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 this 2013 Report, the Committee recommends 10 new measures for enactment by the Legislature. Also included are 45 measures previously proposed, and which continue to be of interest to the Committee. The new measures would:

- provide statutory authorization for issuing a warrant to use a mobile tracking device
- provide an affirmative defense to criminal possession of a gravity knife
- eliminate redundant DNA collections
- allow appellate review of certain questions of law not decided adversely to appellant
- amend the procedure for filing a risk-level recommendation under the Sex Offender Registration Act
- amend the criteria for determining whether a defendant has a predicate felony conviction
- authorize a court to provide a deliberating jury with its entire written jury charge
- allow *sua sponte* motions for severance
- permit appeal of an order modifying or enlarging probation conditions
- conform jury selection procedures in local criminal court to the procedures used in superior court

Part II of this Report provides the details of and explains the purpose of each new measure. Part III summarizes previously endorsed measures of significant interest to the courts.

In 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. New Measures

1. GPS Tracking Device Warrants
(CPL 690.05; 690.60)

The Committee recommends that Article 690 of the Criminal Procedure Law be amended to add express authority for a court to issue a warrant that authorizes a mobile tracking device be placed on a suspect's property or person.

In *People v Weaver* (12 NY3d 433 [2009]), the New York State Court of Appeals determined that the State Constitution requires law enforcement to first secure a warrant in order to place a global positioning satellite ("GPS") tracking device on a suspect's automobile. Subsequently, the United States Supreme Court similarly held that affixing a GPS tracking device on a vehicle and using it to acquire detailed data about the movements of the vehicle constitutes a search or seizure within the meaning of the Fourth Amendment of the United States Constitution (*United States v Jones*, 132 Sup. Ct. 945 [2012]). Although the Supreme Court did not examine whether a warrant is required in all cases, the definitive consequence of both *Weaver* and *Jones* is that New York courts must have a procedure to consider warrant applications for mobile tracking devices.

Procedures for issuing search warrants in New York are codified in Article 690 of the Criminal Procedure Law. Mobile tracking devices, however, do not come within the scope of a search warrant as currently defined. Article 690 provides that a search warrant is a court order directing a police officer to conduct "a search of designated premises, or of a designated vehicle, or of a designated person, for the purpose of seizing designated property or kinds of property, and to deliver any property so obtained to the court which issued the warrant" (CPL 690.05(2)(a)). Mobile tracking devices are not used to seize identified property, but only to track a suspect's activity. Nor does a mobile tracking device fit within the parameters of any other form of warrant authorized under the Criminal Procedure Law. An eavesdropping warrant involves "wiretapping" and is directed to the "mechanical overhearing of conversation" or the "intercepting of or accessing of an electronic communication" (CPL 700.05(1)). A video surveillance warrant involves the "intentional visual observation by law enforcement of a person by means of a television camera or other electronic device that is part of a television transmitting apparatus . . ." (CPL 700.05(9)). Finally, pen registers and trap and trace devices involve identifying telephone numbers that are used to initiate or receive telephone communications (CPL 705.00(1), (2)).

Although a mobile tracking device has characteristics of several types of devices currently requiring a warrant under the Criminal Procedure Law, the Committee recommends that warrants for these devices be provided as a new class of search warrant. Accordingly, this measure adds a new paragraph to section 690.05 that defines a search warrant to include "the installation, maintenance, and monitoring of a mobile tracking device." The measure also adds a new section

690.60 to the Criminal Procedure Law setting forth the procedures a court must follow in issuing a mobile tracking device warrant.

Proposal

AN ACT to amend the criminal procedure law, in relation to issuing warrants for mobile tracking devices

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

Section 1. Paragraph (b) of subdivision 2 of section 690.05 of the criminal procedure law, as added by chapter 504 of the laws of 1991, is amended and a new paragraph (c) is added as follows:

(b) a search of a designated premises for the purpose of searching for and arresting a person who is the subject of:

(i) a warrant of arrest issued pursuant to this chapter, a superior court warrant of arrest issued pursuant to this chapter, or a bench warrant for a felony issued pursuant to this chapter, where the designated premises is the dwelling of a third party who is not the subject of the arrest warrant; or

(ii) a warrant of arrest issued by any other state or federal court for an offense which would constitute a felony under the laws of this state, where the designated premises is the dwelling of a third party who is not the subject of the arrest warrant; or

(c) the installation, maintenance, and monitoring of a mobile tracking device in accordance with section 690.60.

§2. The criminal procedure law is amended by adding a new section 690.60 to read as follows:

§ 690.60. Mobile tracking devices; 1. Definitions. As used in this article the following terms have the following meanings:

(a) "Mobile tracking device" means an electronic or mechanical device affixed to a person or object, including a vehicle, which permits the tracking of the movement of that person or object.

(b) "Use of a mobile tracking device" means the installation, maintenance, and monitoring of a mobile tracking device.

2. Application for a mobile tracking device warrant. An application for a warrant to use a mobile tracking device shall be in writing and be made to a local criminal court. The application shall contain:

(a) the name of the court and the name and title of the applicant;

(b) the identity, if known, of the person or persons who are the subject of the investigation in which use of the mobile tracking device is sought;

(c) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his or her belief that a warrant to use a mobile tracking device should be issued, including a statement of facts establishing probable cause to believe that a particular crime has been, is being, or is about to be committed, and probable cause to believe that a mobile tracking device will result in evidence tending to prove commission of the designated crime or the whereabouts of the person who is the subject of the investigation in which use of the mobile tracking device is sought and as to whom probable cause to believe such person has committed the crime exists;

(d) a statement of the identity and current location, if known, of the person or object to

which a mobile tracking device will be attached, placed, or otherwise installed; and

(e) a statement of the period of time for which the use of a mobile tracking device is required to be maintained.

3. Mobile tracking device warrant; form and content. Upon an application made under subdivision two of this section, the court, upon a finding that probable cause exists to support issuing a warrant, shall enter an ex parte order authorizing the use of a mobile tracking device. The order shall specify:

(a) the name of the applicant, date of issuance, and the subscription and title of the issuing judge;

(b) the identity, if known, of the person who is the subject of the investigation;

(c) the identity of the person or a description of the object to which the mobile tracking device is to be attached, placed, or otherwise installed, if installation is necessary;

(d) the number of mobile tracking devices to be used and the geographical location(s) where the devices are to be used, if and to the extent such locations can be specified;

(e) the period of time during which the use of a mobile tracking device is authorized, which shall not exceed the time period provided in subdivision four of this section;

(f) whether authorization to enter upon a private place or premise for the placement, removal or permanent inactivation of such device is sought;

(g) whether permission is granted to re-access the device for maintenance during the authorization period; and

(h) the identity of the law enforcement agency authorized to use the mobile tracking device.

4. Mobile tracking device warrants; time period and extensions.

(a) A warrant issued under this section shall authorize the use of a mobile tracking device for a period not to exceed 45 days, or the period necessary to achieve the objective of the warrant, whichever is less.

(b) Extensions of the warrant may be granted only upon reapplication establishing probable cause to justify the continued use of a mobile tracking device. This period of the extension shall not exceed 30 days.

5. Execution of mobile tracking device warrant; to whom addressed.

(a) A warrant to use a mobile tracking device issued by a district court, the New York City criminal court, or a superior court judge sitting as a local criminal court may be executed pursuant to its terms anywhere in the state, and if issued by a town, village or city court it may be executed pursuant to its terms only in the county of issuance or an adjoining county; provided, however, that after a mobile tracking device is attached in accordance with the terms of this subsection, it may be monitored anywhere in the state.

(b) A warrant to use a mobile tracking device must be addressed to a police officer whose geographical area of employment embraces or is embraced or partially embraced by the county of issuance or the county where the tracking device is to be installed. The warrant need not be addressed to a specific police officer but may be addressed to any police officer of a designated classification, or to any police officer of any classification employed or having general jurisdiction to act as a police officer in the county.

(c) A warrant to use a mobile tracking device shall be executed not more than 10 days after the date of issuance.

6. Mobile tracking device warrants; notice. Within 90 days after the use of the mobile tracking device has ended, the officer executing a warrant for use of a mobile tracking device shall serve a copy of the warrant on the person who is the subject of the investigation as provided in paragraph (b) of subdivision two of this section or, if unknown, the owner of the property that was tracked. On a showing of good cause to the issuing judge or justice, the service of the notice may be postponed by order of such judge or justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of good cause.

7. Mobile tracking device warrants; removal. Upon termination of authorization in the warrant, the monitoring of the mobile tracking device must cease and as soon as practicable thereafter any mobile tracking device installed for such purpose either must be removed or must be permanently inactivated by any means approved by the issuing judge or justice.

8. Mobile tracking device warrants; exigent circumstances. Upon a showing in the application that exigent circumstances existed at the time of actual installation that precluded obtaining a warrant through application prior to installation, the court may authorize the continued use of the mobile tracking device, effective from the date of actual installation, for a period not to exceed 30 days. An application pursuant to this subdivision shall be made within forty-eight hours after actual installation.

§3. This act shall take effect immediately.

2. Affirmative Defense to Criminal Possession of a Gravity Knife (Penal Law § 265.15(7))

The Committee recommends that section 265.15 of the Penal Law be amended to provide an affirmative defense to criminal possession of a gravity knife.

A gravity knife is defined as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device" (Penal Law § 265.00 (5)). Gravity knives were first made illegal during the 1950's, as a response to gangs who purchased them as a "legal" alternative to switchblades (*see People v Irizarry*, 509 F.Supp 2d 198 [EDNY 2007]). More recently, however, common utility knives that are neither designed nor manufactured as gravity knives fit the technical definition of a gravity knife because an adept user can open them by the use of centrifugal force. These tools, designed for cutting sheet rock, carpeting and window screens have become popular tools widely circulated in general commerce by large retail stores such as Home Depot. In 2006 alone, one manufacturer sold over 1.7 million nationwide. Although New York has successfully prosecuted several large retail stores for selling such utility knives *(see* Eligon, *14 Stores Accused of Selling Illegal Knives*, NY Times, June 17, 2010), utility knives are still widely available in the tri-state area and throughout most of the country.

Criminal possession of a weapon, where the weapon is a gravity knife, is a strict liability offense. It therefore does not matter if the person does not realize that the knife he or she possesses is an illegal gravity knife, nor is it relevant if the possessor only intends to use the knife for innocent purposes, such as in connection with his or her employment. The wide availability of utility knives that were never designed to be gravity knives can therefore result in an unwitting possessor being arrested and prosecuted for criminal possession of a weapon. Contractors or construction laborers possessing a common utility knife are subject to arrest and conviction for a class A misdemeanor. Where the person has previously been convicted of any crime in his or her life, such possession is a class D felony offense carrying a penalty of up to seven years imprisonment. As a strict liability offense, there is no meaningful defense.

This measure is designed to afford relief to those individuals who innocently possess such knives. The Committee recognizes that a gravity knife can be a dangerous instrument, and when possessed with criminal intent, poses a serious threat to public safety. This measure therefore leaves in place the crime of criminal possession of a gravity knife under sections 265.01 and 265.02 of the Penal Law. However, in order to provide some measure of relief where a person possesses the knife without intent to use it unlawfully, this measure allows a defendant to raise an affirmative defense to criminal possession of a gravity knife by establishing that the possession was innocent. As a practical matter, the Committee understands that in many cases, to assert the affirmative defense, a defendant will likely be compelled to testify in support of the affirmative defense. On balance, however, the Committee believes this is the best approach to insure public safety while establishing an appropriate outcome for innocent possessors.

Proposal

AN ACT to amend the penal law, in relation to an affirmative defense to criminal possession of a gravity knife

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

Section 1. The title of section 265.15 of the penal law is amended and a new subdivision seven of such section is added to read as follows:

§ 265.15. Presumptions of possession, unlawful intent and defacement; affirmative defense

7. It is an affirmative defense to criminal possession of a weapon as provided in subdivision one of section 265.01 or subdivision one of section 265.02 where the weapon possessed is a gravity knife and where the person did not intend to use it unlawfully.

§2. This act shall take effect 30 days after it shall have become law and shall apply to all pending trials where jury deliberations have not yet commenced.

3. DNA Collection Where Prior Sample is already in the NYS Identification Index (Executive Law § 995-c(3)(a))

The Committee recommends that the Executive Law be amended to expressly exempt from DNA collection any defendant who already has a DNA profile included in the state DNA identification index.

As of August 1, 2012, defendants convicted and sentenced for any felony or Penal Law misdemeanor are required to provide a DNA sample for inclusion in the New York State DNA identification index* (L. 2012, cc. 19 and 55). Unfortunately, the law fails to provide any exception to collection where a defendant has previously given a DNA sample in connection with a prior conviction and already has a DNA profile included in the DNA identification index. Instead, the statute simply provides, in relevant part, "[a]ny designated offender subsequent to conviction and sentencing . . . shall provide a sample appropriate for DNA testing . . ." (Executive Law § 995-c (3)(a)). The statue further provides, "the court *shall order* that a court officer take a sample or that the designated offender report to an office of the sheriff of that county." The DNA sample, however, is not itself placed into the index. Instead, once a sample of a defendant's buccal cells is collected, it is forensically tested for DNA and the results are produced in the form of a digital profile that corresponds to the unique DNA profile of the defendant providing the sample. It is this digital profile that is included in the index. Subsequent collection of DNA samples will merely result in a re-entry into the index of the exact same digital profile.

The Division of Criminal Justice Services (DCJS), the agency in charge of the DNA identification index, takes the pragmatic position that a sample need not be collected from an offender who has previously provided a sample because any new sample will be wholly duplicative of one already on file. However, in the absence of express statutory language that would authorize courts to forgo collection, many courts currently require collection of redundant samples. Given the vast expansion of the cases for which a DNA sample is now required and the administrative costs associated with collection, ordering a redundant sample is extraordinarily wasteful of the resources of both courts and local law enforcement personnel. While at least one lower court has held that a redundant test is not required (*see People v Husband*, 954 NYS2d 856 [NYC Crim Ct. 2012]), the Committee recommends that the Executive Law be amended to expressly authorize a court to forego ordering that a duplicative DNA sample be taken from a defendant who already has a DNA profile on file with the New York State identification index.

* The single exception is for the class B misdemeanor conviction of criminal possession of marijuana in the fifth degree under subdivision one of PL § 221.10 by persons who have never before been convicted of a crime (Executive Law § 995(7)).

Proposal

AN ACT to amend the executive law, in relation to the taking of DNA samples

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

Section 1. Paragraph (a) of subdivision 3 of section 995-c of the executive law, as amended by chapter 19 of the laws of 2012, is amended to read as follows:

(a) Any designated offender subsequent to conviction and sentencing for a crime specified in subdivision seven of section nine hundred ninety-five of this article, shall be required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article; provided, however, no such sample shall be required where such offender has previously provided a sample and is currently included in the state DNA identification index.

§2. This act shall take effect immediately.

4. Appellate Review of Questions of Law Not Decided Adversely to Appellant (CPL 470.15(1))

The Committee recommends that the Criminal Procedure Law be amended to allow an appellate court, on appeal from a judgment, sentence or order of a criminal court, to consider and determine any question of law presented to or considered by the trial court, despite the trial court not having decided the question adversely to the appellant.

In *People v LaFontaine*, 92 NY2d 470 [1998], the Court of Appeals held that CPL 470.15(1) does not allow an intermediate appellate court to affirm a judgment where the court below made the right ruling, but did so for the wrong reason. *LaFontaine* involved an appeal of a motion to suppress where the prosecution argued several alternative legal theories to support the police search of defendant's premises. The trial court accepted one of those grounds but rejected the others. On appeal, the Appellate Division held that the trial court's legal reasoning was in error, but affirmed the conviction because an alternative ground argued by the people was, in its opinion, legally correct. On further appeal, the Court of Appeals held that the intermediate appellate court was wrong to reach a ground rejected by the trial court, even though the prosecutor fully set forth that legal ground in the trial court record. Instead, the Court determined that the trial court's rejection of the ground argued by the people was not adverse to the appellant-defendant and thus was not the proper subject of appeal. The only appropriate action was for the appellate court to remit the case back to the trial court for further proceedings. The Court clearly understood that this resulted in a needless waste of judicial resources, but stated that this "anomaly rests on unavoidable statutory language," and that "any modification would be for the Legislature to change" (*id. at* 475).

In the years immediately following the *LaFontaine* decision, and perhaps because of its unusual procedural posture, the ruling was rarely applied. More recently, however, the Court has reaffirmed that CPL 470.15(1) must be strictly construed (*People v Concepcion*, 17 NY3d 192 [2011]). The result has led to numerous cases being remitted back to the trial court so that a proper record can be made on which to appeal (*see e.g., People v Yusuf*, 19 NY3d 314 [2012]; *People v Ingram*, 18 NY3d 949 [2012]; *People v Schrock*, 99 AD3d 1196 [4th Dept 2012]; *People v Spratley*, 96 AD3d 1420 [4th Dept 2012]; *People v Santiago*, 91 AD2d 438 [1st Dept 2012]).

The Committee recommends that CPL 470.15(1) be amended to permit an appellate court to consider alternative grounds raised or considered by the trial court, even where the court did not ultimately decide the question of law adversely to the appellant. While this measure therefore enlarges the scope of questions of law that an intermediate appellate court may consider, it continues the current prohibition that an intermediate appellate court may not determine grounds either not raised or not considered in the trial court. By narrowly tailoring the measure to overcome the procedural barrier recognized in *LaFontaine*, the measure will eliminate the inevitable waste of judicial resources encountered when cases are remitted for the trial court solely to make an appropriate record upon which a further appeal can be taken.

Proposal

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

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

Section 1. Subdivision 1 of section 470.15 of the criminal procedure law, as added by chapter 996, of the laws of 1970, is amended to read as follows:

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant, and any question of law or issue of fact raised on appeal that was presented to or considered by the criminal court, and which could result in an identical or modified ruling against the appellant.

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

5. Risk-Level Recommendations under the Sex Offender Registration Act (Correction Law §§ 168-d(2), (3); 168-l(6); 168-n(1), (2))

The Committee recommends that the Sex Offender Registration Act (Corrections Law article 6-C), be amended to make it the responsibility of the District Attorney to provide the risk-level recommendation where a defendant is sentenced to a term of imprisonment of ninety days or less.

Upon certification as a sex offender, a defendant becomes subject to a risk-level determination, assessed by the court following a hearing (Correction Law § 168-d (1)). Prior to the risk-level determination hearing, however, both the court and the offender must be given notice of a risk-level recommendation. Where an offender is not sentenced to a term of imprisonment, it is the District Attorney who provides the risk-level recommendation (*see* Correction Law § 168-d (2), (3)). Where the offender is sentenced to a term of imprisonment, the responsibility to make the recommendation is placed on the Board of Examiners of Sex Offenders (*see* Correction Law § 168-l (6)).

A problem routinely arises when the Board of Examiners of Sex Offenders is tasked with the duty to provide a recommendation for offenders sentenced to a term of imprisonment of 90 days or less. The statutory scheme anticipates that the sentencing court will make the risk-level determination for imprisoned offenders 30 days prior to the offender's release – but only after receiving the Board's recommendation, which must be made within sixty days prior to the offender's release (*see* Correction Law § 168-n (1), (2)). Where the court is unable to make a determination prior to the date scheduled for the defendant's release, it must adjourn the hearing until after release and provide the offender with at least 20 days notice (*see* Correction Law §§ 168-l (8); 168-n (3)). For jail terms of 90 days or less, or sentences that will be satisfied by the amount of time a defendant has already served, the Board has inadequate time to prepare the risk-level recommendation prior to defendant's release. This causes the court to schedule a hearing date after the defendant's release. As a practical matter, courts can not foresee when the Board's recommendation will be received and therefore no hearing will be scheduled until after the court receives the recommendation. By then, most defendants serving short terms of incarceration have already been released.

As a result of this cumbersome procedure, the court must notify the offender of the date for the hearing when it often has little information regarding defendant's present location. Usually, the court has no effective means to notify the offender except by mailing a letter to defendant's last known address as reflected in the court file. If the defendant does not appear at the hearing, the court may then only proceed upon a finding of an unexcused failure to appear *(see* Correction Law §§ 168-d (4), 168-n (6)). Such findings are difficult to make with the limited record available to the court, leading to significant delays in determining an offender's risk-level status.

The Committee believes that the problems encountered under present law can be avoided if the District Attorney is given the responsibility for preparing the risk-level recommendation in cases where a defendant will be incarcerated on a sentence of ninety days or less. District Attorneys already have this obligation for sentences that do not involve imprisonment and will be

able to assure the court that the risk-level recommendation is filed prior to the release of the defendant. The court can then provide adequate notice of the hearing date to the defendant and insure that timely risk-level determinations are conducted.

Proposal

AN ACT to amend the correction law, in relation to risk-level recommendations under the sex offender registration act

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

Section 1. Subdivision 2 of section 168-d of the correction law, as amended by chapter 684 of the laws of 2005, is amended to read as follows:

2. Any sex offender, who is released on probation or discharged upon payment of a fine, conditional discharge [or], unconditional discharge, a definite sentence of 90 days or less or a sentence that will be satisfied by the amount of time already served shall, prior to such release or discharge, be informed of his or her duty to register under this article by the court in which he or she was convicted. At the time sentence is imposed, such sex offender shall register with the division on a form prepared by the division. The court shall require the sex offender to read and sign such form and to complete the registration portion of such form. The court shall on such form obtain the address where the sex offender expects to reside upon his or her release, and the name and address of any institution of higher education he or she expects to be employed by, enrolled in, attending or employed, whether for compensation or not, and whether he or she expects to reside in a facility owned or operated by such an institution, and shall report such information to the division. The court shall give one copy of the form to the sex offender and shall send two copies to the division which shall forward the information to the law enforcement

agencies having jurisdiction. The court shall also notify the district attorney and the sex offender of the date of the determination proceeding to be held pursuant to subdivision three of this section, which shall be held at least forty-five days after such notice is given. This notice shall include the following statement or a substantially similar statement: “This proceeding is being held to determine whether you will be classified as a level 3 offender (risk of repeat offense is high), a level 2 offender (risk of repeat offense is moderate), or a level 1 offender (risk of repeat offense is low), or whether you will be designated as a sexual predator, a sexually violent offender or a predicate sex offender, which will determine how long you must register as a sex offender and how much information can be provided to the public concerning your registration. If you fail to appear at this proceeding, without sufficient excuse, it shall be held in your absence. Failure to appear may result in a longer period of registration or a higher level of community notification because you are not present to offer evidence or contest evidence offered by the district attorney.” The court shall also advise the sex offender that he or she has a right to a hearing prior to the court's determination, that he or she has the right to be represented by counsel at the hearing and that counsel will be appointed if he or she is financially unable to retain counsel. If the sex offender applies for assignment of counsel to represent him or her at the hearing and counsel was not previously assigned to represent the sex offender in the underlying criminal action, the court shall determine whether the offender is financially unable to retain counsel. If such a finding is made, the court shall assign counsel to represent the sex offender pursuant to article eighteen-B of the county law. Where the court orders a sex offender released on probation, such order must include a provision requiring that he or she comply with the requirements of this article. Where such sex offender violates such provision, probation may be

immediately revoked in the manner provided by article four hundred ten of the criminal procedure law.

§2. Subdivision 3 of section 168-d of the Corrections Law, as added by chapter 192 of the laws of 1995, is amended to read as follows:

3. For sex offenders released on probation or discharged upon payment of a fine, conditional discharge [or], unconditional discharge, a definite sentence of 90 days or less, or a sentence that will be satisfied by the amount of time already served, it shall be the duty of the court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article to determine the level of notification pursuant to subdivision six of section one hundred sixty-eight-l of this article and whether such sex offender shall be designated a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. At least fifteen days prior to the determination proceeding, the district attorney shall provide to the court and the sex offender a written statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations. The court shall allow the sex offender to appear and be heard. The state shall appear by the district attorney, or his or her designee, who shall bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence. Where there is a dispute between the parties concerning the determinations, the court shall adjourn the hearing as necessary to permit the sex offender or the district attorney to obtain materials relevant to the determinations from any state or local facility, hospital, institution, office, agency, department or division. Such materials may be obtained by subpoena if not voluntarily provided to the requesting party. In making the determinations, the court shall review any victim's

statement and any relevant materials and evidence submitted by the sex offender and the district attorney and the court may consider reliable hearsay evidence submitted by either party provided that it is relevant to the determinations. Facts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established by clear and convincing evidence and shall not be relitigated. The court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based. A copy of the order shall be submitted by the court to the division. Upon application of either party, the court shall seal any portion of the court file or record which contains material that is confidential under any state or federal statute. Either party may appeal as of right from the order pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules. Where counsel has been assigned to represent the sex offender upon the ground that the sex offender is financially unable to retain counsel, that assignment shall be continued throughout the pendency of the appeal, and the person may appeal as a poor person pursuant to article eighteen-B of the county law.

§3. The opening paragraph of subdivision 6 of section 168-l of the Corrections Law, as amended by chapter 11 of the laws of 2002, is amended to read as follows:

Applying these guidelines, <u>except where the sex offender is serving a definite sentence of 90 days or less, or a sentence that will be satisfied by the amount of time already served,</u> the board shall within sixty calendar days prior to the discharge, parole, release to post-release supervision or release of a sex offender make a recommendation which shall be confidential and shall not be available for public inspection, to the sentencing court as to whether such sex offender warrants the designation of sexual predator, sexually violent offender, or predicate sex

offender as defined in subdivision seven of section one hundred sixty-eight-a of this article. In addition, the guidelines shall be applied by the board to make a recommendation to the sentencing court which shall be confidential and shall not be available for public inspection, providing for one of the following three levels of notification depending upon the degree of the risk of re-offense by the sex offender.

§4. Subdivisions 1 and 2 of section 168-n of the Corrections Law, as added by chapter 192 of the laws of 1995, is amended to read as follows:

1. A determination that an offender is a sexual predator, sexually violent offender, or predicate sex offender as defined in subdivision seven of section one hundred sixty-eight-a of this article shall be made prior to the discharge, parole, release to post-release supervision or release of such offender by the sentencing court applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article after receiving a recommendation from the board <u>or district attorney</u> pursuant to section one hundred sixty-eight-l <u>or section one hundred sixty-eight-d</u> of this article.

2. In addition, applying the guidelines established in subdivision five of section one hundred sixty-eight-l of this article, the sentencing court shall also make a determination with respect to the level of notification, after receiving a recommendation from the board <u>or district attorney</u> pursuant to section one hundred sixty-eight-l <u>or section one hundred sixty-eight-d</u> of this article. Both determinations of the sentencing court shall be made thirty calendar days prior to discharge, parole or release.

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

6. Criteria for Determining Prior Felony Offender Status
(Penal Law §§ 70.04(1)(b)(ii); 70.06(1)(b)(ii); 70.10(1)(b)(ii))

The Committee recommends that the Penal Law be amended to modify the criteria for determining whether a defendant qualifies as a second felony offender (PL § 70.06), second violent felony offender (PL § 70.04) and persistent felony offender (PL § 70.10). Changes in these statutes will necessarily apply by reference to a defendant's qualification to be considered a second child sexual assault felony offender (PL § 70.07) and persistent violent felony offender (PL § 70.08).

Under current law, a defendant's predicate status turns on whether the sentence for the prior felony was imposed before commission of the present felony (PL §§ 70.04(1)(b)(ii); 70.06(1)(b)(ii)); 70.10(1)(b)(ii)). Moreover, except for a persistent felony offender, the commission of the present felony must occur within ten years of the sentence on the earlier felony, not counting periods of incarceration (PL §§ 70.04(1)(b)(iv); 70.06(1)(b)(iv)). These requirements serve a fundamental purpose of enhanced sentencing -- to impose more severe punishment on persons who continue to commit serious crimes relatively soon after having been subjected to punishment for other serious criminal conduct (*People v Morse*, 62 NY2d 205, 221[1984]). It is a defendant's disregard for the "chastening effect of sentence on the prior conviction" that underlies the policy of New York's multiple offender laws (*People v Morse, supra*, 62 NY2d 205 at 219). Thus, a critical calculation for determining predicate felony status is the sentencing date of the prior conviction. In most cases, this makes perfect sense because it is punishment that triggers the "chastening effect."

Recent court opinions, however, illustrate the potential for gamesmanship that the current statute engenders. In *People v Acevedo*, (17 NY3d 297 [2011]), a defendant sentenced as a second felony drug offender with a prior violent felony, successfully attacked his earlier violent felony sentence on the ground that the sentencing court in the earlier case failed to add a period of post release supervision to his prison term (*see People v Sparber*, 10 NY3d 457 [2008]). Applying *Sparber*, the original sentencing court vacated defendant's sentence and resentenced him to the same prison term and no additional period of post release supervision (see PL § 70.85). Once resentenced, defendant moved to vacate the drug felony sentence arguing that he should now be considered a first felony drug offender because the sentence on the violent felony conviction no longer preceded the commission of the drug offense. The Court of Appeals rejected the defendant's argument, but only because defendant's motion for resentence was a tactical measure to avoid predicate status on the drug felony. By contrast, under similar circumstances, the Appellate Division, First Department, agreed with a defendant who claimed he should be sentenced as a first felony offender once resentenced on an earlier conviction because post release supervision had not been made part of the original sentence (*People v Butler*, 88 AD3d 470 [1st Dept 2011]). The *Butler* court distinguished *Acevedo* because the resentencing proceeding on the first felony case was not done as a tactical measure, but had been initiated by the New York State Division of Parole pursuant Correction Law § 601-d (88 AD3d at 472; *c.f., People v Naughton*, 93 AD2d 809 [2d Dept 2012] *lv denied*, 19 NY3d 865 [2012]; *People v Boyer*, 91 AD3d 1183 [3d Dept 2012] *lv granted*, 19 AD3d 1024 [2012]).

The Committee believes that such technical applications of New York's recidivist statutes do not further the principle of enhancing punishment of defendants who reoffend relatively soon after being convicted and sentenced. When the conviction itself is not undermined, and the defendant is punished before commission of a new offense, subsequent resentences do not diminish the "chastening effect" of the earlier imposition of punishment on the conviction. It is also unwarranted to reset the ten year look back simply because a court resentences a defendant as a result of an initial sentencing error. It is only the recidivist who benefits by the current rule, and a defendant who remains conviction free after the original sentence should not be compelled to choose between contesting an illegal sentence or extending the ten year look-back period.

This measure provides that where a defendant has been resentenced following either a motion to set aside a sentence or an appeal of the sentence, and where the underlying conviction has not been disturbed, for purposes of determining defendant's predicate status, the sentence date shall be considered the initial sentence following the conviction.

Proposal

AN ACT to amend the criminal procedure law, in relation to criteria for determining prior felony offender status

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

Section 1. Subparagraph (ii) of paragraph (b) of subdivision 1 of section 70.06 of the penal law, as added by chapter 481 of the laws of 1978, is amended to read as follows:

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony. For purposes of this subparagraph, where a defendant has been resentenced following either a motion to set aside a sentence or an appeal of the sentence, on the ground that the sentence was not legally authorized for the offense of which defendant was convicted, and where the underlying conviction has not been disturbed, the sentence date shall be considered the initial sentence following the conviction;

§2. Subparagraph (ii) of paragraph (b) of subdivision 1 of section 70.04 of the penal law, as added by chapter 277 of the laws of 1973, is amended to read as follows:

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony. For purposes of this subparagraph, where a defendant has been resentenced following either a motion to set aside a sentence or an appeal of the sentence, on the ground that the sentence was not legally authorized for the offense of which defendant was convicted, and where the underlying conviction has not been disturbed, the sentence date shall be considered the initial sentence following the conviction;

§3. Subparagraph (ii) of paragraph (b) of subdivision 1 of section 70.10 of the penal law, as added by chapter 1030 of the laws of 1965, is amended to read as follows:

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony. For purposes of this subparagraph, where a defendant has been resentenced following either a motion to set aside a sentence or an appeal of the sentence, on the ground that the sentence was not legally authorized for the offense of which defendant was convicted, and where the underlying conviction has not been disturbed, the sentence date shall be considered the initial sentence following the conviction; and

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

7. Providing the Court's Charge to Deliberating Jury (CPL 310.30)

The Committee recommends that section 310.30 of the Criminal Procedure Law be amended to allow a trial judge, at the request of a deliberating jury, to provide the jury with a complete written copy of the court's charge. The Committee has previously endorsed a proposal, not enacted into law, to allow a court to submit only portions of the court's charge. The present proposal differs in that it provides for the court's entire charge to be delivered to the jury upon request.

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).

Yet it is not uncommon for a deliberating jury to ask the trial judge to provide it with a copy of its charge, especially in complex cases. The criminal procedure law, however, does not authorize the court to grant such a request. Indeed, the Court of Appeals has held that providing only portions of the court's charge over the objection of a party is improper because it would "convey the message that these [portions] are of particular importance," thus subordinating other portions of the charge (*People v Owens*, 69 NY2d 585, 591 [1987]). Although such concerns are not present where the entire charge is submitted to the jury, the Court subsequently held that the restrictive language of CPL 310.30 prohibits a court from distributing its entire charge to the jury (*People v Johnson*, 81 NY2d 980 [1993]).

The Supreme Court of the United States long ago held that it is not error to provide the jury with a written copy of the charge (*Haupt v United States*, 330 US 631, 643 [1947]). Moreover, between 2003 and 2005, the Jury Trial Project, initiated by then Chief Judge Judith Kaye, conducted a year-long experiment in which participating judges from across New York State sat on 112 trials in which innovative jury trial practices were used. The Jury Trial Project concluded that jurors need assistance to do their jobs well, as reflected by jurors' own assessments of trial complexity. Jurors tended to view trials as being very complex, while judges presiding over the same cases viewed the trial as not at all complex. In criminal cases, where only 8% of judges viewed any particular criminal trial as very complex, nearly half the jurors thought of them as very complex (*Final Report of the Committees of the Jury Trial Project*, New York State Unified Court System, 2005). The Jury Trial Project concluded, based on trials in which deliberating jurors were provided with a written copy of the judge's final charge, that written instructions can assist jurors in correctly fulfilling their responsibilities (*id. at* 32; see also *Jury Trial Innovations in New York State: Enhancing the Trial Process for All Participants: A Practical Guide for Trial Judges*, New York State Unified Court System, 2009). A similar finding was made by the American Bar Association, which determined that a basic principle for a jury trial should be to provide each juror "with a written copy of instructions for use while the jury is being instructed and during deliberations" (*American Bar Association Principles for*

Juries and Jury Trials, Principal 14B, (2005).

This measure would amend CPL section 310.30 to authorize a trial court to submit its entire charge to a deliberating jury upon their request. Consent of the parties is not required. However, 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. Also, on consent of the parties to only provide a limited portion of the charge, the court would be bound by the parties' agreement to provide only that portion agreed to by the attorneys.

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 a written copy of the court's charge, the court may provide the jury with a copy of its entire charge; provided, however, that where all parties consent to providing a limited portion of

the charge, the court shall only provide such limited portion. Before providing written instructions to the jury, the court shall permit counsel to examine the written instructions, shall afford counsel an opportunity to be heard and shall mark the 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.

8. *Sua Sponte* Motions for Severance (CPL 200.40)

The Committee recommends that CPL 200.40 be amended to allow a trial court the discretion, on its own motion, to order that defendants be tried separately. The amendment would conform New York practice to Federal practice and would give a court appropriate flexibility where good cause exists for separate trials.

Under current law, a trial court has the discretion to order that defendants be tried separately "upon motion of a defendant or the people" on a showing of good cause (CPL 200.40(1)). Because this provision does not explicitly allow the court to entertain the motion on its own initiative, severance may only be granted on the application of one of the parties, even where there is good cause for severance (*see Matter of Brown v Schulman*, 245 AD2d 561 [2d Dept 1997]).

Federal courts, by contrast, have the power to grant severance *sua sponte* (*see e.g. United States v De Diego*, 511 F2d 818 [DC Cir 1975]); *see also* LaFave, Criminal Procedure, at § 17.3 [a] ["the court also has the power to order a severance even when such action has not been specifically requested by either the prosecution or a defendant"]). Moreover, the American Bar Association standard for severance provides that "[t]he court may order a severance of offenses or defendants on its own motion before trial if a severance could be obtained on motion of the prosecution or a defendant, or during trial if the severance is required by manifest necessity" (ABA Standards for Criminal Justice, Joinder and Severance, Standard 13.4.2 (2d ed. 1980)).

The Committee believes that a court should have the discretion, where good cause exists, to order a defendant to be tried separately. There is little reason to limit a court's discretion to sever a defendant from a case. Where good cause exists, the failure of a party to request severance or delay a motion to sever will often be for tactical reasons that interfere with the administration of justice. This measure would provide the court with the ability to manage caseloads more effectively, especially in cases involving large numbers of defendants, and will reduce instances of improper gamesmanship by the parties.

Proposal

AN ACT to amend the criminal procedure law, in relation to motions for a defendant to be tried separately

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

Section 1. Subdivision 1 of section 200.40 of the criminal procedure law, as amended by

chapter 516 of the laws of 1986, is amended to read as follows:

1. Two or more defendants may be jointly charged in a single indictment provided that:

(a) all such defendants are jointly charged with every offense alleged therein; or

(b) all the offenses charged are based upon a common scheme or plan; or

(c) all the offenses charged are based upon the same criminal transaction as that term is defined in subdivision two of section 40.10; or

(d) if the indictment includes a count charging enterprise corruption:

(i) all the defendants are jointly charged with every count of enterprise corruption alleged therein; and

(ii) every offense, other than a count alleging enterprise corruption, is a criminal act specifically included in the pattern of criminal activity on which the charge or charges of enterprise corruption is or are based; and

(iii) each such defendant could have been jointly charged with at least one of the other defendants, absent an enterprise corruption count, under the provisions of paragraph (a), (b) or (c) of this subdivision, in an accusatory instrument charging at least one such specifically included criminal act. For purposes of this subparagraph, joinder shall not be precluded on the ground that a specifically included criminal act which is necessary to permit joinder is not currently prosecutable, when standing alone, by reason of previous prosecution or lack of geographical jurisdiction.

Even in such case, the court, upon its own motion or upon motion of a defendant or the people made within the period provided by section 255.20, may for good cause shown order in its discretion that any defendant be tried separately from the other or from one or more or all of the

others. Good cause shall include, but not be limited to, a finding that a defendant or the people will be unduly prejudiced by a joint trial or, in the case of a prosecution involving a charge of enterprise corruption, a finding that proof of one or more criminal acts alleged to have been committed by one defendant but not one or more of the others creates a likelihood that the jury may not be able to consider separately the proof as it relates to each defendant, or in such a case, given the scope of the pattern of criminal activity charged against all the defendants, a particular defendant's comparatively minor role in it creates a likelihood of prejudice to him or to her. Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires.

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

9. Appeals of Orders Modifying Probation Conditions
(CPL 450.30(3))

The Committee recommends that the Criminal Procedure Law be amended to allow a defendant to appeal a court order modifying or enlarging conditions of probation.

The Court of Appeals recently held that a defendant may not appeal a trial court's decision to modify or enlarge a condition of probation. Instead, any challenge must be taken by an Article 78 proceeding (*People v Pagan*, 19 NY3d 368 [2012]). CPL 450.30(3) defines an appeal from a sentence to mean "an appeal from either the sentence originally imposed or from a resentence following an order vacating the original sentence." The Court in *Pagan* held that the sentence "originally imposed" was the one issued when the court first sentenced the defendant. Subsequent modification of the sentence by way of an order modifying or enlarging a condition of probation falls outside the terms of the statute. As the Court concluded, "[b]ecause the . . . modification order was not a 'sentence' within the meaning of CPL 450.30(3), there is no statutory basis for defendant to pursue an appeal" (19 NY3d at 371).

The *Pagan* decision has significant consequences for indigent defendants. Indigent defense providers are not compensated for Article 78 proceedings and, except for the Legal Aid Society in New York City, they do not handle such cases. Thus, throughout most of New York State, indigent defendants have no recourse to challenge changes in conditions of probation. Ironically, an indigent defendant has counsel when he or she has little need - appellate review of the standard conditions of probation imposed at the time of sentence. Subsequent modification of the conditions are likely more onerous than standard conditions because the changes are normally requested by the probation department in response to their perception that the defendant has engaged in negative behavior. Thus, when an indigent defendant has the most need to review a court's decision, he or she has the least ability to do so.

The Committee believes that modification or enlargement of conditions of probation are an integral part of a court's sentence and should be recognized as such. Accordingly, this measure provides that an appeal will lie when a court modifies or enlarges conditions or probation.

Proposal

AN ACT to amend the criminal procedure law, in relation to appeals of orders modifying or enlarging conditions of probation

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

Section 1. Subdivision 3 of section 450.30 of the criminal procedure law, as added by

chapter 996 of the laws of 1970, is amended to read as follows:

3. An appeal from a sentence, within the meaning of this section and sections 450.10 and 450.20, means an appeal from [either] the sentence originally imposed or from a resentence following an order vacating the original sentence or from a modification or enlargement of conditions of probation made pursuant to subdivision one of section 410.20 of this chapter. For purposes of appeal, the judgment consists of the conviction and the original sentence only, and when a resentence occurs more than thirty days after the original sentence or from a modification or enlargement of conditions of probation made pursuant to subdivision one of section 410.20, a defendant who has not previously filed a notice of appeal from the judgment may not appeal from the judgment, but only from the resentence

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

10. Jury Selection in Local Criminal Court
(CPL 360.20)

The Committee recommends amending CPL 360.20 to conform the statute to the procedure used in superior court for selecting a jury.

CPL 360.20 establishes the procedure a local criminal court must use when selecting a trial jury. It provides that "the court must direct that the names of six members of the panel be drawn and called" and that they "must take their places in the jury box and must be immediately sworn to answer truthfully questions asked them." By contrast, a jury selection for superior court is done under CPL 270.15, which uses slightly different language. It provides "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" (CPL 270.15(1), emphasis added). Judges in local criminal court typically resist the statutory directive that only six names be called and fill the jury box in the same manner as in superior court. That procedure, however, is not technically permitted.

There is no rational basis to prevent a local criminal court from using the more efficient procedure allowed in superior court - where courts call more than the minimum number of jurors necessary. Indeed, despite the statutory language of CPL 360.20, the Practice Commentaries to that section suggests that legislative history and intent never implied a legislative aim to install different procedures in the courts:

> "The purpose of this section is to make the procedure for jury selection in the trial of an indictment applicable to the trial of an information in a local criminal court . . . There is one statutory procedural difference. Section 270.15 was amended in 1981 to statutorily authorize the court to seat more than twelve prospective jurors for examination at the same time and no conforming amendment was made to the present section to authorize the seating of more than six prospective jurors for examination at one time. Nevertheless, the obvious thrust of legislative intent under the present section is that with the exception of the number of jurors to ultimately comprise the jury -- i.e., 6 as opposed to 12 -- the entire procedure should be the same as the procedure used on trial of an indictment." (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 360.20 at 226).

The Committee recommends that this legislative oversight be corrected and a conforming amendment be made to CPL 360.20.

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 360.20 of the criminal procedure law, as added by chapter 996 of the laws of 1970, 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 <u>not less than</u> 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.

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

III. 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 NY2d 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 Session 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 [1999]). 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)].

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

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

[†]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 [1986]). 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*).

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.

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. 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.

3. 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.

4. 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.

5. Admissibility of Evidence of a 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 therefore, 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.

12. 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.

13. 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 impaneling 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 impaneling 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.

14. 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)),[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.[2] To conform with the Penal Law, which uses the

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

[2]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" 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).

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 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.[1]

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 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

[1]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.

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.

15. 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.

16. Providing Written Instructions 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 would 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.

17. Issuance and Duration of Final Orders of Protection (CPL 530.12(5), 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.[1] 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

[1] 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. Penal Law 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.

18. 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).[1]

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

[1]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).

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 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.

19. Raising the Monetary Threshold for Felony-Level Criminal Mischief and Securities Fraud (Penal Law §§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.[1]

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.[2]

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 in 1986 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

[1]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,* Penal Law 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).

[2]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.[3]

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 N.Y., at 3175 [July 24, 1986].

The measure would take effect immediately.

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[3]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.

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.

20. 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.[1] 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."[2]

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

[1]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."

[2]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 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.

21. 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[1] 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 having been granted full immunity [citation omitted] and such indictment

[1]Penal Law section 215.50 defines, in seven separate subdivisions, the Class A misdemeanor of criminal contempt in the second degree.

> 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.[2]

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 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

[2]Notably, there is no mention by the Court in *Columbo* of either Penal Law section 215.54 or Judiciary Law section 776.

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.[3]

Proposal

AN ACT to amend the penal law and the judiciary law, in relation to criminal contempt

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.

[3]It should be noted that, as part of the Committee's existing legislative proposal to reform Judiciary Law Article 19, sections 750 through 781 of 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.

§2. Section 776 of the judiciary law is REPEALED.

§3. This act shall take effect immediately.

22. Prosecution by Superior Court Information
After Dismissal of Indictment
(CPL 195.10(1)(a); CPL 210.20(4))

The Committee recommends that the Criminal Procedure Law be amended to establish a procedure to allow a defendant to waive indictment and be prosecuted by Superior Court Information in cases where the court has dismissed an initial indictment against the defendant.

Under current law, a defendant may only waive indictment and consent to be prosecuted by a superior court information where a local criminal court has held the defendant for the action of a grand jury, the defendant is not charged with a Class A felony, and the district attorney consents to the waiver (CPL 195.10). The Court of Appeals has strictly construed these conditions, and has repeatedly invalidated waivers made with the consent of both the defendant and the prosecution where the parties have otherwise failed to conform to the statute (*see People v. Boston*, 75 NY2d 585 [1990]; *People v. Trueluck*, 88 NY2d 546 [1996]; *People v. Casdia*, 78 NY2d 1024 [1991]; *compare People v. D'Amico*, 76 NY2d 877 [1990]).

It is not unusual, however, for the defendant and the prosecution to negotiate a plea in the period after a court dismisses an indictment but before the prosecution has re-presented the case to the grand jury. Plea negotiations are often completed during this interlude because the parties have invariably completed discovery and motion practice on the original indictment and generally have a better understanding of the relative strengths and weaknesses of the case. Yet, although the parties may reach agreement on a plea, there is no readily available procedure for the court to accept the plea. A superior court information is unavailable to the parties because the defendant has not been technically "held" for the action of the grand jury (*see People v. Rivera*, 14 Misc.3d 726 [2006]). Either the prosecution must re-present the case to the grand jury and secure a new indictment, a needless waste of resources and a burden for witnesses, or else follow the strict requirements for filing a superior court information. This requires the prosecutor to file a new felony complaint, re-arrest the defendant on the new felony complaint and arraign the defendant in the local criminal court so the defendant can be "held" for the action of the grand jury.

To avoid the burden of securing a new indictment or filing a new felony complaint, this measure would amend paragraph (a) of subdivision 1 of section 195.10 and subdivision 4 of section 210.20 of the Criminal Procedure Law to provide that after a court dismisses an indictment against a defendant, if the court authorizes the People to resubmit the charge to the grand jury, the defendant will be deemed held for the action of the grand jury. This would then provide the basis for the defendant to waive prosecution by indictment and be prosecuted by superior court information.

<u>Proposal</u>

An ACT to amend the criminal procedure law, in relation to prosecution by superior court information following dismissal of an indictment or count thereof

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 195.10 of the criminal procedure law, as added by chapter 467 of the laws of 1974, is amended to read as follows:

(a) a local criminal court, or a superior court acting pursuant to subdivision four of section 210.20, has held the defendant for the action of a grand jury; and

§2. Subdivision 4 of section 210.20 of the criminal procedure law is amended to read as follows:

4. Upon dismissing an indictment or a count thereof upon any of the grounds specified in paragraphs (a), (b), (c) and (i) of subdivision one, or, upon dismissing a superior court information or a count thereof upon any of the grounds specified in paragraphs (a) or (i) of subdivision one, the court may, upon application of the people, in its discretion authorize the people to submit the charge or charges to the same or another grand jury. Such authorization shall, for purposes of paragraph (a) of subdivision one of section 195.10, be deemed to constitute an order holding the defendant for the action of a grand jury with respect to such charge or charges. When the dismissal is based upon some other ground, such authorization may not be granted. In the absence of authorization to submit or resubmit, the order of dismissal constitutes a bar to any further prosecution of such charge or charges, by indictment or otherwise, in any criminal court within the county.

§3. This act shall take effect immediately.

23. Disclosure by the People of Police-Arranged Identifications of Defendant (CPL 240.20(e)(1))

The Committee recommends that subdivision one of section 240.20(e) of the Criminal Procedure Law be amended to provide that the People must give notice to the defendant of all prior police-arranged identifications of the defendant made by a person whom the prosecutor intends to call as a witness at trial and from whom they intend to elicit an in-court identification.

The Court of Appeals recently held that the People are not required to give notice of a police-arranged *photographic* identification of the defendant by a trial witness (*People v. Grajales*, 8 NY3d 861 [2007]). While the Court recognized that the "better practice is to give defendant notice of all prior police-arranged identifications made by a witness from whom they intend to elicit in-court identification testimony," there is no obligation to provide such notice unless that pretrial identification will be offered at trial. Since pretrial photographic identifications of a defendant are inadmissable at trial, the Court held that by definition there is no requirement that it be provided to the defendant under the notice provisions of CPL 710.30(1)(b).

The Committee believes that it is important for the Criminal Procedure Law to provide a mechanism to insure that photographic identifications of any witness the prosecutor intends to call at trial are disclosed to the defendant prior to trial. At the very least, evidence of a prior photographic identification is relevant to the issue of possible suggestiveness at any subsequent corporeal identification of the defendant by that witness. The Committee does not endorse the position, however, that disclosure should be made part of the People's notice obligation under CPL 710.30(1)(b). The Committee is of the view that the harsh remedy of preclusion for the People's failure to serve timely notice under CPL 710.30 (*see People v. O'Doherty*, 70 NY2d 479 [1987]), would be unwarranted in the case where the evidence of the identification is inadmissable at trial.

The Committee's proposal therefore strikes a balance by requiring the information be disclosed as part of the People's discovery under CPL 240. By placing the obligation within the discovery section, the court will have an adequate range of remedies for discovery violations (*see, e.g.*, CPL Section 240.70 [enumerating available court-imposed sanctions for non-compliance with CPL Article 240]. In addition, the Committee believes that the proposal would further the strong public policy goal of protecting against witness misidentification in criminal prosecutions.

Proposal

AN ACT to amend the criminal procedure law, in relation to discovery of prior police-arranged corporeal and non-corporeal identifications of the defendant

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

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

(e-1) A written statement setting forth the date, time, location and circumstances of any corporeal or non-corporeal identification of the defendant made by or in the presence of a person whom the prosecutor intends to call as a witness at trial where the procedures leading to such identification were arranged by or at the request or direction of a public servant engaged in law enforcement, irrespective of whether the people intend to introduce at trial evidence of such identification;

§2. This act shall take effect immediately.

24. Geographical Jurisdiction of Counties
(CPL 20.40(2))

The Committee recommends that the Criminal Procedure Law be amended to establish a basis for a county to have jurisdiction over criminal conduct where, although New York State has jurisdiction over the conduct, no county can establish jurisdiction under current law.

The Court of Appeals recently affirmed the dismissal of a perjury prosecution stemming from an out-of state deposition where the defendant was questioned by the New York State Attorney General's office in connection with an ongoing New York State antitrust investigation (*see People v. Zimmerman*, 9 NY3d 421 [2007]). The Court of Appeals held that while New York State had jurisdiction to prosecute the alleged perjury, it could find no basis for the defendant to be prosecuted in New York County or any other county in the state. The Court acknowledged the principle that once the State has jurisdiction to prosecute a case, it can "as a general rule, assign the trial of that case to any county it chooses" (9 NY3d at 428-429). But for a county to prosecute, the Legislature must provide a specific jurisdictional basis. Under the current legislative scheme there is simply no provision to allow any county to have jurisdiction over a case which only impacts the State as a whole. As explicitly stated by the Court, the current statute leaves a gap that the Court is not permitted to fill. Instead, the Court suggested that it is up to the Legislature to fill the gap (*see id*. at 430).

In order to provide a basis for jurisdiction in an appropriate county under the situation faced by the prosecution in *Zimmerman*, this measure would add a new paragraph (f) to CPL 20.40(2) to allow a county to exercise jurisdiction if there is a "logical nexus" between the criminal conduct and the county. By the statute's express terms, it would only operate in cases where no other basis for a county to exercise jurisdiction can be established. Therefore, it does not extend the current reach of the remaining provisions of CPL 20.40(2), and is limited solely to closing the legislative "gap" recognized by the Court of Appeals in *Zimmerman*.

Proposal

AN ACT to amend the criminal procedure law, in relation to geographical jurisdiction of offenses

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

Section 1. Subdivision 2 of section 20.40 of the criminal procedure law, as amended by chapter 681 of the laws of 1967, is amended by adding a new paragraph (f) to read as follows:

(f) there is a logical nexus between the conduct and such county, and no other county within

the state otherwise has jurisdiction pursuant to this section. Evidence of a logical nexus may include the place of residence of witnesses relevant to the prosecution or any other relevant fact that establishes good cause for such county to exercise geographical jurisdiction over the conduct.

§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 where the conduct constituting the offense occurred on or after such date.

25. Allegations of Previous Convictions Involving Certain Traffic Infractions (CPL 200.60)

The Committee recommends that the Criminal Procedure Law be amended to allow a prosecutor to file a special information after a court informs the parties that it will submit a lesser included offense of a traffic infraction. This change would only affect those cases where the defendant's prior convictions would raise the lesser included offense from an infraction to a misdemeanor.

The Vehicle and Traffic Law sets forth a graduated scheme of criminal penalties attendant to a conviction for driving while ability impaired [DWAI] (*see* VTL §1193(1)). First and second offenses are traffic infractions. A third offense within 10 years, however, elevates the offense to a misdemeanor and provides for significantly stiffer penalties, including up to 180 days in jail. Several courts have held that in order to sentence the defendant to the misdemeanor penalties, a prosecutor must file an appropriate accusatory instrument and prove, at trial, that the defendant had twice before been previously convicted of DWAI (*see People v. Greer*, 189 Misc.2d 310 [App Term, 2d Dept 2001]); *People v. Lazaar*, 3 Misc.3d 328 [Webster Just Ct 2004]); *People v. Jamison*, 170 Misc.2d 974 [Rochester City Ct 1996]).

When a defendant is initially accused of driving while intoxicated [DWI], however, the accusatory instrument does not allege the defendant's prior history of DWAI because those convictions are not relevant to a DWI charge. Where the proof at trial later provides a reasonable view that the defendant was impaired but not intoxicated, the court in its discretion may submit, and at the request of a party must submit, the lesser included offense of DWAI (*see* CPL 300.50; *People v. Hoag*, 51 NY2d 632 [1981]). If a defendant is then acquitted of DWI, but convicted of the lesser included offense of DWAI, there is currently no mechanism to elevate the traffic infraction to a misdemeanor on the basis of the defendant's prior driving record. This results in an undeserved windfall for defendants who have a history of impaired driving.

The following proposed legislation insures that the defendant's prior driving history is taken into account by providing the prosecutor with an opportunity to file a special information when a court agrees to submit a lesser included offense of a traffic infraction. The Committee believes that by utilizing a special information under CPL 200.60, an appropriate balance is struck between protecting the defendant from any prejudice that might result from the jury hearing evidence of the defendant's prior driving record, and giving the People an opportunity to prove the previous convictions before the lesser included offense is put before the jury.

<u>Proposal</u>

AN ACT to amend the criminal procedure law in relation to filing of a special information alleging previous convictions involving certain traffic offenses.

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

Section 1. Paragraph 4 of section 200.60 of the criminal procedure law is renumbered to paragraph 5, and a new paragraph 4 is added thereto to read as follows:

4. Where the court informs the parties that it will submit a lesser included offense that, solely because of the defendant's prior convictions, would raise the lesser offense from a traffic infraction to a misdemeanor, the people may thereafter file a special information pursuant to this section. If the defendant admits the previous conviction, that element of the offense shall be deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of the previous conviction were not an element of the offense. The court may not submit to the jury any lesser-included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof. If the defendant does not admit the previous conviction, the court must allow the people an opportunity to prove the previous conviction before the jury as a part of their case.

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law, and shall apply to all criminal actions whenever commenced.

26. Dismissal of Outstanding Traffic Infractions
(CPL 30.30)

The Committee recommends that the Criminal Procedure Law be amended to authorize a court to dismiss any traffic infraction that remains as the sole charge in an accusatory instrument whose other charges were dismissed pursuant to CPL 30.30.

Traffic infractions do not fall within the offenses for which CPL 30.30 provisions apply (*see People v. Gonzalez*, 168 Misc.2d 136 [App Term 1st Dept 1996]). As noted in the Commentary to CPL 30.30, speedy trial provisions do not apply to traffic infractions because CPL 30.30(1)(d) specifically applies to "offenses," and a traffic infraction is only a "petty offense."

In practice, especially in DWI cases, the prosecutor will often charge a defendant with misdemeanor or felony criminal charges (i.e., VTL 1192 (2)) as well as a lesser included traffic infraction (VTL 1192(1)). In cases where the prosecutor fails to timely announce readiness on the more serious charges, and the defense files a successful 30.30 motion, however, the court is authorized to dismiss the misdemeanor or felony counts but not the traffic infraction. Although constitutional speedy limitations will still apply (*see e.g., People v. Polite,* 16 Misc.3d 18 [App Term 1st Dept 2007], *citing People v. Taranovich,* 37 NY2d 442 [1975]), this generally permits a much greater period of delay. In the end, by not being able to dismiss the traffic infraction, the case continues to languish in the criminal courts, congesting dockets and rarely being resolved on the merits. To the extent that speedy trial rules promote fair and efficient practice, it would be helpful to grant courts the authority to dismiss traffic infractions at the same time the court is compelled to dismiss all other charges in the same accusatory instrument.

By this measure, the Committee does not recommend a general speedy trial rule for traffic infractions. Instead, this measure provides that where a traffic infraction is charged in the same accusatory instrument with other charges, at least one of which is a violation, misdemeanor or felony, any traffic infraction will not survive longer than the other, more serious, charges. Notably, this measure keeps in place the current procedures for routine traffic infractions not filed as part of more serious charges in an accusatory instrument.

Proposal

AN ACT to amend the criminal procedure law in relation to the speedy trial of certain traffic infractions.

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

Section 1. Subdivision 3 of section 30.30 of the criminal procedure law, as amended by

chapter 96 of the laws of 2006, is amended by adding a new paragraph (d) of subdivision 3, to read as follows:

(d) Where a motion to dismiss all offenses charged in an accusatory instrument must be granted pursuant to subdivision one of this section, and such accusatory instrument charges one or more traffic infractions, such traffic infraction or infractions shall also be dismissed.

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law, and shall apply to criminal actions commenced after that date.

27. Authorizing a 30-Day "Hardship Privilege" to Qualified Defendants (VTL §1193(2)(e)(7)(e))

The Committee recommends that the Vehicle and Traffic Law be amended to authorize a court to grant a hardship privilege to qualifying defendants to allow operation of a non-commercial vehicle in the course of employment for the interim period before a conditional license application can be entertained by the Commissioner of Motor Vehicles.

VTL §1193(2)(e)(7)(a) provides for the automatic license suspension at arraignment, "of any person charged with a violation of subdivision two, two-a, three or four-a of section eleven hundred ninety-two of this article who, at the time of arrest, is alleged to have had .08 of one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to subdivision two or three of section eleven hundred ninety-four of this article."

If a defendant, however, can establish that the automatic suspension will impose an "extreme hardship," the VTL permits a court to grant a "hardship privilege" (VTL §1193(2)(e)(7)(e)). The statute defines extreme hardship as "the inability to obtain alternative means of travel to or from the licensee's employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate.

Significantly, the statute "does not encompass within its definition inconvenience to the defendant or any consideration of whether the defendant is required, as a condition of employment, to operate vehicles as a properly licensed driver" (*People v. Correa*, 168 Misc 2d 309 [Crim Ct, NY County 1996], *see also People v. Henderson*, NYLJ, Oct. 24, 2006 at 24 col 3). In *Correa*, the defendant was a New York City firefighter who was required to maintain a valid driver's license for his employment, even though he did not drive any emergency vehicles during the work day. In *Henderson*, the defendant's employment duties required him to drive to and from various job sites on a daily basis. In both cases, the respective courts held that the statute did not authorize the court to grant a limited license for the defendant to drive while at work even though holding a valid license was necessary for their employment. In cases such as these defendants risk loss of their employment before their cases can be adjudicated.

The Commissioner of Motor Vehicles does have the power to issue a conditional license that allows a defendant to drive during work hours (*see* VTL §1196(a)(2)). But the Commissioner can only grant the conditional license after the defendant's license has been suspended for 30 days (*see* VTL §1193(2)(e)(7)(d)). The Committee believes that a court should have the authority to grant a hardship privilege in appropriate cases to allow a defendant to use a non-commercial vehicle where required for the defendant's employment. This measure does not allow the court to preempt the decision of the Commissioner of Motor Vehicles, but instead provides the court with the authority to bridge the gap until the defendant can apply to the Commissioner of Motor Vehicles for a conditional license. Significantly, the measure provides that the hardship privilege will terminate

when the defendant is able to apply for a conditional license from the Commissioner of Motor Vehicles.

Proposal

AN ACT to amend the vehicle and traffic law, in relation to automatic suspensions of a license

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

Section 1. Clause (e) of subparagraph (7) of paragraph (e) of subdivision 2 of section 1193 of the vehicle and traffic law, as added by chapter 47 of the laws of 1988, and amended by chapter 251 of the laws of 2007, is amended to read as follows:

e. If the court finds that the suspension imposed pursuant to this subparagraph will result in extreme hardship, the court must issue such suspension, but may grant a hardship privilege, which shall be issued on a form prescribed by the commissioner. For the purposes of this clause, “extreme hardship” shall mean the inability to obtain alternative means of travel to or from the licensee's employment, or necessary travel during the course of the licensee’s employment, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate. The burden of proving extreme hardship shall be on the licensee who may present material and relevant evidence. A finding of extreme hardship may not be based solely upon the testimony of the licensee. In no event shall arraignment be adjourned or otherwise delayed more than three business days

solely for the purpose of allowing the licensee to present evidence of extreme hardship. The court shall set forth upon the record, or otherwise set forth in writing, the factual basis for such finding. The hardship privilege shall permit the operation of a vehicle only for travel to or from the licensee's employment, or for necessary travel during the course of the licensee's employment for a period of no more than 30 days, or to or from necessary medical treatment for the licensee or a member of the licensee's household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee's school, college or university if such travel is necessary for the completion of the educational degree or certificate. A hardship privilege shall not be valid for the operation of a commercial motor vehicle.

§ 2. This act shall take effect 30 days after the date on which it shall have become law.

28. Clarifying the Dissemination Rules under the Sex Offender Registration Act (Correction Law §168-l(6)(a))

The Committee recommends that the Correction Law be amended to expressly clarify that the Sex Offender Registration Act [SORA] prohibits law enforcement agencies from releasing certain information about level one sex offenders to the general public over the internet.

Under SORA, the risk level assigned to the offender determines the breadth of dissemination of information regarding the offender to the public and law enforcement agencies. When the law was first enacted, a level one designation limited notification solely to law enforcement agencies; thus, no information was disseminated to the public. The law was modified in 2006, however, and now permits law enforcement to disseminate information regarding the offender "to any entity with vulnerable populations related to the nature of the offense committed by such sex offender" (Correction Law §168-l(6)(a)).

The law does not expressly define an "entity with vulnerable populations" but elsewhere in the statute the phrase is limited to "organizational entities." As provided in Correction Law §168-l:

> Such law enforcement agencies shall compile, maintain and update a listing of vulnerable organizational entities within its jurisdiction. Such listing shall be utilized for notification of such organizations in disseminating such information on level two sex offenders pursuant to this paragraph. Such listing shall include and not be limited to: superintendents of schools or chief school administrators, superintendents of parks, public and private libraries, public and private school bus transportation companies, day care centers, nursery schools, pre-schools, neighborhood watch groups, community centers, civic associations, nursing homes, victim's advocacy groups and places of worship (Correction Law §168-l(6)(b)).

It has been reported that some law enforcement agencies in New York State interpret the 2006 statute to permit dissemination of information to 'vulnerable populations" by posting information on a website open to the general public. The Department of Criminal Justice Services has not opposed this position. The Committee believes that this interpretation is plainly at odds with the statute and should be corrected. This measure provides necessary clarification in this area by tasking the Division of Criminal Justice Services with insuring that dissemination of relevant information is appropriately limited.

<u>Proposal</u>

AN ACT to amend the correction law, in relation to the Sex Offender Registration Act

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

Section 1. Paragraph (e) of subdivision 2 of section 168-b of the Correction Law, as added by chapter 192 of the laws of 1995, is amended to read as follows:

e. The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article, including, but not limited to, requiring that law enforcement agencies not release information about level one sex offenders to the general public over the internet as provided by paragraph a of subdivision six of one hundred sixty-eight-1 of this chapter.

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

29. Authority to Unseal Records in the Interest of Justice
(CPL 160.50; CPL 160.55)

The Committee recommends that the Criminal Procedure Law be amended to authorize a court to unseal records where justice requires it on notice both to the adverse party and the subject of the records.

In 2003, political demonstrators in New York City handcuffed themselves in a human chain across Fifth Avenue, creating a huge traffic disruption. The demonstrators were arrested and later found guilty after a jury trial of obstructing governmental administration in the second degree and disorderly conduct. In advance of the sentencing, the trial court asked the People to provide the prior criminal records of the defendants, and toward that end the prosecutor asked the court to unseal various records which contained information regarding the petitioner's previous political demonstration arrests. The records the court unsealed related to violation convictions and procedural dismissals; none were for acquittals or dismissals on the merits. The defendant's brought an Article 78 proceeding to challenge the court's unsealing order, and, on appeal from the Appellate Division, the Court of Appeals vacated the unsealing order (*see Katherine B. v. Cataldo,* 5 NY3d 196 [2005]). The Court held that CPL 160.50 was intended to serve as a broad sealing provision subject only to a few statutory exceptions. In a narrow and somewhat cramped reading of those exceptions, the Court found no provision which would allow a prosecutor access to sealed records after the commencement of a proceeding. The closest CPL Article 160 comes is in the provision for making sealed records available to "a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it" (CPL 160.50(1)(d)(ii); CPL 160.55(1)(d)(ii)). The Court, however, limited this exception to the unsealing of records for "investigatory purposes," and suggested that the "investigatory purposes" exception ceases upon commencement of the criminal proceeding. The Court thus limited prosecutorial access to sealed records after commencement to the "singular circumstance" where a defendant requests an ACD in low level marijuana cases (*Katherine B.,* 5 NY3d at 205; CPL 160.50(1)(d)(i)).

The Committee believes that *Katherine B.* has inappropriately narrowed the situations where the court may unseal records. There are numerous legitimate times when a court should have the authority to unseal a record in the interest of justice. However, recognizing that an *ex parte* application to unseal may lead to unwarranted unsealing orders, this measure provides that an unsealing order must be made on notice to both the adversary and the subject of the records. This will insure that the court is fully briefed on all the issues surrounding the application and will, in contested cases, provide a record that can be adequately reviewed by an appellate court.

Proposal

AN ACT to amend the criminal procedure law, in relation to unsealing criminal records

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

Section 1. Paragraph (d) of subdivision 1 of section 160.50 of the criminal procedure law, as amended by chapter 169 of the laws of 1994, is amended by adding a new subparagraph (vii) to read as follows:

(vii) a party in a criminal proceeding if, on notice to the adverse party and the subject of the records, the moving party demonstrates to the satisfaction of the court that justice requires that the records be made available to it in connection with the criminal proceeding; and

§ 2. Paragraph (d) of subdivision 1 of section 160.55 of the criminal procedure law, as amended by chapter 169 of the laws of 1994, is amended by adding a new subparagraph (vi) to read as follows:

(vi) a party in a criminal proceeding if, on notice to the adverse party and the subject of the records, the moving party demonstrates to the satisfaction of the court that justice requires that the records be made available to it in connection with the criminal proceeding; and

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

30. Amending the Drug Law Reform Act [DLRA]
(Penal Law §70.30(1)(e))

The Committee recommends that defendants who are sentenced to more than one indeterminate or determinate sentence, at least one of which is a Class A drug felony, be eligible for merging of the sentences under Penal Law §70.30.

The 2004 Drug Law Reform Act (L. 2004, ch. 738) is most notable for replacing life sentences for Class A felonies with determinate sentences. As with any major legislative reform, however, consequences often arise that may be unintended as the new statute is applied to defendants in real-world situations. The Committee has identified an issue that calls for corrective legislation.

The measure involves the technical rules in calculating sentences for defendants who have been sentenced to consecutive terms. Under current rules for calculating multiple sentences, consecutive terms are often merged by operation of law under Penal Law §70.30(1)(e). The aggregate maximum terms for consecutive crimes are added together and then, based on the seriousness of the crimes, if the aggregate maximum exceeds a certain level, the law automatically adjusts the maximum term to that level. This provision, however, is not triggered when one of the crimes is for a Class A felony. The reason for this exclusion is presumably because A felonies have always carried mandatory life sentences, and therefore no merger of sentences was deemed either necessary or warranted. Class A drug felonies, however, no longer carry a mandatory life term. Unfortunately, the DLRA did not address Penal Law §70.30(1)(e) when it abolished life sentences for Class A drug felonies. Thus, as it stands now, a person who has committed several violent crimes may be treated more harshly than one who has committed a similar number of drug felonies, at least one of which is a Class A felony. This measure removes that impediment.

Proposal

AN ACT to amend the penal law, in relation to a change in calculating sentences that involve a Class A drug offenses

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

Section 1. Subparagraph (i) of paragraph (e) 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:

(i) Except as provided in subparagraph (ii), (iii), (iv), (v), (vi) or (vii) of this paragraph, the

aggregate maximum term of consecutive sentences, all of which are indeterminate sentences or all of which are determinate sentences, imposed for two or more crimes, other than two or more crimes that include a Class A felony having a maximum term of life imprisonment, committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years. Where the aggregate maximum term of two or more indeterminate consecutive sentences is reduced by calculation made pursuant to this paragraph, the aggregate minimum period of imprisonment, if it exceeds one-half of the aggregate maximum term as so reduced, shall be deemed to be one-half of the aggregate maximum term as so reduced;

§ 2. Subparagraph (ii) of paragraph (e) 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:

(ii) Where the aggregate maximum term of two or more consecutive sentences, one or more of which is a determinate sentence and one or more of which is an indeterminate sentence, imposed for two or more crimes, other than two or more crimes that include a Class A felony having a maximum term of life imprisonment, committed prior to the time the person was imprisoned under any of such sentences, exceeds twenty years, and none of the sentences was imposed for a class B felony, the following rules shall apply:

(A) if the aggregate maximum term of the determinate sentence or sentences exceeds twenty years, the defendant shall be deemed to be serving a determinate sentence of twenty years.

(B) if the aggregate maximum term of the determinate sentence or sentences is less than twenty years, the defendant shall be deemed to be serving an indeterminate sentence the maximum

term of which shall be deemed to be twenty years. In such instances, the minimum sentence shall be deemed to be ten years or six-sevenths of the term or aggregate maximum term of the determinate sentence or sentences, whichever is greater.

§ 3. Subparagraph (iii) of paragraph (e) 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:

(iii) Where the aggregate maximum term of two or more consecutive sentences, one or more of which is a determinate sentence and one or more of which is an indeterminate sentence, imposed for two or more crimes, other than two or more crimes that include a Class A felony <u>having a maximum term of life imprisonment</u>, committed prior to the time the person was imprisoned under any of such sentences, exceeds thirty years, and one of the sentences was imposed for a class B felony, the following rules shall apply:

(A) if the aggregate maximum term of the determinate sentence or sentences exceeds thirty years, the defendant shall be deemed to be serving a determinate sentence of thirty years;

(B) if the aggregate maximum term of the determinate sentence or sentences is less than thirty years, the defendant shall be deemed to be serving an indeterminate sentence the maximum term of which shall be deemed to be thirty years. In such instances, the minimum sentence shall be deemed to be fifteen years or six-sevenths of the term or aggregate maximum term of the determinate sentence or sentences, whichever is greater.

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law, and shall apply to all sentences imposed on or after that date.

31. Codifying the Writ of *Coram Nobis*
(CPL 450.65)

The Committee recommends that the writ of *coram nobis* be codified in a new section 450.65 of the Criminal Procedure Law.

New York did not recognize a procedure to collaterally attack a judgment of conviction until 1943, when the Court of Appeals permitted such an attack by resurrecting the "ancient writ of *coram nobis*" (*see Lyons v. Goldstein*, 290 NY 19 [1943]). The writ, however, was of limited availability and applied only to judgments secured by fraud, duress or mistake, and where the court itself would have prevented entry of the judgment had it known the truth underlying the conviction.

In 1970, the Legislature provided defendants with a statutory basis to vacate a judgment of conviction when it enacted CPL Article 440 and, and by so doing, replaced "all aspects of the common law writs" covered by the statute (Peter Preiser Practice Commentaries, p 246). Thus, as of 1970, all writs to vacate a judgment of conviction, including the writ of *coram nobis*, disappeared from New York State's jurisprudence.

In *People v. Bachert*, (69 NY2d 593 [1987]), however, the Court of Appeals revived the writ, this time providing for its use when a defendant claimed ineffectiveness of appellate counsel. The *Bachert* Court held that the Legislature had never expressly abolished the writ of *coram nobis* when it enacted Article 440. Instead, it merely preempted the writ in those areas specifically covered by Article 440. The Court found that because ineffective assistance of appellate counsel is not among the eight grounds for vacating a judgment listed in CPL 440.10, a writ of *coram nobis* is an appropriate procedural mechanism for courts to use to allow for review of such a claim.

By once again resurrecting the writ, however, motions attacking the effectiveness of appellate counsel fall outside the modern procedural rules contained in Article 440. For instance, under CPL 440.10(1)(c), "the court may deny a motion to vacate a judgment when . . . [u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so." Without a similar limitation on writs of *coram nobis*, defendants routinely file successive writs attacking the effectiveness of their appellate counsel. Such successive writs rarely have merit, yet without a statute expressly limiting a defendant's successive use of the writ, a defendant may bring endless successive writs. For each of these successive writs, prosecutors are required to file reply briefs and courts are required to review the often frivolous substantive claims. The Committee believes this is a needless waste of valuable resources.

This measure would promote the appropriate use of ineffective assistance of counsel claims by limiting the motion to a single claim as a matter of right. Second or subsequent motions would still be permitted where the defendant first obtained leave of a judge of the intermediate appellate court on a showing of "good cause." The measure recognizes, however, the potential for injustice that could result if a defendant's initial pro se claim were denied and if the denial were used to

foreclose an attorney from subsequently raising the issue. This measure therefore allows an attorney to file an initial motion attacking the effectiveness of appellate counsel regardless of the prior pro se motions made by a defendant.

Proposal

AN ACT to amend the criminal procedure law, in relation to providing a statutory basis to vacate a judgment of conviction on the ground of ineffective assistance of appellate counsel

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 450.65 to read as follows:

§ 450.65 Motion to intermediate appellate court; effective assistance of appellate counsel.

1. At any time after the entry of an adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to section 450.10, 450.15, or 450.20, the defendant may move to set aside the order on the ground of ineffective assistance or wrongful deprivation of appellate counsel.

2. A motion made pursuant to subdivision one shall be made in the same intermediate appellate court that heard the appeal in which counsel was allegedly deficient.

3. A motion made pursuant to subdivision one is not authorized as of right where the ground or issue raised upon the motion was previously determined by the intermediate appellate court, provided, however, that the defendant may apply for a certificate granting permission to file a second or subsequent motion pursuant to subdivision one upon a showing of good cause, which shall include, but is not limited to, establishing that any previous motion made pursuant to subdivision one was made by a defendant acting pro se, and where the current application is made by counsel. A certificate granting permission to file a second or subsequent motion is an order of one judge or justice of the intermediate appellate court in which the previous motion was determined granting such permission and certifying that the case involves questions of law or fact which ought to be reviewed by the intermediate appellate court.

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

32. Amending the E-Stop Law
(Penal Law §65.10, Corrections Law §168-e)

The Committee recommends that the Penal Law and Executive Law be amended to provide discretion for the court and parole board to modify certain conditions of probation or parole for sex offenders.

In 2008, the Legislature enacted the “electronic security and targeting of online predators act,” commonly referred to as the E-Stop law (L.2008, c. 67). It requires all sex offenders to provide the Division of Criminal Justice Services with internet service account information and internet "identifiers," such as e-mail addresses and instant messaging names. The laudable purpose of the law is to empower social networking sites such as Facebook and MySpace to purge sex offenders from registered user lists, and effectively ban sex offenders from accessing these websites.

The E-Stop law also bars defendants over the age of 18 who have been convicted of an offense against a minor, as well as all Level 3 sex offenders regardless of the victim's age, from "using the internet" to communicate with a person under the age of 18. The restriction must be imposed as a mandatory condition of probation, parole or post-release supervision. The only exception allowed is for parents of minor children who are not otherwise prohibited from communicating with their children.

The Committee believes that the single exception provided under the current law does not provide sufficient flexibility to courts and parole boards in appropriate cases. At least as applied to minors who were not victimized by the defendant, and who are not thought to be at risk, the total ban on internet communication appears to be overbroad. For instance, in the case of an 18 year-old convicted of misdemeanor sexual misconduct involving a 16 year-old classmate, the defendant could share a bedroom with his 17 year-old brother in the family home, but would be prohibited from e-mailing him under the E-Stop Law.

Banning sex offenders from using the internet to communicate with minors for the purpose of victimizing them is a praiseworthy goal. But by not providing any method for an individual to show that the statute is being used in a manner inconsistent with its intended purpose, it creates unreasonable barriers to otherwise appropriate conduct. This measure restores limited discretion to judges and parole boards to allow internet conduct with specified individual minors.

Proposal

AN ACT to amend the penal law and the executive law, in relation to conditions of probation and parole for certain sex offenders

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

Section 1. Paragraph (b) of subdivision 4-a of section 65.10 of the penal law, as amended by chapter 67 of the laws of 2008, is amended to read as follows:

(b) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense for which registration as a sex offender is required pursuant to subdivision two or three of section one hundred sixty-eight-a of the correction law, and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law or the internet was used to facilitate the commission of the crime, the court shall require, as mandatory conditions of such sentence, that such sentenced offender be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the court may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child or when the court, in its discretion, expressly permits communication with a person under the age of 18 after considering the stated position, if any, of the parents or guardians of such minor. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender. As used in this subdivision, a "commercial social networking website" shall mean any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web

pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

§ 2. Subdivision 15 of section 259-c of the executive law, as amended by chapter 67 of the laws of 2008, is amended to read as follows:

15. Notwithstanding any other provision of law to the contrary, where a person is serving a sentence for an offense for which registration as a sex offender is required pursuant to subdivision two or three of section one hundred sixty-eight-a of the correction law, and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law or the internet was used to facilitate the commission of the crime, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as mandatory conditions of such release, that such sentenced offender shall be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the board may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with

such child or when the board, in its discretion, expressly permits communication with a person under the age of 18 after considering the stated position, if any, of the parents or guardians of such minor. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender. As used in this subdivision, a "commercial social networking website" shall mean any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

§3. This act shall take effect 30 days after it shall have become law.

33. Examination Orders for Misdemeanor Cases
(CPL 170.10, 530.20, 530.40)

The Committee recommends that the Criminal Procedure Law be amended to authorize a court to commit a defendant to the custody of the sheriff in connection with an order of examination to determine whether the defendant is an “incapacitated person” as defined in CPL 730.10(1).

Currently, the Criminal Procedure Law provides that the court must order recognizance or bail when a defendant is charged with a pending misdemeanor (CPL 530.20(1), CPL 530.40(1), *see also* CPL 170.10 [7]). The only statutory exception authorizing a defendant to be committed to the custody of the sheriff on a pending misdemeanor charge is when the defendant has been found, after a hearing, to have violated a family-offense order of protection under CPL 530.12(11), or where the defendant has been convicted of the misdemeanor charge and is awaiting sentence (CPL 530.45 (1)). Even where bail or recognizance is revoked because a defendant fails to return to court, there is no authority to remand the defendant. In such cases, the court is only permitted to issue another order of bail or recognizance (CPL 530.60(1)).

Unique circumstances are often present when it appears that a defendant may be an “incapacitated person” under Article 730. As a practical matter, defendants subject to an examination order and who are released on bail or recognizance are often reluctant to voluntarily submit to an order of examination. In many cases, defendants are content to return to court as required but will refuse to submit to the examination. Cases therefore languish without resolution of a critical threshold legal issue. Confronted with this problem, courts must either remand the defendant in direct contravention of Article 530 or set unreasonably high bail to insure that the defendant will be appropriately examined. Either choice presents difficult ethical issues for the court.

Although the Court of Appeals has yet to find judicial misconduct premised on a court's having jailed a defendant for purposes of conducting an order of examination, it has, in dicta, suggested that it may be misconduct (*see Matter of LaBelle* (79 NY2d 350, 360-361 [1992]). This is an unsettled area of law because CPL 730.20(2) provides, in apparent conflict with CPL 530.20(1) that a court may direct “hospital confinement of the defendant” if the director of a state hospital informs the court that confinement is necessary for an effective examination. No case has yet to examined the precise contours of the conflict between Articles 530 and 730 on this issue, and the Court in *LaBelle* declined to resolve the issue, preferring to "await a proper case and the proper parties" (79 NY2d at 361).

The current law therefore puts judges in a difficult position when confronted with a misdemeanant who needs to be examined to determine whether the defendant is fit to proceed. This measure resolves that dilemma by allowing a judge to commit a defendant charged with a misdemeanor for a period of 14 days and, on good cause shown, an additional 14 days in connection with an order of examination. The Committee believes that the measure strikes the appropriate balance between the court’s interest in prompt orders of examination and a misdemeanor defendant’s liberty interest.

Proposal

AN ACT to amend the criminal procedure law, in relation to committing a defendant to the custody of the sheriff for purposes of conducting an order of examination pursuant to CPL Article 730

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

Section 1. Subdivision 1 of section 530.20 of the criminal procedure law, as amended by chapter 996 of the laws of 1970, is amended to read as follows:

1. When the defendant is charged, by information, simplified information, prosecutor's information or misdemeanor complaint, with an offense or offenses of less than felony grade only, the court must order recognizance or bail. Provided, however, when in the course of a proceeding the court issues an order of examination pursuant to article 730 of this chapter, the court may order that a defendant charged with a misdemeanor be committed to the custody of the sheriff for a period not to exceed fourteen days for the purpose of conducting the examination. If, at the end of fourteen days, good cause has been shown to extend the order, the court may extend the order an additional fourteen days. Where a court subsequently finds that the defendant is not an incapacitated person pursuant to section 730.30 of this chapter, it shall issue a securing order as provided in section 170.10 of this chapter.

§2. Subdivision 1 of section 530.40 of the criminal procedure law, as amended by chapter 996 of the laws of 1970, is amended to read as follows:

1. When the defendant is charged with an offense or offenses of less than felony grade only, the court must order recognizance or bail. Provided, however, when in the course of a proceeding

the court issues an order of examination pursuant to article 730 of this chapter, the court may order that a defendant charged with a misdemeanor be committed to the custody of the sheriff for a period not to exceed fourteen days for the purpose of conducting the examination. If, at the end of fourteen days, good cause has been shown to extend the order, the court may extend the order an additional fourteen days. Where a court subsequently finds that the defendant is not an incapacitated person pursuant to section 730.30 of this chapter, it shall issue a securing order as provided in section 210.15 of this chapter.

§3. Subdivision 7 of section 170.10 of the criminal procedure law, as amended by chapter 996 of the laws of 1970, is amended to read as follows:

7. Upon the arraignment, the court, unless it intends to make a final disposition of the action immediately thereafter, must, as provided in subdivision one of section 530.20, issue a securing order either releasing the defendant on his or her own recognizance or fixing bail for his or her future appearance in the action or committing him or her to the custody of the sheriff in connection with an order determining whether the defendant is an incapacitated person; except that where a defendant appears by counsel pursuant to paragraph (b) of subdivision one of this section, the court must release the defendant on his or her own recognizance.

§4. This act shall take effect 30 days after it shall have become law.

34. Jury Trials on Cases Consolidated for Trial
(CPL 340.40)

The Committee recommends that section 340.40(3) of the Criminal Procedure Law be amended to require that when a defendant is tried on consolidated charges, at least one of which entitles the defendant to a jury trial, all charges must be conducted before the jury unless the defendant waives a jury as to those charges.

Under New York law, a defendant has a right to a jury trial for all cases charged by indictment. Outside New York City, the defendant also has a right to a jury trial for all misdemeanors charged by information, and within New York City for class A misdemeanors charged by information. For informations that charge an offense of lesser grade than a misdemeanor, there is no right to a jury trial anywhere in the state.

Recently, the Court of Appeals addressed a defendant's right to a jury trial in the context of separate accusatory instruments that were tried in a single trial (*People v. Almeter*, 12 NY3d 591 [2009]). In *Almeter*, the defendant was charged in two accusatory instruments, one containing a single misdemeanor for which the defendant had a right to a jury trial and the other a single violation for which no such right existed. The trial court presided over a joint trial for both charges, but then, over a defense objection, bifurcated the deliberations by submitting only the misdemeanor charge to the jury and reserving the violation charge to itself. The jury acquitted on the misdemeanor charge and the trial court convicted on the violation. In reversing the conviction, the Court held that the trial court improperly delayed informing the defendant that it would be the trier of fact on the violation until both sides had rested. The Court declined to rule, however, on this issue of whether the bifurcated fact finding was acceptable on the basis of two separate accusatory instruments.

CPL section 340.40(3) addresses the issue but is not a model of clarity. It provides that if a single accusatory instrument contains two charges, one which entitles a defendant to a jury trial and another which does not, the entire case goes before the jury, and the defendant may not demand a separate jury and bench trial. But the provision does not expressly apply to cases where separate accusatory instruments are tried in a single proceeding.

This measure provides that where a consolidated trial is to be held before a jury, the jury should consider all separately submitted charges, regardless of whether those charges carry an independent right to a jury trial. The Committee believes that there is little substantive or procedural benefit in having two fact-finders at a single trial simply because one of the charges does not provide a right to a jury trial.

Proposal

AN ACT to amend the criminal procedure law, in relation to a defendant's right to a trial of consolidated charges before a jury

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

Section 1. Subdivision 3 of section 340.40 of the criminal procedure law, as amended by chapter 996 of the laws of 1970, is amended to read as follows:

3. A defendant entitled to a jury trial pursuant to subdivision two, shall be so entitled even though the information also charges an offense for which he or her is otherwise not entitled to a jury trial. In such case, the defendant is not entitled both to a jury trial and a separate single judge trial and the court may not order separate trials. Where two or more accusatory instruments are consolidated for trial, at least one of which entitles the defendant to a jury trial, the trial on all charges shall be before the jury, unless the defendant agrees to waive a jury in the manner prescribed in subdivision two of section 320.10.

§2. This act shall take effect immediately and shall apply to all actions in which trials are commenced on or after the effective date of this act.

35. Revising the Powers of Judicial Hearing Officers
(CPL 120.10, 380.10, 380.20)

The Committee recommends that section 350.20 of the criminal procedure law be amended to permit a judicial hearing officer (JHO) to preside over additional limited proceedings.

Under current law, a JHO may conduct trials of violations and, with a defendant's consent, class B and unclassified misdemeanors (*see* CPL 350.20). Moreover, where a JHO conducts a trial under CPL 350.20, a JHO has the authority to handle motions from verdict to sentencing (CPL 370.10) and to sentence the defendant (CPL 380.10). The Committee believes it would ease the congestion of many local criminal courts if a JHO had the power, with the consent of the defendant, to preside over sentences on negotiated pleas. This would result in one less court appearance by the defendant in a busy court part and significantly reduce the workload of the clerks in those parts. The measure is therefore consistent with the original purpose of the JHO program, which was to utilize the services of retired judges in order to alleviate backlog and delay and "as a direct aid to Judges, freeing the Judges to conduct more trials" (*People v. Scalza*, 76 NY2d 604, 608 [1990]).

Additionally, this measure would authorize a JHO to handle, again with the consent of the defendant, violations of a sentence of conditional discharge. Under current practice, a defendant who is in apparent violation of a sentence of conditional discharge, must return to court on numerous occasions to litigate the issue of the violation or to have the court monitor the defendant's progress while the violation is pending. The process of returning to court and waiting for a case to be called can pose serious hardship on defendants and clogs busy court parts. This measure would benefit the courts, the defendant and the People by providing for more timely adjudication of those violations.

Finally, the Committee also recommends that a JHO be provided the authority to issue and vacate bench warrants in the summons part of the Criminal Court of the City of New York. Although JHO's routinely preside over the summons part, when a defendant fails to appear on a case, the matter must be transferred to a judge of the criminal court for issuance of the warrant. This is done in a wholesale fashion at the end of the court day and necessarily involves delay and difficulty in retracting the warrant if the defendant should appear in court shortly after the warrant is issued. Further, if a defendant is involuntarily returned to the summons part on the bench warrant, the defendant must be held while the matter is again be transferred for a Criminal Court judge to vacate the warrant. This often entails lengthy delay that could be avoided by the simple expedient of allowing the JHO to handle the warrant.

Proposal

AN ACT to amend the criminal procedure law, in relation to the authority of judicial hearing officers

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

follows:

Section 1. Section 120.10 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. For purposes of this article, where a judge of a local criminal court is authorized to issue a warrant of arrest, a judicial hearing officer designated to serve in such court may also issue such a warrant, and vacate it where necessary, provided the judicial hearing officer is presiding in the summons part of the criminal court of the city of New York and the warrant is for a defendant's arrest pursuant to section 150.60 or 530.60 of this chapter.

§2. Subdivision 1 of section 380.10 of the criminal procedure law, as amended by chapter 840 of the laws of 1983, is amended to read as follows:

1. In general. The procedure prescribed by this title applies to sentencing for every offense, whether defined within or outside of the penal law; provided, however, where a judicial hearing officer has conducted the trial pursuant to section 350.20 of this chapter, or where a judicial hearing officer is otherwise authorized to pronounce sentence in a case pursuant to this article, all references to a court herein shall be deemed references to such judicial hearing officer.

§3. Section 380.20 of the criminal procedure law is amended to read as follows:

§380.20. Sentence required. 1. The court must pronounce sentence in every case where a conviction is entered. If an accusatory instrument contains multiple counts and a conviction is entered on more than one count the court must pronounce sentence on each count.

2. For purposes of this section, where the court is a local criminal court, a judicial hearing officer designated to such court may pronounce sentence for the court, provided the sentence is in connection with a previously entered plea of guilty or in connection with a violation of a conditional

discharge previously imposed pursuant to section 65.05 of the penal law.

§4. This act shall take effect immediately.

36. Amending the Sex Offender Registration Act as it Relates to Out-of-State Offenders (Corrections Law §168-a)

The Committee recommends that section 168-a of the Corrections Law be amended to correct an apparent error in the definition of a "sexually violent offender" as it pertains to out-of-state offenders who establish residence in this state.

Correction Law section 168-a (1) defines a "sex offender" to include a person convicted of either a "sex offense" or a "sexually violent offense" as those terms are defined in §168-a (2) and (3) respectively. An offender who has committed a "violent sex offense," however, is treated more harshly than the one who commits only a "sex offense." A "sexually violent offender," for instance, must register annually for life regardless of the risk level ascribed and is never eligible to be relieved from the duty to register (Corrections Law §168-h (2)).

For offenders who have been convicted of crimes within New York, determining whether an offender has committed a "sex offense" or a "violent sex offense" involves a straightforward reference to the Penal Law section the offender was convicted of violating. As applied to out-of-state offenders, however, the statute provides that a "sex offense" includes a conviction for "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred" (Corrections Law §168-a (2)(d)(ii)). A "sexually violent offense" is defined, in part, as an offense in any other jurisdiction which includes all of the essential elements of any such felony provided for in paragraph (a) of this subdivision . . ." If the definition ended there the treatment of in state and out-of-state offenders would be consistent because paragraph (a) of the subdivision simply enumerates the Penal Law offenses which are denominated violent for purposes of the statute. The definition of a "sexually violent offense" continues, however, as follows:

> or a felony in any other jurisdiction for which the offender is required to register as a sex offender in which the conviction occurred" (Correction Law §168 (3)(b) *emphasis supplied*).

The final phrase of the definition is therefore identical to the definition of a "sex offense," and therefore collapses the distinction between violent and non-violent sex offenses, at least as it applies to out-of-state offenders who reside in New York.

The Committee believes that the likely intention was to reserve the more serious "sexually violent offense" category to out-of-state convictions under statutes that match the elements of sexually violent felonies under New York law, and that situation is covered by the first part of Correction Law section 168 (3)(b). The second part of the sentence, which tracks the language of section 168-a 2(d)(ii), was presumably included in error. This measure therefore corrects that error by deleting the errant phrase.

Proposal

AN ACT to amend the corrections law, in relation to the definition of a "sexually violent offender" as applied to out-of-state offenders

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

Section 1. Paragraph (b) of subdivision 3 of section 168-a of the corrections law, as amended by chapter 11 of the laws of 2002, is amended to read as follows:

(b) a conviction of an offense in any other jurisdiction which includes all of the essential elements of any such felony provided for in paragraph (a) of this subdivision [or conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred].

§3. This act shall take effect immediately.

37. Amending the "Safe Schools Against Violence in Education Act" (CPL 380.90, 720.35(3))

The Committee recommends that sections 380.90 and 720.35 of the Criminal Procedure Law be amended to clarify that the mandatory school notification provisions of the "Safe Schools Against Violence in Education Act" applies only to cases where the student is sentenced to a period of incarceration that will interfere with the student's school attendance.

In 2000, the Legislature enacted the "Safe Schools Against Violence in Education Act" (L. 2000, c. 181). As part of the Act, the Legislature amended both CPL 720.35 and 380.90 to provide for automatic notification "to the designated educational official of the school in which such person in enrolled as a student" whenever a student under the age of nineteen is convicted of a crime or is the subject of a youthful offender adjudication. The purpose of the legislation was to insure increased coordination between the criminal justice system and the school that a defendant attends.

The unambiguous language of both statutes provides that the court must notify the school in all cases regardless of the sentence the student receives. The Legislature, however, may have intended a more narrow reach by wanting to limit mandatory notification only to cases where the court's sentence included a period of incarceration that would force the student to be absent from school. The Family Court Act explicitly provides that mandatory reporting to schools only occurs when the student is placed away from his or her home. Although no such explicit language can be found in the Criminal Procedure Law, the practice commentary to CPL 380.20 provides that "[a]lthough the provision lacks clarity with respect to whether it is limited to cases where the youngster is sentenced to incarceration or includes those who were held in detention before conviction and then released upon sentencing, it apparently only applies where the student is sentenced to incarceration." A similar note is found in connection with the practice commentary to CPL 735.20: "While new subdivision three, read literally, appears to require notification for all Youthful Offender adjudications of students enrolled in public and private schools, when read in conjunction with CPL §380.90 and the Family Court Act the intended construction seems limited to cases where the youth has been removed from the home and placed elsewhere."

Notwithstanding the opinion of the practice commentary, settled rules of statutory construction provide that while courts are obliged to interpret a statute to effectuate the intent of the Legislature, "when the statute "is clear and unambiguous, it should be construed so as to give effect to the plain meaning of its words" (People ex rel. Harris v. Sullivan, 74 NY2d 305, 309 (1989)). Nor are courts permitted to legislate under the guise of judicial interpretation (People v. Finnegan, 85 NY2d 53, 58 (1995)). Thus, even though the Legislature might have intended mandatory notification only in cases in which the student is incarcerated, the absence of explicit direction in the statutes has generated inconsistent application of the notification requirements of sections 720.35 and 380.90.

This measure would promote a consistent application of the statutes by expressly limiting mandatory notification to instances where the defendant is unable to regularly attend school because the court has imposed a period of incarceration.

Proposal

AN ACT to amend the criminal procedure law, in relation to the Safe Schools Against Violence in Education Act.

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

Section 1. Subdivision 2 of section 380.90 of the criminal procedure law, as added by chapter 181 of the laws of 2000, is amended as follows:

2. Whenever a person under the age of nineteen who is enrolled as a student in a public or private elementary or secondary school is sentenced for a crime, the court that has sentenced such person shall provide notification of the conviction and sentence to the designated educational official of the school in which such person is enrolled as a student in any case where the court sentences such person to a term of incarceration that will prevent the person from continuously attending school. Such notification shall be used by the designated educational official only for purposes related to the execution of the student's educational plan, where applicable, successful school adjustment and reentry into the community. Such notification shall be kept separate and apart from such student's school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student's permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision.

§ 2. Subdivision 3 of section 720.35 of the Criminal Procedure Law, as added by chapter 181 of the laws of 2000, is amended as follows:

3. If a youth who has been adjudicated a youthful offender is enrolled as a student in a public or private elementary or secondary school the court that has adjudicated the youth as a youthful offender shall provide notification of such adjudication to the designated educational official of the school in which such youth is enrolled as a student in any case where the court sentences the youth to a term of incarceration that will prevent the youth from continuously attending school. Such notification shall be used by the designated educational official only for purposes related to the execution of the student's educational plan, where applicable, successful school adjustment and reentry into the community. Such notification shall be kept separate and apart from such student's school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student's permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision.

§3. This act shall take effect 90 days after it shall have become law and shall apply to any sentence imposed on or after the effective date of this act.

38. Orders of protection in youthful offender cases
(CPL 720.35(2))

The Committee recommends that section 720.35 of the Criminal Procedure Law be amended to insure that a final order of protection issued in connection with a youthful offender adjudication is not sealed for law enforcement purposes.

When a defendant is adjudicated a youthful offender, CPL 720.35(2) provides that "all official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case . . . are confidential and may not be made available to any person or public or private agency . . ." In 1996, the legislature provided a limited exception to this confidentiality provision as follows:

> ". . . provided, however, that information regarding an order of protection or temporary order of protection issued pursuant to section 530.12 of this chapter or a warrant issued in connection therewith may be maintained on the statewide automated order of protection and warrant registry established pursuant to section two hundred twenty-one-a of the executive law during the period that such order of protection or temporary order of protection is in full force and effect or during which such warrant may be executed. Such confidential information may be made available pursuant to law only for purposes of adjudicating or enforcing such order of protection or temporary order of protection. "

By expressly excepting from the confidentiality provisions only those orders of protection issued pursuant to 530.12, all orders of protection issued outside the limited exception (i.e., orders of protection issued under CPL 530.13) are still required to be kept confidential. This results in the sealing of the order of protection itself, even while the order of protection is in effect. Consequently, a final order of protection issued against a youthful offender in a non-family context is difficult to execute, and the present law could frustrate the very purpose of the order; namely, to protect the safety and welfare of the person for whom it is issued.

This measure maintains the general rule that records regarding a youthful offender adjudication should remain confidential in most instances. Notably, the measure does not broaden dissemination of any information to the public regarding the youthful offender adjudication. Disclosure is permitted only to the extent that, if applicable, the order of protection may be maintained on the statewide registry of orders of protection and may only be disclosed for the purposes of adjudicating or enforcing the order. Thus, the measure appropriately balances the salutary effect of keeping records of youthful offenders confidential with the legitimate safety concerns of those for whom the order is issued.

Proposal

AN ACT to amend the criminal procedure law, in relation to orders of protection in youthful offender cases

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

Section 1. Subdivision 2 of section 720.35 of the criminal procedure law, as amended by chapter 217 of the laws of 1996, is amended to read as follows:

2. Except 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 the division of criminal justice services, 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, other than the designated educational official of the public or private elementary or secondary school in which the youth is enrolled as a student provided that such local educational official shall only have made available a notice of such adjudication and shall not have access to any other official records and papers, such youth or such youth's designated agent (but only where the official records and papers sought are on file with a court and request therefor is made to that court or to a clerk thereof), an institution to which such youth has been committed, the division of parole and a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law; provided, however, that information regarding an order of protection or temporary order of protection issued pursuant to section 530.12 or 530.13 of this chapter or a warrant issued in connection therewith may be maintained on the statewide automated order of protection and warrant registry established pursuant to section two hundred twenty-one-a of the executive law during the period that such order of protection or temporary order of protection is in full force and effect or during which such warrant may be

executed. Such confidential information may be made available pursuant to law only for purposes of adjudicating or enforcing such order of protection or temporary order of protection and, where provided to a designated educational official, as defined in section 380.90 of this chapter, for purposes related to the execution of the student's educational plan, where applicable, successful school adjustment and reentry into the community. Such notification shall be kept separate and apart from such student's school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student's permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision.

§2. This act shall take effect immediately.

39. Codifying the agency defense for drug offenses (Penal Law §40.20)

The Committee recommends that the defense of agency be codified in the Penal Law. It further recommends that the Legislature counter the result in People v. Davis, (14 NY3d 446 (2009)) by authorizing a court to submit a charge of criminal possession of a controlled substance in the seventh degree where a defendant interposes an agency defense to the charge of having sold a controlled substance and where there is a reasonable view of the evidence that the defendant possessed the controlled substance allegedly sold.

The agency defense has long provided that a person who acts solely as an agent of the buyer in a narcotics transaction cannot be convicted of the crime of selling narcotics or of possessing them with intent to sell (People v. Lam Lek Chong, 45 NY2d 64 (1978))[1]. It is not a complete defense. Agency furnishes no defense to the charge of mere possession of a controlled substance. People v. Ortiz, 76 NY2d 446 (1990). This is so because the agency defense only negates the element of sale or intent to sell. When a person acts solely for the benefit of the buyer of narcotics in a transaction, the Court of Appeals has held that the person is simply an agent transferring to the recipient that which the recipient in effect already owns or is entitled to and thus the agent neither makes nor intends to make a sale, exchange, gift or disposal of narcotics to the recipient. People v. Sierra, 75 NY2d 56 (1978). The defense is not meant to relieve the agent of all responsibility; the Penal Law is directed primarily at sellers instead of purchasers and generally imposes more severe penalties on the seller than upon the buyer in a drug transaction. People v. Ortiz, 76 NY2d 446; see also People v. Feldman, 50 NY2d 500 (1990). The agency defense has the virtue of being consistent with the statutory framework because it requires the one who acts as the agent of the buyer incur criminal liability that is no greater than that of the buyer. Id.

In Davis, the Court of Appeals reaffirmed the rationale of the agency defense, but nonetheless limited its scope. It held that because it is possible to sell drugs without concomitantly possessing them, criminal possession of a controlled substance in the seventh degree is not a lesser included offense of criminal sale of a controlled substance. Prior to Davis, however, it was common practice in many courts throughout the state to submit a charge of criminal possession of a controlled substance in the seventh degree to a jury whenever the defendant put the issue of agency into the case. This practice provided a fair opportunity for the jury to hold a defendant accountable for the criminal conduct the defendant normally concedes by interposing an agency defense; namely, the criminal conduct of the buyer. Following Davis, juries will rarely be given the opportunity to decide whether the defendant who presents an agency defense is guilty of a sale or, if the defense is accepted, possession of the narcotics. Instead, the jury must decide between convicting the defendant of the sale count, or acquitting completely of the charge associated with that count. As the dissent in Davis noted, this circumstance has the effect of undermining the agency defense. The jury will be asked to weigh the testimony that the defendant was an agent of the buyer without having the ability to convict the defendant of the charge the defendant either tacitly or explicitly

[1] The defense applies equally to the charges of selling marihuana found in P.L. §§ 221.35 to 221.55.

admitted. The jury is likely to either give less credence to the agency testimony or to convict of the charge submitted because the jury does not wish to see a culpable defendant set completely free.

Both the prosecution and defense have an interest in seeing that a defendant's culpability is properly determined in cases involving the agency defense. This measure codifies the agency defense as an affirmative defense and permits the submission of criminal possession of a controlled substance whenever the defendant puts the defense in issue and there is a reasonable view of the evidence to support it. The measure also provides alternative provisions depending upon the drug sold. When the transaction involves the sale of a controlled substance, the appropriate lesser charge will be criminal possession of a controlled substance in the seventh degree. However, when the sale involves marihuana, the interests of justice may vary and the appropriate possession charge will turn on whether there is a reasonable view of the evidence supporting that lesser charge. The statute thus provides the court with the traditional discretion to submit the possession charge that most closely corresponds with the facts adduced at trial. Finally, the proposal recognizes that the prosecution or the defense may wish to avoid the circumstance in which the jury is presented with an all or nothing choice concerning the agency defense and it gives each of them the right to request that the lesser charge go to the jury. It requires, however, that the election be made before the deliberation begins so that the parties are not able to engage in gamesmanship that would permit them to abandon a strategy based on developments during a jury's deliberation.

Proposal

AN ACT to amend the penal law, in relation to the law of agency

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 40.20 to read as follows:

§ 40.20 Agency.

1. A person who acts solely as an agent of the buyer in a sale of a controlled substance cannot be convicted of the crime of selling that controlled substance or of possessing it with intent to sell.

2. Notwithstanding anything to the contrary in section 300.40(3) or 300.40(6) of the criminal procedure law, when the defendant places in issue at trial that he or she lacks culpability for selling, or possessing with intent to sell, a controlled substance, and there is a reasonable view of

the evidence to support the claim, as provided for in the preceding paragraph, that the defendant, when he or she possessed the controlled substance sold, was acting solely as an agent of the buyer:

(a) the defendant is entitled, upon request, to have the jury consider the crime of criminal possession of a controlled substance in the seventh degree during its deliberation. If the defendant fails to request such a charge before the jury retires to begin its deliberation, the right to have the jury consider it is waived and any resulting conviction may not thereafter be challenged on the ground the jury did not consider criminal possession of a controlled substance in the seventh degree.

(b) the prosecutor is entitled, upon request, to have the jury consider the crime of criminal possession of a controlled substance in the seventh degree. If the prosecutor fails to make a request before the jury retires to deliberate, the right to have the jury consider the seventh-degree possession charge is waived.

(c) when the court submits criminal possession of a controlled substance in the seventh degree pursuant to this section, the offense shall be considered a lesser included offense with regard to the greater offense under which it is charged.

3. A person who acts solely as an agent of the buyer in the sale of marihuana cannot be convicted of the crime of selling that marijuana.

4. Notwithstanding anything to the contrary in section 300.40(3) or 300.40(6) of the criminal procedure law, when the defendant places in issue at trial that he or she lacks culpability for selling, or possessing with intent to sell, marijuana and there is a reasonable view of the evidence to support the claim, as provided in the preceding paragraph, that the defendant, when he or she possessed the marijuana sold, was acting solely as an agent of the buyer:

(a) the defendant is entitled, upon request, to have the jury consider the appropriate lesser offense of criminal possession of marihuana as defined by section 221.10, 221.15, 221.20 or 221.25 of this chapter during its deliberation. The trial court shall in its discretion submit the most appropriate classification of the marihuana charge based upon a reasonable view of the evidence admitted during the trial. If the defendant fails to request a marihuana possession charge before the jury retires to begin its deliberation, the right to have the jury consider it is waived and any resulting conviction may not thereafter be challenged on the ground the jury did not consider such a charge.

(b) the prosecutor is entitled, upon request, to have the jury consider the appropriate lesser offense of criminal possession of marihuana as defined by section 221.10, 221.15, 221.20 or 221.25 of this chapter during its deliberation. The trial court shall in its discretion submit the most appropriate classification of the marihuana charge based upon a reasonable view of the evidence admitted during the trial. If the prosecutor fails to make a request before the jury retires to deliberate, the right to have the jury consider the seventh-degree possession charge is waived.

(c) when the court submits criminal possession of marijuana pursuant to this section, the offense shall be considered a lesser included offense with regard to the greater offense under which it is charged.

§2. This act shall take effect 30 days after it shall have become law and shall apply to all pending trials where jury deliberations have not yet commenced.

40. Adjournments in Contemplation of Dismissal
(CPL 170.55)

The Committee recommends that section 170.55 of the of the Criminal Procedure Law be amended to provide courts with greater flexibility to set appropriate conditions when granting an adjournment in contemplation of dismissal.

Currently, when granting an adjournment in contemplation of dismissal, the law allows a court to impose conditions in only a few limited circumstances. For instance, the court may impose conditions as part of a temporary order of protection (CPL 170.55 [3]), and in connection with a family offense involving domestic violence, the court may require that a defendant participate in an educational program addressing the issues of spousal abuse and family violence (CPL 170.55(4)). For non-family offenses the court is authorized to require a defendant to participate in dispute resolution (CPL 170.55(5)), perform certain types of community service (CPL 170.55(6)) or attend an alcohol awareness program if the defendant is under the age of twenty-one (CPL 170.55(7)). Unfortunately, for cases that do not fall within one of these enumerated circumstances, or for defendants who are not good candidates for the specific programs set forth in the statute, the court is powerless to craft more appropriate conditions.

The Committee believes it is appropriate to provide the court and the parties greater leeway to fashion appropriate conditions when granting an adjournment in contemplation of dismissal. This measure will give defendants a better chance of earning a complete dismissal and sealing of the charges, while at the same time promoting public safety and a reduced risk of re-offense. Programs addressing issues of substance abuse, HIV and AIDS awareness, or shoplifting are often used in connection with sentences of probation or conditional discharge, and it is appropriate to use such programs in the context of an adjournment in contemplation of dismissal. The Committee sees little benefit in restricting anger management or violence prevention programs to family offenses when they may be equally or more appropriate in non-family offenses. Similarly, alcohol awareness and treatment programs may be as appropriate for defendants who are over twenty-one as those who are underage. This measure would allow courts, with the consent of the parties, to order a defendant to participate in an educational program, treatment program or other program reasonably related to the defendant's rehabilitation. The proposal expressly provides that any condition may not be imposed in excess of the length of the adjournment (CPL 170.55(2)).

The measure further provides that a court may order a defendant to pay restitution of the fruits of his or her offense or make reparation of the actual out-of-pocket loss caused by the offense. As a practical matter, prosecutors often condition an adjournment in contemplation of dismissal on restitution or reparation, yet under current law this must be done outside the parameters of CPL 170.55. Thus, the parties are required to adjourn the matter, often multiple times, until the restitution or reparation is paid. Only then is the court permitted to grant an adjournment in contemplation of dismissal. This inefficient process forces cases to be repeatedly calendared and defendants to return to court until payment is made. Recognizing that some defendants may be unable to afford full restitution or reparation, the proposal specifically

provides that the court may only order a defendant to pay restitution or reparation in an amount he or she can afford to pay.

Proposal

AN ACT to amend the criminal procedure law, in relation to permissible conditions the court may impose in connection with an adjournment in contemplation of dismissal

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

Section 1. Subdivision 8 of section 170.55 of the criminal procedure law, is renumbered to be subdivision 10, and new subdivisions 8 and 9 are added to read as follows:

8. The court may, as a condition of an adjournment in contemplation of dismissal, order a defendant to participate in an educational program, treatment program or other program reasonably related to the defendant's rehabilitation. The court may not impose such conditions in excess of the length of the adjournment in contemplation of dismissal.

9. The court may, as a condition of an adjournment in contemplation of dismissal, order a defendant to pay restitution of the fruits of his or her offense or make reparation, in an amount he or she can afford to pay, of the actual out-of-pocket loss caused by the offense.

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

41. Revocable Sentences under The Child Passenger Protection Act (Leandra's Law) (Penal Law §60.01)

The Committee recommends that section 60.01 of the Penal Law be amended to authorize courts to re-impose a requirement of an ignition interlock device as a condition of probation or conditional discharge following revocation of a sentence of probation or conditional discharge imposed under Leandra's Law.

The Child Passenger Protection Act (Leandra's Law) provides, in relevant part, that a defendant convicted of a DWI offense under VTL §§1192(2), (2-a) or (3) must be sentenced to a period of probation or conditional discharge that includes a condition that the defendant install an ignition interlock device (IID) on any automobile he or she owns or operates (L. 2009, c. 496). In addition, the sentence of probation or conditional discharge must be consecutive to any period of incarceration imposed (PL §60.21). Under the current statutory scheme, however, a problem arises when a defendant violates a Leandra's Law sentence of probation or conditional discharge and the court revokes the sentence. CPL 410.70(5) sets forth the options available to a court when it revokes a sentence of probation or conditional discharge, and it currently does not authorize a court to re-sentence a defendant pursuant to PL §60.21. Without any reference to PL §60.21, courts are limited to re-sentencing in accordance with PL §§60.01(3) or (4), neither of which authorizes a consecutive period of probation upon which to attach a condition of an IID.

As a result of this lapse in the statutory scheme, defendants who violate probation or conditional discharge will be relieved of the obligation to install an IID on their vehicles in any case where the court imposes a misdemeanor jail term in excess of sixty days or a felony term of imprisonment in excess of six months. Moreover, under current law, the court lacks the authority to re-impose any form of conditional discharge after revoking a sentence of conditional discharge. Given the expanded use of a conditional discharge sentence under Leandra's law, the Committee believes this restriction was unintended, and it unnecessarily hinders a court when fashioning a sentence that may best insure that a defendant does not continue to drink and drive following release from incarceration.

This measure amends section 60.01 of the Penal Law to provide explicit authority to impose a sentence of conditional discharge in accordance with PL §60.21, and further clarifies that any new sentence imposed after revocation of a sentence of probation will include a period of probation that includes a condition requiring a defendant to install an IID on any vehicle defendant owns or operates.

Proposal

AN ACT to amend the penal law, in relation to the revocation of sentences of probation or conditional discharge imposed under the child passenger protection act

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

follows:

Section 1. Subdivision 3 of section 60.01 of the penal law is amended by adding a new paragraph (f) to read as follows:

(f) Following revocation of a sentence of conditional discharge imposed pursuant to section 60.21 of this chapter, probation as provided in section 65.00 of this chapter that includes the installation and maintenance of a functioning ignition interlock device, or a sentence of imprisonment and probation as provided for in section 60.21 of this chapter.

§2. Subdivision 4 of section 60.01 of the penal law, as amended by chapter 548 of the laws of 1984, is amended to read as follows:

4. In any case where a person has been sentenced to a period of probation imposed pursuant to section 65.00 of this chapter, if the part of the sentence that provides for probation is revoked, the court must sentence such person to imprisonment or to the sentence of imprisonment and probation as provided for in paragraph (d) of subdivision two of this section. Following revocation of a sentence of probation imposed as provided in section 60.21 of this chapter, any new sentence imposed shall include probation and the installation and maintenance of a functioning ignition interlock device as provided in section 60.21 of this chapter.

§3. This act shall take effect immediately.

42. Authority to Suspend Jury Deliberations for More than Twenty-four Hours (CPL 310.10(2))

The Committee recommends that the Criminal Procedure Law be amended to allow a trial court to suspend jury deliberations for up to forty-eight hours (excluding weekends and holidays) in appropriate cases.

In 1995, the Legislature gave trial courts discretion to forego sequestration in most cases (L. 1995, c. 83). Over the next several years, the Legislature required the Chief Administrative Judge and the Office of Court Administration to conduct an annual study of the change and file a report with the Governor, the President of the Senate and the Speaker of the Assembly. The reports found that there were significant cost-saving to the change and that eliminating sequestration did not result in an increase in jury tampering or an increase the number of mistrials. After five years, the Legislature made permanent the changes and expanded the reach of the statute to permit trial courts to forego sequestration in all cases (L. 2001, c. 47).

A trial court's discretion is not unfettered, however, and the current statute provides that a court may only suspend jury deliberations "for a reasonable period of time . . . not to exceed twenty-four hours" (CPL 310.10(2)). Undoubtedly, the twenty-four hour limit is intended to permit deliberating jurors to go home each night and return on the next day when the court is in session. Unfortunately, circumstances often arise that make it impossible to reconvene the jury within twenty-four hours, as was illustrated in a recent case arising in Kings County (*see People v Taylor*, 32 Misc 3d 546 [Sup Ct, Kings County 2011, Del Giudice, J.]). In *Taylor*, a deliberating juror was briefly hospitalized and unable to return to court to resume further deliberations the following day. The defense immediately moved for a mistrial, claiming that the express language of CPL 310.10(2) prevented the court from adjourning deliberations more than 24 hours, even though the juror would be available one day later. There were no indications of juror tampering nor did it appear that jury deliberations would be impeded by the additional delay caused by the juror's hospitalization. The case highlights the inflexibility of the statute, and the court urged legislative action to amend the statute..

The Committee believes that the arbitrary limit of twenty-four hours should be relaxed in appropriate cases. While the Committee considered eliminating the twenty-four hour restriction altogether and allowing courts discretion to suspend deliberations "for a reasonable period of time," it ultimately favored an approach that provides courts with more, but not unfettered, discretion. Thus, this measure retains the twenty-four hour limit in most cases, but provides, "upon good cause shown, an additional period not to exceed 48 hours." By requiring "good cause" for any suspension longer than twenty-four hours, the measure insures that lengthy suspensions of jury deliberations will not become routine.

Proposal

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

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

Section 1. Subdivision 2 of section 310.10 of the criminal procedure law, as amended by chapter 47 of the laws of 2001, is amended to read as follows:

2. At any time after the jury has been charged or commenced its deliberations, and after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury, the court may declare the deliberations to be in recess and may thereupon direct the jury to suspend its deliberations and to separate for a reasonable period of time to be specified by the court, not to exceed twenty-four hours or upon good cause shown not to exceed seventy-two hours, except that in the case of a Saturday, Sunday or holiday, such separation may extend beyond such twenty-four or seventy-two hour period. Before each recess, the court must admonish the jury as provided in section 270.40 of this chapter and direct it not to resume its deliberations until all twelve jurors have reassembled in the designated place at the termination of the declared recess.

§2. This act shall take effect immediately, and shall apply to all criminal actions pending on or after the date it is enacted.

43. Unsealing Orders of Protection in Certain Contempt Prosecutions (CPL 160.50)

The Committee recommends that the Criminal Procedure Law be amended to authorize a court to unseal records of an order of protection where necessary to prosecute a defendant for violating that order of protection.

This measure is proposed in response to recent cases that have uncovered a serious issue concerning orders of protection contained in a sealed file (*see People v Marcus A*, 28 Misc 3d 667 [Sup Ct, NY County 2010]); *see also Matter of Akieba Mc*, 72 AD3d 689 [2d Dept 2010]). When a criminal contempt prosecution is commenced, and the basis for the charge is that the defendant knowingly violated a lawful order of a court (*see* PL §§215.50, 215.51 or 215.52), a prosecutor must obtain a copy of the underlying order of protection alleged to have been violated. A certified copy of the order is most often used to replace a misdemeanor complaint with an information (*see* CPL 170.65), or as evidence before the grand jury in felony contempt prosecutions. It is also admissible as trial evidence to establish that the order was issued and in effect at the time of the contempt. Because in most cases an order of protection is a public document, a prosecutor simply obtains a certified copy from the clerk of the court (Judiciary Law §255).

However, where the underlying order of protection has been issued in connection with a case that has terminated in favor of the defendant, both the court record and the District Attorney's records are sealed pursuant to CPL 160.50. Nonetheless, even where the criminal action in which the order of protection arose is dismissed, it does not bar prosecution where a defendant violating the order of protection while the action was pending. However, once the underlying criminal case is dismissed and sealed, there is no provision in the Criminal Procedure Law that allows a court to unseal the order of protection so that a certified copy of the order defendant is charged with violating may be obtained.

The Court of Appeals has repeatedly held that the "general proscription against releasing sealed records and materials [is] subject only to a few narrow exceptions" (*Matter of Katherine B v Cataldo*, 5 NY3d 196, 203 [2005], *quoting Matter of Joseph M*., 82 NY2d 128, 134 [1993]). Although CPL 160.50(1)(d) sets forth those exceptions, the Court has limited the unsealing of records by a District Attorney after commencement of a criminal action to the "singular circumstance" where a defendant requests an adjournment in contemplation of dismissal in low level marijuana cases (5 NY3d at 205; CPL 160.50(1)(d)(i)). Thus, no matter how viable a contempt prosecution might otherwise be, a District Attorney's Office is effectively hamstrung from obtaining an underlying order of protection that had been issued in a sealed case.

The Committee believes that a court should be permitted to unseal a record to allow a prosecutor to obtain a copy of an order of protection when necessary to prosecute a defendant for willful disobedience of a lawful court mandate. This measure is narrowly tailored to meet this individualized need and is necessary to protect both victims of domestic violence and the integrity of the judicial process.

Proposal

AN ACT to amend the criminal procedure law, in relation to unsealing criminal records involving orders of protection

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

Section 1. Subparagraph (i) of paragraph (d) of subdivision 1 of section 160.50 of the criminal procedure law, as amended by section 73 of subparagraph-B of paragraph C of chapter 62 of the laws of 2011, is amended to read as follows:

(i) a prosecutor in any proceeding (a) in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (b) where the records consist of an order of protection and the prosecutor demonstrates to the satisfaction of the court that the records are necessary to the prosecution of the accused for violating or attempting to violate subdivision three of section 215.50, 215.51 or 215.52 of the penal law, or

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

44. Defining "Personal Injury" in the Crime of Leaving the Scene of an Incident Without Reporting
(VTL §600(2)(a))

The Committee recommends that the Vehicle and Traffic Law be amended by substituting the term "bodily injury" for "personal injury" in the crime of leaving the scene of an incident without reporting.

The crime of leaving the scene of an incident without reporting under VTL §600(2)(a) requires, among other things, that "personal injury" be caused to another person due to an incident involving a motor vehicle operated by a defendant. "Personal injury," however, is not defined in the statute and some courts have looked to the Penal Law for a definition. Although the Penal Law does not define "personal injury," it does provide that "'physical injury'" means impairment of physical condition or substantial pain" (PL §10.00(9)). This definition has been the subject of considerable analysis, and it is clear that not all injury rises to the level of "physical injury" (*see Matter of Phillip A.*, 49 NY2d 198 [1980] [injury from a petty slap in the face, or a moderate shove or kick, without more, is insufficient]; *People v McDowell,* 28 NY2d 373 [1971] [black eye without more is insufficient]; *People v Jimenez,* 55 NY2d 895 [1982] [one centimeter cut without some indication of substantial pain insufficient]). Consequently, to the extent that courts consider the term "personal injury" under the Vehicle and Traffic Law to mean "physical injury," it requires that the prosecutor demonstrate more than that simple bodily injury occurred to a person as a result of a motor vehicle incident.

At least one court, however, has rejected any effort to substitute the Penal Law definition of "physical injury" for the term "personal injury" in VTL crimes (*see e.g., People v Bogomolsky*, 14 Misc 3d 26 [App Term, 2d Dept 2006]). In *Bogomolsky,* the court distinguished the two terms and suggested that "personal injury" is a lesser standard than "physical injury," but cited to no case or statute that would provide a more clear definition.

The Committee believes that the duty of a citizen to stop and provide identifying information when involved in a motor vehicle accident should not hinge on the degree of injury a person has suffered as a result of the accident. If a driver knows or has reason to know that any level of injury has occurred as a result of a motor vehicle accident, the duty to provide information seems manifest and significant. The statute should make that plain. This measure substitutes the term "bodily injury" for "personal injury" in order to clarify that any injury is adequate to trigger a duty to stop and identify. The term "bodily injury" is frequently used in civil cases and the Committee believes its use is less likely to confuse courts and parties.

Proposal

AN ACT to amend the vehicle and traffic law, in relation to leaving the scene of an incident without reporting after injury was caused to another person

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

follows:

Section 1. Subdivision 2 of section 600 of the vehicle and traffic law, as amended by chapter 49 of the laws of 2005, is amended to read as follows:

2. [Personal] Bodily injury a. Any person operating a motor vehicle who, knowing or having cause to know that [personal] bodily injury has been caused to another person, due to an incident involving the motor vehicle operated by such person shall, before leaving the place where the said ~~personal~~ bodily injury occurred, stop, exhibit his or her license and insurance identification card for such vehicle, when such card is required pursuant to articles six and eight of this chapter, and give his or her name, residence, including street and street number, insurance carrier and insurance identification information including but not limited to the number and effective dates of said individual's insurance policy and license number, to the injured party, if practical, and also to a police officer, or in the event that no police officer is in the vicinity of the place of said injury, then, he or she shall report said incident as soon as physically able to the nearest police station or judicial officer.

b. It shall be the duty of any member of a law enforcement agency who is at the scene of the accident to request the said operator or operators of the motor vehicles, when physically capable of doing so, to exchange the information required hereinabove and such member of a law enforcement agency shall assist such operator or operators in making such exchange of information in a reasonable and harmonious manner.

c. A violation of the provisions of paragraph a of this subdivision resulting solely from the failure of an operator to exhibit his or her license and insurance identification card for the vehicle

or exchange the information required in such paragraph shall constitute a class B misdemeanor punishable by a fine of not less than two hundred fifty nor more than five hundred dollars in addition to any other penalties provided by law. Any subsequent such violation shall constitute a class A misdemeanor punishable by a fine of not less than five hundred nor more than one thousand dollars in addition to any other penalties provided by law. Any violation of the provisions of paragraph a of this subdivision, other than for the mere failure of an operator to exhibit his or her license and insurance identification card for such vehicle or exchange the information required in such paragraph, shall constitute a class A misdemeanor, punishable by a fine of not less than five hundred dollars nor more than one thousand dollars in addition to any other penalties provided by law. Any such violation committed by a person after such person has previously been convicted of such a violation shall constitute a class E felony, punishable by a fine of not less than one thousand nor more than two thousand five hundred dollars in addition to any other penalties provided by law. Any violation of the provisions of paragraph a of this subdivision, other than for the mere failure of an operator to exhibit his or her license and insurance identification card for such vehicle or exchange the information required in such paragraph, where the [personal] <u>bodily</u> injury involved (i) results in serious physical injury, as defined in section 10.00 of the penal law, shall constitute a class E felony, punishable by a fine of not less than one thousand nor more than five thousand dollars in addition to any other penalties provided by law, or (ii) results in death shall constitute a class D felony punishable by a fine of not less than two thousand nor more than five

thousand dollars in addition to any other penalties provided by law.

§2. This act shall take effect immediately.

45. Amending the Definition of "Counterfeit Trademark"
(Penal Law §165.70)

The Committee recommends that section 165.70 of the Penal Law be amended to add technical precision to the definition of "counterfeit trademark." Specifically, the definition should clarify that the term means a spurious or imitation trademark that is used in connection with trafficking in goods that are identical with or substantially indistinguishable from goods bearing a legitimate trademark. The current definition of a "counterfeit trademark" is awkward and leads to unnecessary confusion in pleading and charging decisions.

In 1992, in response to an increase in trafficking in counterfeit goods, New York added the crimes of "trademark counterfeiting" to the Penal Law (L. 1992, c. 490, §1). The Legislature modeled the law, and the definition of counterfeit trademark, after Federal law (*see* Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law §165.70; *see also* 18 USC §2320). Unfortunately, there is an ungainly difference in the New York statute. Penal Law §165.70(2), in part, defines a "counterfeit trademark" as a "spurious trademark . . . used in connection with trafficking in goods; and . . . used in connection with the sale . . . of goods that are identical with or substantially indistinguishable from a trademark . . . ." Under this definition, "goods" must be indistinguishable from a "trademark." However, a "trademark" is not comparable with goods; instead a trademark is used to *identify* particular goods (*see* PL §165.70(1)). The parallel provision in Federal law does not compare "goods" to a "trademark." The Federal definition makes plain that a "counterfeit trademark" is a spurious mark "used in connection with trafficking in any goods . . . that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office . . ." (18 USC §2322(e)(1)(A)(ii)). The Federal statute therefore appropriately requires a comparison of a "spurious mark" with a legitimate, registered "mark."

The Committee believes that the imprecise wording of New York's definition has practical consequences in the prosecution of cases under the current statute, and has led to inconsistent opinions among courts. For instance, motions to dismiss an accusatory instrument are often claimed when a complaint undertakes to allege a difference between the quality of the counterfeit and the genuine article without actually comparing the marks themselves (*see e.g., People v Jobe*, 20 Misc 3d 1114(A) [Crim Ct, NY County 1999]; *People v Ensley*, 183 Misc 2d 141 [Sup Ct, NY County 1999]). Other courts have upheld the sufficiency of complaints that identify and distinguish the characteristics of the genuine and counterfeit trademark (*People v Guan*, 2003 WL 21169478 (App Term, 1st Dept 2003)).

This measure would amend the definition of a "counterfeit trademark" to reflect that a counterfeit trademark requires a comparison of a spurious mark with a legitimate mark. It will clarify to practitioners that the two marks must be "identical or substantially indistinguishable" to come within the purview of criminal prosecutions, and that any distinctions between the two marks are simply elements of proof necessary to establish that the trafficked goods are illegal copies of goods that bear legitimate marks.

Proposal

AN ACT to amend the penal law, in relation to a the definition of a counterfeit trademark

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

Section 1. Subdivision 2 of section 165.70 of the penal law, as added by chapter 490 of the laws of 1992, is amended to read as follows:

2. The term "counterfeit trademark" means a spurious trademark or an imitation of a trademark that is:

(a) used in connection with trafficking in goods; and

(b) used in connection with the sale, offering for sale or distribution of goods that are identical with or substantially indistinguishable from goods bearing a trademark as defined in subdivision one of this section.

The term "counterfeit trademark" does not include any mark used in connection with goods for which the person using such mark was authorized to use the trademark for the type of goods so manufactured or produced by the holder of the right to use such mark or designation, whether or not such goods were manufactured or produced in the United States or in another country, and does not include imitations of trade dress or packaging such as color, shape and the like unless those features have been registered as trademarks as defined in subdivision one of this section.

§2. This act shall take effect immediately and shall apply to all crimes committed on or after such effective date.

IV. 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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