Report of the Advisory Committee on Criminal Law and Procedure

to the Chief Administrative Judge of the Courts of the State of New York

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I. Introduction

The Advisory Committee on Criminal Law and Procedure, one of the standing advisory committees established by the Chief Administrator of the Courts pursuant to section 212(1)(q) of the Judiciary Law, annually recommends to the Chief Administrative Judge legislative proposals in the area of criminal law and procedure that may be incorporated in the Chief Administrative Judge's legislative program. The Committee makes its recommendations on the basis of its own studies, examination of decisional law and proposals received from bench and bar. The Committee maintains a liaison with the New York State Judicial Conference, bar associations and legislative committees, and other state agencies. In addition to recommending its own annual legislative program, the Committee reviews and comments on other pending legislative measures concerning criminal law and procedure.

In 2006, the Legislature enacted into law versions of four measures proposed by the Committee:

1. Sections 530.12 and 530.13 of the Criminal Procedure Law were amended by Chapter 215 of the Laws of 2006 to significantly extend the permissible duration of a final order of protection issued by a criminal court at conviction.

2. Subdivision three of Penal Law section 70.00 was amended by Chapter 746 of the Laws of 2006 to restore the provision establishing a "one-third of maximum" limitation on the minimum period of an indeterminate sentence imposed on a class C, D or E felony offense, which provision had been inadvertently deleted from the statute when the Legislature made conforming changes to it as part of the 2004 "Drug Law Reform Act" (Chapter 738 of the Laws of 2004).*

3. Paragraph (a) of subdivision two of section 720.10 of the Criminal Procedure Law was amended by Chapter 316 of the Laws of 2006 to conform the language of that paragraph with Penal Law section 130.50 by replacing the now outdated reference to the crime of "sodomy in the first degree" with a reference to "criminal sexual act in the first degree."

4. Paragraph (e) of subdivision one of section 360.25 of the Criminal Procedure Law was amended by Chapter 695 of the Laws of 2006 to clarify that, in a local criminal court, as in a superior court, a prospective juror may be challenged "for cause" if he or she served on a jury in a prior civil or criminal case involving the same "incident," rather than the same "conduct," charged in the present case.

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*This proposal and the two that follow were drafted and adopted by the Committee in 2006. As such, these proposals were enacted into law prior to their being formally included in the Judiciary's legislative program for that year.

In this 2007 Report, the Committee recommends a total of 79 measures for enactment by the Legislature. Of these, 72 measures have previously been proposed, and seven are new. The new measures would:

- amend paragraph (b) of subdivision one of section195.10 of the Criminal Procedure Law to permit a defendant charged with a class A drug felony to waive indictment and consent to be prosecuted by a superior court information;

- amend subdivision one of section 530.12 of the Criminal Procedure Law and subdivision one of section 530.13 of the Criminal Procedure Law to expressly authorize a criminal court to issue a temporary order of protection where the defendant in the case has been remanded;

- amend subdivision one of section 710.15 of the Criminal Procedure Law to replace the existing provision, which requires an accusatory instrument against an "apparently eligible youth" to be filed "with the defendant's consent" as a sealed instrument, with a provision that would require the automatic sealing of the instrument upon filing "unless the defendant requests otherwise;"

- amend subdivisions one and three of section 410.91 of the Criminal Procedure Law to clarify that a determinate sentence of imprisonment imposed pursuant to Penal Law section 70.70(3)(d) upon an "eligible defendant," as that term is defined in subdivision two of section 410.91, may, where the court so directs, be executed as a sentence of parole supervision;

- amend subdivision five of Correction Law section 703 to streamline the existing procedure for obtaining a certificate of relief from disabilities from the State Board of Parole with respect to a judgment of conviction entered in a federal court in New York State;

- repeal section 215.54 of the Penal Law and section 776 of the Judiciary Law, both of which provide, in substance, that the imposition of a prior punishment for criminal contempt under Article 19 of the Judiciary Law shall not bar a subsequent prosecution for criminal contempt under the Penal Law based upon the same conduct; and

- repeal section 400.19 of the Criminal Procedure Law and amend section 200.62 of the Criminal Procedure Law and section 70.07 of the Penal Law to conform the procedures in second child sexual assault felony offender cases to the ruling of the U.S. Supreme Court in Apprendi v. New Jersey (530 U.S. 466 [2000]).

Part II of this Report summarizes each of the measures previously submitted and explains its purpose. Part III summarizes the new measures. In both Parts II and III, individual summaries are followed by drafts of appropriate legislation. Part IV briefly discusses some pending and future matters under Committee consideration.

II. Previously Endorsed Measures

1. Discovery
(CPL Article 240)

The Committee recommends that Article 240 and other sections of the Criminal Procedure Law be amended to effect broad reform of discovery in criminal proceedings. The major features of this measure are (1) elimination of the need for a formal discovery demand; (2) expansion of information required to be disclosed in advance of trial and reduction of the time within which disclosure must be made; (3) modification of the defendant's obligations with respect to notice of a psychiatric defense; and (4) legislative superseder of the Court of Appeals' ruling in People v. O'Doherty, 70 N.Y.2d 479 (1987).

I. Elimination of demand discovery

Under current law, the prosecutor's duty to make disclosure is triggered by defendant's service of a demand to produce (CPL §§240.20(1), 240.80(1)). This measure amends section 240.20 of the Criminal Procedure Law to eliminate the need to make such a demand and to provide instead for automatic discovery of the property and information included in section 240.20(1). Conforming amendments are made to sections 240.10, 240.30, 240.35, 240.40 and 240.60 of the Criminal Procedure Law.

Eliminating the requirement of a written demand would simplify and expedite discovery practice. In an "open file" discovery system, a demand serves the useful purpose of identifying those matters the defendant truly is interested in discovering and thus saves both parties time and effort. New York, however, does not have such an open file system. Because discoverable material is limited under New York law and is routinely requested and received, a demand is not needed to identify the subject of discovery. The demand requirement rather is an unnecessary step that results in delay during the time that demand papers generated from programs on office word processors are exchanged by the defense and the prosecution. Recognizing the futility of exchanging such boilerplate papers, many prosecutors already provide the automatic discovery mandated by this measure.

II. Expedition and liberalization of discovery

Various committees of experts commissioned to study criminal discovery have concluded that expedited and liberalized discovery is an essential ingredient to improving criminal procedure. Expedited and liberalized discovery promotes fairness and efficiency by: providing a speedy and fair disposition of the charges, whether by diversion, plea, or trial; providing the accused with sufficient information to make an informed plea; permitting thorough trial preparation and minimizing surprise, interruptions and complications during trial; avoiding unnecessary and repetitious trials by identifying and resolving prior to trial any procedural,

collateral, or constitutional issues; eliminating as much as possible the procedural and substantive inequities among similarly situated defendants; and saving time, money, judicial resources and professional skills by minimizing paperwork, avoiding repetitious assertions of issues and reducing the number of separate hearings. A.B.A. Standards for Criminal Justice §11.1 (1986). See also National Advisory Commission on Criminal Justice Standards and Goals, Courts §4.9; Judicial Conference Report on CPL, Memorandum and Proposed Statute Re: Discovery, 1974 Sess. Laws of N.Y., p. 1860.

This measure seeks to accomplish the foregoing objectives by streamlining and expanding discovery. It would expedite discovery by requiring automatic disclosure by the prosecutor, within 21 days of arraignment or at the next court appearance after arraignment, whichever is later, of all property that the prosecutor currently is required to disclose under section 240.20. This would reduce the 45 day delay under current law, whereby defense counsel must demand discovery within 30 days after arraignment and the prosecutor has up to 15 days thereafter to comply (CPL §240.80).

In addition, the measure creates a new section 240.21 which, inter alia, would require the prosecutor to disclose, within 21 days of arraignment or at the first court appearance thereafter, whichever is later, all Rosario material (i.e., written or recorded statements of all witnesses that the prosecutor intends to call at a pretrial hearing or trial), including the grand jury testimony of all such witnesses (proposed section 240.21(d)). However, in recognition of the fact that disclosure of this material at such an early stage in the proceedings may endanger the security of a witness or compromise an ongoing investigation, specific redaction provisions are included in this new section. The prosecutor would be authorized to redact any information that serves to identify with particularity a person supplying information relating to the case, except for law enforcement officer witnesses acting in other than an undercover capacity and other witnesses whose identity has already been disclosed to the defense (proposed section 240.21(3)). Similarly, the prosecutor would be authorized to redact information that would interfere with an ongoing investigation (with the same exceptions), but upon the defendant's application, the court could order disclosure of the redacted information (proposed section 240.21(2)). By contrast, the measure expressly provides that the court may order disclosure of redacted information that serves to identify a witness only "if otherwise authorized by statutory or decisional law" (proposed section 240.21(3)).

Under current law, the defendant must serve and file all pretrial motions within 45 days of arraignment (CPL §255.20(1)). This measure would amend section 240.90(2) to provide that pretrial motions with respect to material that the prosecutor has disclosed pursuant to article 240 must be served within 30 days after the prosecutor has disclosed the material that is the subject of the motion. A defendant is in a much improved position to assert effective pretrial motions after having had an opportunity to review the prosecutor's discovery materials. In certain cases, motions otherwise asserted as part of an omnibus application will not have to be made, thereby conserving judicial resources. Under this measure, the defendant's duty to file pretrial motions as to discoverable material would be delayed only for as long as the prosecutor delays in providing

discovery. Timely compliance by the prosecution will require reciprocal timely filing of the defendant's motions.

In addition to expediting discovery, the measure liberalizes the process by expanding the scope of items disclosable to the defendant to include:

A. Law enforcement reports

Proposed section 240.21, in addition to requiring disclosure of Rosario material within 21 days of arraignment or at the next court appearance after arraignment, whichever is later, requires the prosecutor to disclose at that same time all law enforcement reports relating to the criminal action that are in the prosecutor's possession. The prosecutor is required to make a prompt, diligent, good faith effort to seek out and disclose law enforcement reports prepared by police agencies, as defined in section 1.20(34) of the CPL. No such obligation is imposed regarding reports prepared by non-police agencies (proposed section 240.21(4)). However, the defendant may seek a court order directing the prosecutor to obtain a specifically identified law enforcement report of a non-police agency or may seek a judicial subpoena for such a report (proposed section 240.21(5)). The measure affords the prosecutor the same authority to redact certain information before disclosing law enforcement reports as is authorized for Rosario material (proposed section 240.21(2),(3)).

B. Expert witnesses

Proposed section 240.43(1)(c) requires the prosecutor to disclose within 15 days of trial the name, business address and qualifications of any expert the prosecutor intends to call as a witness at trial as well as a written report setting forth the subject matter on which the expert will testify and the basis for any opinions and conclusions. An identical provision imposes a reciprocal disclosure obligation on the defense with respect to its expert witnesses (proposed section 240.43(2)(b)). Disclosure of this information will better enable both sides to prepare their response to expert testimony, thereby preventing surprise and delay at trial.

C. Prior bad acts

The measure also requires the prosecutor to disclose, within 15 days of trial, all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct that the prosecutor intends to introduce at trial for impeachment purposes or as substantive proof (proposed section 240.43(1)(a)). Current law requires disclosure only of prior bad acts that will be introduced for impeachment.

D. Trial exhibits

Proposed section 240.43(1)(b) requires the prosecutor to disclose, within 15 days of trial, all exhibits that will be offered at trial. An identical provision imposes a reciprocal disclosure obligation on the defense (proposed section 240.43(2)(a)).

III. Modifying defendant's discovery obligations with respect to notice of psychiatric defense

Although section 250.10(2) of the Criminal Procedure Law provides that the defendant must serve notice of his or her intent to present psychiatric evidence, it does not require the defendant to specify the type of insanity defense upon which he or she intends to rely (e.g., extreme emotional disturbance). By contrast, sections 250.20(1) (notice of alibi) and 250.20(2) (notice of defenses in offenses involving computers) demand considerable specificity. Section 250.10 also does not require that a psychologist or psychiatrist who has examined a defendant generate a written report of his or her findings, whereas the prosecution's psychiatric examiners must prepare written reports, copies of which must be made available to the defendant (CPL §250.10(4)).

This measure would remedy these gaps in the law by amending section 250.10(2) to require that the notice filed by a defendant under that section specify the type of psychiatric defense or affirmative defense upon which the defendant intends to rely at trial, as well as the nature of the alleged psychiatric malady that forms the basis of such defense or affirmative defense and its relationship to the proffered defense. It should be noted that this proposed amendment to section 250.10(2) has been revised by the Committee to conform with the Court of Appeals decision in People v. Almonor (93 NY2d 571). The measure would codify the specificity requirements for psychiatric notice under Almonor, and would expand the existing section 250.10(2) time limitation for the filing of psychiatric notice from thirty days to sixty days. The measure would also make clear that, in addition to allowing the late filing of notice under that section, the court may permit the late amending of a previously filed notice.*

The measure also requires any expert witness retained by the defendant for the purpose of advancing a psychiatric defense to prepare a written report of his or her findings [proposed section 250.10(4)]. Reports by psychiatric examiners for the prosecutor and for the defense are to be exchanged within 15 days of trial [proposed section 250.10(5)]. Defendant's failure to provide the prosecutor with copies of the written report of a psychiatrist or psychologist whom the defendant intends to call at trial may result in the preclusion of testimony by such psychiatrist or psychologist [proposed section 250.10(7)].

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*This proposal to amend the notice requirements of CPL section 250.10(2) also appears, as a stand-alone measure, infra.

IV. Legislative superseder of People v. O'Doherty ruling*

This measure would amend section 710.30 of the Criminal Procedure Law to supersede the Court of Appeals' ruling in People v. O'Doherty, 70 N.Y.2d 479 (1987). In O'Doherty, the Court of Appeals was called upon to construe section 710.30, which provides that identification testimony and the defendant's statements are inadmissible if notice of the prosecutor's intention to offer such evidence is not served upon the defendant within 15 days of arraignment, unless the prosecutor shows good cause for serving late notice. Although several lower courts had permitted the use of belatedly noticed statements and identification evidence where the defendant was not harmed by the failure to give timely notice, the Court of Appeals held that these decisions conflicted with the plain language of the statute. The Court concluded that lack of prejudice to the defendant is not a substitute for a demonstration of good cause and that the court may not consider prejudice to the defendant unless and until the prosecution has made a threshold showing that unusual circumstances precluded giving timely notice. 70 N.Y.2d at 487.

The Court's holding in O'Doherty has resulted in a windfall to defendants. The overly rigorous application of the notice requirement in section 710.30 detracts from the integrity of the truth-finding process by precluding reliable evidence of guilt where the prosecutor fails through inadvertence or lack of knowledge of the existence of evidence to give notice within 15 days of arraignment. This measure would correct the unfairness of penalizing the prosecution by suppressing evidence where no harm to the defendant has resulted from giving late notice. It would amend section 710.30(2) to provide that the court, upon finding that there is no prejudice to the defendant, may permit late notice, in the interest of justice, at any time up until the commencement of trial. In determining whether to do so, the court could consider any relevant factor, including the probative value or cumulative nature of the evidence, the delay in the proceedings that would result if late notice were permitted, the diligence of the prosecutor in seeking to discover the evidence within the 15 day period, whether, if the evidence is a statement, the statement was in fact made and whether the defendant was aware of the evidence. If the court permitted late notice, the defendant would be provided a reasonable opportunity to make an oral motion to suppress. And if the prosecutor sought and received permission to file the notice more than 90 days after arraignment, the defendant would be entitled to an instruction advising the jury that it could consider, in deciding whether an identification or statement was actually made, that notice thereof was given beyond the time generally required in the statute.

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*The Committee has, for a number of years, included in its discovery reform measure a provision amending section 470.05 of the Criminal Procedure Law to supersede the Court of Appeals' ruling in People v. Ranghelle (69 NY2d 56). As a result of the enactment of the Sexual Assault Reform Act (chapter 1 of the Laws of 2000), the Committee has removed this Ranghelle provision from its discovery reform proposal (see, section 48 of chapter 1 of 2000, which enacts a new CPL section 240.75 ["Discovery; certain violations"] to supersede Ranghelle).

Proposal

AN ACT to amend the criminal procedure law, in relation to discovery

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. Section 240.10 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

§240.10. Discovery; definition of terms. The following definitions are applicable to this article:

1. ["Demand to produce" means a written notice served by and on a party to a criminal action, without leave of the court, demanding to inspect property pursuant to this article and giving reasonable notice of the time at which the demanding party wishes to inspect the property designated.

2.] "Attorneys' work product" means [property] material to the extent that it contains the opinions, theories or conclusions of the prosecutor, defense counsel or members of their legal staffs.

[3.]2. "Property" or "material" 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.

[4.]3. "At the trial" means as part of the [people's] prosecutor's or the defendant's direct case.

§2. The criminal procedure law is amended by adding a new section 240.12 to read as follows:

§240.12. Discovery; attorneys' work product exempted. Notwithstanding any other provision of this article, the prosecutor or the defendant shall not be required to disclose attorneys' work product as defined in subdivision one of section 240.10.

§3. Section 240.20 of the criminal procedure law, as added by chapter 412 of the laws of 1979, the opening paragraph of subdivision 1 as amended by chapter 317 of the laws of 1983, paragraphs (c) and (d) of subdivision 1 as amended by chapter 558 of the laws of 1982, paragraph (e) as added and paragraphs (f), (g), (h) and (i) of subdivision 1 as relettered by chapter 795 of the laws of 1984, paragraph (j) of subdivision 1 as added by chapter 514 of the laws of 1986 and paragraph (k) of subdivision 1 as added by chapter 536 of the laws of 1989, is amended to read as follows:

§240.20. Discovery; [upon demand of] by defendant. 1. Except to the extent protected by court order, [upon a demand to produce by a defendant against whom] within twenty-one days of arraignment or at the next court appearance after arraignment, whichever is later, on an indictment, superior court information, prosecutor's information, information or simplified information charging a misdemeanor [is pending], the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property:

(a) Any written, recorded or oral statement of the defendant, and of a co-defendant 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] the direction of, or in cooperation with [him], such public servant;

(b) 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;

(c) 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 which was 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, or which the [people intend] prosecutor intends to introduce at trial;

(d) Any photograph or drawing relating to the criminal action or proceeding which was made or completed by 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, or which the [people intend] prosecutor intends to introduce at trial;

(e) 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 450.10 of the penal law, irrespective of whether the [people intend] prosecutor intends to introduce at trial the property or the photograph, photocopy or other reproduction[.];

(f) Any other property obtained from the defendant, or a co-defendant to be tried jointly;

(g) 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;

(h) [Anything] Any other property or information 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[.];

(i) The approximate date, time and place of the offense charged and of defendant's arrest[.];

(j) In any prosecution under penal law section 156.05 or 156.10, the time, place and manner of notice given pursuant to subdivision six of section 156.00 of such law[.]; and

(k) In any prosecution commenced in a manner set forth in this subdivision alleging a violation of the vehicle and traffic law, in addition to any material required to be disclosed pursuant to this article, any other provision of law, or the constitution of this state or of the United States, any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment, including the most recent record of inspection, or calibration or repair of machines or instruments utilized to perform such scientific tests or experiments and the certification certificate, if any, held by the operator of the machine or instrument, which tests or examinations were 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, or which the people intend to introduce at trial.

2. The prosecutor shall make a prompt, diligent, good faith effort to ascertain the existence of [demanded] property subject to disclosure under this section and to cause such property to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided, that the prosecutor shall not be required to obtain by subpoena duces tecum [demanded] material which the defendant may thereby obtain.

§4. The criminal procedure law is amended by adding a new section 240.21 to read as follows:

§240.21. Disclosure of police reports and prior statements of prospective witnesses with the right of redaction. 1. Within twenty-one days of arraignment or at the next court appearance after arraignment, whichever is later, on an indictment, superior court information, prosecutor's information, information or simplified information charging a misdemeanor, the prosecutor shall disclose to the defendant the following property, provided it is in the possession of the prosecutor:

(a) Any report of a factual nature relating to the criminal action or proceeding against the defendant and prepared by the prosecutor;

(b) Any report relating to the criminal action or proceeding against the defendant prepared by, or at the direction or request of, a police officer, as defined in subdivision thirty-four of section 1.20 of this chapter, who is employed by a law enforcement agency which participated in the investigation, arrest or post-arrest processing of defendant with respect to the criminal action or proceeding against defendant;

(c) Any report, other than those described by paragraphs (a) and (b) of this subdivision, relating to the criminal action or proceeding against the defendant, which was prepared by a law enforcement officer, provided such report is in the actual possession of the prosecutor; and

(d) Any written or recorded statement, including an examination videotaped pursuant to section 190.32 of this chapter and any testimony before a grand jury, other than statements contained in a law enforcement report disclosed pursuant to paragraphs (a) through (c) of this subdivision, made by a witness whom the prosecutor intends to call at a pretrial hearing or at trial

and which relates to the subject matter of that witness' prospective testimony.

2. Any property, material, report or statement required to be disclosed under this section may be redacted by the prosecutor to eliminate information, the disclosure of which could interfere with an ongoing investigation.

(a) At the next court appearance following disclosure or at any time thereafter, upon application of the defendant, such redaction may be reviewed by the court and disclosure may be ordered, unless the prosecutor demonstrates that disclosure of the information sought to be redacted could interfere with an ongoing investigation or demonstrates the need for any other protective order. Upon application of the prosecutor, the court may review any such redaction in an ex parte, in camera, proceeding.

(b) Any report that is redacted pursuant to this subdivision shall so indicate, unless the court orders otherwise, in the interest of justice for good cause shown, including the protection of witnesses or maintaining the confidentiality of an ongoing investigation.

3. Any property, material, report or statement required to be disclosed under this section may be redacted by the prosecutor to eliminate the name, address, or any other information that serves to identify with particularity a person supplying information relating to the criminal action or proceeding against the defendant. There may be no redaction of: the name of a witness whose name has already been disclosed to the defendant by the prosecution; the address of a witness whose address has already been disclosed to the defendant by the prosecution; and the name and business address of a witness who is a law enforcement official acting in an official, other than an undercover, capacity. Upon motion of the defendant, the court may, if otherwise authorized by statutory or decisional law, order disclosure of the redacted information.

4. The prosecutor shall make a prompt, diligent, good faith effort to ascertain the existence of any law enforcement report, described in paragraphs (a) and (b) of subdivision one of this section and witness statements, described in paragraph (d) of subdivision one of this section, which are in the possession or control of the prosecutor and, upon finding any such reports or statements, the prosecutor shall cause them to be disclosed promptly. For purposes of this article, a law enforcement report described in paragraphs (a) and (b) of subdivision one of this section, and statements contained in such reports, are deemed to be in the control of the prosecutor and any report described in paragraph (c) of subdivision one of this section, and statements contained in such reports, are deemed not to be within the control of the prosecutor. Any report or statement required to be disclosed pursuant to this subdivision may be redacted by the prosecutor and a court may review such redaction as provided in subdivisions two and three of this section.

5. (a) Any time after thirty-five days from arraignment, upon notice to the prosecutor and in conformity with the requirements of section twenty-three hundred seven of the civil practice law and rules, the defendant may request the court to order the prosecution to obtain a specific report or to issue a subpoena duces tecum for a specific police or law enforcement report, as described in paragraphs (a) through (c) of subdivision one of this section, that has not been disclosed to the defendant.

(b) The request. The request shall specify with particularity the specific report, or reports, which have not been disclosed and reasons demonstrating a reasonable likelihood that such report or reports exist. The request shall further set forth whether the prosecutor has been requested to produce the specific report and the response to that request.

(c) The subpoena. Upon finding: (i) that there exists a specific, particularly described report required to be disclosed, pursuant to paragraphs (a) through (c) of subdivision one of this section, that has not been disclosed, (ii) that the defendant has requested the prosecutor to obtain that report, and (iii) that a court order directing the prosecutor to obtain that report and disclose it to the defendant is not likely to result in disclosure within fourteen days, the court, after affording the prosecutor an opportunity to be heard, may issue the subpoena pursuant to section twenty-three hundred seven of the civil practice law and rules. The subpoena must specify with particularity the report or reports and be made returnable to the issuing court as of a reasonable return date.

(d) The return, redaction and disclosure. Upon receipt of a subpoenaed report by the court, the clerk of the court shall so notify the prosecutor and the defendant. The prosecutor may redact any such report, and the court may review that redaction, as provided in subdivisions two and three of this section. Upon motion of the defendant, the court may, if otherwise authorized by statutory or decisional law, order disclosure of the redacted information. The subpoenaed property shall be turned over to the defendant five days, excluding Saturdays, Sundays and holidays, after notice to the prosecutor of its receipt or at the commencement of trial, whichever is earlier.

(e) Implementation. The chief administrator of the courts shall promulgate rules implementing the provisions of this subdivision.

6. Nothing in this section shall be construed to create, limit, expand or in any way affect any authority that the court otherwise may have to order pre-trial disclosure of the identity or address of a witness.

7. At any time after arraignment, the court may limit or extend the time requirements provided for in this section.

§5. The section heading and the opening paragraph of subdivision 1 of section 240.30 of the criminal procedure law, the section heading as added by chapter 412 of the laws of 1979 and the opening paragraph of subdivision 1 as amended by chapter 317 of the laws of 1983, are amended to read as follows:

§240.30. Discovery; [upon demand of] by the prosecutor. Except to the extent protected by court order, [upon a demand to produce] within fifteen days of disclosure by the prosecutor pursuant to sections 240.20 and 240.21 of this article, and prior to trial, a defendant against whom an indictment, superior court information, prosecutor's information, information or simplified information charging a misdemeanor is pending shall disclose and make available to the prosecution for inspection, photographing, copying or testing, subject to constitutional limitations:

§6. Section 240.35 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

§240.35. Discovery; refusal [of demand] to disclose. Notwithstanding the provisions of sections 240.20 and 240.30, the prosecutor or the defendant, as the case may be, may refuse to disclose any information which [he] that party reasonably believes is not discoverable [by a demand to produce,] pursuant to [section 240.20 or section 240.30 as the case may be,] this article or for which [he] the party reasonably believes a protective order would be warranted. Such refusal shall be made in a writing, which shall set forth the grounds of such belief as fully as possible, consistent with the objective of the refusal. The writing shall be served upon the

[demanding] other party and a copy shall be filed with the court. Such refusal shall be made within the time by which disclosure is required, but may be made after that time, as the court may determine is required in the interest of justice.

§7. Subdivisions 1 and 2 of section 240.40 of the criminal procedure law, subdivision 1 as amended by chapter 317 of the laws of 1983 and subdivision 2 as amended by chapter 481 of the laws of 1983, are amended to read as follows:

1. Upon [motion] application of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the court in which such accusatory instrument is pending:

(a) must order discovery as to any material not disclosed [upon a demand] pursuant to section 240.20, if it finds that the prosecutor's refusal to disclose such material is not justified; (b) must, unless it is satisfied that the [people have] prosecutor has shown good cause why such an order should not be issued, order discovery or issue any other order authorized by subdivision one of section 240.70 as to any material not disclosed [upon demand] pursuant to section 240.20 where the prosecutor has failed to serve a timely written refusal pursuant to section 240.35; and (c) may [order discovery with respect to any other property, which the people intend to introduce at the trial], subject to a protective order and except where otherwise limited or prohibited by statute, order discovery or issue a subpoena pursuant to section twenty-three hundred seven of the civil practice law and rules with respect to any property not otherwise subject to, or exempt from, disclosure under this article in the possession of the prosecutor or any law enforcement agency employing a police officer, as defined in subdivision thirty-four of section 1.20 of this chapter, which participated in the investigation, arrest or post-arrest processing of the defendant relating

to the criminal action or proceeding, upon a showing by the defendant that discovery with respect to such property is material to the preparation of his or her defense, and that the request is reasonable. [Upon granting the motion pursuant to paragraph (c) hereof, the court shall, upon motion of the people showing such to be material to the preparation of their case and that the request is reasonable, condition its order of discovery by further directing discovery by the people of property, of the same kind or character as that authorized to be inspected by the defendant, which he intends to introduce at the trial] The prosecutor may redact any such property and the court may review that redaction, as provided for in subdivisions two and three of section 240.41 of this article. Nothing in this paragraph shall be construed to create, limit, expand or in any way affect any authority that the court otherwise may have to order disclosure of the identity or address of a witness.

2. Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending: (a) must order discovery as to any property not disclosed [upon a demand] pursuant to section 240.30, if it finds that the defendant's refusal to disclose such material is not justified; and (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to:

(i) Appear in a line-up;

(ii) Speak for identification by a witness or a potential witness;

(iii) Be fingerprinted;

(iv) Pose for photographs not involving reenactment of an event;

(v) Permit the taking of samples of blood, hair or other materials from his or

her body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto;

(vi) Provide specimens of his or her handwritings;

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

This subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the constitution of this state or of the United States. This section shall not be construed to limit or otherwise affect the administration of a chemical test where otherwise authorized pursuant to section one thousand one hundred [ninety-four-a] ninety-four of the vehicle and traffic law.

§8. Section 240.43 of the criminal procedure law, as added by chapter 222 of the laws of 1987, is amended to read as follows:

§240.43. Discovery; disclosure of prior uncharged criminal, vicious or immoral acts[. Upon a request by a defendant, the prosecutor shall notify the defendant of all]; disclosure of property intended to be introduced at trial; disclosure of reports and resumes of expert witnesses. 1. Fifteen days before the commencement of trial, or on such other date after arraignment as may be fixed by the court, the prosecutor shall, upon a request of the defendant, disclose to the defendant and make available for inspection, photographing, copying, or, where appropriate, testing:

(a) All specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for substantive proof or for purposes of impeaching the credibility of the defendant. [Such

notification by the prosecutor shall be made immediately prior to the commencement of jury selection, except that the court may, in its discretion, order such notification and make its determination as to the admissibility for impeachment purposes of such conduct within a period of three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection.]

(b) Any property, to the extent not previously disclosed, which the prosecutor intends to offer at trial. The prosecutor may redact any such property and the court may review such redaction as authorized by subdivisions two and three of section 240.21 of this article. Nothing in this paragraph shall be construed to create, limit or expand or in any way affect any authority the court may otherwise have to order disclosure of the identity or address of a witness.

(c) A writing setting forth the name, business address and qualifications of any expert the prosecution intends to call as a witness at trial and a written report by that witness setting forth in reasonable detail the subject matter on which the expert is expected to testify including the witness's opinion and conclusions, if any, as well as the basis for those opinions and conclusions. This section shall not apply to a psychiatric expert governed by section 250.10 of this chapter, and the requirements hereof of a written report shall not apply to an expert who will testify to the results of a test for controlled substances and who has already prepared a report that has been disclosed pursuant to section 240.20 of this article, or a person who is testifying as an ordinary witness as well as an expert. To the extent that the report required by this section does not otherwise exist, the prosecutor shall cause the expert to prepare such a report. If the court finds that the prosecutor has, in bad faith, failed to provide the writing and report required by this subdivision, the court may preclude introduction of the expert testimony.

2. Fifteen days before trial, or on such other date as may be fixed by the court, upon request of the prosecutor, the defendant shall disclose to the prosecution and make available for inspection, photographing, copying, or, where appropriate, testing:

(a) Any property, to the extent not previously disclosed, which the defendant intends to introduce at trial.

(b) A writing setting forth the name, business address and qualifications of any expert the defense intends to call as a witness at trial and a written report by that witness setting forth in reasonable detail the subject matter on which the expert is expected to testify including the witness's opinion and conclusions, if any, as well as the basis for those opinions and conclusions. This subdivision shall not apply to a psychiatric expert governed by section 250.10 of this chapter, and the requirements hereof of a written report shall not apply to an expert who will testify to the results of a test for controlled substances who has already prepared a report that has been disclosed pursuant to section 240.30 of this article, or a person who is testifying as an ordinary witness as well as an expert. To the extent that the report required by this section does not otherwise exist, the defense shall cause the expert to prepare such a report. If the court finds that the defense has, in bad faith, failed to provide the writing and report required by this subdivision, it may preclude introduction of the expert testimony.

§9. Section 240.44 of the criminal procedure law, as added by chapter 558 of the laws of 1982, is amended to read as follows:

§240.44. Discovery; upon pre-trial hearing. Subject to a protective order, at the commencement of a pre-trial hearing held in a criminal court at which a witness is called to testify, each party [,at the conclusion of the direct examination of each of its witnesses,] shall,

upon the request of the other party, make available to that other party to the extent not previously disclosed, including all statements or testimony previously disclosed in a redacted form:

1. Any written or recorded statement, including any testimony before a grand jury, made by such witness other than the defendant which relates to the subject matter of the witness's testimony and which is in the possession or control of the party calling the witness.

2. A record of a judgment of conviction of such witness other than the defendant if the record of conviction is known by the prosecutor or the defendant as the case may be, to exist.

3. The existence of any pending criminal action against such witness other than the defendant if the pending criminal action is known by the prosecutor or defendant, as the case may be, to exist.

§10. Section 240.45 of the criminal procedure law, as amended by chapter 558 of the laws of 1982 and paragraph (a) of subdivision 1 as amended by chapter 804 of the laws of 1984, is amended to read as follows:

§240.45. Discovery; upon trial, of prior statements and criminal history of, and promises to, witnesses. 1. [After the jury has been sworn and before the prosecutor's opening address,] At the commencement of jury selection or, in the case of a single judge trial after commencement and before submission of evidence, the prosecutor shall, subject to a protective order, make available to the defendant to the extent not previously disclosed:

(a) Any written or recorded statement in the possession or control of the prosecutor, including any testimony before a grand jury and an examination videotaped pursuant to section 190.32 of this chapter, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony, including unredacted

statements previously disclosed in redacted form;

(b) A record of judgment of conviction of a witness the [people intend] prosecutor intends to call at trial if the record of conviction is known by the prosecutor to exist;

(c) The existence of any pending criminal action against a witness the [people intend] prosecutor intends to call at trial, if the pending criminal action is known by the prosecutor to exist;

(d) The details of any promises to, or agreements with, a witness the prosecutor intends to call at trial, if such promise or agreement is related to the witness's testimony or cooperation, and is known or should be known by the prosecutor.

The provisions of paragraphs (b) and (c) of this subdivision shall not be construed to require the prosecutor to fingerprint a witness or otherwise cause the division of criminal justice services or other law enforcement agency or court to issue a report concerning a witness.

2. [After presentation of the people's direct case and before the presentation of the defendant's direct case] At the commencement of jury selection, the defendant shall, subject to a protective order, make available to the prosecutor:

(a) 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, [and] which relates to the subject matter of the witness's testimony and is in the possession or control of the defendant;

(b) a record of judgment of conviction of a witness, other than the defendant, the defendant intends to call at trial if the record of conviction is known by the defendant to exist;

(c) the existence of any pending criminal action against a witness, other than the defendant, the defendant intends to call at trial, if the pending criminal action is known by the

defendant to exist;

(d) Any promises or agreements with a witness the defense intends to call at trial, if such promise or agreement is related to the witness's testimony or cooperation, and is known or should have been known by the defense.

§11. Section 240.60, as added by chapter 412 of the laws of 1979, is amended to read as follows:

§240.60. Discovery; continuing duty to disclose. If, after complying with the provisions of this article or an order pursuant thereto, a party finds, either before or during trial, additional material subject to discovery or covered by such order, [he] that party shall promptly make disclosure of such material and comply with the [demand or] order, [refuse to comply with the demand where refusal is authorized,] or apply for a protective order.

§12. The criminal procedure law is amended by adding a new section 240.65 to read as follows:

§240.65. No limitations on other procedures to obtain property. The specification of property subject to disclosure under this article shall not be construed to limit or otherwise affect the right of a defendant to obtain, by subpoena or court order, as otherwise authorized by law, property not subject to, or exempt from, disclosure under this article that is in the possession of a person or entity other than the prosecutor or a law enforcement agency employing a police officer, as defined in subdivision thirty-four of section 1.20 of this chapter, which participated in the investigation, arrest or post-arrest processing of the defendant relating to the criminal action or proceeding. Nothing in this section shall be construed to create, limit or expand or in any way affect any authority the court may otherwise have to order disclosure of the identity or address of

a witness.

§13. Subdivision 1 of section 240.70 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

1. If, during the course of discovery proceedings or during trial, the court finds that a party has failed to comply with any of the provisions of this article, the court may order such party to permit discovery of the property not previously disclosed, grant a continuance, issue a protective order, give an adverse inference instruction to the trier of fact, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action.

§14. Section 240.80 of the criminal procedure law is REPEALED.

§15. Subdivision 2 of section 240.90 of the criminal procedure law, as added by chapter 412 of the laws of 1979, is amended to read as follows:

2. [A] Within thirty days of the prosecutor's disclosure to the defendant of property subject to disclosure under the provisions of this article, a motion by a defendant for additional discovery shall be made as otherwise prescribed in section 255.20 of this chapter. Such motion must be supported by sworn allegations of fact that each item of property sought has not previously been disclosed to the defendant and sworn allegations of fact demonstrating that each item of property sought is material to the preparation of the defense when such a showing of materiality is a prerequisite to disclosure.

§16. Section 250.10 of the criminal procedure law, as amended by chapter 548 of the laws of 1980, subdivision 1 as amended by chapter 558 of the laws of 1982, paragraph (a) of subdivision 1 and subdivision 5 as amended by chapter 668 of the laws of 1984, is amended to

read as follows:

§250.10. Notice of intent to proffer psychiatric evidence; examination of defendant upon application of prosecutor. 1. As used in this section, the term "psychiatric evidence" means:

(a) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect.

(b) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25 of the penal law and paragraph (a) of subdivision two of section 125.27 of the penal law.

(c) Evidence of the defendant's mental disease or defect to be offered by the defendant in connection with any other defense or claim not specified in the preceding paragraphs.

2. As used in this section, the term "psychiatric defense" means:

(a) The affirmative defense of lack of criminal responsibility by reason of mental disease or defect.

(b) The affirmative defense of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25 of the penal law and paragraph (a) of subdivision two of section 125.27 of the penal law.

(c) Any other defense or claim supported by evidence of defendant's mental disease or defect.

3. Psychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of [his] an intention to present psychiatric

evidence. The notice must specify the type of defense or affirmative defense enumerated in subdivision two of this section upon which the defendant intends to rely, and must set forth the nature of the alleged psychiatric malady that forms the basis of such defense or affirmative defense and its relationship to the proffered defense; provided, however, that the defendant shall not be required to include in such notice matters of evidence relating to how he or she intends to establish such defense or affirmative defense. Such notice must be served and filed before trial and not more than [thirty] sixty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made or amended at any later time prior to the close of the evidence.

[3.]4. (a) When a defendant, pursuant to subdivision [two] three of this section, serves notice of intent to present psychiatric evidence, the [district attorney] prosecutor may apply to the court, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist or licensed psychologist as defined in article one hundred fifty-three of the education law designated by the [district attorney] prosecutor. If the application is granted, the psychiatrist or psychologist designated to conduct the examination must notify the [district attorney] prosecutor and counsel for the defendant of the time and place of the examination. Defendant has a right to have his or her counsel present at such examination. The [district attorney] prosecutor may also be present. The role of each counsel at such examination is that of an observer, and neither counsel shall be permitted to take an active role at the examination.

[4.] (b) After the conclusion of the examination, the psychiatrist or psychologist must promptly prepare a written report of his or her findings and evaluation, including any opinions

and conclusions, as well as the basis for those opinions and conclusions. A copy of such report and a writing setting forth the qualifications of the examining psychiatrist or psychologist must be made available to the [district attorney] prosecutor and to the counsel for the defendant. No transcript or recording of the examination is required, but if one is made, it shall be made available to both parties prior to the trial.

5. Any expert witness retained by a defendant or the prosecutor, other than the psychiatrist or licensed psychologist who examines the defendant under subdivision four of this section, for the purpose of advancing or rebutting a psychiatric defense, whom defendant or the prosecutor intends to call at trial must prepare a written report of his or her findings and evaluation, including the witness's opinion and conclusions, if any, as well as the basis for those opinions and conclusions.

6. Within fifteen days before the commencement of trial, the parties shall exchange copies of any reports prepared pursuant to subdivisions four and five of this section, as well as a writing setting forth the qualifications of the persons making the reports. Any transcript or recording of an examination of defendant pursuant to subdivision four or five of this section shall be made available to the other party together with the report of the examination.

7. If, after the exchange of psychiatric reports between the prosecutor and counsel for defendant, as provided in subdivision six of this section, any psychiatrist or psychologist through whom a party intends to introduce psychiatric evidence at trial examines the defendant, or any psychiatrist or psychologist who has previously examined the defendant makes further findings or evaluation regarding the defendant, he or she must promptly prepare a report of his or her findings and evaluation, including opinions and conclusions, if any, as well as the basis for those

opinions and conclusions. A copy of such report and the written qualifications of a psychiatrist expert not previously disclosed must be made available to the prosecutor and to the counsel for the defendant.

8. If the court finds that the defendant has willfully refused to cooperate fully in the examination ordered pursuant to subdivision [three] four of this section or that the defendant has in bad faith failed to provide the prosecutor with copies of the written report of the findings and evaluation of a psychiatrist or psychologist whom defendant intends to call to testify at trial as provided in subdivisions five and six of this section, it may preclude introduction of testimony by a psychiatrist or psychologist concerning mental disease or defect of the defendant at trial. Where, however, the defendant has other proof of his or her affirmative defense, and the court has found that the defendant did not submit to or cooperate fully in the examination ordered by the court, this other evidence, if otherwise competent, shall be admissible. In such case, the court must instruct the jury that the defendant did not submit to or cooperate fully in the pre-trial psychiatric examination ordered by the court pursuant to subdivision [three] four of this section and that such failure may be considered in determining the merits of the affirmative defense.

9. If the court finds that the prosecutor has in bad faith failed to provide the defense with copies of the written report of the findings and evaluation of a psychiatrist or psychologist whom the prosecutor intends to call to testify at trial as provided in subdivisions four and six of this section, it may preclude introduction of testimony by a psychiatrist or psychologist concerning mental disease or defect of the defendant at trial.

§17. Subdivisions 9, 10 and 11 of section 450.20 of the criminal procedure law are renumbered subdivisions 10, 11 and 12 and a new subdivision 9 is added to read as follows:

9. A pre-trial order prohibiting introduction of evidence or precluding the testimony of a witness, provided the people file a statement in the appellate court pursuant to section 450.50 of this article.

§18. Section 450.50 of the criminal procedure law is amended to read as follows:

§450.50. Appeal by people from order suppressing evidence; filing of statement in appellate court. 1. In taking an appeal, pursuant to subdivision eight or nine of section 450.20, to an intermediate appellate court from an order of a criminal court suppressing evidence, prohibiting the introduction of evidence or precluding the testimony of a witness, the people must file, in addition to a notice of appeal or, as the case may be, an affidavit of errors, either of which must be filed within five days of the prohibition or preclusion order, a statement asserting that the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

2. The taking of an appeal by the people, pursuant to subdivision eight or nine of section 450.20, from an order suppressing evidence, prohibiting the introduction of evidence or precluding the testimony of a witness, constitutes a bar to the prosecution of the accusatory instrument involving the evidence ordered suppressed, prohibited or precluded, unless and until such [suppression] order is reversed upon appeal and vacated.

§19. Section 700.70 of the criminal procedure law, as amended by chapter 194 of the laws of 1976, is amended to read as follows:

§700.70. Eavesdropping warrants; notice before use of evidence. The contents of any

intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which interception was authorized or approved. [This] Thereafter, an extension of the fifteen day period may be [extended] sought by the prosecutor and ordered in the interests of justice by the trial court [upon good cause shown if it] at any time, provided the court finds that the defendant will not be prejudiced by the delay in receiving such papers.

§20. Subdivision 2 of section 710.30 of the criminal procedure law, as separately amended by chapters 8 and 194 of the laws of 1976, is amended to read as follows:

2. (a) Such notice must be served within fifteen days after arraignment on an indictment, superior court information, prosecutor's information, information or simplified information charging a misdemeanor, and before trial, and upon such service the defendant must be accorded a reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. [For good cause shown, however,]

(b) Late notice. Anytime thereafter, before the commencement of trial, upon finding that there is no prejudice to the defendant, the court may, in the interest of justice, permit the [people] prosecutor to serve such notice[, thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion]. In determining whether to grant permission to file such notice, the court may take into consideration any relevant circumstance, including the probative value of the statement or identification, the delay in proceeding to trial that would be occasioned by permitting such notice, the cumulative nature of

the statement or identification, whether the statement was made, the due diligence of the prosecutor in seeking to discover the statement or identification within fifteen days of arraignment, the time between the discovery of the statement or identification by the prosecutor and the disclosure to the defendant, and whether, despite the absence of notice, the defendant was aware of the statement or identification. If late identification or statement notice is permitted and there has been no suppression hearing with respect to such identification or statement, the defendant must be given a reasonable opportunity to make an oral motion to suppress.

(c) Instruction at trial. At trial, if permission to file notice was sought more than ninety days from arraignment or less than a week before trial, whichever is earlier, the court, upon request of the defendant, shall instruct the jury that in determining whether a statement or identification had been made, it may take into consideration the fact that notice of the statement or identification was given beyond the time generally required by this section.

(d) Statements and identifications made after fifteen days from arraignment. Upon becoming aware of a statement or identification made after fifteen days from arraignment, the prosecutor shall disclose such fact to the defendant within fifteen days of the prosecutor's having become aware of the statement and immediately, if a pre-trial hearing, jury selection or trial before a single judge has commenced. Upon receipt of such notice, the defendant shall be given a reasonable opportunity to make an oral motion to suppress.

§21. This act shall take effect 90 days after it shall have become law.

2. Appeal by the People from
Preclusion Order
(CPL 450.20, 450.50)

The Committee recommends that section 450.20 of the Criminal Procedure Law be amended to provide that the People may appeal as of right from an order prohibiting the introduction of certain evidence or the calling of certain witnesses, entered before trial pursuant to section 240.70 of the Criminal Procedure Law. The Committee further proposes that section 450.50 of the Criminal Procedure Law be amended to permit the People to take an appeal from a preclusion order, if the People file a statement asserting that they are unable to prosecute without the evidence ordered precluded, and to provide that the taking of an appeal from a preclusion order constitutes a bar to prosecution unless or until such order is reversed or vacated.

In People v. Anderson, 66 N.Y.2d 529, 537 (1985), the Court of Appeals held that section 30.30 of the Criminal Procedure Law does not require the Court to dismiss an action for a default by the People after the People have announced their readiness for trial where lesser sanctions, such as preclusion orders, are available. Anticipating that the Court's decision in Anderson may lead to an increase in the use of preclusion orders, the Committee recommends that section 450.20 of the Criminal Procedure Law be amended to permit the People to appeal from a preclusion order. The People's right to take such an appeal would be conditioned, however, on the filing of a statement asserting that the prosecution cannot proceed without the precluded evidence.

This procedure would conform to that now required where the People take an appeal from an order suppressing evidence. It would allow the People to obtain appellate review of preclusion orders, while assuring that only those orders affecting evidence at the heart of the People's case are the subject of interlocutory appeals.

Proposal

AN ACT to amend the criminal procedure law, in relation to appeal by the people from a preclusion order

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 450.20 of the criminal procedure law is amended by adding a new subdivision 12 to read as follows:

12. An order prohibiting the introduction of certain evidence or the calling of certain

witnesses, entered before trial pursuant to section 240.70; provided that the people file a statement in the appellate court pursuant to section 450.50.

§2. Section 450.50 of the criminal procedure law is amended to read as follows:

§450.50. Appeal by people from order suppressing evidence; filing of statement in appellate court. 1. In taking an appeal, pursuant to subdivision eight or twelve of section 450.20, to an intermediate appellate court from an order of a criminal court suppressing evidence or an order prohibiting the introduction of certain evidence or the calling of certain witnesses, the people must file, in addition to a notice of appeal or, as the case may be, an affidavit of errors, a statement asserting that the deprivation of the use of the evidence ordered suppressed or precluded has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

2. The taking of an appeal by the people, pursuant to subdivision eight or twelve of section 450.20, from an order suppressing evidence or an order prohibiting the introduction of certain evidence or the calling of certain witnesses, constitutes a bar to the prosecution of the accusatory instrument involving the evidence ordered suppressed or precluded, unless and until such suppression or preclusion order is reversed upon appeal and vacated.

§3. This act shall take effect 90 days after it shall have become a law.

3. Motion to Dismiss Indictment
in Interest of Justice
(CPL 210.40)

The Committee recommends that a new paragraph be added to subdivision one of section 210.40 of the Criminal Procedure Law to provide that in determining whether to grant a motion to dismiss an indictment in the interest of justice, the court shall consider whether there has been unreasonable delay due to the People's repeated and unjustifiable failure to proceed with the action after both sides have answered ready and the court has fixed a date for a hearing or trial.

Although the expeditious processing of a criminal case often is hampered by the failure to produce witnesses at a hearing or trial, the Court of Appeals has held that a trial court has no authority to enter a nonappealable trial order of dismissal as a remedy for the People's inability to produce the complaining witness after multiple adjournments. Holtzman v. Goldman, 71 N.Y.2d 564 (1988). The Court noted, however, that the trial court was not helpless in the face of the People's failure to proceed and had various options available to it, including a dismissal in the interest of justice. 71 N.Y.2d at 574. The Court observed that such a dismissal "may well be appropriate" to redress the People's abuse of adjournments. 71 N.Y.2d at 575.

While the Court of Appeals thus indicated that dismissal in the interest of justice is an appropriate remedy for the failure to proceed, section 210.40 of the Criminal Procedure Law does not provide expressly for consideration of this factor. By inviting the trial court to consider whether unreasonable delay has resulted from the repeated and unjustifiable failure to proceed after the parties have answered ready and the court has fixed a hearing or trial date, this measure would draw attention to the Court of Appeals' suggestion that section 210.40 is a permissible vehicle for redressing abuse of adjournments. At the same time, it would ensure that any dismissal in the interest of justice on this ground would be subject to the requirement that the court state the basis for its ruling (CPL §210.40(3)) and would be appealable by the People (CPL §450.20(1)).

Proposal

AN ACT to amend the criminal procedure law, in relation to motion to dismiss indictment in furtherance of justice

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (j) of subdivision 1 of section 210.40 of the criminal procedure law is relettered paragraph (k) and a new paragraph (j) is added to read as follows:

(j) whether there has been unreasonable delay due to the people's repeated and unjustifiable failure to proceed with the action after the people and the defendant have answered ready and the court has fixed a date for a hearing or trial;

§2. This act shall take effect 90 days after it shall have become a law.

4. Bail or Recognizance for Cooperating Defendant Convicted of Class A-II Felony (CPL 530.40)

The Committee recommends that subdivision three of section 530.40 of the Criminal Procedure Law be amended to allow a superior court to order bail or recognizance for a defendant who has been convicted of a class A-II felony if the defendant is providing, or has agreed to provide, material assistance pursuant to section 65.00(1)(b) of the Penal Law.

Section 530.40(3) of the Criminal Procedure Law precludes a superior court from ordering recognizance or bail, inter alia, after a defendant has been convicted of a class A felony. Although in most cases this reflects a sound policy, it may in some cases wholly undermine the incentive to cooperate in drug investigations that section 65.00(1)(b) of the Penal Law seeks to create for defendants charged with serious drug offenses. That section permits a court, in certain circumstances, to sentence to probation a defendant convicted of a class A-II or class B felony drug offense if the prosecutor recommends such a sentence and confirms that the defendant is providing, or has provided, material assistance to the authorities in a drug investigation. As one trial court has pointed out, however, the mandatory incarceration requirement of section 530.40(3) effectively prevents a defendant who pleads guilty to a class A-II felony, but is eager to cooperate with the authorities in return for the more lenient sentence of probation permitted under section 65.00(1)(b), from actually providing that cooperation. Indeed, if a defendant is incarcerated, he or she will generally be unable to assist in a drug investigation. The court in that case, therefore, urged the Legislature to remedy the problematic inconsistency between these two statutes. See People v. Dale D'Amigo, N.Y.L.J., June 5, 1990, p. 26, col. 5 (Suffolk Cty. Ct).

This measure would eliminate that inconsistency by creating an exception to the mandatory incarceration rule of section 530.40(3) for a defendant who is convicted of a class A-II felony but who agrees to cooperate in a drug investigation. By doing so, if a defendant who pleaded guilty or was otherwise convicted of a class A-II felony was cooperating, or agreed to cooperate, with the authorities in a drug investigation, the court could order bail or recognizance, and thereby enable the defendant to fulfill his or her commitment to cooperate. This would provide such defendants with a meaningful opportunity to benefit from the incentive provided them in section 65.00(1)(b), as well as afford law enforcement a more effective weapon in combating drug crimes.

Proposal

AN ACT to amend the criminal procedure law, in relation to an order of recognizance or bail

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 3 of section 530.40 of the criminal procedure law, as amended by chapter 264 of the laws of 2003, is amended to read as follows:

3. Notwithstanding the provisions of subdivision two, a superior court may not order recognizance or bail, or permit a defendant to remain at liberty pursuant to an existing order, after he or she has been convicted of either: (a) a class A felony or (b) any class B or class C felony defined in article one hundred thirty of the penal law committed or attempted to be committed by a person eighteen years of age or older against a person less than eighteen years of age. In either case the court must commit or remand the defendant to the custody of the sheriff; provided, however, that a superior court may order recognizance or bail, or permit a defendant to remain at liberty pursuant to an existing order, after the defendant has been convicted of a class A-II felony, if the defendant is providing, or has agreed to provide, material assistance pursuant to paragraph (b) of subdivision one of section 65.00 of the penal law.

§2. This act shall take effect immediately.

5. Oral Pre-Trial Motions
(CPL 200.95, 210.43, 210.45, 225.20, 710.60)

The Committee recommends that provisions in the Criminal Procedure Law requiring that pre-trial motions be made in writing be amended to allow for oral pre-trial motions whenever the defendant and the prosecutor consent and the court agrees.

The Criminal Procedure Law now requires that pre-trial motions be made in writing. Although some pre-trial motions, such as speedy trial motions, may in some cases raise complicated factual or legal issues, the vast majority of pre-trial motions consist of routine, straightforward applications that are made in virtually every criminal action that survives the arraignment stage. Many attorneys, in fact, frequently file the same omnibus pre-trial motion, with only a few technical changes, in case after case. The current mandatory writing requirement thus results in a needless waste of paper and burdensome delay in criminal proceedings.

This measure would add a new subdivision 1-a to section 255.20 of the Criminal Procedure Law to allow for oral pre-trial motions if the defendant and the prosecutor consent and the court agrees. Even if initially agreeing that the motion could be made orally, the court would retain the authority to require written papers if they would aid the court in determining the motion. Conforming amendments are made to several other sections of the Criminal Procedure Law that now require that specific types of pre-trial motions be made in writing. See CPL 200.95(5), 210.43(3), 210.45, 710.60. These amendments, though removing language mandating written motions, would not change the current requirements that certain pre-trial motions, when made in writing, be supported by sworn factual allegations. See CPL 210.45, 710.60. Finally, the measure directs the Chief Administrator of the Courts to promulgate an appropriate form that courts must use when an oral pre-trial motion is made, to record the nature of the motion and any decision thereon. This safeguard will ensure that the issues raised in a pre-trial motion will be plainly discernible to the attorneys and courts involved in any appeal of the case.

Oral pre-trial motions are an easier and more efficient procedure for disposing of most pre-trial applications. Rather than require that these motions always be in writing, the law should encourage oral pre-trial motions whenever the parties and the court agree. By doing so, criminal actions will proceed more expeditiously.

Proposal

AN ACT to amend the criminal procedure law, in relation to pre-trial motions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5 of section 200.95 of the criminal procedure law, as added by chapter 558 of the laws of 1982, is amended to read as follows:

5. Court ordered bill of particulars. Where a prosecutor has timely served a written refusal pursuant to subdivision four of this section and upon motion, [made] either oral or in writing, of a defendant, who has made a request for a bill of particulars and whose request has not been complied with in whole or in part, the court must, to the extent a protective order is not warranted, order the prosecutor to comply with the request if it is satisfied that the items of factual information requested are authorized to be included in a bill of particulars, and that such information is necessary to enable the defendant adequately to prepare or conduct his or her defense and, if the request was untimely, a finding of good cause for the delay. Where a prosecutor has not timely served a written refusal pursuant to subdivision four of this section the court must, unless it is satisfied that the people have shown good cause why such an order should not be issued, issue an order requiring the prosecutor to comply or providing for any other order authorized by subdivision one of section 240.70.

§2. Subdivision 3 of section 210.43 of the criminal procedure law, as added by chapter 411 of the laws of 1979, is amended to read as follows:

3. The procedure for bringing on a motion pursuant to subdivision one of this section[,] shall accord with the procedure prescribed in subdivisions one and two of section 210.45 of this article. After the parties have been heard, if the motion is made orally, and after all papers, if any, 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 [on the motion papers submitted] thereon and, if not, may make such inquiry as it

deems necessary for the purpose of making a determination.

§3. Subdivisions 1, 2, 3, 4 and 5 of section 210.45 of the criminal procedure law are amended to read as follows:

1. [A] If 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] of the defendant or [by] of another person or persons. [Such sworn] If the motion is in writing, the allegations must be sworn, and may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence supporting or tending to support the allegations of the [moving papers] motion.

2. [The] If the motion is made in writing, the people may file with the court, and in such case must serve a copy thereof upon the defendant or his or her 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.

3. After the parties have been heard, if the motion is made orally, and after all papers, if any, 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.

4. The court must grant the motion without conducting a hearing if:

(a) The [moving papers allege] motion alleges a ground constituting legal basis for the motion pursuant to subdivision one of section 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.

5. The court may deny the motion without conducting a hearing if:

(a) The [moving papers do] motion does not allege any ground constituting legal basis for the motion pursuant to subdivision one of section 210.20; or

(b) The motion is based upon the existence or occurrence of facts, and the [moving papers do not contain sworn] defendant has not stated allegations supporting all the essential facts; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof.

§4. Subdivisions 1 and 2 of section 255.20 of the criminal procedure law, subdivision 1 as amended by chapter 369 of the laws of 1982 and subdivision 2 as added by chapter 763 of the laws of 1974, are amended to read as follows:

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be made or served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. In an action in which an eavesdropping warrant and application have been furnished pursuant to section 700.70 or a notice of intention to introduce evidence has been served pursuant to section 710.30, such period shall be extended until forty-five days after the last date of such

service. 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 shall commence on the date counsel initially appears on defendant's behalf.

2. All pre-trial motions, whether written with supporting affidavits, affirmations, exhibits and memoranda of law, or oral, whenever practicable, shall be included within the same application or set of motion papers, and shall be raised or made returnable on the same date, unless the defendant shows that it would be prejudicial to the defense were a single judge to consider all the pre-trial motions. Where one motion seeks to provide the basis for making another motion, it shall be deemed impracticable to include both motions in the same set of motion papers or oral application pursuant to this subdivision.

§5. Section 255.20 of the criminal procedure law is amended by adding a new subdivision 1-a to read as follows:

1-a. Upon the consent of the defendant and the prosecutor, and upon the agreement of the court, any pre-trial motion may be made orally. However, the court may at any time thereafter require that such a motion be in writing if the court believes that written papers would assist in determining the motion. The chief administrator of the courts shall promulgate an appropriate form that courts throughout the state shall use when an oral pre-trial motion is made and upon which the court shall record the nature of such motion and the court's decision thereon.

§6. Subdivisions 1, 2, 3 and 5 of section 710.60 of the criminal procedure law, subdivision 3 as amended by chapter 776 of the laws of 1986, are amended to read as follows:

1. A motion to suppress evidence made before trial [must be in writing and upon reasonable notice to the people and with an opportunity to be heard. The motion papers] must

state the ground or grounds of the motion and must contain [sworn] allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. [Such] If the motion is in writing, the allegations must be sworn, and may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. [The] If the motion is in writing, the people may file with the court, and in such case must serve a copy thereof upon the defendant or his or her counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion [papers comply] complies with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion [papers do] does not allege a ground constituting legal basis for the motion; or

(b) The [sworn] allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three or six of section 710.20.

5. A motion to suppress evidence made during trial [may be in writing and may] must be litigated and determined [on the basis of motion papers] as provided in subdivisions one through four [, or it may, instead, be made orally in open court. In the latter event, the]. The court must,

where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.

§7. This act shall take effect 90 days after it shall have become law.

6. Identification by Means of Previous Recognition (CPL 60.27)

The Committee recommends that a new section 60.27 be added to the Criminal Procedure Law to allow, in certain circumscribed situations, a third party to testify to a witness's pre-trial identification of the defendant when the witness is unwilling to identify the defendant in court because of fear.

The general common law rule is that the testimony of a third party, such as a police officer, to recount a witness's prior identification of the defendant is inadmissible. The Criminal Procedure Law currently recognizes an exception to this rule when the witness is unable on the basis of present recollection to identify the defendant in court. See CPL 60.25. That statutory exception does not, however, permit a third party to recount a witness's prior identification when the witness is unwilling to identify the defendant in court because of fear. See People v. Bayron, 66 N.Y.2d 77 (1985).

This measure would allow such testimony, but only if certain conditions were established. First, the witness must have identified the defendant prior to trial under circumstances consistent with the defendant's constitutional rights. Second, the prosecution must prove, by a preponderance of the evidence, that the witness is unwilling to identify the defendant in court because the witness, or a relative of the witness as that term is defined in CPL 530.11, received a threat of physical injury or substantial property damage to himself, herself or another. If these conditions were met, a third party would be permitted to testify to the witness's prior identification of the defendant.

By permitting the admission of such testimony in these circumstances, the measure would frustrate the efforts of those who seek to undermine the judicial process through intimidation and fear. Importantly, general and unsubstantiated fear on the part of the witness would not open the door to the admission of this testimony; only proof of an actual threat would suffice. Accordingly, this measure would promote the truth-seeking function of the trial without jeopardizing the defendant's right to a fair trial.

Proposal

AN ACT to amend the criminal procedure law, in relation to identification by means of previous recognition

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new section 60.27 to read as follows:

§60.27. Rules of evidence; identification by means of previous recognition; witness's unwillingness to make present identification because of threat. 1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given when, at a hearing outside the presence of the jury:

(a) It is established that (i) a witness is unwilling to state at the proceeding whether or not the person claimed by the people to have committed the offense was observed by the witness at the time and place of the commission of the offense or upon some other occasion relevant to the case; and (ii) on an occasion subsequent to the offense, the witness observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person whom the witness recognized as the same person whom the witness had observed on the first or incriminating occasion; and (iii) the defendant is in fact the person whom the witness observed and recognized on the second occasion. That the defendant is the person whom the witness observed and recognized on the second occasion may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion; and

(b) The people prove, by a preponderance of the evidence, that the witness is unwilling to state at the proceeding whether or not the person claimed by the people to have committed the offense was observed by the witness at the time and place of the offense, or upon some other occasion relevant to the offense, because the witness, or a member of the witness's family or household, as defined in section 530.11, received a threat of physical injury or substantial

property damage to himself, herself or another.

2. Under the circumstances prescribed in subdivision one, a person or persons to whom the witness promptly declared his or her recognition of the defendant on the second occasion may testify as to the witness's identification of the defendant on that occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized on the second occasion, constitutes evidence in chief.

§2. This act shall take effect 90 days after it shall have become law.

7. Deferral of Prosecution
(CPL Article 740)

The Committee recommends that a new article 740 be added to the Criminal Procedure Law to permit a superior court, upon application by the defendant and with the consent of the prosecutor, to order that the prosecution of certain felony cases be deferred for a period of up to two years. At the end of the deferral period, if the case has not been restored to the calendar and resumed due to the defendant's violation of a condition of the deferral, the case would be dismissed in the furtherance of justice.

A number of jurisdictions, including California, Florida, Colorado, Arizona and the federal courts, permit deferral of prosecution in certain felony cases. Although the specific procedures under which these jurisdictions defer felony prosecutions may vary, the policies supporting deferral are the same. First, deferred prosecution provides certain defendants, usually those with no prior felony convictions who are charged with a nonviolent felony, with the opportunity to demonstrate that their unlawful behavior was aberrational and should not result in their being permanently tainted as convicted felons. Second, by postponing, and ultimately avoiding in most of the cases, the necessity for a trial and other protracted court proceedings, deferred prosecution enables prosecutorial and judicial resources to concentrate on those cases involving more serious allegations of wrongdoing.

This measure would promote these salutary policies. It would create a new article 740 of the Criminal Procedure Law to permit a superior court, upon application by the defendant and with the consent of the prosecutor, to defer prosecution of a criminal action for a period of time not to exceed two years. Under the proposed section 740.10, deferral would not be permitted if the defendant had a previous felony conviction, previously had a criminal case deferred, or is charged with a violent felony offense, a felony sex offense or a felony weapon offense. However, deferral would be permitted even in the aforesaid cases if the court, upon evaluation of the defendant's character and the nature and circumstances of the crime charged, determined that deferral was appropriate. In addition to the important protection of requiring the prosecutor's consent, the prosecutor may also insist that the defendant plead guilty, or express an acknowledgment of guilt, of one or more of the charges or one or more lesser included offenses of the charges. The measure further requires the defendant to waive the right to a speedy trial during the period of deferral.

The measure would also permit the court to impose any reasonable conditions on the defendant during the period of deferral. If one of the conditions requires supervision of the defendant, the court may order that such supervision be undertaken by a probation agency or by a designated private agency. It is intended that courts would make extensive use of private agencies to supervise defendants whose prosecutions are deferred, so that any additional burdens on already overwhelmed probation agencies would be minimized.

The court would retain full jurisdiction over the case during the period of deferral, and

could order the defendant to appear before it at any time. Under proposed section 740.40, if the court had reasonable grounds to believe that the defendant violated a condition of the deferral, the court could issue a bench warrant directing that the defendant be taken into custody and brought before the court. In determining whether the defendant violated a condition, the court would not be required to conduct a formal hearing but the defendant would be afforded an opportunity to be heard. Upon a determination that the defendant violated a condition, the court would be authorized to terminate the deferral and restore the criminal case to the calendar and resume the prosecution or, if the defendant previously entered a guilty plea, proceed to sentencing. A court's decision to restore a case to the calendar (as well as a court's refusal in the first instance to order deferral) would not be reviewable on appeal.

Under proposed section 740.50, if at the end of the period of deferral the case has not been restored to the calendar, the defendant's plea, if any, shall be deemed to have been vacated and the accusatory instrument shall be deemed to have been dismissed in the furtherance of justice. The sealing provisions of section 160.50 of the CPL would apply to such a dismissal.

If administered pursuant to the strict procedures set forth in this measure, deferral of prosecution, in appropriate cases, could significantly benefit courts, prosecutors and defendants. New York should follow the lead of other comparable jurisdictions and enact a statutory scheme permitting this useful procedure.

Proposal

AN ACT to amend the criminal procedure law, in relation to deferral of prosecution in certain felony cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 4 of section 30.30 of the criminal procedure law is amended by adding a new paragraph (k) to read as follows:

(k) the period during which the prosecution is deferred pursuant to article 740 of this chapter.

§2. Subdivision 3 of section 160.50 of the criminal procedure law is amended by adding a new paragraph (m) to read as follows:

(m) An action is dismissed pursuant to article 740 of this chapter.

§3. The criminal procedure law is amended by adding a new article 740 to read as follows:

ARTICLE 740

DEFERRAL OF PROSECUTION

§740.10. Deferral of prosecution; eligible defendants.

§740.20. Deferral of prosecution; procedure for deferral.

§740.30. Refusal to order deferral or order of court restoring criminal action not reviewable on appeal; court retains legal custody of defendant.

§740.40. Termination of deferral; restoration of criminal action.

§740.50. Dismissal of action; effect thereof; records.

§740.10. Deferral of prosecution; eligible defendants. 1. Upon application by the defendant and with the consent of the prosecutor and the agreement of the court, prosecution of a criminal action may be deferred pursuant to section 740.20 unless the defendant has previously been convicted of a felony, has previously had a prosecution of a criminal action against him or her deferred, or is charged in the present action with (i) a class A felony offense as defined in the penal law, (ii) a violent felony offense as defined in section 70.02 of the penal law, (iii) any felony offense defined in article 130 of the penal law, or (iv) any felony offense defined in article 265 of the penal law.

2. Notwithstanding the provisions of subdivision one of this section, upon application by the defendant and with the consent of the prosecutor, prosecution of a criminal action may be deferred pursuant to section 740.20 regardless of the defendant's prior criminal history or the

crime or crimes with which the defendant is charged if the court, having regard to the nature and circumstances of the crime or crimes charged and to the character of the defendant, is of the opinion that deferral of prosecution is appropriate.

§740.20. Deferral of prosecution; procedure for deferral. 1. After arraignment in a local criminal court upon a felony complaint, or at or after arraignment in a superior court upon an indictment or superior court information, and before final disposition thereof, a superior court, upon application by the defendant and with the consent of the prosecutor, may order that the prosecution of the criminal action be deferred for a specific period of time not to exceed two years.

2. As a condition of the prosecutor's consent, the prosecutor may demand that the defendant enter a plea of guilty, or express an acknowledgment of guilt, to one or more of the offenses charged or to one or more lesser included offenses thereof.

3. At the time the deferral is ordered, the defendant must waive, either orally or in writing, his or her right to a speedy trial of the charges during the period of deferral.

4. Upon ordering the deferral, the court may impose any reasonable conditions upon the defendant during the period of deferral, including but not limited to any of the conditions specified in section 65.10 of the penal law relating to supervision or conduct and rehabilitation in connection with a sentence of probation or conditional discharge. The defendant must receive a written copy of such conditions at the time the deferral is ordered. If the court imposes a condition that requires supervision of the defendant, the court may order that such supervision shall be the responsibility of the probation department serving the court or the responsibility of a designated private agency.

§740.30. Refusal to order deferral or order of court restoring criminal action not reviewable on appeal; court retains legal custody of defendant. 1. A refusal of the court to order deferral of the prosecution of a criminal action or an order of the court pursuant to section 740.40 restoring a criminal action shall not be reviewable on appeal.

2. During the period of deferral, the court shall retain custody of the defendant and may, at any time, order that the defendant appear before it. Failure to appear as ordered without reasonable cause therefor shall constitute a violation of the conditions of the deferral irrespective of whether such requirement is specified as a condition thereof.

§740.40. Termination of deferral; restoration of criminal action. 1. If at any time during the period of deferral the court has reasonable grounds to believe that the defendant has violated a condition of the deferral or has failed to appear before the court after being ordered to do so, the court may issue a bench warrant to a police officer or to an appropriate peace officer directing that the defendant be taken into custody and brought before the court.

2. In determining whether the defendant violated a condition of the deferral, a hearing shall not be required but the defendant shall have an opportunity to be heard. If the court thereafter determines that the defendant has violated a condition of the deferral, the court may terminate the deferral of the prosecution and order that the criminal action against the defendant be restored to the calendar and resumed or, if the defendant has previously entered a plea of guilty, the court may terminate the deferral and fix a date for pronouncing sentence.

§740.50. Dismissal of action; effect thereof; records. If at the end of the period of deferral the criminal action has not been restored to the calendar, the defendant's guilty plea, if any, shall be deemed to have been vacated and the accusatory instrument shall be deemed to have

been dismissed by the court in the furtherance of justice. Upon dismissal of an action, the arrest and prosecution shall be deemed a nullity, and the defendant shall be restored to the status he or she occupied before the arrest and prosecution. All papers and records relating to an action that has been dismissed pursuant to this section shall be subject to the sealing provisions of section 160.50 of this chapter.

§4. This act shall take effect 90 days after it shall have become law.

8. Plea of Guilty to Lesser Included Offense by Terminally Ill Defendant (CPL 220.10)

The Committee recommends that section 220.10(5) of the Criminal Procedure Law be amended to permit a terminally ill defendant to plead guilty, notwithstanding the limitations otherwise specified in that section, to any lesser included offense (or offenses) of the offense (or offenses) charged.

Section 220.10(5) of the Criminal Procedure Law prescribes detailed limitations on the extent to which defendants may plead guilty to lesser included offenses of the charges for which they have been indicted. These limitations, although generally sound in ordinary cases, have had a particularly deleterious impact on court administration in a steadily growing number of cases -- i.e., cases in which the defendants are terminally ill with AIDS. Because of the section 220.10(5) limitations, the least serious offense to which many of these defendants may plead guilty often carries with it a minimum, mandatory prison sentence that is longer than their life expectancy. Thus, without regard to the evidence against them, these defendants virtually always insist on a trial, because they realize that they essentially have nothing to lose by going to trial. The result is that the courts are forced to try a significant number of cases that might otherwise be disposed of prior to trial.

To be sure, the courts could dismiss some of these cases in furtherance of justice. See CPL §210.40. Courts are often reluctant to do so, however, particularly when prosecutors and victims object. The better approach in many cases would be to permit these defendants to plead guilty to an offense that would not require a prison sentence longer than their life expectancy. This measure, by eliminating the section 220.10 plea limitations in cases involving terminally ill defendants, would achieve that result. Importantly, it would require a judicial determination that (1) the terminal illness has so incapacitated the defendant as to create a reasonable probability that he or she is physically incapable of presenting any danger to society, and (2) based on the factors specified in section 210.40 of the CPL, permitting entry of the plea would be in the interest of justice. Moreover, unlike a section 210.40 interest of justice dismissal, the prosecutor's consent would be required.

Proposal

AN ACT to amend the criminal procedure law, in relation to entry of a plea of guilty

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5 of section 220.10 of the criminal procedure law is amended by adding a new paragraph (i) to read as follows:

(i) Notwithstanding the other provisions of this subdivision, the defendant may enter a plea of guilty to one or more lesser included offenses with respect to any or all of the offenses charged, provided that the prosecutor consents and the court agrees after determining that:

(i) the defendant is suffering from a terminal condition, disease or syndrome and, as a result, is, and is likely to remain, so debilitated or incapacitated as to create a reasonable probability that he or she is physically incapable of presenting any danger to society; and

(ii) upon consideration of the factors specified in subdivision one of section 210.40, permitting entry of such a plea of guilty would be in the interest of justice.

§2. This act shall take effect immediately.

9. Amendment of Indictment on Retrial
(CPL 280.20, 310.60, 330.50, 470.55)

The Committee recommends that the Criminal Procedure Law be amended to establish a procedure for amending an indictment, prior to retrial, to charge lesser included offenses of counts that have been disposed of under such circumstances as to preclude defendant's retrial thereof.

In People v. Mayo, 48 N.Y.2d 245 (1979), the defendant was charged with robbery in the first degree. The trial court refused to submit that charge to the jury, submitting instead the lesser included offenses of robbery in the second and third degrees. The jury was unable to reach a verdict on these lesser charges and a mistrial was declared. The defendant then was retried on the original indictment. Although the first degree robbery count was not submitted to the jury at the second trial, the Court of Appeals held that it was improper to retry the defendant on the original indictment. The Court reasoned that since the sole count of the indictment could not be retried because of the prohibition against double jeopardy, nothing remained to support further criminal proceedings under that accusatory instrument. 48 N.Y.2d at 253. Impliedly, this holding also foreclosed amendment of the original indictment to charge the lesser included offenses on which retrial was not prohibited. Accordingly, the practical effect of the Court's holding is to require re-presentation of cases to grand juries. This consumes the time and resources of prosecutors, grand juries and witnesses alike, without any concomitant benefit to the defendant. See People v. Gonzales, 96 A.D.2d 847 (2d Dept. 1983) (Titone, J., dissenting). Cf. People v. Green, 96 N.Y.2d 195 (2001)[holding that a new information was not required to retry defendant for Driving While Impaired where jury acquitted of Driving While Intoxicated but failed to reach verdict on lesser charge of Impaired].

To avoid the wasteful necessity of re-presentation, this measure would amend the Criminal Procedure Law to create a procedure whereby an indictment may be amended prior to retrial to charge lesser included offenses of counts that have been disposed of at the prior trial. Under this procedure, when an offense specified in a count of an indictment was disposed of under circumstances that would constitute a bar to a retrial of that offense but not a retrial of a lesser included offense, the indictment would be deemed to contain a count charging the lesser included offense. Additionally, upon the prosecutor's application, and with notice to the defendant and an opportunity to be heard, the court would be required in this situation to order the amendment of the indictment to delete any count for which retrial would be barred and to reduce any offense charged therein to a lesser included offense. The measure would apply this new procedure to instances in which a mistrial has been declared (CPL 280.10), a jury has been discharged after being unable to agree on a verdict (CPL 310.60), the trial court has set aside a verdict (CPL 330.50) and an appellate court has reversed a conviction and orders a new trial (CPL 470.55).

Proposal

AN ACT to amend the criminal procedure law, in relation to amendment of indictment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 280.20 of the criminal procedure law is amended to read as follows:

§280.20. Motion for mistrial; status of indictment upon new trial. [Upon]

1. Except as provided in subdivision two, upon a new trial resulting from an order declaring a mistrial, the indictment is deemed to contain all the counts which it contained at the time the previous trial was commenced [, regardless of whether any count was thereafter dismissed by the court prior to the mistrial order].

2. Upon a new trial resulting from an order declaring a mistrial, the indictment shall not be deemed to contain any count previously disposed of under circumstances that would constitute a bar to retrial thereof; provided, however, that where an offense specified in a count of an indictment was disposed of under circumstances constituting a bar to a retrial of that offense but not a retrial of a lesser included offense, the indictment shall be deemed to contain a count charging that lesser included offense.

3. The court shall, upon application of the prosecutor and with notice to the defendant and opportunity to be heard, order the amendment of an indictment to effect the deletion of a count or counts, or reduction of an offense charged in a count to a lesser included offense, so that the indictment upon which the new trial is had does not charge an offense disposed of under circumstances that would constitute a bar to retrial thereof.

§2. Subdivision 2 of section 310.60 of the criminal procedure law, as amended by chapter 170 of the laws of 1983, is amended to read as follows:

2. When the jury is so discharged, the defendant or defendants may be retried upon the indictment. [Upon] Except as provided in subdivision three, upon such retrial [,] the indictment is deemed to contain all counts which it contained [, except those which were dismissed or were deemed to have resulted in an acquittal pursuant to subdivision one of section 290.10].

§3. Section 310.60 of the criminal procedure law is amended by adding two new subdivisions 3 and 4 to read as follows:

3. Upon a retrial following discharge of the jury, the indictment shall not be deemed to contain any count previously disposed of under circumstances that would constitute a bar to retrial thereof; provided, however, that where an offense specified in a count of an indictment was disposed of under circumstances that would constitute a bar to a retrial of that offense but not a bar to retrial of a lesser included offense, the indictment shall be deemed to contain a count charging that lesser included offense.

4. The court shall, upon application of the prosecutor and with notice to the defendant and opportunity to be heard, order the amendment of an indictment to effect the deletion of a count or counts, or reduction of an offense charged in a count to a lesser included offense, so that the indictment upon which the new trial is had does not charge an offense disposed of under circumstances that would constitute a bar to retrial thereof.

§4. Subdivision 4 of section 330.50 of the criminal procedure law is amended to read as follows:

4. [Upon] Except as provided in subdivision five, upon a new trial resulting from an

order setting aside a verdict, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced[, regardless of whether any count was dismissed by the court in the course of such trial, except those upon or of which the defendant was acquitted or is deemed to have been acquitted].

§5. Section 330.50 of the criminal procedure law is amended by adding a new subdivision 5 to read as follows:

5. Upon a new trial resulting from an order setting aside a verdict, the indictment shall not be deemed to contain any count previously disposed of under circumstances that would constitute a bar to retrial thereon; provided, however, that where an offense specified in a count of an indictment was disposed of under circumstances constituting a bar to a retrial of that offense but not a retrial of a lesser included offense, the indictment shall be deemed to contain a count charging that lesser included offense. The court shall, upon application of the prosecutor and with notice to the defendant and opportunity to be heard, order the amendment of an indictment to effect the deletion of a count or counts, or reduction of an offense charged in a count to a lesser included offense, so that the indictment upon which the new trial is had does not charge an offense disposed of under circumstances that would constitute a bar to retrial thereof.

§6. Subdivision 1 of section 470.55 of the criminal procedure law is amended to read as follows:

1. [Upon] Except as provided in subdivision two, upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced[, regardless of

whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal or upon some other post-judgment order].

§7. Subdivision 2 of section 470.55 of the criminal procedure law is renumbered subdivision 4 and two new subdivisions 2 and 3 are added to read as follows:

2. Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument shall not be deemed to contain any count dismissed upon appeal or some other post-judgment order or any count previously disposed of under circumstances that would constitute a bar to retrial thereof; provided, however, that where an offense specified in a count of an indictment was disposed of under circumstances constituting a bar to a retrial of that offense but not a retrial of a lesser included offense, the indictment shall be deemed to contain a count charging that lesser included offense.

3. The trial court shall, upon application of the prosecutor and with notice to the defendant and opportunity to be heard, order the amendment of an indictment to effect the deletion of a count or counts, or reduction of an offense charged in a count to a lesser included offense, so that the indictment upon which the new trial is had does not charge an offense disposed of under circumstances that would constitute a bar to retrial thereof.

§8. This act shall take effect immediately.

10. Stay of Execution of Judgment or Sentence Pending Appeal to the Court of Appeals (CPL 460.50, 460.60)

The Committee recommends that section 460.60 of the Criminal Procedure Law be amended to permit a judge who has received an application for leave to appeal to the Court of Appeals to issue an order staying execution of the judgment or sentence being appealed regardless of the nature of the sentence that was imposed.

Section 460.60 of the Criminal Procedure Law provides that a stay may be issued on an application for leave to appeal to the Court of Appeals from "an order of an intermediate appellate court affirming or modifying a judgment including a sentence of imprisonment, a sentence of imprisonment, or an order appealed pursuant to section 450.15." CPL 460.60(1)(a). Read literally, the statute would seem to prohibit a stay when the penalty imposed is limited to a fine, probation or some other sanction not involving a term of imprisonment. The Court of Appeals requested that the Committee examine the statute and consider proposing legislation to clarify this issue.

This measure unequivocally resolves the question by amending section 460.60(1)(a) to permit a stay regardless of the type of sentence that was imposed in the case. Notably, this would conform the procedure for seeking a stay when a case is being appealed to the Court of Appeals to that when a case is being appealed to an intermediate appellate court. In the latter situation, CPL 460.50(1) was amended a number of years ago to allow for a stay on an appeal to an intermediate appellate court in any case, not just in a case in which a term of imprisonment was imposed. See L. 1971, c. 884. In the Committee's view, no logical reason supports a more restrictive stay procedure for appeals to the Court of Appeals.

The measure also amends CPL 460.50(1) to make its language more consistent with the 1971 amendment of that section, which, as noted, was intended to permit a stay on an appeal to an intermediate appellate court regardless of the nature of the sentence that was imposed.

Proposal

AN ACT to amend the criminal procedure law, in relation to staying execution of judgment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 460.50 of the criminal procedure law, as amended by

chapter 884 of the laws of 1971, is amended to read as follows:

1. Upon application of a defendant who has taken an appeal to an intermediate appellate court from a judgment or from a sentence of a criminal court, a judge designated in subdivision two may issue an order [both] (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his or her own recognizance or fixing bail pursuant to the provisions of article five hundred thirty. That phase of the order staying or suspending execution of the judgment does not become effective, with respect to a defendant in custody, unless and until the defendant is released, either on his or her own recognizance or upon the posting of bail.

§2. Paragraph (a) of subdivision 1 of section 460.60 of the criminal procedure law, as amended by chapter 168 of the laws of 1981, is amended to read as follows:

(a) A judge who, pursuant to section 460.20 of this chapter, has received an application for a certificate granting a defendant leave to appeal to the court of appeals from an order of an intermediate appellate court affirming or modifying a judgment [including a sentence of imprisonment], a sentence [of imprisonment], or an order appealed pursuant to section 450.15 of this chapter, of a criminal court, may, upon application of such defendant-appellant issue an order [both] (i) staying or suspending the execution of the judgment pending the determination of the application for leave to appeal, and, if that application is granted, staying or suspending the execution of the judgment pending the determination of the appeal, and (ii) either releasing the defendant on his or her own recognizance or continuing bail as previously determined or fixing bail pursuant to the provisions of article five hundred thirty. Such an order is effective immediately and that phase of the order staying or suspending execution of the judgment does

not become effective, with respect to a defendant in custody, unless and until the defendant is released, either on his or her own recognizance or upon the posting of bail.

§3. This act shall take effect immediately.

11. Amendment of Indictment to Add Offense Omitted Because of Clerical Error (CPL 200.70)

The Committee recommends that section 200.70 of the Criminal Procedure Law be amended to authorize a trial court, upon a timely application by the People, to order the amendment of an indictment to add an offense that was omitted from the indictment because of a clerical error.

In People v. Perez, 83 N.Y.2d 269 (1994), the Court of Appeals held that a trial court lacks authority under section 200.70 of the CPL to amend an indictment by adding a new count that had been properly voted by the grand jury but left out of the indictment as a result of a clerical error. The Court, however, emphasized that its holding was based solely on the express language of the statute, and it went on to remark (Id., at 276):

> The People note the waste of prosecutorial resources that will result from requiring a superseding indictment to bring a count which the records indicate the Grand Jury clearly intended. They also point to the added inconvenience to witnesses if the Grand Jury has disbanded and re-presentment is necessary. The obvious merit to those policy considerations must be addressed by the Legislature, however, not the courts. [citation omitted]

The Committee agrees that, when the People are able to establish at a timely stage in the proceedings that an offense that the grand jury voted was inadvertently omitted from the indictment, resources are wasted and needless delay in the proceedings results if the trial court is powerless to order an amendment of the indictment. Accordingly, this measure adds a new subdivision three to section 200.70 to authorize a court, upon the People's application with notice to the defendant and an opportunity to be heard, to order amendment of the indictment to add an inadvertently omitted offense. The court would be authorized to do so, however, only if: (1) the People applied for such an order before serving a bill of particulars or responding to the defendant's omnibus motion, or in cases in which the defendant does not request a bill of particulars or serve an omnibus motion, within 60 days of commencement of trial; and (2) the court concluded that the grand jury minutes or any other relevant records established that the grand jury actually voted to indict for the inadvertently omitted offense.

The measure also provides that the People, when making such an application, must release to the defendant the portions of the grand jury minutes and other relevant records that they contend establish that the grand jury voted to indict for the omitted offense. And when ordering amendment of the indictment to add the omitted offense, the court must grant the defendant a reasonable adjournment and permit the defendant to request a bill of particulars and make any relevant pretrial motion with respect to the newly-added count.

Proposal

AN ACT to amend the criminal procedure law, in relation to amendment of indictment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 200.70 of the criminal procedure law, as amended by chapter 467 of the laws of 1974, is amended to read as follows:

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, except as provided in subdivision three, may an indictment or a 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.

§2. Section 200.70 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3. (a) Upon application by the people with notice to the defendant and opportunity to be heard, the court may order the amendment of an indictment to charge or state an offense that was inadvertently omitted from the indictment.

(b) The court may order such amendment only if (i) the people apply for such order before serving a bill of particulars pursuant to section 200.95 or a response to the defendant's

pretrial motion pursuant to section 255.20, or, if the defendant has not requested a bill of particulars or served a pretrial motion, no later than sixty days before the commencement of trial, and (ii) the court determines that the record of the grand jury proceedings or any other existing relevant records establish that the grand jury voted to indict for the omitted offense.

(c) Upon making such application, the people must release to the defendant those portions of the record of the grand jury proceedings and any other existing relevant records establishing that the grand jury voted to indict for the omitted offense.

(d) Upon ordering such an amendment, the court must (i) upon application of the defendant, order any adjournment of the proceedings which may, by reason of such amendment, be necessary to afford the defendant adequate opportunity to prepare a defense, and (ii) permit the defendant to request a bill of particulars and make any relevant pretrial motion with respect to the new offense.

§3. This act shall take effect immediately.

12. Admissibility of Evidence of Person's Prior Violent Conduct (CPL 60.41)

The Committee recommends that a new section 60.41 be added to the Criminal Procedure Law providing a trial court with discretion, in certain circumstances, to permit the admission of evidence of a person's violent conduct.

In People v. Miller, 39 N.Y.2d 543 (1976), the Court of Appeals held that in a criminal trial in which the defendant asserts a defense of justification, evidence of the victim's prior acts of violence are not admissible unless the defendant had knowledge of those acts. This rule, which leaves New York among a dwindling minority of jurisdictions on this question, has been widely criticized, most recently in an opinion by a judge of the United States Court of Appeals for the Second Circuit. See Williams v. Lord, 996 F.2d 1481 (2d Cir. 1993)(Cardamone, J., concurring). In questioning the soundness of the New York rule, that opinion recognizes that the truth of the allegations against a criminal defendant is more likely to emerge when all relevant evidence is admissible, leaving the weight of such evidence to be determined by the trier of fact. Id. at 1485 (Cardamone, J., concurring).

The Committee believes that justice is not fully served in many cases if evidence of a victim's prior violent conduct, which may be extremely relevant in determining the victim's behavior at the time of the alleged crime and thus may support a defendant's claim of self-defense, is admissible only if the defendant had knowledge of such conduct at that time. Accordingly, this measure affords trial courts the discretion to allow such evidence, but only if the defendant first establishes that the person engaged in such conduct and the court determines that the evidence is material and relevant to the defendant's justification defense. In making that determination, however, the court must take into consideration the defendant's own history of violent conduct, if any.

This measure will bring New York in line with most other jurisdictions around the country by allowing the trier of fact, in appropriate cases, to consider a victim's own violent past when evaluating the validity of a defendant's claim of self-defense.

Proposal

AN ACT to amend the criminal procedure law, in relation to evidence of person's prior violent conduct

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new section 60.41 to read as follows:

§60.41. Rules of evidence; admissibility of evidence of person's violent conduct. In any criminal proceeding in which the defendant raises a defense of justification, evidence of a person's prior violent conduct, of which the defendant was unaware at the time of the alleged offense, is admissible in the court's discretion and in the interests of justice if (a) the defendant establishes that the person engaged in such conduct, and (b) such evidence is material and relevant to the defense of justification. In determining whether the evidence is material and relevant, the court shall consider any prior violent conduct on the part of the defendant.

§2. This act shall take effect immediately.

13. Reduction of Peremptory Challenges
(CPL 270.25)

The Committee recommends that section 270.25 of the Criminal Procedure Law be amended to reduce the number of peremptory challenges allotted to a single defendant from 20 to 15 for regular jurors if the highest crime charged is a Class A felony, from 15 to 10 for regular jurors if the highest crime charged is a Class B or C felony, and from 10 to 7 for regular jurors in all other superior court cases. In addition, the number of peremptory challenges allotted for alternate jurors in all superior court cases would be reduced from two to one. In "extraordinary" circumstances, the court could increase the number of peremptory challenges allotted. And when two or more defendants are tried together, the number of peremptory challenges allotted to the defendants would be increased by a number equaling one less than the number of the defendants being tried.

After conducting an intensive study of the jury system in New York, the Chief Judge's Jury Project recommended, among other things, the reduction of the number of peremptory challenges to the levels proposed in this measure as a means of improving the efficiency of our jury selection system. The Jury Project based its recommendation on the following specific findings:

- The CPL currently provides for among the highest number of peremptory challenges in the nation.
- The availability of such a large number of peremptory challenges can foster the systematic exclusion of particular groups from jury service in a given trial.
- Excessive peremptory challenges extend the time necessary to conduct jury selection, thereby delaying trials and congesting court calendars.
- Excessive peremptory challenges require an inordinate number of prospective jurors and thereby increase the burden on New York's already overburdened jury pool.

The Committee agrees with these findings and recommends this measure as an effective method of significantly reducing delays in the conduct of criminal jury trials, without diminishing the fairness of the trial. This measure would permit the court, in "extraordinary" circumstances, to increase the number of allotted peremptory challenges. The Committee believes this authority is necessary to protect the rights of the parties in exceptional cases.

Proposal

AN ACT to amend the criminal procedure law, in relation to the number of peremptory challenges

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 2 and 3 of section 270.25 of the criminal procedure law are amended to read as follows:

2. [Each] When one defendant is tried, each party must be allowed the following number of peremptory challenges:

(a) [Twenty] Fifteen for the regular jurors if the highest crime charged is a class A felony, and [two] one for each alternate juror to be selected.

(b) [Fifteen] Ten for the regular jurors if the highest crime charged is a class B or class C felony, and [two] one for each alternate juror to be selected.

(c) [Ten] Seven for the regular jurors in all other cases, and [two] one for each alternate juror to be selected.

In extraordinary circumstances, the court may allow a party a greater number of peremptory challenges than is prescribed herein.

3. When two or more defendants are tried jointly, the number of peremptory challenges prescribed in subdivision two is not multiplied by the number of defendants, but such defendants are to be treated as a single party, except that the number of peremptory challenges allowed the defendants shall be increased by a number equaling one less than the number of such defendants. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed.

§3. This act shall take effect 90 days after it shall have become a law and shall be applicable only to trials commencing on or after such effective date.

14. Exclusion of Period of Escape in Calculating Time Period for Determining Predicate Felony Status (PL 70.04, 70.06)

The Penal Law currently provides that a defendant's prior felony conviction qualifies as a predicate felony conviction for sentencing purposes if the defendant was sentenced for the prior felony not more than ten years before committing the instant felony. It also provides that this ten-year limitation period is tolled by any period of time during which the defendant was incarcerated between the time of commission of the prior felony and the time of commission of the instant felony. The Committee recommends that these provisions -- sections 70.04(1)(b)(v) and 70.06(1)(b)(v) of the Penal Law -- be amended to provide that the ten-year period may be tolled by up to five additional years for any period of time during which the defendant was at-large following an escape from incarceration. The Committee also recommends that, whether there has been an escape or not, under no circumstances may the ten-year period be tolled by more than ten years.

In People v. Tatta, 196 A.D.2d 328 (2d Dept. 1994), the court was faced with the question of whether a defendant's escape from custody serves to toll the ten-year limitation period for determining a defendant's status as a predicate felony offender. In strictly construing the applicable statute, (PL §70.06(1)(b)(v)), which allows for tolling only for the "time served" under incarceration, the court held that the period in which the defendant was at-large by virtue of his escape could not be used to toll the limitations period. This was so even though the court characterized as "specious" the defendant's argument that the time he spent as an escapee should not be used to toll the limitations period because he had led a "law-abiding" life when he was at large. Id. at 331.

The Committee believes that this result, although based on a technically correct reading of the statute, is irrational and serves to benefit those defendants who flout governmental authority by escaping from correctional institutions. Indeed, in some instances, such a policy could even encourage some to attempt to escape from incarceration. Accordingly, this measure requires that an escape from custody toll the ten-year limitations period, although as a matter of fairness the limitations period could not be tolled by more than an additional five years. In addition, also as a matter of fairness, the measure generally creates a maximum tolling period of ten years. As a result, particularly old convictions -- those dating back more than 20 years before commission of the instant felony -- would not qualify as predicate convictions.

Proposal

AN ACT to amend the penal law, in relation to determining whether a prior conviction is a predicate felony conviction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (v) of paragraph (b) of subdivision 1 of section 70.04 of the penal law, as added by chapter 481 of the laws of 1978, is amended to read as follows:

(v) In calculating the [ten year] ten-year period under subparagraph (iv), any period of time during which the person [who] was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, and any period of time not exceeding five years during which the person was at-large following an escape from custody arising from such incarceration, shall be excluded and such [ten year] ten-year period shall be extended by a period or periods equal to the time served under such incarceration and any time not exceeding five years during which the person was at-large following such escape. Provided, however, that under no circumstances may the ten-year period be extended by a period exceeding ten years;

§2. Subparagraph (v) of paragraph (b) of subdivision 1 of section 70.06 of the penal law, as added by chapter 277 of the laws of 1973, is amended to read as follows:

(v) In calculating the [ten year] ten-year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, and any period of time not exceeding five years during which the person was at-large following an escape from custody arising from such incarceration, shall be excluded and such [ten year] ten-year period shall be extended by a period or periods equal to the time served under such incarceration and any time not exceeding five years during which the person was at-large following such escape. Provided,

however, that under no circumstances may the ten-year period be extended by a period exceeding ten years;

§3. This act shall take effect immediately.

15. Speedy Trial Reform
(CPL 30.30)

The Committee recommends a number of amendments to the speedy trial statute and other provisions of the CPL to accord criminal courts greater authority to fix and enforce expeditious schedules for hearings and trials, and to minimize opportunities for delay by requiring earlier disclosure of Rosario material.

Section 30.30 of the CPL, enacted by the Legislature in 1972, requires the prosecution to be ready for trial within six months of commencement of a felony action, within 90 days of commencement of a criminal action when the highest offense charged is a misdemeanor punishable by a prison sentence of more than three months, within 60 days when the highest offense charged is a misdemeanor punishable by a prison sentence of not more than three months, and within 30 days when the highest offense charged is a violation. CPL §30.30(1). Various periods of time may be excluded in computing these periods. CPL §30.30(4).

Most would agree that section 30.30 has been largely unsuccessful in moving criminal cases to trial in expeditious fashion. This is particularly so in New York City, where in recent years the average disposition time of a criminal case in the Criminal Court has increased considerably. Although in good part these protracted periods are due to the huge caseloads borne by judges, the problem is more than just a lack of sufficient judicial resources. It also involves the willingness of all sides to go to trial. Section 30.30 is not actually a speedy trial rule; it is merely a prosecutor-ready rule, doing nothing to promote the defense's readiness for trial or to require the trial court's active involvement in bringing cases to trial. With no other compulsion to hold hearings and trials promptly, a "culture of unreadiness" has evolved in some jurisdictions around the State, particularly in New York City. In this culture, dates set for hearings and trials are not taken seriously by the parties or even by the trial judge. The result is that the parties frequently are not prepared to proceed on those dates, and that successive adjournments are routinely granted.

In an effort to change this culture and actively to involve trial judges in promoting the parties' readiness for trial, the Advisory Committee has developed a coordinated proposal consisting of legislation and administrative rules. The major provisions of the proposed legislation are as follows:

1. Amendment of section 30.20 of the CPL to authorize the Chief Administrator of the Courts to promulgate rules promoting speedy trials. These rules would include:

- A requirement that trial courts conduct pretrial conferences at which fixed dates would be scheduled for commencement of trial and any pretrial suppression hearing.

- Grounds upon which trial courts could adjourn fixed trial or hearing dates.

- Sanctions that trial courts may lawfully impose if an attorney is not ready to proceed on a date scheduled for commencement of trial or hearing or fails to produce a substitute attorney ready to proceed on that date.

- To avoid gamesmanship, a requirement that parties submit, at each court appearance following determination of pretrial motions, written statements declaring whether they are ready to proceed to trial at that time.

2. Amendment of section 30.20 of the CPL to authorize trial courts, pursuant to rules promulgated by the Chief Administrator, to direct the prosecution to disclose Rosario material to the defense within a reasonable period of time before commencement of a trial or of a pretrial hearing. Current law requires that disclosure be made at the proceeding itself.

3. Amendment of section 30.30(4)(g) of the CPL to provide that, unless the defendant objects and states his or her readiness to proceed to trial, any period of time resulting from adjournment of the proceedings granted at the prosecution's request after the prosecution has announced that it is ready to proceed to trial not be charged to the prosecution in calculating speedy trial time.

4. Amendment of section 255.20(1) of the CPL to provide that the prosecution must respond to the defendant's pretrial omnibus motion within 15 days (unless reasonable grounds exist for an extension). Current law specifies no time period for the prosecution's response.

The major provisions of the administrative rules proposed to complement enactment of this measure are as follows:

1. Following determination of the defendant's omnibus motion, the trial court must schedule a pretrial conference at which the court, in consultation with the parties, must set a date for commencement of the trial or of any pretrial hearing that has been ordered but not yet held.

2. Within seven days of the date fixed for commencement of trial, the court must conduct a second pretrial conference, at which the court shall resolve evidentiary matters, such as a Sandoval application, and the prosecution shall provide copies of trial exhibits and disclose Rosario material. In addition, at this second conference the court must confirm the attorneys' availability on the date fixed for commencement of the trial or hearing and entertain any applications for adjournment.

3. Applications for adjournment may be granted only for the following reasons:

- A defendant in custody has not been produced (in which case adjournment may not exceed 72 hours).

- The defendant has absconded.

- A material witness or material evidence is unavailable despite the exercise of due diligence by the offering party, and reasonable grounds exist that the witness or evidence soon will be available.

- Some other unforeseeable circumstance has arisen that the court determines warrants an adjournment.

4. If an adjournment has not been granted and an attorney does not appear ready to proceed on the date set for commencement of trial or hearing (or produce a substitute attorney who is ready to proceed), the court may impose any sanction the law now permits. These include, but are not limited to: ordering the trial or hearing to proceed as scheduled, imposing financial sanctions consistent with the Chief Administrator's rules, ordering defendant's release from custody, and granting a motion to suppress.

5. If the parties are ready to proceed on the scheduled date but the court is not, the appropriate administrative judge must attempt to find another judge to try the case. If none is available, the trial court, in consultation with the parties, must fix a new date. Any conflicts that arise when two judges have scheduled an attorney to proceed with a trial or hearing on the same date must be resolved in accordance with Part 125 of the Rules of the Chief Administrator (see 22 NYCRR Part 125).

The foregoing rules, a draft copy of which is included herein, would require approval of the Administrative Board of the Courts before becoming effective.

Proposal

AN ACT to amend the criminal procedure law, in relation to speedy trial

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 30.20 of the criminal procedure law is amended by adding two new subdivisions 3 and 4 to read as follows:

3. The chief administrator of the courts shall promulgate rules that promote the defendant's right to a speedy trial and the public's interest in speedy trials. Such rules shall require that trial courts conduct pretrial conferences at which, in consultation with the parties,

fixed dates are scheduled for commencement of the trial and any pretrial hearing ordered pursuant to article 710 of this chapter, and may specify the grounds for adjournment of such dates. Such rules also shall require that the parties, at each court appearance following the determination of any pretrial motions made pursuant to section 255.20 of this chapter, submit written statements declaring whether they are ready to proceed to trial. The form of the written statement shall be determined by the chief administrator. Such rules also shall set forth the sanctions available by law that trial courts may impose if an attorney is not ready to proceed on a date scheduled for the commencement of trial or a pretrial hearing or fails to produce a substitute attorney who is ready to proceed on that date.

4. Notwithstanding any other provision of law, and pursuant to rules that the chief administrator of the courts may promulgate, the trial court, subject to a protective order, may order that the prosecution make available to the defendant within a reasonable period of time before the commencement of trial or a pretrial hearing any prior written or recorded witness statements that the prosecution is required to disclose pursuant to section 240.44 or 240.45, as the case may be.

§2. Paragraph (g) of subdivision 4 of section 30.30 of the criminal procedure law, as added by chapter 184 of the laws of 1972, is amended to read as follows:

(g) other periods of delay occasioned by exceptional circumstances, including but not limited to, the period of 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 and additional time is justified by the exceptional circumstances of the case. In the absence of such exceptional circumstances, any other period of delay resulting from a continuance granted at the request of the district attorney, after the district attorney has announced that the people are ready for trial, also shall be excluded, unless the defendant has objected to the continuance and declared his or her readiness to proceed to trial.

§3. Subdivision 1 of section 255.20 of the criminal procedure law, as amended by chapter 369 of the laws of 1982, is amended to read as follows:

1. Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pretrial motions shall be served [or] and filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment. In an action in which an eavesdropping warrant and application have been furnished pursuant to section 700.70 or a notice of intention to introduce evidence has been served pursuant to section 710.30, such period shall be extended until forty-five days after the last date of such service. 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 shall commence on the date counsel initially appears on defendant's behalf. Any response by the prosecution to a pretrial motion shall be served and filed within fifteen days of service of the motion, although for reasonable grounds shown the court may extend such period.

§4. This act shall take effect 90 days after it shall have become law.

I. A proposed new Section 200.9-a of the Uniform Rules for New York State Trial Courts

§200.9-a Pretrial Conferences and Scheduling of Trials and Pretrial Hearings

(a) Following the determination of any pretrial motions pursuant to Article 255 of the Criminal Procedure Law, the court shall conduct a pretrial conference. At the conference, the court, in consultation with the parties, shall fix a date for commencement of trial if such a date has not previously been fixed. If the court has not already conducted a pretrial hearing ordered pursuant to Article 710 of the Criminal Procedure Law, the court, in consultation with the parties, also shall fix a date for commencement of such hearing. The court also shall fix a date for a second pretrial conference, which shall be held within seven days of the date fixed for commencement of trial.

(b) At the second pretrial conference:

(1) the court shall determine, to the extent practicable, all preliminary evidentiary matters, including, but not limited to, applications relating to the admissibility of the defendant's prior convictions or alleged prior uncharged criminal, vicious or immoral acts;

(2) subject to a protective order, the prosecutor shall provide marked copies of all trial exhibits and disclose any prior statements of witnesses that must be disclosed in accordance with CPL § 240.45; and

(3) the court shall confirm the attorneys' availability on the date fixed for commencement of trial or a pretrial hearing, or entertain an application for adjournment under subdivision (c) of this section.

(c) The court may grant an application for adjournment of the date scheduled for commencement of trial or a pretrial hearing only if (1) the sheriff fails to produce in court a

defendant in custody, except that the court may adjourn such date for a period not exceeding seventy-two hours, (2) a defendant who has escaped from custody or previously has been released on bail or on his or her own recognizance does not appear in court when required, (3) a material witness or material evidence is unavailable despite the offering party's exercise of due diligence to secure such witness or evidence and reasonable grounds exist to believe that the witness or evidence will become available in a reasonable period, or (4) some other unforeseeable circumstance has arisen that the court determines warrants an adjournment.

(d) On the date scheduled for commencement of trial or a pretrial hearing, the prosecutor and the defense counsel must appear and be ready to proceed, or produce a substitute attorney who is ready to proceed. Upon the failure of the prosecutor or defense counsel to so appear or produce a substitute attorney, the court, to the extent consistent with the defendant's right to effective assistance of counsel, may order that the trial or hearing proceed as scheduled, impose financial sanctions against an attorney pursuant to Subpart 130-2 of these rules, order the defendant's release from custody, grant the defendant's motion to suppress, or impose any other sanction permitted by law that is appropriate under the circumstances.

(e) If the court is not available to adjudicate the trial or pretrial hearing on the scheduled date, the appropriate administrative judge shall designate another judge to adjudicate the trial or hearing. If none is available, the court, in consultation with the parties, shall fix a new date for commencement of the trial or hearing. Any conflicts that arise when two different courts have scheduled an attorney to proceed with a trial or pretrial hearing on the same date shall be resolved in accordance with Part 125 of these rules.

II. A proposed new Section 200.9-b of the Uniform Rules for New York State Trial Courts

§200.9-b Written Statements of Readiness to Proceed to Trial

Following the determination of any pretrial motions pursuant to section 255.20 of the Criminal Procedure Law, the parties shall submit to the court at each court appearance a written statement stating whether they are ready to proceed to trial on that date. Such statement shall be in a form prescribed by the Chief Administrator of the Courts.

16. Bench Warrant Issued by the New York City Criminal Court (CPL 530.70)

The Committee recommends that a new subdivision seven be added to section 530.70 of the Criminal Procedure Law providing that a bench warrant issued by the New York City Criminal Court, in a case in which the defendant is held for the action of the grand jury or in which the Criminal Court is divested of jurisdiction by the filing of an indictment in the Supreme Court, shall remain effective in most cases until the Supreme Court issues its own bench warrant.

Under current practice, a bench warrant issued by a local criminal court becomes void when the court loses jurisdiction of the case -- that is, when the court orders that the defendant be held for the action of the grand jury or when the defendant is indicted by the grand jury, whichever is earlier. See generally People v. Brancoccio, 83 N.Y.2d 638 (1994); see also CPL §180.30(1). By contrast, a local criminal court's bail order remains valid after indictment, and bail posted pursuant to such an order may be forfeited by the superior court if the defendant fails to appear for arraignment on the indictment. See CPL §210.10(2). This termination of the validity of the local criminal court bench warrant presents a problem because the superior court generally is not able to issue its own bench warrant until an indictment is filed in that court and the defendant is arraigned thereon, which in many instances does not occur for a considerable period of time after the local criminal court has lost jurisdiction of the case. Thus, until the superior court has an opportunity to issue its own warrant, the police are unable to take into custody and return to court a defendant who has failed to appear in court when required to do so.

This measure is an attempt to fill this gap. It provides that a bench warrant issued by the New York City Criminal Court remains effective, in a case in which the Criminal Court ordered the defendant held for grand jury action or in which the Court was divested of jurisdiction by the filing of an indictment in the Supreme Court, until the Supreme Court issues its own bench warrant.* This provision would not apply, of course, if the Criminal Court's warrant is executed, the defendant surrenders himself or herself prior to the Supreme Court issuing its own bench warrant, or the grand jury dismisses the charges. The measure further provides that if the defendant is returned to the Criminal Court on the warrant after the Court has lost jurisdiction of the case, the court must (1) direct the executing officer to bring the defendant without unnecessary delay to the Supreme Court; or (2) if the Supreme Court is not available, commit the defendant to the custody of New York City Department of Correction, which must detain the defendant until no later than the next business day that the Supreme Court is in session. The measure makes clear that the Criminal Court shall have no other jurisdiction over the case.

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*The measure applies only to bench warrants issued by the New York City Criminal Court, and not to all local criminal courts in the State. That is because institution of the procedure proposed would create practical problems in other, smaller jurisdictions in the State where local criminal courts are not always aware that a grand jury has indicted a defendant in a case that originally was commenced in their court.

Proposal

AN ACT to amend the criminal procedure law, in relation to a bench warrant issued by the New York city criminal court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 530.70 of the criminal procedure law is amended by adding a new subdivision 7 to read as follows:

7. Notwithstanding any other provision of law, a bench warrant issued by the New York city criminal court, in a criminal action in which the defendant was held for the action of the grand jury or in which such court was divested of jurisdiction by the filing of an indictment in the supreme court, shall remain in effect until the supreme court in which the criminal action is pending issues its own bench warrant, unless the warrant is executed or the defendant surrenders himself or herself prior to the supreme court issuing its own warrant or unless the grand jury dismisses the charge or charges before it. If, after the New York city criminal court holds the defendant for the action of the grand jury or after such court is divested of jurisdiction, the defendant is returned to such court on the bench warrant, the court shall direct the executing officer to bring the defendant without unnecessary delay to the supreme court in which the action is pending. If such supreme court is not available at that time, the New York city criminal court shall commit the defendant to the custody of the commissioner of the New York city department of correction, who shall detain the defendant until not later than the next session of the supreme court occurring on the next business day. The New York city criminal court shall have no other jurisdiction of the offense or offenses charged.

§2. This act shall take effect 90 days after it shall have become law.

17. Period of Time Within Which Prosecution Must be Ready for Trial on a Misdemeanor Indictment (CPL 30.30(5))

The Committee recommends that paragraphs (c) and (d) of section 30.30(5) of the Criminal Procedure Law be amended to provide that, when a criminal action is commenced by the filing of a felony complaint that is replaced by an indictment in which the highest offense charged is a misdemeanor, the period of time within which the prosecution must be ready for trial is the statutory period applicable to misdemeanor offenses, not the six-month period applicable to felony offenses.

In People v. Tychanski, 78 N.Y.2d 909 (1991), the Court of Appeals construed section 30.30 of the CPL as providing that when a felony complaint is replaced by an indictment in which the highest offense charged is only a misdemeanor, the applicable period in which the prosecution must be ready for trial is six months, not the shorter periods normally applicable to misdemeanor charges. See CPL §30.30(1)(b) [90-day period applicable when highest offense charged is a Class A misdemeanor]; CPL §30.30(5)(1)(c) [60-day period applicable when highest offense charged is a Class B misdemeanor]. Although the Committee is in accord with this construction of the statute, the Committee has concluded that the Legislature, in drafting section 30.30, inadvertently omitted misdemeanor indictments from the list of accusatory instruments that trigger the shorter speedy trial periods when a felony complaint is replaced with or converted to a nonfelony accusatory instrument. This measure, accordingly, expressly adds misdemeanor indictments to that list. In so doing, the measure will better ensure that misdemeanor indictments, although relatively rare accusatory instruments, will be prosecuted in a more appropriately expeditious fashion.

Proposal

AN ACT to amend the criminal procedure law, in relation to the period of time within which the people must be ready for trial

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (c) and (d) of subdivision 5 of section 30.30 of the criminal procedure law, as added by chapter 184 of the laws of 1972, are amended to read as follows:

(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 pursuant to article 180 [or], a prosecutor's information is filed pursuant to section 190.70, or an indictment is filed pursuant to section 190.65 in which the highest offense charged is a misdemeanor, the period applicable for the purposes of subdivision one must be 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, excluding the periods provided in subdivision four, already elapsed from the date of 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 pursuant to article 180 [or], a prosecutor's information is filed pursuant to section 190.70, or an indictment is filed pursuant to section 190.65 in which the highest offense charged is a misdemeanor, the period applicable for the purposes of subdivision two must be 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, excluding the periods provided in subdivision four, 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.

§2. This act shall take effect immediately and shall apply to all criminal actions commenced on or after such effective date.

18. Temporary Separation of Sequestered Jury During Deliberations (CPL 310.10)

The Committee recommends that section 310.10(1) of the Criminal Procedure Law be amended by deleting the requirement that a sequestered jury in a criminal action be "continuously" kept together during deliberations.

Section 310.10(1) of the CPL provides that a sequestered jury in a criminal case must be "continuously" kept together during the deliberations phase of the trial, under the supervision of a court officer. Although the purpose of this provision is to shield the jury from outside influences that may prejudice the deliberations, common sense dictates that deliberating jurors cannot be "continuously" held together when religious, health or other circumstances require that a juror be temporarily separated from the other jurors. The Court of Appeals, in fact, has recognized that the statute cannot be read this literally. See People v. Fernandez, 81 N.Y.2d 1023 (1993)(trial court had discretion to permit one or more deliberating jurors to attend church services so long as they remained supervised).

By deleting from the statute the word "continuously," this measure makes clear what the Court of Appeals has acknowledged -- that trial judges must have the discretion in certain situations to permit deliberating jurors to separate temporarily, so long as such separations are supervised. Permitting supervised temporary separations in appropriate situations will significantly ease the burden of jury service for jurors with special needs and circumstances, without creating a risk that outside influences will taint the deliberation process.

Proposal

AN ACT to amend the criminal procedure law, in relation to conduct of jury deliberations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 310.10 of the criminal procedure law, as amended by chapter 83 of the laws of 1995, is amended to read as follows:

1. Following the court's charge, except as otherwise provided by subdivision two of this section, the jury must retire to deliberate upon its verdict in a place outside the courtroom. It

must be provided with suitable accommodations therefor and must, except as otherwise provided in subdivision two of this section, be [continuously] kept together under the supervision of a court officer or court officers. In the event such court officer or court officers are not available, the jury shall be under the supervision of an appropriate public servant or public servants. Except when so authorized by the court or when performing administerial duties with respect to the jurors, such court officers or public servants, as the case may be, may not speak to or communicate with them or permit any other person to do so.

§2. This act shall take effect immediately.

19. Prosecutor's Motion to Vacate Judgment
(CPL 440.10)

The Committee recommends that section 440.10(1) of the Criminal Procedure Law be amended to provide a prosecutor with authority to move to vacate a judgment on the grounds specified in that section.

Under section 440.10(1) of the CPL, a defendant, at any time after the entry of judgment, may move to vacate the judgment on any number of specified grounds. This provision provides a critical means of redressing an injustice that comes to light after the defendant has been convicted and sentenced. In some cases, however, it is the prosecution that learns of the injustice, and only after the defendant's appeals have been exhausted and the defendant is no longer represented by counsel. For example, the prosecution may learn long after the case has been disposed that the testimony of its primary witness was fabricated. In these situations, the CPL currently provides no formal means by which the prosecution may seek to undo the wrongful conviction.

This measure would provide such a means. It would afford the prosecutor the same authority as the defendant to move to vacate a judgment on one or more of the grounds specified in section 440.10. Creation of such a procedure will better enable prosecutors to fulfill their obligation to see that justice is realized when they learn of information that calls into question the validity of a conviction.

Proposal

AN ACT to amend the criminal procedure law, in relation to motion to vacate judgment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraph of subdivision 1 of section 440.10 of the criminal procedure law is amended to read as follows:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant or the prosecutor, vacate such judgment upon the ground that:

§2. This act shall take effect immediately.

20. Timing of Request to Submit a Lesser Included Offense to Jury (CPL 300.50)

The Committee recommends that section 300.50(2) of the Criminal Procedure Law be amended to provide that a request to submit a lesser included offense to the jury be made prior to the summations.

Section 300.50 of the CPL provides that if there is a reasonable view of the evidence that the defendant committed a lesser included offense of a count charged in the accusatory instrument, and either party requests that the court submit such lesser included offense in the alternative to the jury, the court must submit the offense. Because the statute does not specify the period within which a request to submit a lesser included offense must be made, a number of appellate courts have reversed convictions on account of the trial court's refusal to submit a lesser included offense where the request to do so was made after the summations. See, e.g., People v. McInnis, 179 A.D.2d 781 (2d Dept. 1992); People v. Noguera, 102 A.D.2d 775 (1st Dept. 1984); People v. Hanley, 87 A.D.2d 850 (2d Dept. 1982). The implication of these holdings is that a request for a lesser included offense, when supported by a reasonable view of the evidence, must always be granted even if doing so requires that summations must be re-opened to provide the parties with an opportunity to address the lesser included offense.

This result is an irrational one that needlessly delays the trial and the submission of the case to the jury. If either party, absent some good reason, fails prior to the summations to request that a lesser included offense be submitted to the jury, the trial court should have the discretion to deny the request. This measure, by making clear that the request should precede the summations, would provide the court with that discretion. Although, under this proposal, the court would retain the authority to grant a post-summation request for submission of a lesser included offense, it would no longer be required to do so.

Proposal

AN ACT to amend the criminal procedure law, in relation to submission of lesser included offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 300.50 of the criminal procedure law is amended to read as follows:

2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so before commencement of the summations, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.

§2. This act shall take effect immediately.

21. Further Speedy Trial Reform
(CPL 30.30)

The Committee recommends that section 30.30 of the Criminal Procedure Law be amended in a number of important respects. This measure, in conjunction with the Committee's coordinated proposal of legislation and administrative rules to involve trial judges more actively in promoting the parties' readiness for trial, will go a long way toward expediting trials and dispositions of criminal matters.

Section 30.30 of the CPL requires the prosecution to be ready for trial within six months of commencement of a felony action, within 90 days of commencement of a criminal action when the highest offense charged is a misdemeanor punishable by a prison sentence of more than three months, within 60 days when the highest offense charged is a misdemeanor punishable by a prison sentence of not more than three months, and within 30 days when the highest offense charged is a violation. CPL §30.30(1). Various periods of time may be excluded in computing these periods. CPL §30.30(4).

Section 30.30, which requires only that the prosecution declare its readiness for trial within these prescribed periods and not that trials commence within any particular time, has been largely unsuccessful in moving criminal cases to trial in timely fashion. Although delays in bringing cases to trial are due in part to the huge criminal caseloads borne by judges, delays also are a result, at least in some large urban jurisdictions and particularly in New York City, of a lack of willingness of all sides to go to trial. To address this "culture of unreadiness" that has evolved in these jurisdictions, the Committee has developed the aforementioned proposal to provide criminal courts with greater authority to fix and enforce schedules for hearings and trials. Modification of selected provisions of section 30.30, however, is also needed, and it is that objective to which this measure is directed.

First, the measure would add a new subdivision 2-a to section 30.30 to provide that a court may inquire into a prosecutor's statement of readiness and nullify such statement if the court determines that the prosecution is not in fact ready for trial. This provision is necessary because of the lack of clarity in current law concerning the extent to which a court may go beyond a prosecutor's statement of readiness.

Second, the measure proposes a series of amendments designed to remedy the frustrating disruption and delay that can result when a speedy trial motion is filed just as trial is about to commence. A new paragraph (d) is added to section 30.30(3) to require that, unless good cause is shown, a motion to dismiss under section 30.30 must be made at least 15 days before commencement of trial. In addition, express authority is provided for the trial judge to reserve decision on the motion until after the trial is completed and the verdict is rendered.

The new paragraph (d) also would require that the defendant's motion papers include sworn factual allegations specifying the time periods that should be charged against the

prosecution under the statute and the reasons why those periods should be included in the time computation. The measure provides that failure to comply with these requirements could result in summary denial of the motion. Under current law, the defendant need only allege that the prosecution failed to declare its readiness for trial within the statutory time period, at which point the burden shifts to the prosecution to identify the statutory exclusions on which it relies to bring it within the time limit for declaring readiness. See, e.g., People v. Berkowitz, 50 N.Y.2d 333 (1980). Requiring that factual allegations be included in the motion would reduce the number of patently non-meritorious speedy trial motions and enable the court to deny summarily those that continue to be filed.

Finally, the measure would add a new subdivision 4-a to section 30.30 requiring the court, whenever it is practicable to do so, to rule at each court appearance whether the adjournment period following the court appearance is to be included or excluded in computing the time within which the prosecution must be ready for trial under section 30.30. The absence of such rulings can make it extremely difficult for trial judges to reconstruct at the time a speedy trial motion is made whether adjournment periods throughout the life of the case should be charged to the prosecution under the statute. Without the benefit of these rulings, transcription of the minutes of numerous court appearances often must be ordered, causing considerable delay, particularly when a speedy trial motion is made on the eve of trial.

Proposal

AN ACT to amend the criminal procedure law, in relation to speedy trial

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 30.30 of the criminal procedure law is amended by adding a new subdivision 2-a to read as follows:

2-a. Whenever pursuant to this section a prosecutor states or otherwise provides notice that the people are ready for trial, the court may make inquiry of the prosecutor. If, after conducting its inquiry, the court determines that the people are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid for purposes of this section.

§2. Subdivision 3 of section 30.30 of the criminal procedure law is amended by adding a

new paragraph (d) to read as follows:

(d) A motion pursuant to subdivision one shall be made at least fifteen days before the commencement of trial, provided, however, that for good cause shown the court may permit the motion to be made at a later date, but not later than commencement of trial. The court may reserve decision on such motion until after completion of the trial and a verdict has been rendered and accepted by the court. The motion must be in writing and upon reasonable notice to the prosecution and with opportunity to be heard. The motion papers shall contain sworn allegations of fact specifying the adjournment periods that the defendant alleges should be included in computing the time within which the people must be ready for trial pursuant to subdivision one, and the reasons why such periods should be so included. If the motion papers fail to comply with these requirements, the court may summarily deny the motion.

§3. Section 30.30 of the criminal procedure law is amended by adding a new subdivision 4-a to read as follows:

4-a. At each court appearance date preceding the commencement of trial in a criminal action, the court, whenever it is practicable to do so, shall rule on whether the adjournment period immediately following such court appearance date is to be included or excluded for the purposes of computing the time within which the people must be ready for trial within the meaning of this section. The court's ruling shall be noted in the court file.

§4. This act shall take effect 90 days after it shall have become law.

22. Release of Defendant From Custody When Prosecution is Not Ready for Trial (CPL 30.30)

The Committee recommends that section 30.30 of the Criminal Procedure Law be amended to exclude certain serious crimes from the statutory mandate that a defendant in custody pending his or her trial be released if the prosecution is not ready for trial within 90 days of the commitment of the defendant to such custody. The Committee also recommends that the 90-day period be extended to 120 days when the defendant is charged with an offense that, upon conviction, would result in him or her being sentenced as a second violent felony offender.

Under section 30.30(2)(a) of the CPL, a defendant charged with a felony who is being held in custody pending trial must be released on bail or recognizance if the prosecution is not ready for trial within 90 days of the defendant's commitment to custody; shorter periods apply to non-felony offenses. See CPL §30.30(2)(b)-(d). This provision does not apply, however, if the defendant is charged with murder in the first degree, murder in the second degree, manslaughter in the first degree, manslaughter in the second degree or criminally negligent homicide. See CPL §30.30(3)(a). Although the provision promotes the important goal of ensuring the prosecution's timely readiness for trial, its unduly broad reach may in some cases serve to undermine that goal and result in dangerous risks to public safety. Indeed, despite the fact that serious felony cases in larger urban jurisdictions rarely proceed to trial within the relatively short time period set forth in section 30.30(2)(a), the prosecution's failure to be ready for trial within that time period can require the release of defendants who may never return to court voluntarily.

Accordingly, this measure would expand the group of offenses exempted from the section 30.30(2)(a) requirement to include the other Class A felony offenses not currently exempted -- kidnapping in the first degree (PL §135.25), criminal possession of a controlled substance in the first degree (PL §220.21) and criminal sale of a controlled substance in the first degree (PL §220.43) -- as well as any violent felony offense that, upon conviction, would result in the defendant being sentenced as a persistent violent felony offender. In addition, the measure would enlarge the 90-day period in section 30.30(2)(a) to 120 days when the defendant is charged with an offense that, upon conviction, would result in his or her being sentenced as a second violent felony offender.

Adoption of this measure would promote public safety and reduce the number of cases in which defendants are released from custody under this provision and then fail to return to court voluntarily.

Proposal

AN ACT to amend the criminal procedure law, in relation to release of defendants from custody if the people are not ready for trial

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 2 of section 30.30 of the criminal procedure law is amended to read as follows:

(a) ninety days from the commencement of his or her commitment to the custody of the sheriff in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony; provided, however, that such period of time shall be one hundred twenty days from the commencement of the defendant's commitment to the sheriff if the defendant is accused of an offense that, upon conviction thereof, would result in the defendant being a second violent felony offender as defined in section 70.04 of the penal law;

§2. Paragraph (a) of subdivision 3 of section 30.30 of the criminal procedure law is amended to read as follows:

(a) Subdivisions one and two do not apply to a criminal action wherein the defendant is accused of an offense defined in [sections] section 125.10, 125.15, 125.20, 125.25 [and] or 125.27 of the penal law; in addition, subdivision two also shall not apply to a criminal action wherein the defendant is accused of an offense defined in section 135.25, 220.21 or 220.43 of the penal law or an offense that, upon conviction thereof, would result in the defendant being a persistent violent felony offender as defined in section 70.08 of the penal law.

§3. This act shall take effect 90 days after it shall have become law.

23. Selection of Trial Jurors
(CPL Articles 270 and 360)

The Committee recommends that the current procedure for selecting trial jurors in criminal cases, as prescribed in articles 270 and 360 of the Criminal Procedure Law, be amended to ensure that those jurors who ultimately decide a case are fully prepared to do so.

Among the specific changes it proposes, this measure would eliminate current law's provision for selection of "alternate" jurors and "trial" jurors. It would substitute a system whereby a court, depending on its view of the anticipated length of the trial, would direct the selection of: (i) at least 12 and up to 18 jurors in felony cases; or (ii) at least 6 and up to 8 jurors in non-felony cases in which jury trials are required. No differentiation would be made at this point in the status or responsibilities of the jurors thereby selected. The number of peremptory challenges now provided for in the Criminal Procedure Law would not change.

Thereafter, following the evidentiary phase of the trial and the court's charge to the jury, the 12 jurors (or 6 in a non-felony case) who actually are to decide the case would be selected. The selection process would be a random one conducted by the clerk of the court in the presence of the court, the defendant, the defense attorney and the prosecutor. The non-deliberating jurors -- that is, those not selected to deliberate the case -- then would be available to serve just as alternate jurors do now once deliberations have begun.

The virtues of this proposal are clear. Experience has shown that, under the current system, alternate jurors often do not devote the required attention unless and until they are actually substituted for a discharged juror. This has resulted in mistrials or, when alternate jurors do not concede their inability to deliberate intelligently, uninformed jury verdicts. Under the system proposed in this measure, however, until the clerk randomly selects the jurors after the close of the proof and the charge, none would know whether or not he or she actually will be among those who deliberate to decide the case. Thus all jurors would have a strong incentive to pay close attention to the trial proceedings and, ultimately, be better prepared to participate in deliberations.

We believe that this proposal would prove workable and would promote economy and fairness. Similar procedures for selecting jurors exist in other states, including New Jersey and Michigan.

Proposal

AN ACT to amend the criminal procedure law, in relation to formation of a jury

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1. Section 270.05 of the criminal procedure law is REPEALED.

§2. Section 270.10 of the criminal procedure law is amended to read as follows:

§270.10. Trial Jury; formation in general; challenge to the panel. 1. The panel from which the jury is drawn is formed and selected as prescribed in the judiciary law.

2. A challenge to the panel is an objection made to the entire panel of prospective trial jurors returned for the term and may be taken to such panel or to any additional panel that may be ordered by the court. Such a challenge may be made only by the defendant and only on the ground that there has been such a departure from the requirements of the judiciary law in the drawing or return of the panel as to result in substantial prejudice to the defendant.

[2.]3. A challenge to the panel must be made before the selection of the jury commences, and, if it is not, such challenge is deemed to have been waived. Such challenge must be made in writing setting forth the facts constituting the ground of challenge. If such facts are denied by the people, witnesses may be called and examined by either party. All issues of fact and law arising on the challenge must be tried and determined by the court. If a challenge to the panel is allowed, the court must discharge that panel and order another panel of prospective trial jurors returned for the term.

§3. Subdivisions 3 and 4 of section 270.15 of the criminal procedure law, subdivision 3 as amended by chapter 634 of the laws of 1997, are amended to read as follows:

3. The court may thereupon direct that the persons excluded be replaced in the jury box by an equal number from the panel or, in its discretion, direct that all sworn jurors be removed from the jury box and that the jury box be occupied by such additional number of persons from

the panel as the court shall direct. In the court's discretion, sworn jurors who are removed from the jury box as provided herein may be seated elsewhere in the courtroom separate and apart from the unsworn members of the panel or may be removed to the jury room and allowed to leave the courthouse. The process of jury selection as prescribed herein shall continue until at least twelve persons and as many as eighteen persons, as the court in its discretion and taking into consideration the anticipated length of the trial may direct, are selected and sworn as trial jurors. [The juror whose name was first drawn and called must be designated by the court as the foreperson, and no special oath need be administered to him or her.] If before [twelve] the number of jurors the court has decided should be selected are all sworn, a juror already sworn for any reason fails to appear in court within a reasonable period of time from the time that the court has scheduled for the proceedings to resume or becomes unable to serve by reason of illness or other physical incapacity or for any other reason, the court [must] may discharge him or her and the selection of the trial jury must be completed in the manner prescribed in this section.

4. A challenge for cause of a prospective juror which is not made before he or she is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial. If such challenge is allowed by the court, the juror shall be discharged and the selection of the trial jury shall be completed in the manner prescribed in this section[, except that if alternate jurors have been sworn, the alternate juror whose name was first drawn and called shall take the place of the juror so discharged].

§4. Subdivision 2 of section 270.25 of the criminal procedure law is amended to read as follows:

2. Each party must be allowed the following number of peremptory challenges:

(a) [Twenty for the regular jurors if] If the highest crime charged is a class A felony, [and two for each alternate juror] twenty if only twelve jurors are to be selected.

(b) [Fifteen for the regular jurors if] If the highest crime charged is a class B or class C felony, [and two for each alternate juror] fifteen if only twelve jurors are to be selected.

(c) [Ten for the regular jurors in] In all other cases, [and two for each alternate juror] ten if only twelve jurors are to be selected.

The total number of peremptory challenges specified in paragraphs (a), (b) and (c) of this subdivision must be increased by two for each additional juror to be selected beyond the first twelve selected.

§5. Section 270.30 of the criminal procedure law, as amended by chapter 1 of the laws of 1995, is amended to read as follows:

§270.30. Trial jury; [alternate jurors] selection of deliberating jurors. 1. [Immediately after the last trial juror is sworn, the court may in its discretion direct the selection of one or more, but not more than six additional jurors to be known as "alternate jurors", except that, in a prosecution under section 125.27 of the penal law, the court may, in its discretion, direct the selection of as many alternate jurors as the court determines to be appropriate. Alternate jurors must be drawn in the same manner, must have the same qualifications, must be subject to the same examination and challenges for cause and must take the same oath as the regular jurors] If more than twelve jurors were selected and sworn, and if at the conclusion of the court's charge more than twelve jurors remain on the jury, the clerk of the court, in the presence of the court, the defendant, the defendant's attorney and the prosecutor, shall randomly draw the names of twelve

of the remaining jurors, and those twelve jurors shall retire to deliberate upon a verdict. The juror whose name was first drawn must be designated by the court as the foreperson, and no special oath need be administered to him or her. After the [jury has] deliberating jurors have retired to deliberate, the court must either (1) with the consent of the defendant and the [people] prosecutor, discharge the [alternate] remaining non-deliberating jurors or (2) direct the [alternate] remaining non-deliberating jurors not to discuss the case and must further direct that they be kept separate and apart from the [regular] deliberating jurors.

2. In any prosecution in which the people seek a sentence of death, the court shall not discharge the [alternate] non-deliberating jurors when the [jury retires] deliberating jurors retire to deliberate upon [its] their verdict and the [alternate] non-deliberating jurors, in the discretion of the court, may be continuously kept together under the supervision of an appropriate public servant or servants until such time as the [jury returns its] deliberating jurors return their verdict. If the [jury returns] deliberating jurors return a verdict of guilty to a charge for which the death penalty may be imposed, the [alternate] non-deliberating jurors shall not be discharged and shall remain available for service during any separate sentencing proceeding which may be conducted pursuant to section 400.27.

§6. Section 360.10 of the criminal procedure law, as amended by chapter 815 of the laws of 1971, is amended to read as follows:

§360.10. Trial jury; formation in general. [1. A trial jury consists of six jurors, but "alternate jurors" may be selected and sworn pursuant to section 360.35.

2.] The panel from which the trial jury is drawn is formed and selected as prescribed in the uniform district court act, uniform city court act, and uniform justice court act. In the New

York city criminal court the panel from which the jury is drawn is formed and selected in the same manner as is prescribed for the formation and selection of a panel in the supreme court in counties within cities having a population of one million or more.

§7. Section 360.20 of the criminal procedure law is amended to read as follows:

§360.20. Trial jury; examination of prospective jurors; challenges generally. If no challenge to the panel is made as prescribed by section 360.15, or if such challenge is made and disallowed, the court must direct that the names of six members of the panel be drawn and called. Such persons must take their places in the jury box and must be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action. The procedural rules prescribed in section 270.15 with respect to the examination of the prospective jurors and to challenges are also applicable to the selection of a trial jury in a local criminal court, except that in a local criminal court the process of jury selection as prescribed in section 270.15 shall continue until at least six persons and as many as eight persons, as the court in its discretion and taking into consideration the anticipated length of the trial may direct, are selected and sworn as trial jurors.

§8. Subdivision 2 of section 360.30 of the criminal procedure law is amended to read as follows:

2. Each party must be allowed three peremptory challenges if only six jurors are to be selected. The total number of peremptory challenges must be increased by one for each additional juror to be selected beyond the first six selected. When two or more defendants are tried jointly, such challenges are not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more

defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed.

§9. Section 360.35 of the criminal procedure law is amended to read as follows:

§360.35. Trial jury; [alternate juror] selection of deliberating jurors.

1. [Immediately after the last trial juror is sworn, the court may in its discretion direct the selection of either one or two additional jurors to be known as "alternate jurors." The alternate jurors must be drawn in the same manner, must have the same qualifications, must be subject to the same examination and challenges for cause and must take the same oath as the regular jurors. Whether or not a party has used its peremptory challenge in the selection of the trial jury, one peremptory challenge is authorized in the selection of the alternate jurors] If more than six jurors were selected and sworn, and if at the conclusion of the court's charge more than six jurors remain on the jury, the clerk of the court, in the presence of the court, the defendant, the defendant's attorney and the prosecutor, shall randomly draw the names of six of the remaining jurors, and those six jurors shall retire to deliberate upon a verdict. The juror whose name was first drawn must be designated by the court as the foreperson, and no special oath need be administered to him or her.

2. The provisions of section [270.35] 270.30 with respect to [alternate] non-deliberating jurors are also applicable to a trial jury in a local criminal court.

§10. The criminal procedure law is amended by adding a new section 360.37 to read as follows:

§360.37. Trial jury; discharge of juror; replacement of juror during deliberations. The provisions of section 270.35 with respect to discharge of a sworn juror and replacement of a

deliberating juror with a non-deliberating juror are applicable to a trial jury in a local criminal court.

§11. This act shall take effect 90 days after it shall have become law.

24. Elimination of Requirement that Prosecution Consent to Sentence of Parole Supervision (CPL 410.91)

The Committee recommends that section 410.91 of the Criminal Procedure Law be amended to eliminate the requirement that the prosecution consent before a court may sentence a defendant to parole supervision.

The Sentencing Reform Act of 1995 created a new criminal sanction entitled "parole supervision." Under this new sanction, a defendant is sentenced to an indeterminate prison sentence with a minimum and maximum term within the ranges set forth in section 70.06 of the Penal Law, but rather than being committed to State prison the defendant is placed under the immediate supervision of the State Division of Parole. The defendant must comply with parole conditions, including an initial, intensive 90-day placement in the "Willard" drug treatment facility in Seneca County. Those defendants qualifying for this new sentence are second felony offenders: (1) whose instant conviction is for a Class D or Class E drug felony offense; (2) whose prior conviction was not a violent felony offense or a Class A or Class B felony offense; (3) who have a history of drug dependence that was a significant contributing factor to their criminal conduct; and (4) who are not subject to an undischarged term of imprisonment. If the defendant's conviction is for a Class D felony, however, the prosecution must consent to the sentence.

The statute's requirement that the prosecution consent before a court may sentence a defendant to this sanction constitutes an unprecedented and unwarranted intrusion into the sentencing authority of trial judges. Although in New York prosecutors have long been authorized to reject a defendant's guilty plea to less than the charges set forth in the accusatory instrument, see CPL §220.10, judges, acting within the sentencing ranges provided in the Penal Law, have been entrusted with the discretion to select the appropriate sanction to impose. Without a compelling rationale for doing so, this statute removes that discretion from sentencing judges. One unfortunate result of this has been the acute underutilization of the Willard facility due to prosecutors' sparing consent to placement of defendants in this commendable program. See "Drug Center Meets Resistance From Prosecutors," New York Times, October 21, 1996, p. B1, col. 2.

This measure would eliminate the prosecutorial consent provision set forth in section 410.91(4) of the CPL. Elimination of this requirement would properly restore the discretion of sentencing judges to determine when to impose this new sanction. The measure would not affect the prosecution's authority to reject a defendant's guilty plea to less than the charges in the accusatory instrument, but it would remove the prosecution from what has always been, and should continue to be, the exclusive sentencing domain of the court.

Proposal

AN ACT to amend the criminal procedure law, in relation to a sentence of parole supervision

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 4 of section 410.91 of the criminal procedure law is REPEALED and subdivisions 5 through 8 are renumbered to be subdivisions 4 through 7.

§2. This act shall take effect immediately.

25. Admissibility of Evidence of a Witness's Sexual Conduct (CPL 60.43)

The Committee recommends that section 60.43 of the Criminal Procedure Law be amended to provide that the same protections against the admissibility of evidence in a non-sex offense criminal case of a victim's sexual conduct apply also to a witness in such a case.

Section 60.43 of the CPL provides that evidence of a victim's sexual conduct is inadmissible in a prosecution for a non-sex offense unless the court, in the interest of justice, finds it to be relevant following an offer of proof outside the presence of the jury. If the court determines that such evidence is admissible, it must state the findings of fact essential to its determination. The statute is modeled after the "rape shield law" set forth in section 60.42 of the CPL, which affords similar protections to victims in sex offense cases.

Inexplicably, section 60.43 applies only to victims in criminal cases and not to witnesses, whose privacy interests deserve similar protection from the admissibility of irrelevant yet highly prejudicial evidence. Accordingly, this measure would extend the provisions of the statute to witnesses. By doing so, the CPL would make clear that this highly personal information should be admitted into evidence only when its exclusion would jeopardize the defendant's right to a fair trial.

Proposal

AN ACT to amend the criminal procedure law, in relation to admissibility of a witness's sexual conduct

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 60.43 of the criminal procedure law, as added by chapter 832 of the laws of 1990, is amended to read as follows:

§60.43. Rules of evidence; admissibility of evidence of victim's or witness's sexual conduct in non-sex offense cases. Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, or evidence of a witness's sexual conduct may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit

an offense defined in the penal law unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.

§2. This act shall take effect immediately.

26. Access to Law Enforcement Records
Under the Freedom of Information Law
(Public Officers Law 87(2))

The Committee recommends that section 87(2) of the Public Officers Law be amended explicitly to exempt from disclosure under the Freedom of Information Law law enforcement records that relate to a pending criminal action.

In Matter of Gould v. NYC Police Department, 89 N.Y.2d 267 (1996), the Court of Appeals held that police records are not categorically exempt from disclosure under the New York Freedom of Information Law (FOIL). The Court reached this ruling based on its construction of the language of the FOIL statute, which contains no blanket exemption for police or other law enforcement records. Cf. Pub. Off. Law § 87(2)(e)(i), (iii) & (iv) [exemptions apply if disclosure of law enforcement records would "interfere with law enforcement investigations or judicial proceedings," "identify a confidential source or disclose confidential information relating to a criminal investigation," or reveal nonroutine "criminal investigative techniques or procedures"]. Although the Court acknowledged the potential negative policy implications of its holding, it expressly deferred to the Legislature "to balance the rights accorded." 89 N.Y.2d at 279.

At least in the context of pending criminal actions, the proper "balance of the rights accorded" dictates that disclosure of law enforcement records and documents be governed by the discovery provisions of the Criminal Procedure Law and regulated by the judge presiding over the criminal action, not by the Freedom of Information Law. FOIL may well be an appropriate vehicle for obtaining disclosure of law enforcement records after a criminal action has proceeded to judgment. And although police records generally should be disclosed to the defense during the early stages of a criminal action (see Committee's discovery reform proposal, p. 3, supra), disclosure of such information during the pendency of the action should be regulated by criminal procedural provisions and supervised by the court and the parties to the criminal proceeding, who will be sensitive to the competing interests and rights implicated by disclosure. See In Re Application of Legal Aid Society v. New York City Police Department, 274 A.D.2d 207 [1st Dept. 2000] [holding, in a proceeding under FOIL, that a police department's assertion that disclosure of records to a defendant in a pending criminal prosecution would interfere with that proceeding is "a sufficiently particularized justification for the denial of access to those records" under FOIL, since FOIL disclosure during the course of the prosecution would, inter alia, "interfere with the orderly process of disclosure" set forth in CPL Article 240]. Accord Matter of Pittari v. Pirro, 258 A.D.2d 202 [2d Dept.1999], lv. denied 94 N.Y.2d 755.

Accordingly, this measure would add express language to section 87(2) of the Public Officers Law making clear that records in the possession of a law enforcement agency that relate to a pending criminal action are not obtainable under FOIL.

Proposal

AN ACT to amend the public officers law, in relation to access to law enforcement records under the freedom of information law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 87 of the public officers law is amended by adding a new paragraph (k) to read as follows:

(k) are in the possession of a law enforcement agency and relate to a criminal action as defined in subdivision sixteen of section 1.20 of the criminal procedure law that has not yet proceeded to judgment.

§2. This act shall take effect immediately.

27. Motion to Dismiss Indictment for Failure to Afford Defendant the Right to Testify Before Grand Jury (CPL 210.20)

The Committee recommends that section 210.20(1)(c) of the Criminal Procedure Law be amended to provide that an order dismissing an indictment for failure to afford the defendant an opportunity to testify before the grand jury shall be conditioned upon the defendant actually testifying before the grand jury to which the charges are to be resubmitted.

Section 190.50(5)(a) of the Criminal Procedure Law requires the district attorney to notify a defendant who has been arraigned in a local criminal court upon an undisposed felony complaint that a grand jury proceeding against the defendant is pending and to afford the defendant a reasonable time to exercise the right to testify before the grand jury. Paragraph (c) of subdivision five provides that any indictment obtained in violation of paragraph (a) is invalid and must be dismissed upon a motion pursuant to section 210.20. Three Appellate Divisions have construed the language of paragraph (c) as requiring dismissal of an indictment where the People fail to give the notice required by paragraph (a) and as precluding an order conditioning a dismissal upon the defendant appearing before a grand jury to which the charges are re-presented. See Borrello v. Balbach, 112 A.D.2d 1051 (2d Dept. 1985). Accord People v. Massard, 139 A.D.2d 927 (4th Dept. 1988); People v. Bey-Allah, 132 A.D.2d 76 (1st Dept. 1987).

In Borrello v. Balbach, the Second Department acknowledged that several lower courts had fashioned orders conditioning dismissal on the defendant exercising his or her right to testify before the grand jury. The Court, however, rejected this approach, saying:

> To dismiss the indictment outright, it is claimed, would merely encourage the insincere defendant to engage in gamesmanship to delay his prosecution. Such reasoning, however, overlooks the fact that the People may in the first instance avoid any gamesmanship by duly notifying the defendant of the date on which the charges will be presented to the Grand Jury. Moreover, the five-day time limitation for making a motion to dismiss contained in CPL 190.50(5)(c) adequately serves to separate those defendants who sincerely wish to testify before the Grand Jury from those with no such intention.
>
> Accordingly, we conclude that where a person is entitled to relief under CPL 190.50(5), the only proper remedy is outright dismissal of the indictment, in view of the mandatory language contained in paragraph (c) of that subdivision and the absence of any statutory basis for the expedient solution of a conditional dismissal.

112 A.D.2d at 1053 (citations omitted).

Notwithstanding these Appellate Division rulings, the lower courts have struggled to avoid the necessity of dismissing an indictment where the People have failed to give the notice required by section 190.50(5), if the defendant does not intend to take advantage of the right to testify when the case is represented to the grand jury. In People v. Garcia, N.Y.L.J., October 5, 1989, p. 23, col. 2 (Sup. Ct. N.Y. Co.), for example, the Court held that defendant's challenge to a conditional order of dismissal was barred by laches. The Court stated:

> While the Appellate Division, Second Department noted in Borrello, supra, that it felt that there were sufficient statutory safeguards to prevent gamesmanship by insincere defendants serving grand jury notice, this court's practical experience has been to the contrary. Given the difficulties of both scheduling and rescheduling grand jury presentations and the cost in prosecutor, police and court time, a conditional dismissal is appropriate and just and should be authorized. The court commends an appropriate amendment to CPL 190.50 to the Legislature's attention.

See also People v. Lynch, 138 Misc. 2d 331, 336 (Sup. Ct. Kings Co. 1988) (converting motion to dismiss indictment based on failure to accord defendant the right to testify into motion to dismiss in interests of justice and denying motion on ground that dismissing indictment without defendant's agreeing to testify would serve no purpose); People v. Salazar, 136 Misc. 2d 992 (Sup. Ct. Bronx Co. 1987) (refusing to dismiss indictment where defendant did not intend to testify before a grand jury).

In accordance with the suggestion in People v. Garcia, this measure would amend section 210.20 to provide that an order dismissing an indictment for the People's failure to afford the defendant an opportunity to appear before the grand jury shall be conditioned upon the defendant exercising his or her right to testify before another grand jury to which the charges are to be resubmitted. The measure further provides that the court, in its order, may direct that the defendant testify first before any other witnesses or evidence are presented. Following the order, the prosecutor must provide the defendant with a reasonable opportunity to testify before the grand jury. If the defendant fails to do so, the court, upon the prosecutor's application, must vacate the order and reinstate the indictment. Such an amendment would protect the defendant's right to testify before the grand jury, but would avoid the burden of re-presenting cases to the grand jury where the defendant has no intention of invoking that right.

Proposal

AN ACT to amend the criminal procedure law, in relation to motion to dismiss indictment for failure to notify defendant of right to testify before grand jury

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1. Paragraph (c) of subdivision 1 of section 210.20 of the criminal procedure law is amended to read as follows:

(c) The grand jury proceeding was defective, within the meaning of section 210.35, provided that where the defect is as set forth in subdivision four of that section, an order of dismissal entered pursuant to this subdivision shall be conditioned upon the defendant testifying before another grand jury to which the charge or charges are to be resubmitted. In its order, the court may direct that the defendant testify first before any other witnesses or evidence are presented. Following such an order, the prosecutor shall provide the defendant with a reasonable opportunity to testify before the grand jury. If the defendant fails to so testify, without a reasonable excuse therefor, the court, upon application of the prosecutor, shall vacate the order of dismissal and order the indictment reinstated; or

§2. This act shall take effect 90 days after it shall have become a law.

28. Deferral of Mandatory Surcharge
(CPL 420.40(2), PL 60.35(8))

The Committee recommends amendment of section 420.40(2) of the Criminal Procedure Law and repeal of section 60.35(8) of the Penal Law to eliminate the requirement that a criminal court wait at least 61 days before it may defer a defendant's payment of the mandatory surcharge.

In 1995, the Legislature eliminated the authority of a court to waive an indigent criminal defendant's payment of the mandatory surcharge. In place of the waiver, the legislation created a new procedure whereby a court may defer payment of the surcharge. L. 1995, ch. 3, §§ 70, 71. Under this new procedure, the court, at the time of sentencing, must issue a summons to any defendant not sentenced to a term of incarceration in excess of 60 days (the procedure is permissive for town and village courts but mandatory for all other courts). The summons must direct the defendant to reappear in court on the first day the court is in session following 60 days after its issuance, unless the surcharge is paid before such date. PL §60.35(8). On the return date, the defendant may present information establishing that payment of the surcharge should be deferred because of his or her indigence. CPL § 420.40(2). If the court agrees and decides to defer payment, the defendant is not excused from payment; instead, the court's deferral order must be filed with the county clerk, and any unpaid balance may be collected in the same manner as a civil judgment. CPL § 420.40(5).

This procedure has proved extremely cumbersome, particularly in the local criminal courts. It requires the scheduling of an additional court appearance in virtually all criminal cases, a significant burden for most courts, notably the New York City Criminal Court with its hundreds of thousands of filings each year. In addition, the mandated 61-day adjournment is unduly lengthy, thereby minimizing the percentage of defendants, who generally do not have date books and must rely on not losing the scrap of paper their attorney gave them, who appear on that date. This often leads to issuance of a bench warrant when a defendant fails to appear, resulting in the police going out and arresting and detaining the defendant (sometimes overnight), at great expense to the taxpayer. Worse yet, when the defendant is then returned to the court, he or she usually pleads indigence, which often results in the court deferring payment of the surcharge -- something that could have been done at the time of sentencing without the necessity of further court appearances, executions of warrants and considerable additional delay and expense.

The Committee recognizes the reasons the Legislature acted to eliminate a court's authority to waive payment of the surcharge, and it does not propose that such authority be revived. Rather, this measure would amend section 420.40(2) of the Criminal Procedure Law and repeal subdivision eight of section 60.35 of the Penal Law to permit a court, at the time of sentencing or at a subsequent time that the court selects, to defer a defendant's payment of the surcharge and direct entry of its order by the county clerk at that time. Permitting a court to defer payment at the time of sentencing, rather than after issuance of a summons and a mandated 61-day adjournment, will avoid countless unnecessary calendar appearances and other considerable burdens and expenses. In those cases, however, when the court determines that an additional

appearance after sentencing may increase the likelihood of a defendant's payment, the measure affords the court the flexibility to schedule such an appearance.

Proposal

AN ACT to amend the criminal procedure law and the penal law, in relation to deferral of a mandatory surcharge

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 420.40 of the criminal procedure law, as amended by chapter 62 of the laws of 2003, is amended to read as follows:

2. [On an appearance date set forth in a summons issued pursuant to subdivision three of section 60.35 of the penal law, section eighteen hundred nine of the vehicle and traffic law or section 27.10 of the parks, recreation and historic preservation law] At the sentencing or at a subsequent appearance date fixed by the court, a person upon whom a mandatory surcharge, sex offender registration fee or DNA databank fee [was] has been levied shall have an opportunity to present on the record credible and verifiable information establishing that the mandatory surcharge, sex offender registration fee or DNA databank fee should be deferred, in whole or in part, because, due to the indigence of such person the payment of said surcharge, sex offender registration fee or DNA databank fee would work an unreasonable hardship on the person or his or her immediate family.

§2. Subdivision 8 of section 60.35 of the penal law is REPEALED.

§3. This act shall take effect immediately.

29. Release of Defendant From Custody Upon Failure of Timely Grand Jury Action (CPL 180.80)

The Committee recommends that section 180.80 of the Criminal Procedure Law be amended to provide that whenever a defendant in custody files notice requesting the right to testify before the grand jury, the court in its discretion may extend by up to 48 hours the time period within which the grand jury must indict such a defendant.

Under section 180.80 of the Criminal Procedure Law, a defendant against whom a felony complaint has been filed and who is being held in custody must be released from custody on his or her own recognizance if the grand jury fails to indict (or a preliminary hearing is not commenced) within a specified time period -- either 120 hours from the commencement of custody, or 144 hours from commencement of custody where a weekend day or holiday occurs during such period. The only exceptions to this requirement are where the delay was due to the defendant's "request, action or condition, or occurred with his consent," CPL § 180.80(1), or the prosecution demonstrates "good cause" for not releasing the defendant. CPL § 180.80(3).

Under CPL § 190.50(5), a defendant may serve notice upon the prosecution requesting the right to testify before the grand jury. The interplay of that statute with section 180.80 has caused problems in the administration of justice in a significant number of cases. That is because defense counsel, particularly in large jurisdictions such as New York City, generally serve the section 190.50 notice in every case, usually at the arraignment on the felony complaint. This is so even though, as experience has shown, defendants rarely exercise this right and actually testify before the grand jury. This causes a serious problem when, as not infrequently occurs, a defendant in custody is not timely produced in court on the last day of the section 180.80 period (when arraigning judges routinely schedule the second court appearance). Because the defendant is not present to withdraw his or her notice, the prosecution is presented with a dilemma -- seek an indictment from the grand jury that almost surely will subsequently be dismissed by the court on the ground that the defendant was denied the right to testify, or decline to seek an indictment at that time and thereby compel the court to release the defendant under the statute. See generally People v. Evans, 79 N.Y.2d 407 (1992)(strongly implying that the sheriff's failure to timely produce a defendant on the last day of the 180.80 period does not constitute "good cause" to avoid the release mandate of the statute).

This measure is an effort to resolve this procedural quandary, at least in part. It would authorize the court, in its discretion, to extend the 180.80 time period by up to 48 hours whenever a defendant has filed notice requesting the right to testify before the grand jury. If judges had this discretionary authority, it is presumed that defense counsel and their clients would more carefully evaluate whether to serve section 190.50 notice, rather than mechanically do so at arraignment in every case. At the same time, it would provide judges with the flexibility to direct a modest extension of the 180.80 period when, as regrettably, but inevitably, happens in a significant

number of cases, a defendant is not produced in time to exercise or decline to exercise the right to testify. Such an amendment would more effectively protect the public's interest in preventing the unnecessary release from custody of certain defendants, yet it would not appreciably undermine a felony defendant's interest in obtaining expeditious action by the grand jury.

Proposal

AN ACT to amend the criminal procedure law, in relation to release of defendant from custody upon failure of timely grand jury action

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 180.80 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. The defendant has filed notice pursuant to subdivision five of section 190.50 requesting a right to appear as a witness in his or her own behalf before the grand jury, in which case the court in its discretion may extend, for a reasonable period not to exceed forty-eight hours, the time period specified in this section following which the defendant must be released.

§2. This act shall take effect immediately.

30. Hearing on a Defendant's
Mental Capacity to Proceed
(CPL 730.30)

The Committee recommends that section 730.30(2) of the Criminal Procedure Law be amended to provide that, when each psychiatric examiner concludes that the defendant is not an incapacitated person, the court may, but is not required to, conduct a hearing on the defendant's mental capacity.

When a court suspects that a criminal defendant may be suffering from a mental incapacity, it must issue an order under article 730 of the Criminal Procedure Law directing that the defendant be examined to evaluate his or her competency to stand trial. Pursuant to that order, the defendant is examined by at least two "psychiatric examiners," who then submit examination reports to the court. However, even when the psychiatric examiners agree that the defendant is competent to stand trial, the court must conduct a competency hearing if one of the parties so requests. CPL § 730.30(2). This is a burdensome requirement that needlessly forces courts to conduct a hearing when the facts of the case do not warrant one.

Accordingly, this measure would amend section 730.30(2) to provide that, when the psychiatric examiners agree that the defendant is not an incapacitated person, the court may, but is not required to, conduct a competency hearing. This amendment would properly place the decision to conduct a hearing in this situation within the sound discretion of the trial court. In doing so, the measure would reduce the number of unnecessary hearings in cases in which the facts clearly demonstrate that the defendant is competent to stand trial, yet it would permit the court to conduct a hearing when, even though the examination reports conclude that the defendant is competent, the court determines that a hearing would be the more prudent course to take.

Proposal

AN ACT to amend the criminal procedure law, in relation to conducting a hearing on a defendant's mental capacity to proceed

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 730.30 of the criminal procedure law is amended to read as follows:

2. When the examination reports submitted to the court show that each psychiatric

examiner is of the opinion that the defendant is not an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity, [and] or it [must] may conduct a hearing upon motion therefor by the defendant or by the district attorney. If no motion for a hearing is made, or if the court determines that a hearing is not necessary, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against [him] the defendant must proceed; if the court is not so satisfied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director.

§2. This act shall take effect immediately.

31. Discovery of Search Warrant Documents and Seized Property (CPL 240.20)

The Committee recommends that section 240.20(1)(f) of the Criminal Procedure Law be amended to provide that any property seized pursuant to the execution of a search warrant relating to the criminal action or proceeding, and the inventory or return of such property, shall be discoverable by the defendant. The Committee also recommends that a new paragraph (l) be added to section 240.20(1) providing that the search warrant, the search warrant application and the documents or transcript of any testimony or other oral communication offered in support of the search warrant application also shall be discoverable by the defendant, except to the extent such material or information is protected from disclosure by a court order.

Under section 240.20 of the Criminal Procedure Law, upon a defendant's service of a demand to produce, the prosecution must disclose to the defendant and make available for inspection, photographing, copying or testing various information and material. CPL § 240.20(1). Conspicuously absent from the detailed listing of such information and material, however, is the property that has been seized pursuant to a search warrant relating to the case, and the search warrant itself and its underlying documents (including the search warrant application and the supporting affidavits). The absence of an express statutory direction has engendered confusion as to whether these items are subject to discovery.

In the Committee's view, fairness and efficiency dictate that these items be subject to discovery in routine cases, and that the Criminal Procedure Law so provide. The defense should be entitled to inspect any property seized pursuant to a search warrant relating to the case and the written inventory of such property (see CPL § 690.50(4), requiring the police to prepare such an inventory). In addition, to enable it to prepare any potential motion to contravene the search warrant, the defense should be entitled to copies of the warrant and its underlying documents.

Accordingly, this measure would amend section 240.20(1)(f) of the CPL to include among the property that the prosecution must disclose to the defense any property seized pursuant to a search warrant relating to the case and the inventory or return of such property; the measure also would add a new paragraph (l) to section 240.20(1) of the CPL to require the prosecution to disclose a copy of the search warrant, the search warrant application and the documents or transcript of any testimony or other oral communication offered in support of the search warrant application. Of course, in those cases in which disclosure of any of these items would raise a risk of harm to any individual, interfere with an ongoing law enforcement investigation or have some other significant adverse effect, the prosecution could seek a protective order from the court limiting or denying such disclosure (see CPL §240.50).

Proposal

AN ACT to amend the criminal procedure law, in relation to discovery of search warrants and related materials

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (f) of subdivision 1 of section 240.20 of the criminal procedure law, as amended by chapter 795 of the laws of 1994, is amended to read as follows:

(f) Any other property obtained from the defendant, or a co-defendant to be tried jointly, as well as any property seized pursuant to the execution of a search warrant relating to the criminal action or proceeding and the inventory or return of such property;

§2. Subdivision 1 of section 240.20 of the criminal procedure law is amended by adding a new paragraph (l) to read as follows:

(l) Any search warrant relating to the criminal action or proceeding, the search warrant application and the documents or transcript of any testimony or other oral communication offered in support of the search warrant application, except such material or information as is protected from disclosure by a court order issued pursuant to law.

§3. This act shall take effect immediately.

32. Anonymous Jury
(CPL 270.15)

The Committee recommends that a new subdivision 1-b be added to section 270.15 of the Criminal Procedure Law to permit the court to issue a protective order precluding disclosure of jurors' and prospective jurors' names and addresses to any person where the court determines that there is a likelihood that one or more jurors or prospective jurors will be subject to bribery, tampering, injury, harassment or intimidation.

Subdivision 1-a of section 270.15 of the Criminal Procedure Law now provides that the court may issue a protective order regulating disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Significantly, subdivision 1-a, which the measure retains, does not allow the court to protect jurors' and prospective jurors' names from disclosure, nor does it provide complete assurance that jurors' addresses will not be disclosed to defendant by defense counsel. See New York Criminal Procedure Law §270.15, Supplementary Practice Commentary (McKinney Supp. 1989, pp. 199-200) (potential conflict between attorney's faithfulness to officer-of-the-court code and attorney-client relationship "could cause trouble in the very type case for which this legislative protection is created"). While salutary, subdivision 1-a may not provide sufficient protection for jurors and prospective jurors in all cases.

Although there are no reported New York State appellate cases addressing the propriety of withholding the names and addresses of jurors and prospective jurors, an anonymous jury was selected in the celebrated 1983 Brinks case in Orange County. See also People v. Watts, 173 Misc 2d 373, 377 (Sup. Ct., Richmond Cty. 1997) (holding that a defendant's statutory right to knowledge of jurors' names and addresses may be forfeited where defendant's acts represent a "clear threat to either the safety or integrity of the jury"). Moreover, the federal courts are in agreement that a trial judge has the discretion to protect the identities of jurors and prospective jurors in an appropriate case. See United States v. Scarfo, 850 F.2d 1015, 1021-1023 (3rd Cir.), cert. denied, 488 U.S. 910 (1988) (motion to impanel an anonymous jury granted where alleged boss of organized crime group was charged with conspiracy and extortion, prospective witness and judge had been murdered in the past and attempts had been made to bribe other judges); United States v. Persico, 832 F.2d 705, 717 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988) (upholding decision to impanel anonymous jury based on violent acts committed in normal course of Columbo Family business, the Family's willingness to corrupt and obstruct criminal justice system and extensive pretrial publicity); United States v. Ferguson, 758 F.2d 843, 854 (2d Cir.), cert. denied, 474 U.S. 841 (1985) (trial court justified in keeping jurors' identities secret where evidence that defendants had discussed killing five government witnesses and "Wanted: Dead or Alive" poster of another government witness had been circulated); United States v. Thomas, 757 F.2d 1359, 1362-1365 (2d Cir. 1985), cert. denied, 479 U.S. 818 (1986) (anonymous jury impaneled where defendants charged with narcotics, firearm and RICO violations and government submitted evidence that defendants had bribed a juror at a prior trial and had put out a contract on the life of the chief government witness); United States v. Barnes,

604 F.2d 121, 140-141 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (court properly directed jurors not to disclose their names and addresses where notwithstanding that no actual threats were received, the seriousness of the charges, the extent of pretrial publicity and the history of attempts to influence and intimidate jurors in multi-defendant narcotics cases tried in the Southern District of New York was sufficient to put the court on notice that safety precautions should be taken). See generally United States v. Gambino, 809 F.Supp.1061, 1064-1065 (S.D.N.Y. 1992).

In United States v. Thomas, defendants claimed that impanelment of an anonymous jury deprived them of due process by destroying the presumption of innocence. The Second Circuit rejected this argument, saying:

> [P]rotection of jurors is vital to the functioning of the criminal justice system. As a practical matter, we cannot expect jurors to "take their chances" on what might happen to them as a result of a guilty verdict. Obviously, explicit threats to jurors or their families or even a general fear of retaliation could well affect the jury's ability to render a fair and impartial verdict. Justice requires that when a serious threat to juror safety reasonably is found to exist, precautionary measures must be taken.
>
> * * * *
>
> Nevertheless, we do not mean to say that the practice of impaneling an anonymous jury is constitutional in all cases. As should be clear from the above analysis, there must be, first, strong reason to believe that the jury needs protection and, second, reasonable precaution must be taken to minimize the effect that such a decision might have on the jurors' opinions of the defendants.

757 F.2d at 1364-1365. Accord United States v. Scarfo, 850 F.2d at 1021-1023 (selection of anonymous jury did not impair defendant's right to exercise peremptory challenges or infringe on the presumption of innocence).

There are compelling policy considerations favoring the use of anonymous juries in appropriate cases. As the Third Circuit observed in United States v. Scarfo:

> Juror's fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented .... As judges, we are aware that, even in routine criminal cases, veniremen are often uncomfortable with disclosure of their names and addresses to a defendant. The need for such information in preparing an effective defense is not always self-evident. If, in circumstances like those in

> Barnes, jury anonymity promotes impartial decision making, that result is likely to hold equally true in less celebrated cases.
>
> The virtue of the jury system lies in the random summoning from the community of twelve "indifferent" persons - "not appointed till the hour of trial" - to decide a dispute, and in their subsequent, unencumbered return to their normal pursuits. The lack of continuity in their service tends to insulate jurors from recrimination for their decisions and to prevent the occasional mistake of one panel from being perpetuated in future deliberations. Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept. In short, we believe that the probable merits of the anonymous jury procedure are worthy, not of a presumption of irregularity, but of disinterested appraisal by the courts.

850 F.2d at 1023 (citations omitted). These considerations, together with the lack of any constitutional bar to impanelment of an anonymous jury, warrant passage of legislation that expressly would permit the court to protect the identities of jurors from disclosure.

This measure provides that any party may move within three days prior to the commencement of jury selection for an order directing that jurors and prospective jurors names and residential or business addresses not be disclosed to any person. The court may permit the filing of such a motion thereafter, for good cause shown. The measure requires that the motion be made under seal, and directs that any papers submitted in support thereof or in opposition thereto, as well as any record of the proceedings, remain under seal unless otherwise ordered by the court. The court must make findings of fact "essential to the determination" of the motion and may conduct a hearing, provided that any such hearing "shall be closed."At a hearing on the motion, the moving party is required to show by clear and convincing evidence that such an order is necessary. The court may issue the protective order only when, based on the "totality of the circumstances," it determines "that there is a likelihood that one or more jurors or prospective jurors will be subject to bribery, tampering, injury, harassment or intimidation."

To balance any adverse effect on defendant of withholding the identities of jurors, this measure permits the court to enlarge the scope and duration of voir dire. See United States v. Scarfo, 850 F.2d at 1017 (potential jurors completed written questionnaires encompassing wide range of personal demographics and jurors questioned personally by court and counsel); United States v. Persico, 832 F.2d at 717 (searching voir dire conducted by trial judge alleviated risk that use of anonymous jury would cast unfair aspersions on defendants); United States v. Barnes, 604 F.2d at 142 (no denial of right to exercise challenges where parties had "arsenal of information" about prospective jurors based on extensive voir dire).

The measure further seeks to offset any prejudicial effect of selecting jurors on an anonymous basis by requiring the court to give a precautionary instruction to the jury upon defendant's request. See United States v. Thomas, 757 F.2d at 1364-1365 (trial judge's explanation to the jury minimized potential for prejudice to defendant). But see United States v. Scarfo, 850 F.2d at 1026 (suggesting that if court had not made a point of discussing anonymity, jurors simply might have assumed nondisclosure to be the normal course).

The measure also makes a conforming change to subdivision one of section 270.15, and further provides that, if the court issues a protective order under subdivision 1-b and a party or counsel is aware of or otherwise learns of the identity of a juror or prospective juror, that party or counsel must notify the court and the other party of that fact. The court may then, in its discretion, take appropriate action, including but not limited to discharging or releasing the juror or directing disclosure of the juror's identity to the other party.

Proposal

AN ACT to amend the criminal procedure law, in relation to anonymous juries

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 1 of section 270.15 of the criminal procedure law, as amended by chapter 467 of the laws of 1985, is amended to read as follows:

(a) If no challenge to the panel is made as prescribed by section 270.10, or if such challenge is made and disallowed, the court shall direct that the names of not less than twelve members of the panel be drawn and called as prescribed by the judiciary law, except as otherwise required by this section. Such persons shall take their places in the jury box and shall be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action. In its discretion, the court may require prospective jurors to complete a questionnaire concerning their ability to serve as fair and impartial jurors, including but not limited to place of birth, current address, education, occupation, prior jury service,

knowledge of, relationship to, or contact with the court, any party, witness or attorney in the action and any other fact relevant to his or her service on the jury. An official form for such questionnaire shall be developed by the chief administrator of the courts in consultation with the administrative board of the courts. A copy of questionnaires completed by the members of the panel shall be given to the court and each attorney prior to examination of prospective jurors.

§2. Section 270.15 of the criminal procedure law is amended by adding a new subdivision 1-b to read as follows:

1-b. (a) Any party may make a motion for an order protecting the names and business or residential addresses of jurors and prospective jurors from disclosure to any person. The procedure for bringing on such a motion shall, except as otherwise provided herein, accord with the procedure prescribed in subdivisions one and two of section 210.45 of this chapter. Such a motion shall be made no later than three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection, but for good cause may be made thereafter. The motion shall be made under seal, and any papers submitted in support thereof or in opposition thereto as well as any record of the proceedings shall remain under seal unless otherwise ordered by the court. The court shall make findings of fact essential to the determination thereof and, if necessary, shall conduct such a hearing as the court may require, provided that any such hearing shall be closed. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision two of section 60.20 of this chapter also may be received. Upon such hearing, hearsay evidence shall be admissible to establish any material fact.

(b) At the hearing, the moving party shall bear the burden of proving by clear and

convincing evidence that a protective order is necessary. The court may issue a protective order pursuant to this subdivision only when, based on the totality of the circumstances, it determines that there is a likelihood that one or more jurors or prospective jurors will be subject to bribery, tampering, injury, harassment or intimidation.

(c) If the court grants the motion, it shall direct that all jurors and prospective jurors thereafter shall be identified by some means other than their names. The court may enlarge the scope and duration of the parties' examination of prospective jurors to assure that the parties have sufficient information upon which to base the exercise of peremptory challenges and challenges for cause pursuant to sections 270.20 and 270.25.

(d) If the court grants the motion, and a party or counsel is aware of or otherwise learns of the identity of a juror or prospective juror, that party or counsel shall notify the court and the other party of the fact that it knows the identity of a juror. The court, in its discretion, may then take appropriate action, including but not limited to discharging or releasing the juror or prospective juror or directing disclosure of the juror's identity to the other party.

(e) Upon request by a defendant, but not otherwise, the court shall instruct the jury that the fact that the jury was selected on an anonymous basis is not a factor from which any inference unfavorable to the defendant may be drawn.

§4. This act shall take effect 90 days after it shall have become a law.

33. Parent-Child Privilege
(CPLR 4502-a, Family Court Act 1046(a)(vii))

The Committee recommends the adoption of a statutory parent-child privilege in criminal, civil and Family Court cases. Developed by this Committee and the Chief Administrative Judge's Advisory Committee on Civil Practice, this measure provides for the creation of a new section 4502-a of the CPLR establishing a formal parent-child privilege. This then becomes applicable to criminal cases through section 60.10 of the Criminal Procedure Law, which states that unless otherwise provided the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings. Similarly, it becomes applicable to Family Court cases through section 165 of the Family Court Act, which states: "where the method of procedure in any proceeding in which the Family Court has jurisdiction is not prescribed, the provisions of the civil practice law and rules still apply to the extent that they are appropriate to the proceedings involved." However, because of the special nature of some Family Court proceedings, this measure amends section 1046(a)(vii) of the Family Court Act to exempt child abuse and neglect cases from the ambit of the privilege.

Although there is currently no statutory privilege for confidential communications between parent and child, New York courts have recognized a common-law parent-child privilege, principally in criminal cases. Even in this particularly sensitive area, trial and appellate courts have recognized such privilege. In Matter of A and M (61 A.D.2d 426), for example, the Fourth Department upheld the application of the privilege in a case where the parents of a 16 year-old boy suspected of arson had been subpoenaed to testify as to alleged admissions made to them by the boy. Finding that the "integrity of family relational interests is clearly entitled to constitutional protection"(Id., at 432), the Court in Matter of A and M reasoned that:

> It would be difficult to think of a situation which more strikingly embodies of the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, "Listen to your son at the risk of being compelled to testify about his confidence?"

61 A.D.2d at 429.

The Court in Matter of A and M recognized that "[t]he State has a legitimate interest in the process of fact-finding necessary to discover, try, and punish criminal behavior [citations omitted]" (Id., at 433). "Nevertheless," the Court stated,

> if it is determined that the information sought ... [in this case] was divulged by the boy in the context of the familial setting for the purpose of obtaining support, advice or guidance, we believe that the interest of society in protecting and nurturing the parent-child relationship is of such overwhelming significance that the State's interest in fact-finding must give way.

61 A.D.2d at 433-434.

Other courts have followed Matter of A and M in recognizing a parent-child privilege under similar circumstances (i.e., where a minor child under arrest or investigation for a serious crime seeks the guidance and advice of a parent). See People v. Edwards, 135 A.D.2d 556; People v. Harrell, 87 A.D.2d 21, 26, aff'd 59 N.Y.2d 620; People v. Tesh, 124 A.D.2d 843, lv. denied 69 N.Y.2d 750; People v. Gloskey, 105 A.D.2d 871; and Matter of Mark G., 65 A.D.2d 917. Moreover, at least one court has extended Matter of A and M to apply the privilege in a prosecution for criminally negligent homicide to a conversation between a father and his 23 year-old emancipated son (People v. Fitzgerald, 101 Misc.2d 712, 720 [holding that "such a parent-child privilege as arising out of a constitutional right to privacy may not and should not be limited by the age of either party asserting such claim"]). But see People v. Hilligas, (175 Misc.2d 842, 846) [declining to follow Fitzgerald on the ground that once a child reaches adulthood, the nature of the relationship between parent and child is such it "no longer outweighs the State's interest in investigating serious crimes"] and People v. Johnson, (84 N.Y.2d 956, 957) [holding that "a parent-child testimonial privilege . . . would not even arguably apply [on the facts of that case] in that the defendant was 28 years old at the time of the conversation with his mother, another family member was present; the other testified before the grand jury hearing evidence against defendant; and the conversation concerned a crime committed against a member of the household"].

This measure would fill the current statutory void and provide much needed uniformity by establishing explicit parameters for the application of the parent-child privilege in civil, criminal, and Family Court cases. Under the Committee's proposal, the general evidentiary rule would be stated in a newly added CPLR section 4502-a as follows: "[I]n an action or proceeding a child and his or her parent shall not be compelled to disclose a confidential communication between them." Under enumerated exceptions to the rule, the privilege would not apply to: (1) a confidential communication made in furtherance of the commission of any offense or with the intent to perpetrate a fraud; (2) a confidential communication that relates to an offense alleged to have been committed by any family or household member against any member of the same family or household; and (3) general business communications. It would only include those exchanges which would not have been made but for the parent-child relationship. The proposal also includes an exception for proceedings under section 1046 of the Family Court Act involving child abuse or neglect.

Under the proposal, a person is deemed a child regardless of age, and the definition of a parent includes a natural or adoptive parent, a step-parent, a foster parent, a legal guardian, or "a person whose relationship with the child is the functional equivalent of any of the foregoing." Although the measure defines "communication" broadly to include any verbal or nonverbal expression (including written expressions) directed to another person and intended to convey a meaning to such other person, it provides that a communication may be considered "confidential" (and thus potentially covered by the privilege) only if it: (1) was not intended to be disclosed to third persons other than another parent or a sibling of the child; and (2) was expressly or impliedly induced by the parent-child relationship.

The measure does not provide, as in the case of the spousal privilege under CPLR section 4502, that one of the participants in the confidential communication can prevent the disclosure by the other. Rather, the proposed language merely restricts compelled disclosure for qualified communications. Either party to the confidential communication may reveal it if they choose. Thus, in sensitive matters such as matrimonial cases, support proceedings, and proceedings under Article 81 of the Mental Hygiene Law for the appointment of a guardian, either parent or child could decide to testify, even if the other party chooses to invoke their privilege.

The Committee believes that this narrowly tailored measure strikes a proper balance by maintaining the integrity of the fact-finding function in civil, criminal and Family Court proceedings, while at the same time promoting the judicially recognized goal of assuring confidentiality in communications between parent and child. It has modified its earlier proposal to incorporate the recommendations of the Chief Administrative Judge's Advisory Committee on Civil Practice.

Proposal

AN ACT to amend the civil practice law and rules and the family court act, in relation to creation of a statutory parent-child privilege in civil, criminal, and family cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The civil practice law and rules is amended by adding a new section 4502-a to read as follows:

§4502-a. Parent-child confidential communication. 1. Except as otherwise provided herein, in an action or proceeding a child and his or her parent shall not be compelled to disclose

a confidential communication between them.

2. As used in this section:

(a) A person is a "child" regardless of age.

(b) A "parent" of a child includes a natural or adoptive parent of the child, a step-parent of the child, a foster parent of the child, a legal guardian, or a person whose relationship to the child is the functional equivalent of any of the foregoing.

(c) A "communication" is any verbal or nonverbal expression, including a written expression, directed to another person and intended to convey a meaning to such other person.

(d) A communication is "confidential" if it (i) was not intended to be disclosed to a third person other than a parent or a sibling of a child; and (ii) was expressly or impliedly induced by the parent-child relationship.

3. This section shall not apply to:

(a) a confidential communication made in furtherance of the commission of any offense, or with the intent to perpetrate a fraud;

(b) a confidential communication that relates to an offense alleged to have been committed by any family or household member against any member of the same family or household. For purposes of this paragraph, "family or household members" shall mean persons related by consanguinity or affinity; or unrelated persons who are living or who in the past have lived in the same household continually or at regular intervals, or persons who have a child in common, whether or not they have ever lived in the same household; or

(c) general business communications.

§2. Paragraph (vii) of subdivision (a) of section 1046 of the Family Court Act, as

amended by chapter 81 of the laws of 1979 and chapter 432 of the laws of 1993, is amended to read as follows:

(vii) neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the parent-child privilege as set forth in section forty-five hundred two-a of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, nor the rape crisis counselor-client privilege, as set forth in section forty-five hundred ten of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

§3. This act shall take effect immediately, and shall apply only to actions and proceedings commenced on or after such effective date.

34. Providing Written Copies of Charge to Jurors Upon Request for Further Instruction or Information (CPL 310.30)

The Committee recommends that section 310.30 of the Criminal Procedure Law be amended to permit a trial judge, without the consent of the parties, to provide a deliberating jury with one or more written copies of all or a portion of its charge in response to the jury's request for further instruction or information.

Sections 310.20 and 310.30 of the Criminal Procedure Law specify the materials that may be provided by the court to a deliberating jury. These materials include the exhibits received in evidence as may be permitted by the court (CPL section 310.20(1)), a verdict sheet (CPL section 310.20(2)), a written list of the names of the witnesses whose testimony was presented during the trial (CPL section 310.20(3)) and, under certain circumstances, copies of the text of a statute (CPL section 310.30).* These sections are silent, however, as to the submission to the jury of written copies of the court's charge.

Although the Court of Appeals has expressly approved the practice of allowing jurors to take notes of the court's charge, and to use those notes in deliberations (see, People v. Hues, 92 NY2d 413, 419, n.5; People v. Tucker, 77 NY2d 861), it has expressly disapproved the practice of providing the jury, over the defendant's objection, with a written copy of all or a portion of its charge. In People v. Owens (69 NY2d 585), for example, the Court held that the trial court had erred in, sua sponte, giving the jury a portion of its charge in writing to consider during deliberations, and that the error was not subject to harmless error analysis (Id., at 591-592). In so holding, the Court relied on CPL section 310.30, which, as noted, expressly prohibits delivering any portion of a statute to the jury without the consent of the parties (Id., at 590; see also, People v. Moore, 71 NY2d 684, 687). The Court found that delivering written portions of the charge to the jury, particularly where there has been no request from the jury for further instruction, presents the same potential for "danger and prejudice" as providing written portions of statutory text (Owens, supra, at 590). It identified the potential dangers as follows:

> First, the fact that the trial court has selected certain portions of its charge may itself convey the message that these are of particular importance. Second, the very repetition of parts of the charge may serve to emphasize them and subordinate the others. Finally, the written instructions may be reinforced by their physical presence in the jury room, as the oral instructions fade from memory.

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*CPL section 310.30 currently provides, in pertinent part, that "[w]ith the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may...give to the jury copies of the text of any statute which, in its discretion, the court deems proper."

Owens, supra., at 591.

The Court in Owens left open the question of whether it is permissible, over the defendant's objection, to give the jury a written copy of the court's full charge (Id., at 590). It answered that question in the negative in People v. Johnson (81 NY2d 980). In Johnson, the jury had requested that the trial court provide it with a written copy of its entire charge and the court, over the objection of the defendant, complied. The Appellate Division reversed the resulting conviction and the Court of Appeals affirmed, holding that, in providing the jury with a copy of its charge (which included statutory material) without the defendant's consent, the trial court violated the express provisions of CPL section 310.30 (Id., at 981).

The Committee is of the view that, when a deliberating jury asks for further instruction or information, the court should be authorized to respond to that request by providing the jury with written copies of all or a portion of its charge "as the court deems proper." By limiting the circumstances under which the court may provide such written material to only those cases where a deliberating jury requests further information or guidance, this measure minimizes the potential for "danger and prejudice" identified in Owens, supra. As an additional protection, the measure would require the court, before providing the jury with a copy of all or part of its charge, to permit counsel to examine any such copy, afford counsel an opportunity to be heard and mark the copy as a court exhibit. The measure also deletes the above-mentioned provision of CPL section 310.30 which allows the court, with the consent of the parties, to provide a deliberating jury with copies of the text of any statute. This provision was considered unnecessary in view of the fact that any relevant statutory material would most likely appear in the charge itself and could, under the proposal, be provided to the jury in writing by the court.

As criminal cases have become increasingly complex, with juries frequently asked to consider an array of charges against multiple defendants, trial courts should have the option of permitting the jury to take into the jury room a written copy of its charge, especially where the jury has specifically requested further guidance or instruction. By establishing such authority, this measure will greatly enhance the court's ability to assist jurors in understanding and applying the law.

Proposal

AN ACT to amend the criminal procedure law, in relation to jury deliberations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 310.30 of the criminal procedure law, as amended by chapter 208 of

the laws of 1980, is amended to read as follows:

§310.30 Jury deliberation; request for information. At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. [With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper] In addition, the court may provide the jury with one or more written copies of all or a portion of its charge as the court deems proper. Before giving to the jury a written copy of all or a portion of its charge pursuant to this section, the court shall permit counsel to examine any such written copy, shall afford counsel an opportunity to be heard and shall mark any such written copy as a court exhibit.

§2. This act shall take effect immediately, and shall apply to all trials commenced on or after such effective date.

35. Defense Subpoenas to Government Agencies
(CPL 610.20(3))

The Committee recommends that subdivision three of CPL section 610.20 be amended to permit a court considering a defense application for a subpoena duces tecum to a government agency, for good cause shown, to dispense with the CPLR section 2307 requirement that the prosecutor and the subpoenaed agency be notified of the application, and the requirement that the prosecutor be served with the subpoena.

Subdivision three of CPL section 610.20 currently provides, in pertinent part, as follows:

> An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof. Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules.

CPL section 610.20(3).

Pursuant to CPLR section 2307, a subpoena duces tecum "to be served upon a library, or a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things," must be issued by a court, and, unless the court orders otherwise, must be made on at least one day's notice to the person or entity having custody of the book, document or other thing and the adverse party (CPLR section 2307). Moreover, the subpoena must be served both on the person or entity having custody of the subpoenaed material and on the adverse party "at least twenty-four hours before the time fixed for the production of such records unless in the case of an emergency the court shall by order dispense with such notice otherwise required."

The CPL section 610.20(3) requirement that a court order be obtained for a subpoena duces tecum to a government agency, and that the application therefor be made on notice to the adverse party, applies only to defense attorneys, not prosecutors (see, CPL section 610.20(2)). This provision has been criticized as giving an unfair advantage to prosecutors in that it has the effect of requiring the defense, but not the prosecution, to reveal its strategy, thus providing a kind of "back door" discovery not otherwise available through the applicable provisions of CPL Article 240. Indeed, the provision has led to defense requests in several capital prosecutions for an exception to the notice requirement.

In People v. Mateo (173 Misc.2d 70 [Co. Ct., Monroe Co.,1997]), for example, the defense sought an order allowing its requests for judicial subpoenas under section 610.20(3) to be ex parte and under seal where the materials sought were to be used in the mitigation (sentencing)

phase of a capital trial (Id., at 70-71). The People opposed the application, arguing that the procedure would contravene the statute. The Court granted the relief sought, at least to the extent of agreeing to review each defense subpoena request in camera and then deciding "on an individual basis" whether notice of a particular subpoena request should be given to the District Attorney (Id., at 71). The Court found that "[w]ere the District Attorney noticed as to every type of subpoenaed record sought by the defense, they would also be alerted about the very heart of the defendant's strategy at the sentencing phase" (Id., see also, People v. Van Dyne, 175 Misc. 2d 558 [Co. Ct., Monroe Co., 1998] [granting defense motion to allow for ex parte presentation of defense applications for subpoenas duces tecum under CPL section 610.20(3) in preparation for mitigation phase of capital trial]; People v. Hall, 179 Misc.2d 488 [Supreme Ct., Monroe Co., 1998] [denying defense request in capital case for permission to submit ex parte applications for subpoenas duces tecum under CPL section 610.20(3), and denying defense application for order prohibiting prosecutor from issuing subpoenas duces tecum under section 610.20(2) without notice to defense and opportunity to be heard] and People v. Owens, 182 Misc.2d 794 [Co. Ct., Monroe Co.,1999] [denying request for order allowing defense to apply ex parte and under seal for judicial subpoenas duces tecum under CPL section 610.20(3)]).

Notably, in 1995, the Legislature passed a bill that would have amended CPLR section 2307 to eliminate the requirement, in both civil and criminal cases, of a motion and court order for a subpoena duces tecum to a government agency. The bill (S.3804/Volker) was generally opposed by law enforcement agencies on the ground that the process of notice and judicial review under CPLR section 2307 (as applied to defendants through CPL section 610.20(3)) serves as an effective deterrent and screening process to weed out overly broad, burdensome or otherwise improper subpoenas. The Governor, in vetoing the bill, agreed, stating that the measure would result in a "significant increase in the number of improper subpoenas served," thereby creating an unnecessary and unreasonable burden for law enforcement and other affected state and local agencies (see, 1995 Executive Veto Message for S.3804/Volker).

The Committee believes that, while it may be inadvisable to do away with the current requirement of judicial review of these defense subpoena requests in criminal prosecutions, fairness dictates that the court be permitted to entertain these applications on an ex parte basis, and to dispense with, or delay, notice to the prosecutor and the subpoenaed agency in appropriate cases. Accordingly, this measure would retain the existing CPL section 610.20(3) requirement that a defendant apply to the court for a subpoena duces tecum to a government agency, but would specify that the application may be made ex parte. Further, the measure would permit the court, "for good cause shown," to dispense with the CPLR section 2307 requirement that the motion be made on notice to the custodian of the material sought and the prosecutor, as well as the requirement that the prosecutor be served with the subpoena once it is issued. Finally, the measure would permit the court to direct that notice of its issuance of the subpoena be provided to the prosecutor "in such time and manner as the court deems proper."

Proposal

AN ACT to amend the criminal procedure law, in relation to subpoenas duces tecum issued on behalf of defendants

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 3 of section 610.20 of the criminal procedure law is amended to read as follows:

3. An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself or herself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof. Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section twenty-three hundred seven of the civil practice law and rules; provided however, that notwithstanding any provision of such section twenty-three hundred seven to the contrary, the court may, for good cause shown: (a) permit the defendant to make his or her application for a subpoena duces tecum ex parte and dispense with the requirement that such application be made on notice to the custodian of the book, document or other thing and the adverse party; and (b) dispense with the requirement that the adverse party be served with the subpoena. In addition, if the court deems it appropriate, it may direct that notice of the court's issuance of the subpoena be provided to the adverse party in such time and manner as the court deems proper. Nothing

contained in this subdivision shall be deemed to negate the requirement in such section twenty-three hundred seven that the custodian of the book, document or other thing, except in the case of an emergency, be served with such subpoena at least twenty-four hours before the time fixed for the production of such records.

§2. This act shall take effect immediately.

36. Adequacy of Psychiatric Notice
(CPL 250.10(2))

The Committee recommends that subdivision two of CPL section 250.10 be amended to require that the notice filed by a defendant under that section specify the type of psychiatric defense or affirmative defense upon which the defendant intends to rely at trial, as well as the nature of the alleged psychiatric malady that forms the basis of such defense or affirmative defense and its relationship to the proffered defense.

Subdivision two of CPL section 250.10 currently provides that in order for a defendant's psychiatric evidence to be admissible at trial, the defense must file and serve timely written notice of its intention to present such evidence. Although the statute directs that "such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment" (CPL section 250.10(2)), it does not specify the information the notice must contain. The Court of Appeals squarely addressed this issue in People v. Almonor (93 NY2d 571).

Following his indictment for Assault in the Second Degree, the defendant in Almonor served the prosecution with notice under CPL section 250.10 which stated, in its entirety, as follows: "Please take notice that pursuant to [CPL] 250.10(2), the defendant intends to present psychiatric evidence on his behalf in the captioned matter" (Almonor, supra, at 574). Despite repeated requests by the prosecution for the defense to identify the nature of the defense and the type of psychiatric evidence it intended to present, the defense refused to provide any further information, stating, in substance, that it had complied fully with the requirements of CPL section 250.10 (Id., at 575).* During jury selection, the defendant proposed to introduce at trial psychiatric evidence of a "diminished capacity" defense. The court rejected the defendant's proposal on the ground that he had not provided proper notice of that defense under CPL section 250.10, and ruled that the defendant would be allowed to present proof in support of the "insanity" affirmative defense only (Id., at 575; see also, PL section 40.15). The trial resulted in a hung jury (Id).

Following a warning by the court that it "did not want to encounter a CPL 250.10 notice problem again at retrial"(Id), the defense, prior to commencement of the second trial, advised the prosecution that the defendant had been diagnosed as suffering from "an acute stress disorder" at the time of the alleged crime, and that his expert would testify as to that diagnosis at retrial (Id). Just prior to jury selection at the second trial, the defendant revealed for the first time that "he intended to pursue a Penal Law §40.15 insanity affirmative defense, and, in addition, a

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*The prosecution in Almonor maintained, specifically, that the defendant's notice was "too vague a basis upon which to conduct its own [psychiatric] examination [of the defendant] or otherwise engage the issues, considering that the notice could be interpreted to invoke either an insanity defense or some other type of psychiatric defense that might lower defendant's level of responsibility" (Almonor, supra, at 574-575).

psychiatric defense based on his inability to form an assaultive intent" (Id). The trial court precluded the second defense based on the untimeliness of the defendant's notice (Id). The defendant was convicted of Assault in the Second Degree, and the Appellate Division affirmed the conviction (Id).

In affirming the Appellate Division's order in Almonor, the Court of Appeals held that, because the defendant had not provided adequate notice under CPL section 250.10(2), the trial court had acted properly in precluding defendant's proposed defense relating to his alleged lack of assaultive intent (Id., at 581). In so holding, the Court found that the statute's "notification format" is governed by two provisions, the notice requirement in subdivision two of section 250.10, and the three categories of psychiatric defenses enumerated in subdivision one of that section (Id). As stated by the Court,

> [a] notice [under CPL 250.10(2)] that names a disorder untied to a CPL 250.10(1) category is an abstraction. An insanity affirmative defense is not the same as a *mens rea*-type defense. The two appear in different paragraphs of CPL 250.10(1). They rest on different psychiatric foundations and different mental states. They call for different psychiatric testimony and involve different legal theories...Unless the prosecution is informed early enough of the nature of the defense with reference to the CPL 250.10(1) categories, it cannot conduct its [own psychiatric] examination of the defendant meaningfully or in time to prepare for trial.

Almonor, supra, at 580.

The Court further stated that

> [t]he governing principle is that CPL 250.10 requires that the defense furnish timely notice of the CPL 250.10(1) category or categories on which it intends to rely. The statute also contemplates that the notice contain enough information to enable the prosecution and the court to discern the general nature of the alleged psychiatric malady and its relationship to a particular, proffered defense...When defendant finally revealed that he intended to rely on the insanity affirmative defense and, in addition, on a defense involving a lack of assaultive intent, *both* based on acute stress disorder, he brought himself in compliance with the statute. The revelation, however, was untimely.

Almonor, supra, at 581 (Emphasis in original).

This measure would codify the Court's holding in Almonor, and in so doing would further the underlying objectives of CPL section 250.10: "to promote procedural fairness and

orderliness...[and] to create a format by which psychiatric evidence may be prepared and presented manageably and efficiently, eliminating the element of surprise" (Id., at 577-578). The measure would also include a provision, similar to that contained in CPL section 200.95(1)(a) ["Bill of Particulars"], to clarify that, in satisfying the psychiatric notice requirement of section 250.10(2), the defendant "shall not be required to include in such notice matters of evidence relating to how he or she intends to establish such defense or affirmative defense." Finally, the measure would expand the existing time limitation for the filing of psychiatric notice under section 250.10 from thirty days after arraignment on the indictment to sixty days, and would clarify that a court may permit not only the late filing of psychiatric notice, but also the late amendment of a previously filed notice.

Proposal

AN ACT to amend the criminal procedure law, in relation to notice of intent to proffer psychiatric evidence

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 250.10 of the criminal procedure law is amended to read as follows:

2. Psychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of [his] an intention to present psychiatric evidence. The notice must specify the type of defense or affirmative defense enumerated in subdivision one of this section upon which the defendant intends to rely, and must set forth the nature of the alleged psychiatric malady that forms the basis of such defense or affirmative defense and its relationship to the proffered defense; provided, however, that the defendant shall not be required to include in such notice matters of evidence relating to how he or she intends to establish such defense or affirmative defense. Such notice must be served and filed before trial and not more than [thirty] sixty days after entry of the plea of not guilty to the indictment. In the

interest of justice and for good cause shown, however, the court may permit such service and filing to be made or amended at any later time prior to the close of the evidence.

§2. This act shall take effect immediately and shall apply to all criminal actions commenced on or after such effective date.

37. Statute of Limitations for Bail Jumping Offenses
(CPL 30.10(4))

The Committee recommends that paragraph (a) of subdivision 4 of CPL section 30.10 be amended, and a new paragraph (c) be added, to provide that, in calculating the statute of limitations period for commencement of a prosecution for bail jumping arising from the defendant's alleged failure to appear in connection with a felony charge, any period following the commission of the offense where the defendant's whereabouts are "continuously unknown" shall not be included, regardless of whether the defendant's whereabouts might have been ascertained by the exercise of "reasonable diligence."

Pursuant to Penal Law section 215. 55, a person is guilty of Bail Jumping in the Third Degree

> when by court order he has been released from custody or allowed to remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with a criminal action or proceeding, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

Penal Law section 215.55.*

Both the First and Second Departments have held that bail jumping is not a "continuing crime." In People v. Landy (125 AD2d 703), for example, the First Department, in affirming the trial court's dismissal on statute of limitations grounds of an indictment charging Bail Jumping in the First Degree, stated:

> The crime of bail jumping in the first degree is defined simply as the failure to appear in court on the required date or voluntarily within 30 days thereafter...It becomes a completed crime when 30 days have expired after the failure to appear [citations omitted]. Because the language of the statute does not unambiguously express a legislative determination that the crime should be considered a continuing one, "that interpretation should be given which best protects the rights of a person charged with an offense" [citations omitted]. Therefore, bail

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*Bail Jumping in the Third Degree is a class A misdemeanor. The elements of the felony-level offenses of Bail Jumping in the Second Degree and Bail Jumping in the First Degree are identical to those of Bail Jumping in the Third Degree, except that, for the Second Degree crime, the charge in the underlying action or proceeding must be a felony (see, PL section 215.56), and for the First Degree crime the defendant must be charged in a pending indictment with a class A or a class B felony (see, PL section 215.57).

> jumping in the first degree is not a continuing crime [citations omitted], and the criminal action must normally be commenced within five years after the offense is committed (CPL 30.10[2][b]).

Landy, supra, at 704; see also, People v. Martinez, 60 AD2d 551 [1st Dept. 1977].

The general rule under CPL section 30.10(2) is that a criminal action for a felony (other than a class A felony) must be commenced "within five years after the commission thereof," and that a criminal action for a misdemeanor must be commenced "within two years after the commission thereof." Pursuant to paragraph (a) of subdivision 4 of that section, "any period following the commission of the offense during which (i) the defendant was continuously outside this state or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence" shall not be included in calculating the applicable time limitation for commencement of the action. Section 30.10(4)(a) also provides, however, that "in no event shall the period of limitation be extended by more than five years beyond the [otherwise applicable] period" (CPL section 30.10(4)(a)).

Because the crime of bail jumping is deemed completed at the expiration of the statutory thirty-day "grace" period, the People must generally file an accusatory instrument, and thereby commence the bail jumping prosecution, within five years of that date (or two years for misdemeanor bail jumping) or suffer a possible dismissal on statute of limitations grounds (see, Landy, supra; see also, CPL sections 210.20(1)(f); 1.20(16)). Although the People could avoid a statute of limitations dismissal by simply filing the accusatory instrument within the five-year period, they might then face a statutory speedy trial problem, since the filing of the accusatory instrument would start the speedy trial "clock," thereby requiring an affirmation of "readiness" by the People before the expiration of the applicable speedy trial period (see, CPL sections 30.30(1); 210.20(1)(g)). Because, however, an absent defendant would not yet have been arraigned on the bail jumping charge, no bench warrant could issue (see, CPL sections 1.20(30)). Thus, the People would not have the benefit of the recently enacted CPL section 30.30(4)(c)(ii) provision requiring the automatic exclusion from the speedy trial calculation of the period during which a bench warrant for the defendant is outstanding.

The Committee is of the view that, where a defendant voluntarily fails to appear in a criminal action when required, and his or her whereabouts are "continuously unknown," that should be sufficient to toll the running of the statute of limitations period for commencing a bail jumping prosecution, especially where the underlying action involves a felony charge. The People should not also be required to show that the absent defendant's whereabouts in such cases were "continuously unascertainable by the exercise of reasonable diligence." By placing this additional burden on the People, the existing statute creates a situation whereby a defendant who voluntarily fails to return to court to face criminal charges may actually benefit from his or her own malfeasance.

This measure is intended to prevent this result by eliminating the "reasonable diligence"

requirement in CPL section 30.10(4), but only for bail jumping prosecutions arising from the defendant's failure to appear in connection with a felony charge. The measure would also eliminate the five-year "cap" on the statute of limitations tolling provision for these bail jumping offenses (see, CPL section 30.10(4)(a)), thereby assuring that, no matter how long a defendant's whereabouts remain "continuously unknown," a bail jumping prosecution can still be timely commenced. The measure would apply not only to the three bail jumping offenses contained in Article 215 of the Penal Law, but also to the crime of Failing to Respond to an Appearance Ticket (PL section 215.58), where the appearance ticket involves the defendant's alleged commission of a felony.

Notably, the measure would make no change to Penal Law section 215.59, which provides an affirmative defense to the crimes of bail jumping and Failing to Respond to an Appearance Ticket where the defendant's failure to appear was "unavoidable and due to circumstances beyond his control."

Proposal

AN ACT to amend the criminal procedure law, in relation to periods of limitation in prosecutions for bail jumping and failing to respond to an appearance ticket

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 4 of section 30.10 of the criminal procedure law is amended to read as follows:

(a) [Any] Except as otherwise provided in paragraph (c) of this subdivision, any period following the commission of the offense during which (i) the defendant was continuously outside this state or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exercise of reasonable diligence. However, in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two.

§2. Subdivision 4 of section 30.10 of the criminal procedure law is amended by adding a

new paragraph (c) to read as follows:

(c) In any prosecution for bail jumping in the first degree as defined in section 215.57 of the penal law, bail jumping in the second degree as defined in section 215.56 of the penal law, bail jumping in the third degree as defined in section 215.55 of the penal law or failing to respond to an appearance ticket as defined in section 215.58 of the penal law, arising from the defendant's alleged failure to appear in connection with a charge against him or her of committing a felony, any period following the commission of the offense during which (i) the defendant was continuously outside this state or (ii) the whereabouts of the defendant were continuously unknown. So much of paragraph (a) of this subdivision as bars extension of the period of limitation by more than five years beyond the period otherwise applicable under subdivision two shall not apply in calculating the period of limitation for the offenses enumerated in this paragraph.

§3. This act shall take effect immediately and shall apply to bail jumping and failing to respond to an appearance ticket offenses committed on or after such effective date.

38. Disclosure of Prior Search Warrant Applications (CPL 690.35(3))

The Committee recommends that subdivision three of CPL section 690.35 be amended to require that an application for a search warrant disclose all prior denials of the same or a similar application, as well as any failure to issue a search warrant based on the same or a similar application, by a different judge, if known to the applicant.

In People v. Bilsky (95 NY2d 172), the Court of Appeals considered the question of whether the "law of the case" doctrine applies to successive applications for a search warrant made before two different Magistrates. In Bilsky, a New York City Criminal Court judge was presented with an application for a search warrant in an ongoing narcotics investigation. The judge, after examining the affidavit and asking the police officer some questions, signed the warrant, and then immediately crossed out her signature, explaining to the law enforcement officers present that she was "uncomfortable" about signing the warrant (Id). The judge gave no further explanation for her action, but advised the officers that they could present the warrant application to another Magistrate (Id). The following day, the prosecution presented the warrant application to a second Magistrate, who reviewed the application and signed the warrant. The supporting affidavit presented to the second judge was identical to the one given to the first Judge, and several sentences had been added to the application explaining that a prior application had been made to a different judge who had crossed out her signature and "encouraged the People to bring th[e] matter before another magistrate" (Id).

The trial court denied the defendant's motion to suppress the illegal drugs and other contraband recovered following execution of the warrant, finding "no basis for finding that [the second judge] did not act as a neutral magistrate in his review of the application for a search warrant in this matter" (Id). On the defendant's appeal of his conviction following a plea of guilty, the First Department affirmed, holding that the "law of the case" doctrine "was not applicable so as to invalidate the warrant that issued for a judicially authorized search predicated on a finding of probable cause" (Id., citing People v. Bilsky, 261 AD2d 174). The Court found that the circumstances in which the first Magistrate signed the warrant but then crossed out her signature and allowed the prosecution to seek out a second Magistrate did "not evince a determination of the issues surrounding the events described in the affidavit" (Id., citing Bilsky, 261 AD2d 174).

The Court of Appeals affirmed, rejecting the defendant's argument that the "law of the case" doctrine precluded the second Magistrate from issuing the otherwise valid warrant (Id). Noting that proper application of the doctrine "presupposes that legal determinations of a merits nature have been made or are necessarily implicated," the Court found that the first Magistrate's striking of her signature "cannot be considered a legal merits determination that the law enforcement officials failed to present probable cause" (Id). The Court further found that, because search warrant applications are customarily made ex parte, with no opportunity for the parties to fully litigate the issues, rulings on these applications are "generally...not the type of

determinations to which the law of the case doctrine are intended to apply" (Id).

In upholding the use of successive search warrant applications both in the case before it and in general, the Court, in Bilsky, emphasized that

> disclosure of a prior warrant application is the proper and preferred practice; it ought to be followed in the presentation of any successive warrant application to another neutral Magistrate. Forthright disclosure lessens the potential for inappropriate 'Judge shopping' and alerts the different Magistrate fully to earlier developments, or nondevelopments, so that appropriate inquiry and consideration may be given for a fully informed judgment and decision on the matter at hand [citation omitted].

Id. The Court noted in this regard that CPLR section 2217(b), which has no analogue in the Criminal Procedure Law, expressly requires that "[a]n ex parte motion shall be accompanied by an affidavit stating the results of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown" (Id).

This measure addresses the gap in existing CPL Article 590 identified in Bilsky by requiring "forthright disclosure" in a search warrant application of any and all unsuccessful prior applications to a different judge where such information is known to the applicant.

Proposal

AN ACT to amend the criminal procedure law, in relation to search warrant applications

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (e) of subdivision 3 of section 690.35 of the criminal procedure law is amended to read as follows:

(e) In the case of an application for a search warrant as defined in paragraph (b) of subdivision two of section 690.05, a copy of the warrant of arrest and the underlying accusatory instrument ; and

(f) A full disclosure of all prior denials of the same or a similar application, as well as any

prior failure to issue a search warrant based on the same or a similar application, by a different judge, if known to the applicant.

§2. This act shall take effect immediately.

39. Intimidating a Victim or Witness in the Fourth Degree (PL 215.18)

The Committee recommends that a new section 215.18 be added to the Penal Law to create the crime of "Intimidating a Victim or Witness in the Fourth Degree."

In People v. Hasan (185 Misc.2d 301), the Court considered the question of whether a defendant's alleged attempt to influence the complainant to withdraw criminal charges by making a series of phone calls to her constituted the offense of Tampering With a Witness in the Fourth Degree (PL §215.10).* At the time of the alleged witness tampering offense, the defendant had been served with an appearance ticket in the underlying criminal case but had not yet been arraigned (Id., at 302).

The Court in Hasan granted the defendant's motion to dismiss the witness tampering charge. In dismissing the charge, the Court found that, because the accusatory instrument on the underlying criminal charge had not been filed until *after* the defendant attempted to influence the complainant, there was "no action or proceeding...pending at the time the defendant placed his calls. Therefore, the complainant was not a witness or about to be called as a witness in an action or proceeding at the time the defendant asked her to drop the charges" (Id., at 306).

The Court noted that the related charge of Intimidating a Victim or Witness might be brought in cases similar to this, where the defendant's alleged intimidation of the witness takes place at an early stage of a criminal proceeding, before the accusatory instrument is filed (Id., citing Matter of Phillippa P., 221 AD2d 159 [1st Dept. 1995]). As correctly noted by the Court, however, all of the existing crimes of Intimidating a Victim or Witness under Penal Law Article 215

> require that the defendant cause physical injury or property damage, or instill a fear of physical injury...Yet, a witness may be intimidated to withdraw charges in more subtle ways, such as by harassment with frequent telephone calls, as is charged in the instant case, or by being followed about. This is especially true in domestic violence cases, where the defendant may, for example, repeatedly call the complainant at her place of business, causing her to fear loss of her job. Thus, there appears to be a gap in the law, which the passage of additional legislation may fill, e.g., an A misdemeanor charge of intimidating a witness in the fourth degree.

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*Pursuant to Penal Law section 215.10(a), a person is guilty of tampering with a witness when, "knowing that a person is or is about to be called as a witness in an action or proceeding,...he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding" (PL §215.10(a)).

Hasan, supra, at 306; see also, PL §§ 215.15, 215.16 and 215.17.

This measure would close the statutory gap identified in Hasan by establishing a new Class A misdemeanor in Article 215 to cover situations where the "intimidating" conduct, though offensive, does not rise to the level of causing physical injury or property damage to the victim or witness. The measure provides, in substance, that a person is guilty of this offense ("Intimidating a Victim or Witness in the Fourth Degree") when, knowing that another person possesses information relating to a criminal transaction, and with the intent to induce such other person to refrain from communicating the information to law enforcement or a court, he or she: (1) strikes, shoves, kicks or otherwise subjects such other person or a third person to similar physical contact, or attempts or threatens to do the same; (2) engages in a course of conduct or repeatedly commits acts with the intent to alarm or seriously annoy such other person or a third person; or (3) threatens to damage the property of such other person or a third person.

By criminalizing offensive conduct clearly intended to dissuade persons with knowledge of criminal activity from coming forward with such information, this measure closes a gap in existing law and provides a deterrent to those who would, for their own benefit, try to subvert the truth-seeking process.

Proposal

AN ACT to amend the penal law, in relation to the crime of intimidating a victim or witness in the fourth degree

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The penal law is amended by adding a new section 215.18 to read as follows:

§215.18. Intimidating a victim or witness in the fourth degree. A person is guilty of intimidating a victim or witness in the fourth degree when, knowing that another person possesses information relating to a criminal transaction and other than in the course of that criminal transaction or immediate flight therefrom, he or she, with the intent to induce such other person to refrain from communicating such information to any court, grand jury, prosecutor, police officer or peace officer:

1. Strikes, shoves, kicks or otherwise subjects such other person or another person to physical contact of a similar nature, or attempts or threatens to do the same; or

2. Engages in a course of conduct or repeatedly commits acts with the intent to alarm or seriously annoy such other person or another person; or

3. Threatens to damage the property of such other person or another person.

Intimidating a victim or witness in the fourth degree is a class A misdemeanor.

§2. This act shall take effect on the first day of November next succeeding the date that it shall have become a law.

40. Revision of the Contempt Law
(Judiciary Law Article 19)

The Committee recommends that Article 19 of the Judiciary Law be amended to effect comprehensive reform of the law governing contempt. This measure was originally proposed in 2000 by the Chief Administrative Judge's Advisory Committee on Civil Practice, and appeared in revised form in that Committee's 2001 Report to the Chief Administrative Judge. The measure was then referred to this Committee for review, and was further revised to incorporate provisions authorizing, inter alia: the setting of bail on an alleged or adjudicated contemnor where there is reasonable cause to believe such is necessary to insure the individual's future appearance when required; the use of bench warrants in certain circumstances to bring an alleged or adjudicated contemnor before the court; the assignment of counsel pursuant to Article 18-B of the County Law for indigent contemnors facing a possible jail sanction or appealing a sanction that includes jail; the vacating or modification of a previously entered contempt finding or sanction by the court that entered it; and the appointment by an administrative judge or appellate court of a "disinterested member of the bar" to prosecute a contempt charge or respond to an appeal of a contempt finding. The measure, as so revised, appeared in both Committees' 2002 Reports to the Chief Administrative Judge. In 2003, a few additional changes were made at the recommendation of the Chief Administrative Judge's Advisory Committee on Local Courts.

The measure repeals Article 19 of the Judiciary Law in its entirety, replacing the largely outdated and often confusing language of that Article with more modern terminology, and eliminating provisions that are duplicative or have outlived their usefulness. At the same time, the measure retains, albeit in a more comprehensible form, virtually all of the concepts traditionally associated with a court's exercise of the contempt power, including "summary" contempt (section 753(1)),* the authority to impose fines and/or jail as sanctions for contemptuous conduct, and the authority to apply these sanctions either as a punishment for such conduct (section 751), or as a remedy where the conduct interferes with or otherwise prejudices the rights or remedies of a party to an action or proceeding (section 752).

In defining contempt under proposed section 750, the measure eliminates all references to "civil" and "criminal" contempt -- concepts that have generated substantial litigation and confusion in the past -- and replaces them with an inclusive definition that, despite its brevity, encompasses nearly all of the conduct constituting "civil" and "criminal" contempt under existing Judiciary Law sections 750 and 753.** To conform with the Penal Law, which uses the

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*Unless otherwise specifically noted, all parenthetical section references are to proposed sections of Article 19 of the Judiciary Law, as added by this measure.

**This is accomplished, in part, through the use of a single "catch-all" provision in proposed section 750(4), which includes within the definition of contempt under Article 19 "any other conduct designated by law as a contempt." This provision replaces several cumbersome cross-references in existing Judiciary Law section 750 to, inter alia, the "unlawful practice of law"

term "intentionally" rather than "willfully" in defining the mens rea for various offenses under that chapter, the measure has been amended this year to replace "willful" with "intentional" in the proposed section 750 definition of contempt. It should be noted, however, that, in so harmonizing the two chapters, no substantive change in the "mens rea" requirement for contempt under Judiciary Law Article 19 is intended.

Where a person is found to have engaged in conduct constituting contempt under proposed section 750, the court, under proposed sections 751 and 752, may "punish" or "remedy" the contempt, through the imposition of a fine or imprisonment, or both, in accordance with the procedures set forth in those sections.

Thus, for example, under proposed section 751 ("Punitive contempt; sanctions"), where the court makes a finding of contempt and seeks to *punish* the contemnor, it may do so by imposing a fine or a jail sanction of up to six months, or both. Where the contempt involves willful conduct that disrupts or threatens to disrupt court proceedings, or that "undermines or tends to undermine the dignity and authority of the court," the permissible fine under that section may not exceed $5000 "for each such contempt." In fixing the amount of the fine or period of imprisonment, the court, under proposed section 751(2), must consider "all the facts and circumstances directly related to the contempt," including the nature and extent of the contempt, the amount of gain or loss caused thereby, the financial resources of the contemnor and the effect of the contempt "upon the court, the public, litigants or others." The measure also directs that, where a punitive sanction of a fine or imprisonment is imposed, the underlying contempt finding must be based "upon proof beyond a reasonable doubt" (section 753(5)).

The court also has the authority, under proposed section 752 ("Remedial contempt; sanctions"), to impose a *remedial* sanction for a contempt in order to "protect or enforce a right or remedy of a party to an action or proceeding or to enforce an order or judgment." As with the punitive contempt sanction, this remedial sanction would be in the form of a fine (including successive fines) or imprisonment, or both (section 752). The measure requires, however, that in imposing a remedial fine or term of imprisonment, the court must direct that the imprisonment, and the cumulation of any successive fines imposed, "continue only so long as is necessary to protect or enforce such right, remedy, order or judgment" (section 752). Where a remedial sanction for contempt is imposed, the underlying contempt finding must be supported by "clear and convincing" evidence (section 753(5)).

The measure provides that a court's finding of contempt must be in writing and must "state the facts which constitute the offense" (section 754). Similarly, if a sanction is imposed, the order imposing it must be in writing, and "shall plainly and specifically prescribe the punishment or remedy ordered therefor" (section 754). However, where a contempt is summarily

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under Judiciary Law Article 15, and an employer's subjection of an employee to "penalty or discharge" for jury service, in violation of Judiciary Law section 519 (see, e.g., subdivisions (A)(7) and (B) of existing Judiciary Law section 750).

punished pursuant to proposed section 753(1), the facts supporting the contempt finding, and the specific punishment imposed thereon, shall be placed on the record, to be followed "as soon thereafter as is practicable" by a written finding and order (proposed section 754).

The procedures governing contempt proceedings, including the summary adjudication and punishment of contempt, are set forth in proposed section 753 ("Procedure"). With regard to summary contempt, the measure provides, in substance, that where the contempt is

> committed in the immediate view and presence of the court [it] may be punished summarily where the conduct disrupts proceedings in progress, or undermines or threatens to undermine the dignity and authority of the court in a manner and to the extent that it reasonably appears that the court will be unable to continue to conduct its normal business in an appropriate way.

Proposed section 753(1).

The measure also provides that, before a person may be summarily found in contempt and punished therefor, the court must give the person "a reasonable opportunity to make a statement on the record in his or her defense or in extenuation of his or her conduct" (section 753(1)).

Where the contempt is not summarily punished, the court, under proposed section 753(2), must provide the alleged contemnor with written notice of the contempt charge, an opportunity to be heard and to "prepare and produce evidence and witnesses in his or her defense," the right to assistance of counsel and the right to cross-examine witnesses. Where the contemptuous conduct involves "primarily personal disrespect or vituperative criticism of the judge," and the conduct is not summarily punished, the alleged contemnor is entitled to a "plenary hearing in front of another judge designated by the administrative judge of the court in which the conduct occurred" (section 753(3)). This judicial disqualification provision, which has no analogue in existing Judiciary Law Article 19, is modeled after the Rules of the Appellate Division (see, section 604.2(d) of the Rules of the First Department and section 701.5 of the Rules of the Second Department), and is intended to insure that due process is satisfied in cases where the contemptuous conduct involves a particularly egregious personal attack on the judge. See, generally, Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

Proposed section 753 includes an additional provision not found in existing Article 19 that would allow for the appointment by an Administrative Judge (or the appellate court on an appeal of a contempt adjudication) of a "disinterested member of the bar" to prosecute a contempt charge or respond to a contempt appeal (section 753(4)). This provision is intended to address the situation in which, due to the nature of the alleged contempt or the circumstances of its commission, there is no advocate to pursue the contempt charge in the trial court or argue in favor of upholding the contempt finding on appeal. Where, for example, a contempt is committed by a non-party to a civil or criminal case (e.g., a reporter violates a trial judge's order prohibiting

the taking of photographs in court), or involves misconduct by a party that does not affect the opposing party's rights or remedies, the court may be forced to either pursue the contempt charge itself, or forgo prosecution altogether. By allowing for the appointment in these situations of a disinterested attorney to pursue the contempt charge, and to argue in support of any resulting contempt ruling on appeal, this provision fills a critical gap in existing Article 19 and insures that the fundamental nature of the adversarial process remains intact.***

The measure provides that where a person charged with contempt is financially unable to obtain counsel, and the court determines that, upon a finding of contempt, it might impose a sanction of imprisonment, the court must, unless it punishes the contempt summarily under proposed section 753(1), assign counsel pursuant to Article 18-B of the County Law (section 753(6)). The requirement that the court, before assigning counsel, make a preliminary determination that it may impose jail as a sanction if a contempt is found, is intended to eliminate the need to assign counsel in every single contempt case involving an indigent contemnor (see, existing Judiciary Law section 770 [providing, in pertinent part, that where it appears that a contemnor is financially unable to obtain counsel, "the court *may in its discretion* assign counsel to represent him or her"], emphasis added). Notably, the measure requires that counsel be assigned *regardless* of whether the indigent contemnor is facing a "punitive" jail sanction under proposed section 751, or a "remedial" jail sanction under proposed section 752 (see, generally, People ex rel Lobenthal v. Koehler, 129 AD2d 28, 29 [1st Dept. 1987] [holding that, under U.S. Supreme Court precedent, an indigent alleged contemnor facing possible jail as a sanction has the right to assigned counsel, regardless of whether the charged contempt is "civil" or "criminal" in nature]; see also, Hickland v. Hickland, 56 AD2d 978, 980 [3d Dept. 1977]).

Similarly, the measure requires that, where an adjudicated contemnor who is financially unable to obtain counsel appeals a contempt ruling that includes a sanction of imprisonment, the appellate court must assign counsel pursuant to Article 18-B (section 755(2)). Because existing Article 18-B of the County Law contains no express reference to the assignment of counsel to indigent persons charged with contempt under the Judiciary Law, the measure makes conforming changes to County Law section 722-a to include these Judiciary Law contempt proceedings (other than summary proceedings) and appeals within the scope of proceedings to which Article 18-B applies (see, section 5 of the measure).

With regard to appeals generally, the measure provides that an "adjudication of contempt" -- which is defined in proposed section 755(1) as the court's written "finding" of contempt together with its written order imposing a sanction, if any -- is "immediately appealable

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***The Committee recognizes that, under existing practice, where a summary contempt ruling is challenged by way of a CPLR Article 78 proceeding in accordance with existing Judiciary Law section 752, the issuing judge, as the named respondent, is generally represented by the State Attorney General's Office. As discussed, infra, however, under this measure, all contempt rulings, including those rendered summarily, will be appealable only pursuant to CPLR Articles 55, 56 and 57.

and shall be granted a preference by the appellate court" (section 755(1)). Such appeals are to be governed by the provisions of CPLR Articles 55, 56 and 57, and "shall be in accordance with the applicable rules of the appellate division of the department in which the appellate court is located" (section 755(2)). As previously noted, in the interest of uniformity, the measure eliminates the requirement, found in existing Judiciary Law section 752, that review of summary contempt rulings be had pursuant to CPLR Article 78, and requires that *all* appeals of Article 19 contempt adjudications be pursuant to the aforementioned "appeal" articles of the Civil Practice Law and Rules (see, section 3 of the measure [amending CPLR section 7801(2) to conform that section to proposed Judiciary Law section 755(2)]). In addition to these appellate provisions, proposed section 755 contains a related provision, not found in existing Judiciary Law Article 19, authorizing the court that makes a contempt finding or issues an order imposing a sanction thereon, to vacate or modify such finding or order "at any time after entry thereof" (section 755(3)).

One of the most significant provisions of the measure is proposed section 756, which authorizes, inter alia, the issuance of a securing order to insure an alleged or adjudicated contemnor's presence in court when required, as well as the issuance of a bench warrant directing a police officer to bring a contemnor before the court "forthwith." Although existing Judiciary Law Article 19 includes references to a contemnor's giving an "undertaking" for his or her appearance in court, and to the "prosecution" of the undertaking where the contemnor fails to appear (see, e.g., existing Judiciary Law sections 777 through 780), the situations in which an undertaking may be used under Article 19 appear to be limited to certain "civil" contempt proceedings (see, Brunetti, "The Judiciary Law's Criminal Contempt Statute: Ripe for Reform," NYS Bar Journal, December 1997, at 57-58). As such, it is unclear whether, in a "criminal" contempt proceeding under existing Article 19, a judge has the authority to issue a securing order setting bail on an alleged contemnor who may not return to court when directed (Id).

Proposed section 756 fills this gap in the law by establishing clear rules for the use of securing orders and bench warrants in all Article 19 contempt proceedings. The section provides, for example, that:

> [W]here a person is charged with, or is awaiting the imposition of a sanction upon a finding of, contempt..., the court may, where it has reasonable cause to believe that a securing order is necessary to secure such person's future court attendance when required during the pendency of the contempt proceedings, issue a securing order fixing bail...With respect to a person charged with contempt but against whom a finding of contempt has not yet been entered, no securing order may be issued...absent an additional finding...that there is reasonable cause to believe that the person so charged committed the contempt.

Section 756(a) and (b).

The measure incorporates by reference, in subdivision (1)(c) of proposed section 756, relevant provisions of CPL Articles 510 (relating to securing orders and applications for recognizance or bail), 520 (relating to bail and bail bonds), 530 (relating to orders of recognizance or bail) and 540 (relating to the forfeiture and remission of bail), and renders these provisions applicable to securing orders issued under proposed section 756, but only "to the extent not inconsistent with" that section (756(1)(c)). As noted, the measure also expressly provides for the issuance of bench warrants in certain specified circumstances, and directs that any such warrant "be executed in the manner prescribed by section 530.70 of the criminal procedure law" (756(2) and (3)). The measure further requires that, where a court enters a finding of contempt under Article 19 and issues an order imposing a punishment or remedy of imprisonment thereon, it "must commit the person who is the subject of the order to the custody of the sheriff, or must order such person to appear on a future date to be committed to the custody of the sheriff" (section 756(3)). Where, under proposed section 751, the imprisonment is imposed as a *punitive* sanction, the person is entitled to credit for time spent in jail on the contempt charge prior to commencement of the imposed term of imprisonment, in accordance with the provisions of section 756(4)).

Notably, the measure does not address the exercise of the contempt power by courts "not of record." A proposed section 756, dealing with the extent of the contempt power for these courts, which had appeared in an earlier version of the measure, has been removed, leaving the articulation of this power to the terms of the lower court acts. Conforming amendments will be proposed at a later time to address the exercise of the contempt power by courts of limited jurisdiction, as well as the use of the terms "civil contempt" and "criminal contempt" in a variety of other statutory contexts.

Finally, the measure makes conforming changes to: (1) Judiciary Law sections 476-a(1) and 485 to clarify that certain conduct constituting the "unlawful practice of law" under Judiciary Law Article 15 shall continue to be punishable as contempt under Article 19, and to replace certain references to repealed sections of the Penal Law in section 476-a(1) with their modern-day counterparts in the General Business Law (see, section 6 of the measure); and (2) Judiciary Law section 519 to clarify that violations by employers of that section shall continue to be punishable as contempt under Article 19 (see, section 8 of the measure).

It has been stated that "[a] court lacking the power to coerce obedience of its orders or punish disobedience thereof is an oxymoron" (Gray, "Judiciary and Penal Law Contempt in New York: A Critical Analysis," Journal of Law and Policy, Vol. III, No. 1, at 84), and that, "[i]n the United States, 'the contempt power lies at the core of the administration of a state's judicial system'[citation omitted]. A court without contempt power is not a court" (Id). This Committee, and the Advisory Committee on Civil Practice, fully concur with these observations, and jointly offer this comprehensive measure as a means of bringing much needed reform to an area of the law that is of critical importance to the Judiciary and to the effective administration of justice.

Proposal

AN ACT to amend the judiciary law, the civil practice law and rules, and the county law, in relation to the law governing contempt

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections 750 through 781 of the judiciary law are REPEALED.

§2. The judiciary law is amended by adding eight new sections, 750 through 757, to read as follows:

§750. Contempt. Contempt of court is defined as (1) intentional conduct that disrupts or threatens to disrupt court proceedings or that undermines or tends to undermine the dignity and authority of the court; (2) intentional disobedience of the court's lawful order or mandate; (3) intentional violation of a duty or other misconduct by which a right or remedy of a party to an action or special proceeding or enforcement of an order or judgment may be defeated, impaired, impeded or prejudiced; (4) any other conduct designated by law as a contempt; or (5) intentional conduct that aids or abets another person in committing any of the acts listed above. Failure to pay a sum of money ordered or adjudged, except a fine or sanction, for which execution may be had pursuant to the civil practice law and rules shall not constitute contempt.

§751. Punitive contempt; sanctions. 1. A court of record may, following a finding of contempt, punish such contempt by a fine or by imprisonment, not exceeding six months in the jail of the county where the court is sitting, or both, in the discretion of the court; provided, however, that where a fine is imposed pursuant to this section for conduct constituting contempt

as defined in subdivision one of section seven hundred fifty, such fine shall not exceed five thousand dollars for each such contempt. Where a person is committed to jail for the nonpayment of a fine imposed under this section, such commitment shall be for a period not to exceed six months, and such period of imprisonment shall run consecutively with any other term of imprisonment imposed under this section.

2. In fixing the amount of the fine or imprisonment, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (a) the nature and extent of the contempt; (b) the amount of gain or loss caused by the contempt; (c) the financial resources of the person held in contempt; and (d) the effect of the contempt upon the court, the public, litigants or others.

§752. Remedial contempt; sanctions. A court of record has the power to remedy, by fine, including successive fines, or imprisonment, or both, a contempt so as to protect or enforce a right or remedy of a party to an action or proceeding or to enforce an order or judgment; provided however, that the court, in imposing such remedial sanction, shall direct that such imprisonment, and the cumulation of any such successive fines, shall continue only so long as is necessary to protect or enforce such right, remedy, order or judgment.

§753. Procedure. 1. Contempt committed in the immediate view and presence of the court may be punished summarily where the conduct disrupts or threatens to disrupt proceedings in progress, or undermines or threatens to undermine the dignity and authority of the court in a manner and to the extent that it reasonably appears that the court will be unable to continue to conduct its normal business in an appropriate way. Before a summary adjudication of contempt, the court shall give the person charged a reasonable opportunity to make a statement on the

record in his or her defense or in extenuation of his or her conduct.

2. Where a contempt is not summarily punished and the court has reason to believe that a contempt has been committed as defined by section seven hundred fifty, the court shall provide written notice to the person charged with contempt; a reasonable opportunity to prepare and produce evidence and witnesses in his or her defense; an opportunity to be heard; the right to assistance of counsel; and the right to cross-examine witnesses.

3. In all cases where the alleged contempt primarily involves personal disrespect or vituperative criticism of the judge, and where such contempt is not summarily adjudicated pursuant to subdivision one of this section, the person charged with the contempt is entitled to a plenary hearing in front of another judge designated by the administrative judge of the court in which the conduct occurred.

4. In any proceeding held pursuant to subdivision two or three of this section, or in any appeal from an adjudication of contempt, the administrative judge of the court conducting the proceeding, or the appellate court on the appeal, may appoint a disinterested member of the bar to prosecute the alleged contempt or respond to the appeal in accordance with this article and any rules governing such appointments which may be promulgated by the chief administrator of the courts.

5. A finding of contempt for which a fine or imprisonment is imposed pursuant to section seven hundred fifty-one shall be based only upon proof beyond a reasonable doubt. A finding of contempt for which a fine or imprisonment is imposed pursuant to section seven hundred fifty-two shall be based only upon proof by clear and convincing evidence.

6. Where it appears in any proceeding held pursuant to subdivision two or three of this

section that the person charged with contempt is financially unable to obtain counsel, and where the court determines that it may, upon a finding of contempt against such person, impose a sanction of imprisonment pursuant to section seven hundred fifty-one or seven hundred fifty-two, the court shall assign counsel to represent such person at such proceeding in accordance with the relevant provisions of article 18-B of the county law.

§754. Finding of contempt; order imposing sanction. A finding of contempt shall be in writing stating the facts which constitute the offense. Where a sanction is imposed upon such finding, the order imposing such sanction shall also be in writing and shall plainly and specifically prescribe the punishment or remedy ordered therefor. Where, however, a contempt is summarily punished pursuant to subdivision one of section seven hundred fifty-three, the court shall place on the record the facts constituting the offense and the specific punishment ordered therefor and shall, as soon thereafter as is practicable, prepare a written finding and order conforming to the requirements of this section.

§755. Adjudication of contempt; appeals; power of court to modify or vacate contempt finding or sanction. 1. An adjudication of contempt shall consist of the court's written finding of contempt and its written determination and order with respect to the imposition of a sanction, if any; and such adjudication shall be immediately appealable and shall be granted a preference by the appellate court.

2. An appeal from an adjudication of contempt shall be pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules, and shall be in accordance with the applicable rules of the appellate division of the department in which the appellate court is located. Where such adjudication of contempt includes a sanction of

imprisonment, and where the person upon whom such sanction has been imposed is financially unable to obtain counsel for the appeal, the appellate court shall assign counsel to represent such person in accordance with the relevant provisions of article 18-B of the county law.

3. Notwithstanding any provision of law to the contrary, a finding of contempt under this article, as well as an order imposing a sanction upon such finding, may, at any time after entry thereof, be vacated or modified by the court that made such finding or imposed such sanction.

§756. Securing attendance of persons in contempt proceedings; warrants; commitment; jail time. 1. (a) Notwithstanding any provision of law to the contrary, where a person is charged with, or is awaiting the imposition of a sanction upon a finding of, contempt under this article, the court may, where it has reasonable cause to believe that a securing order is necessary to secure such person's future court attendance when required during the pendency of the contempt proceedings, issue a securing order fixing bail.

(b) With respect to a person charged with contempt but against whom a finding of contempt has not yet been entered, no securing order may be issued pursuant to paragraph (a) absent an additional finding by the court that there is reasonable cause to believe that the person so charged committed the contempt.

(c) The provisions of section 510.10 of the criminal procedure law, relating to the revocation or termination of a securing order; section 510.20 of the criminal procedure law, relating to applications for recognizance or bail and the making and determination thereof; subdivision two of section 510.30 of the criminal procedure law, relating to the factors and criteria to be considered in issuing an order of recognizance or bail; subdivisions two and three of section 510.40 of the criminal procedure law, relating to the court's granting an application for

recognizance and the examination and approval of bail posted, respectively; section 510.50 of the criminal procedure law, relating to the enforcement of a securing order; article 520 of the criminal procedure law, relating to bail and bail bonds; subdivision one of section 530.60 of the criminal procedure law, relating to the revocation, for good cause shown, of an order of recognizance or bail; and article 540 of the criminal procedure law, relating to the forfeiture and remission of bail, shall, to the extent not inconsistent with this section, apply to orders issued pursuant thereto.

2. Where a person charged with, or awaiting the imposition of a sanction upon a finding of, contempt under this article fails to appear in court as required, the court may issue a warrant, addressed to a police officer, directing such officer to take such person into custody anywhere within the state and to bring him or her to the court forthwith. Such warrant shall be executed in the manner prescribed by section 530.70 of the criminal procedure law relating to bench warrants. Upon the person's appearance before the court following the execution of such warrant, or upon his or her voluntary appearance following the issuance of such warrant, the court may, after providing such person an opportunity to be heard on the circumstances surrounding such failure to appear, issue an order fixing bail in accordance with subdivision one of this section; provided however, that, where such person, at the time of such failure to appear, is at liberty on bail pursuant to a previously issued order under this section, the court, upon such appearance, must vacate the order and issue a new order fixing bail in a greater amount or on terms more likely to secure the future attendance of such person, or committing such person to the custody of the sheriff.

3. Where a court enters a finding of contempt under this article and issues an order upon

such finding that includes a punishment or remedy of imprisonment, the court must commit the person who is the subject of the order to the custody of the sheriff, or must order such person to appear on a future date to be committed to the custody of the sheriff. If the person is not before the court when the order that includes a punishment or remedy of imprisonment is entered, the court may issue a warrant authorizing a police officer to take such person into custody anywhere within the state and to bring that person before the court. Such warrant shall be executed in the manner prescribed by section 530.70 of the criminal procedure law relating to bench warrants.

4. Where a term of imprisonment is imposed on a person as a sanction for a punitive contempt in accordance with section seven hundred fifty-one of this article, such term shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such term as a result of the contempt charge that culminated in the imposition of such sanction. The credit herein provided shall be calculated from the date custody under the charge commenced to the date such term of imprisonment commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject.

§3. Subdivision 2 of section 7801 of the civil practice law and rules is amended as follows:

2. Which was made in a civil action or criminal matter [unless it is an order summarily punishing a contempt committed in the presence of the court].

§4. Subdivision 4 of section 722 of the county law is amended to read as follows:

4. Representation according to a plan containing a combination of any of the foregoing.

Any judge, justice or magistrate in assigning counsel pursuant to sections 170.10, 180.10, 210.15 and 720.30 of the criminal procedure law, or in assigning counsel to a defendant when a hearing has been ordered in a proceeding upon a motion, pursuant to article four hundred forty of the criminal procedure law, to vacate a judgment or to set aside a sentence, or in assigning counsel pursuant to the provisions of subdivision six of section seven hundred fifty-three of the judiciary law or section two hundred sixty-two of the family court act or section four hundred seven of the surrogate's court procedure act, shall assign counsel furnished in accordance with a plan conforming to the requirements of this section; provided, however, that when the county or the city in which a county is wholly contained has not placed in operation a plan conforming to that prescribed in subdivision three or four of this section and the judge, justice or magistrate is satisfied that a conflict of interest prevents the assignment of counsel pursuant to the plan in operation, or when the county or the city in which a county is wholly contained has not placed in operation any plan conforming to that prescribed in this section, the judge, justice or magistrate may assign any attorney in such county or city and, in such event, such attorney shall receive compensation and reimbursement from such county or city which shall be at the same rate as is prescribed in section seven hundred twenty-two-b of this chapter.

§5. Section 722-a of the county law is amended to read as follows:

§722-a. [Definition of Crime] Definitions. 1. For the purposes of this article, the term "crime" shall mean: (a) a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof; and (b) a contempt of court, as defined in section seven hundred fifty of the judiciary

law, other than a contempt that is summarily punished pursuant to subdivision one of section seven hundred fifty-three of the judiciary law, for which a sanction of imprisonment is authorized and may be imposed pursuant to section seven hundred fifty-one or seven hundred fifty-two of the judiciary law.

2. For the purposes of this article, the terms "criminal action" and "criminal proceeding," in addition to having their ordinary meaning, shall also mean an action or proceeding conducted pursuant to article nineteen of the judiciary law involving a charge of contempt for which a sanction of imprisonment is authorized and may be, or has been, imposed pursuant to section seven hundred fifty-one or seven hundred fifty-two of the judiciary law.

§6. Subdivision 1 of section 476-a of the judiciary law, as amended by chapter 709 of the laws of 1965, is amended to read as follows:

1. The attorney-general may maintain an action upon his or her own information or upon the complaint of a private person or of a bar association organized and existing under the laws of this state against any person, partnership, corporation, or association, and any employee, agent, director, or officer thereof who commits any act or engages in any conduct prohibited by law as constituting the unlawful practice of the law.

The term "unlawful practice of the law" as used in this article shall include, but is not limited to, (a) any act prohibited by [penal law] sections [two hundred seventy, two hundred seventy-a, two hundred seventy-e, two hundred seventy-one, two hundred seventy-five, two hundred seventy-five-a, two hundred seventy-six, two hundred eighty or four hundred fifty-two] four hundred seventy-eight, four hundred seventy-nine, four hundred eighty-three, four hundred eighty-four, four hundred eighty-nine, four hundred ninety, four hundred ninety-one or four

hundred ninety-five of this article, or section three hundred thirty-seven of the general business law, or (b) any other act forbidden by law to be done by any person not regularly licensed and admitted to practice law in this state [, or (c) any act punishable by the supreme court as a criminal contempt of court under section seven hundred fifty-B of this chapter].

§7. Section 485 of the judiciary law is amended to read as follows:

§485. Violation of certain preceding sections a misdemeanor; violation of certain sections a contempt of court. Any person violating the provisions of sections four hundred seventy-eight, four hundred seventy-nine, four hundred eighty, four hundred eighty-one, four hundred eighty-two, four hundred eighty-three or four hundred eighty-four, shall be guilty of a misdemeanor. In addition, a violation of the provisions of section four hundred seventy-eight, four hundred eighty-four or four hundred eighty-six shall constitute a contempt of court punishable pursuant to article nineteen of this chapter.

§8. Section 519 of the judiciary law, as amended by chapter 85 of the laws of 1995, is amended to read as follows:

§519. Right of juror to be absent from employment. Any person who is summoned to serve as a juror under the provisions of this article and who notifies his or her employer to that effect prior to the commencement of a term of service shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty. An employer may, however, withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than ten employees shall not withhold the first forty dollars of such juror's daily wages during the first three days of jury service. Withholding of wages in accordance with this section shall not be deemed a penalty. Violation of

this section shall constitute a [criminal] contempt of court punishable pursuant to [section seven hundred fifty] article nineteen of this chapter.

§9. This act shall take effect immediately.

41. Compensation of Experts
(Judiciary Law 34-a)

The Committee recommends that a new section 34-a be added to the Judiciary Law to clarify that, where a trial court engages the services of an expert in a criminal action or proceeding, the expert shall be entitled to receive "reasonable compensation" for his or her services, and such compensation shall be a state charge.

In People v. Arnold (98 NY2d 63, 68), the Court of Appeals, in a prosecution for drug and weapons possession, held that the trial court committed reversible error when, after both sides had rested, it called as its own witness a police officer who both parties had deliberately chosen not to call. The Court found that, under the circumstances of that case, the trial court had "abused its discretion as a matter of law" by "assum[ing] the parties' traditional role of deciding what evidence to present, and introduc[ing] evidence that had the effect of corroborating the prosecution's witnesses and discrediting defendant on a key issue" (Id., at 68). The Court noted, however, that, while the practice "should be engaged in sparingly," a trial court's calling its own witness may be permissible in certain circumstances, such as where "special expertise" is required (Id).

While the Committee agrees that there are certain limited circumstances in which a trial court in a criminal case may properly retain the services of an expert witness to testify at a trial or hearing, there is currently no provision in law for compensating an expert so retained. This measure is intended to fill this statutory gap by expressly providing for the compensation of court-retained experts. The measure would take effect immediately, and by its terms would not apply to an expert witness appointed pursuant to section 722-c of the County Law, or pursuant to sections 35 or 35-b of the Judiciary Law.

Proposal

AN ACT to amend the judiciary law, in relation to the compensation of experts in criminal cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The judiciary law is amended by adding a new section 34-a to read as follows:

§34-a. Compensation of certain experts who serve as witnesses or otherwise in criminal action or proceeding. Where, in a criminal action or proceeding, the court engages the services of an expert, he or she shall be entitled to receive reasonable compensation for his or her services in

an amount to be fixed by the court. All expenses for compensation under this section shall be a state charge to be paid out of funds appropriated to the administrative office for the courts for that purpose. The provisions of this section shall not apply to an expert appointed pursuant to section 722-c of the county law or pursuant to sections 35 or 35-b of this chapter.

§2. This act shall take effect immediately.

42. Appeal of CPL 140.45 Dismissal Orders
(CPL 450.20, 450.51)

The Committee recommends that CPL section 450.20 be amended, and a new CPL section 450.51 be added, to authorize an appeal as of right by the People from an order dismissing an accusatory instrument pursuant to CPL section 140.45.

CPL section 140.45 requires a local criminal court to dismiss an accusatory instrument filed pursuant to a warrantless arrest when the instrument is not sufficient on its face and the "court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file" a sufficient accusatory instrument (CPL section 140.45). In People v. Hernandez (98 NY2d 8), the Court of Appeals considered an appeal from an order of the Appellate Term reversing an order of the trial court dismissing a misdemeanor complaint pursuant to section 140.45. Finding that no appeal lies from a dismissal order issued under that section, the Court reversed the order of the Appellate Term, and remitted the case to that Court for dismissal of the appeal (Id., at 10-11). In so holding, the Court found that CPL section 450.20, which authorizes an appeal by the People as of right from certain orders and sentences of a criminal court,

> only authorizes an appeal from an order dismissing an accusatory instrument if the order was entered 'pursuant to section 170.30, 170.50, or 210.20.' In contrast, the Legislature has not provided the People with any right of appeal from CPL 140.45 dismissals.

Id., at 10.

This measure would address this gap in the law by adding a new subdivision (1-b) to CPL section 450.20 to expressly authorize an appeal by the People to an intermediate appellate court from an order of a local criminal court dismissing an accusatory instrument pursuant to CPL section 140.45. Under the measure, such an appeal could be taken only where the People file, along with their notice of appeal or affidavit of errors, a statement "asserting that...[they] have no additional facts or evidence, beyond what is stated in the accusatory instrument or was otherwise made known to the trial court prior to its dismissal order, to remedy the insufficiency identified by the court as constituting the basis of its [dismissal] order." This statement requirement, which would appear in a new CPL section 450.51, is loosely based on the existing CPL section 450.50 provision requiring the filing of a statement by the People as a prerequisite to their appeal of a pretrial suppression order. By requiring the filing of this additional statement under proposed section 450.51, the Committee intends to limit appeals of CPL section 140.45 dismissal orders to only those cases where the People, because they have no additional evidence to address the insufficiency identified by the trial court, are unable to file a new accusatory instrument correcting the defect.

Finally, the measure would make clear that, where an appeal taken pursuant to CPL section 450.20(1-b) is decided against the People, "no further prosecution of the dismissed

charge or charges shall be permitted."

Proposal

AN ACT to amend the criminal procedure law, in relation to appeal of a dismissal order entered pursuant to section 140.45 of the criminal procedure law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 450.20 of the criminal procedure law is amended by adding a new subdivision (1-b) to read as follows:

1-b. An order dismissing an accusatory instrument, entered pursuant to section 140.45; provided that the people file a statement in the appellate court pursuant to section 450.51;

§2. The criminal procedure law is amended by adding a new section 450.51 to read as follows:

450.51. Appeal by people from order dismissing accusatory instrument; filing of statement in appellate court. In taking an appeal, pursuant to subdivision (1-b) of section 450.20, to an intermediate appellate court from an order of a local criminal court dismissing an accusatory instrument pursuant to section 140.45, the people must file, in addition to a notice of appeal or, as the case may be, an affidavit of errors, a statement asserting that the people have no additional facts or evidence, beyond what is stated in the accusatory instrument or was otherwise made known to the trial court prior to its dismissal order, to remedy the insufficiency identified by the court as constituting the basis of its order. Where an appeal taken pursuant to such subdivision (1-b) of section 450.20 is finally decided against the people, no further prosecution of the dismissed charge or charges shall be permitted.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, and shall apply to all criminal actions and proceedings commenced on or after such effective date.

43. Authority to Impose Consecutive Sentences For Single-Act Multiple Victim Homicides (PL 70.25(2))

The Committee recommends that Penal Law section 70.25(2) be amended to allow for the imposition of consecutive sentences of imprisonment for multiple homicides caused by a single act or omission of the defendant.

Penal Law section 125.27 currently allows for the imposition of a death sentence or life imprisonment without parole where a defendant intentionally causes the death of another person and, "as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons." PL section 125.27(1)(a)(viii)[Murder in the First Degree]; see also, PL section 60.06. In contrast, when a judge sentences a defendant to imprisonment for multiple killings that do not constitute Murder in the First Degree (e.g., multiple "felony" murders under Penal Law section 125.25(3), multiple "depraved indifference" murders under Penal Law section 125.25(2), multiple Manslaughters or Vehicular Manslaughters under Penal Law sections 125.12, 125.13, 125.15 or 125.20, or multiple Criminally Negligent Homicides under Penal Law section 125.10), where the crimes were committed "through a single act or omission," Penal Law section 70.25(2) requires that any prison sentences imposed for these multiple killings run concurrently rather than consecutively. See, PL section 70.25(2)[providing that, "when more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences, except if one or more of such sentences is for a violation of section 270.20 of this chapter, must run concurrently"].

The Committee believes that a sentencing judge should have the discretion to impose consecutive, rather than concurrent, sentences of imprisonment for multiple victim homicides committed either through a defendant's "single act or omission" or "through an act or omission which in itself constituted one of the offenses and also was a material element of the other." Accordingly, this measure would amend Penal Law section 70.25(2) to authorize, but not require, the imposition of consecutive sentences where multiple sentences of imprisonment are imposed for two or more offenses "committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other," provided "such sentences are imposed on convictions for offenses constituting homicide,*

*The definition of "homicide" in Penal Law section 125.00 incorporates all of the offenses in Penal Law Article 125 except those that do not require the death of a person or an unborn child. See, PL section 125.00. Although this definition would also include Murder in the First Degree under the aforementioned multiple victim" provision of that statute (PL section 125.27(1)(a)(viii)), the sentencing provisions of section 70.25(2) would have no applicability to that particular offense since, presumably, only a single sentence of imprisonment (i.e., life without parole or 20-25 to life) could be imposed for a multiple killing under Penal Law section

as that term is defined in section 125.00 of...[the Penal Law], involving separate victims."

It should be noted that, while this measure would allow for the imposition of consecutive sentences in certain situations where concurrent sentences are now required, it would not alter the applicable sentence calculation "caps" for certain consecutive determinate and indeterminate sentences under existing Penal Law section 70.30.

Proposal

AN ACT to amend the penal law, in relation to sentences of imprisonment for homicide offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 70.25 of the penal law, as amended by chapter 56 of the laws of 1984, is amended to read as follows:

2. When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences [, except if one or more of such sentences is for a violation of section 270.20 of this chapter,] must run concurrently unless (a) one or more of such sentences is for a violation of section 270.20 of this chapter; or (b) such sentences are imposed on convictions for offenses constituting homicide, as that term is defined in section 125.00 of this chapter, involving separate victims.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, and shall apply only to offenses committed on or after such effective date.

125.27(1)(a)(viii).

44. Refusal to be Sworn as a Witness at a Superior Court Criminal Trial or Proceeding (PL 215.51(a))

The Committee recommends that subdivision (a) of Penal Law section 215.51 be amended to include within the definition of the class E felony offense of Criminal Contempt in the First Degree the "contumacious and unlawful" refusal to be sworn as a witness at a criminal trial or other criminal proceeding in a Superior Court, and the "contumacious and unlawful" refusal of a sworn witness at such a trial or proceeding to answer a legal and proper question.

Pursuant to Penal Law section 215.50(4), the "contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory" constitutes the crime of Criminal Contempt in the Second Degree, a Class A misdemeanor. See, PL section 215.50(4). Pursuant to Penal Law section 215.51(a), however, the same conduct, when committed before a Grand Jury, constitutes the crime of Criminal Contempt in the First Degree, a Class E felony. See, PL section 215.51(a).

The Committee believes that there is no valid reason why the refusal to be sworn (or, having been sworn, to answer a proper question) before a Grand Jury, which is a part of a Superior Court, should be a Class E felony, while the same refusal, when committed at a trial or hearing on an indictment in the same Superior Court, should be only a Class A misdemeanor. Accordingly, this measure would amend Penal Law section 215.51(a) to increase the classification of the offense of "contumaciously and unlawfully" refusing to be sworn as a witness or answer a proper question at a criminal trial or proceeding in a Superior Court from a Class A misdemeanor (Criminal Contempt in the Second Degree) to a Class E felony (Criminal Contempt in the First Degree).

Proposal

AN ACT to amend the penal law, in relation to refusal to be sworn as a witness at a criminal trial or other criminal proceeding in a superior court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (a) of section 215.51 of the penal law, as amended by chapter 222 of the laws of 1994, is amended to read as follows:

(a) he or she contumaciously and unlawfully refuses to be sworn as a witness before a

grand jury or at a criminal trial or any other criminal proceeding in a superior court as defined in subdivision eighteen of section 1.20 of the criminal procedure law , or, when after having been sworn as a witness before a grand jury or at a criminal trial or other criminal proceeding in a superior court as defined in subdivision eighteen of section 1.20 of the criminal procedure law , he or she contumaciously and unlawfully refuses to answer any legal and proper interrogatory; or

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

45. Expanding the Means by Which a Party May Impeach Its Own Witness With Proof of a Prior Contradictory Statement (CPL 60.35)

The Committee recommends that CPL section 60.35 be amended to expand the means by which a party in a criminal proceeding may impeach its own witness to include a prior audiotaped, videotaped or other electronically recorded contradictory statement of the witness, as well as a prior contradictory statement written by the witness.

In its current form, CPL section 60.35 permits a party in a criminal case to impeach its own witness only with a prior written statement signed by the witness or with a prior oral statement under oath. See, CPL section 60.35(1). Professor Preiser, in his commentary to that section, points out that "the statute, having been drafted prior to the electronic era, does not even permit a statement recorded on video tape to be admitted." See, Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL 60.35, at 679.

The Committee is of the view that section 60.35 is unnecessarily restrictive, and should be expanded to allow for impeachment by a party of its own witness by means of an electronically recorded prior oral statement, including an audiotaped or videotaped statement. An audiotaped, videotaped or other electronically recorded prior inconsistent statement of a witness, even if not made under oath or later reduced to a signed writing, is, in the Committee's view, sufficiently reliable to warrant consideration by the jury on the issue of the witness's credibility. Similarly, where a party demonstrates that its witness has written a prior statement that contradicts his or her testimony at trial "on a material issue of the case which tends to disprove the position of such party"(CPL section 60.35(1)), the party should not be precluded from offering the prior statement for impeachment purposes under section 60.35 merely because the writing has not also been signed by the witness.

In accordance with these views, this measure would amend subdivision one of CPL section 60.35 to allow a party to impeach its own witness under that section by contradictory evidence consisting of "a statement written or signed by the witness, or an audiotaped, videotaped or other electronically recorded oral statement of such witness, or a transcript of an oral statement given under oath by such witness." The measure, which would take effect immediately and apply to "all criminal actions and proceedings commenced on or after such effective date," also would make conforming changes to subdivisions two and three of CPL section 60.35.

Proposal

AN ACT to amend the criminal procedure law, in relation to impeachment of a witness by proof of a prior contradictory statement

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 60.35 of the criminal procedure law is amended to read as follows:

§60.35. Rules of evidence; impeachment of own witness by proof of prior contradictory statement. 1. When, upon examination by the party who called him or her, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may [introduce] impeach the witness by evidence [that such witness has previously made either] contradictory to such testimony consisting of a [written] statement written or signed by [him] the witness, or an audiotaped, videotaped or other electronically recorded oral statement of such witness, or a transcript of an oral statement given under oath [contradictory to such testimony] by such witness.

2. Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his or her testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

3. When a witness has made or signed a prior [signed] written, [or] sworn or recorded statement contradictory to his or her testimony in a criminal proceeding upon a material issue of the case, but [his] such testimony does not tend to disprove the position of the party who called [him] the witness and elicited such testimony, evidence that the witness made such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts.

§2. This act shall take effect immediately, and shall apply to all criminal actions and proceedings commenced on or after such effective date.

46. Clarifying the Availability of a Persistent Felony Offender Sentence For Certain Second Child Sexual Assault Felony Offenders (PL 70.10(2))

The Committee recommends that subdivision two of Penal Law section 70.10 be amended to clarify that a defendant who meets the eligibility criteria for sentencing as a persistent felony offender under that section is not rendered ineligible for such a sentence merely because he or she also meets the criteria for sentencing as a second child sexual assault felony offender pursuant to Penal Law section 70.07.

As currently written, subdivision two of Penal Law section 70.10 provides that, where a person has been found to be a persistent felony offender under the Criminal Procedure Law, and the Court makes the required findings under that subdivision, the defendant may be sentenced, "in lieu of...the sentence of imprisonment authorized by [Penal Law] section 70.00, 70.02, 70.04 or 70.06," to a sentence of imprisonment authorized by Penal Law section 70.00 for a class A-I felony (PL section 70.10(2); emphasis added).

The absence, in the "in lieu of" clause of section 70.10(2), of an express reference to recently added Penal Law section 70.07 ("Sentence of imprisonment for second child sexual assault felony offender") could be construed as precluding the imposition of a persistent felony offender sentence on a defendant who satisfies the criteria for both a persistent felony offender and a second child sexual assault felony offender. The Committee disagrees with this reading of the statute, and believes that the Legislature, had it intended to categorically preclude a defendant who satisfies the criteria for a second child sexual assault felony offender sentence from being sentenced under Penal Law section 70.10, would have included a reference to Penal Law section 70.07 in subdivision one of section 70.10. See, PL section 70.10(1) [defining a persistent felony offender, inter alia, "as a person, other than a persistent violent felony offender as defined in [Penal Law] section 70.08;" emphasis added]. The lack of such a reference suggests that the Legislature did not intend to exclude persons who may be sentenced as second child sexual assault felony offenders from eligibility for the more severe (A-I felony) prison sentences available under Penal Law section 70.10.

This measure would add an express reference in the "in lieu of" clause of Penal Law section 70.10(2) to the second child sexual assault felony offender sentencing statute (PL section 70.07), thereby making clear that a defendant who satisfies the criteria for sentencing as a persistent felony offender may be sentenced as such "in lieu of" being sentenced as a second child sexual assault felony offender.

Proposal

AN ACT to amend the penal law, in relation to the sentencing of persistent felony offenders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 70.10 of the penal law, as amended by chapter 481 of the laws of 1978, is amended to read as follows:

2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his or her criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04 [or], 70.06 or 70.07 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event, the reasons for the court's opinion shall be set forth in the record.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

47. Nonparty Motions to Quash a Subpoena
(CPL 450.25, 450.60, 460.10, 460.50)

The Committee recommends that the Criminal Procedure Law be amended to authorize an expedited appeal to an intermediate appellate court, by permission, by a nonparty to a criminal case of an order denying the nonparty's motion to quash a subpoena duces tecum.

The Court of Appeals has not squarely addressed the question whether a nonparty may directly appeal an order, issued during the course of a criminal proceeding, denying the nonparty's motion to quash a subpoena. With regard to such orders issued as part of a criminal investigation, however, the Court has consistently held that

> [a]n order denying or granting a motion to quash a subpoena issued in the course of a criminal investigation, *prior* to the commencement of a criminal action, may be appealable when issued by a court vested with civil jurisdiction...[citations omitted]. Such an order arises out of a special proceeding on the civil side of the court.

People v. Santos, 64 NY2d 702, 704 [citing Matter of Cunningham v. Nadjari, 39 NY2d 314], emphasis added; see also, Matter of Abrams, 62 NY2d 183; Matter of Santangello v. People, 38 NY2d 536; and Matter of Boikess v. Aspland, 24 NY2d 136, 138-139.

As explained by the Court in People v. Johnson (103 AD2d 754 [2nd Dept. 1984]),

> [t]he denial or grant of a motion to quash a Grand Jury subpoena, i.e., a subpoena issued in the course of a criminal investigation, is a final and appealable order...[citations omitted]. Since criminal charges may never be filed, the motion to quash a subpoena issued in a criminal investigation is construed as civil in nature and the order disposing of said motion is deemed to have been made in a special proceeding on the civil side of the court...[citation omitted], provided the court possesses both criminal and, at least limited, civil jurisdiction... [citation omitted]. Such a subpoena is to be distinguished from a subpoena issued *after* a criminal action (CPL 1.20, subd. [16]) has been commenced (CPL 1.20, subd. [17]), directing the production of information to aid in the prosecution or defense of a pending criminal trial. A motion to quash a subpoena issued in the course of a criminal action is a proceeding criminal in nature.

Johnson, supra, at 754-755, emphasis added.

In Santos, supra., the Court was faced with an appeal by a party (the People) in a pending criminal proceeding of an Appellate Division order dismissing an appeal of a pretrial order

denying the party's motion to quash a subpoena for certain police records. Citing the general rule that "no appeal lies from an order arising out of a criminal proceeding absent specific statutory authorization," the Court dismissed the appeal. Id., at 704. The Court held that "an order determining a motion to quash a subpoena for the production of police reports, issued in the course of prosecution of a criminal action..., arises out of a criminal proceeding...[citations omitted] for which no direct appellate review is authorized (CPL 450.10, 450.20, 450.90)." Id. The Court in Santos did not indicate whether the result would have been different had the motion to quash, and the appeal from the denial thereof, been at the request of a nonparty to the underlying criminal proceeding.

Despite the lack of a clear directive from the Court of Appeals on this issue, the First and Second Departments have repeatedly recognized the right of a nonparty to appeal a trial court's order denying the nonparty's motion to quash a subpoena in a pending criminal case. See, e.g., People v. Bagley, 279 AD2d 426 (1st Dept. 2001), leave denied, 96 NY2d 711; Matter of Grand Jury Subpoena No. 2573/85, 111 AD2d 891 (2nd Dept. 1985), leave denied, 65 NY2d 606; People v. Marin, 86 AD2d 40 (2nd Dept. 1982); Johnson, supra, 103 AD2d at 755; see also, People v. Purley, 297 AD2d 499, 501 (1st Dept. 2002); People v. Cabon, 150 Misc2d 1028 (App Term 1991), leave denied, 183 AD2d 579; and People v. Rivera, NYLJ, 5/28/87, at 12, col. 6 (App Term 1987). In Marin, supra, for example, the Court considered an appeal by a nonparty, in a pending arson and murder prosecution, of a trial court order denying the nonparty's motion to quash a defense subpoena duces tecum. The defendant in Marin argued on the appeal that "whatever the law may be with respect to the denial of an application to quash a Grand Jury subpoena, no appeal lies from a denial of a motion to quash a subpoena duces tecum issued during a criminal trial, even if the purported appellant is a third party who is aggrieved thereby." Id., at 42. The Court rejected this argument, holding that, as to the nonparty, the order denying the motion to quash the subpoena was "final...and appealable." Id., at 43. In so holding, the Court stated as follows:

> Concededly, there is authority for the proposition that no appeal may be taken by either of the immediate parties to an underlying criminal action from a denial of an application to quash a trial subpoena duces tecum, since the propriety of such an order can be resolved on the direct appeal from any resulting judgment of conviction...[citation omitted]. However, the latter avenue of relief is totally unavailable to...[the nonparty in this case], who is clearly aggrieved by the County Court's order. Therefore, the denial of an appeal to the...[nonparty] at this juncture would irrevocably preclude it from any opportunity to vindicate its position before an appellate body, regarding the serious issues raised in its moving papers.

Id., at 42.

This measure would provide much needed uniformity and clarity in this area by

establishing an expedited procedure, within the framework of CPL Articles 450 and 460, for a nonparty in a pending criminal case to try to "vindicate its position [with respect to the denial of its motion to quash] before an appellate body." Id. Specifically, the measure would create a new CPL section 450.25 to provide, inter alia, that, where a certificate granting leave to appeal has been issued pursuant to CPL section 460.15, "an appeal to an intermediate appellate court may be taken by a nonparty to a criminal action or proceeding from an order of a criminal court denying the nonparty's motion to quash a subpoena requiring the production of specified physical evidence." Under the measure, such an appeal could be taken only "upon reasonable notice to the parties to the action or proceeding," and with an opportunity for the parties to be heard, and would be "expeditiously filed, heard and determined" in accordance with rules governing such appeals to be adopted by the respective Appellate Divisions.

Notably, the measure would also add a new subdivision seven to CPL section 460.50 to, inter alia, allow a nonparty that has obtained a certificate granting leave to appeal pursuant to CPL sections 450.25 and 460.15 to apply to the criminal court that denied its motion to quash for an order staying the underlying criminal action or proceeding pending determination of the appeal. If such application is denied by the criminal court, the nonparty, pursuant to newly added section 460.50(7), could then renew its stay application before the judge or justice of the intermediate appellate court who granted the nonparty's leave application. Under the measure, a nonparty's stay application could only be brought upon "reasonable notice" to the parties to the underlying action or proceeding, and the parties must be "accorded adequate opportunity to appear and be heard in support thereof or in opposition thereto."

The Committee believes that a nonparty aggrieved by an order denying its motion to quash a subpoena duces tecum should have an opportunity to test the appropriateness of the order before an appellate tribunal. This measure will insure that appropriate and expeditious appellate review of these trial court orders is made available under the CPL.

Proposal

AN ACT to amend the criminal procedure law, in relation to the appeal of an order denying a motion to quash a subpoena duces tecum by a nonparty

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The criminal procedure law is amended by adding a new section 450.25 to read as follows:

§450.25. Appeal by nonparty to intermediate appellate court from order denying a

motion to quash a subpoena duces tecum. 1. Provided that a certificate granting leave to appeal is issued pursuant to section 460.15, an appeal to an intermediate appellate court may be taken by a nonparty to a criminal action or proceeding from an order of a criminal court denying the nonparty's motion to quash a subpoena requiring the production by such nonparty of specified physical evidence.

2. An appeal taken pursuant to subdivision one shall be expeditiously filed, heard and determined in accordance with the rules of the appellate division of the department in which such intermediate appellate court is located. Such appeal may be taken only upon reasonable notice to the parties to the action or proceeding who shall have an opportunity to be heard thereon.

3. The appellate division of each judicial department shall adopt rules for providing notice to the parties pursuant to subdivision two, and for the expeditious filing, briefing, hearing and determination of appeals under this section.

4. This section shall not apply where the subpoena that is the subject of the motion to quash relates to a grand jury proceeding.

§2. The opening paragraph of section 450.60 of the criminal procedure law is amended to read as follows:

The particular intermediate appellate courts to which appeals authorized by sections 450.10 [and], 450.20 and 450.25 must be taken are as follows:

§3. Section 460.10 of the criminal procedure law is amended by adding a new subdivision 4-a to read as follows:

4-a. An appeal by a nonparty to an intermediate appellate court by permission pursuant to section 450.25 shall be taken in accordance with the rules of the appellate division of the

department in which such intermediate appellate court is located.

§4. The title of section 460.50 of the criminal procedure law is amended, and a new subdivision 7 is added, to read as follows:

§460.50. Stay of judgment or proceedings pending appeal to intermediate appellate court.

7. (a) Where a nonparty to a criminal action or proceeding has, pursuant to section 460.15, been granted a certificate granting leave to appeal an order of a criminal court pursuant to section 450.25, such nonparty may apply to the criminal court that issued such order for an order staying such action or proceeding pending the determination of the appeal.

(b) If an application brought pursuant to paragraph (a) is denied, the nonparty may apply to the judge or justice of the intermediate appellate court who granted such certificate for an order staying such action or proceeding pending the determination of the appeal.

(c) An application pursuant to paragraph (a) or (b) of this subdivision shall be brought upon reasonable notice to the parties to such action or proceeding, and such parties shall be accorded adequate opportunity to appear and be heard in support thereof or in opposition thereto. Such application shall be made in a manner determined by the rules of the appellate division of the department in which such intermediate appellate court is located.

§5. This act shall take effect 90 days after it shall have become a law; provided that any rules necessary for the implementation of this act shall be adopted on or before such effective date.

48. Imprisonment Beyond Maximum Expiration Date of Determinate Sentence (PL 70.40(1)(b))

The Committee recommends that Penal Law section 70.40(1)(b) be amended to clarify that an inmate who has completed service of the entire term of a determinate sentence imposed by the Court may not be held further on that sentence absent his or her post-release violation of one or more conditions of post-release supervision as provided in Penal Law section 70.45(5)(d).

Pursuant to Penal Law section 70.45, "[e]ach determinate sentence of imprisonment also includes, as a part thereof, an additional period of post-release supervision," which period "shall commence upon the person's release from imprisonment to supervision by the [D]ivision of [P]arole." PL section 70.45(1) and (5)(a). "Upon release from the underlying term of imprisonment, the person shall be furnished with a written statement setting forth the conditions of post-release supervision in sufficient detail to provide for the person's conduct and supervision" by the Division of Parole. PL section 70.45(3). Where a person violates one or more conditions of post-release supervision, he or she may be given a "time assessment" and returned to prison for not less than six months and not more than the balance of the period of post-release supervision, not to exceed five years. PL section 70.45(1) and(5)(d).

When a person is serving a determinate sentence of imprisonment, release on that sentence may occur no sooner than the "conditional release" date of the sentence, which is six-sevenths of the term imposed. See, PL sections 70.30 and 70.40. An inmate who is denied conditional release on a determinate sentence may be required to serve the entire determinate term imposed before being released to post-release supervision. Id.

The Committee understands that the Division of Parole has interpreted Penal Law section 70.45 as permitting the continued incarceration of certain inmates serving determinate sentences beyond the maximum expiration date of the determinate term imposed by the court, and has, along with the Department of Correctional Services, implemented a policy reflecting this interpretation. This construction, in effect, treats the maximum expiration date of the underlying determinate sentence as a "conditional release" date, thereby allowing an inmate who, for example, on such maximum expiration date has failed to secure satisfactory post-release housing, to be held, without ever being released to post-release supervision, for up to the entire period of post-release supervision. The Committee strongly disagrees with this reading of Penal Law section 70.45, and believes that it is contrary to both the plain language of that section and the Legislative objectives underlying it.

The Committee is of the view that post-release supervision, as indicated by its very name and by the statutory directive that supervision by the Division of Parole not commence until the inmate's "release from imprisonment" (PL section 70.45(5)(a)), was clearly intended to be served post-release. Similar to parole supervision, it was created by the Legislature both to insure that communities who receive former inmates are protected from further victimization, and to try to

maximize offenders' successful reintegration into society. See, generally, Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law section 70.45, 2003 Cumulative Pocket Part at 162-163 [citing Legislative Memorandum in Support of chapter 1 of the Laws of 1998]. And, like parole supervision, it was designed to insure that offenders who, following their release from institutional confinement, violate the conditions of supervision, are subject to immediate re-incarceration. Contrary to the position espoused by the Division of Parole, post-release supervision was not intended to serve as a second "conditional release" date for determinate sentences, such that an inmate denied release after serving six-sevenths of the determinate term imposed by the court could again be denied release after serving the full term (i.e., seven-sevenths) of the sentence.

This measure would add a new subparagraph (iii) to paragraph (b) of subdivision one of Penal Law section 70.40 to remove any doubt that an inmate serving a determinate sentence of imprisonment who is denied conditional release (i.e., who is not released after serving six-sevenths of the determinate term) may not be held on such sentence beyond the maximum expiration date of the sentence unless, following release, he or she violates one or more conditions of post-release supervision. The measure would have no impact on the existing authority of the Board of Parole, under subdivision three of section 70.45, to "impose as a condition of post-release supervision that for a period not exceeding six months immediately following release from the underlying term of imprisonment the person be transferred to and participate in the programs of a residential treatment facility" as that term is defined in the Correction Law.

The Committee believes that justice can only truly be served where the parties to a criminal prosecution, and the sentencing court itself, have an accurate understanding of the parameters of the sentence imposed. This is especially true where, as here, the sentence involves a commitment of the defendant to state prison. This measure serves that purpose by amending the Penal Law to make absolutely clear that a defendant who has served seven-sevenths of a determinate term imposed by the court must, assuming he or she has no other sentence holds or other detainers, be released to post-release supervision.

Proposal

AN ACT to amend the penal law, in relation to determinate sentences of imprisonment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision one of section 70.40 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(b) A person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall, if he or she so requests, be conditionally released from the institution in which he or she is confined when the total good behavior time allowed to him or her, pursuant to the provisions of the correction law, is equal to the unserved portion of his or her term, maximum term or aggregate maximum term; provided, however, that (i) in no event shall a person serving one or more indeterminate sentence of imprisonment and one or more determinate sentence of imprisonment which run concurrently be conditionally released until serving at least six-sevenths of the determinate term of imprisonment which has the longest unexpired time to run and (ii) in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release and (iii) except as provided in paragraph (d) of subdivision five of section 70.45, in no event shall a person who is not conditionally released be held on such sentence or sentences beyond the term, maximum term or aggregate maximum term of the sentence which has the longest unexpired term to run. The conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law.

Every person so released shall be under the supervision of the state board of parole for a period equal to the unserved portion of the term, maximum term, aggregate maximum term, or period of post-release supervision.

§2. This act shall take effect immediately.

49. Providing Written Instructions Regarding the Offense Charged to Jurors Upon Request (CPL 310.30)

The Committee recommends that section 310.30 of the Criminal Procedure Law be amended to allow a trial judge, without the consent of the parties, to provide a deliberating jury, upon its request therefor, with written instructions regarding the elements of the crime or crimes charged, or of any defense or affirmative defense submitted in relation thereto.

Sections 310.20 and 310.30 of the Criminal Procedure Law specify the materials that may be provided by the court to a deliberating jury, which include exhibits received in evidence as may be permitted by the court (CPL section 310.20(1)), a verdict sheet (CPL section 310.20(2)), a written list of the names of the witnesses whose testimony was presented during the trial (CPL section 310.20(3)) and, under certain circumstances and with the consent of the parties, copies of the text of a statute (CPL section 310.30).

It is not uncommon, especially in complex prosecutions involving numerous counts with multiple defendants, for a deliberating jury to ask the trial judge to provide it with written instructions on elements of some or all of the offenses submitted, and any related defenses. Because, however, there is nothing in existing CPL section 310.30 that would expressly permit a court to provide the jury with these materials, a trial judge who complies with such a request, especially without first obtaining the defendant's consent, may be committing reversible error. See, generally, People v. Damiano (87 NY2d 477), People v. Johnson (81 NY2d 980) and People v. Owens (69 NY2d 585).

This measure would amend CPL section 310.30 to expressly permit a trial judge to respond to a deliberating jury's request for written instructions regarding the elements of one or more of the crimes or defenses submitted by providing the requested materials to the jury. Under the measure, there would be no need to obtain the consent of the parties prior to such submission, but counsel for both parties would be permitted to examine the written instructions and be heard thereon, and the documents would be marked as a court exhibit, prior to their submission to the jury.

This measure, which is more limited in scope than the Committee's previously endorsed proposal to amend CPL section 310.30 to allow a Trial Court to provide a deliberating jury with written copies of all or a portion of its charge (see, Proposal 35, supra), would nonetheless facilitate the deliberative process by allowing a jury that so requests to take into its deliberations written instructions regarding the elements or defenses submitted for its consideration.

Proposal

AN ACT to amend the criminal procedure law, in relation to jury deliberations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 310.30 of the criminal procedure law, as amended by chapter 208 of the laws of 1980, is amended to read as follows:

§310.30. Jury deliberation; request for information. At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper. In addition, where the jury requests written instructions regarding the elements of any offense submitted, or of any defense or affirmative defense submitted in relation thereto, the court may provide the jury with such written instructions as the jury has requested and the court deems proper. Before giving to the jury such written instructions regarding the elements of any offense or of any defense or affirmative defense pursuant to this section, the court shall permit counsel to examine such written instructions, shall afford counsel an opportunity to be heard and shall mark such written instructions as a court exhibit.

§2. This act shall take effect immediately, and shall apply to all trials commenced on or after such effective date.

50. Definition of Fraudulent Insurance Act
(PL 176.05)

The Committee recommends that Penal Law section 176.05 be amended to clarify that the term "fraudulent insurance act," as used in the definitions of the Penal Law Article 176 insurance fraud crimes, includes a "fraudulent health care insurance act" as defined in that section.

Article 176 of the Penal Law, which deals with insurance fraud and establishes six different degrees of that crime, was amended in 1998 to, inter alia, strengthen the State's ability to deter Medicaid fraud and abuse. See, Donnino, Supplementary Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law Article 176 at 11; see also, L. 1998, chap. 2. When, as part of these amendments, the Legislature modified Penal Law section 176.05 to define the term "fraudulent health care insurance act," it failed to clarify that the conduct described in the new definition is a type of "fraudulent insurance act." As a result, under a literal reading of Article 176, a "fraudulent health care insurance act" does not fall within any of the six "insurance fraud" crimes defined in that Article. As suggested in the Supplementary Practice Commentary to Article 176, this could not have been intended by the Legislature, as it would render the 1998 amendments to section 176.05 a nullity. See, Donnino, supra, at 11-12.

The Committee agrees that, in amending section 176.05, the Legislature clearly intended that the crime of insurance fraud include acts constituting a "fraudulent health care insurance act." This measure would clarify that intent by adding language to section 176.05 to specifically provide that, for purposes of Article 176, the term "fraudulent insurance act" includes both a "fraudulent commercial or personal insurance act" and a "fraudulent health care insurance act." The measure would also make conforming amendments to the title of Penal Law section 176.05.

Proposal

AN ACT to amend the penal law, in relation to clarifying the applicability of the definition of fraudulent health care insurance act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 176.05 of the penal law, as amended by chapter 2 of the laws of 1998, is amended to read as follows:

§176.05. [Insurance fraud] Fraudulent insurance act; defined.

A fraudulent insurance act means and includes a fraudulent commercial or personal insurance act, or a fraudulent health care insurance act, as each such term is defined in this section.

1. A fraudulent commercial or personal insurance act is committed by any person who, knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, self insurer, or purported insurer, or purported [self insurer] self-insurer, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy, or certificate or evidence of self insurance for commercial insurance or commercial self insurance, or a claim for payment or other benefit pursuant to an insurance policy or self insurance program for commercial or personal insurance which he or she knows to: (i) contain materially false information concerning any fact material thereto; or (ii) conceal, for the purpose of misleading, information concerning any fact material thereto.

2. A fraudulent health care insurance act is committed by any person who, knowingly and with intent to defraud, presents, causes to be presented, or prepares with knowledge or belief that it will be presented to, or by, an insurer or purported insurer or self-insurer, or any agent thereof, any written statement or other physical evidence as part of, or in support of, an application for the issuance of a health insurance policy, or a policy or contract or other authorization that provides or allows coverage for, membership or enrollment in, or other services of a public or private health plan, or a claim for payment, services or other benefit pursuant to such policy, contract or plan, which he or she knows to:

(a) contain materially false information concerning any material fact thereto; or

(b) conceal, for the purpose of misleading, information concerning any fact material thereto. Such policy or contract or plan or authorization shall include, but not be limited to, those issued or operating pursuant to any public or governmentally-sponsored or supported plan for health care coverage or services or those otherwise issued or operated by entities authorized pursuant to the public health law. For purposes of this subdivision an "application for the issuance of a health insurance policy" shall not include (A) any application for a health insurance policy or contract approved by the superintendent of insurance pursuant to the provisions of sections three thousand two hundred sixteen, four thousand three hundred four, four thousand three hundred twenty-one or four thousand three hundred twenty-two of the insurance law or any other application for a health insurance policy or contract approved by the superintendent of insurance in the individual or direct payment market; and (B) any application for a certificate evidencing coverage under a self-insured plan or under a group contract approved by the superintendent of insurance.

§2. This act shall take effect immediately.

51. Including Child Support Compliance Information Within Scope of Pre-Sentence Investigation (CPL 390.30)

The Committee recommends that subdivision one of CPL section 390.30 be amended to add a defendant's "child support order status" and "child support order compliance" to the list of matters required to be investigated by the probation agency responsible for preparing the defendant's pre-sentence report.

Subdivision one of CPL section 390.30 establishes the scope of a pre-sentence investigation, and requires that information be gathered

> with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.

CPL section 390.30(1).

This measure would amend CPL section 390.30(1) to expand the scope of the pre-sentence investigation to include an inquiry into the defendant's child support order status (i.e., whether the defendant is currently subject to a child support order), as well as the extent of the defendant's compliance with any such order. The Committee believes that requiring the collection of information about a defendant's outstanding child support obligations as part of the pre-sentence investigation process will allow the sentencing court to make a more informed decision about an appropriate sanction, especially where a possible sentence of probation or a conditional discharge is contemplated. See, Penal Law section 65.10(2)(f)[authorizing a sentencing court to impose, as a condition of probation or a conditional discharge, a requirement that the defendant "[s]upport his dependents and meet other family responsibilities"].

Proposal

AN ACT to amend the criminal procedure law, in relation to pre-sentence investigations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 390.30 of the criminal procedure law is amended to

read as follows:

1. The investigation. The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, child support order status, child support order compliance, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.

§2. This act shall take effect immediately, and shall apply to offenses committed on or after such effective date.

52. Calculation of Concurrent Indeterminate Sentences
(PL 70.30(1)(a))

The Committee recommends that subdivision one of Penal Law section 70.30 be amended to require that time served under imprisonment on an indeterminate or determinate sentence be credited to both the minimum period and maximum term of any concurrent indeterminate sentence, subject to the limitation that any time served prior to the defendant's release to parole, conditional release, maximum expiration, post-release supervision, stay of execution pending appeal or vacatur of sentence shall not be credited to any concurrent indeterminate or determinate sentence imposed after such release.

Pursuant to paragraph (a) of subdivision one of Penal Law section 70.30, when two or more sentences of imprisonment run concurrently, the time served under imprisonment on any of the concurrent sentences must be credited against each of the other concurrent sentences. PL section 70.30(1)(a). As currently written, section 70.30(1)(a) directs that this credit be applied only to the minimum period of any concurrent indeterminate sentences; no credit is applied to the maximum term of these sentences. Where, however, the concurrent sentence being credited is a determinate sentence, the credit is applied to the entire "term" of the determinate sentence. PL section 70.30(1)(a).

It has been suggested that this discrepancy in the crediting of sentences under Penal Law section 70.30(1)(a) has the effect of providing a greater benefit to defendants sentenced for violent felony offenses (i.e., those serving determinate sentences under Penal Law sections 70.02, 70.04, 70.06(6) or 70.07) than to defendants sentenced for non-violent felony offenses (i.e., in general, those serving indeterminate sentences). For example, the fact that credit for time served on a given sentence is applied only to the minimum period of any concurrent indeterminate sentences, and not to the maximum term, means that the conditional release ("CR") date on the credited indeterminate sentences remains unchanged. See, generally, Correction Law section 803(1)(b)[providing that a person serving an indeterminate sentence of imprisonment, other than a sentence with a maximum of life, may receive a "good behavior" time allowance not to exceed one-third of the maximum term imposed by the court; emphasis added] and PL section 70.40(1)(b)[providing that a person serving one or more than one indeterminate sentence may be conditionally released from the institution in which he or she is confined "when the total good behavior time allowed to him pursuant to the...correction law is equal to the unserved portion of his...maximum term or aggregate maximum term;" emphasis added].

In contrast, when the same credit for time served is applied, as required by Penal Law section 70.30(1)(a), to the "term" of any concurrent determinate sentences, the CR date for those sentences is directly impacted, to the defendant's benefit, because the CR date for determinate sentences is calculated using the "term" of the sentence. See, Correction Law section 803(1)(c) and PL section 70.40(1)(b).

In addition, where concurrent sentences are imposed and the "controlling" sentence (i.e.,

the sentence with the longest unexpired time to run) is an indeterminate sentence, the existing crediting provision of Penal Law section 70.30(1)(a) will have no effect on the maximum expiration date of the "merged" concurrent sentences. See, PL section 70.30(1)(a)[providing that, for concurrent sentences, "[t]he maximum term or terms of the indeterminate sentences and the term or terms of the determinate sentences shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run"]. In contrast, where the "controlling" sentence is a determinate sentence, the credit applied under section 70.30(1)(a) will result in an earlier "maximum expiration" date for the merged sentences. Id.

This measure would address this discrepancy in section 70.30(1)(a) by requiring that time served under imprisonment on a given sentence be credited to both the minimum and maximum terms of a concurrent indeterminate sentence. At the same time, the measure would eliminate another, presumably unintended, consequence of existing section 70.30(1)(a) by denying all credit against any concurrent indeterminate sentence (i.e., against both the maximum and minimum terms thereof) or concurrent determinate sentence where the sentence to which the concurrent credit would be applied is imposed after the defendant's release (e.g., on parole, conditional release or post-release supervision) on the sentence on which the claimed credit was earned.

Proposal

AN ACT to amend the penal law, in relation to the calculation of concurrent indeterminate and determinate sentences of imprisonment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 1 of section 70.30 of the penal law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(a) If the sentences run concurrently, the time served under imprisonment on any of the sentences shall be credited against the minimum periods and maximum terms of all the concurrent indeterminate sentences and against the terms of all the concurrent determinate sentences, subject to the following limitation: In the event a defendant serving a determinate or indeterminate sentence is released to parole, conditional release, maximum expiration, post-

release supervision, stay of execution pending appeal or vacatur of sentence, any time served prior to such release shall not be credited to any concurrent determinate or indeterminate sentence imposed after such release. This limitation shall not affect the sentence credit authorized by subdivision five of this section. The maximum term or terms of the indeterminate sentences and the term or terms of the determinate sentences shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run;

§2. This act shall take effect immediately.

53. Exoneration of Bail on a Pending Felony Complaint
(CPL sections 530.20 and 530.40)

The Committee recommends that sections 530.20 and 530.40 of the Criminal Procedure Law be amended to require the granting, by a local criminal court or superior court, of a defendant's application for exoneration of bail, absent a showing of "good cause" why bail should not be exonerated, where a felony complaint has been pending for at least 45 days from the defendant's arraignment thereon with no action by the Grand Jury.

This measure would address the bail status of a defendant charged in a pending felony complaint who makes bail and may be required to return to court repeatedly, often over a period of several weeks or months, while awaiting Grand Jury action. As noted in a recent New York Law Journal article on the topic, a defendant in this situation

> can request that the criminal court exonerate his bail and return the money pending action of the [G]rand [J]ury and subsequent arraignment in a superior court if indicted. The local courts, however, are often reluctant to do so. Assistant district attorneys routinely claim they are within the People's statutory [speedy trial] time frame...and that the bail is necessary to ensure the defendant will return to court for his next scheduled appearance. It is interesting to note, however, that the similarly charged defendant, unable to make bail, must be released on his own recognizance 45 days after the initial arraignment in the local criminal court, if the district attorney has failed to obtain an indictment [citing CPL section 190.80]. This results in the rather perverse situation where one defendant must be released without bail while another defendant, facing the same charges and potential penalty, who made bail and returns for his court appearances regularly, is not entitled to have his bail funds returned.

MacNamara, Outside Counsel, *Defendants' Limbo: From Felony Complaint to Grand Jury Action*, NYLJ, June 27, 2003 at p.4, col. 4.

Noting that a defendant who is able to raise sufficient money for bail often does so by borrowing from family members and friends, the author argues that

> [i]t is unreasonable that those individuals should have to suffer financially due to prosecutorial inaction or indifference. Forty-five days is more than a sufficient time period for the People to secure an indictment. If the [P]eople have not secured an indictment within 45 days of the initial court appearance, the incarcerated defendant

> should be released and bail should be exonerated for the defendant who was free on bail. This will encourage the People to critically evaluate their case at an early stage and either secure an indictment or offer a reasonable plea.

Id., at p.5, col.4.

The Committee agrees that, where there is no action on a pending felony complaint for a period of 45 days from arraignment, a defendant who is able to make bail should, barring unusual circumstances, be in no worse a position with respect to his or her bail status than a defendant charged with an identical offense who could not make bail. This measure would address this discrepancy in the law by, in effect, creating a "presumption" in favor of bail exoneration after a 45-day period has elapsed with no Grand Jury action on a felony complaint. Specifically, the measure would add a new subdivision three to CPL section 530.20 to require the granting by a local criminal court of a defendant's application for exoneration of bail, absent a showing of "good cause" by the People why bail should not be exonerated, where the felony complaint, on the date of such application, has been pending in such court, with no action by the grand jury, for a period of at least 45 days from the defendant's arraignment thereon. The measure, which would take effect immediately upon enactment, would make a similar amendment to CPL section 530.40, to allow the defendant's application for exoneration to be made in a superior court when the felony complaint is pending there.

Proposal

AN ACT to amend the criminal procedure law, in relation to exoneration of bail

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 530.20 of the criminal procedure law is amended by adding a new subdivision 3, to read as follows:

3. When a local criminal court has, in accordance with this section, ordered bail with respect to a defendant charged by felony complaint, and the defendant is subsequently at liberty in the action following the posting of bail, such court shall exonerate bail and order recognizance when, at the time of the defendant's application therefor, the felony complaint has been pending

in such local criminal court, with no action of the grand jury, for a period of at least 45 days from the date of the defendant's arraignment thereon; provided, however, that the court may deny such application where the people show good cause why bail should not be exonerated.

§2. Section 530.40 of the criminal procedure law is amended by adding a new subdivision 5, to read as follows:

5. Notwithstanding the provisions of subdivision two, where a defendant charged by felony complaint is at liberty in the action following the posting of bail, the court shall exonerate bail and order recognizance when, at the time of the defendant's application therefor, such felony complaint has been pending, with no action of the grand jury, for a period of at least 45 days from the date of defendant's arraignment thereon; provided, however, that the court may deny such application where the people show good cause why bail should not be exonerated.

§3. This act shall take effect immediately.

54. Authorizing a Definite Sentence of Imprisonment For Certain Non-Violent Class C Felony Offenses (PL 70.00(4))

The Committee recommends that subdivision four of Penal Law section 70.00 be amended to expand the ability of a sentencing court to impose a definite sentence of imprisonment, in lieu of an indeterminate sentence, for certain non-violent class C felonies for which a sentence to probation, a conditional discharge or a fine alone is currently an authorized sentence.

Penal Law section 70.00(1) sets forth the general rule that a sentence of imprisonment for a non-violent felony offense (other than a drug or marihuana offense) must be an indeterminate sentence. Subdivision four of that section establishes an exception to this rule by allowing for the imposition of a definite sentence of imprisonment for persons, other than second or persistent felony offenders, convicted of a class D or E felony offense.* That subdivision provides, in pertinent part, as follows:

> When a person, other than a second or persistent felony offender, is sentenced for a class D or E felony, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

Penal Law section 70.00(4).

For certain class C non-violent felony offenses enumerated in subdivision four of Penal Law section 60.05(4), imprisonment is mandatory, and can *only* be satisfied by the imposition of an indeterminate sentence. *See*, PL sections 60.05(4) and 70.00(1). For those non-violent class C felony offenses that are *not* enumerated in section 60.05(4), however, a sentence

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*Penal Law section 70.70(2)(c), which is modeled after section 70.00(4), establishes an additional exception to the general rule by allowing for the imposition of a definite sentence of imprisonment for class C, D and E felony marihuana and drug offenses. Because, however, definite sentences for class C marihuana and drug felonies are separately provided for in section 70.70(2)(c), these offenses are not included as part of the instant measure amending Penal Law section 70.00(4). See, PL sections 60.04(1)[providing that "[n]otwithstanding the provisions of any law," that section shall govern sentencing in all Penal Law Article 220 and 221 felony cases]; 60.04(4)[providing, inter alia, that any sentence of imprisonment imposed on a Penal Law Article 220 or 221 felony conviction must be imposed pursuant to Penal Law section 70.70] and 70.70(2)(c)[authorizing the imposition of a definite sentence of imprisonment for class C, D and E felonies defined in Penal Law Articles 220 and 221].

of imprisonment is not required.** As such, these offenses may be satisfied with a sentence of straight probation, a conditional discharge or with only a fine. *See*, PL sections 60.01(2) and (3), 65.00(1)(a) and 65.05(1)(a). Where, however, the court chooses to impose imprisonment for one of these offenses rather than, for example, probation or a conditional discharge, the sentence of imprisonment *must* be an indeterminate sentence. PL section 70.00(1). For this reason a "split" sentence would presumably not be permitted. *See*, PL 60.01(2)(d).

The Committee believes that this discrepancy in the available range of sentences for this relatively large group of class C non-violent felonies makes little sense. If, as is currently the case, a defendant convicted of one of these offenses may be sentenced to an indeterminate sentence of imprisonment, or to probation, a conditional discharge or a fine, he or she should also be eligible for a sentence that would seem to fall "in between" these two extremes (i.e., a definite sentence or a "split" sentence). This measure would amend subdivision four of Penal Law section 70.00 to correct this discrepancy by adding this group of non-violent class C felonies to the list of felony offenses that are eligible for an "alternative" definite sentence of imprisonment under that subdivision.

Proposal

AN ACT to amend the penal law, in relation to sentences of imprisonment for certain class C felony offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Subdivision 4 of section 70.00 of the penal law, as amended by chapter 738 of the laws of

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**The list of non-violent class C felony offenses for which a sentence of imprisonment is not required includes the following: Manslaughter in the Second Degree (PL section 125.15), Vehicular Manslaughter in the First Degree (PL section 125.13), Trademark Counterfeiting in the First Degree (PL section 165.73), Soliciting or Providing Support for an Act of Terrorism in the First Degree (PL section 490.15), Money Laundering in the Second Degree (PL section 470.15), Criminal Facilitation in the Second Degree (PL section 115.05), Criminal Possession of Stolen Property in the Second Degree (PL section 165.52), Bribery in the Second Degree (PL section 200.03), Computer Tampering in the First Degree (PL section 156.27), Forgery in the First Degree (PL section 170.15), Welfare Fraud in the Second Degree (PL section 158.20) and Criminal Possession of a Public Benefit Card (PL section 158.50). Although a sentence of imprisonment is also not required for class C felony marihuana and drug offenses (see, PL section 60.04(4)), these offenses are, as noted, currently eligible for a definite sentence of imprisonment under Penal Law section 70.70(2)(c).

2004, is amended to read as follows:

4. Alternative definite sentence for class D, [and] E, and certain class C felonies. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, or for a class C felony, other than a class C felony specified in subdivision four of section 60.05 or a class C violent felony specified in paragraph (b) of subdivision one of section 70.02, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

55. Issuance and Duration of Final Orders of Protection (CPL 530.12(5) and 530.13(4))

The Committee recommends that sections 530.12(5) and 530.13(4) of the Criminal Procedure Law be amended to provide that the duration of a final order of protection issued in a case where the defendant is sentenced to probation on a "sexual assault" conviction shall not exceed, in the case of a felony sexual assault, ten years, and in the case of a misdemeanor sexual assault, six years. The Committee further recommends that these same two provisions of law be amended to require that, when a final order of protection is issued in any case, it be issued at sentencing rather than at the time of conviction.

In 2000, the Legislature amended subdivision three of Penal Law section 65.00 to increase the period of probation for a felony "sexual assault" from five to ten years, and the period of probation for a class A misdemeanor "sexual assault" from three to six years. *See*, Laws of 2000, ch.1, section 10.* At the time, however, the Legislature made no corresponding change to the provisions of CPL sections 530.12(5) and 530.13(4), which establish the duration of a so-called "final" order of protection issued upon conviction of a family offense (CPL 530.12) or non-family offense (CPL 530.13). As a result, final orders of protection issued on felony or misdemeanor "sexual assault" convictions where a sentence of probation was imposed were required by law to expire at a point when only half of the defendant's probation sentence had been served.

To address this problem, the Committee, in 2004, proposed legislation to amend CPL sections 530.12(5) and 530.13(4) to extend the permissible duration of final orders of protection issued in "sexual assault" probation cases. Prompted in part by the Committee's proposal, the Legislature, by Chapter 215 of the Laws of 2006, amended these CPL provisions to significantly extend the permissible duration of final orders of protection issued in *all* criminal cases. Unfortunately, the 2006 amendments again failed to fully account for the statutorily required longer probation periods for misdemeanor and felony "sexual assault" convictions. Thus, despite the Legislature's salutary 2006 amendments extending the permissible duration of final orders of protection, when such an order is issued on a "sexual assault" conviction where a sentence of probation is imposed, the order must still expire *before* the defendant's probation sentence has been completely served.

Accordingly, the Committee again offers this measure – revised to incorporate the aforementioned 2006 legislative changes – to remedy this continuing gap in the law. The measure, which is otherwise identical to the Committee's 2004 proposal, would amend CPL sections 530.12(5) and 530.13(4) to provide that the duration of a final order of protection issued in a case where the defendant is sentenced to probation on a "sexual assault" conviction shall not

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*As added to section 65.00(3) by Chapter 1 of 2000, the term "sexual assault" means an offense defined in Penal Law Articles 130 or 263, or in Penal Law section 255.25 (Incest), or an attempt to commit any such offense. PL section 65.00(3).

exceed, in the case of a felony sexual assault, ten years, and in the case of a misdemeanor sexual assault, six years.

In addition to extending the permissible duration of a final order of protection in sexual assault prosecutions where a probation sentence is imposed, the measure would correct another problem in these same two sections of law. Specifically, the measure would amend CPL sections 530.12(5) and 530.13(4) to provide that a final order of protection, when issued in *any* case, shall be issued not on the date of conviction, as is currently required under the statutes, but on the date of sentence. A final order of protection is intended to provide protection to a victim or witness during the period following disposition of the case, when the defendant may no longer be subject to a temporary order of protection issued as a condition of bail or recognizance (*see,* CPL sections 530.12(1) and 530.13(1)). It makes no sense, therefore, to require that the final order be issued "upon conviction," when the defendant may lawfully be subject to a temporary order of protection (i.e., one issued as a condition of bail or recognizance) right up until the date of sentencing. Further, by calculating the duration of a final order of protection from the sentencing date rather than from the date of conviction, the result in many cases will be that the order will expire later, thus providing a longer period of protection for the victim, witness or family member named therein.

Proposal

AN ACT to amend the criminal procedure law, in relation to final orders of protection

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening unlettered paragraph of subdivision 5 of section 530.12 of the criminal procedure law is amended to read as follows:

Upon sentencing on a conviction of any crime or violation between spouses, parent and child, or between members of the same family or household, the court may in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and, in the case of a felony conviction, shall not exceed the

greater of: (i) eight years from the date of such [conviction] sentencing, except where the sentence is or includes a sentence of probation on a conviction for a felony sexual assault, as defined in subdivision three of section 65.00 of the penal law, in which case, ten years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or in the case of a conviction for a class A misdemeanor, shall not exceed five years from the date of such [conviction] sentencing, except where the sentence is or includes a sentence of probation on a conviction for a class A misdemeanor sexual assault, as defined in subdivision three of section 65.00 of the penal law, in which case, six years from the date of such sentencing; or in the case of a conviction for any other offense, shall not exceed two years from the date of [conviction] sentencing. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions, such an order may require the defendant:

§2. The opening unlettered paragraph of subdivision 4 of section 530.13 of the criminal procedure law, set out first, is amended to read as follows:

Upon sentencing on a conviction of any offense, where the court has not issued an order of protection pursuant to section 530.12 of this article, the court may, in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection. Where a temporary order of protection was issued, the court shall state on the record the reasons for issuing or not issuing an order of protection. The duration of such an order shall be fixed by the court and, in the case of a felony conviction, shall not exceed the greater of: (i)

eight years from the date of such [conviction] sentencing, except where the sentence is or includes a sentence of probation on a conviction for a felony sexual assault, as defined in subdivision three of section 65.00 of the penal law, in which case, ten years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed; or in the case of a conviction for a class A misdemeanor, shall not exceed five years from the date of such [conviction] sentencing, except where the sentence is or includes a sentence of probation on a conviction for a class A misdemeanor sexual assault, as defined in subdivision three of section 65.00 of the penal law, in which case, six years from the date of such sentencing; or in the case of a conviction for any other offense, shall not exceed two years from the date of [conviction] sentencing. For purposes of determining the duration of an order of protection entered pursuant to this subdivision, a conviction shall be deemed to include a conviction that has been replaced by a youthful offender adjudication. In addition to any other conditions such an order may require that the defendant:

§3. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

56. Lowering the Minimum Determinate Sentence for a Class D Violent Felony Offense (PL 70.02(3)(c))

The Committee recommends that paragraph (c) of subdivision three of section 70.02 of the Penal Law be amended to lower the permissible minimum determinate sentence for a class D violent felony offense from two years to one and one-half years.

Under the relevant provisions of Penal Law Article 70 ("Sentences of Imprisonment"), where the defendant is not a multiple felony offender, a sentencing judge currently has the option of imposing, *inter alia*, a definite sentence of one year in jail for certain class D violent felony firearm offenses, and a definite sentence of one year or less for most other class D violent felony offenses (*see*, PL sections 70.02(2), 70.02(4) and 70.00(4)). Where, however, the sentencing judge determines that a sentence of more than one year is warranted for one of these same offenses, he or she must impose a determinate sentence of not less than two years. *See*, Penal Law sections 70.02(2)(b) and 70.02(3)(c).

The Committee can see no reason why, where a definite sentence of one year (or less than one year) is currently an authorized sentence for a particular class D violent felony offense, a judge who opts instead for a determinate sentence for that same offense must impose a sentence of not less than two years. Accordingly, this measure would amend the relevant sentencing provision of Penal Law section 70.02 to lower the permissible minimum term of a determinate sentence for a class D violent felony offense from two years to one and one-half years. The measure, which would take effect on the first day of November following enactment, would not change the current permissible maximum determinate term for these offenses.

Proposal

AN ACT to amend the penal law, in relation to determinate sentences of imprisonment for class D violent felony offenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (c) of subdivision 3 of section 70.02 of the penal law is amended to read as follows:

(c) For a class D felony, the term must be at least [two] one and one-half years and must not exceed seven years; and

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

57. Increasing the Permissible Jail Portion of a "Split" Sentence (PL 60.01(2)(d))

The Committee recommends that paragraph (d) of subdivision two of Penal Law section 60.01 be amended to increase the maximum period of incarceration that may be served in conjunction with a sentence of probation or a conditional discharge (i.e., a "split" sentence) from sixty days to ninety days for class A misdemeanors, and from six months to nine months for felonies.

Penal Law section 60.01(2)(d) currently permits a sentencing court to impose, as a condition of probation or a conditional discharge, a definite or intermittent sentence of imprisonment. Penal Law section 60.01(2)(d). Under that section, the imprisonment portion of this so-called "split" sentence runs concurrently with the probation or conditional discharge portion of the sentence, and may not exceed six months when imposed on a felony conviction, or sixty days when imposed on a misdemeanor conviction. *Id.*[*] Although the "split" sentence under section 60.01(2)(d) provides an important sentencing alternative in cases where neither a "straight" jail nor supervisory sentence is considered appropriate, there are many cases where, due to the existing statutory limitations on the jail portion of the sentence, the judge at sentencing (or the prosecutor during plea negotiations) may feel constrained to reject the "split" sentence in favor of straight imprisonment. The Committee believes that this valuable and cost-effective sentencing option would be even more widely utilized if judges, in class A misdemeanor and felony prosecutions in particular, had the discretion to impose a longer jail term as part of the sentence.

This measure, which is based on a recommendation by the New York State County Court Judges Association, would accomplish this goal by amending Penal Law section 60.01(2)(d) to increase the permissible maximum period of the incarceration portion of a split sentence from six months to nine months for felonies, and from sixty days to ninety days for class A misdemeanors. The measure would take effect on the first day of November following its enactment, and would apply only to offenses committed on or after such date.

Proposal

AN ACT to amend the penal law, in relation to revocable sentences of probation or conditional discharge and imprisonment

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[*]When an intermittent jail sentence is imposed as part of a split sentence, the intermittent sentence may not, under section 60.01(2)(d), exceed four months. The measure proposed here would leave this intermittent sentence provision unchanged. The measure also would leave unchanged the existing sixty-day jail limitation for a split sentence imposed on a class B misdemeanor conviction.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (d) of subdivision 2 of section 60.01 of the penal law is amended to read as follows:

(d) In any case where the court imposes a sentence of imprisonment not in excess of sixty days[,] for a class B misdemeanor, or not in excess of ninety days for a class A misdemeanor, or not in excess of [six] nine months for a felony or in the case of a sentence of intermittent imprisonment not in excess of four months, it may also impose a sentence of probation or conditional discharge provided that the term of probation or conditional discharge together with the term of imprisonment shall not exceed the term of probation or conditional discharge authorized by article sixty-five of this chapter. The sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation or conditional discharge.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, and shall apply only to offenses committed on or after such effective date.

58. Definition of "Lesser Included Offense"
(CPL 220.20(1))

The Committee recommends that the opening paragraph of subdivision one of section 220.20 of the Criminal Procedure Law be amended to make a technical correction to the cross-reference in that paragraph to certain provisions of section 220.10 of the Criminal Procedure Law.

The opening paragraph of subdivision one of CPL section 220.20 currently provides that "[a] 'lesser included offense,' within the meaning of subdivisions four and five of section 220.10 relating to the entry of a plea of guilty to an offense of lesser grade than one charged in a count of an indictment," means not only "lesser included offense" as that term is defined in CPL section 1.20(37), but also an offense that is "deemed to be such" pursuant to the various rules enumerated in section 220.20(1). *See*, CPL section 220.20(1).

Due to amendments made to CPL section 220.10 after its enactment in 1970, and the failure to make conforming changes to section 220.20(1), the existing cross-reference in the latter statute to "subdivisions four and five" of section 220.10 is no longer entirely correct. The correct cross-reference should be to subdivisions "three, four and five" of section 220.10(1). This measure would amend section 220.20(1) to make this technical change.

Proposal

AN ACT to amend the criminal procedure law, in relation to the definition of lesser included offense for plea purposes

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraph of subdivision 1 of section 220.20 of the criminal procedure law is amended to read as follows:

A "lesser included offense," within the meaning of subdivisions three, four and five of section 220.10 relating to the entry of a plea of guilty to an offense of lesser grade than one charged in a count of an indictment, means not only a "lesser included offense" as that term is defined in subdivision thirty-seven of section 1.20, but also one which is deemed to be such

pursuant to the following rules:

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

59. Establishing the Identity of a Deceased Victim in the Grand Jury (CPL 190.30(3))

The Committee recommends that subdivision three of section 190.30 of the Criminal Procedure Law be amended to allow a written or oral statement, under oath, to be admitted in the Grand Jury for the purpose of establishing the identity of a deceased victim in a homicide or other prosecution.

Subdivision three of CPL section 190.30 currently provides that a written or oral statement, under oath, by a person attesting to one of several matters enumerated in that subdivision "may be received in such [G]rand [J]ury proceeding as evidence of the facts stated therein." CPL section 190.30(3). The matters enumerated in paragraphs (a) through (f) of subdivision three include, *inter alia*, "that person's ownership or lawful custody of, or license to possess property...including an automobile or other vehicle, its value and the defendant's lack of superior or equal right to possession thereof"(CPL section 190.30(3)(a)), and "that person's ownership or lawful custody of, or license to occupy, premises...and of the defendant's lack of license or privilege to enter or remain thereupon." CPL section 190.30(3)(c). As noted in the Practice Commentaries to section 190.30(3), these statutory "exceptions to the competent evidence requirement" are intended, *inter alia*, "to minimize the inconvenience to victims of repeated appearances, in situations where their testimony would simply recite facts that are relatively cut and dry." Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Vol. 11A, CPL 190.30, at 243.

The goal of minimizing inconvenience to victims in Grand Jury proceedings was further advanced when the Legislature, in 1998, amended subdivision two-a of section 190.30 to authorize the submission in the Grand Jury (provided certain conditions are satisfied) of a faxed copy of a witness's written sworn statement of the kind described in subdivision three of that section. *See*, Laws of 1998, ch. 360, §1. This latter amendment has been described as "a concession to the electronic age [that] promises to both eliminate a certain amount of needless victim inconvenience and speed up presentation of cases." Preiser, Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y., Vol. 11A, CPL 190.30, 2003 Pocket Part, at 59.

This measure would amend subdivision three of CPL section 190.30 to establish yet another category of evidence that may be received by a Grand Jury through a sworn written or oral statement, or through a faxed copy thereof in accordance with the provisions of subdivision two-a of that section. Specifically, the measure would add a new paragraph (g) to CPL section 190.30(3) to allow for the submission in the Grand Jury of a written or oral statement under oath by a surviving relative of a deceased victim (i.e., a spouse or former spouse of the victim, or a person related within the sixth degree of consanguinity or affinity to the victim), or another person familiar with the deceased (provided the factual basis for the person's familiarity with the victim is provided in the statement), to the effect that such person identified the deceased for the coroner or medical examiner. The proposal would also

allow for the admission of a sworn statement by the coroner or medical examiner to the effect that he or she witnessed the identification of the deceased by the surviving relative or other person familiar with the deceased.

This measure, especially if used in conjunction with the existing authority under section 190.30(2-a) to offer written faxed statements to the Grand Jury, would both save time and spare surviving relatives of the victim the burden of appearing before the Grand Jury to testify on an issue that is rarely in dispute.

Proposal

AN ACT to amend the criminal procedure law, in relation to the admissibility in a grand jury proceeding of a written or oral statement under oath establishing the identity of a deceased victim

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 3 of section 190.30 of the criminal procedure law is amended by adding a new paragraph (g) to read as follows:

(g) for purposes of establishing the identity of a deceased victim: (i) that the person is the spouse or former spouse of the deceased, is related to the deceased within the sixth degree of consanguinity or affinity, or, based on specific factual information provided in such oral or written statement, is otherwise familiar with the deceased, and formally identified the body of the deceased for the appropriate county coroner or medical examiner; or (ii) that the person is the county coroner or medical examiner and witnessed the identification of the deceased by an individual described in clause (i) hereof who stated to such coroner or medical examiner that individual's relationship to or familiarity with the deceased in accordance with such clause (i).

§2. This act shall take effect immediately.

60. Authority of Local Criminal Court to Issue or Extend Temporary Order of Protection After Indictment (CPL 530.12 and 530.13)

The Committee recommends that sections 530.12 and 530.13 of the Criminal Procedure Law be amended to clarify that a local criminal court may issue or extend a temporary order of protection, either as a condition of recognizance or bail or simultaneously with the issuance of a warrant, notwithstanding that an indictment has already been voted or filed in the action at the time of such issuance or extension, provided the defendant has not yet been arraigned on the indictment and the Superior Court has not otherwise taken action in the case.

This measure deals with the issue whether, under the Court of Appeals' decision in *People v. Brancoccio* (83 N.Y.2d 638), a local criminal court, on a pending felony complaint, has the authority to extend a previously issued temporary order of protection even after an indictment has been voted in the case. This issue typically arises when a defendant who is out on bail or ROR on a felony complaint, and is the subject of an existing temporary order of protection, makes a scheduled appearance in the local criminal court and is advised by the prosecutor that an indictment has been voted by the Grand Jury.

In *Brancoccio*, the prosecutor, pursuant to CPL section 170.20(2),* had requested an adjournment of a misdemeanor case pending in the local criminal court in order to present the charges to a Grand Jury. After an indictment had been voted charging the defendant with burglary, but before it was filed, the defendant, with the prosecutor's consent, pleaded guilty in the local criminal court to misdemeanor trespass in satisfaction of the pending charges. Defendant moved to dismiss the subsequently filed indictment on double jeopardy grounds, claiming that the local criminal court continued to have jurisdiction of the case at the time of his guilty plea since the indictment, though already voted at the time of the plea, had not yet been filed. The People argued that the plea was a nullity since the local criminal court had been deprived of jurisdiction by the mere *voting* of the indictment. The trial court denied defendant's dismissal motion, and he was ultimately convicted of attempted burglary in the second degree. *Brancoccio, supra*, at 640-641.

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*Subdivision one of CPL section 170.20 provides, in substance, that a local criminal court is divested of jurisdiction of a misdemeanor charge contained in a local criminal court accusatory instrument when an indictment charging the misdemeanor is "*filed* in a superior court." CPL section 170.20(1); emphasis added. Subdivision two of section 170.20, which was the focus of *Brancoccio*, permits a prosecutor to obtain an adjournment and stay of misdemeanor proceedings in a local criminal court for the purpose of presenting the charges to a Grand Jury. That subdivision provides that, where an adjournment has been granted and an indictment "results" within the designated adjournment period, the local criminal court is thereby divested of jurisdiction of the charges "and all proceedings in the local criminal court with respect thereto are terminated." CPL section 170.20(2).

The Appellate Division upheld the defendant's conviction, and the Court of Appeals affirmed. The latter Court specifically rejected the defendant's claim that, in order for the local criminal court to have been divested of jurisdiction, the indictment must have been *filed*. *Id.*, at 640-641. In so holding the Court construed the language of subdivision two of CPL section 170.20, which provides that the divestiture of jurisdiction occurs when an indictment "results," as not requiring the *filing* of the indictment to accomplish divestiture. The Court contrasted the Legislature's use of the word "results" in subdivision two of section 170.20, with its use of "filed" in subdivision one of that section, and concluded that the time of divestiture referenced in the former subdivision was the point at which the indictment was "voted" by the Grand Jury. *Id.*, at 642.

Although *Brancoccio* has been cited for the general proposition that a local criminal court is automatically divested of jurisdiction of a criminal action upon the voting of an indictment in the case, there are various provisions of the Criminal Procedure Law, in addition to subdivision one of CPL section 170.20, that establish other points of divestiture. CPL section 170.25(2), for example, provides that, where a defendant has made a motion for an order directing the prosecutor to present pending misdemeanor charges to a Grand Jury, and the motion is granted, the subsequent *filing* of an indictment by the Grand Jury terminates the proceedings in the local criminal court. CPL section 170.25(2). CPL sections 180.30(1) and 180.70(1), moreover, provide that where a defendant has been ordered held by a local criminal court for the action of the Grand Jury, and the order, felony complaint and other papers are transmitted, in accordance with those sections, to the Superior Court, the action "is deemed to be still pending in the local criminal court" until the order and transmitted papers "are received by the [S]uperior [C]ourt." CPL sections 170.30(1) and 180.70(1); emphasis added.

In a recent Supreme Court decision in Kings County, *People v. Nerley* (2003 WL 727165 [N.Y. Sup.]), the Court directly addressed the issue whether a local criminal court judge has the power to extend an order of protection even after a Grand Jury has voted and filed an indictment. In *Nerley*, the prosecutor had announced in the New York City Criminal Court that a Grand Jury had filed an indictment covering the charges in the underlying felony complaint. *Id.* The Criminal Court judge had ruled that the filing of the indictment "had divested the Criminal Court of all jurisdiction including the power to extend a temporary order of protection" that had previously been issued in the case, and transferred the matter to the Supreme Court for the purpose of having the order of protection extended. *Id.* The Supreme Court in *Nerley* disagreed with the lower Court's conclusion that it had no authority to extend the order.

Focusing on the fact that a temporary order of protection is, in effect, a condition of bail or recognizance (*see*, CPL sections 530.12(1) and 530.13(1)), and that CPL section 530.40(2)(b) "implicitly codifies and presumes the continued effectiveness of the bail conditions set in the Criminal Court until defendant's arraignment in Supreme Court,"** the Court in *Nerley* held that

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**CPL section 530.40(2)(b) provides, in substance, that when a criminal action is pending in a Superior Court and the indictment was filed in the case "at a time when a felony complaint

the lower Court retained the authority, as part of its order continuing bail in the case, to continue the *conditions* of that bail, notwithstanding that an indictment had already been voted and filed. *Id.* In this regard, the Court stated as follows:

> [As] the Criminal Court's bail determination is still viable prior to arraignment in Supreme Court and as the statutory definition of bail includes the issuance of any temporary orders of protection, then the extension of an order of protection by the Criminal Court until the defendant's arraignment in Supreme Court is merely a reaffirmation of the Criminal Court's bail decision and is thus merely a ministerial act required to maintain the status quo. The act of filing the indictment with the Supreme Court signifies that [C]ourt's acquisition of trial jurisdiction rather than the abrogation of any of the results of the Criminal Court's exercise of its preliminary jurisdiction including the power to continue the conditions of bail in the case.

Nerley, Id.

This measure would resolve any ambiguity regarding the authority of a local criminal court to extend a temporary order of protection under these circumstances by expressly permitting such an extension. Specifically, the proposal would add a new subdivision two-a to CPL sections 530.12 (orders of protection for family offenses) and 530.13 (orders of protection for non-family offenses) to permit a local criminal court to issue or extend a temporary order of protection, either as a condition of recognizance or bail pursuant to subdivision one of each section, or simultaneously with the issuance of a warrant pursuant to subdivisions four and three of those sections, respectively, notwithstanding that an indictment has already been voted or filed in the case at the time of such issuance or extension, provided the defendant has not yet been arraigned on the indictment and the Superior Court has not otherwise taken action in the case.

The reference in proposed subdivision two-a to the local court's ability to "issue," as opposed to merely "extend," an order of protection post-indictment is intended to deal with the presumably rare situation where a temporary order of protection is first requested *after* the defendant has already made appearances in the case. Thus, for example, under the measure, the local criminal court could, at the defendant's final appearance in that court, and after an

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charging the same conduct was pending in a local criminal court, and in which such local criminal court...has issued an order of recognizance or bail which is still effective, the [S]uperior [C]ourt's order [of recognizance or bail] may be in the form of a direction continuing the effectiveness of the previous order." CPL section 530.40(2)(b).

indictment has already been voted or filed, issue a temporary order of protection as a condition of the defendant's continued recognizance or bail. The reference in proposed subdivision two-a to the issuance of an order of protection "simultaneously with the issuance of a warrant" is intended to cover the situation where, rather than continuing the bail conditions after the defendant has been indicted, the local criminal court issues a warrant due to the defendant's failure to appear. The validity of these bench warrants, in light of the apparent divestiture of jurisdiction of the local criminal court following indictment, is the subject of a related proposal that has been part of the Committee's legislative program for some time.

It should be noted that the measure, by its terms, is not limited to criminal actions commenced by the filing of a felony complaint. Thus, the authority established by the new subdivision two-a would apply even in cases where a defendant charged with one or more misdemeanors *only* has been indicted on those charges or on related (i.e., felony) charges by the Grand Jury.

Proposal

AN ACT to amend the criminal procedure law, in relation to the post-indictment issuance or extension of a temporary order of protection by a local criminal court

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 530.12 of the criminal procedure law is amended by adding a new subdivision 2-a to read as follows:

2-a. Notwithstanding any other provision of law, a local criminal court may issue or extend a temporary order of protection as a condition of an order of recognizance or bail pursuant to subdivision one, or simultaneously with the issuance of a warrant pursuant to subdivision four, notwithstanding that a grand jury has, at the time of such issuance or extension, voted or filed an indictment in the action, provided the defendant has not yet been arraigned on the indictment in the superior court and the superior court has not otherwise acted in the case.

§2. Section 530.13 of the criminal procedure law is amended by adding a new subdivision

2-a to read as follows:

2-a. Notwithstanding any other provision of law, a local criminal court may issue or extend a temporary order of protection as a condition of pre-trial release or as a condition of release on bail pursuant to subdivision one, or simultaneously with the issuance of a warrant pursuant to subdivision three, notwithstanding that a grand jury has, at the time of such issuance or extension, voted or filed an indictment in the action, provided the defendant has not yet been arraigned on the indictment in the superior court and the superior court has not otherwise acted in the case.

§3. This act shall take effect immediately.

61. Creating a "Bona Fide Researcher" Exception to the Sealing Requirements of the CPL (Judiciary Law 212(1), 750(A))

The Committee recommends that section 212 of the Judiciary Law be amended to authorize the Chief Administrator of the Courts to provide by rule for access, "for bona fide, non-commercial research purposes only," to certain sealed criminal case records and data. The Committee also recommends that section 750 of the Judiciary Law be amended to include within the definition of criminal contempt under that section the intentional dissemination of such records or data by a researcher in violation of the terms of a "non-dissemination agreement" entered into with the Chief Administrator.

The recent increase in the number of "specialized" courts, such as Drug Courts, Integrated Domestic Violence Courts and Mental Health Courts, operating throughout the State has led to a corresponding increase in requests for criminal case information by researchers studying the operation and effectiveness of these courts. Indeed, in the Drug Court context, it is quite common for the Federal Bureau of Justice Assistance to include in its grant proposals a requirement that an "outcome evaluation" be conducted to assess the effectiveness of the particular Drug Court program funded by the grant. Part of this evaluation often includes tracking former Drug Court participants' subsequent contacts with the criminal justice system. This, in turn, may require access to both public court records, such as pending case information and conviction data, and to criminal case records that have been sealed pursuant to CPL section 160.50 [relating to criminal actions terminated "in favor of the accused"] or 720.35 [relating to youthful offender adjudications].* Due, however, to the absence in these sealing statutes of an express provision allowing for the unsealing of court records "for research purposes" (see, CPL sections 160.50(1)(d) and 720.35(2)), this information is generally considered off limits to researchers, even where the researcher agrees in writing not to re-disclose or publish any information that would permit the defendant in the sealed case to be identified. See, generally, Matter of Hynes v. Karassik, 47 N.Y.2d 659, 663 [characterizing the exceptions to sealing set forth in CPL 160.50(1)(d) as "narrowly defined"]; and Matter of Joseph M., 82 N.Y.2d 128, 133-134 [rejecting the notion that courts have "inherent authority" to unseal criminal case records sealed pursuant to CPL 160.50].

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*CPL section 160.50(1)(c) provides, in pertinent part, that, when a criminal action is terminated in favor of the accused, as defined by subdivision three of that section, "all official records and papers...relating to the arrest or prosecution" on file with the Division of Criminal Justice Services (DCJS) or any court, police agency or prosecutor's office, "shall be sealed and not made available to any person or public or private agency." CPL section 160.50(1)(c). CPL section 720.35(2) provides, in pertinent part, that, "[e]xcept where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency or...[DCJS], relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency..." CPL section 720.35(2).

The Committee believes that, provided appropriate safeguards are in place to protect the confidentiality of sealed criminal case information and, in particular, the defendant's identity, the limited release of such information for bona fide, non-commercial research purposes furthers important public policy goals and should be permitted. The Committee further believes that, due to the nature of these research requests – which typically involve records of more than one criminal court and may include several courts located in different counties or judicial districts – it makes sense to centralize the consideration and processing of these requests. Accordingly, this measure would amend Judiciary Law section 212(1)** to add a new paragraph (w) specifically empowering the Chief Administrator to provide by rule for the release of case records and data sealed pursuant to CPL section 160.50 or 720.35 "for bona fide, non-commercial research purposes." The amendment is modeled after the "bona fide researcher" exception that currently exists, under Executive Law section 837(4)(e), for sealed criminal history records maintained by DCJS. Pursuant to that exception, DCJS, in cooperation with the Chief Administrator and "any other public or private agency," is authorized to

> [s]upply data, *including confidential and sealed criminal history record information*, for bona fide research purposes. Such information shall be disseminated in accordance with procedures established by...[DCJS] to assure the security and privacy of identification and information data, which shall include the execution of an agreement which protects the confidentiality of the information and reasonably protects against data linkage to individuals.

Executive Law section 837(4)(e); emphasis added.

Similar to Executive Law section 837, the proposed amendment to Judiciary Law section 212 would require the Chief Administrator, in exercising his or her authority under the statute, to adopt rules to assure the "security and privacy" of the released information, and the "bona fide nature of the research request." If adopted, such rules would also require the execution of a "non-disclosure" agreement between the Chief Administrator (or his or her designee) and the researcher which would "protect...the confidentiality of the information and expressly prohibit...the public dissemination by the researcher of any information obtained pursuant to such agreement that identifies, or tends to identify, an individual defendant or from which the identity of an individual defendant might reasonably be ascertained." Where a researcher, or his or her employee, agent or representative, "intentionally disseminates, causes to be disseminated, or facilitates the dissemination of information" in violation of such an agreement, such

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**Judiciary Law section 212 provides, in pertinent part, that the Chief Administrator of the Courts, "on behalf of the [C]hief [J]udge, shall supervise the administration and operation of the [U]nified [C]ourt [S]ystem." That section also enumerates the specific "functions, powers and duties" of the Chief Administrator. Among the powers enumerated in section 212 is the authority of the Chief Administrator to "[d]elegate to any deputy, assistant, court or administrative judge, administrative functions, powers and duties possessed by him." Judiciary Law section 212(1)(s).

dissemination would, under section two of the measure (amending Judiciary Law section 750(A)), constitute a criminal contempt.

The measure is narrowly drawn to limit access to sealed records to only bona fide, "non-commercial" researchers, and is limited in scope to only those court records and data that have been sealed pursuant to CPL section 160.50 or 720.35. Court records rendered confidential by some *other* provision of the CPL (e.g., grand jury records under CPL section 190.25(4) and presentence reports under CPL section 390.50(1)), by another state statute (e.g., juror records under Judiciary Law section 509(a)), or by federal law or regulation (e.g., drug and alcohol treatment records under 42 C.F.R., Part 2) would not, under the measure, be subject to release absent some other exception to sealing that would permit such dissemination.

Proposal

AN ACT to amend the judiciary law, in relation to releasing sealed criminal case records and data for bona fide, non-commercial research purposes

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 212 of the judiciary law is amended by adding a new paragraph (w) to read as follows:

(w) (i) Notwithstanding any provision of section 160.50 or 720.35 of the criminal procedure law to the contrary, have discretion to provide by rule for access, for bona fide, non-commercial research purposes only, to criminal case records and data on file with the unified court system, including criminal case records and data kept electronically, that have been sealed pursuant to such section 160.50 or 720.35, provided such access is not prohibited by federal law or regulation, or by any other state law. In exercising his or her authority under this subdivision, the chief administrator shall adopt rules governing the dissemination of such information to assure the security and privacy of the information released and the bona fide nature of the research request. Such rules shall require the execution of an agreement between the chief

administrator or his or her designee and the researcher which protects the confidentiality of the information and expressly prohibits the public dissemination by the researcher of any information obtained pursuant to such agreement that identifies, or tends to identify, an individual defendant or from which the identity of an individual defendant might reasonably be ascertained. For purposes of this paragraph, public dissemination shall mean dissemination to any individual or public or private entity other than an employee, agent or representative of such researcher.

(ii) Where a researcher, or an employee, agent or representative of such researcher, intentionally disseminates, causes to be disseminated, or facilitates the dissemination of information in violation of one or more terms of an agreement executed pursuant to subparagraph (i) of this paragraph, such conduct shall constitute a criminal contempt in accordance with subdivision eight of section 750 of this chapter.

§2. Subdivision A of section 750 of the judiciary law is amended by adding a new paragraph 8 to read as follows:

8. Intentional dissemination of information, or the intentional causing or facilitation of such dissemination, by a researcher, or by an employee, agent or representative of such researcher, in violation of one or more terms of an agreement executed pursuant to subparagraph (i) of paragraph (w) of subdivision one of section 212 of this chapter.

§3. This act shall take effect immediately.

62. Permitting All Ineffective Assistance of Counsel Claims to be Raised on Collateral Review (CPL 440.10(2))

The Committee recommends that paragraphs (b) and (c) of subdivision two of section 440.10 of the Criminal Procedure Law be amended to provide that ineffective assistance of counsel claims shall be exempt from the procedural bars to collateral review imposed by these two provisions of the post-conviction motion statute.

Although CPL section 440.10(1)(h) allows generally for a defendant to challenge the constitutionality of his or her conviction on collateral review, subdivision two of the statute establishes a number of mandatory procedural bars to such claims. Specifically, pursuant to subdivision (2)(b) of section 440.10, the court *must* deny a motion to vacate a judgment under that section when "[t]he judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal." CPL section 440.10(2)(b). And, under CPL section 440.10(2)(c), the court *must* deny such motion when, "[a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issued raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or effect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him." CPL section 440.10(2)(c).*

The underlying purpose of subdivisions 2(b) and 2(c) is to prevent a defendant from using CPL section 440.10 as a substitute for direct appeal. See, People v. Cook, 67 N.Y.2d 100 (1986). Many jurisdictions, including the federal system, have analogous procedural bars. According to the United States Supreme Court, such rules are intended to "conserve judicial resources and to respect the law's important interest in the finality of judgments." Massaro v. United States, 123 S. Ct. 1690, 1693 (2003). But, as the Supreme Court recognized in exempting ineffective-assistance claims from the federal judiciary's similar procedural bar, requiring a criminal defendant to bring ineffective-assistance claims on direct appeal "does not promote these objectives." Id. Applying the procedural bar to ineffective-assistance claims creates a "risk that defendants w[ill] feel compelled to raise the issue before there has been an opportunity fully to develop the claim's factual predicate," and the issue will "be raised for the first time in a forum not best suited to assess those facts." Id. at 1694. As the Supreme Court further explained, "when [an ineffectiveness] claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record that is not developed precisely for the purpose of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." Id. The trial court is, "the forum best suited to developing the facts necessary to determining the adequacy of

*The prohibition on collateral review established by these two provisions of section 440.10(2) currently includes ineffective-assistance claims that are based on facts appearing in the trial record. See, e.g., People v. Allen, 285 A.D.2d 470 (2d Dept. 2001).

representation during an entire trial." Id. In addition, the collateral motion "often will be ruled upon by the judge who presided at trial, who should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial." Id.

The Supreme Court's reasons for exempting ineffective-assistance claims from its equivalent procedural bar are equally applicable to New York's statutory scheme. New York courts have already emphasized that in typical cases, ineffective-assistance claims should be raised on collateral review. See, e.g., People v. Brown, 45 N.Y.2d 852 (1978) ("in the typical case, it would be better, and in some cases essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL §440.10"). However, notwithstanding this seemingly broad language, it is far from unheard of for a court to deny the CPL 440.10 application on the premise that the trial record was adequate to permit raising the claim on appeal. See, e.g., People v. Duver, 294 A.D.2d 594 (2nd Dept. 2002); People v. Cardenas, 4 A.D.3d 103 (2nd Dept. 2004). Prohibiting a defendant from collaterally raising an ineffective-assistance claim that potentially falls within the narrow class of directly appealable ineffectiveness claims imposes unnecessary burdens on defendants and on the judicial system. Importantly, it is often difficult for a defendant to predict whether a given court will categorize his or her ineffectiveness claim as cognizable on direct appeal.

This creates a dilemma for a defendant who plans to press an ineffective-assistance claim. If the defendant raises the claim on collateral review, there is a risk that the trial court will deny his or her claim under the mandatory procedural bars – the defendant then will only be able to raise the claim on direct appeal if the appellate court has agreed to delay the perfection of his or her appeal until the disposition of the 440.10 motion and if the appellate court agrees with the trial court's determination that the claim is cognizable on appeal. If, on the other hand, the defendant raises the claim first on direct appeal, there is a risk that the appellate court will decide that the claim is not cognizable on direct appeal – in that situation, the defendant will have had to complete the entire appellate process before getting to raise a claim that could have obviated the need for an appeal in the first place. If the defendant raises the claim in both fora simultaneously, he or she runs the greatest risk of all – losing on procedural grounds in two courts without any adjudication of the merits of the claim.

Following the lead of the federal system and the majority of other states, this measure would amend subdivision two of CPL section 440.10 to remove the existing bars to collateral review where the claim is the ineffective assistance of counsel. In so doing, it would encourage these claims to be brought in the preferable forum in the first instance, would help to eliminate the potential injustices to defendants outlined above, and would help to prevent unnecessary, or unduly delayed, appeals in these cases.

Proposal

AN ACT to amend the criminal procedure law, in relation to claims of ineffective assistance of counsel in post-conviction motions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (b) and (c) of subdivision 2 of section 440.10 of the criminal procedure law are amended to read as follows:

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal unless the issue raised upon such motion is ineffective assistance of counsel; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his or her unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him or her unless the issue raised upon such motion is ineffective assistance of counsel; or

§2. This act shall take effect immediately.

63. Facilitating a Sex Offense With a Controlled Substance (PL 130.90)

The Committee recommends that section 130.90(1) of the Penal Law be amended to delete the requirement that the controlled substance or other drug administered by the defendant to the intended sex crime victim without the latter's consent be "unlawfully" possessed by the defendant.

As part of a comprehensive measure amending Penal Law Article 130 and several other provisions of law, the Legislature, in 2003, amended Penal Law section 130.90(1) to expand the definition of the class D felony offense of Facilitating a Sex Offense with a Controlled Substance. See, Chapter 264 of the Laws of 2003, §24. As so amended, section 130.90(1) now provides, in pertinent part, that a person is guilty of Facilitating a Sex Offense with a Controlled Substance when he or she

> knowingly and unlawfully possesses a controlled substance *or any preparation, compound, mixture or substance that requires a prescription to obtain* and administers such substance *or preparation, compound, mixture or substance that requires a prescription to obtain* to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in this article.

Penal Law section 130.90(1), as amended by L. 2003, ch. 264, §24; emphasis added.

According to the Sponsor's Memorandum to Chapter 264 (S.5690/Golden), the language added to Penal Law section 130.90(1) in 2003 (indicated above in italics) is intended to "include within the elements of [F]acilitating a [S]ex [O]ffense with a [C]ontrolled [S]ubstance the knowing and unlawful administering of any preparation, compound, mixture or substance that requires a prescription to obtain." Sponsor's Memorandum to S.5690/Golden [2003], at p.2.

It has been suggested that the Legislature, by apparently requiring in section 130.90(1) that the substance "that requires a prescription to obtain" be *unlawfully* possessed by the person administering it, may have inadvertently failed to cover the situation where a *lawfully* possessed prescription drug (e.g., valium possessed by a person who obtained it by prescription) is administered to the victim, without the victim's consent, for the purpose of committing a felony sex offense.*

The proposed amendment to Penal Law section 130.90 will close this presumably

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*Although the term "unlawfully" is not defined in Penal Law section 130.90 or elsewhere in Article 130, the term is defined in subdivision two of Penal Law section 220.00 to mean "in violation of article thirty-three of the public health law."

unintended gap in the law.

Proposal

AN ACT to amend the penal law, in relation to the offense of facilitating a sex offense with a controlled substance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 130.90 of the penal law is amended to read as follows:

1. knowingly [and unlawfully] possesses a controlled substance or any preparation, compound, mixture or substance that requires a prescription to obtain and administers such substance or preparation, compound, mixture or substance that requires a prescription to obtain to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in this article; and

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

64. Prohibiting the Release of Certain Records on OCA's Electronic Statewide Criminal History Database (CPL 160.55)

The Committee recommends that CPL section 160.55(1) be amended to require that all references to criminal cases that have been terminated "by conviction for [a] noncriminal offense" and sealed in accordance with that section be excluded on search results returned from the Office of Court Administration's electronic statewide criminal case database.

For several years now, OCA has operated a criminal history search service that allows any member of the public, for a fee, to request a name-based search of OCA's electronic criminal history database ("the database"). The database contains information relating to pending and completed criminal cases from most of the State's local criminal and superior courts, and includes, inter alia, criminal case docket and indictment numbers, criminal charge information, relevant court appearance dates and conviction and sentence information.* In 2003, OCA significantly expanded this service from a limited, thirteen-county only, electronic search to one that, upon payment of a $52 "criminal history search fee,"covers pending and completed criminal cases from all 62 counties of the State. See, generally, Chapter 62 of the Laws of 2003, Part J, section 14 [authorizing OCA to collect a fee of $52 "for the provision of criminal history searches and other searches for data kept electronically by the [U]nified [C]ourt [S]ystem"].

The recent expansion of OCA's criminal history search service to allow for statewide searches of criminal cases, and the expected further expansion of that service by OCA to permit "customer-conducted" internet-based searches of the database, have led to questions about the scope of the criminal case information being released. In particular, questions have been raised about the release of information relating to so-called "non-criminal" case dispositions. These are cases where the defendant typically is arrested for a "criminal" offense such as a misdemeanor or felony, but ultimately is convicted – usually as part of a plea bargain – of only a "non-criminal" offense such as a traffic infraction or violation (e.g., disorderly conduct under Penal Law section 240.20, or trespass under Penal Law section 140.05). See, PL section 10.00(6)[defining a "crime" as "a misdemeanor or a felony;" and CPL section 1.20(39)[defining "petty offense" as "a violation or a traffic infraction"].

Pursuant to CPL section 160.55(1)(c), all "official records and papers"of these non-criminal dispositions on file with the Division of Criminal Justice Services (DCJS), the prosecutor's office and the police are (subject to certain exceptions not relevant here) required to be sealed and "not made available to any person or public or private agency." CPL section

*In accordance with the relevant provisions of the Criminal Procedure Law, no information on cases that have been sealed under the youthful offender statute (CPL section 720.35), the statute relating to "removal" of criminal cases to Family Court (CPL section 725.15) or the statute relating to cases that resulted in a dismissal, acquittal or other "termination in favor of the accused" is included in the "search results" returned by OCA's criminal history search service.

160.55(1)(c). There is, however, no requirement in the statute that *court* records of these cases be sealed. The result is that, while all references to these non-criminal dispositions are sealed by DCJS and generally will not appear on a statewide criminal history record (i.e., "rapsheet") produced by that agency,** the court files for the cases remain open and available for inspection at the court clerk's office. More important, due to the absence in the statute of a sealing requirement for court records, when a name search is conducted on the OCA statewide database, all relevant arrest, conviction and sentence information on the case, as well as information on the original felony or misdemeanor charge(s), will be released as part of the "search result" returned by OCA for that individual.

The Committee recognizes that, by its terms, CPL section 160.55(1)(c) entitles a defendant convicted of a "petty offense" following an arrest for a misdemeanor or felony to only a "partial sealing" of the case, and that, unlike the records on file with DCJS and law enforcement agencies, court records of these cases have traditionally remained open for public inspection at the court clerks' offices. The Committee believes, however, that the availability of these records through OCA's statewide criminal history search service, and the anticipated expansion of that service to allow for virtually instantaneous access to these records via the internet, have created a situation whereby the limited sealing protections of the existing statute have been rendered all but meaningless.

This measure would correct the problem by amending CPL section 160.55 to require OCA to delete all references to these non-criminal case dispositions from "search results" returned to customers of its statewide criminal history search service. Specifically, the measure would add an unlettered paragraph at the end of subdivision one of section 160.55 to provide that, where a criminal action or proceeding is terminated by a conviction for a noncriminal offense and is subject to the existing sealing requirements of that statute, "no statewide criminal history search conducted by...[OCA] for data kept electronically by the unified court system shall include, in the search result returned or displayed to the person or public or private agency requesting the search, any reference to such criminal action or proceeding or the arrest or prosecution of the defendant." To account for situations where the sentencing Judge directs that sealing under the statute be stayed for a specified period (e.g., for the one-year period of a conditional discharge sentence imposed pursuant to Penal Law section 65.05(3)(b)), the measure would further provide that the prohibition on release of these records through the statewide database shall take effect on the date of such termination "or such other date following termination as may be directed by the court."

**As the official "state repository" of criminal history record information, DCJS produces rapsheets from its own database for a variety of purposes, both criminal and non-criminal. See, e.g., CPL section 160.30 [requiring DCJS, upon receipt of fingerprints from a police agency following a new arrest, to search its records and produce a "report ("i.e., rapsheet), for use by the court, defense attorney and prosecutor]; and Social Services Law section 378-a(2) [requiring DCJS, at the request of the NYS Office of Children and Family Services, to, inter alia, conduct fingerprint-based criminal history searches of prospective foster and adoptive parents.]

It is the Committee's view that, by eliminating all references to these non-criminal case dispositions on search results returned from the OCA statewide database, while leaving the "hard copy" records of the cases open for inspection and copying at the court clerk's office, this measure restores to section 160.55 the appropriate balance between the public's right to access these records and the defendant's limited right to confidentiality under the statute.

Proposal

AN ACT to amend the criminal procedure law, in relation to statewide criminal history searches

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 160.55 of the criminal procedure law is amended by adding, at the end thereof, an unlettered paragraph to read as follows:

Where a criminal action or proceeding is terminated by conviction of the defendant of a traffic infraction or a violation and notice thereof is required to be given by the clerk of the court pursuant to this subdivision, no statewide criminal history search conducted by the office of court administration for data kept electronically by the unified court system shall include, in the search result returned or displayed to the person or public or private agency requesting the search, any reference to such criminal action or proceeding or the arrest or prosecution of the defendant. This prohibition shall take effect on the date of such termination or such other date following termination as may be directed by the court.

§2. This act shall take effect immediately.

65. Oral Applications for Material Witness Orders (CPL 620.85)

The Committee recommends that a new section 620.85 be added to the Criminal Procedure Law to provide for oral applications for material witness orders and the issuance, based on such an oral application, of an order directing the prospective material witness to appear or a warrant directing a police officer to bring the prospective witness before the court forthwith.

Pursuant to CPL section 620.20(1), "[a] material witness order may be issued upon the ground that there is reasonable cause to believe that a person whom the people or the defendant desire to call as a witness in a pending criminal action: (a) [p]ossesses information material to the determination of such action; and (b) [w]ill not be amenable or responsive to a subpoena at a time when his attendance will be sought." CPL section 620.20(1).* Pursuant to CPL section 620.30(1), "[a] proceeding to adjudge a person a material witness must be commenced by application to the appropriate court, *made in writing and subscribed and sworn to by the applicant*, demonstrating reasonable cause to believe the existence of facts, as specified in subdivision one of section 620.20, warranting the adjudication of such person as a material witness." CPL section 620.30(1); emphasis added.

The Committee recognizes that, in criminal prosecutions generally, and during criminal trials and hearings in particular, emergencies sometimes arise that require speedy remedies by the court. This may include the need to bring a recalcitrant "material" witness before the court as quickly as possible, before a formal, written application can be prepared and filed. Unfortunately, the existing statutory scheme for material witness orders, which provides no exception to the requirement that an application therefor be "made in writing," fails to account for such emergencies. This measure, which is modeled after the provisions of CPL sections 690.35 and 690.36 governing oral applications for search warrants,** is intended to close this gap in the law

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*As provided in subdivision two of CPL section 620.20, a material witness order may be issued only when: (1) an indictment has been filed with a superior court and is currently pending therein; (2) a grand jury proceeding has been commenced and is currently pending; or (3) a felony complaint has been filed with a local criminal court and is currently pending therein. CPL section 620.20(2).

**Pursuant to CPL section 690.35(1), an application for a search warrant "may be in writing or oral." An oral application for a search warrant "may be communicated to a judge by telephone, radio or other means of electronic communication." CPL section 690.36(1). Pursuant to subdivision three of CPL section 690.36, upon being advised that an oral search warrant application is being made, "a judge shall place under oath the applicant and any other person providing information in support of the application. Such oath or oaths and all of the remaining communication must be recorded, either by means of a voice recording device or verbatim stenographic or verbatim longhand notes. If a voice recording device is used or a stenographic record made, the judge must have the record transcribed, certify to the accuracy of the

by providing trial Judges with the authority to entertain, and act upon, an oral application for a material witness order.

The first subdivision of proposed section 620.85 closely tracks CPL section 690.36(1) in providing that "[a]n oral application for a material witness order may be communicated to a judge in person*** or by telephone, radio or other means of electronic communication." Similarly, subdivision two of the proposed statute mirrors CPL section 690.36(2) in requiring that the oral applicant "identify himself or herself and the purpose of the communication." And, as with oral applications for search warrants, proposed section 620.85(2) specifically permits "persons, properly identified, *other than the applicant*" to provide "directly to the court...some or all of...[the] allegations" necessary to support issuance of the requested material witness order. See, proposed CPL section 620.85(2) [emphasis added] and CPL section 690.36(2).

Subdivisions three and four of the proposed statute incorporate many, if not most, of the procedural safeguards required for oral search warrant applications as set forth in CPL sections 690.36(3), 690.40(3), 690.45(2) and 690.50(5). These include the following requirements:

- that the conversation be recorded either by means of a recording device or "verbatim stenographic or verbatim longhand notes." See, proposed CPL section 620.85(3) and CPL section 690.36(3).

- that any such voice recording or stenographic notes be filed with the court "within a reasonable period following...[the] application," and that any such longhand notes "be subscribed by the [J]udge and filed with the court within a reasonable period following...[the oral] application." See, proposed CPL section 620.85(3) and CPL section 690.36(3).****

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transcription and file the original record and transcription with the court within twenty-four hours of the issuance of a warrant. If longhand notes are taken, the judge shall subscribe a copy and file it with the court within twenty-four hours of the issuance of a warrant." CPL section 690.36(3).

***The reference to an oral application made "in person" is intended to cover the situation where the oral application is made on the record in court.

****Subdivision three of proposed section 620.85 also provides that, where a voice recording device is used or a stenographic record made, the Judge "may, where he or she deems it appropriate, have the record transcribed, certify to the accuracy...[thereof] and file the transcription with the court within a reasonable period following the issuance or denial of an order or warrant" directing the appearance of the prospective material witness. This provision reflects the Committee's view that, given that the execution of any such order or warrant would

- that the applicant, and any other person providing information in support of the application, be sworn. See, proposed CPL section 620.85(3) and CPL section 690.36(3).

- that the applicant prepare an order for the prospective material witness to appear, or a warrant directing the police to bring such witness before the court forthwith, in accordance with CPL section 620.30(2)(a) and (b), and read the order or warrant to the Judge, verbatim, at the time of the oral application. See, proposed CPL section 620.85(4) and CPL section 690.40(3).

- that any such order or warrant "clearly indicate that it has been obtained on an oral application pursuant to...section [620.85]," and that it "state the name of the issuing [J]udge and the time and date on which such [J]udge directed its issuance." See, proposed CPL section 620.85(4) and CPL section 690.45(2).

- that a copy of any such order or warrant be filed with the court by the applicant when the prospective material witness appears for arraignment pursuant to CPL section 620.40. See, proposed CPL section 620.85(4) and CPL section 690.50(5).

Finally, the proposal makes a conforming amendment to CPL section 620.30(1) to add a reference to oral applications under proposed section 620.85.

Proposal

AN ACT to amend the criminal procedure law, in relation to oral applications for material witness orders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

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necessarily be followed by a hearing under CPL section 620.50, and since any tape recordings or stenographic notes must, under that subdivision, be retained and filed with the court, the Judge should have the discretion to decide whether a transcript of the recording or notes should be prepared in a particular case.

Section 1. Subdivision 1 of section 620.30 of the criminal procedure law is amended to read as follows:

1. A proceeding to adjudge a person a material witness must be commenced by application to the appropriate court, made either in writing and subscribed and sworn to by the applicant or orally in accordance with section 620.85, demonstrating reasonable cause to believe the existence of facts, as specified in subdivision one of section 620.20, warranting the adjudication of such person as a material witness.

§2. The criminal procedure law is amended by adding a new section 620.85 to read as follows:

§620.85. Material witness order; commencement of proceeding by oral application therefor.

1. An oral application for a material witness order may be communicated to a judge in person or by telephone, radio or other means of electronic communication.

2. Where an oral application for a material witness order is made, the applicant therefor must identify himself or herself and the purpose of the communication. After being sworn as provided in subdivision three of this section, the applicant must provide orally the same allegations of fact required by subdivision one of section 620.30; provided, however, persons, properly identified, other than the applicant may also provide some or all of such allegations of fact directly to the court. If satisfied that the application is well founded, the court may, in accordance with paragraph (a) of subdivision two of such section 620.30, issue an order directing the prospective witness to appear and may, where further allegations are provided demonstrating reasonable cause in accordance with paragraph (b) of such subdivision two,

instead issue a warrant in accordance with such paragraph (b).

3. Upon being advised that an oral application for a material witness order is being made, a judge shall place under oath the applicant and any other person providing information in support of the application. Such oath or oaths and all of the remaining communication must be recorded, either by means of a voice recording device or verbatim stenographic or verbatim longhand notes. Any such voice recording or stenographic notes must be filed with the court within a reasonable period following such application, and any such longhand notes must be subscribed by the judge and filed with the court within a reasonable period following such application. In addition, if a voice recording device is used or a stenographic record made, the judge may, where he or she deems it appropriate, have the record transcribed, certify to the accuracy of the transcription and file the transcription with the court within a reasonable period following the issuance or denial of an order or warrant pursuant to subdivision two of this section.

4. Where a judge determines to issue an order or warrant pursuant to subdivision two of this section, the applicant therefor shall prepare the order or warrant and shall read it, verbatim, to the judge. Any such order or warrant shall clearly indicate that it has been obtained on an oral application pursuant to this section and shall state the name of the issuing judge and the time and date on which such judge directed its issuance. When the prospective witness appears before the court for arraignment pursuant to section 620.40, a copy of such order or warrant shall be filed with the court by the applicant.

§3. This act shall take effect immediately.

66. Authorizing "Nunc Pro Tunc" License Suspensions and Revocations in Certain Cases (VTL 1193(2)(d)(3))

The Committee recommends that paragraph (d) of subdivision two of section 1193 of the Vehicle and Traffic Law be amended to add a new subparagraph three authorizing a sentencing court, in certain circumstances, to issue an order deeming the mandatory license suspension or revocation period imposed under that paragraph to have taken effect as of the date of the defendant's guilty plea.

Pursuant to VTL section 1193(2), defendants convicted of Driving While Intoxicated (DWI) or related offenses under VTL section 1192 face, in addition to other penalties required or permitted by that section, certain mandatory license sanctions. Under VTL section 1193(2)(a)(1), for example, a person convicted of Driving While Ability Impaired (DWAI) under VTL section 1192(1) must have his or her driver's license suspended for a period of at least ninety days.* Similarly, pursuant to VTL section 1193(2)(b)(1), a defendant convicted of DWAI whose offense was committed within five years of a conviction for a violation of any subdivision of VTL section 1192 must have his or her license revoked for a period of at least six months. And, a defendant with no prior VTL 1192 convictions who is convicted of DWI or Driving While Ability Impaired by Drugs must, under VTL section 1193(2)(b)(2) have his or her license revoked for a period of at least six months. Pursuant to VTL section 1193(2)(d)(1), these license sanctions (with certain exceptions not relevant here) take effect immediately upon sentencing.**

The mandatory license sanction provisions of VTL section 1193 have led to an anomaly in certain Drug Courts in the State that regularly accept defendants charged with VTL 1192 offenses. Typically, a defendant charged with a VTL 1192 offense who is accepted into Drug Court will enter a plea of guilty to that offense at the time of entry into the program and, upon successful completion thereof, will receive a non-jail sentence on that plea, or, with the consent

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*The VTL 1193 section license sanctions referenced here apply to operators of motor vehicles *other than* "commercial" or "special" vehicles, and do not include VTL section 1192 offenses committed by persons under the age of 21. In general, VTL section 1193 provides for enhanced license sanctions for VTL section 1192 offenses involving these types of vehicles or where the convicted defendant is under age 21.

**VTL section 1193(2)(d)(1) provides, in relevant part, as follows: "Notwithstanding anything to the contrary contained in a certificate of relief from disabilities issued pursuant to...the correction law, where a suspension or revocation, other than a revocation required to be issued by the commissioner [of the Department of Motor Vehicles], is mandatory pursuant to paragraph (a) or (b) of this subdivision, the magistrate, justice or judge shall issue an order suspending or revoking such license *upon sentencing*, and the license holder shall surrender such license to the court. Except as hereinafter provided, *such suspension or revocation shall take effect immediately.*" VTL section 1192(2)(d)(1); emphasis added.

of the prosecutor, be allowed to withdraw the plea and plead guilty to a lesser VTL 1192 offense. In either situation, the successful treatment participant will, at the time of sentence, and notwithstanding that his or her driving privileges were suspended during the entire period of treatment participation (see, e.g., VTL sections 1193(2)(e)(1)[requiring "suspension pending prosecution" for, inter alia, certain repeat VTL 1192 offenders]; 1193(2)(e)(7) [requiring "suspension pending prosecution" for defendants charged with DWI who have an alleged BAC of .08 or higher]; and 510 (3-a) [providing that a license or registration may be "temporarily suspended without notice, pending any prosecution, investigation or hearing"]), be subject to a mandatory license suspension or revocation for the minimum period prescribed by section 1193(2)(a) or (b).

This measure would address this anomaly by adding a new subparagraph three to VTL section 1192(2)(d) to provide an additional sentencing option in these cases. Specifically, the measure would authorize a superior or local criminal court Judge,*** when sentencing a defendant on his or her guilty plea following the defendant's successful completion – under the court's "direct supervision" – of a substance abuse treatment program certified by the New York State Office of Alcoholism and Substance Abuse Services ("OASAS"), to impose the mandatory VTL section 1193 license sanction "nunc pro tunc" (i.e., deeming the suspension or revocation to have taken effect on the date of the participant's guilty plea). The measure would expressly provide that this "nunc pro tunc" sentencing option would apply *only* in those cases where the defendant's license was suspended "pending prosecution," pursuant to an applicable provision of the VTL, during the entire period of the defendant's participation in treatment, and *only* where such participation was pursuant to a "written agreement between...[the] court and...[the defendant]," and for a period of at least six months.

By permitting a defendant who, under direct court supervision, enters and successfully completes an OASAS-certified substance abuse treatment program, to, in effect, obtain "credit" against the VTL 1193 mandatory license suspension or revocation period for the period the defendant was in treatment and under a VTL license suspension "pending prosecution," this measure furthers the important policy goal of encouraging defendants in appropriate cases to seek, and succeed in, treatment as an alternative to incarceration.

The measure would take effect immediately.

Proposal

AN ACT to amend the vehicle and traffic law, in relation to mandatory license

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***Although, in an earlier form, the measure granted this "nunc pro tunc" authority only to Judges presiding in an OCA-designated Drug Court, it was the Committee's view that the measure should be expanded to apply to *any* court where the defendant, as part of a plea bargain, successfully completes an OASAS-certified treatment program of at least six-months duration and had his or her license suspended "pending prosecution" during the entire course of treatment.

suspension or revocation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (d) of subdivision 2 of section 1193 of the vehicle and traffic law is amended by adding a new subparagraph 3 to read as follows:

(3) Where the license holder has, under the direct supervision of a court and in accordance with a written agreement between such court and such license holder, participated in and successfully completed the requirements of a substance abuse treatment program certified by the New York state office of alcoholism and substance abuse services following his or her plea of guilty to a violation of any subdivision of section eleven hundred ninety-two of this chapter, the justice or judge of such court may, upon sentencing, issue an order deeming such mandatory license suspension or revocation to have taken effect on the date such plea was entered and accepted by the court; provided however, that no such order shall be issued unless the holder's participation in such substance abuse treatment program was for a period of at least six months, and the holder, during the entire course of such participation, had been subject to a license suspension pending prosecution pursuant to this section or subdivision 3-a of section 510 of this chapter, or a license suspension pending hearing or revocation pursuant to section 1194 of this chapter. The court shall forward to the commissioner a copy of any order issued pursuant to this subparagraph within ninety-six hours of sentencing. Such order shall be on a form promulgated for that purpose by the chief administrator of the courts in consultation with the commissioner.

§2. This act shall take effect immediately.

67. Precluding Penal Law Contempt Prosecutions of Family Court Act Article 7 ("PINS") Respondents Who Violate Family Court Dispositional Orders (PL 30.00(1))

The Committee recommends that subdivision one of Penal Law section 30.00 be amended to provide that a person less than eighteen years old is not criminally responsible for the crime of criminal contempt in the second degree as defined in Penal Law section 215.50(3)* when the "lawful process or other mandate of the court" violated by the defendant was issued in a Family Court Act Article 7 "PINS" (Person in Need of Supervision)** proceeding.

Both the First and Second Departments have held that a violation of a PINS dispositional order cannot be converted into a juvenile delinquency petition based on the theory that the PINS respondent committed acts which, if committed by an adult, would constitute the crime of criminal contempt under the Penal Law. In Matter of Edwin G. (296 A.D.2d 7 [1st Dept. 2002]), for example, the Court considered an appeal from a Family Court order adjudicating a 15-year-old respondent a juvenile delinquent and placing him with the NYS Office of Children and Family Services for 12 months for his failure to comply with various directives of the Family Court as set forth in its PINS dispositional order. The juvenile delinquency petition filed in that case charged the respondent with committing acts which, if committed by an adult, would constitute criminal contempt in the second degree under Penal Law section 215.50(3).

In reversing the Family Court's order, the Appellate Division in Edwin G. noted that, while "[t]he Judiciary Law broadly empowers courts of record to adjudge in contempt persons who willfully violate lawful court orders or directives (Judiciary Law §750)," section 156 of the Family Court Act expressly precludes the use of the contempt power to enforce a Family Court order where "a specific punishment or other remedy" for the violation of such an order is provided in the Family Court Act "or any other law." Id., at 10. Finding that a violation of a PINS order "triggers only the remedies in [Family Court Act] sections 777 to 779," the Court concluded that Family Court has no authority to adjudge a PINS violator in contempt:

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*Subdivision three of Penal Law section 215.50 provides, in substance, that a person is guilty of the class A misdemeanor of criminal contempt in the second degree when he or she intentionally disobeys or resists "the lawful process or other mandate of a court." PL section 215.50(3).

**For purposes of Article 7 of the Family Court Act, a "person in need of supervision" is "[a] person less than eighteen years of age who does not attend school in accordance with the provisions of [P]art [O]ne of...[Article 65] of the [E]ducation [L]aw or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority, or who violates the provisions of section 221.05 of the [P]enal [L]aw." Family Court Act section 712(a).

> At most, the PINS violator may be returned to the court for a new dispositional hearing. As such..., the Family Court under these circumstances lacks the power of contempt and 'even when faced with a situation where the PINS [appellant] persistently absconds from every nonsecure placement facility in which he or she has been placed, the Family Court may not rely on such circumstances to compel placement in a secure facility' (citation omitted)...As such, we agree with the Second Department that Judiciary Law §750 does not confer such a power that is otherwise restricted in Article 7 of the Family Court Act...We also agree that the court may not therefore 'bootstrap' the present PINS proceeding into a juvenile delinquency proceeding under Article 3 of the Family Court Act as a means of justifying use of contempt as a sanction for what, in sum, is actually PINS-type behavior rather than true delinquency (citation omitted).

Id., at 11-12; see also, Matter of Jasmine A., 284 A.D.2d 452, 453 (2nd Dept. 2001) [reversing and vacating Family Court orders adjudging the appellant a juvenile delinquent and placing her in a limited secure facility on the ground that the Family Court had improperly "'bootstrapped' a PINS proceeding into two juvenile delinquency proceedings through employment of its contempt power to punish typical runaway behavior of a PINS"].

In People v. Nancy C. (188 Misc. 2d 383, 384 [Watertown City Court, 2001]), the court, in a case involving a 16-year-old charged in adult court with criminal contempt for violating a Family Court PINS dispositional order, considered the related question whether the crime of criminal contempt under Penal Law section 215.50(3) "was meant by the Legislature to apply to Family Court dispositional orders issued under [A]rticle...7...of the Family Court Act." The People in Nancy C. had argued that, "after age 16 any person subject to such dispositional orders can be charged under Penal Law §215.50(3) for any violation of its terms." Id. The court rejected the People's argument and dismissed the criminal contempt charge, finding that, "while in theory Penal Law §215.50(3) might be applied to Family Court [A]rticles 3 and 7 dispositional orders[,] it was not the Legislature's intent because to do so would incorporate criminal punishment into the remedies available in [A]rticles 3 and 7 to rehabilitate the...[Juvenile Delinquent] or...[Person in Need of Supervision]." Id., at 388.

Consistent with the reasoning expressed in these cases, the Committee believes that running away from home or school, or engaging in other rebellious, non-criminal conduct in violation of a PINS dispositional order should not be criminalized by prosecution in adult criminal court under Penal Law section 215.50(3). Accordingly, this measure, which would take effect immediately, would amend subdivision one of Penal Law section 30.00 (the defense of "Infancy") to specifically exclude persons "less than eighteen years old" from criminal liability for criminal contempt in the second degree under Penal Law section 215.50(3) where the order allegedly violated was issued in a Family Court Article 7 PINS proceeding.

Proposal

AN ACT to amend the penal law, in relation to the crime of criminal contempt in the second degree and the defense of infancy

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 30.00 of the penal law is amended to read as follows:

1. Except as provided in subdivision two of this section, a person less than sixteen years old is not criminally responsible for conduct, and a person less than eighteen years old is not criminally responsible for the crime of criminal contempt in the second degree as defined in subdivision three of section 215.50 when the lawful process or other mandate of the court was issued in a proceeding pursuant to article seven of the family court act.

§2. This act shall take effect immediately.

68. Waiver of Presentence Reports
(CPL 390.20(4)(a)(i))

The Committee recommends that subparagraph (i) of paragraph (a) of subdivision four of section 390.20 of the Criminal Procedure Law be amended to clarify that a presentence report may be waived, on the consent of both parties and the court, where the defendant is to be sentenced on a felony or misdemeanor conviction to an agreed-upon sentence of one year or less, provided the term of such sentence, less any good behavior time to be applied, is equal to or less than the total "jail time" credit earned as of the date of sentence, and provided further that the sentencing court obtains an updated criminal history report prior to pronouncing sentence.

CPL section 390.20(4)(a)(i) currently provides that a presentence investigation and report "may be waived by the mutual consent of the parties and with the consent of the judge" whenever a sentence of imprisonment (other than a determinate or indeterminate sentence)* "has been agreed upon by the parties and will be satisfied by the time served." CPL section 390.20(4)(a)(i). The reference in the existing statute to "time served" has been interpreted by some to mean that the waiver provision may only apply where the actual pronounced sentence is "time served."

This measure is intended to clarify that, even where the agreed-upon sentence is, for example, "one year" or "six months," the parties and the court may agree to waive a presentence investigation and report provided that, at the time of sentence, the defendant has accumulated enough "jail time" credit to satisfy the entirety of the sentence imposed (less any good behavior time to be credited under Penal Law section 70.30(4)(b)), thereby resulting, in effect, in a sentence of "time served." To ensure that the court has an accurate and up-to-date criminal history for the defendant prior to consenting to a waiver, the measure, as noted, requires the court to obtain an updated criminal history report prior to pronouncing sentence. See, also, CPL section 390.10 [providing, in substance, that a court may not pronounce sentence on a conviction for a "fingerprintable" offense until it has received a criminal history report from the NYS Division of Criminal Justice Services or a "police department report" containing the defendant's prior arrest record].

Proposal

AN ACT to amend the criminal procedure law, in relation to waiver of presentence reports

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

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*The measure would leave unchanged the existing provision of CPL section 390.20(4)(a) that precludes any waiver of a presentence investigation and report where an indeterminate or determinate sentence of imprisonment is to be imposed.

Section 1. Subparagraph (i) of paragraph (a) of subdivision 4 of section 390.20 of the criminal procedure law is amended to read as follows:

(i) A sentence of imprisonment of one year or less has been agreed upon by the parties [and will be satisfied by the time served], provided that the term of such sentence, less any good behavior time to be applied to the sentence pursuant to paragraph (b) of subdivision four of section 70.30 of the penal law, is equal to or less than the total jail time credit to be applied to such sentence, as of the date of sentence, pursuant to subdivision three of such section 70.30, and provided further that the court obtains an updated division of criminal justice services fingerprint report prior to pronouncing sentence, or

§2. This act shall take effect immediately.

69. Raising the Monetary Threshold for Felony-Level Criminal Mischief and Securities Fraud (PL 145.05(2), 145.10; GBL 352-c(6))

The Committee recommends that Penal Law sections 145.05(2) (criminal mischief in the third degree) and 145.10 (criminal mischief in the second degree), and General Business Law section 352-c(6) (securities fraud) be amended to raise the existing monetary thresholds for commission of these felony offenses.

Under Penal Law section 145.05(2), a person is guilty of the class E felony of criminal mischief in the third degree when,

> with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she...damages property of another person *in an amount exceeding two hundred fifty dollars.*

Penal Law section 145.05(2); emphasis added.

Pursuant to Penal Law section 145.00(1), a person is guilty of criminal mischief in the fourth degree, a class A misdemeanor, when "having no right to do so nor any reasonable ground to believe that he has such a right, he...[i]ntentionally damages property of another person..." Penal Law section 145.00(1).

A review of the legislative history of the crime of criminal mischief reveals that the current distinction between misdemeanor and felony-level criminal mischief dates back to the 1881 Penal Law, which provided for a felony-level punishment of up to four-years imprisonment for a person who "unlawfully and willfully destroys or injures any real or personal property of another...[i]f the value of the property destroyed, or the diminution in the value of the property by the injury is more than twenty-five dollars." See, Laws of 1881, chapter 676. The minimum threshold amount for property damage for this felony-level offense was raised to $50 in 1912 (see, Laws of 1912, chap. 163), and to $250 in 1915 (see, Laws of 1915, chap. 342), where it has remained for the past 90 years.

While the current $250 property damage threshold for felony-level criminal mischief has remained unchanged since 1915, the corresponding minimum thresholds for felony-level treatment of certain *other* property and theft-related offenses have, in recent years, been significantly increased. Thus, for example, in 1986, the Legislature amended the class E felony offenses of grand larceny in the third degree (PL section 155.30(1)), criminal possession of stolen property in the second degree (PL section 165.45(1)) and insurance fraud in the second degree (PL section 176.15) to increase from $250 to $1000 the monetary threshold needed to establish

those offenses. See, Laws of 1986, chap. 515, sections 1, 5 and 8.*

In addition, the Legislature, in 1986, amended the class D felony offenses of grand larceny in the third degree (PL section 155.35), criminal possession of stolen property in the third degree (PL section 165.50) and insurance fraud in the third degree (PL section 176.20) to raise from $1500 to $3000 the monetary threshold for commission of those class D felony offenses, but failed to make any corresponding change to the $1500 threshold for commission of the class D felony offense of criminal mischief in the second degree under Penal Law section 145.10. See, Laws of 1986, chap. 515, sections 2, 6 and 8.**

The Committee believes that the current monetary thresholds for criminal mischief in the third and second degrees (Penal Law sections 145.05(2) and 145.10, respectively) are too low and should be raised to conform to the higher thresholds established by the Legislature in1986 for comparable theft and stolen property-related felony offenses such as grand larceny, criminal possession of stolen property and insurance fraud. Accordingly, this measure would amend Penal Law section 145.05(2)(criminal mischief in the third degree) to raise the current $250 monetary damage threshold for commission of that class E felony offense to match the existing ($1000) monetary threshold for the class E felony offenses of grand larceny in the fourth degree (PL section 155.30(1)), criminal possession of stolen property in the fourth degree (PL section 165.45(1)) and insurance fraud in the fourth degree (PL section 176.15).

Further, the measure would amend Penal Law section 145.10 (criminal mischief in the second degree) to raise the current $1500 monetary threshold for commission of that class D felony offense to match the existing $3000 threshold for the class D felony offenses of grand larceny in the third degree (PL section 155.35), criminal possession of stolen property in the third degree (PL section 165.50) and insurance fraud in the third degree (PL section 176.20).

Finally, the measure would correct a related anomaly in the law by amending subdivision six of General Business Law section 352-c to raise to $1000 the current $250 threshold for the

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*As with the crime of criminal mischief in the third degree under Penal Law section 145.05(2), each of these class E felony offenses represents, in effect, an aggravated form of a class A misdemeanor offense, with the sole aggravating factor being the value of the stolen property in question. See, PL sections 155.25 (defining the class A misdemeanor of petit larceny); 165.40 (defining the class A misdemeanor of criminal possession of stolen property in the fifth degree) and 176.10 (defining insurance fraud in the fifth degree).

**Note that the Legislature, by Chapter 515 of the Laws of 1986, also changed the degree (but not the "D" and "E" felony classifications or section numbers) of several of the aforementioned offenses.

class E felony securities fraud offense defined in that section.***

In proposing these substantive, and long overdue, changes to the Penal Law and General Business Law, the Committee finds that the rationale in support of Chapter 515 of 1986, as expressed by the Governor in his Memorandum approving that legislation, is equally applicable here:

> The bill adjusts for inflation to reflect the realities of the monetary world of 1986. Dollar values distinguishing degrees of larceny, possession of stolen property, and insurance fraud have remained unchanged since the adoption of the new Penal Law in 1965. Thus, for example, criminal possession of three hundred dollars worth of stolen property is currently a felony, punishable by up to four years in prison. These monetary thresholds are unrealistically low and unduly strain police resources. While felony arrests for low-level thefts are routinely reduced to misdemeanors by prosecutors and judges, the police must adhere to the law and process a three hundred dollar theft as a felony. This requires substantial allocation of resources and reduces the number of police officers available for patrol. The bill adjusts for inflation by raising the monetary threshold to one thousand dollars for the class E felonies and three thousand dollars for the class D felonies of grand larceny, criminal possession of stolen property, and insurance fraud.

Governor's Memorandum of Approval for L.1986, ch.515, 1986 McKinney's Session Laws of

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***Subdivision six of General Business Law section 352-c, which was added to that section in 1982 and was never amended (see, Section 3 of Chapter 146 of the Laws of 1982), currently provides as follows: "Any person, partnership, corporation, company, trust or association, or any agent or employee thereof who intentionally engages in fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale, or who makes any material false representation or statement with intent to deceive or defraud, while engaged in inducing or promoting the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of any securities or commodities, as defined in this article, and thereby wrongfully obtains property of a value in excess of two hundred fifty dollars, shall be guilty of a class E felony." GBL section 352-c(6). General Business Law section 352-c is contained in Article 23-A of the General Business Law (commonly referred to as the "Martin Act"), which "provides the regulatory framework governing the offer and sale of securities, commodities and other investment vehicles in and from New York." Mihaly and Kaufmann, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 19, General Business Law art. 23-A, at 10.

N.Y., at 3175 [July 24, 1986].

The measure would take effect immediately.

Proposal

AN ACT to amend the penal law and the general business law, in relation to criminal mischief and securities fraud

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section. 1. Subdivision 2 of section 145.05 of the penal law is amended to read as follows:

2. damages property of another person in an amount exceeding [two hundred fifty] one thousand dollars.

Criminal mischief in the third degree is a class E felony.

§2. Section 145.10 of the penal law is amended to read as follows:

§145.10. Criminal mischief in the second degree. A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding [one] three thousand [five hundred] dollars.

Criminal mischief in the second degree is a class D felony.

§3. Subdivision 6 of section 352-c of the general business law is amended to read as follows:

6. Any person, partnership, corporation, company, trust or association, or any agent or employee thereof who intentionally engages in fraud, deception, concealment, suppression, false

pretense or fictitious or pretended purchase or sale, or who makes any material false representation or statement with intent to deceive or defraud, while engaged in inducing or promoting the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of any securities or commodities, as defined in this article, and thereby wrongfully obtains property of a value in excess of [two hundred fifty] one thousand dollars, shall be guilty of a class E felony.

§4. This act shall take effect immediately and shall apply to offenses committed on or after such effective date, and to offenses committed prior to such effective date provided sentence is imposed on or after such date.

70. Issuance of Securing Order Pending Retrial Following Post-Trial Dismissal of Indictment (CPL 310.70(4))

The Committee recommends that section 310.70 of the Criminal Procedure Law be amended to add a new subdivision four expressly authorizing a trial court to issue a securing order where, following dismissal of an indictment after trial, the court authorizes submission of lesser included charges, with respect to which the jury was unable to agree, to a new grand jury.

This measure is intended to fill a gap in the Criminal Procedure Law identified in People v. Storey (182 Misc.2d 365 [Sup. Ct. Kings Co., 1999]). In Storey, the jury acquitted the defendant of the three indicted charges (two counts of murder in the second degree and one count of criminal possession of a weapon in the second degree), but was unable to reach a verdict on the separately submitted lesser included counts of manslaughter in the first and second degrees. Id., at 366. The People moved to retry the defendant on the manslaughter charges and requested a securing order pursuant to CPL section 210.45(9).*

Citing the Court of Appeals' decision in People v. Mayo (48 N.Y.2d 245 [1979]),** the

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*CPL section 210.45(9) provides, in pertinent part, as follows: "When the court dismisses the entire indictment but authorizes resubmission of the charge or charges to a grand jury, such authorization is, for 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." CPL section 210.45(9).

**In Mayo, the defendant was charged with robbery in the first degree. The trial court refused to submit that charge to the jury, submitting instead the lesser included offenses of robbery in the second and third degrees. The jury was unable to reach a verdict on these lesser charges and a mistrial was declared. The defendant then was retried on the original indictment. Although the first degree robbery count was not submitted to the jury at the second trial, the Court of Appeals held that it was improper to retry the defendant on the original indictment. The Court reasoned that since the sole count of the indictment could not be retried because of the prohibition against double jeopardy, nothing remained to support further criminal proceedings under that accusatory instrument. 48 N.Y.2d at 253. Impliedly, this holding also foreclosed amendment of the original indictment to charge the lesser included offenses on which retrial was not prohibited. The practical effect of the Court's holding in Mayo is to require prosecutors seeking to retry a defendant on such lesser included offenses to represent the charges to a new Grand Jury. This Committee has, for several years now, proposed legislation to amend the CPL to, in effect, overrule Mayo. Under that proposal, when an offense specified in a count of an indictment was disposed of under circumstances that would constitute a bar to a retrial of that offense but not a retrial of a lesser included offense, the indictment would be "deemed" to contain a count

court held that "any retrial of this indictment would be barred under settled double jeopardy principles," and dismissed the indictment "with leave to seek a new indictment" on the lesser included manslaughter charges. Storey, supra., at 366. With respect to these lesser charges, the court found that "[a] retrial is clearly authorized by CPL §310.70(2)." Id., at 370.*** With respect to the People's application for a securing order pursuant to CPL section 210.45(9), however, the court found that that provision was intended to apply only where a *pretrial* motion to dismiss has been granted with leave to represent. Id., at 368.**** Concluding, that "[a trial] court cannot be, and is not without authority" to issue a securing order under the circumstances presented, the court relied instead on the "new process and forms of proceedings" power under Judiciary Law section 2-b(3) to issue a securing order pending the People's presentation of the manslaughter charges to a grand jury. Id., at 370-371. See also, Judiciary Law section 2-b(3) [providing, in relevant part, that a court of record has the power "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it"].

This measure would close the gap in the law identified in Storey by amending CPL section 310.70 to expressly authorize the issuance by a trial court of a securing order when, in accordance with Mayo, the court dismisses an indictment following a jury verdict with leave to the prosecutor to submit to a new grand jury separately submitted charges with respect to which the trial jury was unable to agree. The measure accomplishes this by adding a new subdivision four to section 310.70, modeled directly on the provisions of subdivision nine of CPL section 210.45. The latter subdivision "furnishes the procedure for dealing with the liberty of the defendant in a case where the indictment is dismissed [pretrial] and the court has authorized resubmission." Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL

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charging the lesser included offense.

***CPL section 310.70(2) provides, in substance, that, "[f]ollowing the rendition of a partial verdict pursuant to subdivision one [and subject to certain enumerated exceptions], a defendant may be retried for any submitted offense upon which the jury was unable to agree." CPL section 310.70(2). Subdivision three of that section defines a "submitted offense" for purposes of that section as "any offense submitted by the court to the jury, whether it be one which was expressly charged in a count of the indictment or a lesser included offense thereof submitted pursuant to section 300.50." CPL section 310.70(3).

****The court in Storey noted that the First and Second Departments have reached apparently conflicting results on the question whether CPL section 210.45(9) may properly serve as the basis for the issuance of a securing order following the post-trial dismissal of an indictment with leave to represent. Compare, People v. Suarez, 148 A.D.2d 367, 368 (1st Dept., 1989)[reversing manslaughter conviction with leave to represent (in accordance with Mayo), and remanding to trial court "for the purpose of issuing a securing order pursuant to CPL 210.45(9)"]; with People v. Jones, 48 A.D.2d 547, 548 (2d Dept., 1989)[reversing felony assault conviction with leave to represent "any appropriate charges" to a new grand jury, and directing trial court to "issue a securing order pursuant to CPL 470.45...(cf., CPL 210.45[9])"].

210.45, at 736.

As with the corresponding provision of CPL section 210.45(9), "[i]n order to give validity to the restraint during th[e] period" in which the prosecutor is presenting the charges to the grand jury, proposed subdivision four of section 310.70 "*deems* the authorization for resubmission to constitute an order holding defendant for action of the grand jury." Id., emphasis in original. And, as with section 210.45(9), the measure requires that the "deemed" order holding the defendant for the action of the grand jury be accompanied by a securing order "either releasing the defendant on his or her own recognizance or fixing bail or committing the defendant to the custody of the sheriff pending submission of the case to the grand jury and the grand jury's disposition thereof." Finally, the measure incorporates, with one exception,***** the provisions of paragraphs (a) through (d) of CPL section 210.45(9) establishing a specific time limit on the duration of any securing order issued pending submission of the case to the grand jury.

Proposal

AN ACT to amend the criminal procedure law, in relation to the issuance of a securing order following dismissal of an indictment after trial

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 310.70 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. When, following the rendition of a partial verdict pursuant to subdivision one, the court dismisses the entire indictment but authorizes the submission to a grand jury of one or more submitted offenses with respect to which the jury was unable to agree, such authorization is, for purposes of this subdivision, deemed to constitute an order holding the defendant for the action

*****Although paragraph (d) of proposed subdivision four of section 310.70 repeats, verbatim, the "good cause" extension language of CPL section 210.45(9), it establishes a shorter maximum period for a post-trial securing order (30 days as opposed to the 45-day period set forth in CPL section 210.45(9)(d)). The Committee believes that this shorter period is warranted in view of the fact that, in cases where a post-trial securing order is issued under section 310.70(4), the defendant will have been *acquitted* of the top count in the indictment. See, generally, Mayo, supra.

of a grand jury with respect to such offense or offenses. Such order must be accompanied by a securing order either releasing the defendant on his or her own recognizance or fixing bail or committing the defendant to the custody of the sheriff pending submission 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 submit the case to a grand jury;

(b) Arraignment of the defendant upon an indictment or prosecutor's information filed as a result of submission of the case to a grand jury. Upon such arraignment, the arraigning court must issue a new securing order;

(c) The filing with the court of a grand jury dismissal of the case following submission thereof;

(d) The expiration of a period of thirty 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 submit 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 or she is in the custody of the sheriff, or if the defendant is at liberty on bail it must exonerate the bail. Although expiration of the period of time specified in paragraph (d) without any submission or grand jury disposition of the case terminates the effectiveness of the securing order, it does not terminate the effectiveness of the order authorizing submission.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

71. Authorizing Payment of Restitution by Credit Card
(Judiciary Law 212(2)(j); CPL 420.05, 420.10(1))

The Committee recommends that paragraph (j) of subdivision two of section 212 of the Judiciary Law and sections 420.05 and 420.10 of the Criminal Procedure Law be amended to authorize payment by credit card of restitution or reparation imposed as part of a sentence in a criminal case.

Chapter 457 of the Laws of 2005 ("the legislation"), which was signed into law and took effect on August 9, 2005, amended various provisions of the Judiciary Law, Uniform District Court Act, Civil Practice Law and Rules and Criminal Procedure Law to greatly expand the authority of courts in civil and criminal cases to accept certain court-related payments, including bail,* fees "and other monies payable to a court...or the [O]ffice of [C]ourt [A]dministration" by means of "a credit card or similar device."

In relevant part, the legislation amended CPL section 420.05 to allow the payment by credit card of any "fee" imposed in a criminal case.** See, Chapter 457 of the Laws of 2005, section 3. Prior to enactment of the legislation, the only criminal fee specifically authorized to be paid by credit card under the CPL was the "crime victim assistance fee."*** Further, the legislation amended section 212(2)(j) of the Judiciary Law to expand the credit card payment "system" required to be established by the Chief Administrator of the Courts to include payment by credit card of not only bail, fines, mandatory surcharges and court fees, but any "other moneys payable to a court, county clerk in his or her capacity as clerk of court, or the office of court

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*Section 4 of the legislation amended CPL section 520.10(1)(i), which previously provided that a credit card is an "authorized form of bail" only in a VTL prosecution, to provide that a credit card is an "authorized form of bail"in *any* prosecution. See, Chapter 457 of the Laws of 2005, section 4.

**This provision of the legislation was, in effect, an expanded version of the Committee's earlier proposal to amend CPL section 420.05 and Judiciary Law section 212(2)(j) to permit the payment of a DNA Databank or Sex Offender Registration Fee by credit card. See, 2005 Report of the Advisory Committee on Criminal Law and Procedure, at p.217; see also, PL section 60.35(1)(a).

***As amended, CPL section 420.05 now provides, in relevant part, as follows: "When the court imposes a fine, mandatory surcharge or fee upon an individual who stands convicted of any offense, such individual may pay such fine, mandatory surcharge or fee by credit card or similar device. In such event, notwithstanding any other provision of law, he or she also may be required to pay a reasonable administrative fee." CPL section 420.05.

administration." See, Chapter 457 of the Laws of 2005, section 1.[****]

Notably, there is nothing in the legislation, or in other relevant statutory law, that would authorize the payment by credit card of *restitution* imposed as part of a sentence in a criminal case.[*****] Since restitution cannot fairly be characterized as a fine, mandatory surcharge or fee, it would appear to fall outside the plain language of CPL section 420.05. And, because restitution, under current law, is required to be paid to a designated "restitution agency," not the court, it cannot fairly be characterized as "mon[ey] payable to a court...or the [O]ffice of [C]ourt [A]dministration" under Judiciary Law section 212(2)(j). See, CPL sections 420.10(1)[requiring the sentencing court, when imposing restitution, to designate "the official or organization other than the district attorney...to whom payment is to be remitted"], and 420.10(8)[directing the "chief elected official in each county" (or, in New York City, the mayor) to "designate an official or organization other than the district attorney to be responsible for the collection and administration of restitution and reparation payments" under the Penal Law and CPL].

The Committee believes that restitution and reparation should be added to the list of court-imposed financial obligations that may be paid by credit card in a criminal case. Accordingly, this measure would amend Judiciary Law section 212(2)(j), and CPL sections 420.05 and 420.10(1), to authorize a defendant to pay directly to the sentencing court "by credit card or similar device" all or a part of the restitution or reparation amount and "designated surcharge" ordered by the court.

In order to simplify as much as possible the procedure for paying restitution by credit card, the measure would leave unchanged the current requirements that the sentencing court, in every case where restitution or reparation is ordered, "designate the official or organization other than the district attorney" to whom payment is to be remitted, and impose a "designated surcharge" of up to ten percent of the entire amount of restitution or reparation ordered. The measure would, however, create what amounts to a "credit card exception" to the existing requirement in CPL section 420.10(1) that restitution or reparation be remitted only to such

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[****]As amended, Judiciary Law section 212(2)(j) now provides, in relevant part, as follows: "[The chief administrator of the courts shall also] notwithstanding any provision of law, rule or regulation to the contrary, establish a system for the posting of bail and the payment of fines, mandatory surcharges, court fees, and other monies payable to a court, county clerk in his or her capacity as clerk of court, or the office of court administration...by means of a credit card or similar device. Notwithstanding any provision of law to the contrary, the chief administrator may require a party making payment in such manner also to pay a reasonable administrative fee." Judiciary Law section 212(2)(j).

[*****]It is interesting to note that, while the law currently does not provide for payment of restitution by credit card, it does require that collection of restitution be given priority over collection of a fine when both are imposed as part of the same sentence. See, CPL section 420.10(1)(b).

"designated official or organization." Specifically, the measure would amend that section to expressly permit payment of restitution, reparation and the designated surcharge directly to the court by credit card, but would require the court, upon receiving such payment, to "promptly electronically transmit[ ] or otherwise transfer[ ]" the payment to the designated official or organization "for processing and disbursement in accordance with the court's restitution or reparation order." The intent here is to minimize the burden on the court and court staff with regard to the collection process itself, while at the same time make it easier for defendants to satisfy their restitution or reparation obligation by allowing them – as is now the case with criminal fines, fees and surcharges paid by credit card – to make the credit card payment directly to the court.

Proposal

AN ACT to amend the judiciary law and the criminal procedure law, in relation to payment of restitution and reparation by credit card or similar device

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (j) of subdivision 2 of section 212 of the judiciary law, as amended by section 1 of chapter 457 of the laws of 2005, is amended to read as follows:

(j) Notwithstanding any provision of law, rule or regulation to the contrary, establish a system for the posting of bail and the payment of fines, restitution, reparation, designated surcharges, mandatory surcharges, court fees, and other monies payable to a court, county clerk in his or her capacity as clerk of court, or the office of court administration, or to a sheriff upon enforcing a court order or delivering a court mandate pursuant to article eighty of the civil practice law and rules, by means of a credit card or similar device. Notwithstanding any provision of law to the contrary, the chief administrator may require a party making a payment in such manner also to pay a reasonable administrative fee. In establishing such system, the chief administrator shall seek the assistance of the state comptroller who shall assist in developing

such system so as to ensure that such funds shall be returned to any jurisdiction which, by law, may be entitled to them. The chief administrator shall periodically accord the head of each police department or police force and of any state department, agency, board, commission or public authority having police officers who fix pre-arraignment bail pursuant to section 150.30 of the criminal procedure law an opportunity to have the system established pursuant to this paragraph apply to the posting of pre-arraignment bail with police officers under his or her jurisdiction.

§2. Section 420.05 of the criminal procedure law, as amended by chapter 457 of the laws of 2005, is amended to read as follows:

§420.05. Payment of fines, restitution, reparation, designated surcharges, mandatory surcharges and fees by credit card.

When the court imposes a fine, restitution, reparation, designated surcharge, mandatory surcharge or fee upon an individual who stands convicted of any offense, such individual may pay such fine, restitution, reparation, designated surcharge, mandatory surcharge or fee by credit card or similar device. In such event, notwithstanding any other provision of law, he or she also may be required to pay a reasonable administrative fee. The amount of such administrative fee and the time and manner of its payment shall be in accordance with the system established by the chief administrator of the courts pursuant to paragraph (j) of subdivision two of section two hundred twelve of the judiciary law.

§3. The opening paragraph of subdivision 1 of section 420.10 of the criminal procedure law is amended to read as follows:

1. Alternative methods of payment. When the court imposes a fine upon an individual, it shall designate the official other than the district attorney to whom payment is to be remitted.

When the court imposes restitution or reparation and requires that the defendant pay a designated surcharge thereon pursuant to the provisions of subdivision eight of section 60.27 of the penal law, it shall designate the official or organization other than the district attorney, selected pursuant to subdivision eight of this section, to whom payment is to be remitted; provided, however, that, in accordance with section 420.05 of this chapter, the court shall also permit the defendant to remit all or a portion of such restitution or reparation, and such designated surcharge, directly to the court by means of a credit card or similar device. Any such payment of restitution, reparation or designated surcharge made by credit card or similar device shall promptly be electronically transmitted or otherwise transferred by the court to such designated official or organization for processing and disbursement in accordance with the court's restitution or reparation order.

§4. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law.

72. Written Grand Jury Instructions
(CPL 190.25(6))

The Committee recommends that subdivision six of section 190.25 of the Criminal Procedure Law be amended to clarify that the court or district attorney may, when providing to a grand jury any oral instructions "concerning the law with respect to its duties or any matter before it" under that subdivision, also provide written instructions thereon.

Notably, there is nothing in existing CPL section 190.65, or elsewhere in the CPL, that expressly precludes a prosecutor or the impaneling court from providing grand jurors with the applicable substantive law in writing. Further, while the Court of Appeals, relying on CPL section 310.30, has expressly disapproved the practice of providing a deliberating *petit* jury, over the defendant's objection, with a written copy of all or a portion of the court's charge (see, e.g., People v. Owens, 69 N.Y.2d 585, and People v. Johnson, 81 N.Y.2d 980), there appears to be no reported appellate or trial level decision that addresses the propriety of providing a *grand* jury with written substantive instructions. Nonetheless, it appears that, in at least some jurisdictions in the State, there is a reluctance on the part of impaneling courts and prosecutors to provide any written substantive materials, such as relevant Penal Law offense definitions, to a grand jury when giving instructions pursuant to section 190.25(6).

This measure would remove any doubt as to the propriety of providing grand jurors with substantive written instructions under subdivision six of section 190.25 by amending that subdivision to expressly permit the practice.* To ensure a reviewable record of the written grand jury instructions, the measure would further provide that "the complete text of any such written instructions must, following the distribution of such written instructions to the grand jury, be read into the record by the district attorney, who shall state on the record that such written instructions have been so distributed." In addition, the measure would clarify that nothing contained in the proposed amendment to subdivision six of section 190.25 "shall be deemed to affect the court's obligation, pursuant to subdivision five of [CPL] section 190.20...to deliver or cause to be delivered to each grand juror a printed copy of all the provisions of...[CPL] article [190], or the giving of oral or written instructions pursuant to such subdivision five."**

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*In accordance with the Committee's view that at least some of the instructions provided under section 190.25(6) should be given orally, the measure expressly provides that, where instructions are given under that subdivision, the court or prosecutor *must* orally instruct the grand jury and *may* "also distribute written instructions."

**Subdivision five of CPL section 190.20 provides as follows: "After a grand jury has been sworn, the court must deliver or cause to be delivered to each grand juror a printed copy of all the provisions of this article, and the court may, in addition, give the grand jurors any oral and written instructions relating to the proper performance of their duties as it deems necessary or appropriate." CPL section 190.20(5).

The Committee recognizes that the idea of amending CPL Article 190 to expressly authorize the practice of providing written substantive instructions to a grand jury is not a new one. Indeed, in its 1999 Report to the Chief Judge and the Chief Administrative Judge, the Grand Jury Project made the following recommendation:

> CPL §190.25(6) should be amended to make explicit that, upon request of a grand juror for further instruction with respect to a statute, the court or the prosecutor may give to the grand jury copies of the text of any statute which, in its discretion, the court or prosecutor deems proper. The amendment should include a requirement that a copy of any such text be made an exhibit in the proceeding in which it is furnished to the grand jury. However, the determination of a court or prosecutor of whether to submit the text of a particular statute should not be a ground for dismissing an accusatory instrument filed after an otherwise proper proceeding.

1999 Report of the Grand Jury Project, Volume I, at p.84.

As noted in the Report, the Grand Jury Project's proposed amendment to CPL section 190.25(6) would closely track the procedure set forth in CPL section 310.30, which applies to the deliberations of a trial jury. That section provides, in relevant part, as follows: "With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper." CPL section 310.30. Similar to section 310.30, the proposal would "permit the court or prosecutor to furnish the text of a statute when a grand juror requests further instruction concerning a statute and the court or the prosecutor, in the sound exercise of discretion, believes that the request is necessary or appropriate." 1999 Report of the Grand Jury Project, Volume I, at p.85.

While the Committee fully agrees with the conclusion reached by the Grand Jury Project that CPL section 190.25(6) ought to be amended to clarify the authority of the court and prosecutor to provide written substantive instructions under that section, it is the Committee's view that the measure proposed here, which is arguably broader and less cumbersome than the proposal recommended by the Grand Jury Project, would better assist grand jurors in meeting their obligations under CPL Article 190.

Proposal

AN ACT to amend the criminal procedure law, in relation to written grand jury instructions

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1. Subdivision 6 of section 190.25 of the criminal procedure law is amended to read as follows:

6. The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must orally instruct the grand jury, and may also distribute written instructions to the grand jury, concerning the law with respect to its duties or any matter before it[, and]. Any such oral instructions and legal advice must be recorded in the minutes, and the complete text of any such written instructions must, following the distribution of such written instructions to the grand jury, be read into the record by the district attorney, who shall state on the record that such written instructions have been so distributed. Nothing contained in this subdivision shall be deemed to affect the court's obligation, pursuant to subdivision five of section 190.20 of this chapter, to deliver or cause to be delivered to each grand juror a printed copy of all the provisions of this article, or the giving of oral or written instructions pursuant to such subdivision five. Nor shall the provisions of this subdivision be deemed to require the reading into the record of the text of any written instructions or materials provided to grand jurors pursuant to any other provision of this chapter.

§2. This act shall take effect 90 days after it shall have become a law, and shall apply to all grand jury proceedings occurring on or after such date.

III. New Measures

1. Waiver of Indictment on Class A Drug Felonies (CPL 195.10(1)(b))

The Committee recommends that paragraph (b) of subdivision one of section 195.10 of the Criminal Procedure Law be amended to permit a defendant charged with a class A drug felony to waive indictment and consent to be prosecuted by a superior court information.

Pursuant to subdivision one of CPL section 195.10, a defendant may waive indictment and consent to be prosecuted by a superior court information when: (1) a local criminal court has held the defendant for the action of a grand jury; and (2) *the defendant is not charged with a class A felony*; and (3) the district attorney consents to the waiver. CPL 195.10(1); emphasis added. The existing statutory prohibition on waiving indictment when the defendant is charged with a class A felony is based on the following provision of Article I, section 6 of the New York State Constitution:

> [A] person held for the action of a grand jury upon a charge for...[a felony], *other than one punishable by death or life imprisonment,* with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel.

N.Y. Const. Art. I, sec. 6; emphasis added.

Prior to the enactment of Chapter 738 of the Laws of 2004 ("Chapter 738"), all class A-I and class A-II drug felonies were punishable by an indeterminate sentence with a maximum term of life imprisonment. As such, under both Article I, section 6 of the New York State Constitution and the corresponding provision of CPL section 195.10, a defendant charged with a class A drug felony was precluded from waiving indictment and consenting to be prosecuted by a superior court information. See, CPL section 195.10(1)(b). With the enactment of Chapter 738, however, the Legislature eliminated indeterminate sentencing – including the life maximum – for all class A drug felonies and instituted a system of determinate sentencing, with maximums (depending on the offense and the defendant's prior criminal history) ranging from ten to thirty years. See, section 36 of Chapter 738 of the Laws of 2004, effective 1/13/05. Having eliminated the life maximum for class A drug felonies, the Legislature, without having to make any corresponding change to the above-quoted language of Article I, section 6 of the Constitution, could now provide by statute for the waiver of indictment and prosecution by superior court information in class A felony drug prosecutions.

The Committee believes that the interests of justice would be served by amending CPL section 195.10 to accomplish that goal. Accordingly, this measure would amend paragraph (b) of subdivision one of that section to clarify that only defendants charged with a class A felony "punishable by death or life imprisonment" are ineligible under that paragraph to waive indictment and consent to be prosecuted by superior court information.

Proposal

AN ACT to amend the criminal procedure law, in relation to prosecution of crimes by superior court information

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision 1 of section 195.10 of the criminal procedure law is amended to read as follows:

(b) the defendant is not charged with a class A felony punishable by death or life imprisonment; and

§2. This act shall take effect immediately.

2. Authority to Issue a Temporary Order of Protection When the Defendant is Remanded (CPL 530.12(1) and 530.13(1))

The Committee recommends that subdivision one of section 530.12 of the Criminal Procedure Law and subdivision one of section 530.13 of the Criminal Procedure Law be amended to expressly authorize a criminal court to issue a temporary order of protection (TOP) where the defendant in the case has been remanded.

Subdivision one of CPL section 530.12 currently authorizes a court, where a criminal action is pending charging any crime or violation "between spouses, former spouses, parent and child, or between members of the same family or household," to issue a TOP "*as a condition of any order of recognizance or bail* or an adjournment in contemplation of dismissal." CPL section 530.12(1); emphasis added. Similarly, subdivision one of CPL section 530.13 currently authorizes a court in a pending criminal action, for "good cause shown" and where the court has not issued a TOP under CPL section 530.12, to issue a TOP "*as a condition of pre-trial release, or as a condition of release on bail* or an adjournment in contemplation of dismissal." CPL section 530.13(1); emphasis added.

Notably, neither CPL section 530.12 nor 530.13 expressly permit the issuance of a TOP where the defendant, rather than being ordered held on bail or released on his or her own recognizance, is "committed to the custody of the sheriff" (i.e., remanded). This is true, moreover, notwithstanding the fact that a defendant, even while remanded awaiting trial, may have opportunities, by mail, telephone or otherwise, to harass, intimidate, threaten "or otherwise interfere...with" the victim or victims of the alleged offense. See, generally, CPL sections 530.12(1)(c) and 530.13(1)(b).

This measure would close this apparent gap in the statutory scheme for issuing temporary orders of protection by amending CPL sections 530.12(1) and 530.13(1) to add a provision authorizing the issuance of a TOP "in conjunction with any securing order committing the defendant to the custody of the sheriff." The measure would take effect immediately.

Proposal

AN ACT to amend the criminal procedure law, in relation to temporary orders of protection

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraph of subdivision 1 of section 530.12 of the criminal

procedure law is amended to read as follows:

When a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household, as members of the same family or household are defined in subdivision one of section 530.11 of this article, the court, in addition to any other powers conferred upon it by this chapter may issue a temporary order of protection in conjunction with any securing order committing the defendant to the custody of the sheriff or as a condition of any order of recognizance or bail or an adjournment in contemplation of dismissal. In addition to any other conditions, such an order may require the defendant:

§2. The opening paragraph of subdivision 1 of section 530.13 of the criminal procedure law is amended to read as follows:

When any criminal action is pending, and the court has not issued a temporary order of protection pursuant to section 530.12 of this article, the court, in addition to the other powers conferred upon it by this chapter, may for good cause shown issue a temporary order of protection in conjunction with any securing order committing the defendant to the custody of the sheriff or as a condition of pre-trial release, or as a condition of release on bail or an adjournment in contemplation of dismissal. In addition to any other conditions, such an order may require that the defendant:

§3. This act shall take effect immediately.

3. Filing of Sealed Accusatory Instrument Against an "Apparently Eligible Youth" (CPL 720.15(1))

The Committee recommends that subdivision one of section 710.15 of the Criminal Procedure Law be amended to replace the existing provision, which requires an accusatory instrument against an "apparently eligible youth" to be filed "with the defendant's consent" as a sealed instrument, with a provision that would require the automatic sealing of such an instrument upon filing "unless the defendant requests otherwise."

CPL section 720.15(1) currently provides that, "[w]hen an accusatory instrument against an apparently eligible youth* is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public." CPL section 720.15(1).** The awkward language of this sealing provision – apparently requiring the defendant's advance consent to the filing of the accusatory instrument as a sealed instrument – has been interpreted by some as requiring a sealing application by the defendant, followed by a court order, before the clerk may seal the instrument. In "high profile"media cases in particular, the question has arisen whether, subsequent to the filing of an accusatory instrument against an "apparently eligible" youth but prior to the court's having obtained the express consent of the defendant or his or her counsel to the sealing of the instrument, the court clerk is authorized (or obligated) to release a copy of that instrument to a member of the public or the press who requests it. See, generally, Judiciary Law section 255.

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*CPL section 720.10(1) defines a "youth," for purposes of the youthful offender (YO) article (CPL Article 720), as a "person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old or a person charged with being a juvenile offender as defined in...[CPL section 1.20(42)]." Pursuant to CPL section 720.10(2), every "youth" is eligible to be found a YO unless: (1) the underlying conviction to be replaced by the YO finding is for a felony enumerated in CPL section 720.10(2)(a); (2) the youth has previously been convicted and sentenced for a felony; or (3) the youth has previously been adjudicated a YO following conviction for a felony or has been adjudicated a juvenile delinquent for a designated felony act as defined in the Family Court Act. CPL section 720.10(2).

**Subdivision two of CPL section 720.15 provides that "[w]hen a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and with the defendant's consent, be conducted in private." Subdivision three of that section provides that the provisions of subdivisions one and two, "requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action to be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law. The provisions of subdivision one requiring the accusatory instrument filed against a youth to be sealed shall not apply where such youth has previously been adjudicated a...[YO] or convicted of a crime." CPL section 720.15(2) and (3).

This measure would provide much needed clarity in this area by amending CPL section 720.15(1) to require that, in all cases other then those excepted by existing CPL section 720.15(2) and (3), an accusatory instrument filed against an "apparently eligible youth" be *automatically* filed as a sealed instrument with respect to the public, subject to a subsequent unsealing application by the youth or his or her counsel. The measure would take effect immediately.

Proposal

AN ACT to amend the criminal procedure law, in relation to the sealing of an accusatory instrument filed against an apparently eligible youth

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 720.15 of the criminal procedure law is amended to read as follows:

1. When an accusatory instrument against an apparently eligible youth is filed with a court, [the court, with the defendant's consent,] such instrument must [order that it], unless the defendant requests otherwise, be filed as a sealed instrument, though only with respect to the public.

§2. This act shall take effect immediately.

4. Determinate "Parole Supervision" Sentences
(CPL 410.91(1) and (3))

The Committee recommends that subdivisions one and three of section 410.91 of the Criminal Procedure Law be amended to clarify that a determinate sentence of imprisonment imposed pursuant to Penal Law section 70.70(3)(d) upon an "eligible defendant," as that term is defined in subdivision two of section 410.91, may, where the court so directs, be executed as a sentence of parole supervision.

As part of the 2004 "Drug Law Reform Act"("DLRA"), the Legislature added three new sections to the Penal Law (sections 60.04, 70.70 and 70.71) to replace the existing indeterminate sentencing scheme for felony drug offenses with a new, determinate, sentencing scheme. See, sections 20 and 36 of Chapter 738 of the Laws of 2004, effective 1/13/05. In establishing the available determinate sentences of imprisonment for non-class A "second felony drug offenders" under the newly added Penal Law section 70.70(3), the Legislature made clear that where the felony drug offense for which sentence is to be imposed is also a "specified offense" under CPL section 410.91(5), and the defendant is otherwise eligible therefor, the court may direct that the determinate sentence "be executed as a parole supervision sentence" pursuant to the procedures prescribed in CPL section 410.91. See, Penal Law section 70.70(3)(d) and CPL section 410.91(5) [including within the definition of "specified offense" all class D and class E controlled substance and marijuana felony offenses defined in Penal Law Articles 220 and 221].

Due to an apparent oversight, however, the Legislature failed to include in the DLRA an amendment to CPL section 410.91, which currently defines a "sentence of parole supervision" only as an *indeterminate* sentence. Thus, for example, subdivision one of that section currently provides, in relevant part, that "[a] sentence of parole supervision is an *indeterminate sentence of imprisonment* which may be imposed upon an eligible defendant, as defined in subdivision two of this section. Such sentence shall have a minimum term and a maximum term within the ranges specified by subdivisions three and four of section 70.06 of the [P]enal [L]aw." CPL section 410.91(1); emphasis added. Similarly, subdivision three of section 410.91 currently provides, in relevant part, that "[w]hen an *indeterminate sentence of imprisonment* is imposed upon an eligible defendant for a specified offense...the court may direct that such sentence be executed as a sentence of parole supervision" provided the court makes certain enumerated findings regarding, *inter alia*, the defendant's drug dependence. See, CPL section 410.91(3); emphasis added.

This measure would correct this legislative oversight by amending subdivisions one and three of CPL section 410.91 to clarify that, in accordance with the express language of Penal Law section 70.70(3)(d), a sentence of parole supervision can be *either* an indeterminate sentence of imprisonment *or* a determinate sentence of imprisonment imposed upon an "eligible defendant." The measure further clarifies that, if the sentence is a determinate parole supervision sentence, the term of such sentence must be in accordance with the applicable provisions of Penal Law section 70.70(3)(b)(iii) and (iv)[establishing the term of a determinate sentence for a

second felony drug offender convicted of a class D or class E felony, respectively, where the offender's prior felony conviction was not a violent felony].

Proposal

AN ACT to amend the criminal procedure law, in relation to a sentence of parole supervision

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 410.91 of the criminal procedure law is amended to read as follows:

1. A sentence of parole supervision is an indeterminate sentence of imprisonment, or a determinate sentence of imprisonment imposed pursuant to paragraphs (b) and (d) of subdivision three of section 70.70 of the penal law, which may be imposed upon an eligible defendant, as defined in subdivision two of this section. [Such] If an indeterminate sentence, such sentence shall have a minimum term and a maximum term within the ranges specified by subdivisions three and four of section 70.06 of the penal law. If a determinate sentence, such sentence shall have a term within the ranges specified by subparagraphs (iii) and (iv) of paragraph (b) of subdivision three of section 70.70 of the penal law. Provided, however, if the court directs that the sentence be executed as a sentence of parole supervision, it shall remand the defendant for immediate delivery to a reception center operated by the state department of correctional services, in accordance with section 430.20 of this chapter and six hundred one of the correction law, for a period not to exceed ten days. An individual who receives such a sentence shall be placed under the immediate supervision of the state division of parole and must comply with the conditions of parole, which shall include an initial placement in a drug treatment campus for a

period of ninety days at which time the defendant shall be released therefrom.

§2. Subdivision 3 of section 410.91 of the criminal procedure law is amended to read as follows:

3. When an indeterminate or determinate sentence of imprisonment is imposed upon an eligible defendant for a specified offense, as defined in subdivision five of this section, the court may direct that such sentence be executed as a sentence of parole supervision if the court finds (i) that the defendant has a history of controlled substance dependence that is a significant contributing factor to such defendant's criminal conduct; (ii) that such defendant's controlled substance dependence could be appropriately addressed by a sentence of parole supervision; and (iii) that imposition of such a sentence would not have an adverse effect on public safety or public confidence in the integrity of the criminal justice system.

§3. This act shall take effect immediately.

5. Streamlining the Procedure for Issuing a Certificate of Relief From Disabilities on a Federal Conviction (Correction Law 703)

The Committee recommends that subdivision five of Correction Law section 703 be amended to streamline the existing procedure for obtaining a certificate of relief from disabilities from the State Board of Parole with respect to a judgment of conviction entered in a federal court in New York State.

Subdivisions one and two of Correction Law section 701, which define the scope of "relief" offered by a certificate of relief from disabilities, provide in relevant part as follows:

> 1. A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender* of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. Such certificate may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or be eligible for public office.
>
> 2. Notwithstanding any other provision of law, except...[Public Health Law section 2806(5) or VTL section 1193(2)(b)], a conviction of a crime or of an offense specified in a certificate of relief from disabilities shall not cause automatic forfeiture of any license, permit, employment or franchise, including the right to register for or vote at an election, or automatic forfeiture of any other right or privilege, held by the eligible offender and covered by the certificate. Nor shall such conviction be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise any right or a disability to apply for or to receive any license, permit or other authority or privilege, covered by the certificate...

*For purposes of Correction Law Article 23, "eligible offender" means "a person who has been convicted of a crime or of an offense, but who has not been convicted more than once of a felony." Correction Law section 700(1)(a).

Correction Law section 701(1) and (2).**

Pursuant to Correction Law section 702(1), a certificate of relief from disabilities may be issued to an eligible offender by a court "of this state" that imposed sentence on the conviction for which the certificate is sought, provided the sentence imposed was either a revocable sentence or a sentence "other than one executed by commitment to an institution under the jurisdiction of the [S]tate [D]epartment of [C]orrectional [S]ervices"("DOCS"). When issued by the sentencing court under section 702, the certificate may be issued either at the time of sentence, "in which case it may grant relief from forfeitures as well as from disabilities," or at any time thereafter, "in which case it shall apply only to disabilities." Correction Law section 702(1).

Where a certificate of relief from disabilities is sought by an eligible offender who has been committed to an institution under the jurisdiction of DOCS, or who resides within New York State and whose conviction "was rendered by a court in any other jurisdiction," the application for the certificate must be made to the New York State Board of Parole. See, Correction Law section 703(1)(a) and (b). Pursuant to subdivisions five and six, respectively, of Correction Law section 703, the decision to grant or deny a certificate of relief by the Board of Parole "shall be by unanimous vote of the members authorized to grant or revoke parole," and the Board, in determining whether to issue the requested certificate "may conduct an investigation of the applicant." Under subdivision three of that section, the Board of Parole shall not issue any certificate of relief from disabilities unless it is satisfied that: (1) the person to whom it is granted is an "eligible offender;" (2) the relief to be granted by the certificate is consistent with the rehabilitation of the offender; and (3) the relief to be granted by the certificate is "consistent with the public interest." See, Correction Law section 703(3).***

In accordance with Correction Law section 703(1)(b), an "eligible offender" seeking a certificate of relief from disabilities on a judgment of conviction entered by a federal court must apply to the State Board of Parole.**** Reportedly, the process for a federally-convicted "eligible

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**Pursuant to Correction Law section 701(3), "[a] certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege."

***These three criteria are identical to those required to be satisfied prior to the issuance of a certificate of relief by a court pursuant to Correction Law section 702. See, Correction Law section 702(2).

****Notably, according to a 1996 state-by-state survey of "civil disabilities of convicted felons" prepared by the Office of the Pardon Attorney of the U.S. Department of Justice, the only available *federal* "restoration mechanism" for removing civil disabilities resulting from a federal

offender" to obtain a certificate of relief under section 703 is an arduous and time-consuming one, and may take as long as 12 to 15 months to complete. It has been estimated that approximately 100 federally-convicted offenders seek certificates of relief each year from the State Board of Parole, and that, in 2004 and 2005 alone, a total of some 108 such applications were granted by the Board. It has been suggested that, since the federal probation office in the district where the federal conviction is entered is far more familiar with the facts and circumstances of the underlying criminal case (and the defendant) than the State Board of Parole, it would make sense to try to shift at least some of the burden of investigating and determining these section 703(1)(b) federal offender applications to the federal probation office.

This measure would amend Correction Law section 703 to accomplish this objective. Specifically, the measure would amend subdivision five of that section to provide that, where a certificate of relief from disabilities is sought pursuant to section 703 on a judgment of conviction rendered by a federal court in this State, "and the [B]oard of [P]arole is in receipt of a written recommendation in favor of the issuance of such certificate from the chief probation officer of the federal district where such conviction was obtained, the [B]oard shall, give presumptive weight to such recommendation in determining whether such certificate shall be issued provided that such recommendation is based upon a finding by the federal probation office in such district that the requirements of paragraphs (a), (b) and (c) of subdivision three have been satisfied."

Modeled loosely after the provisions of Correction Law sections 753(2) and 752 that require certain agencies and employers, in considering an application by a convicted person for a license or employment, to give "consideration" to a certificate of relief from disabilities issued to the applicant, "which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein," this measure is intended to assist the State Board of Parole by streamlining and supplementing its current procedures for considering applications for certificates of relief from federally-convicted offenders.***** The measure would take effect immediately.

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conviction is a presidential pardon. See, *Civil Disabilities of Convicted Felons: A State-by-State Survey*, Office of the Pardon Attorney, U.S. Department of Justice, at pp. i and v (October, 1996).

*****The Committee recognizes that, in order for the proposed section 703(5) "written recommendation" procedure to work properly, the federal probation office serving the court in the federal district where the conviction was obtained would have to agree to prepare and submit to the State Board of Parole – presumably at the request of the offender – a written recommendation that satisfies the requirements of the proposed statute. It is the Committee's understanding that the federal probation offices located in New York State have, at least preliminarily, indicated their willingness to cooperate in this initiative should the proposal be enacted into law.

Proposal

AN ACT to amend the correction law, in relation to certificates of relief from disabilities issued by the board of parole

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5 of section 703 of the correction law is amended to read as follows:

5. In granting or revoking a certificate of relief from disabilities the action of the board of parole shall be by unanimous vote of the members authorized to grant or revoke parole. Such action shall be deemed a judicial function and shall not be reviewable if done according to law. Where a certificate of relief from disabilities is sought pursuant to paragraph (b) of subdivision one on a judgment of conviction rendered by a federal court in this state, and the board of parole is in receipt of a written recommendation in favor of the issuance of such certificate from the chief probation officer of the federal district where such conviction was obtained, the board shall give presumptive weight to such recommendation in determining whether such certificate shall be issued provided that such recommendation is based upon a finding by the federal probation office in such district that the requirements of paragraphs (a), (b) and (c) of subdivision three have been satisfied.

§2. This act shall take effect immediately.

6. Criminal Contempt and Double Jeopardy: Repealer
(Penal Law 215.54; Judiciary Law 776)

To conform with controlling appellate decisional law in the areas of double jeopardy and criminal contempt, the Committee recommends that section 215.54 of the Penal Law and section 776 of the Judiciary Law, both of which provide, in substance, that the imposition of a prior punishment for criminal contempt under Article 19 of the Judiciary Law shall not bar a subsequent prosecution for criminal contempt under the Penal Law based upon the same conduct, be repealed.

Judiciary Law section 776 provides that

> [a] person, punished as prescribed in...[Judiciary Law Article 19], may, notwithstanding, be indicted for the same misconduct, if it is an indictable offense; but the court, before which he is convicted, must, in forming its sentence, take into consideration the previous punishment.

Judiciary Law section 776.

The corresponding provision of Penal Law Article 215 provides that

> [a]djudication for criminal contempt under subdivision A of section seven hundred fifty of the judiciary law shall not bar a prosecution for the crime of criminal contempt under section 215.50* based upon the same conduct but, upon conviction thereunder, the court, in sentencing the defendant shall take the previous punishment into consideration.

Penal Law section 215.54.

In People v. Columbo (31 N.Y.2d 947, 949 [1972]), the Court of Appeals, following a second remand of the case to that Court from the United States Supreme Court for reconsideration of a double jeopardy issue (see, Columbo v. New York, 405 U.S. 9, 11 [1972]), held that the defendant's previous punishment for contempt of court under the Judiciary Law for refusing to obey an order to testify before the grand jury barred a subsequent indictment for the same offense under the Penal Law. The Court of Appeals, in Columbo, stated as follows:

> Although defendant could have been properly indicted for his refusal to testify before the Grand Jury on October 14, 1965, after

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*Penal Law section 215.50 defines, in seven separate subdivisions, the class A misdemeanor of criminal contempt in the second degree.

> having been granted full immunity [citation omitted] and such indictment would not be barred by double jeopardy, he was not indicted for that crime, but, instead was indicted for his refusal to obey the order of ...[the Grand Jury Judge] on December 7, 1965, to return to the same Grand Jury and testify. Thus, defendant was indicted for the same act and offense for which he previously was punished by...[the Grand Jury Judge] for contempt of court pursuant to section 750 of the Judiciary Law. The same evidence proves the Judiciary Law contempt for which defendant was previously punished and the Penal Law contempt charged in the indictment, and the elements of the two contempt charges are the same. Since the Supreme Court of the United States has held that defendant's previous punishment for contempt...pursuant to the Judiciary Law was for "criminal" contempt under the particular facts of this case [citation omitted], defendant's subsequent indictment for the same offense under...the ...Penal Law is barred by the double jeopardy clause [citation omitted].

Colombo, supra., at 949; see also, Matter of Capio v. Justices of the Supreme Court, 34 N.Y.2d 603 [1974], affirming on the opinion at 41 A.D.2d 235.**

In a more recent case, People v. Wood (95 N.Y.2d 509, 515 [2000]), the Court of Appeals, citing Columbo, held that the defendant's prosecution for criminal contempt in the first degree under Penal Law section 215.51 for violating an order of protection was barred because the defendant had previously been prosecuted for contempt under Family Court Article 8 based upon the same conduct. As in Columbo, the Court in Wood, in analyzing the double jeopardy issue, applied the "same elements test" enunciated by the United States Supreme Court in Blockburger v. United States (284 U.S. 299 [1932]) and reiterated in the criminal contempt context in United States v. Dixon (509 U.S. 688 [1993]):

> The Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense"[citation omitted]. The "applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not" [citing Blockburger]. If each of the offenses contains an element which the other does not, they are not the "same offense" under the rule enunciated by Blockburger and any claim of constitutional double

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**Notably, there is no mention by the Court in Columbo of either Penal Law section 215.54 or Judiciary Law section 776.

> jeopardy necessarily fails [citation omitted]. The test focuses on "the proof necessary to prove the statutory elements of each offense charged against the defendant, not on the actual evidence to be presented at trial" [citations omitted].

Wood, supra., at 513.

In his comments on the interplay between criminal contempt and double jeopardy in the 1998 law review article, *Criminal and Civil Contempt: Some Sense of a Hodgepodge* (72 St. John's L. Rev. 337, 407-408 [Spring, 1998]), Lawrence Gray notes that the Court of Appeals' and U.S. Supreme Court's decisions in Columbo "do...not appear to be the proverbial 'last word'" on the topic. As stated in that article,

> [i]n United States v. Dixon, the latest Supreme Court decision on the issue, a badly splintered Court hardly achieved a coherent conclusion. Specifically, the Court held that where a criminal contempt of court does not have the "same elements" as a legislatively-enacted crime, a contempt proceeding followed by a criminal prosecution does *not* implicate double jeopardy [citations omitted].

Gray, Id; emphasis added.

Notwithstanding Mr. Gray's observation that the Court of Appeals' decision in Columbo may not be the "last word"on the issues of constitutional double jeopardy and criminal contempt, it is clear that Penal Law section 215.54 and Judiciary Law section 776, at the very least, raise serious constitutional concerns in light of Columbo and also appear to conflict directly with certain of the statutory double jeopardy protections afforded by CPL Article 40 ["Exemption From Prosecution by Reason of Previous Prosecution"]. For these reasons, the Committee offers this measure repealing both sections in their entirety.***

Proposal

AN ACT to amend the penal law and the judiciary law, in relation to criminal contempt

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***It should be noted that, as part of the Committee's existing legislative proposal to reform Judiciary Law Article 19, sections 750 through 781of that Article are repealed in their entirety and replaced with new provisions. Although the Committee does not specifically address the repeal of Judiciary Law section 776, or the related double jeopardy issue, in its memorandum in support of that proposal, the Committee created no analogue to section 776 in its proposed new Article 19.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 215.54 of the penal law is REPEALED.

§2. Section 776 of the judiciary law is REPEALED.

§3. This act shall take effect immediately.

7. Addressing the *Apprendi* Problem in the Second Child Sexual Assault Felony Offender Statutes (CPL 200.62, 400.19; PL 70.07)

The Committee recommends that section 400.19 of the Criminal Procedure Law be repealed and section 200.62 of the Criminal Procedure Law and section 70.07 of the Penal Law be amended to simplify the procedures in second child sexual assault felony offender cases and conform them to the U.S. Supreme Court's ruling in Apprendi v. New Jersey (530 U.S. 466 [2000]).

In Apprendi, the Supreme Court held that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." Cunningham v. California, ___ S. Ct. ___, 92007 WL 135687 (U.S. Cal. 2007), citing Apprendi, supra; see also, Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005) and Cunningham, supra. The Supreme Court has clarified that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." Blakely, supra., at 303-304 (emphasis in original).

As explained in greater detail below, the Committee is of the view that the existing CPL section 400.19 procedures for determining whether a defendant is a "second child sexual assault felony offender"– and thus subject to the mandatory enhanced sentencing provisions for these offenders established by Penal Law section 70.07* – is in conflict with the Supreme Court's ruling in Apprendi to the extent that it permits a Judge, rather than a jury, to determine the ages

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*Pursuant to subdivision one of Penal Law section 70.07, "[a] person who stands convicted of a felony offense for a sexual assault against a child, having been subjected to a predicate felony conviction for a sexual assault against a child, must be sentenced in accordance with the provisions of subdivision four or five of this section." Subdivision three of that section provides, in relevant part, that "[t]he provisions of section 400.19 of the [C]riminal [P]rocedure [L]aw shall govern the procedures that must be followed to determine whether a person who stands convicted of a sexual assault against a child has been previously subjected to a predicate felony conviction for such a sexual assault and whether such offender was eighteen years of age or older at the time of the commission of the predicate felony." Subdivision four of section 70.07 sets forth the sentencing ranges for sentences imposed under that section which, depending on the felony classification level of the instant and prior felony sexual assault against a child, are significantly higher than those required for repeat felony offenders under Penal Law sections 70.04 and 70.06. Finally, subdivision five of section 70.07 provides that where the court finds that a person found to be second child sexual assault felony offender was under the age of 18 years at the time of the commission of the predicate felony offense, the court may, in lieu of imposing a sentence under subdivision four of that section, instead impose a sentence "authorized for the instant felony offense" pursuant to Penal Law section 70.04(3).

of the victim and the defendant at the time of the defendant's commission of the prior child sexual assault.

When the Legislature enacted the Sexual Assault Reform Act in 2000,

> one of its purposes was to enhance the maximum sentence against repeat child sex offenders...Since there is no crime in the Penal Law entitled "sexual assault against a child," the Legislature created that term and defined it to include certain sex felonies which do not necessarily contain the age of the victim as an element of the crime, but which, in fact, were committed against children...Accordingly, "[a] 'sexual assault against a child' means a felony offense, the essential elements of which include the commission or attempted commission of sexual conduct as defined in PL § 130.00[10] committed or attempted to be committed against a child less than fifteen years old." PL 70.07[2].
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> Because Article 130 does contain several crimes in which the victim's age is *not* an element...the Legislature provided for the victim's age to be adjudicated through the special information procedure...[set forth in CPL section 200.62].

People v. Walters, 196 Misc.2d 78, 80-81(Sup. Ct. New York Co. 2003); emphasis in original.

CPL section 200.62 provides, in substance, that "whenever a person is charged with a sex offense as defined in Article 130 of the Penal Law, and the victim's age is not an element of the offense, the indictment may be accompanied by a special information [filed with the court by the prosecutor] alleging that the victim was in fact less than fifteen years old...If the accused does not concede the victim's age, it must be proved to the jury [or, where the defendant has waived a jury, to the court] beyond a reasonable doubt...[That section] also provides that such...[a special] information is unnecessary when the victim's age *is* an element of the offense." Id., emphasis in original; see also, CPL section 200.62(1) and (2)(b). In accordance with the underlying purpose of section 200.62, which is to "memorialize the age of the victim for enhancement of the sentence upon recidivism" (Preiser, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL 200.62, 2003 Supp. Pamphlet, at 294), subdivision four of that section provides that "[a] determination pursuant to this section that the victim was less than fifteen years old at the time of the commission of the offense *shall be binding in any future proceeding in which the issue may arise* unless the underlying conviction or determination is vacated or reversed." CPL section 200.62(4); emphasis added.

By requiring that the victim's age be proved to the jury, "the Legislature [in enacting CPL section 200.62 in 2003] was clearly cognizant of the Apprendi doctrine, announced just three months earlier, which required 'that any fact that increases the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Walters, supra., at 82. To avoid the Apprendi problem, and "in lieu of postponing...[proof of the victim's age in the prior child sexual assault] until the subsequent [child sexual assault] offense, which might not occur for fifteen years or more...when passage of time could make it difficult to establish the fact, the law provides for determination during the processing of the predicate [sex offense]." Preiser, supra., at 295.

Thus, where the section 200.62 procedure has been followed and the age of the victim of the predicate sex offense submitted to the jury and proved beyond a reasonable doubt (or where the defendant has conceded the fact of the victim's age on the predicate offense), that determination is presumably valid and binding under Apprendi and can be used to enhance the defendant's punishment, under Penal Law section 70.07, upon conviction of a subsequent sexual assault against a child. Because, however, the filing of a "special information" by the prosecutor alleging that the victim is under age fifteen is discretionary under CPL section 200.62(1), there may be situations – especially where the age of the victim is not an element of the prior child sex offense or the previous prosecution took place prior to the enactment of section 200.62 – where the age of the victim of the prior crime has not been sufficiently established at the time the defendant is convicted of the subsequent child sexual assault. As described below, by failing to provide for a *jury* determination of the prior victim's age in these situations, the CPL section 400.19 procedure for determining whether a defendant is to be sentenced as a second child sexual assault felony offender runs afoul of Apprendi and must be changed.**

Subdivisions one, three and four of CPL section 400.19 currently provide, in relevant part, as follows:

> 1. When information available to the people prior to the trial of a felony offense for a sexual assault against a child indicates that the defendant may have previously been subjected to a predicate felony conviction for a sexual assault against a child, a statement may be filed by the prosecutor at any time before trial commences setting forth the date and place of each alleged predicate felony conviction for a sexual assault against a child and a statement whether the defendant was eighteen years of age or older at the time of the commission of the predicate felony.

**Under Apprendi and its progeny, the fact of the defendant's prior sex offense *conviction* "standing alone is simply a sentencing factor permitting an increase in the maximum sentence on recidivism without need for an indictment or the right to a jury. Due process requires only a finding of prior conviction after notice and an opportunity to be heard [citations omitted]. The problem however is that the age of the victim of the predicate is a unique factor that, [if it is to be used for sentence enhancement purposes], has to be established by due process [i.e., by a jury]." Preiser, supra.

> 3. The defendant must be given a copy of such statement and the court must ask whether he wishes to controvert any allegation made therein. If the defendant wishes to controvert any allegation in the statement, he must specify the particular allegation or allegations he wishes to controvert. Uncontroverted allegations in the statement shall be deemed to have been admitted by the defendant.
>
> 4. Where the uncontroverted allegations in the statement are sufficient to support a finding that the defendant has been subjected to a predicate felony conviction for a sexual assault upon a child and that the defendant was eighteen years of age or older at the time of the commission of the predicate felony, the court must enter such finding and when imposing sentence must sentence the defendant in accordance with the provisions of section 70.07 of the penal law.

CPL section 400.19.

Where the defendant controverts an allegation in the statement, the court, under subdivision five of section 400.19, is required to hold a hearing. Pursuant to subdivision six of that section, however, the hearing "must be before the court *without a jury*." CPL section 400.19(6); emphasis added. The burden of proof at the hearing "is upon the people and a finding that the defendant has been subjected to a predicate felony conviction for a sexual assault against a child as defined in...[Penal Law section 70.07(2)] and that the defendant was 18 years of age or older at the time of the commission of the predicate felony must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial of the issue of guilt." CPL section 400.19 (6)(a).*** At the conclusion of the hearing, "the court must make a finding as to whether or not the defendant has been subjected to a predicate felony conviction for a sexual assault against a child as defined in...[Penal Law section 70.07(2)] and whether the defendant was eighteen years of age or older at the time of the commission of the predicate felony." CPL section 400.19(6)(d).

***With regard to proof of the age of the victim of the predicate felony offense, paragraph (b) of subdivision six of section 400.19 further provides that, "[r]egardless of whether the age of the victim is an element of the alleged predicate felony offense, where the defendant controverts an allegation that the victim of an alleged sexual assault upon a child was less than fifteen years old, the people may prove that the child was less than fifteen years old by any evidence admissible under the rules applicable to a trial of the issue of guilt. For purposes of determining whether a child was less than fifteen years old, the people shall not be required to prove that the defendant knew the child was less than fifteen years old at the time of the alleged sexual assault." CPL section 400.19(6)(b).

The Committee is of the view that, where a defendant controverts an allegation in the statement that the victim of the alleged predicate child sexual assault was less than 15 years of age at the time of the commission of the offense, and where that fact was not proven to a jury or conceded by the defendant at the prior proceeding in accordance with CPL section 200.62, it must, in accordance with Apprendi, be proven to a jury beyond a reasonable doubt before an enhanced sentence under Penal Law section 70.07 can be imposed. Similarly, where a defendant controverts an allegation in the statement that he or she was 18 years of age or older at the time of the commission of the alleged predicate offense, that fact, under Apprendi, must also be proven to a jury beyond a reasonable doubt before an enhanced sentence under section 70.07 can be imposed. As such, the aforementioned provisions of CPL section 400.19 that provide for these issues to be determined by the court without a jury must be revised to conform with Apprendi.

This comprehensive measure would accomplish this result, and simplify the law in this area, by repealing CPL section 400.19 in its entirety and moving the relevant "second child sexual assault" procedures from that section to five newly added subdivisions at the end of CPL section 200.62. As so amended, the latter section would govern *both* the "special information" procedures for alleged "child sexual assault offenders" *and* the procedures for determining whether an offender is to be sentenced as a "second child sexual assault felony offender." With regard to the latter, the measure would, in a new subdivision five of CPL section 200.62, replace the existing second child sexual assault felony offender "statement" (see, CPL section 400.19(2)) with a "special information" procedure modeled after the existing "special information" for "child sexual assault offenders" established by subdivision one of that section. In relevant part, the new subdivision five would provide as follows:

> 5. Whenever it appears that a person is charged with the commission of a felony offense for a sexual assault upon a child as defined in section 70.07 of the penal law and it also appears that such person has previously been convicted one or more times of a felony for a sexual assault upon a child, a special information approved by a grand jury**** may be filed by the prosecutor at any time before trial commences setting forth the date and place of each alleged predicate felony conviction for a sexual assault upon a child and a statement that the defendant was eighteen years of age or older at the time of the commission of each predicate felony.

Proposed CPL section 200.62(5).

****To ensure that the facts alleged in the special information relating to the age of the victim and the defendant at the time of the prior offense have been reviewed and voted on by a grand jury, the measure would require that the special information be "approved" by the grand jury prior to its being filed with the court. The measure would add a similar requirement for a special information filed pursuant to existing subdivision one of section 200.62.

Similarly, the measure would add a new subdivision six to section 200.62 to replace the "preliminary examination" requirement of CPL section 400.19(3) with the following "arraignment" procedure modeled directly after the procedure for "child sexual assault offenders" set forth in existing section 200.62(2):

> 6. Prior to trial, or after the commencement of the trial but before the close of the people's case, the court, in the absence of the jury, must arraign the defendant upon such information and advise him or her that he or she may admit the allegations, deny them or remain mute. Depending upon the defendant's response, the trial of the indictment must proceed as follows: (a) If the defendant admits allegations in the information sufficient to support a finding that the defendant has been subjected to a predicate felony conviction for a sexual assault upon a child and that the defendant was eighteen years of age or older at the time of the commission of the predicate felony, the court must enter such finding. If the defendant is convicted at trial of a sexual assault upon a child, when imposing sentence the court must sentence the defendant in accordance with the provisions of section 70.07 of the penal law.

Proposed CPL section 200.62(6).

To address the Apprendi problem in existing CPL section 400.19(6), the measure would add a new subdivision (6)(b) to section 200.62 to provide, in relevant part, as follows:

> If the defendant denies one or more material allegations [in the second child sexual assault "special information" filed with the court] or remains mute, the people may, by proof beyond a reasonable doubt, prove such allegations to the court sitting without the jury; provided, that *if the defendant does not admit that the victim of the prior crime was less than fifteen years old at the time of the crime or that the defendant was over eighteen years of age at the time of the crime, the defendant may elect to have such issue or issues decided by the jury. Where the trial of the indictment is a non-jury trial, or where the defendant has disposed of the charges in the indictment by entry of one or more pleas of guilty, the court shall, if the defendant elects to have such issue or issues decided by a jury, impanel a jury, in accordance with article 270 of this chapter, for such purpose.* The admissibility of evidence shall be governed by the rules applicable to a trial on the issue of guilt.

Proposed CPL section 200.62(6); emphasis added.

To further simply the procedure in these second child sexual assault cases, proposed subdivision nine of section 200.62 would clarify that the People could combine, "in a single special information filed with the court, the allegations and statements authorized to be set forth in separate special informations pursuant to subdivisions one and five" of that section.

Finally, the measure, which would take effect "30 days after it shall have become a law," would make a conforming change to Penal Law section 70.07(3) to delete the reference in that section to CPL section 400.19 and replace it with a reference to CPL section 200.62.

Proposal

AN ACT to amend the criminal procedure law and the penal law, in relation to the procedure for second child sexual assault felony offenders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 400.19 of the criminal procedure law is REPEALED.

§2. Section 200.62 of the criminal procedure law, as added by chapter 1 of the laws of 2001, the opening paragraph of subdivision 2 as amended by chapter 264 of the laws of 2003 and paragraph (c) of such subdivision as added by such chapter, is amended to read as follows:

§200.62. Indictment; special information for child sexual assault offender; procedure for determining whether defendant is a second child sexual assault felony offender. 1. Whenever a person is charged with the commission or attempted commission of an offense defined in article one hundred thirty of the penal law which constitutes a felony and it appears that the victim of such offense was less than fifteen years old, an indictment for such offense may be accompanied by a special information, approved by the grand jury and filed by the district attorney with the court, alleging that the victim was less than fifteen years old at the time of the commission of the offense; provided, however, that such an information need not be filed when the age of the victim is an element of the offense.

2. Prior to trial, or after the commencement of the trial but before the close of the people's case, the court, in the absence of the jury, must arraign the defendant upon such information and advise him or her that he or she may admit such allegation, deny it or remain mute. Depending upon the defendant's response, the trial of the indictment must proceed as follows:

(a) If the defendant admits that the alleged victim was less than fifteen years old at the time of the commission or attempted commission of the offense, that allegation shall be deemed established for all subsequent purposes, including sentencing pursuant to section 70.07 of the penal law.

(b) If the defendant denies such allegation or remains mute, the people may, by proof beyond a reasonable doubt, prove before the jury or, where the defendant has waived a jury trial, the court, that the alleged victim was less than fifteen years old at the time of the commission or attempted commission of the offense.

[(c) Nothing in this subdivision shall prevent the people, in a trial before the court or a jury, from making reference to and introducing evidence of the victim's age.]

3. Where a jury, pursuant to paragraph (b) of subdivision two of this section, makes the determination of whether the alleged victim of the offense was less than fifteen years old, such jury shall consider and render its verdict on such issue only after rendering its verdict with regard to the offense.

4. A determination pursuant to this section that the victim was less than fifteen years old at the time of the commission of the offense shall be binding in any future proceeding in which the issue may arise unless the underlying conviction or determination is vacated or

reversed.

5. Whenever it appears that a person is charged with the commission of a felony offense for a sexual assault upon a child as defined in section 70.07 of the penal law and it also appears that such person has previously been convicted one or more times of a felony for a sexual assault upon a child, a special information approved by a grand jury may be filed by the prosecutor at any time before trial commences setting forth the date and place of each alleged predicate felony conviction for a sexual assault upon a child and a statement that the defendant was eighteen years of age or older at the time of the commission of each predicate felony. Where the provisions of subdivision one of section 70.06 of the penal law apply, such information shall also set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation set forth in subparagraph (iv) of paragraph (b) of such subdivision.

6. Prior to trial, or after the commencement of the trial but before the close of the people's case, the court, in the absence of the jury, must arraign the defendant upon such information and advise him or her that he or she may admit the allegations, deny them or remain mute. Depending upon the defendant's response, the trial of the indictment must proceed as follows:

(a) If the defendant admits allegations in the information sufficient to support a finding that the defendant has been subjected to a predicate felony conviction for a sexual assault upon a child and that the defendant was eighteen years of age or older at the time of the commission of the predicate felony, the court must enter such finding. If the defendant is convicted at trial of a sexual assault upon a child, when imposing sentence the court must sentence the defendant in

accordance with the provisions of section 70.07 of the penal law.

(b) If the defendant denies one or more material allegations or remains mute, the people may, by proof beyond a reasonable doubt, prove such allegations to the court sitting without the jury; provided, that if the defendant does not admit that the victim of the prior crime was less than fifteen years old at the time of the crime or that the defendant was over eighteen years of age at the time of the crime, the defendant may elect to have such issue or issues decided by the jury. Where the trial of the indictment is a non-jury trial, or where the defendant has disposed of the charges in the indictment by entry of one or more pleas of guilty, the court shall, if the defendant elects to have such issue or issues decided by a jury, impanel a jury, in accordance with article 270 of this chapter, for such purpose. The admissibility of evidence shall be governed by the rules applicable to a trial on the issue of guilt.

(c) Regardless of whether the age of the victim is an element of the alleged predicate felony offense, where the defendant does not admit an allegation that the victim of an alleged sexual assault upon a child was less than fifteen years old, the people may prove that the child was less than fifteen years old by any evidence admissible under the rules applicable to a trial of the issue of guilt. For purposes of determining whether a child was less than fifteen years old, the people shall not be required to prove that the defendant knew the child was less than fifteen years old at the time of the alleged sexual assault.

(d) Where a jury makes a determination pursuant to paragraph (b) of this subdivision, the parties shall present evidence and the jury shall render its verdict on such issue only after rendering its verdict with regard to the offense.

(e) If the facts necessary to establish that the defendant has been subjected to a

predicate felony conviction for a sexual assault upon a child and that the defendant was eighteen years of age or older at the time of the commission of the predicate felony are found, the court must enter such finding. If the defendant is convicted at trial of a sexual assault upon a child, the court must sentence the defendant in accordance with the provisions of section 70.07 of the penal law.

(f) A determination pursuant to this subdivision that the defendant has been subjected to a previous felony conviction for sexual assault upon a child shall be binding in any future proceeding in which the issue may arise unless the underlying conviction or determination is vacated or reversed.

7. A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction for a sexual assault upon a child. The defendant may, when arraigned on an information charging that he has been subjected to such a conviction, controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

8. Nothing in this section shall prevent the people, in a trial before the court or a jury, from making reference to and introducing evidence of the victim's age.

9. Nothing in this section shall be deemed to preclude the people from combining, in a single special information filed with the court, the allegations and statements authorized to be set

forth in separate special informations pursuant to subdivisions one and five of this section.

§3. Subdivision 3 of section 70.07 of the penal law is amended to read as follows:

3. For purposes of determining whether a person has been subjected to a predicate felony conviction under this section, the criteria set forth in paragraph (b) of subdivision one of such section 70.06 shall apply provided however that for purposes of this subdivision, the terms "ten year" or "ten years", as provided in subparagraphs (iv) and (v) of paragraph (b) of subdivision one of such section 70.06, shall be "fifteen year" or "fifteen years". The provision of section [400.19] 200.62 of the criminal procedure law shall govern the procedures that must be followed to determine whether a person who stands convicted of a sexual assault against a child has been previously subjected to a predicate felony conviction for such a sexual assault and whether such offender was eighteen years of age or older at the time of the commission of the predicate felony.

§4. This act shall take effect 30 days after it shall have become a law.

IV. Pending and Future Matters

Among the measures the Committee will be considering this year is a proposal to amend section 70.02(4) of the Penal Law to permit a sentencing court, in imposing sentence on a plea of guilty to a class D violent felony offense entered in satisfaction of a charge of criminal possession of a weapon in the second degree under Penal Law section 265.03(3), to consider certain mitigating circumstances based on the history and character of the defendant. The impetus for this proposal is a recent change in the felony classification – from a Class D violent felony to a Class C violent felony – for the offense of criminal possession of a weapon where the weapon is a loaded firearm possessed outside the defendant's home or place of business. See, Chapter 742 of the Laws of 2006. The proposed amendment would close a perceived gap in the existing sentencing scheme under which the court is currently not authorized to consider the defendant's prior criminal history (or lack thereof) in determining whether a non-determinate sentence should be imposed even where the prosecutor, the court and defense counsel all agree that, based on the defendant's lack of a criminal history, a non-determinate sentence is appropriate.

The Committee will also be considering a proposal to amend the existing statutory provisions governing restitution hearings in criminal cases (Penal Law section 60.27(2) and CPL section 400.30(4)) to mirror the federal statutory provision (18 U.S.C. section 3664(e)) that gives courts in restitution hearings the discretion to allocate the burden of proof, with respect to certain issues, among the parties "as justice requires." As recently noted by the Court of Appeals in People v. Tzitzikalakis (___ N.Y.2d ___, decided 2/15/07), the plain language of CPL section 400.30(4) places the burden at a restitution hearing solely on the People to prove the victim's out-of-pocket loss, even in a restitution "offset" situation such as Tzitzikalakis, where the defendant clearly is in the best position to determine the value of the offset. Notably, the Court, in Tzitzikalakis, specifically called for "legislative reform" in this area.

Finally, as in past years, the Committee will be carefully reviewing the numerous ideas and suggestions that have been offered by judges and nonjudicial personnel from around the State to streamline and improve the fairness of criminal court operations and procedures.

V. Conclusion

The Committee will continue to meet regularly to study and discuss all significant proposals affecting criminal law and procedure. We express our gratitude to the Chief Judge, the Chief Administrative Judge and the Judicial Conference for their support in achieving our shared objective of improving the criminal law.

Respectfully submitted,

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