Report of the **Advisory Committee** on **Local Courts**

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

January 2017

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I. INTRODUCTION

The Local Courts Advisory Committee is one of five standing advisory committees established by the Chief Administrative Judge of the Courts pursuant to Judiciary Law § 212(1)(q). The Committee advises the Chief Administrative Judge on legal and operational issues relating to the New York City Civil Court, New York City Criminal Court, District Courts on Long Island, City Courts outside New York City, and Town and Village Courts. The Committee is comprised of judges, clerks and attorneys serving and practicing in the above-named courts. It serves as a liaison with the professional associations of the judges and clerks of these courts, and coordinates its actions and recommendations with other advisory committees established by the Chief Administrative Judge. In addition to its legislative program, the Committee reviews and makes recommendations concerning existing court policies, rules and forms. During 2016 the Committee again reviewed and commented on a wide range of issues affecting the local courts.

The Legislature passed and the Governor signed a measure to authorize off-hours arraignment parts in counties outside the City of New York (L. 2016, c. 492), a proposal similar to one of the Committee's 2016 recommended measures which proposed a broadening of the jurisdiction of a local Criminal Court to arraign an accused when another local Criminal Court in the county is unavailable (CPL §§ 100.55; 120.90; 140.20; Judiciary Law § 212).

This Annual Report for 2017 contains ten measures developed on the basis of the Committee's studies, examination of decisional law, and suggestions received from the bench and bar.

New Proposals

The Committee remains committed to submitting a streamlined, high-priority list of legislative and rule making measures. This year the Committee is again recommending ten measures, one of which is new. The Committee recommends the enactment of a new CPL

§ 240.15 to require open file discovery in prosecutions of alcohol and drug related offenses under the Vehicle and Traffic Law.

The Committee recommends an amendment of Penal Law § 60.01(2)(d) that would increase from 60 days to 90 days the maximum period of incarceration that may be served in conjunction with a sentence of probation or conditional discharge for a Class A misdemeanor. The Committee believes this measure would provide judges with greater discretion in sentencing, give prosecutors greater flexibility in plea bargaining, and enable more defendants to benefit from the rehabilitative options available through probation.

The Committee continues to recommend a proposal relating to persons who fail without justification to appear in court to answer charges of unlawful possession of alcohol. The proposal would amend Alcoholic Beverage Control Law § 65(c) by authorizing courts to render civil default judgments for unjustified failure to appear in court on a charge of under-age possession of alcohol. This measure would promote the goal of discouraging underage drinking without requiring the harsher consequences that may flow from suspension of a driver's license under the Vehicle and Traffic Law.

Priorities

The Committee's program for 2017 focuses on initiatives that, if enacted, would promote more effective, comprehensive adjudication, improve court efficiency, and reduce litigation cost and delay across multiple areas of practice. The Committee proposes amendments of the Criminal Procedure Law to allow appeals from local criminal courts to intermediate appellate courts based on certified transcripts of audio recordings rather than antiquated affidavits of errors; allow all local criminal courts rather than the New York City Criminal Court only to hold single-judge trials in B misdemeanor cases; allow for waiver of pre-sentence investigation reports in all local criminal courts (rather than the New York City Criminal Court only) where a negotiated sentence of imprisonment for a term of one year or less is mutually agreed upon by

the parties, with the consent of the judge, and no sentence of probation is imposed; and, authorize Judicial Hearing Officers to accept certain guilty pleas.

In order to improve the administration of justice, address the collateral consequences of court proceedings, and promote offender accountability, the Committee recommends measures to authorize the sealing of court records in a criminal matter where the charges are dismissed on the People's motion; and, to authorize the imposition of the sentence of a fine and conditional discharge upon conviction for the offense of driving while impaired.

The Committee expresses its advance appreciation to the Legislature and the Administrative Board of the Courts for considering this Annual Report, and welcomes comments and suggestions from the Legislature, the Judiciary, the Bar and the public concerning issues that arise in the local courts. Comments and suggestions may be addressed throughout the year to:

Holly Nelson Lütz, Counsel
Local Courts Advisory Committee
Office of Court Administration
4 ESP, Suite 2001
Empire State Plaza
Albany, New York 12223
hlutz@nycourts.gov

II. NEW MEASURE

1. Requiring Open File Discovery in Prosecutions of Alcohol and Drug Related offenses under the Vehicle & Traffic Law (CPL § 240.15 [new])

The Committee recommends addition of a new section 240.15 to the Criminal Procedure Law to require open file discovery strictly limited to prosecutions of alcohol and drug related offenses under Article 31 of the Vehicle and Traffic Law. The new statute would require that the offense of DWI be the highest offense charged. This measure would require exchange without demand of all material and written information in the possession of either the defendant or prosecutor not otherwise protected or privileged under rule, statute or other law within 30 days of the commencement of a criminal action. Materials received after the 30 days has expired are required to be exchanged within 5 days of receipt.

It has been brought to the attention of the Committee that open file discovery for cases commenced charging offenses under Article 31 is working well today in practice in counties of diverse size and population across the state, including Nassau, Kings, Suffolk and Wyoming Counties. In these counties demonstrable benefits in stimulating plea agreements and eliminating delays have been achieved. Improvements in standards and goals are achieved for the court system. The Committee believes that statewide mandate of such practice is now appropriate and timely. The Committee urges adoption of this measure to expand upon the improvements available from limited open file, reciprocal discovery to defendants, prosecutors and the court system alike.

Proposal

AN ACT to amend the criminal procedure law, in relation to discovery in alcohol and drug related offenses under the vehicle and traffic law

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 240.15 to read as follows:

§ 240.15. Discovery: open file, limited to prosecutions of alcohol and drug related offenses under the vehicle and traffic law. Within 30 days of the commencement of a criminal action charging a defendant with an offense or offenses the most serious being an offense under article 31 of the vehicle and traffic law, all material or written reports or documents in the possession of either the defendant or the prosecutor, not privileged or otherwise protected by rule, statute or other law, shall be exchanged between the defendant and the prosecutor without demand therefore. Such material or written reports or documents received after the expiration of the 30 day period shall be exchanged within 5 days of receipt. Such material or written reports or documents shall include but are not limited to any written report or testimony of a police officer, statements of a defendant, statements, names and addresses of witnesses, any physical examination, scientific tests or experiments, results of laboratory reports or testing reports or any portion thereof.

§ 2. This act shall take effect 90 days after the date on which it shall have become law and shall apply to criminal actions commenced on or after that date.

III. PREVIOUSLY ENDORSED MEASURES

1. Increasing the Permissible Term of Imprisonment of a "Split Sentence" (Penal Law §60.01[2][d])

This measure would authorize an increase in the maximum jail sentence – from 60 days to 90 days – that may be imposed for a misdemeanor conviction where there is a concurrent sentence of jail plus probation or conditions, i.e., a "split sentence." Penal Law 60.01(2)(d) authorizes a court to impose a split sentence of up to a maximum of 60 days in jail for a misdemeanor, along with a term of probation, which together cannot exceed the authorized term of probation as set forth in Penal Law § 65.00(3). See People v Zephrin, 14 NY3d 296, 299-300 (2010).

The "split sentence" option of Penal Law § 60.01(2)(d) provides for an important sentencing alternative in those cases where neither a "straight" jail term nor a supervisory sentence is considered appropriate by itself. Unfortunately, however, there are many cases where the judge at sentencing or the prosecutor during plea negotiations may feel constrained to reject the "split sentence" in favor of straight imprisonment because they are uncomfortable with sentencing the defendant to only 60 days in jail. This works to deprive many defendants, especially in drug treatment and other specialty courts, of the beneficial rehabilitative options available through probation. The Committee believes that "split sentences" would be utilized more widely if judges had the discretion to impose a jail term of up to 90 days as part of the overall split sentence, and that fewer prosecutors would insist on long sentences of straight jail time if there was an option of combining probation with a jail term of 90 days instead of only 60 days. In the Committee's view, sentencing a defendant with an underlying problem like drug addiction to a split sentence of 90 days plus probation generally produces better results than sentencing the defendant to a longer term of straight jail time without the benefits and rehabilitative options available through probation.

In order to effectuate the foregoing goals, this measure would amend Penal Law § 60.01(2)(d) to increase, from 60 days to 90 days, the maximum period of incarceration that may be served in conjunction with a sentence of probation or conditional discharge for a Class A misdemeanor.

Proposal

AN ACT to amend the penal law, in relation to revocable sentences of probation or conditional discharge and imprisonment

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

Section 1. Paragraph (d) of subdivision 2 of section 60.01 of the penal law is amended to read as follows:

(d) In any case where the court imposes a sentence of imprisonment not in excess of sixty days[,] for a class B misdemeanor, or not in excess of ninety days for a class A misdemeanor, or not in excess of six months for a felony or in the case of a sentence of intermittent imprisonment not in excess of four months, it may also impose a sentence of probation or conditional discharge provided that the term of probation or conditional discharge together with the term of imprisonment shall not exceed the term of probation or conditional discharge authorized by article sixty-five of this chapter. The sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation or conditional discharge.

§2. This act shall take effect on the first day of November next succeeding the date on which it shall become a law, and shall apply only to offenses committed on or after such effective date.

2. Authorizing Courts to Render Default Judgments for Failure to Appear in Court on Charge of Unlawful Possession of Alcohol With Intent to Consume By Persons Under the Age of Twenty-One. (ABC § 65-c)

This measure would amend the Alcoholic Beverage Control Law to authorize a court outside a city with a population of over one million to render a default judgment of a fine against a person who does not appear in court within the specified time to answer a charge of underage possession of alcohol. This measure supplants the Committee's previous recommendation of an amendment of the Vehicle and Traffic Law authorizing courts to authorize suspension of a driver's license under the same conditions.

Years of experience in the judicial, law enforcement and child-welfare communities demonstrate that a charge of under-age possession of alcohol may be the first and best opportunity to avert more serious and potentially life-threatening alcohol-related offenses. When defendants less than age 21 are charged with under-age possession of alcohol with intent to consume under Alcoholic Beverage Control Law section 65-c, authorized sentences of completing alcohol awareness programs and community service offer potential judicial remedies to help deter drunk driving and other more serious offenses.

Unfortunately, many of these young defendants ignore their appearance tickets or, if convicted, ignore the very sentences calculated to discourage more serious offenses. Under current law, there is no practical redress or other remedy besides contempt, a resource-intensive path that may lead to incarceration inapposite for these offenders. For that reason, large numbers of under-age defendants flaunt the law: many do so precisely because they know there is no negative consequence for ignoring the charge or sentence. This, in turn, compounds their disrespect for the law and encourages further offenses. The Internet is rife with advice for teens concerning the lack of negative consequences for ignoring appearance tickets or court-imposed penalties for under-age drinking. Given these dynamics, it is little surprise that in some courts, the scoff rate on under-age alcohol possession exceeds 30%. These dynamics are particularly evident after proms, concerts, festivals and other large gatherings of teens, which expose teens

not only to alcohol but also to the risk of drunk driving. Remedies for alcohol-possession violations are sorely needed in order to deter drunk driving and prevent injuries and deaths.

While fully cognizant that under-age offenders are minors for whom our law must take an especially measured approach, New York State must ensure that courts have effectual remedies at their disposal when persons charged with under-age possession of alcohol fail to appear or complete court-ordered sentences. By doing so, the Legislature would promote respect for the law and the courts generally, and help prevent more serious offenses and concomitant risk to life.

Accordingly, this measure would authorize a court to render a civil default judgment against a defendant who fails to answer a charge of under-age possession of alcohol with intent to consume under ABC Law §65-c, or who is convicted and fails to timely satisfy his or her sentence. This limited approach seeks only to bring these defendants before the court to answer charges and honor sentences that are calculated to educate them and prevent potentially life-threatening behaviors.

Proposal

AN ACT to amend the alcoholic beverage control law, in relation to authorizing courts to render default judgments in cases of failure to answer for unlawful possession of an alcoholic beverage with the intent to consume by persons under the age of twenty-one years

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

§ 1. Section 65-c of the alcoholic beverage control law is amended by adding three new subdivisions 7, 8 and 9 to read as follows:

7. In the event a person charged with a violation of this section does not answer within the time specified, the court having jurisdiction, other than a court in a city over one million in population may, in addition to any other action authorized by law, enter a plea of guilty on behalf

of the defendant and render a default judgment in an amount to be determined by the court within the amount authorized by law. Any such default judgment shall be civil in nature. However, at least thirty days after the expiration of the original date prescribed for entering a plea and before a plea of guilty and a default judgment may be rendered, the clerk of the court shall notify the defendant by certified mail: (a) of the violation charged; (b) of the impending pleas of guilty and default judgment; (c) that such judgment will be filed with the county clerk of the court in which the operator or registrant is located; and (d) that a default or plea of guilty may be avoided by entering a plea or making an appearance within thirty days of the sending of such notice. Pleas entered within that period shall be in a manner prescribed in the notice. In no case shall a default judgment and plea of guilty be rendered more than two years after the expiration of the time prescribed for originally entering a plea. When a person has entered a plea of not guilty and has demanded a hearing, no fine or penalty shall be imposed for any reason, prior to the holding of the hearing which shall be scheduled by the court within thirty days of such demand.

8. The filing of the default judgment with the county clerk shall have the full force and effect of a judgment duly docketed in the office of such clerk and may be enforced in the same manner and with the same effect as that provided by law in respect to executions issued against property upon judgments of a court of record and such default judgment shall remain in full force and effect for eight years notwithstanding any other provision of law.

9. Notwithstanding the provisions of subdivision seven of this section, the clerk of the court shall have two years from the effective date of this subdivision to serve notice of the impending plea of guilty and default judgment upon the person charged with a violation of this

section who has not answered within the time specified and prior to the effective date of this subdivision.

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply where the acts constituting unlawful possession of an alcoholic beverage with intent to consume for the offense of which the person is convicted occurred on or after such effective date.

3. Perfecting Appeals from Local Criminal Courts Based on Mechanical or Electronic Recordings
(CPL 460.10(2)-(3), 460.70(1))

This measure would amend Criminal Procedure Law sections 460.10 and 460.70 to allow appeals from local criminal courts to intermediate appellate courts to be perfected based on a mechanical or electronic recording of the proceedings below.

Under current law, where proceedings in a local criminal court are transcribed by a court stenographer, appeals to an intermediate appellate court (i.e. County Court or an Appellate Term of Supreme Court) are perfected by filing a notice of appeal and then settling the transcript of the proceedings below. CPL 460.10, 460.70(1). Where local criminal court trial proceedings below are not transcribed by a court stenographer, however, appeals to the County Court or an Appellate Term of Supreme Court are perfected by filing an affidavit of errors setting forth alleged errors or defects in the trial proceeding. CPL 460.10(3)(a).

As authorized by the Chief Judge of the State of New York, the Chief Administrative Judge has directed that all proceedings in a Town or Village Justice Court be recorded by mechanical recording device. 22 NYCRR [Rules of the Chief Judge] § 30.1; Administrative Order [Chief Administrative Judge] 245/08. By similar authority, proceedings in certain City Courts outside the City of New York are subject to mechanical recording. These initiatives have created questions – and divided judicial opinions – about whether the resulting recordings form a sufficient basis upon which to appeal such proceedings to an intermediate appellate court.

In People v Bartholemew, 31 Misc 3d 698 (Broome Co Ct 2011), the County Court, sitting as an intermediate appellate court, held that a criminal defendant appealing from an order of the Binghamton City Court could not appeal from a mechanical recording of the City Court's proceedings, and instead had to proceed by an affidavit of errors. The Court held that filing and serving the affidavit of errors is a jurisdictional prerequisite to an intermediate appellate court's hearing of the appeal, and that failure to file the affidavit of errors – even given a certified transcript of the proceeding below – was a non-waivable jurisdictional defect. Id. at 701, following People v Duggan, 69 NY2d 931 (1987); see also Cash v Maggio, 38 Misc 3d 971,

(Livingston Co Ct 2012) (no appeal from Justice Court to County Court except upon affidavit of errors despite presence of mechanical record of proceeding below).

Conversely, in People v Schumacher, 35 Misc 3d 1206 (Sullivan Co Ct 2012), the County Court, sitting as an intermediate appellate court, held that a criminal defendant appealing from a Justice Court could indeed appeal using the mechanical recording of the proceeding below. Disagreeing with the Bartholemew court, Schumacher reasoned that rigid adherence to the provisions of CPL article 460 governing appeals from local criminal court to an intermediate appellate court would "undermine the spirit of the [Judiciary's proceedings-recording] Order of 2008," which seeks to transition "local courts to a modernized and streamlined process." Id. The court reasoned that a criminal appellant "need not adhere to a statutory scheme that was appropriate when one used a quill and ink to generate a subjective affidavit of errors based on recollection of court proceedings; New York's local courts now have an economic, accurate, and expedited way, by mechanical recordings, to provide appellants with a transcribed record equivalent to a stenographic recording." Id.

To promote efficiency, judicial economy and clarity among bar and bench, this measure would codify the Schumacher result and abrogate Bartholemew. Section one of this measure would amend CPL 460.10(2) and 460.10(3) to exempt mechanically recorded local criminal court cases from the need to prepare and serve an affidavit of errors as a prerequisite for prosecuting an appeal. Section two of this measure would harmonize the foregoing with CPL 460.70(1), governing the settlement of transcripts in local criminal court proceedings.

Mechanical recording of local criminal court proceedings has become so common and well-proved that a settled transcript from those recordings is a more reliable basis to prosecute an appeal than subjectively reconstructing trial proceedings by manual affidavit of errors. Enacted in 1971, the existing statute governing intermediate appeals predates mechanical recordings by decades; in the current era of mechanical recording, the statute creates jurisdictional traps and much inefficiency for parties and courts alike. There is no defensible policy or practical reason that appellants possessing an accurate recording and transcript thereof nevertheless must proceed on an affidavit of errors, especially given that the consequence of relying on the former is a non-waivable jurisdictional defect that can doom an appeal. Such outcomes are especially disfavored

given that, for misdemeanors and violations, State policy is to minimize cost and complexity in service of access-to-justice objectives. Because preparing an affidavit of errors can be more costly than routine settlement of a transcript, this measure also would promote more cost-effective access to justice in local criminal courts in which there is no court stenographer.

Critically, nothing in this measure would change practice in superior criminal courts or promote recording over court stenography where the latter exists. Rather, this limited measure provides only that where a local criminal court already uses mechanical recording, a verdict or sentence in that court is appealable by settling the transcript without resort to an outdated affidavit of errors.

Proposal

AN ACT to amend the criminal procedure law, in relation to perfecting appeals from local criminal courts based on mechanical or electronic recordings

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

Section 1. Subdivision 2 and the opening unlettered paragraph of subdivision 3 of section 460.10 of the criminal procedure law are amended to read as follows:

2. An appeal taken as of right to a county court or to an appellate term of the supreme court from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were recorded by a court stenographer or by mechanical or electronic means is taken in the manner provided in subdivision one; except that where no clerk is employed by such local criminal court the appellant must file the notice of appeal with the judge of such court, and must further file a copy thereof with the clerk of the appellate court to which

the appeal is being taken.

An appeal taken as of right to a county court or to an appellate term of the supreme court from a judgment, sentence or order of a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer or by mechanical or electronic means is taken as follows:

§ 2. The second unlettered paragraph of subdivision 1 of section 460.70 of the criminal procedure law, as amended by chapter 85 of the laws of 1995, is amended to read as follows:

When an appeal is taken by a defendant pursuant to section 450.10 or subdivision two of section 460.10, a transcript shall be prepared and settled and shall be filed with the criminal court by the court reporter. The expense for such transcript and any reproduced copies of such transcript shall be paid by the defendant. Where the defendant is granted permission to proceed as a poor person by the appellate court, the court reporter shall promptly make and file with the criminal court a transcript of the stenographic minutes of such proceedings as the appellate court shall direct. The expense of transcripts and any reproduced copies of transcripts prepared for poor persons under this section shall be a state charge payable out of funds appropriated to the office of court administration for that purpose. The appellate court shall where such is necessary for perfection of the appeal, order that the criminal court furnish a reproduced copy of such transcript to the defendant or his or her counsel.

§ 3. This act shall take effect on the first day of November next succeeding the date on which it shall have become law, and shall apply to all actions in which a notice of appeal from a local criminal court to an intermediate appellate court is filed on or after such date.

4. Extending to Probation Departments and Courts Outside New York City Waiver of Pre-sentence Investigations and Reports in Certain Cases. (CPL 390.20)

This measure would amend the Criminal Procedure Law, as recently amended by chapter 556 of the Laws of 2013, to eliminate, outside New York City, the requirement of pre-sentence investigations ("PSIs") and reports where a negotiated sentence of imprisonment for a term of 365 days or less is mutually agreed upon by the parties, with the consent of the judge, and no sentence of probation will be imposed.

Prior to enactment of chapter 556, probation departments throughout the state were required to conduct PSIs and prepare written reports for all defendants convicted in felony cases, and in misdemeanor cases where a sentence of imprisonment was imposed for a term in excess of 180 days. CPL 390.20. Section 6 of chapter 556 amended section 390.20 to establish an exception to these requirements where a negotiated sentence of imprisonment for a term of 365 days or less has been reached as a result of a conviction or revocation of a probation sentence, and where probation will not be imposed under either scenario. However, this exception was limited to "any city having a population of one million or more." The present measure would broaden that exception to encompass any probation department or court outside New York City without regard to population.

This measure recognizes that the legislative purposes underlying chapter 556 – eliminating the costly requirement of PSIs for negotiated sentences and allowing for probation departments to more appropriately reassign probation officers – are equally applicable in the 57 counties located outside New York City. The current PSI requirements necessitate additional court hearings, delay sentencing and expend public resources in conducting investigations and preparing reports that rarely affect final sentencing outcomes. The Committee believes that probation departments and courts outside New York City should be treated no differently than those in New York City with regard to an expensive, time-consuming mandate shown to have little impact on sentencing.

It is important to note that neither chapter 556 nor this measure would make any other

change in statutory requirements concerning PSIs or affect a judge's discretion to order a PSI in any case where the judge believes it is appropriate to do so, including any case where the statute would no longer automatically require a PSI.

Proposal

AN ACT to amend the criminal procedure law, in relation to waiver of pre-sentence investigations and reports

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

Section 1. Subdivision 5 of section 390.20 of the criminal procedure law, as added by chapter 556 of the laws of 2013, is amended to read as follows:

5. Negotiated sentence of imprisonment. [In any city having a population of one million or more and notwithstanding] Notwithstanding the provisions of subdivision one or two of this section, a pre-sentence investigation and written report thereon shall not be required where a negotiated sentence of imprisonment for a term of three hundred sixty-five days or less has been mutually agreed upon by the parties with the consent of the judge, as a result of a conviction or revocation of a sentence of probation.

§2. This act shall take effect on the ninetieth day after it shall have become a law.

5. Fine and Conditional Discharge Upon Conviction for Driving While Ability Impaired
(Penal Law § 60.20)

This measure amends the Penal Law to authorize the imposition of the sentence of a fine and conditional discharge upon conviction for the offense of driving while ability impaired.

Section 1192(1) of the Vehicle and Traffic Law makes it unlawful for a person to operate a motor vehicle while "the person's ability to operate such motor vehicle is impaired by the consumption of alcohol." Vehicle and Traffic Law § 1192(1). The violation of this provision of the Vehicle and Traffic Law is a traffic infraction and punishable by a fine in an amount between $300 and $500 or by imprisonment for 15 days, or by both a fine and imprisonment. Vehicle and Traffic Law § 1193(1)(a).

Section 60.20 of the Penal Law sets forth the sentences that are to be imposed upon the conviction of a traffic infraction. The sentences are: a conditional discharge; an unconditional discharge; a fine or imprisonment, or both; or a sentence of intermittent imprisonment. See Penal Law § 60.20. While the Vehicle and Traffic Law expressly prohibits the court from imposing a conditional discharge without also imposing a fine for any violation of its provisions, see Vehicle and Traffic Law § 1193(1)(e), Penal Law section 60.20 does not authorize the imposition of a fine and conditional discharge for the conviction of a traffic infraction.

A conditional discharge is a sentence intended to rehabilitate a person convicted of an offense by discharging the applicable penalty (i.e. imprisonment or probation) on condition that the person performs certain acts that the court deems reasonably necessary to ensure that he or she will lead a law-abiding life. See Penal Law §§ 65.05 and 65.10. Among other things, a conditional discharge may require that the person undergo medical or psychiatric treatment or participate in an alcohol or substance abuse program. See Penal Law § 65.10(d) and (e). Because the discharge may be conditioned upon the person's receipt of treatment or counseling, the conditional discharge provides the court with a very useful tool for addressing substance abuse problems that may underlie an individual defendant's conviction for driving while impaired.

Finally, authorizing a court to impose the sentence of a conditional discharge for the conviction of the offense of driving while impaired is consistent with other provisions of the Vehicle and Traffic Law, which authorize mandatory treatment for substance abuse for persons who violate its provisions. See Vehicle and Traffic Law § 1198-a(2)(b) (requiring persons convicted of driving while intoxicated to receive treatment).

Proposal

AN ACT to amend the penal law, in relation to authority to impose a sentence of a fine and conditional discharge upon conviction of the offense of driving while ability impaired

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 60.20 of the penal law, as added by chapter 477 of the laws of 1970, is amended to read as follows:

(d) A sentence of intermittent imprisonment, as provided in article eighty-five; or

(e) Upon a conviction under subdivision one of section one thousand one hundred ninety-two of the vehicle and traffic law, a fine or a sentence to a term of imprisonment, or both as prescribed in the vehicle and traffic law, and a period of conditional discharge, as provided in article sixty-five of this chapter.

§ 2. This act shall take effect on the thirtieth day after it shall have become a law and shall apply only where the traffic infraction was committed on or after such effective date.

6. Authorize Judicial Hearing Officers to Accept Certain Guilty Pleas
(CPL 350.20, 380.10)

This measure amends sections 350.20 and 380.10 of the Criminal Procedure Law to authorize a judicial hearing officer to accept a guilty plea when authorized to hold a trial of a B misdemeanor.

Judicial hearing officers are retired judges appointed to perform certain designated judicial functions in civil and criminal courts pursuant to Article 22 of the Judiciary Law for the purpose of freeing judges to conduct more trials. People v. Scalza, 76 N.Y.2d 604, 608 (1990).

Section 350.20 of the Criminal Procedure Law authorizes a local criminal court to assign a judicial hearing officer to conduct a trial of a B misdemeanor upon consent of all parties to the criminal proceeding. When assigned to try the case, the judicial hearing officer has the same powers as a judge of the court in which the proceeding is pending. CPL 350.20(2). With respect to a trial of a B misdemeanor, section 350.20 provides that the judicial hearing officer shall determine all questions of law, act as the exclusive trier of all issues of fact, and render a verdict. CPL 350.20(1).

Experience has shown that after a case has been assigned to a judicial hearing officer under this provision the defendant frequently decides to plead guilty in lieu of proceeding to trial. This presents a problem in that section 350.20 does not expressly authorize a judicial hearing officer to accept a guilty plea; as a result, the matter must be returned to the judge from whom it originated for a final disposition. Return of the case to the originating judge defeats the very purpose of the original assignment, namely, to free the judge to dispose of matters involving more serious offenses.

This proposal would authorize the judicial hearing officer to accept a guilty plea by amending section 350.20 to provide that a judicial hearing officer shall have jurisdiction over the proceeding as defined in sections 1.20(24) and 10.30(1) of the Criminal Procedure Law. Section 10.30(1) provides that local courts have trial jurisdiction of all offenses other than felonies. Section 1.20(24) provides that a criminal court's trial jurisdiction of an offense includes, among other things, the "authority to accept a plea to" the offense. In addition, this measure would

amend section 380.10 of the Criminal Procedure Law to provide that the sentencing procedure set forth in that statute applies to all offenses, including those adjudicated by judicial hearing officers.

By authorizing a judicial hearing officer to accept a guilty plea, this measure would enable the judicial hearing officer to fully dispose of the matter assigned to him or her and thereby conserve judicial resources.

Proposal

AN ACT to amend the criminal procedure law, in relation to authorizing a judicial hearing officer to accept a guilty plea when assigned to conduct a trial

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

Section 1. Subdivision 2 of section 350.20 of the criminal procedure law, as added by chapter 840 of the laws of 1983, is amended to read as follows:

2. In the discharge of this responsibility, the judicial hearing officer shall have the same powers as a judge of the court in which the proceeding is pending, which includes authority to accept a plea to or in satisfaction of the accusatory instrument. The rules of evidence shall be applicable at a trial conducted by a judicial hearing officer.

§ 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 accepted a

plea to or in satisfaction of an accusatory instrument, all references to a court herein shall be deemed references to such judicial hearing officer.

§ 3. 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 accusatory instruments filed on or after such effective date.

7. Expanding Statewide the Current Authority for Single-Judge Trials in B Misdemeanor Cases
(CPL 340.40(2))

This measure amends section 340.40 of the Criminal Procedure Law to expand statewide the current authority of a local criminal court to hold a single judge trial where the potential term of imprisonment for the offense is not more than six months.

Section 340.40(2) of the Criminal Procedure Law now provides that a defendant charged by information with a misdemeanor must be accorded a jury trial, except that, in the New York City Criminal Court, a defendant must be accorded a single judge trial where the authorized term of imprisonment for the charged misdemeanor is not more than six months.

This measure would extend the exception now applicable only in the New York City Criminal Court to all local criminal courts. Thus, in local criminal courts located outside of New York City, trials of class B misdemeanors would be nonjury trials only. This measure does not infringe on a defendant's right to a jury trial because, under the Constitution, the right to a jury trial attaches only when the defendant is charged with a crime for which the maximum penalty is more than six months' incarceration. See Baldwin v. New York, 399 U.S. 66 (1970).

This measure would save substantial time and money in a number of ways. By freeing up limited jury resources, this measure would enlarge the misdemeanor trial capacity of the State's local criminal courts. By authorizing single-judge trials for offenses less than six months, this measure would shorten the time from arraignment to trial, reduce costs associated with impaneling juries, and ensure an adequate supply of jurors for the trial of more serious misdemeanors and felony charges. These fiscal and administrative advantages would especially benefit District Courts on Long Island, upstate City Courts and busy suburban Justice Courts.

Proposal

AN ACT to amend the criminal procedure law, in relation to trial in certain local criminal courts

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

Section 1. Subdivision 2 of section 340.40 of the criminal procedure law, as amended by chapter 673 of the laws of 1984, is amended to read as follows:

2. In any local criminal court a defendant who has entered a plea of not guilty to an information which charges a misdemeanor must be accorded a jury trial, conducted pursuant to article three hundred sixty, except that [in the New York city criminal court,] the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial. The defendant may at any time before trial waive a jury trial in the manner prescribed in subdivision two of section 320.10, and consent to a single judge trial.

§ 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 informations filed on or after such effective date.

8. Sealing Court Records of Action Dismissed on Motion of Prosecutor (CPL 160.50)

This measure would amend section 160.50 of the Criminal Procedure Law to authorize the sealing of the court records in a criminal action or proceeding in the event that the charges are dismissed upon motion by the prosecutor.

Currently, section 160.50 of the Criminal Procedure Law authorizes the court to seal the records of a criminal action or proceeding that has terminated in favor of the defendant. The purpose of the sealing rule is to ensure that the person charged with, but not convicted of, a criminal offense is free of the stigma of having been the subject of the charge. The records subject to this provision, which consist of all official records and papers, including judgments and orders of a court, but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the Division of Criminal Justice Services, any court, police agency, or prosecutor's office, must be sealed. See CPL 160.50(1). Subdivision three of this provision sets forth the specific circumstances under which an action or proceeding will be considered terminated in favor of the defendant. See CPL 160.50(3). The class of dispositions qualifying for such treatment includes acquittal and various specified dismissals and vacaturs. Id.

Prosecutors have the discretion not to proceed with a criminal action or proceeding. See People v. Thomas, 4 Misc.3d 57, 59 (Sup. Ct., App. Term 2004), aff'd 4 N.Y.3d 143 (2005). Despite the broad class of dispositions covered by section 160.50, however, it does not expressly authorize the sealing of court records when the prosecutor moves to dismiss the entire accusatory instrument or when the prosecutor elects not to prosecute after the accusatory instrument has been filed but prior to the arraignment. There is no reason to exclude the records associated with this class of dispositions from the sealing rule established by section 160.50. This measure would provide express authorization for inclusion.

By authorizing the sealing of court records upon the prosecutor's motion to dismiss or election not to proceed, this measure would extend the protections of section 160.50 to a person whose criminal case is terminated in his or her favor under these circumstances.

Proposal

AN ACT to amend the criminal procedure law, in relation to sealing of a court record upon dismissal of a criminal action upon motion of the prosecutor

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 160.50 of the criminal procedure law, as amended by chapter 518 of the laws of 2004, is amended to read as follows:

(b) an order to dismiss the entire accusatory instrument against such person pursuant to section 170.30, 170.50, 170.55, 170.56, 180.70, 210.20, 210.46 or 210.47 of this chapter or on the motion of the appropriate prosecutor was entered or deemed entered, or an order terminating the prosecution against such person was entered pursuant to section 180.85 of this chapter, and the people have not appealed from such order or the determination of an appeal or appeals by the people from such order has been against the people; or

§ 2. Paragraph (i) of subdivision 3 of section 160.50 of the criminal procedure law is amended to read as follows:

(i) prior to the filing of an accusatory instrument in a local criminal court against such person or after the filing of the accusatory instrument but prior to an arraignment, the prosecutor elects not to prosecute such person. In such event, the prosecutor shall serve a certification of such disposition upon the division of criminal justice services and upon the appropriate police department or law enforcement agency which, upon receipt thereof, shall comply with the provisions of paragraphs (a), (b), (c) and (d) of subdivision one of this section in the same manner as is required thereunder with respect to an order of a court entered pursuant to said

subdivision one.

§ 3. This act shall take effect immediately.

9. Dangerous Dog Proceedings: Providing Courts with Discretion to Direct Seizure of a Dog after an Evidentiary Hearing.
(Agriculture and Markets Law § 123(2))

Pursuant to the Agriculture and Markets Law ("AML"), a "dangerous dog" proceeding is commenced by the filing of an *ex parte* sworn statement describing an attack or threatened attack by a dog. AML § 123(2) requires the judge reviewing the statement to make an immediate determination whether there is probable cause to believe the dog is dangerous. If so, the court "shall issue an order to any dog control officer, peace officer . . . or police officer directing such officer to immediately seize such dog and hold the same pending judicial determination." Whether or not the judge finds probable cause for seizure, he or she is required to hold a hearing on the complaint within five days.

Under the statute, where the court finds probable cause that a dog is dangerous the court is required to direct seizure of the dog prior to holding an evidentiary hearing or giving the respondent an opportunity to be heard. While seizure may be appropriate in many cases, mandatory seizure is not always practical or feasible. In addition, the statute is silent concerning whether the court may direct seizure of the dog following a hearing. Thus, where a judge does not find probable cause that a dog is dangerous until the conclusion of the evidentiary hearing, the statute does not at that point authorize seizure of the dog. While the court must make an immediate snapshot determination regarding seizure based upon unproven allegations at the outset of the proceeding, it has no ability to issue a seizure order after making a final determination that the dog is dangerous based on the evidence presented at the hearing. This loophole poses both public safety and enforcement concerns: where the dog has not been seized and the respondent does not comply with court-ordered conditions, such as subjecting the dog to spaying or neutering, professional evaluation or secure confinement, it would appear that the court would have to hold the dog's owner in contempt to ensure compliance.

In view of the foregoing concerns, AML § 123(2) should be amended to give the court discretion whether to direct seizure of a dog at the outset of the proceeding, and to authorize the court to direct seizure of a dangerous dog following a hearing on the merits.

Proposal

AN ACT to amend the agriculture and markets law, in relation to dangerous dog proceedings

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

Section 1. The first unlettered paragraph of subdivision 2 of section 123 of the agriculture and markets law, as amended by chapter 59 of the laws of 2010, is amended to read as follows:

Any person who witnesses an attack or threatened attack, or in the case of a minor, an adult acting on behalf of such minor, may, and any dog control officer or police officer as provided in subdivision one of this section shall, make a complaint under oath or affirmation to any municipal judge or justice of such attack or threatened attack. Thereupon, the judge or justice shall immediately determine if there is probable cause to believe the dog is a dangerous dog and, if so [shall] may issue an order to any dog control officer, peace officer, acting pursuant to his or her special duties, or police officer directing such officer to immediately seize such dog and hold the same pending judicial determination as provided in this section. Whether or not the judge or justice finds there is probable cause for such seizure, he or she shall, within five days and upon written notice of not less than two days to the owner of the dog, hold a hearing on the complaint. The petitioner shall have the burden at such hearing to prove the dog is a "dangerous dog" by clear and convincing evidence. If satisfied that the dog is a dangerous dog, the judge or justice may issue an order to any dog control officer, peace officer acting pursuant to his or her special duties, or police officer directing such officer to immediately seize such dog and hold the

same pending adequate proof satisfactory to the court of compliance with any other order of the court pursuant to this subdivision or subdivision three of this section, and further shall [then] order neutering or spaying of the dog, microchipping of the dog and one or more of the following as deemed appropriate under the circumstances and as deemed necessary for the protection of the public:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

IV. FUTURE MATTERS

As always, the Committee welcomes and stands ready to review ideas and suggestions proposed by judges, court employees, practitioners, bar associations and members of the public concerning all issues relating to the jurisdiction and operations of the Local Courts across New York State. In 2017, the Committee looks forward to contributing its knowledge and expertise on issues of significance to the local courts, including adoption and implementation of new forms for statewide use establishing a uniform document to assist the courts, district attorneys and defendants to establish proof of financial responsibility or insurance under Vehicle and Traffic Law § 319. Additionally, the Committee will continue to confer with the Chief Administrative Judge's other Advisory Committees whenever they may have a corresponding interest in issues relating to the jurisdiction and operations of the local courts, including ongoing efforts to ensure the presence of counsel at after-hours and weekend arraignments.

Respectfully submitted,

Hon. Michael F. McKeon, Chair

Mr. Daniel Alessandrino
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Ms. Erika Webb

Holly Nelson Lütz, Counsel
Local Courts Advisory Committee