obtain pubic hair samples from a rape subject prior to the commencement of formal adversarial proceedings citing Mosselle as authority. Based upon Mosselle and Mott, it would seem that a court order will be required for fingernail scrapings even though the exigencies of situations involving the need suggest that the evidence might be lost in the interim.

A far more significant question remains. Is a court order required for a show-up? Certainly that constitutes non-testimonial evidence obtained from the defendant. While a show-up is not included in the laundry list of items delineated as discoverable by court order under CPL 240.40(2), the statute provides that such order may , among other things, require the defendant to appear in a line-up et cetera. Clearly, a show-up could be included in the rather all encompassing phrase "among other things".

Protective Orders

The provision for protective orders under Article 240 is extremely broad. Section 240.50 provides, inter alia,

that the court may, upon motion of either party, or of any affected person, or upon its own motion, issue a protective order denying, limiting, conditioning, delaying or regulating discovery pursuant to this article for good cause, including constitutional limitations, danger to the integrity of physical evidence or a substantial risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment to any person or an adverse effect upon the legitimate needs of law enforcement, including the protection of the confidentiality of informants, or any other factor or set of factors which outweighs the usefulness of the discovery.

In the first instance, the practitioner should be aware that the provisions of the section providing for a motion for a protective order by any affected person includes a broad range of prospective objectors including confidential informant, a police chief or any prospective witness. Furthermore, Section 240.90(3) provides that the application by such person may be ex parte or in camera. Additionally, the statute provides that such a protective order may be based upon "good cause" which includes, and the reader should note that that is not limiting language, the enumerated requisites such as "the integrity of physical evidence and substantial risk of physical harm or intimidation" and then ends with "any other factors or set

of factors which outweighs usefulness of discovery". Suffice it to say, that the trial court is invested with the broadest discretionary powers to limit any discovery demand and the usefulness of this section is subject only to the limitations of the imagination of the practitioner in each individual case.

Section 240.60 provides for a continuing duty to disclose those matters required to be disclosed by demand or upon court order. Section 240.70 deals with sanctions for non-compliance with demanded discovery or court ordered discovery and provides, inter alia, that the court may order compliance, grant a continuance, issue a protective order or prohibit the introduction of evidence or the calling of a witness. Section 240.70 is rather important to the prosecution in that it provides that the defense may not make any adverse comment in summation or at any other point of the trial upon the failure of the People to call any prospective witness disclosed to the defense pursuant to the provisions of this article or its failure to introduce any physical evidence or reports disclosed to the defense pursuant to this article.

Retention of Discoverable Evidence

The next question that arises, but is not specifically addressed by the discovery statute, is whether the

prosecution is under a duty to retain property which is or would be the subject of discovery under the statute. It would seem that if the statute requires the prosecutor to make a diligent and good faith effort to ascertain the existence of discoverable property and that such effort is a continuing one then the prosecutor must also be under a duty to preserve discoverable evidence once obtained and the Court of Appeals has so held. In People v Kelly, 62 NY2d 516 (1984), the court stated:

> "A necessary corollary of the duty to disclose is the obligation to preserve evidence until a request for disclosure is made * * *. Any other rule would facilitate evasion of the disclosure requirements * * *. Accordingly, where discoverable evidence gathered by the prosecution or its agent is lost, the People have a heavy burden of establishing that diligent, good-faith efforts were made to prevent the loss * * *. Otherwise, sanctions will be imposed." Id. at p 520.

The reader will note that the Court of Appeals was not limiting its pronouncement to Brady or exculpatory evidence. Its holding encompasses any evidence that would be discoverable by the defendant. The larger question to be dealt with is what type of sanctions, if any, will be imposed where discoverable property has been lost or destroyed. This will depend upon the degree of the prosecutor's bad faith or negligence, the importance of the evidence lost and, at the appellate level, the quality of

the evidence of guilt adduced at trial.[48] The Kelly decision is particularly instructive in this regard. The court makes it clear that such determinations must be made on an ad hoc basis and, as a general rule, the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence.

In People v Kelly, supra, the Court of Appeals reversed a lower court dismissal and remanded with instructions to the court to impose less drastic but appropriate sanctions. In that case the defendants allegedly mugged an undercover officer taking a wallet from his shoulder bag. The wallet contained a twenty dollar bill and two one dollar bills. Following the larceny the wallet and bills were returned to the undercover decoy officer and were, therefore, unavailable for discovery by the defendants. The defendants, in support of their motion to dismiss, claimed that the irrevocable loss of the bills precluded assertion of their entrapment defense. Their claim was that the twenty dollar bill was a doctored one dollar bill and this evidence would demonstrate that the police intended to use the money as an inductment to lure defendants into

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[48] United States v Bryant, 439 F2d 642; People v Close, 103 AD2d 970 (3rd Dept. 1984); People v Saddy, 84 AD2d 175 (2nd Dept. 1981).

committing the larceny. The Court of Appeals suggested, as less drastic sanctions, that the trial court could instruct the jury that the money was doctored in the manner claimed or charge the jury that an adverse inference should be drawn against the prosecution on account of the missing evidence.

Dismissal was found to be an appropriate sanction in People v Saddy, supra. There the defendant was convicted of criminal sale of a controlled substance. His defense was agency. It developed that there had been numerous phone conversations between defendant and the undercover officer, all recorded. However, the police erased all tapes except those recorded on October 19, 1979. It was defendant's contention that the undercover officer, in every phone conversation, had prodded defendant to obtain drugs for him and that defendant had finally done so as an accommodation and made no profit on the sale. He sought discovery of the tapes in support of his contention. The Appellate Division found that the tapes would have played a significant role in resolving the factual issue raised by the defendant by way of his agency defense and that the loss of that evidence warranted reversal of the two sale convictions as a sanction.

Some other kinds of sanctions imposed by the courts has been preclusion of testimony where minutes of the prior

testimony of the witness were lost,[49] holding of a reconstruction hearing[50] and directing the prosecution to furnish defendant all remaining minutes and records of the witness' statements.[51]

In People v DeZimm, 102 AD2d 633 (3rd Dept. 1984), the Third Department refused to extend the holding in Saddy. In that case the State Police electronically monitored a transaction between defendant and the undercover officer for the latter's protection. The monitoring, however, was not recorded. Defendant claimed that failure to record denied him access to potentially exculpatory evidence which could have substantiated his version of the transaction and sought a reversal of his conviction on that ground. The court declined to impose a duty upon the police to record all monitored conversations and affirmed the conviction.

In People v Close, supra, the court affirmed a murder conviction in which defendant had sought dismissal of the indictment for the prosecution's failure to preserve the victim's blood samples which purportedly contained fatal amounts of insulin. The court determined that there was no

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[49] People v Tunney, 84 Misc 2d 1090 (Sup. Ct. N.Y. Co. (1975).

[50] People v Hicks, 85 Misc 2d 649 (N.Y. Co. Crim. Ct. 1976).

[51] People v Aviles, 89 Misc 2d 1 (Sup. Ct. N.Y. Co. 1977).

indication that the law enforcement officials who disposed of the small amount of blood did so in bad faith and that there was substantial other evidence of defendant's guilt including her confession. The court stated: "With these facts prevailing, the disposal of the blood was harmless and does not require reversal".

A far more interesting result was reached in People v Briggs, 81 AD2d 1017 (4th Dept. 1981). There the court affirmed a felony driving while under the influence of alcohol conviction. The sole evidence in support of the indictment was the results of a blood test administered pursuant to the Vehicle and Traffic Law. The defendant's blood sample had been inadvertently lost or destroyed by the police department. Despite the fact that this was the only evidence upon which the conviction rested the court stated:

> "Whether the blood sample could have produced evidence favorable to defendant's case is speculative and failure to produce it does not establish a violation of the Brady rule * * *. In this sense the blood specimen was neither exculpatory nor material * * *". Id. at p 1017.

The subject of the retention of evidence would not be complete without a discussion of the recent cases dealing with the failure of the police to capture and preserve an additional breath sample in driving while intoxicated cases. There have been numerous such cases.

In People v Molina, 121 Misc 2d 483 (Bronx Co. Crim. Ct. 1983), the court found that the failure of the police to capture and preserve an additional breath sample for independent testing and examination by the defendant constituted a violation of due process and granted defendant's motion to suppress the breathalyzer test results. In People v Torres, 125 Misc 2d 78 (N.Y.Co. Crim. Ct. 1984), on the other hand, the court determined that the Constitution was not implicated and that the failure of the police to capture and preserve a second breath sample goes more to the weight of the test evidence being offered than to its admissibility and, accordingly, declined to suppress the results of the breathalyzer test. The decision in Molina was recently reversed by the appellate term and the Court of Appeals has denied leave to appeal. Also since the Molina case the United States Supreme Court has unanimously decided in California v Trombetta, 467 US _____, 81 L.Ed.2d 413 (1984), that the due process clause of the Fourteenth Amendment does not require law enforcement agencies to preserve breath samples in order to introduce breath analysis test at trial.

Finally, the reader should be aware that there are a number of appellate cases dealing with the failure to

preserve photographic arrays and the sanctions to be imposed in such cases.[52]

ARTICLE 610

Before considering some of the recent cases dealing with subpoenas it would seem advisable to review the statutory provisions authorizing their use. A subpoena is defined as a "process of a court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court on a designated date."[53] Specific note should be taken of the language specifying a designated action or proceeding in such court on a designated date. There is no authority for the issuance of a subpoena without having an action or proceeding in a specified court on a definite date. Thus, the issuance of a subpoena returnable in advance of grand jury for the purpose of obtaining evidence for examination

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[52] People v Ennis, 107 AD2d 707 (2nd Dept. 1985); People v Johnson, 106 AD2d 469 (2nd Dept. 1984); People v Foti, 83 AD2d 640 (2nd Dept. 1981); People v English, 75 AD2d 981 (4th Dept. 1980).

[53] CPL § 610.10(2).

and inspection is not authorized by statute.[54] However, a recent amendment to the Criminal Procedure Law specifically authorizes the issuance of a subpoena duces tecum returnable in advance of trial and the trial court is vested with the authority to permit the issuing party opportunity to inspect the subpoenaed evidence.[55]

A subpoena ad testificandum merely summons the witness to appear and testify and is different from the subpoena duces tecum which requires the witness to bring with him and produce specified physical evidence.[56] It should be noted that there is a distinction between the procedure applying to subpoena duces tecum in civil cases from those in criminal cases. In a civil case the subpoena duces tecum requires the production of books, papers and other physical evidence and may be complied with by the production in court by any person able to identify them and testify concerning their origin, purpose and custody.[57] Thus a person designated in a civil subpoena duces tecum does not

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[54] Interface Hospital v People, 71 Misc 2d 910 (Sup. Ct. Queens Co. 1972). Federal Rule 17C permits the subpoenaing of evidence in advance of trial.

[55] CPL § 610.25(2).

[56] CPL § 610.10(3).

[57] CPLR § 2301 and 2305(b).

necessarily have to appear personally whereas under the CPL the person named in the subpoena must appear with the documents.

In a criminal proceeding a subpoena ad testificandum may be issued by the court, the District Attorney or defense counsel.[58] However, with regard to a subpoena duces tecum if defense counsel wishes such a subpoena served on any department, bureau or agency of the State or a political subdivision thereof, or to any officer or representative thereof he or she must obtain a court order.[59] In such case the subpoena may be issued by a justice of the Supreme Court in the district in which the documents are located or by a judge of the court in which the action is triable and, unless otherwise ordered by the court, a motion for such subpoena must be made on at least one day's notice to the department or individual having custody of the documents.[60]

There are no specific provisions for challenging a subpoena duces tecum under the CPL. However, the CPLR provides that a motion to "quash, fix conditions or modify" must be made promptly in the court in which the subpoena is

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[58] CPL § 610.20.

[59] CPL § 610.20(3).

[60] CPL § 610.20(3) and CPLR § 2307.

returnable.[61] It should be noted that where a motion for a subpoena duces tecum is made on notice argument should be at the time of the application for the subpoena as to whether or not it should issue. There is some disagreement as to whether the issuance of a subpoena constitutes a mere ministerial act by the issuing judge so that argument could only be made on the return of the subpoena, but the better authorities would seem to hold that the issuance of such a subpoena is not a ministerial act and the court may rule on the propriety of the subpoena at the time of the application therefor.[62]

Personnel Records of Police Officers

There are a number of cases dealing with the issuance of a subpoena duces tecum for the production of personnel records of police officers for use on cross examination of the officers to impeach their credibility.

In People v Sumpter, 75 Misc 2d 55 (Sup. Ct. N.Y. Co. 1973) the defendant served a subpoena duces tecum on the police department requiring the production of "personnel

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[61] CPLR § 2304.

[62] Carlisle v Bennett, 268 NY 212 (1935); People v Coleman, infra. to the contrary see People v Butchino, 9 AD2d 597 (3rd Dept. 1959).

records" of the two police officers expected to be prosecution witnesses. The department, through its counsel, moved to quash the subpoena. The admitted purpose of the subpoena was to ascertain whether the police records disclosed a basis for an inquiry of the witnesses on cross examination as to alleged prior "bad acts" which might impeach their credibility. The court concluded that the personnel files were subject to subpoena and that the court, in camera, would inspect the files to determine whether any information contained therein should be made available to defense counsel in aid of cross examination to impeach credibility or for any other purposes. The court, although passing on the propriety of the issuance of a subpoena, seemed to bottom its decision on whether or not the files constituted "exempt property" and were therefor not discoverable, thereby tacitly recognizing the use of the subpoena for discovery purposes.[63]

In People v Fraiser, 75 Misc 2d 756 (Nassau Co. Ct. 1973), the Sumpter ruling was considered and expressly rejected. In Fraiser the defendant sought to obtain the complete personnel file including all records of disciplinary actions of the arresting officers in a

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[63] 75 Misc 2d at pp 57-58.

narcotics case. The defendant acknowledged that the purpose of the subpoena was to ascertain whether such records would reveal any "bad acts" by said police officers which could prove helpful in impeaching their credibility upon cross examination. The application for the subpoena was denied on the basis that "documents are not subject to inspection for the mere reason that they will be useful in supplying a clue whereby evidence can be gathered. Documents to be subject to inspection must be evidence themselves. * * *"[64]

The issue was finally settled by the Court of Appeals in People v Gissendanner, 48 NY2d 543 (1979). There the defense sought, by way of subpoena, the personnel files of two police officers who were the principal witnesses against the defendant. The facts of the case are extremely important to an understanding of the court's position. The chief prosecution witness Eisenhauer testified that he and three other police officers went to defendant's house. While the three officers sat in an unmarked car across the street, Eisenhauer met defendant outside, walked to and into the house with defendant, made the purchase and returned to the unmarked car. The prosecution called two of the

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[64] 75 Misc 2d at p 757; See Also People v Torres, 77 Misc 2d 13 (N.Y. City Crim. Ct. Kings Co. 1973); People v Coleman, 75 Misc 2d 1090 (Nassau Co. Ct. 1973).

surveillance officers to the stand. Officer Grassi testified that he observed Eisenhauer enter the house with defendant and then exit alone. The other officer testified that he watched Eisenhauer approach the house, but his view of the entrance was obscured by hedges and he did not actually see Eisenhauer enter the house nor did he see the defendant.

The defendant's version was that she knew Eisenhauer having met him on several prior occasions. As to the night of the crime she testified she was driving toward her home and saw Eisenhauer standing on the porch, whereupon she drove past the house returning a short time later when she noticed him leave the porch and get into a parked car.

The Court of Appeals recognized that the theory of the defense was to discredit Eisenhauer and Grassi and urge upon the jury that they had fabricated the story of the drug sale. For that purpose defense counsel requested the trial court to issue subpoena duces tecum to compel production of "any and all records of Eisenhauer's and Grassi's employment at the police department" and acknowledged that the purpose of the application was to "find material appropriate for cross examination when the officers testified". The trial court refused to issue the subpoena and the Appellate Division affirmed.

The Court of Appeals affirmed unanimously reaffirming,

in general, that a subpoena duces tecum may not be used for the purposes of discovery or to ascertain the existence of evidence. The court acknowledged that there may be cases where a subpoena is appropriately issued and an in camera inspection conducted to determine the existence of relevant evidence. Referring to those cases where such applications have been granted the Court of Appeals stated:

> "The thread that runs through these cases does not indicate that a defendant must make a preliminary showing that the record actually contains information that carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends. The decisions erect no inviolable shield to prevent the discovery of what might turn out to be relevant and exculpatory material. What they do call for is the putting forth in good faith of some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw. Here there was no such demonstration." 48 NY2d at p 550.

The decision pointedly observed that there is no basis for the issuance of such subpoenas where the requests are motivated by nothing more than impeachment of witnesses' general credibility. It will only be permitted where the request for access is directed toward revealing specific biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the

case at hand.[65]

While the pronouncement of the Court of Appeals concerning the non-use of subpoenas for discovery purposes seems clear, there nevertheless remains confusion in this area. In People v Herrera, 131 Misc 2d 96 (Sup. Ct. Queens Co. 1985), the court, in a case involving a bribery indictment, issued subpoenas duces tecum for an in camera inspection of the Internal Affairs Division records pertaining to certain police officers involved in the case. The defendant alleged that if the officers were investigated for alleged bribe-taking at the time of the alleged crimes, or prior or subsequently thereto the information carries a potential for establishing the unreliability of either the criminal charge or of a witness upon whose testimony it depends. This hardly seems the predicate which would make it reasonably likely that the files will bear fruit in the event of an in camera investigation. Nevertheless, the trial court denied the motion to quash holding that the predicate requiring a clear showing of facts sufficient to warrant judicial review must be interpreted liberally. In support of his holding the Judge reasoned:

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[65]Such a case is exemplified in People v Puglisi, 44 NY2d 748 (1978), a narcotics case where defense counsel had information that the undercover officer who testified as to the buy had improperly handled previous "buys".

> "In this court's opinion, this is analogous to a defense counsel making a motion to dismiss an indictment as part of his omnibus motion, in accordance with CPL 210.20 and 210.35, where, for example, upon information and belief, he alleges various irregularities in the secret grand jury proceedings of which he played no part." Id. at p 98.

As previously mentioned, the Legislature amended Section 610.25 of the Criminal Procedure Law to provide that a subpoena duces tecum could be made returnable on a designated day prior to trial. As might be supposed defense counsel began applying for subpoenas toward the end of discovering evidence claiming that Section 610.25 broadened the rather restrictive provisions of Articles 240 and 610 and as might be further supposed at least one court has so ruled.

In People v Miranda, 115 Misc 2d 533 (Sup. Ct. Bronx Co. 1982), the District Attorney moved to quash subpoenas duces tecum seeking police department arrest reports, complaint reports and complaint follow-up reports. The People took the traditional approach that a subpoena is a device used for the production of evidence and not discovery. The court, in rejecting that approach stated:

> "It appears however, that in light of the 1979 amendment to CPL section 610.25(2), that the maxims quoted by the People are now effectively superceded. * * * The amendment has apparently modified previous law which clearly made a distinction between pre-trial discovery materials on one hand and evidence

> on the other, and clearly circumscribed the use of a subpoena duces tecum to the latter." Id. at p 534.

The court in denying the motions to quash held that the proper procedure was to review the materials in camera to determine if any material evidence existed.

In People v Cammilleri, 123 Misc 2d 851 (Sup. Ct. Richmond Co. 1984), the court came to exactly the opposite conclusion, stating:

> "It is the opinion of the court that the Legislature in enacting the 1979 amendment to CPL 610.25 and the Governor in approving the same, intended neither an expansion of criminal discovery so as to abrogate the exemptions of CPL article 240 nor to create a procedure by which the courts are required to pass upon the content of every police department report prepared by every investigation and prosecution.
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> "Absent a showing that the police reports are likely to contain specific, identifiable evidentiary material it would be an improvident use of the court's limited time and resources to conduct an in camera inspection of police records in all cases. To the extent that the court in People v Miranda (supra) and People v Harte (99 Misc 2d 86) seem to suggest otherwise, this court must respectfully disagree." Id. at pp 852-853.

Until this issue has been considered at the appellate level the practitioner will be subject to the vagaries of the legal and philosophical differences of the various trial judges. It is well to consider, however, that the

repronouncement in Gissendanner that subpoenas are not to be used as vehicles for discovery came some three months after the amendment of CPL 610.25(2). Additionally, the practitioner should note that all amendatory language refers to "evidence" being produced and retained prior to and during trial. It is respectfully submitted that the amendment was not intended to broaden pretrial discovery, but to permit delivery of voluminous evidentiary matter prior to trial so that counsel could pre-mark it and prepare for its introduction into evidence at trial thus substantially expediting the actual trial.

ARTICLE 200

The procedure for obtaining a bill of particulars was dramatically changed by the Laws of 1982, Chapter 558; effective October 10, 1982. That legislation repealed Section 200.90 of the Criminal Procedure Law and replaced it with Section 200.95. As with our discovery statute, a bill of particulars is now obtained upon request.[66] This practice has the very salutory effect of saving valuable bench time and avoiding needless appearances by the prosecution and the defense to "argue" "boiler plate"

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[66]CPL § 200.95(1)(b).

motions.

The definition of a bill of particulars is entirely new and diverse from the old definition in four ways:[67] First, the new law eliminates the well recognized exception that "matters of evidence" need not be disclosed in a bill of particulars. Under the new law the prosecution is required to delineate what they intend to prove at trial, but not how they intend to prove it; Second, the new law requires disclosure of information pertaining to the offense charged and including the substances of each defendant's conduct encompassed by said charge. Thus, for the first time the defense has the right to know how a codefendant's conduct is encompassed in the charge; Third, the statute requires the prosecution to specify whether the defendant is being charged as a principle, an accomplice or both; Finally, the statute limits disclosure to those matters the prosecution intends to prove on their direct case.

The reader should note that the new statute does not require disclosure of the identity of the prosecution witnesses. It does provide that where disclosure may identify a particular witness the prosecution may seek a

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[67]CPL § 200.95(1)(a)

protective order to avoid such identification.[68]

The request for a bill of particulars must be served within thirty (30) days of arraignment or if the defendant is not represented by counsel at arraignment, within thirty (30) days of the date counsel initially appears on behalf of the defendant.[69] Within fifteen (15) days of the request, or as soon thereafter as is practicable, the prosecution must serve a bill of particulars upon the defendant.[70]

The prosecution may refuse to comply with all or part of any request upon the belief that the requested information is not authorized, is not necessary or where a protective order would be warranted.[71] The written refusal must set forth the grounds therefor as completely as possible and must be served within fifteen (15) days of the request for a bill of particulars.

Like the discovery statute, motion practice comes into play only upon refusal to comply with a request or failure to comply without a refusal.[72] Where a written refusal has

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[68]CPL § 200.95(7)(a).

[69]CPL § 200.95(3).

[70]CPL § 200.95(2).

[71]CPL § 200.95(4).

[72]CPL § 200.95(5).

been served, upon motion of the defendant, the court must, to the extent a protective order is not warranted, order a bill of particulars where it is satisfied that the material requested is authorized and necessary to prepare a defense and, if the request was untimely, that the delay was for good cause. Where the prosecution has not refused and has failed to serve a bill of particulars, the court, upon motion, must order disclosure unless it is demonstrated that there is good cause why such order should not be made.

At any time prior to trial the prosecution may amend its bill of particulars without leave of the court. At any time during trial the prosecution may apply, upon notice to defendant, for permission to amend its bill of particulars and the court must grant such application so long as it finds that no undue prejudice will result to the defendant.[73] Where such an amendment is permitted the court must order an adjournment of the proceedings if the defendant so requests.

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[73]CPL § 200.95(8).

DISCOVERY OF INFORMANT'S IDENTITY

Although there have been significant cases concerning the necessity of disclosing an informant's identity since as early as 1957[74] there have been three recent New York Court of Appeals cases establishing firm guidelines as to when and how such disclosure is mandated. Since the Court of Appeals has indicated that there may well be circumstances where the defendant may lay his foundation for such disclosure by pretrial motion as well as upon the development of testimony at a hearing or on trial the subject seems appropriate to this article.

The first case that we will deal with is People v Darden, 34 NY2d 177 (1974). In that case, at the suppression hearing, the trial court refused to require the People to disclose the identity of an informer who furnished information which provided a basis for the defendant's arrest. The Appellate Division upheld the refusal to disclose the identity of the informer which order was

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[74] Roviero v United States, 353 US 53 (1957); United States ex rel. Drews v Myers, 327 F2d 174 (3rd Cir. 1964); United States v Russ, 362 F2d 843 (2nd Cir. 1966); United States v Soles, 482 F2d 105 (2nd Cir. 1973); People v Castro, 29 NY2d 324 (1971); People v Cerato, 24 NY2d 1 (1969); People v Malinsky, 15 NY2d 86 (1965).

affirmed by the Court of Appeals. However, the Court of Appeals, in that opinion, established guidelines to be followed in the future.

In the Darden case, at the suppression hearing, the police testified that they had received an anonymous telephone tip that a large shipment of heroin was coming into Rochester. Thereafter a previously reliable informer telephoned to say that a large shipment was indeed coming in and described the prospective carrier of the shipment as to his build and the clothing he would be wearing and added that he would be carrying an attache' case. The description of the carrier furnished by the informer, including the attache' case, tallied with the defendant who was arrested upon disembarking from a plane in Rochester. It was not seriously contested at the suppression hearing that the information furnished by the informer was not sufficient to establish probable cause for the defendant's arrest. The real issue was whether the District Attorney's refusal to disclose the identity of the informer, sustained by the court, deprived defendant of a fair hearing.

The Court of Appeals regarded it "* * * as fair and wise, in a case such as this, where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer when the issue of identity of the

informer is raised at the suppression hearing, for the suppression judge then to conduct an in camera inquiry. The prosecution should be required to make the informer available for interrogation before the judge. The prosecutor may be present but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the judge to put to the informer.[75] The court went on to state that the judge should make a summary report as to the informer's existence and as to the communications made by him to the police and that the report should be made available to defendant and the People and the transcript of the testimony sealed so that it will be available for appellate review. The court pointed out that: "such a procedure as we have described would be designed to protect against the contingency, * * * that the informer might have been wholly imaginary and the communication from him entirely fabricated".[76]

At first blush it would seem that the Darden case poses no special problems for the prosecutor since he will be able to protect the informer's identity via in camera

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[75] 34 NY2d at p 181.

[76] 34 NY2d at p 182.

interrogation. The reality of the situation is otherwise. It has been the writer's experience that confidential informants are wont to participate in the judicial process in any capacity and they will be most reluctant to testify, even in secret or in camera proceedings.

The rule is otherwise where informer identity questions arise at the time of trial. Although the question of the necessity of disclosure in such cases must continue to be determined on an ad hoc basis the Court of Appeals in People v Goggins, 34 NY2d 163 (1974), has established definite guidelines to be used in making such determinations. In the Goggins case an informant introduced an undercover policeman to a drug dealer in a Brooklyn bar stating "Abdul, take care of my man". Leaving the informant behind the policeman followed "Abdul" out of the bar and purchased drugs from him. Several days later the same procedure was followed at which time drugs were again sold to the policeman. On both occasions the policeman was face to face with the dealer for approximately two minutes. On the evening of defendant's arrest, the undercover policeman left the bar and called his backup team to arrest defendant in the bar. The policeman had previously described the seller to that team, but his description appeared to be somewhat sketchy. The team entered the bar at dusk, arrested the defendant and as they walked out of the bar the undercover policeman drove by and

caught a fleeting glance of defendant without returning to the precinct to make further identification. The next time the officer saw the defendant was one year later when he identified him in court as the man from whom he had bought the heroin. Finally, the defendant gave a credible explanation for his presence in the bar when he was arrested, denied being present at the bar at the time of the sales and was corroborated in this respect by his estranged wife. The court held that under those circumstances the identity of the informer should have been disclosed. The court pointed out that the person who was truly the man designated "Abdul" was in issue in the case and because there were gaps and weaknesses in the prosecutor's case concerning the identification it became apparent that the informer could clearly play a decisive role in resolving the very colorable factual dispute between the undercover officer and the defendant. The court went on to point out that in addition to the obvious weaknesses in the prosecution case concerning identification, which alone would constitute grounds for disclosure, the defendant was entitled to disclosure by reason of the development of his own defense.

In People v Brown, 34 NY2d 163, decided at the same time as Goggins, the Court of Appeals affirmed the lower court's denial to order disclosure of the informant's

identity. In that case the defendant was convicted of selling drugs on two occasions to an undercover officer. On each occasion the informant took the officer to the defendant's apartment, the first time to introduce the officer to the defendant. On each occasion the informant left the defendant and the officer whereupon the defendant allegedly sold cocaine to the police officer. On the night of the arrest, the officer waited nearby while his backup team went to the apartment and escorted the defendant therefrom. The undercover officer viewed the defendant through binoculars and determined he was the person who had sold him cocaine. Thereafter the undercover officer reconfirmed his identification by viewing the defendant when he was being brought into the precinct house to be booked. The Court of Appeals in affirming the order of the Appellate Division stated: "The transaction in People v Brown offers an appropriate contrast (to Goggins). In Brown, the sale was made in a particular apartment in which the defendant was found when arrested, rather than in a public bar as in Goggins. Most important, after the arrest of Brown, the officer who made the purchase went to the station house after the backup team had arrested the defendant and identified him as the seller. On these facts, the trial court properly exercised its discretion in denying disclosure. Here the risk of mistaken identification was

minimal. Significantly, the defendant has failed to focus on any weak point in the prosecutor's case or closely contested issue of fact which might be resolved by disclosure of the informant's identity."[77] In addition the Court of Appeals pointed out that Brown presented no significant defense and that his request for disclosure failed on that ground as well.

There have been a number of cases since Goggins which are instructive as to when disclosure is or is not appropriate.[78] In People v Baez, 103 AD2d 746 (2nd Dept. 1984), the Appellate Division reversed defendant's conviction and ordered a new trial on the ground that the trial court erred in not ordering disclosure. In that case the informant was present during the sale of a controlled substance. Two months after the sale the undercover officer was shown a photograph of the defendant and was told that defendant had been arrested on another drug sale. He then was taken to a space behind a correction officer's locker room, viewed the defendant through a crack between the lockers, and identified him. The court found that the

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[77] 34 NY2d at p 172.

[78] People v Lloyd, 43 NY2d 686 (1977); People v Colon, 39 NY2d 872 (1976); People v Pena, 37 NY2d 642 (1975); People v Gilmore, 106 AD2d 399 (2nd Dept. 1984); People v Yattaw, 106 AD2d 679 (3rd Dept. 1984).

post-arrest identification was impermissibly suggestive but held that it did not warrant suppression of the undercover officer's in-court identification. Nevertheless, given the suggestive nature of the post-arrest identification together with the defendant's alibi the court held that disclosure of the informant's identity was mandated.

In addition to the principles established in Goggins as to disclosure of an informant's identity, the case made it clear that production of the informant, if appropriate, may be directed by the trial court. What Goggins did not do was define the circumstances under which production would be appropriate. Three years later in People v Jenkins, 41 NY2d 307 (1977), the court dealt squarely with that issue. The threshold question is disclosure, of course, because if there is no right to disclosure there can be no compulsion to produce. The right to production, however, does not automatically flow from the right of disclosure.

In Jenkins, and two companion cases decided therewith, the identity of the informant was revealed on cross examination of prosecution witnesses and, at the close of the People's case, the defendants sought production of the informant. The informant had moved to Florida prior to trial with the assistance of law enforcement authorities, due to her fear for her own personal safety. Once having arrived in Sanford, Florida she disappeared. The trial

court found that the prosecution was in no way responsible for her ultimate disappearance and that diligent efforts had been undertaken to locate her, but to no avail.

The court made it clear that in any case where the prosecution procurred the removal of an informant from the jurisdiction to prevent his appearance as a witness (bad faith removal), then there is a duty to produce which, if not done, would result in either dismissal of the charges or a new trial.

However, where there is no bad faith and reasonable efforts have been made to ascertain the whereabouts of and produce the informant, as in the Jenkins case, then a different rule applies. As stated by the court:

> "The ultimate concern, as Goggins aptly articulated, is the defendant's right of confrontation, due process, and fairness (supra, p 168). At the same time, the People should not be penalized when the informant has on his or her own initiative, effectively disappeared after relinquishment of government control. Thus, in order to compel production, or dismissal of the charges under the circumstances presented in this case, we conclude that the defendant must meet a higher burden and demonstrate that the proposed testimony of the informant would tend to be exculpatory or would create a reasonable doubt as to the reliability of the prosecution's case either through direct examination or impeachment.
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> "* * * if the prosecutor exerts reasonable good faith efforts to make the witness available, then neither dismissal of the charges may be ordered nor a new trial directed unless the defendant demonstrates affirmatively that the

> testimony of the informant was not only relevant but also that it is likely to have been favorable to some degree in tending to exculpate the defendant or, alternatively, he must show the existence of a significant likelihood that the witness' testimony could be impeached to a meaningful degree creating a doubt as to the reliability of the prosecutor's case."[79]
> Id. at pp 310-311.

Henceforth, the identity of an informant need not be revealed to defense counsel at the time of a suppression hearing, but upon a proper showing the defendant will be entitled to an in camera hearing in order to verify the existence of the informant as well as the validity of the information provided by him. On the other hand the Court of Appeals has made it very clear that where a defendant's guilt or innocence is at issue at the trial stage, the decision of whether or not an informant's identity should be disclosed will not be resolved in such an ex parte hearing. Under those circumstances the trial court must view all of the People's evidence to determine whether or not his testimony could play a decisive role in resolving a factual dispute bearing upon the guilt or innocence of the defendant. If the quality of the People's proof does not suggest the need for disclosure then the trial court should

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[79]For a more recent case where inability to produce was excused see People v Martinez, 54 NY2d 723 (1981). See also People v Lazoda, 104 AD2d 663 (2nd Dept. 1984); People v Tayeh, 96 AD2d 1045 (2nd Dept. 1983).

deny the motion. The defendant, of course, is entitled to again make a motion for disclosure upon the development of his own defense and the motion will be granted if such defense presents a plausible issue as to his guilt and/or a reasonable risk of mistaken identification.

Finally, where disclosure has been ordered the prosecution may be ordered to produce the informant where the defendant has affirmatively established that the informant's testimony would in some degree tend to exculpate the defendant or that there is a significant likelihood that the informant's testimony could be impeached to a meaningful degree thus creating a doubt as to the reliability of the prosecution's case.

THE BRADY DOCTRINE AS A MEANS OF DISCOVERY

In concluding, I think it appropriate to review briefly the doctrine enunciated in Brady v Maryland, 373 US 83 (1963), for that case clearly provides one of the more potent means of discovery and the sanctions for its violation are most dire. There the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material to either guilt or punishment, regardless of the good or bad faith of the prosecution. At

the outset, it should be pointed out that the sanctions provided for a Brady violation are either dismissal of the indictment or, at best, a new trial.[80]

Before considering some of the cases in New York it would be well to consider the specific language of Brady. Strictly read, it would appear that if defense counsel fails to make a request for exculpatory material in the possession of the prosecution a District Attorney is at liberty to deliberately suppress any such material toward the end of obtaining a conviction. It seems quite clear that Brady is not the basis of such a limited meaning. Probably the most comprehensive discussion concerning the intent and scope of the Brady doctrine is contained in United States v Keogh, 391 F2d 138 (2d Cir. 1968). In that case the Second Circuit Court of Appeals made it clear that prosecutorial suppression of evidence favorable to a defendant does not always constitute reversible error. There the court

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[80] U.S. ex rel. Meers v Wilkins, 326 F2d 135 (2d Cir. 1964); E.g. United States v Consolidated Laundries Corp., 291 F2d 563 (2d Cir. 1961). Although the cases do not suggest in what instance there should be a dismissal as opposed to a new trial one would surmise that a dismissal would be warranted where the court determined that the suppressed evidence would have raised a reasonable doubt as a matter of law or where, between trial and appellate review, defense witnesses or evidence have become unavailable so that the defendant has been irreversibly prejudiced.

established three categories of suppression: (1) deliberate suppression of exculpatory evidence for the purpose of obstructing justice; (2) suppression of favorable evidence material to guilt regardless of good or bad faith and (3) suppression of evidence that is not deliberate with no request for disclosure having been made, but where hindsight reveals that the defense could have put the evidence to "more significant use".

As can be observed, the character of the prosecutor in situations one and three (i.e., his good or bad faith) would have a significant impact upon the Appellate Court as to whether or not the suppression of the evidence would result in reversal. Such a criteria does not seem appropriate in determining whether or not the defendant was denied due process and the United States Supreme Court has so held in United States v Agurs, 427 US 97 (1976). There the court stated:

> "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. Cf. Giglio v United States, 405 US 150, 154, 31 L Ed 2d 104, 92 S Ct 763. Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the

evidence, not the character of the prosecutor." 427 US at p 110.[81]

In Agurs, the defendant was convicted of second degree murder for repeatedly stabbing James Sewell in a motel room causing his death. The defense was self defense and appellant moved for a new trial upon the ground that the prosecution had failed to provide defendant with information about Sewell's prior assaultive behavior which would have tended to support the defense.

The court, in a seven to two decision, upheld the conviction and tendered some specific guidelines for the prosecution in complying with the obligations imposed upon it under Brady.

The court envisioned three kinds of situations involving the discovery, after trial, of information which had been known to the prosecutor but unknown to the defense.

In the first situation, the undisclosed evidence demonstrates that the prosecution's case included perjured testimony about which the prosecution knew or should have

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[81]While this rationale seems eminently logical the practitioner should be cognizant of the language in a recent Court of Appeals case suggesting that the culpability of the prosecutor is a factor to be considered. In People v Smith, 63 NY2d 41 (1984), the Court of Appeals stated: "The record is devoid of any indication of prosecutorial bad faith or negligence. Thus, applying the Agurs standard, a new trial would be required only if the material were obviously exculpatory and created a reasonable doubt not otherwise existing." Id. at p 67.

known. Under those circumstances the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

The second situation, illustrated by the Brady case, is characterized by a pretrial request for specific evidence. In such a situation, the test of materiality is not the same as in a case where no request or a general request has been made. If there is a finding that the suppressed material specifically requested "might" have affected the outcome of the trial, the conviction will be set aside. As stated by the court:

> "In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 US at p 106.[82]

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[82]It should be noted that in a most recent case at least five of the Justices have concurred in a refinement of the standard of materiality. It is defined as "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" and a reasonable probability is "a probability sufficient to undermine confidence in the outcome". United States v Bagley, ____ US ____, 87 L.Ed.2d 481. For a view of what one State Appellate Court has determined is necessary under this second prong see People v Pugh, 107 AD2d 521 (4th Dept. 1985).

The court then went on to deal with the Agurs situation where the defendant made no request at all.[83] Under that circumstance what kind of material does a prosecutor have a duty to disclose? The answer is that a prosecutor has a duty to disclose that evidence which, when evaluated in the context of the entire record, would have created reasonable doubt. "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 US at pp 112-113.

It would be well to note the warning issued to prosecutors in the Agurs case.

> "Nevertheless, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of discovery. But to reiterate a critical point,

[83] The court pointed out that where defendant made a request for "Brady material" or for "anything exculpatory", such request gives the prosecutor no better notice than if no request is made and the standard applied would be the same in each such case.

> the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 US at p 108.

What does or does not constitute Brady material is not within the scope of this article. We are concerned with the "procedural" aspects of Brady.[84] There is one case, however, which the practitioner should note well. As stated in the past, Brady material is that which bears directly on the issue of guilt and generally does not involve collateral matters unless there has been a specific request therefor and a disregard of such request by the prosecution. The case to which I refer is People v Jones, 44 NY2d 76 (1978). There the defendant was charged with robbery in the first degree, robbery in the second degree, grand larceny and criminal possession of a weapon to which he entered pleas of not guilty. The case appeared on the trial calendar on several occasions during 1975 and was adjourned each time due to the inability of the prosecution to locate the complaining witness. The case was finally announced ready for trial and plea negotiations were conducted as a

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[84] An extremely comprehensive collation of the cases decided after Brady can be found in 34 ALR 3rd 16.

result of which the defendant withdrew his prior pleas of not guilty and pleaded guilty to robbery in the third degree. It developed that the complaining witness had died and that fact was known to the prosecution prior to the entry of a plea of guilty, but the prosecution did not divulge that information to the defendant or his attorney. At the time of sentencing, defense counsel moved to withdraw the plea of guilty on the ground that the death of the witness in chief constituted Brady material and that the People, in failing to disclose that information to defense counsel, had withheld exculpatory matter material to the defense of the case in violation of Brady v Maryland, supra. The court in denying the motion to withdraw the plea had this to say:

> "It advances analysis to focus on the precise nature of the matter which was not disclosed by the prosecutor during the plea negotiations -- information with respect to the death of the complaining witness. The circumstance that the testimony of the complaining witness was no longer available to the prosecution was not evidence at all. Further, to the extent that proof of the fact of the death of this witness might have been admissible on trial, it would not have constituted exculpatory evidence -- i.e., evidence favorable to an accused where the evidence is material either to guilt or to punishment. Accordingly, it does not fall within the doctrine enunciated in Brady v Maryland (373 US 83, 87; and cf. United States v Agurs, 427 US 97, 112). Counsel does not now claim otherwise. Rather, as counsel tacitly admitted in his colloquy with the court on the motion to withdraw the plea, the death of Rodriguez would

merely have been one of the factors -- though a most significant factor -- to be weighed by defendant in reaching his decision whether, as a matter of tactics in light of the strength of the People's case against him, to interpose a negotiated plea of guilty.

"The question remains as to the extent of the prosecution's obligation to disclose information in its possession which, as here, is highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself. Analytically the issue is not whether this defendant was entitled to evidence in the possession of the prosecution; the question before us on this appeal is whether the pretrial conduct of the prosecutor in the course of plea negotiation was such as to constitute a denial of due process to defendant in the circumstances disclosed in this record.

"The Supreme Court has observed that the prosecutor 'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' (Berger v United States, 295 US 78, 88). Defendant notes that, as the basis for announcing the case ready, the prosecutor had represented to the court and to defense counsel that the complaining witness had been located and would therefore be available to testify at trial. Defendant adds that the prosecutor knew, or at least was chargeable

> with knowledge, that the plea for which defendant had negotiated was predicated principally on the availability of the Rodriguez testimony. Defendant then argues that it was reprehensible on the part of the prosecutor not to disclose that he had been informed of Rodriguez' death, before the acceptance of defendant's guilty plea. He asserts that nondisclosure in these circumstances constituted a denial of due process and that the sanction therefor must be to permit a withdrawal of the plea. We reject this contention.
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> "Counsel cite no reported case, nor has our independent research disclosed any, in which judicial attention has been focused on the failure of a prosecutor before trial or during plea negotiations to disclose non-evidentiary information pertinent to the tactical aspects of a defendant's determination not to proceed to trial. No particularized rule can or need be assayed, however. At the threshold we assume that, notwithstanding that the responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant, no prosecutor is obliged to share his appraisal of the weaknesses of his own case (as opposed to specific exculpatory evidence) with defense counsel. 'A defendant is not entitled to withdraw his plea merely because he discovers * * * that his calculus misapprehended the quality of the State's case.' (Brady v United States, 397 US 742, 757)."

A fair reading of the cases in New York would indicate that Brady does not ordinarily provide a basis for an omnibus pretrial motion for discovery, but merely requires a "demand" (preferably written) on the part of the defense at which point the burden is upon the prosecution to review its file and, in its discretion, deliver over to the defense any

and all material favorable to the defendant upon the issue of guilt or punishment.[85] There will be times, however, where the Brady doctrine will be the proper subject of a motion and, upon a proper factual showing, a court may deem it necessary to intervene. Such was the case in People v Bottom, 76 Misc 2d 525 (Sup. Ct. N.Y. Co. 1974). In that case Justice Roberts, after a most thorough discussion of Brady and its practical impact on the criminal bar, ordered an in camera examination of certain portions of the prosecution's file. In justification for his ruling Justice Roberts concluded:

> "For pragmatic reasons the court cannot become involved in screening the people's file in every case, nor can the defense, for obvious reasons, be permitted to do such rummaging for itself. * * * The result is that the prosecutor must of necessity have a great deal of initial discretion over what is to be disclosed. * * * But where, as here, there is a controversy in which the court has a factual basis for believing that the District Attorney may be in possession of exculpatory evidence, total reliance upon the prosecutor is no longer necessary and may be unjustified. The trial court's supervision should then begin." Id. at p 530.[86]

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[85] People v Fein, 18 NY2d 162, 171-72 (1966); People v McMahon, 72 Misc 2d 1097, 1100 (Albany Co. Ct. 1972).

[86] 76 Misc 2d at p 530.

The holding in Bottom was specifically adopted by the Court of Appeals in People v Testa, 40 NY2d 1018 (1976) and People v Andre, 44 NY2d 179 (1978). In the Andre case a cleaning woman, alone in an empty classroom in a public school, was raped by two teenagers. Immediately after the crime she was unable to identify her attackers other than to pick out "look-alike" photographs. Four months later, upon seeing the defendant in school, she identified him as one of the assailants. As a result, the defendant was arrested, tried and convicted of attempted robbery. The trial revolved around the issue of identification and, at the identification hearing, the victim's testimony was vague and confused. At the trial an eleven year old witness, who was nine at the time of the incident, testified that she and another girl had seen the defendant and another boy with the cleaning woman at about the time of the crime in the vicinity of the classroom where the crime occurred, and she remembered the occasion because the girls had run away from the area when defendant accosted them. She never reported the incident and it was a year and a half later that the girls were unearthed as witnesses.

The People did not call the companion of the witness and refused defendant's request to produce or identify her. Defense counsel moved for a mistrial on the basis of suppression of potentially exculpatory evidence which motion

was denied upon the basis of the prosecutor's statement that the witness had exhibited an "inability to identify the defendant" when she was shown a photographic array which included a photograph of the defendant.

The court remanded the case to the trial court for further proceedings citing Brady and Bottom as authority. In so doing the court stated:

> "* * * here there was 'some basis' for further inquiry. The District Attorney's statement characterizing the detective's exhibition of the photographic array to the nondisclosed witness was both hearsay and conclusory in form. It could have been of but little assistance to the court. Its acceptance had the effect of yielding to the prosecution the court's responsibility to determine the import of the requested material.
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> "The District Attorney's statement to the court said no more than that the pictures she had viewed in the array were not those of either of the boys she had seen on the afternoon of the crime; at no time was it suggested that the witness was or was not able to describe and remember what the youths looked like and by that description appreciably eliminate or further implicate Andre as one of the perpetrators (cf. Grant v Alldredge, 498 F2d 376; Matter of Kapatos, 208 F Supp 883). Notedly, it was not stated that the second girl had claimed a lack of recollection of initial observation. While the failure to identify could stem from a number of other unprobed possible causes, the circumstances of the initial viewing, as described by Jackie, make it unlikely that the opportunity and reason to notice the appearance of the youths was any greater in the case of one girl than the other.
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> "Moreover, Jackie's testimony was crucial in the framework of a case that otherwise was established only by the victim's woefully weak identification testimony and its far from conclusive bolstering by the three people who

had seen Andre at the school that afternoon. Guilt or innocence in this case hinged on identification and it was on her testimony on this issue that the People placed their main reliance. Whether the second girl's version corroborated or negated Jackie's story could make all the difference in the world. (Cf. United States v Agurs, 427 US 97, 112-113; United States ex rel. Meers v Wilkins, 326 F2d 135).

"The second girl's testimony could also be vital because Jackie, though her testimony went to the heart of the issue, was not an invulnerable witness. The record reveals that she was unusually vague on dates, not an inconsequential factor in identification testimony. This shortfall was compounded by the long interval that had elapsed between the date of the crime and that of her initial interview. Also, while the Judge and jury could gain an impression of Jackie's personal qualities -- her intelligence, her imagination, her potential for making observations under stress, her ability to recollect these observations and her capacity to communicate them -- her credibility could be illuminated by juxtaposition with the capacities of the other child of the same age who, seeing things from the same vantage point, ended up remembering and describing them differently. Thus, even if Jackie's version was not directly negated by the second girl, the latter's testimony still would not be cumulative." Id at pp 186-187.

Concerning the manner in which such determinations should be made in the future and the manner in which the trial bar should proceed the court noted:

"It goes without saying that 'some basis' is not a term capable of precise definition. In the context in which it is used here, it certainly contemplates more than purely subjective assertion of a defendant's desire for information. On the other hand, a defendant is not required to

> demonstrate, in advance of the holding of the inquiry he seeks, that that inquiry will in fact necessarily result in a finding of materiality. Between these extremes, in most instances, disclosure rests within the compass of the Trial Judge's sound discretion, exercised in the perspective of the issues in the particular case, the nature of the other proof known to him and other relevant circumstances, including the risk of reprisal, if any, against the witness whose identity is revealed. Beyond that, except to the extent that we do so by our decision in cases such as the present one, the quest for what BRANDEIS called 'the true rule' must await the step-by-step and case-by-case evolution characteristic of the common law.
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> "Thus, when confronted with an application of this type, a perfunctory inquiry generally will not do. Among other reasons, a reviewing court will not, without the benefit of a meaningful record, be in a position to know what effect the evidence would have had if it were disclosed. (People v Bottom, 76 Misc 2d 525, 530, supra).
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> "Perforce, once the Trial Judge has made sufficient inquiry, he must be allowed great leeway (see Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 Cal L Rev 56, 99-101). In some cases, a statement by the prosecutor that the evidence is inculpatory (i.e., that this witness and several others have identified the defendant) may end the inquiry and lead to a denial of disclosure; in others, it may suffice for the Judge to interview the witness privately in chambers; in still others, a formal hearing, with counsel present, is required (see, e.g., Xydas v United States, 445 F2d 660, cert den 404 US 826; Pollard v United States, 441 F2d 566, 568; Levin v Katzenbach, 363 F2d 287)." Id at p 185.

In conclusion, where defense counsel has made an appropriate Brady demand, it is imperative that the prosecutor carefully review his or her file before and

during the trial to determine, in the first instance, whether he or she is in possession of any evidence favorable to the defendant and, whether during the trial, any evidence of which he has been in possession takes on new significance and becomes favorable to the defendant by reason of events unforeseen before commencement of the trial. The failure of the prosecutor to undertake such a comprehensive analysis of his file may very well undue the fruits of careful and time consuming preparation and result in the case being tried anew. If there be any doubt as to the prosecution's obligation in this regard the practitioner has only to read the Court of Appeals decision in People v Simmons, 36 NY2d 126 (1975). In that case the defendant was convicted, after a jury trial, of robbery in the second degree. After testifying against the defendant at a preliminary hearing the victim of the crime died and the court received in evidence at the identification hearing and at the trial a transcript of the deceased's preliminary hearing testimony. After the trial it was discovered that the deceased victim's grand jury testimony established that he was mistaken at the preliminary hearing when he testified that the defendant was one of the two intruders who returned to his apartment several days after the robbery. It was also established that although the grand jury minutes were in the trial folder of the assistant district attorney assigned to the

trial, the discrepancy was not discovered until after trial because no demand was made for the production of said testimony. Furthermore, it appeared that the preliminary hearing, grand jury proceedings and the trial were handled by different assistant district attorneys. In holding that the prosecution's failure to disclose the grand jury testimony constituted a denial of due process the court stated:

> "While the rule may seem unduly harsh on the prosecution in this case, the office of the district attorney is an entity and the individual knowledge of a case possessed by assistants assigned to its various stages must, in the final analysis, be ascribed to the prosecutorial authority (Giglio v United States, supra)." Id at p 132.

CONCLUSION

As was correctly pointed out in People v Privitera, supra, there appears to be no constitutional basis for the granting of discovery. However, language in recent Supreme Court opinions have been somewhat suggestive that the court was moving in that direction. In Coleman v Alabama, 399 US 1 (1970), the court dealt with the issue of whether or not a defendant is entitled to an attorney at a preliminary hearing. In the course of its decision the court stated:

"Trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial." Later in Wardius v Oregon, supra, the court struck down an alibi statute providing for discovery by the People without reciprocal discovery by the defendant. In discussing the growth of discovery statutes throughout the states the court stated: "The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." The court went on to recite with approval its language in Williams v Florida, supra: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for (a rule) which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."

While the above language has prompted some practitioners to speculate as to when the court would declare that criminal discovery was of constitutional dimensions, it now seems very clear that the court will not

do so. On at least one occasion the court has specifically stated that there is no general constitutional right to discovery in a criminal case and Brady did not create one. Weatherford v Bursey, 97 S Ct 837, 846 (1977). Nevertheless, it is clear that discovery is here to stay and that the Supreme Court in the future will have more to say about the subject and the various State statutes embracing it.

With the enactment of Article 240 permissible discovery in this State has been pre-empted by the Legislature and the court should not feel free to exercise unlimited supervisory jurisdiction in criminal prosecutions in the face of the restrictions imposed therein by that statute. By reason of that legislative mandate such procedural devices as bills of particulars[87] and subpoenas[88] should not be utilized for discovery purposes and any attempt to obtain discovery by utilization of those procedures should be opposed on the basis of legislative pre-emption. However, as indicated in this article certain of the lower courts in this State have been disposed to entertain applications for subpoena as a discovery tool and probably will continue to do so.

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[87]People v Ricci, 59 Misc 2d 259 (Oneida Co. Ct. 1969); People v Courtney, 40 Misc 2d 541 (Sup. Ct. N.Y. Co. 1963).

[88]Article 610, supra at p 52.

The practitioner should also be aware of the Jenkins-Goggins-Brown-Darden dichotomy and follow the case law thereunder as it develops, since those cases constitute still another avenue of extrastatutory discovery in this State.

Finally, the practitioner should be acutely aware of the ever proliferating case law under Brady, because that doctrine establishes a form of self-imposed discovery requiring, in essence, the assumption by the prosecution of the duel role of defense and prosecution.

TABLE OF CASES

TABLE OF CASES (continued)

TABLE OF CASES (continued)

TABLE OF CASES (continued)

TABLE OF CASES (continued)

TABLE OF CASES (continued)

TABLE OF CASES (continued)

INDEX

INDEX (continued)