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 on criminal law and procedure that may be incorporated in the Judiciary's legislative program. The Committee makes its recommendations based on its own studies, examination of decisional law and proposals received from the 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 2019 Report, the Committee recommends 7 new measures for enactment by the Legislature. Also included are several measures previously submitted during the 2018 legislative session. Finally, the Committee provides summaries of previously endorsed proposals which were not passed by one or both houses of the Legislature, but which continue to be supported by the Committee. The new measures would:

1. amend the Correction Law to authorize a sheriff to use a county jail facility for pre-arraignment detention of arrested individuals when done in connection with an off-hours arraignment plan established by the Chief Administrative Judge;

2. amend the Criminal Procedure Law to expand the circumstances where a court may place a notation on a verdict sheet to assist a jury in distinguishing counts;

3. amend the Criminal Procedure Law to require law enforcement agencies to seal certain criminal records until needed when acting within the scope of their law enforcement duties;

4. amend the Criminal Procedure Law to require that an accusatory instrument against an eligible adolescent offender be filed as a sealed instrument;

5. amend the Criminal Procedure Law to authorize court officers to detain an individual who is the subject of an outstanding arrest warrant;

6. amend the Correction Law involving sex offender risk-level orders;

7. amend the Vehicle and Traffic Law to correct an inconsistency in the sanction following a conviction for driving while under the influence of drugs.

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 proposed legislation. Part IV summarizes temporarily tabled measures that had been previously endorsed by the Committee. Complete legislative proposals for these measures are available on request to the Committee.

II. New Measures

1. Pre-arraignment Detention in County Jails
(Correction Law §§ 500-a; 500-c)

The Committee recommends that the Correction Law be amended to authorize pre-arraignment detention of arrested individuals in a county jail facility when done as part of a plan for an off-hours arraignment part established by the Chief Administrative Judge.

The United States Supreme Court and the New York State Court of Appeals have unequivocally declared that the right to counsel attaches at an accused's arraignment (*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Hurrrell-Harring v. New York*, 15 NY3d 8 (2010); *see also* CPL 170.10(3), 180.20(3)). For decades, however, New York has struggled to meet this critical obligation in many courts, especially in rural counties where law enforcement often lacks the ability to detain an accused in a local facility, and qualified attorneys for an immediate arraignment are often unreachable or unavailable.

To their credit, New York's legislative, executive and judicial branches have recognized the critical need to resolve this problem and have begun to make the significant changes necessary to ensure indigent defendants the right to counsel at first appearance. For instance, increased indigent defense funding as part of the *Hurrell-Harring* settlement and a similar commitment to increase funding statewide over a five-year period beginning in 2018 is significantly helping to address the problem.

Another critical initiative helping to alleviate the problem was added in 2016, when the Legislature enacted laws authorizing the Chief Administrative Judge, after consultation with critical local stakeholders and with the approval of the Administrative Board of the Courts, to establish county-wide off-hours arraignment parts in jurisdictions outside New York City (L. 2016, c. 492). To date, eleven counties have developed approved plans and are currently operating an off-hours arraignment part. Where established, off-hours arraignment parts have been extremely successful in ensuring defendants are afforded counsel at arraignments.

A defining feature of every county plan thus far has incorporated twice daily arraignments in the off-hours part, thus ensuring that no defendant will be held for more than 12 hours before being arraigned. However, because most local law enforcement agencies lack the capability to detain a defendant in a local lock-up, the plans provide that local law enforcement may bring the arrested person to the county jail facility to be held until arraignment. Unfortunately, the authority for a county jail to hold a defendant before a securing order is issued requires specific authorization by the Correction Law (see Correction Law §§500-a, 500-c). Thus, each county that wants to establish an off-hours part must ask the Legislature to amend the Correction Law to authorize pre-arraignment detention in a county jail facility. This has proved cumbersome and slow as counties must individually draft legislation and submit bills piecemeal to the Legislature for approval.

This measure would alleviate this delay by allowing a county jail facility to accept pre-arraignment prisoners if done in connection with the establishment of an off-hours arraignment part. The measure does not mandate that the sheriff accept pre-arraignment prisoners and will have no impact on those counties that have already secured legislative authority for pre-arraignment detention of arrested individuals. The measure is designed to relieve a county from

the need to individual petition the Legislature for pre-arraignment detention authority when done as part of their approved plan for an off-hours arraignment part.

Section one adds a new subdivision 2-t to section 500-a of the Correction Law authorizing a county jail to be used for pre-arraignment detention when the person under arrest is being held for arraignment in the off-hours arraignment part established by the Chief Administrative Judge.

Section two adds a corresponding new subdivision twenty-five to section 500-c of the Correction Law and provides that the obligations of the sheriff to pre-arraignment prisoners are that same as to any other prisoner committed to the custody of the sheriff.

Proposal

AN ACT to amend the correction law, in relation to the detention of individuals in a county jail pending a first court appearance in an off-hours arraignment part

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

Section 1. Section 500-a of the correction law is amended by adding a new subdivision 2-t to read as follows:

2-t. Notwithstanding any other provision of law, where the chief administrator of the Ccourts establishes an off-hours arraignment part in a county in accordance with subdivision (w) of section two hundred twelve of the judiciary law, the county correctional facility of the county may be used for the detention of persons under arrest being held for arraignment in such part.

§2. Section 500-c of the correction law is amended by adding a new subdivision 25 to read as follows:

25. Notwithstanding any other provision of law, where the chief administrator of the courts establishes an off-hours arraignment part in a county in accordance with subdivision (w) of section two hundred twelve of the judiciary law, all the provisions of this section shall equally apply in any case where the sheriff is holding a person under arrest for arraignment

prior to commitment, as if such person had been judicially committed to the custody of the sheriff and such person may be held in such county correctional facility.

§3. This act shall take effect immediately.

2. Verdict Sheets
(CPL 310.20)

The Committee recommends that the Criminal Procedure Law be amended to expand the list of authorized notations a trial court may add to a verdict sheet to assist the jury in distinguishing among submitted offenses.

Under current law, to assist a trial jury in distinguishing among various counts on a verdict sheet, the court may include "dates, names of complainants or specific statutory language" (CPL 310.20 (2)). The Court of Appeals has strictly construed this provision, holding that unless the parties agree to additional notations on the verdict sheet "it is reversible error, not subject to harmless error analysis, to provide a jury in a criminal case with a verdict sheet that contains annotations not authorized by this subdivision" (*People v Miller*, 18 NY3d 704, 706 [2012]).

In practice, however, jurors often need additional guidance to distinguish various counts listed on a verdict sheet. For instance, in larceny and similar cases, it is common to have distinct counts pertaining to different items of property that were stolen or possessed. In narcotics cases, there are often multiple counts of sale or possession relating to different types of narcotics either possessed or offered for sale. In pattern burglary cases, charges often include counts whose only distinction is the location of the burgled premises, while in assault cases the only differences in counts may be the type of weapon allegedly used in each count. Finally, in sex offense cases counts may be distinguishable only by the type of sexual contact alleged. These are everyday examples and jurors may be needlessly confused when attempting to deliberate on a specific count on the verdict sheet and need to match relevant facts, or lack of them, to the count under consideration. Sometimes, parties will not consent to additional annotation for tactical reasons unrelated to the interest of clarifying the verdict sheet to assist the jury. Judges may be therefore left with confused jurors who must be repeatedly returned to the courtroom for clarification of the verdict sheet.

This measure broadens the authority of the court to annotate a verdict sheet in certain circumstances. Although the Committee considered giving courts broad discretion to annotate a verdict sheet, subject only to an abuse of that discretion, it ultimately determined that the most common examples raised to the Committee could be appropriately addressed by a narrower amendment to the statute. Therefore, in addition to the notations permitted under the existing statute, which allows the court to set forth the dates, names of complainants or specific statutory language of the offense, this measure provides that the court may also set forth specific locations, types, value or amounts of property, objects or substances, or manner of sexual contact, regardless of whether the offenses are defined by the same article of the law. The measure continues the mandate that the court instruct the jury that the sole purpose of the notation is to distinguish between the counts.

Proposal

AN ACT to amend the criminal procedure law, in relation to verdict sheets

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

follows:

Section 1. Subdivision 2 of section 310.20 of the criminal procedure law, as amended by the chapter 588 of the laws of 2002, is amended to read as follows:

2. A written list prepared by the court containing the offenses submitted to the jury by the court in its charge and the possible verdicts thereon. Whenever the court submits two or more counts [charging offenses set forth in the same article of the law], the court may set forth [the dates, names of complainants,] a brief notation by which the counts may be distinguished, including dates; names of complainants; locations; types, value or amounts of property, objects or substances; manner of sexual contact; or specific statutory language, without defining the terms[, by which the counts may be distinguished]; provided, however, that the court shall instruct the jury in its charge that the sole purpose of the notations is to distinguish between the counts; and

§2. This act shall take effect immediately.

3. Court Officer Detention of Individuals Subject to an Outstanding Arrest Warrant (CPL 140.50)

The Committee recommends that section 140.50 of the Criminal Procedure Law be amended to authorize procedures where a court officer of the unified court system must stop and detain a person whom the officer reasonably believes is the subject of an outstanding arrest warrant.

The Criminal Procedure Law defines an arrest warrant as a "process issued by a local criminal court directing a police officer to arrest a defendant" (CPL 120.10). Court officers of the Unified Court System are peace officers and not police officers (*see* CPL 2.10(21)(a)). Nonetheless, by the very nature of their duties, court officers are often the first to recognize that a person entering the court is subject to an outstanding arrest warrant. When a court officer recognizes that a defendant or member of the public in the courthouse is subject to an outstanding arrest warrant, however, the officer may not arrest the person. The Court of Appeals squarely held that peace officers may not execute an arrest warrant (*see e.g. People v Small*, 26 NY3d 253 (2015)). In *Small*, the Court held that where corrections officers, who are also peace officers, receive a warrant for a defendant's arrest while the defendant is held on another matter, the warrant does not allow the correction officer to arrest the incarcerated defendant:

> "Only police officers may execute an arrest warrant (*see* CPL 120.10[1]), and correction officers are peace officers, not police officers (*see* CPL 1.20[33]; 2.10[25]). Even if we accept defendant's assertions that correction officers informed him of his arrest and that they attempted to arrest him, they could not have legally done so." (26 NY3d *at* 258).

The inability of a court officer to legally effectuate an arrest leads to uncertainty about the level of interference a court officer may legally apply to an individual whom the court officer reasonably believes is the subject of an outstanding arrest warrant. Often, the arrest warrant will have been issued on an indictment that the court officer knows is outstanding against the person, but it also may occur in local criminal courts based on an arrest warrant issued on an information (see CPL 120.20). Current court procedures require the court officer to contact a local police precinct to advise of the open arrest warrant. However, if the subject of the arrest warrant concludes whatever business brought him or her into the courthouse, the court officer is confronted with a dilemma. While the officer may presumably stop the person to get identifying information and confirm that the outstanding arrest warrant exists (see CPL 140.50(2)), once the officer confirms that there is an outstanding warrant, the officer is unable to arrest the individual and must either detain the individual until a police officer arrives or release the person. In busy jurisdictions, court officers frequently are compelled to detain individuals for several hours. In some cases, especially on a misdemeanor warrant or a detention toward the end of the business day, the police simply do not arrive by the close of the court session. Court officers are rightly concerned that extended detention may be unlawful, and that civil liability may attach.

While the Attorney General has taken the position that, under certain circumstances, a peace officer may effectuate an arrest of a person subject to an arrest warrant (see 2007 N.Y. Inf. Op. Atty. Gen 1037), the Attorney General predicated his opinion on whether the peace officer had an independent lawful basis for stopping the suspect unrelated to the arrest warrant. Where the independent basis for the stop is lawful, the subsequent knowledge that the suspect has an

outstanding arrest warrant allowed for the arrest. Considering the more recent *Small* case, however, it is not clear this informal opinion is correct. Even if the Attorney General's opinion is correct, however, it has very limited application and may not adequately justify an arrest under the most common circumstances confronting court officers, where there is no independent basis for an arrest other than the warrant. Moreover, using an informal opinion of the Attorney General as the basis for a new court policy would undoubtedly spawn needless litigation on each arrest to determine if the arrest was lawful.

This measure resolves this open question by amending CPL 140.50 to authorize a court officer to detain a person on the officer's reasonable belief that the individual is the subject of an outstanding arrest warrant. The detention is permitted solely to allow the court officer to contact the police to allow the police to come to the courthouse to effectuate the arrest. Moreover, the measure provides for detention only until the end of the court session or a "reasonable time thereafter." By limiting the length of detention, the measure assures an appropriate balance between public safety and an individual's right not to be detained unreasonably.

Proposal

AN ACT to amend the criminal procedure law, in relation to court officers detaining individuals subject to an outstanding arrest warrant

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

Section 1. Section 140.50 of the criminal procedure law is amended by adding a new subdivision 2-a to read as follows:

2-a. Any person who is a peace officer and who provides security services for any court of the unified court system may, while within such court, stop and detain a person whom the peace officer reasonably believes is the subject of an outstanding arrest warrant. The peace officer shall promptly notify the nearest available police agency that the subject of an outstanding arrest warrant is in his or her custody, and shall be permitted to detain the person for a reasonable time to allow a police officer to execute the warrant, but in no event shall the person be detained longer than the close of the court session or a reasonable time thereafter.

§2. This act shall take effect immediately.

4. Sealing Law Enforcement Records
(CPL 160.58; 160.59)

The Committee recommends that the Criminal Procedure Law be amended to clarify that law enforcement records are subject to conditional sealing pursuant to section 160.58 and post-conviction sealing pursuant to section 160.59, notwithstanding that law enforcement may access those records when acting within the scope of their law enforcement duties.

The Criminal Procedure Law provides for sealing criminal records in several circumstances, including when a criminal action terminates in favor of an accused (CPL 160.50), upon conviction of a non-criminal offense (CPL 160.55), after successful judicial diversion (CPL 160.58) and after a successful motion to seal certain convictions ten years after sentence (CPL 160.59). In each of these instances, the court sends a sealing notice to the appropriate law enforcement agency. Law enforcement agencies, however, do not accept sealing orders where the basis of the sealing is made pursuant to CPL 160.58 (conditional sealing) or 160.59 (on motion ten years after sentence) because these two sealing statutes do not expressly direct the sealing of law enforcement records.

CPL 160.50 and 160.55, which apply to actions which have either terminated in favor of the accused or result in a conviction for a non-criminal offense, provide that where the record of an action has been sealed, the clerk "shall immediately notify the commissioner of the division of criminal justice services *and the heads of all appropriate police departments and other law enforcement agencies* that the action has been terminated . . ." (*emphasis added*). Records so sealed may only be made available under limited conditions (*see* CPL 160.50(1)(d); CPL 160.55(1)(d); *see also Katherine B.* v *Cataldo*, 5 NY3d 196 (2005) [unsealing provisions of CPL 160.50 are strictly construed]).

CPL 160.58 and 160.59, on the other hand, provide that when a court orders sealing "all official records and papers relating to the arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court shall be sealed and not made available to any person or public or private agency . . . " (CPL 160.58(4); 160.59(8)), and "the clerk of the court shall immediately notify the commissioner of the division of criminal justice services. . . " (CPL 160.58(5); 160.59(8)). Notably absent is any reference to law enforcement agencies.

The Legislature apparently did not include a direction to law enforcement agencies to seal records under CPL 160.58 and 160.59 because those sections affirmatively authorize such agencies to use such records under certain conditions. Unlike CPL 160.50 and 160.55, there is an expansive exception in CPL 160.58 and 160.59 that allows a law enforcement agency to access sealed files "when acting in the scope of their law enforcement duties" (see 160.58(6); 160.59(9)).

Nevertheless, there is a qualitative difference between allowing a law enforcement agency to have access to sealed records when acting in the scope of its law enforcement duties and excluding those agencies from sealing their records in the first instance. Unsealed records can be accessed for any reason, and no sanction would be incurred if the records were made available to the press, employment investigative agencies or the public.

This measure would clarify that, upon sealing, law enforcement agencies are required to

seal their records of the arrest and conviction. The current provisions allowing law enforcement authorities to use sealed records for law enforcement purposes would be unchanged.

Section one of the measure amends two subdivisions of CPL 160.58. First, a conforming technical amendment is made to subdivision four providing that published court opinions and appellate materials are not subject to sealing, thus bringing this subdivision in line with CPL 160.50 and 160.55. The subdivision is further amended to include the appropriate police agency and prosecutor's office in the initial sealing. Subdivision five is amended by directing the court to notify the appropriate police agency and prosecutor's office that the case has been sealed.

Section two of the measure makes similar amendments to subdivision eight of CPL 160.58. The subdivision is amended to provide that published court opinions and appellate materials are not subject to sealing, that the appropriate police agency and prosecutor's office are subject to sealing and that the court shall notify them of the sealing.

The measure would become effective ninety days after enactment.

Proposal

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

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

Section 1. Subdivisions 4 and 5 of section 160.58 of the criminal procedure law are amended to read as follows:

4. When a court orders sealing pursuant to this section, 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 arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court, police agency, or prosecutor's office, shall be sealed and not made available to any person or public or private agency; provided, however, the division shall retain any fingerprints, palmprints and photographs, or digital images of the same.

5. When the court orders sealing pursuant to this section, the clerk of such court shall

immediately notify the commissioner of the division of criminal justice services, the heads of all appropriate police departments and other law enforcement agencies, and any court that sentenced the defendant for an offense which has been conditionally sealed, regarding the records that shall be sealed pursuant to this section.

§2. Subdivision 8 section 160.59 of the criminal procedure law is amended to read as follows:

8. When a sentencing judge or county or supreme court orders sealing pursuant to this section, 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 arrests, prosecutions, and convictions, including all duplicates and copies thereof, on file with the division of criminal justice services or any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency except as provided for in subdivision nine of this section; provided, however, the division shall retain any finger-prints, palmprints and photographs, or digital images of the same. The clerk of such court shall immediately notify the commissioner of the division of criminal justice services, the heads of all appropriate police departments and other law enforcement agencies, regarding the records that shall be sealed pursuant to this section. The clerk also shall notify any court in which the defendant has stated, pursuant to paragraph (b) of subdivision two of this section, that he or she has filed or intends to file an application for sealing of any other eligible offense.

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

5. Public Access to Certain Accusatory Instruments Filed in Youth Part (CPL 725.15(3))

The Committee recommends that Criminal Procedure Law 725.15(3) be amended to require that an adolescent offender accusatory instrument be initially filed as a sealed instrument where the youth is eligible for youthful offender adjudication, the charges are subject to presumptive removal to the Family Court and the court has not determined that removal to the Family Court is unwarranted.

Under current law, the Criminal Procedure Law permits a court to conduct proceedings against qualified youth in private, thus protecting youth where it is likely that the charges will not result in a conviction (*see* CPL 720.15). Moreover, where non-felony charges are filed against youth eligible for youthful offender adjudication, the charges must be filed under seal. The purpose of insulating qualifying youth is to protect them from the stigma of their public arrest and accusation where all records of the case will become confidential as a matter of law upon final disposition (*see* CPL 720.35(2)). In this era of open digital access to information, the filing of an accusatory instrument under seal while the criminal case is pending is often critical to ensuring that qualifying youth have meaningful protection from future public opprobrium.

The recently enacted Raise the Age legislation (L. 2017 c. 59) will significantly diminish reliance on CPL 720.15 for youth under 18 because most misdemeanor charges against qualifying youth will be brought in Family Court, where records are not open to indiscriminate public inspection (*see* PL § 30.00; FCA § 166). In contrast, charges against "adolescent offenders," defined as youth who commit a felony offense when 16-years old or, commencing October 1, 2019, when 17-years old (*see* CPL 1.20(44)), must be filed in the youth part of the superior court. An accusatory instrument filed in the youth part is a public document. However, many charges against adolescent offenders will be quickly removed from youth part to the Family Court, and upon removal, the adolescent offender will be treated as a juvenile delinquent (FCA 301.2(1)). Adolescent offenders charged with most non-violent felony offenses will have their cases automatically removed to Family Court unless the prosecutor files a motion to prevent removal within thirty days of the arraignment (CPL 722.23(1)). Thus, many adolescent offenders will be in the adult criminal justice system for very short periods. To be distinguished are violent and other serious class A felonies filed in youth part, which are subject to different procedures and require the court to assess whether certain aggravating circumstances are present that would disqualify removal to Family Court except on consent of the court and prosecutor (*see* CPL 722.23(2)). The Committee does not recommend limiting public access to the more serious offenses listed in CPL 722.23(2) but recommends that the Legislature limit public access to accusatory instruments in cases that are to be removed to Family Court and treated as juvenile delinquency cases.

This measure amends subdivision three of CPL 720.15 and requires accusatory instruments against adolescent offenders charged with less serious or non-violent felony offenses to be filed as sealed instruments, but only with respect to the public. The measure focuses on cases in youth part that will most likely be removed to Family Court, limits public sealing only to the brief period between the filing of an accusatory instrument and the removal of the case to Family Court or the court's decision to deny removal.

Proposal

AN ACT to amend the criminal procedure law, in relation to preliminary proceedings involving adolescent offenders

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

Section 1. Subdivisions 3 of section 720.15 of the criminal procedure law, as amended by chapter 774 of the laws of 1985, is amended to read as follows:

3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action to be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law, except where such felony offense charges the youth as an adolescent offender subject to removal proceedings to the family court under subdivision one of section 722.23 of this chapter and the court has made no determination denying removal. The provisions of subdivision one requiring the accusatory instrument filed against a youth to be sealed shall not apply where such youth has previously been adjudicated a youthful offender or convicted of a crime.

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

6. Sex Offender Risk-level Orders
(Correction Law §§ 168-l; 168-n; 168-nn)

The Committee recommends that Article 6-C of the Correction Law be amended to provide for provisional sex offender risk-level orders in cases where a final risk-level determination cannot be made before the sex offender's scheduled release from incarceration. The Committee further recommends that the board of examiners of sex offenders (the "Board") be required to submit its sex level offender risk-level recommendation to the court and parties ninety days before the offender's scheduled release from custody, and that the court be authorized to issue its sex offender risk-level order fifteen days before the offender's scheduled release from custody.

The Sex Offender Registration Act (Correction Law Article 6-C) requires that the court issue a sex offender risk-level order for offenders who are released from a correctional facility, hospital or institution where the offender is confined or committed. Prior to issuing the order, the court must hold a determination proceeding at which the offender has the right to appear and be heard (Correction Law § 168-n). At times, however, that proceeding cannot be held or completed by the offender's scheduled release date, most often because parties are awaiting necessary records or because of scheduling issues. Although the failure of the court to issue a risk-level order does not foreclose release of a defendant or the duty of a defendant to register as a sex offender (*see* Correction Law § 168-l), the New York State Department of Corrections and Community Supervision ("DOCS") regularly delays the offender's release until the hearing is conducted and the risk level is set. This has led parties in some cases to apply to the courts to issue "provisional" risk levels so that an offender can be released as scheduled, while awaiting the conclusion of the determination proceeding. Courts have issued such temporary risk levels in multiple cases, although there is no adequate statutory authority for doing so (*see* Correction Law § 168-l(8)).

Under current law, there is a very precise timeline for an incarcerated inmate to receive a sex offender risk level before being released from jail or prison (see Correction Law §§ 168-e, 168-l, 168-m, 168-n). In brief, the timeline is as follows:

1. At least 120 days before offender's release, any state or local correction facility, hospital or institution or other law enforcement agency with relevant information shall provide it to the Board for review.
2. At least 90 days before release and 30 days prior to Board recommendation: Defendant must be notified of the Board's review and permitted to submit relevant information.
3. At least 60 days prior to release: Risk level Recommendation by Board must be provided to the court.
4. At least 50 days prior to release: Court must schedule a risk-level hearing and must provide defense and prosecutor at least 20 days' notice of the hearing.
5. 40 days prior to release: District Attorney must notify the court and the offender 10 days before hearing if it intends to contest Board recommendation.
6. Risk-level hearing. Court may adjourn proceedings for parties to receive relevant materials.

7. 30 days prior to release: Court must render findings of fact and conclusions of law regarding risk-level determination.
8. 15 days before release: Jail or prison registers defendant as a sex offender at the designated level.
9. Prior to release: DCJS enters registration information and forwards information to appropriate law enforcement agency.

As is obvious from a review of this very precise timeline, courts routinely find it difficult to issue a risk-level determination order ahead of the offender's scheduled release. The Committee therefore recommends amending procedures in ways that will help avoid delay in risk assessment orders, while also giving more guidance to the court and parties when a risk-level order cannot be issued before an offender's release date.

This measure amends the Corrections Law by requiring the Board to make its sex offender risk-level recommendation ninety days before an offender's scheduled release instead of the current sixty days, and by authorizing the court to issue its risk-level determination within fifteen days of the offender's release instead of the current thirty days. These additional time frames reflect a more realistic period necessary for the court to complete its risk determination before the offender's scheduled release date. Additionally, where the risk-level order cannot be made before an offender's scheduled release, new procedures and standards are established for issuing a provisional risk-level order.

This measure adds a new subdivision § 168-nn setting forth a procedure for the court to issue provisional risk-level orders. It contains four enumerated paragraphs. Paragraph 1 provides that where the court is unable to set a risk level before an offender's release date, it must determine whether the offender is a sexual predator, sexually violent offender or predicate sex offender and set an appropriate provisional risk level.

Paragraph 2 provides that the presumptive risk level should be either the level agreed to by the parties or, in the absence of an agreement, the level recommended by the Board without reference to the Board's recommended departure, if any, from that level. The court is permitted to set a level different from the presumptive level, but in such case must issue findings on the record for its conclusion.

Paragraph 3 makes clear that a provisional risk level cannot be made without the offender's consent unless the offender will be released without the court issuing a risk-level order under Correction Law § 168-n. However, no consent is necessary where defendant will otherwise be released without a risk-level order in place, although the parties will be given an opportunity to be heard in writing or on the record.

Finally, paragraph 4 recognizes that a provisional risk level may not be the same as the court's final risk-level order, which must be issued "expeditiously" after the offender's release (*see* Correction Law § 168-l (8)). It therefore prohibits provisional risk-level information from being posted on the internet while the provisional risk level is effective.

Proposal

AN ACT to amend the correction law, in relation to provisional determinations involving risk levels for certain sex offenders

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

Section 1. The correction law is amended by adding a new section 168-nn to read as follows:

§168-nn: Provisional Sex Offender Risk Level Determinations. 1. In any case where it is anticipated that a risk level will not be set by the date of an inmate's scheduled discharge, parole or release, from a correctional facility, local correctional facility or hospital, the court may issue a provisional sex offender risk level determination. A provisional sex offender risk level determination shall establish whether the 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. Such a determination shall also establish whether the offender is designated a level one offender at low risk to re-offend; a level two offender at moderate risk to re-offend or a level three offender at high risk to re-offend.

2. With respect to whether an offender is designated as being at low, moderate or high risk to re-offend, the court shall presumptively establish such risk level as: (i) the level agreed upon by the parties, if the parties agree on a level, or (ii) if the parties do not agree on a level, the level recommended by the board of examiners of sex offenders based on the board's point score, without considering any recommended departure by the Board. The court may establish a provisional sex offender risk level determination which differs from these presumptions if the court deems that appropriate, after providing findings on the record as to why the court has made a provisional sex offender risk level determination which departs from such presumptions.

3. A provisional sex offender risk level determination may be effective for a period not to exceed 90 days. Such a determination, during the period it is in effect, shall have the same legal force as a judicial determination following a hearing pursuant to section 168-n of this chapter. Upon a determination pursuant to section 168-n of this chapter, that determination shall replace and supercede a provisional sex offender risk level determination. A provisional sex offender risk level determination shall not be deemed to have any presumptive effect or evidentiary value with respect to a determination pursuant to section 168-n of this chapter. A person subject to a provisional sex offender risk level determination shall have the same right to counsel as provided pursuant to section 169-n of this chapter.

4. A provisional sex offender risk level determination may not be issued without a defendant's consent, provided, however, that if it is anticipated a defendant will be discharged, paroled or released from a correctional facility, local correctional facility or hospital prior to a judicial determination pursuant to section 168-n of this chapter, such consent shall not be required. The court shall allow the parties to be heard in writing or on the record prior to the setting of a provisional sex offender risk level determination, but a defendant's personal appearance shall not be required prior to the setting of such a provisional risk level.

5. Notwithstanding any other provision of this section, to prevent the posting of risk level information on the internet which may not accurately reflect an offender's final risk level determination, provisional sex offender risk level determinations shall not be posted on the internet pursuant to section 168-q of this chapter or other provisions of this article, provided, however, that upon a judicial determination of a sex offender's risk level pursuant to section 168-n of this chapter, the division shall promptly place the required information for any level two or three sex offender on the subdirectory established pursuant to section 168-q of this chapter and

make such listing available at all times on the internet via the division homepage, pursuant to such section.

§2. Subdivision 6 of section 168-l of the correction law, as amended by chapter 11 of the laws of 2002, is amended to read as follows:

6. Applying these guidelines, the board shall [within sixty] at least ninety 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.

§3. Subdivision 2 of section 168-n of the correction law, as amended by chapter 453 of the laws of 1999, is amended to read as follows:

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 pursuant to section one hundred sixty-eight-l of this article. Both determinations of the sentencing court shall be made [thirty] at least 15 calendar days prior to discharge, parole or release.

7. Sanction for Driving While Ability Impaired by Drugs (VTL §510(2))

The Committee recommends that the Vehicle and Traffic Law be amended to correct an inconsistency in the license sanction for conviction of driving while ability impaired by drugs (VTL §1192(4)). Under current law, section 1193(2)(b)(2) requires a sentencing court to impose a six-month *revocation* of the defendant's driver's license, whereas section 510(2)(b)(v) requires the court to impose a six-month *suspension* of the defendant's license.

Article 20 of the Vehicle and Traffic Law is the principal article which sets forth the regulatory scheme for suspending or revoking an operator's license. Appropriately titled "Suspension and Revocation," it was first promulgated in 1959 and was at that time the only article authorizing license sanctions. Although in 1959 the Vehicle and Traffic Law had no specific provision prohibiting driving while impaired by drugs, any conviction for unlawful operation of a motor vehicle while intoxicated carried a mandatory revocation of the operator's driver's license (L. 1959, c. 775; VTL §510(2)(b)). The article was amended several times in the 1960s, including making it unlawful to drive while impaired by drugs (see L. 1966, c. 963), and with each amendment the Legislature continued to mandate license revocation for a violation of VTL §1192 (*see e.g.*, L. 1969, c. 445). In 1970, the Legislature repealed and replaced VTL §1192, and in the recodification provided a discrete paragraph making it unlawful to drive while impaired by drugs. The sanction continued to be mandatory license revocation upon conviction (L. 1970, c. 275; VTL §§ 1192(4); 510(a)(iii)). This continued though much of the 1970s and 1980s, and while numerous amendments to the Vehicle and Traffic Law were grafted onto existing provisions – including graduated penalties and more discrete offenses tied to the operator's blood alcohol level. Violation of driving while impaired by drugs consistently carried a license sanction of mandatory revocation.

As more and more legislative changes were made to Vehicle and Traffic Law provisions involving alcohol and drugs, the Legislature again determined in 1988 it was necessary to recodify VTL §1192. In its legislative findings, it noted:

> The legislature hereby finds that there are a myriad of alcohol and drug-related provisions spread throughout the vehicle and traffic law. This creates confusion and uncertainty for legal practitioners, law enforcement agencies, courts and the public. The legislature thus finds that these provisions should be recodified into a single article of the vehicle and traffic law. In enacting such a recodification, it is not the intent of the legislature to disturb or endorse existing case law or administrative practice. Rather, it is to achieve greater clarity and comprehensibility through the consolidation of the provisions into one article (L. 1988, c. 47 §1).

The 1988 recodification included a new VTL §1193, combining both the sentencing provisions and the license sanctions for violations of VTL §1192. A corresponding amendment to VTL §510 removed any reference to VTL §1193, thereby fully separating the "Alcohol and Drug Related Offenses" contained in Article 31 from the general "Revocation and Suspension" procedures in Article 20. Notably, a violation of driving while ability impaired by drugs

continued to carry a mandatory six-month revocation, thus keeping with the Legislature's stated intent to clarify, but not substantively change, existing law (VTL §1193(2)(b)(2)).

Unfortunately, in 1993, the distinction between the two articles became blurred in a measure directed at suspension and revocation of driver's licenses, including youthful offenders and juvenile offenders, upon conviction of certain drug related offenses. Included in the measure was an amendment to VTL §510 that required automatic *suspension* of a license for six months upon conviction of "any crime in violation of subdivision four of section eleven hundred ninety-two of this chapter," a subdivision which continued to carry a mandatory six-month *revocation* under VTL §1193(2)(b)(2). The inconsistency has remained in the law since then, despite a 2006 amendment to VTL §1193(2)(b)(2) which imposed a mandatory license revocation for conviction of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs (L. 2006, c. 732, §6).

This measure eliminates the inconsistent requirement in VTL §510(2)(b)(4) that courts *suspend* a defendant's license upon conviction for driving while ability impaired by drugs, and amends that provision by removing the reference to VTL §1192(4). Accordingly, the license sanction for a violation of driving while ability impaired by drugs will again be mandatory *revocation* as provided in VTL §1193(2)(b)(2).

The measure would take effect for all sentences imposed on or after the date of enactment.

Proposal

AN ACT to amend the vehicle and traffic law, in relation to license sanctions upon conviction of driving while ability is impaired by drugs

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

Section 1. Subparagraph (v) of paragraph (b) of subdivision 2 of section 510 of the vehicle and traffic law, as amended by chapter 3 of the laws of 1995, is amended to read as follows:

(v) For a period of six months where the holder is convicted of, or receives a youthful offender or other juvenile adjudication in connection with, any misdemeanor or felony defined in article two hundred twenty or two hundred twenty-one of the penal law, any violation of the federal controlled substances act[,][any crime in violation of subdivision four of section eleven

hundred ninety-two of this chapter] or any out-of-state or federal misdemeanor or felony drug-related offense; provided, however, that any time actually served in custody pursuant to a sentence or disposition imposed as a result of such conviction or youthful offender or other juvenile adjudication shall be credited against the period of such suspension and, provided further, that the court shall determine that such suspension need not be imposed where there are compelling circumstances warranting an exception.

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

II. Previously Endorsed Measures

1. 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, except that in the case of a Saturday, Sunday or holiday, such separation may extend beyond such twenty-four hour period] not lasting beyond close of business on the next day or, for good cause shown, beyond close of business on the third day following recess of jury deliberations unless both parties consent to a longer period of suspension and separation. For the purposes of this section, where a day referred to in this subdivision falls on a Saturday, Sunday or holiday, such day shall mean the next day thereafter during which the courthouse is open for the conduct of trials. Before each recess, the court must admonish the jury as provided in section 270.40 of this [chapter] title 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.

2. Removal of Qualifying Cases to Veterans Courts
(CPL 170.15(4); 180.20(3))

The Committee recommends that the Criminal Procedure Law be amended to allow for removal of a criminal action against a veteran to a Veterans Court in an adjacent county. The measure only applies to counties outside New York City and removal may only be done with the consent of the court, the defendant and prosecutors of both counties.

Studies have shown that at least twenty percent of the 1.6 million troops who served in Iraq and Afghanistan from 2001-2008 will face serious mental-health injuries such as post-traumatic-stress-disorder, traumatic brain injury or major depression.[1] Because most do not carry the visible scars of war, veterans often suffer in silence and without access to the support services that may be available to them. Their disorders lead to higher rates of divorce, drug and alcohol abuse and incarceration. After recognizing a growing problem with low level criminal conduct committed by servicemen returning from military service, Erie County started the nation's first Veterans Court in 2008. That experience has established that veterans are ideal candidates for diversion because they are often able to be connected to benefits and treatment earned through military service. The court has been the model for Veterans Courts instituted in other counties in New York and throughout the nation.

The Veterans Court is a hybrid drug and mental health court that serves veterans who are struggling with addiction, mental illness or other problems. When a qualified veteran is identified, usually at or before arraignment, the qualifying defendant is diverted from the traditional criminal prosecution into the more specialized treatment path of the Veterans Court. Offenders are assessed by the Veterans Administration in their local area, enrolled in a program that addresses their mental health or substance abuse issues and then meet with a team including the judge, veteran mentors and other service providers. Judges see the veterans once a week or every two weeks as they progress toward mental fitness or sobriety until their treatment program is completed. The process usually extends from 12 to 16 months, and recidivism rates for veterans who complete the program are exceptionally low.

Although there are 19 Veterans Courts in New York State, veterans who are arrested in counties that do not have a Veterans Court are simply unable to avail themselves of the special services such courts provide. This measure is designed to help alleviate that problem by allowing these services to be made available to veterans in nearby communities that technically fall outside the court's regular jurisdiction. To qualify, however, a defendant must consent to the diversion and must receive the approval of the local court, the Veterans Court and the prosecutors of both counties.

[1] *Invisible Wounds of War, Summary and Recommendations for Addressing Psychological and Cognitive Injuries*, Rand Corporation, Center for Military Health Policy Research, 2008.

Proposal

AN ACT to amend the criminal procedure law, in relation to removal of a criminal action to a veterans court

Section 1. Legislative findings. The legislature finds and declares that New York, along with the rest of the country, owes an enduring debt to the brave men and women who have served in our nation's armed forces. Their service in defense of our country and its ideals must never be forgotten. We also must not fail to recognize that when veterans return from foreign conflicts their transition to civilian life is not always an easy one and can be marked by depression, other forms of mental illness and substance abuse. Studies have shown that the trauma a soldier suffers while deployed is a major contributing factor to low level, but often persistent, criminal activity.

New York stands in the vanguard for treating veterans whose criminal conduct is linked to their military service. In 2008, the nation's first veterans treatment court was started in the Buffalo city court. By recognizing the root causes of many veterans' contacts with the criminal justice system and applying proven resources, including counseling, treatment for drug or alcohol addiction, hands-on assistance with housing needs and job training and placement, we have led the way in reducing recidivism among returning veterans. Starting with that single court in Buffalo, the veterans treatment court has become the model for many other states. While New York now has twenty-nine veterans treatment courts, not all of New York's veterans live in a county that currently has such a court. We can do better.

In order to broaden the availability of veterans treatment courts to qualified veterans, this act would authorize the transfer of a criminal case against a qualified veteran whose charges are pending in a local criminal court that is not a veterans treatment court to another local criminal court in an adjoining county that is a veterans treatment court. Following the successful "drug

hub court" model, the case would only be transferred on the application of the defendant, and with the consent of the court and district attorneys of both the sending and the receiving county. This will ensure the broadest possible reach of every existing veterans treatment court, and send a signal that New York and its courts are committed to acknowledging and serving the special needs of the greatest number of qualified veterans. In practical terms, this act would immediately and dramatically increase the number of counties where veterans charged with criminal offenses would have access to the proven benefits of a veterans treatment court. Moreover, because this act also calls for the establishment of such number of veterans treatment courts as may be necessary to fulfill the act's purposes, the act will help to provide all veterans in the state with access to such courts.

§ 2. Subdivision 4 of section 170.15 of the criminal procedure law, as amended by chapter 67 of the laws of 2000, is amended to read as follows:

4. Notwithstanding any provision of this section to the contrary, in any county outside a city having a population of one million or more, upon or after arraignment of a defendant on an information, a simplified information, a prosecutor's information or a misdemeanor complaint pending in a local criminal court, such court may, upon motion of the defendant and with the consent of the district attorney, order that the action be removed from the court in which the matter is pending to another local criminal court in the same county which has been designated a drug court by the chief administrator of the courts, or, on consent of the district attorney in the receiving county, to another local criminal court in an adjoining county that has been designated a veterans treatment court by the chief administrator of the courts, and such drug court or veterans treatment court may then conduct such action to [judgement] judgment or other final disposition; provided, however, that an order of removal issued under this subdivision shall not

take effect until five days after the date the order is issued unless, prior to such effective date, the drug court or veterans treatment court notifies the court that issued the order that:

(a) it will not accept the action, in which event the order shall not take effect, or

(b) it will accept the action on a date prior to such effective date, in which event the order shall take effect upon such prior date. Upon providing notification pursuant to paragraph (a) or (b) of this subdivision, the drug court or veterans treatment court shall promptly give notice to the defendant, his or her counsel and the district attorney.

§ 3. Subdivision 3 of section 180.20 of the criminal procedure law, as amended by chapter 67 of the laws of 2000, is amended to read as follows:

3. Notwithstanding any provision of this section to the contrary, in any county outside a city having a population of one million or more, upon or after arraignment of a defendant on a felony complaint pending in a local criminal court having preliminary jurisdiction thereof, such court may, upon motion of the defendant and with the consent of the district attorney, order that the action be removed from the court in which the matter is pending to another local criminal court in the same county which has been designated a drug court by the chief administrator of the courts, or, on consent of the district attorney in the receiving county, to another court in an adjoining county that has been designated a veterans treatment court by the chief administrator of the courts, and such drug court or veterans treatment court may then dispose of such felony complaint pursuant to this article; provided, however, that an order of removal issued under this subdivision shall not take effect until five days after the date the order is issued unless, prior to such effective date, the drug court or veterans treatment court notifies the court that issued the order that:

(a) it will not accept the action, in which event the order shall not take effect, or

(b) it will accept the action on a date prior to such effective date, in which event the order shall take effect upon such prior date.

Upon providing notification pursuant to paragraph (a) or (b) of this subdivision, the drug court or veterans treatment court shall promptly give notice to the defendant, his or her counsel and the district attorney.

§ 4. The criminal procedure law is amended by adding a new section 230.21 to read as follows:

§ 230.21 Removal of action to an adjoining county.

1. In any county outside a city having a population of one million or more, the court may, upon motion of the defendant and with the consent of the district attorney of both counties, order that the indictment and action be removed from the court in which the matter is pending to a superior court in an adjoining county that has been designated a veterans treatment court by the chief administrator of the courts, and such court may then conduct such action to judgment or other final disposition? provided, however, that an order of removal issued under this subdivision shall not take effect until five days after the date the order is issued unless, prior to such effective date, the veterans treatment court notifies the court that issued the order that:

(a) it will not accept the action, in which event the order shall not take effect, or

(b) it will accept the action on a date prior to such effective date, in which event the order shall take effect upon such prior date.

2. Upon providing notification pursuant to paragraph (a) or (b) of subdivision one of this section, the veterans treatment court shall promptly give notice to the defendant, his or her counsel and the district attorney of both counties.

§ 5. Subdivision 2 of section 212 of the judiciary law is amended by adding a new

paragraph (w) to read as follows:

(w) To the extent practicable establish such number of veterans treatment courts as may be necessary to fulfill the purposes of subdivision four of section 170.15 and subdivision three of section 180.20 of the criminal procedure law.

§ 6. This act shall take effect immediately.

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3. 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 defendant charged with a class B or class C drug offense from fifteen challenges to ten challenges. The number of peremptory challenges allotted for alternate jurors would remain the same, at two.

For many years, the Committee has adopted the recommendations of the Chief Judge's Jury Project, which favors the reduction of the number of peremptory challenges as a means of improving the efficiency of our jury selection system. New York is an outlier in this area by granting significantly more peremptory challenges than almost any other jurisdiction. For instance, in all Federal non-capital felony trials, the government only has six peremptory challenges and the defendant ten (see Federal Rules of Criminal Procedure, Rule 24).

In New York, the number of peremptory challenges in criminal cases is determined by the nature and degree of the offense, with more serious felonies having a greater number of peremptory challenges. Accordingly, there is a direct relationship between the penalty that can be imposed on an offense and the number of challenges allowed.

This measure recognizes that New York's drug law reforms have substantially reduced the sentencing ranges both for class B and class C felony drug offenses. Class B felony drug offenders are subject to 1 to 9 year determinate terms for first felony offenders; 2 to 12 year determinate terms for predicate non-violent felony offenders and 6-15 year determinate terms for offenders with a predicate violent felony conviction. Class C felony offenders are subject to determinate terms of 1 to 5 ½ years for first felony offenders; 1 ½ to 8 years for predicate non-violent felony offenders and 3 ½ to 9 years for offenders with a prior conviction for a violent felony offense. Many drug offenders can also receive a range of treatment and other sentences which do not require a state prison sentence and are not available to many non-drug offenders. Finally, although the Committee has not commissioned a statistical analysis of the issue, it is apparent that many drug offenders who are sentenced to state prison receive sentences which are at or close to statutory minimums.

In contrast, Class B felony non-drug offenders are subject to indeterminate or determinate sentences of up to 25 years while class C felony non-drug offenders are subject to sentences of up to 15 years. There is no precise correlation between drug offender sentences and sentences imposed on other sentencing classes. The Committee believes, however that the sentencing exposures faced by most class B and C felony drug offenders now more closely align with those of class D non-drug felons (sentences of up to 7 years) rather than class B or C felony drug offenders as are provided to class D and E felony non-drug offenders.

This measure reflects those reductions of sentencing ranges by reducing the number of peremptory challenges allowed to the same as those allowed for a class D or E felony.

<u>Proposal</u>

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

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 270.25 of the criminal procedure law is amended to read as follows:

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, other than a class B or class C felony as defined in article two hundred twenty, and two for each alternate juror to be selected.

§2. This act shall take effect on the ninetieth day after it shall have become a law and shall be applicable only to jury trials commencing on or after such effective date.

4. Sealing Petty Offenses
(CPL 160.55)

The Committee recommends that section 160.55 of the Criminal Procedure Law be amended to clarify that cases that have an outcome of a conviction only for a petty offense fall within the meaning of the statute regardless of the original arrest charge.

There is an unusual and unintended anomaly in how executive agencies apply CPL 160.55 to convictions where the original arrest charge is a petty offense (e.g., a traffic infraction or violation offense), as distinguished from cases where the original arrest charge is a misdemeanor or felony but later ends only in a conviction for a petty offense. To understand how this anomaly has arisen, it is necessary to understand the history of the statute. In relevant part, the statue currently provides that

> "[u]pon the termination of a criminal action or proceeding against a person by the conviction of such person of a traffic infraction or a violation [other than loitering or DWAI, unless the court decides to not seal in the interest of justice] . . . all official records and papers relating to the arrest or prosecution . . . on file with the division of criminal justice services, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency" (CPL 160.55(1)).

Despite this unequivocal language, most law enforcement agencies, including the Division of Criminal Justice Services and local police departments, distinguish between cases where an accused is arrested on a top charge that is a violation or traffic infraction and those that have a top charge of a misdemeanor or felony offense, but are later convicted only of a traffic infraction or violation. In the latter, all agree that the case should be sealed; in the former, law enforcement records consistently are not sealed.

The reasons for this result are found in the history of the statute as reflected in a decades-old, but never updated, McKinney's commentary on the topic. CPL 160.55 was enacted in 1980 and was originally designed to seal non-criminal dispositions that appeared on an accused's criminal history report (the "rap sheet"). At the time, and still today, a conviction for a non-criminal offense could only be reflected on a DCJS rap sheet if the accused was initially arrested on a fingerprintable offense (see CPL 160.10(1)). Where an accused is arrested for a non-printable offense, DCJS does not reflect the arrest and thus the case, regardless of disposition, is not reflected on a defendant's rap sheet.

Based on the original reach of the statute, it was understood that sealing convictions for a petty offense at DCJS involved only fingerprintable arrests. The practice commentary written at the time of the original statute accurately reflects this state of the law:

> "This section, added to the CPL in 1980, complements the provisions of the preceding section (160.50), which apply where the entire criminal action or proceeding is terminated in the defendant's favor. The situation covered here is where defendant, *having been arrested or charged with a printable offense (CPL §160.10), ultimately is*

convicted of a petty offense, except the three specifically excluded." (emphasis added)

The statute operated as reflected in the commentary until 1994, when the legislature expanded CPL 160.55 to include sealing not only petty offenses that would be reflected on and accused's rap sheet, but also records of law enforcement, including police and DA records (L. 1994, c. 169 § 81). Obviously, law enforcement agencies possess all arrest records, regardless of whether a defendant is charged with a fingerprintable offense. Thus, the distinction that was critical when the statute was first enacted – whether DCJS had any record to seal – became irrelevant to law enforcement records. At that point, a glaring inconsistency arose that made the sealing of petty offenses at the local law enforcement level dependent on whether the arrest carried a top-count charge of a crime. Ironically, the current application of the statute results in more favorable treatment for those accused of misdemeanors and felonies over those who are initially accused only of a petty offense, an outcome the Legislature surely could not have intended.

This measure amends CPL 160.55(1) by adding language to make it clear that the scope of the statute is gauged solely on the conviction charges as reflected in the final disposition of the case; the arrest charge is irrelevant. The measure elects to retain the prefatory language that the section applies to a "criminal action or proceeding" because petty offense charges, although not criminal, are still part of a criminal action or proceeding when adjudicated in the Unified Court System (see CPL 1.20(16)).

Proposal

AN ACT to amend the criminal procedure law, in relation to sealing petty offenses

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 160.55 of the criminal procedure law, as amended by chapter 169 of the laws of 1994, is amended to read as follows:

[Upon]Regardless of the class of offense for a which a person is initially charged, upon the termination of a criminal action or proceeding against a person by the conviction of such person of a traffic infraction or a violation, other than a violation of loitering as described in paragraph (d) [or (e)] of subdivision one of section 160.10 of this chapter or the violation of operating a motor vehicle while ability impaired as described in subdivision one of section eleven hundred ninety-two of the vehicle and traffic law, unless the district attorney upon motion

with not less than five [days]days' notice to such person or his or her attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise, or the court on its own motion with not less than five days' notice to such person or his or her attorney determines that the interests of justice require otherwise and states the reasons for such determination on the record, the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated by such conviction. Upon receipt of notification of such termination:

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

5. Court Fees for Youthful Offenders
(PL §60.02)

The Committee recommends amending the Penal Law to eliminate the mandatory surcharge for defendants adjudicated a youthful offender.

The newly enacted legislation to raise the age of criminal responsibility (L. 2017, c. 59), recognizes the need to treat older youth differently than adult offenders. The critical provisions for raising the age of criminal responsibility go into effect in two stages, applying to 16-year-olds on October 1, 2018, and to 17-year-olds one year later, on October 1, 2019. However, through initiatives already in place, the Judiciary has gained significant experience and insight into criminal offenses committed by older youth. For instance, superior courts have had dedicated youth parts for many years, and more recently, adolescent diversion parts (ADP) were created to handle 16- and 17- year old youth charged with lower level crimes. These court parts were established to provide better outcomes for older youth and, where appropriate, to relieve such defendants of the stigma that a criminal conviction often imposes.

In ADP, the court mandates young defendants to attend counseling sessions with court social workers trained in the problems of troubled youth and to perform community service. The goal of such treatment and service is to reduce recidivism and avoid a criminal conviction for the teen through an ultimate dismissal of the charges after an adjournment in contemplation of dismissal, a plea to a reduced violation charge, or in more serious cases, a plea to the charge with a designation of "youthful offender."

In most cases of older youth, the court and prosecutor will agree to youthful offender adjudication for the sole purpose of allowing the defendant to avoid a criminal conviction. Nonetheless, under current law the youth is still subject to a mandatory surcharge of ninety-five to one hundred fifty-five dollars for each docketed offense as well as the crime victim assistance fee (CVAF) of twenty-five dollars (PL §60.35(1)(iii)). The reality is that many youths resolve more than one case with pleas to an offense under each of separate dockets. This results in the imposition of multiple mandatory surcharges and crime victim assistance fees. And while the CVAF may be waived upon a finding of hardship, a court may not waive the mandatory surcharge ((CPL 420.35(2)).

The legislative history of the mandatory surcharge when examined in the context of other provisions relating to youthful offenders is strikingly inconsistent. When the Legislature created youthful offender status, it reflected the belief that youths often commit crimes out of immature impulsiveness, and that it does not serve their interest or that of society to hobble them with a criminal record at the threshold of adulthood. Consistent with this understanding, defendants afforded youthful offender status were exempt from the imposition of mandatory surcharges because a youthful offender adjudication is not a conviction of a crime. However, as part of a comprehensive effort to raise revenue, the legislature amended the Penal Law in 2004 to require a mandatory surcharge on all adjudications of youthful offenders (L. 2004 c. 56). The legislative history for this amendment, however, is silent on whether the legislature considered the collateral impact imposing mandatory surcharges would have on youth. Nor is it clear why the Legislature required imposition of the mandatory surcharge but exempted youthful offenders from having to pay the sex offender registration fee, DNA databank fee, or supplemental sex offender victim fee

imposed on adults (see Bill Jacket, L. 2004, c.56).

Experience shows that youth involved in the adult criminal justice system face many challenges that have a direct bearing on their ability to raise the mandatory surcharge amounts legitimately. Many youths arrested for crime are poor, live in unstable homes, have a history of abuse and neglect, and come from families that are unable to assist the youth in paying mandatory court fees or have no desire to do so.*

The only alternative to paying the surcharges is to ask the court to have the surcharge collected in the same manner as a civil judgment (CPL 420.10(6)). Such alternative is no real solution either for the youth or for society. Indeed, a civil judgment is likely to create the very stigma that the youthful offender law was enacted to prevent, and what a youthful offender adjudication is designed to avoid. While the imposition of a civil judgment frees these teenagers from the immediate obligation to pay the mandatory surcharge, this alternative can, and most likely will, have a negative effect on the youth's ability to win admission to a higher education institution and to secure student loans, employment and credit.

Institutions of higher learning increasingly check the credit history of applicants. While a credit history will not show a youthful offender adjudication, it will reveal the collection debt of the youth and that the applicant's creditor is the criminal court. This implicitly reveals that the defendant has been sanctioned by the criminal justice system. Even if an institution of higher learning does not conduct a credit check for admission, it will certainly do so if the applicant applies for financial aid, a likelihood for most teenagers who appear in youth court or ADP and later go on to college.

Further, it is standard practice for employers seeking to fill even low-level positions to conduct a credit check on all job applicants. A civil judgment on behalf of the criminal court against an applicant may be fatal to those applications. Even if the defendant is not stymied by the civil judgment notation in pursuit of higher education or employment, it may still prevent him or her from securing a loan or other bank credit as an adult, an essential resource for middle-class or working-class individuals.

The main purpose of the mandatory surcharge is to help defray the cost of the criminal justice system. If the defendant is hobbled by imposition of a civil judgment, whatever savings the court system gains, if any, will be far outweighed by the cost of any future arrest,

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* Aside from suffering the effects of poverty and a lack of a stable family situation, nationally, two-thirds of adolescents who enter the court system have at least one mental health diagnosis; often these diagnoses make obtaining and maintaining employment very challenging. Studies also suggest that court-involved youth lag in educational development, with 50% of them delayed in all academic areas, compared to 18% of youth with no court involvement (Peter Leone and Lois Weinberg, *Addressing the Unmet Educational Needs of Children and Youth in the Juvenile* Justice *and Child Welfare Systems*, Georgetown University Center for Juvenile Justice Reform, May 2010, p. 10). Moreover, youth in the criminal justice system frequently have undiagnosed learning disabilities that, combined with their low skill levels, also directly affect their job-readiness. Meanwhile, studies also suggest that anywhere from 17 to 70 percent of court-involved young people have had a childhood maltreatment history, many living with families that struggle with poverty, addiction, homelessness, and other pressures (Denise Herz, et al, *Addressing the Needs of Multi-System Youth: Strengthening the Connection Between Child Welfare and Juvenile Justice*, Georgetown University Center for Juvenile Justice Reform, March 2012, p.17).

prosecution, court-assigned defense and incarceration of this person. Thus, the mandatory surcharge imposed upon those defendants afforded "youthful offender" status (PL §60.35[10]) inadvertently perpetuates those disabilities even when the disposition of the criminal charge has been resolved in a way consistent the Legislature's vision.

This measure amends section 60.02 of the Penal Law by eliminating the requirement that the court impose a mandatory surcharge when adjudicating a defendant a youthful offender.

Proposal

AN ACT to amend the penal law in relation to the mandatory surcharge for youthful offenders

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

Section 1. Subdivision 3 of section 60.02 of the penal law, as amended by Section 1 of part Y of chapter 56 of the laws of 2008, is amended to read as follows:

(3) The provisions of section 60.35 of this article shall apply to a sentence imposed upon a youthful offender finding and the amount of the [mandatory surcharge and] crime victim assistance fee which shall be levied at sentencing shall be equal to the amount specified in such section for the offense of conviction for which the youthful offender finding was substituted; provided, however that the court shall not impose the mandatory surcharge, sex offender registration fee, DNA databank fee or supplemental sex offender victim fee, as defined in subparagraphs (iv) and (v) of paragraph (a) and paragraph (b) of subdivision one of section 60.35 of this article, for an offense in which the conviction was substituted with a youthful offender finding.

§2. This act shall take effect immediately.

6. Dismissal of Outstanding Traffic Infractions
(CPL 30.30)

The Committee recommends that the Criminal Procedure Law be amended to authorize a court in New York City to dismiss any traffic infraction that remains as the sole charge in an accusatory instrument where all other charges are 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, prosecutors often combine charges of a misdemeanor or felony with a related lower level traffic infraction. This permits the prosecutor to offer a plea to a petty offense in appropriate cases where the higher offense cannot be proved, or is thought to make it easier to introduce evidence of the traffic infraction on any trial of the misdemeanor or felony charges. However, in cases where the prosecutor fails to timely announce readiness on the more serious charges, and the defense files a successful speedy trial motion, the court is only authorized to dismiss the misdemeanor or felony counts. The speedy trial statute does not authorize the court to dismiss the related traffic infraction. Although constitutional speedy limitations will still apply to the low-level traffic infraction (*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 traffic infraction charges continue 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. Moreover, the Committee has determined that this issue arises almost exclusively in the courts of New York City, and has not been identified as a serious deterrent to the resolution of cases in courts outside New York City. For this reason, the measure only applies to cities with a population of more than one million people.

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 is amended by adding a new paragraph (d) to read as follows:

(d) In cities of more than one million people, where a motion to dismiss all offenses charged in an accusatory instrument is granted pursuant to subdivision one of this section, and such accusatory instrument also charges one or more traffic infractions, such traffic infraction or infractions shall also be dismissed.

§ 2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to criminal actions commenced on and after such date.

7. Calculation of Consecutive Definite Sentences
(Penal Law §70.30)

To avoid confusion in calculating multiple consecutive sentences for jail terms in county facilities, the Committee recommends amending the Criminal Procedure Law to clarify that the final aggregate term of incarceration must be computed before applying jail time or good time credit.[1]

Penal Law §70.30(2)(b) provides that when calculating consecutive definite sentences, the consecutive terms are added together and, so long as they are to be served in a single institution, are limited to a maximum of two years. Confusion arises when county correction staff must determine how to apply jail time credit and good time credit to consecutive jail terms. The current statute is silent on how this calculation should be done, which has led to incorrect jail time calculations.

The problem is illustrated in *People ex rel Ryan v. Cheverko*, (22 N.Y.3d 132 (2013)), where defendant was sentenced to five definite one year terms of imprisonment, four of which were to run consecutively. Pursuant to Penal Law §70.30(2)(b), county corrections calculated the term by first aggregating all consecutive terms (1,460 days) and then applying jail time credit and good time credit to that aggregate term (592 days). This left a total of 868 days. Since the 868 days was longer than two years imprisonment, they adjusted defendant's discharge date to a date exactly two years from the date his sentences commenced. However, after referring to the legislative history of the statute, the Court of Appeals held that "the two-year limit was intended as an 'aggregate term' that effectively replaces a court-imposed aggregate term exceeding two years (22 N.Y.3d at 136). The Court therefore held that correctional authorities must calculate the sentences "based on a two-year aggregate term of incarceration" and jail time credit and good time credit should be deducted from that two-year aggregate term rather than the full aggregate term imposed by the sentencing court" (*id*.).

This measure conforms the statute to the court of Appeals holding in *Cheverko* by making it plain that the maximum sentence that may be imposed on consecutive sentences is an aggregate term of two years. This would eliminate the current ambiguity in the statue and signal to county corrections staff that jail time credit and any earned good time credit must be applied after determining the correct aggregate term under the court's sentence.

Proposal

AN ACT to amend the penal law, in relation to calculation of consecutive definite sentences

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

[1] Jail time credit applies to any period of incarceration on the case a defendant may serve prior to sentence (see PL §70.30(3)), and good time credit "reflects any 'discretionary reductions' in the term awarded for a prisoner's 'good behavior and efficient and willing performance of duties' while incarcerated" (*People ex rel Ryan v. Cheverko*, 22 N.Y.3d 132, 137 n 2 (2013) *citing* Correction Law §804(1)).

follows:

Section 1. Paragraph (b) of subdivision 2 of section 70.30 of the penal law is amended to read as follows:

(b) If the sentences run consecutively and are to be served in a single institution, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term, or by service of an aggregate term of two years imprisonment plus any term imposed for an offense committed while the person is under the sentences, whichever is less;

§2. This act shall take effect immediately.

8. Return of Voluntarily-Surrendered Firearms
(CPL 530.14(5))

The Committee recommends that section 530.14 of the Criminal Procedure Law be amended to provide a procedure for the return of firearms voluntarily surrendered in connection with the issuance of an order of protection after the order of protection has terminated.

While a court has the authority to order the surrender of weapons in connection with the issuance of an order of protection (*see* CPL 530.14; FCA 842-a), there is no statute authorizing a court to order law enforcement to restore the weapons after the reason for the surrender has ended. Law enforcement officials who were ordered by a court to take possession of the weapons are reluctant to release the weapons back to the owner unless the owner presents them with another court order authorizing the release. However, under current law, the court that issued the order often has no jurisdiction to order law enforcement to return any weapons surrendered. As a result, the owner is compelled to resort to an Article 78 proceeding in Supreme Court to compel release of the weapons (*see Engel v Engel*, 24 A.D.3d 548(2d Dept 2005); *Aloi v Aloi*, 10 A.D.3d 655 (2d Dept 2004)).

The issue is described in the Practice Commentary to the Family Court Act dealing with surrender of weapons:

> " . . . neither Section 842-a nor any other Article 8 section authorizes the Court to order the return of firearms, and the Court consequently lacks jurisdiction to entertain an application; see *Blauman v. Blauman*, 2 A.D.3d 727, 769 N.Y.S.2d 584 (2d Dept. 2003). The dichotomy is illustrated in *Aloi v. Nassau County Sheriff's Department*, N.Y.L.J., 8/3/05, p. 20 (Sup. Ct. Nassau Cty. 2005). Family Court had initially issued a temporary order of protection and a Section 842-a order, but both had been withdrawn as part of a negotiated settlement. In the absence of Family Court jurisdiction, the respondent's only recourse was a new petition in Supreme Court (the Sheriff understandably refused to return the firearms in the absence of a court order), thereby delaying the lawful return of his property, increasing litigation costs and legal fees, and placing an unnecessary burden on the Supreme Court. The apparent jurisdictional oversight can be remedied only through legislation.

A similar analysis applies to surrender orders that originate in a local criminal court under CPL 530.14. In contrast, Supreme Court orders of protection may not have such a limitation since a Supreme Court justice appears to have the authority to order return of weapons (*see Dudek v Nassau County Sheriff's Dept.,* 991 F.Supp.2d 402 (E.D.N.Y. 2013).

The current measure amends CPL 530(14) to provide a procedure for a court of record to order the return of a voluntarily surrendered firearm after the reason for the surrender has ended. Significantly, the measure provides notice and an opportunity to be heard to the district attorney, the county attorney, the protected party and any licensing officer responsible for issuance of a firearms license to the subject of the order. Further, in order to ensure that any licensing authority has a full opportunity to consider revoking any existing firearm license possessed by the subject of the order, the order providing for the return of a voluntarily surrendered firearm must be stayed for the longer of ninety days or until the conclusion of any license revocation proceeding.

Proposal

AN ACT to amend the criminal procedure law, in relation to procedures for the return of firearms voluntarily surrendered in connection with an order of protection

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

Section 1. Paragraph (b) of subdivision 5 of section 530.14 of the criminal procedure law, as added by chapter 644 of the laws of 1996, is amended to read as follows:

(b) The prompt surrender of one or more firearms pursuant to a court order issued pursuant to this section shall be considered a voluntary surrender for purposes of subparagraph (f) of paragraph one of subdivision a of section 265.20 of the penal law. The disposition of any such firearms shall be in accordance with the provisions of subdivision six of section 400.05 of the penal law, provided, however, that upon termination of any suspension order issued pursuant to this section or section 842-a of the family court act, upon written application of the subject of the order, with notice and opportunity to be heard to the district attorney, the county attorney, the protected party, and any licensing officer responsible for issuance of a firearms license to the subject of the order pursuant to Article 400 of this chapter, and upon a written finding that there is no legal impediment to the subject's possession of a surrendered firearm, any court of record may order the return of a firearm not otherwise disposed in accordance with subdivision six of section 400.05 of the penal law. When issuing such order in connection with any firearm subject to a license requirement under Article 400 of this chapter, unless the licensing authority consents to a shorter period, the order must be stayed for the longer of ninety days or the conclusion of any license revocation proceeding.

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

8. Deferral of Mandatory Surcharge
(CPL 420.40)

The Committee recommends that section 420.40 of the Criminal Procedure Law be amended to allow a court to consider deferral of the mandatory surcharge at the time a defendant is sentenced, and to be able to consider a defendant's individual circumstances in its determination.

The Court of Appeals recently held that a sentencing court lacked the authority to consider a defendant's request to defer a mandatory surcharge and that a defendant may only seek to defer payment by way of a subsequent motion to resentence (*People v Jones* (26 NY3d 730, 733 (2016)). Incarcerated defendants without means to pay mandatory surcharges and fees (which for felony defendants normally include charges of at least $375) have funds deducted from whatever money they earn through prison labor or may receive from outside sources (see PL §60.35(1) (superintendent shall collect the mandatory surcharge from the inmates' fund or money earned in a work release program). Moreover, even where a defendant is able to make a motion for deferral of the surcharge, as stated in *Jones*, "the statutory scheme contemplates that granting such request is neither routine nor common, certainly not for persons in confinement. As we read the statutes, they are intended to ensure what defendant now seeks to avoid, namely the payment of the surcharge during a defendant's confinement, *except in the most unusual and exceptional of circumstances* where a defendant's sources of income support a judicial finding of inability to pay any portion of the surcharge" (26 NY3d at 740, *emphasis supplied*). In order for a court to find that an incarcerated defendant suffers an "unreasonable hardship" the inmate must show exceptional hardship over and above the hardship other inmates face while incarcerated (*see People v Tookes*, 52 Misc.3d 956, 974-975) (Sup. Ct., N.Y. Cty. 2016).

The Committee is aware that the imposition of mandatory surcharges are related to the "State's legitimate interest in raising revenues" . . . and the mandatory surcharge "is paid to the State to shift costs of providing services to victims of crime from 'law abiding taxpayers and toward those who commit crimes' . . . (*People v Jones*, 26 NY3d at 737, *citations omitted*). Nonetheless, the current standard set forth in the Criminal Procedure Law, and its interpretation by the courts, has, in the Committee's view, almost wholly eliminated the ability of an incarcerated inmate to defer the surcharge. As a result, applications by incarcerated defendants for deferral of surcharges are routinely considered "premature" and not considered on their individual merits (*see e.g., People v Griffen*, 81 A.D.3d 743 (2d Dept 2011)).

The Committee believes that trial judges should have the discretion in appropriate cases to defer surcharges and fees until after an incarcerated defendant's release to allow inmates to better address individual health or hygiene issues, facilitate communications with family or have a greater ability to purchase basic commissary items. Most inmates are indigent and earn meager funds through prison labor. Reducing these earnings further through surcharge and fee assessments can create an unreasonable hardship for some inmates. Routinely denying such inmates the ability to argue for a deferral of court fees at the time of sentence is needlessly wasteful of court resources, causes undue proliferation of post-judgment motions and inappropriately restricts the ability of a court to consider a defendant's particular circumstances in deciding the application.

This measure amends paragraph 2 of subdivision 420.40 of the Criminal Procedure Law to allow a motion to defer the imposition of a mandatory surcharge at the time of sentence. It also makes plain that in evaluating the application, the Court shall assess each defendant's circumstances individually, rather than comparing a defendant's circumstances to those of other defendants or inmates. The direction in the proposed statute for courts considering deferrals to evaluate both the interest served by fee collections and the effect of financial obligations on inmate re-entry is based on the American Bar Associations' "Standards for Criminal Justice: Treatment of Prisoners" (Standard 23-8.8 (b) (2011) which recommends that such factors be balanced where inmate fee collections are imposed - "In imposing and enforcing financial obligations on prisoners, governmental authorities, including courts, should consider both the interest served by the imposition of the obligation and the cumulative effect of financial obligations on a prisoner's successful and law-abiding re-entry"). The proposed bill would leave unchanged the general standard for fee deferrals, which the Legislature created in the 1995 Sentencing Reform Act, requiring that a deferral cannot be granted unless an inmate demonstrates an "unreasonable hardship." Rather, the bill would provide guidance to courts in making such determinations and eliminate unnecessary motions by allowing unreasonable hardship determinations to be made at sentencing.

Finally, the measure amends other paragraphs within the section to reflect that mandatory court fees now include a supplemental sex offender registration fee and a crime victims' assistance fee.

Proposal

AN ACT to amend the criminal procedure law, in relation to deferral of court fees

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

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

§420.40 Deferral of a mandatory surcharge; financial hardship hearings.

1. Applicability. The procedure specified in this section governs the deferral of the obligation to pay all or part of a mandatory surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee imposed pursuant to subdivision one of section 60.35 of the penal law and financial hardship hearings relating to mandatory surcharges.

2. On an appearance date set forth in a summons issued pursuant to subdivision three of section 60.35 of the penal law, section eighteen hundred nine of the vehicle and traffic law or section 27.12 of the parks, recreation and historic preservation law, or upon the date a defendant is sentenced for the commission of a crime in connection with which any mandatory surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee has or will be imposed, a person upon whom a mandatory surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee was levied shall have an opportunity to present on the record credible and verifiable information establishing that [the mandatory surcharge, sex offender registration fee or DNA databank fee]such fees should be deferred, in whole or in part, because, due to the indigence of such person the payment of [said surcharge, sex offender registration fee or DNA databank fee]such fees would work an unreasonable hardship on the person or his or her immediate family. In determining whether the imposition of such fees would create an "unreasonable hardship" on the person or his or her immediate family, the court shall consider both the interest served by the imposition of the obligation and the cumulative effect of financial obligations on the person's successful and law-abiding re-entry. The Court shall assess each defendant's circumstances individually, rather than comparing a defendant's circumstances to those of other defendants or inmates.

3. In assessing such information the superior court shall be mindful of the mandatory nature of the surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee and DNA databank fee, and the important criminal justice and victim services sustained by such fees.

4. Where a court determines that it will defer part or all of a mandatory surcharge, sex

offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee imposed pursuant to subdivision one of section 60.35 of the penal law, a statement of such finding and of the facts upon which it is based shall be made part of the record.

5. A court which defers a person's obligation to pay a mandatory surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee imposed pursuant to subdivision one of section 60.35 of the penal law shall do so in a written order. Such order shall not excuse the person from the obligation to pay the surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee. Rather, the court's order shall direct the filing of a certified copy of the order with the county clerk of the county in which the court is situate except where the court which issues such order is the supreme court in which case the order itself shall be filed by the clerk of the court acting in his or her capacity as the county clerk of the county in which the court is situate. Such order shall be entered by the county clerk in the same manner as a judgment in a civil action in accordance with subdivision (a) of rule five thousand sixteen of the civil practice law and rules. The order shall direct that any unpaid balance of the mandatory surcharge, sex offender registration fee, supplemental sex offender registration fee, crime victims' assistance fee or DNA databank fee may be collected in the same manner as a civil judgment. The entered order shall be deemed to constitute a judgment-roll as defined in section five thousand seventeen of the civil practice law and rules and immediately after entry of the order, the county clerk shall docket the entered order as a money judgment pursuant to section five thousand eighteen of such law and rules.

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

9. Definite Sentences for Certain First Time Nonviolent Felony Offenders (Penal Law § 70.00(4))

The Committee recommends that section 70.00 of the Penal Law be amended to authorize a court to impose a definite sentence - a term of incarceration in a local jail for one year or less - for defendants convicted of certain Class C non-violent felony offenses.

The Penal Law currently provides a trial court with an eclectic choice of authorized sentences for a first felony offender convicted of a class C non-violent felony offense. Article 70 of the Penal Law requires a court to impose an indeterminate state prison term ranging from a minimum of 1-3 years to a maximum of 5-15 years (PL §§ 70.00(3)(b); 70.00(2)(c)). Nonetheless, the Penal Law does not always require a court to use Article 70 when imposing a felony sentence for a class C non-violent felony offense (*see* PL § 60.01). For example, for a class C non-violent felony a court may impose a sentence of probation (PL § 65.00), a conditional discharge (PL § 65.05) or even an unconditional discharge (CPL 65.20). Moreover, a class C felony drug offender is eligible to receive probation or conditional discharge, a determinate sentence in state prison of at least one year followed by a period of post-release supervision or a definite sentence of 1 year or less where the court determines that a state prison term would be "unduly harsh" (Penal Law §§ 60.04(4), 60.01(3)(a), 70.70(2)(c)). Only a few designated class C felonies require a court to impose a term of imprisonment under PL Article 70.[2]

The result of this labyrinth of sentencing laws is that, for class C non-violent felonies, with the exception of drug felonies and certain designated felonies, the court is permitted to impose a sentence with a non-jail term or an indeterminate state prison sentence but may not impose a definite sentence of one year or less in a local jail facility (*see e.g. People v Furman*, 280 A.D.2d 385 (1st Dept 2001). The Committee recommends closing this gap.

This measure amends section 70.00(4) to authorize a definite sentence for class C nonviolent felony offenses in any case where the court could impose either a probation sentence. Thus, those class C designated felonies that require imposition of a state prison term are not affected. Finally, the measure expressly excludes drug felonies to ensure that the court must continue to impose sentences for those crimes under section 60.04 of the Penal Law.

Proposal

AN ACT to amend the penal law, in relation to alternative definite sentences for certain non-violent class C felonies

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

2 PL § 60.05 provides that the following class C felony offenses require the court to impose a sentence imprisonment in accordance with section 70.00: attempt to commit any of the class B felonies of bribery in the first degree, bribe receiving in the first degree, conspiracy in the second degree and criminal mischief in the first degree; criminal usury in the first, rewarding official misconduct in the first degree, receiving reward for official misconduct in the first degree, attempt to promote prostitution in the first degree, promoting prostitution in the second degree, and arson in the third degree.

follows:

Section 1. Subdivision 4 of section 70.00 of the criminal procedure law, as added by chapter 738 of the laws of 2004, is amended to read as follows:

4. Alternative definite sentence for class D, [and]E [felonies]and certain class C felonies. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, or to a class C felony for which a sentence is authorized by article sixty-five of this chapter other than a felony defined article two hundred twenty of two hundred twenty-one of this chapter and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

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

10. 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. However, because there is nothing in existing CPL 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 N.Y.2d 477 (1995)); *People v. Johnson* (81 N.Y.2d 980 (1993) and *People v. Owens* (69 N.Y.2d 585 (1987)).

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. Moreover, before submitting the written instruction, the judge would have to once again read the instruction 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, shall mark such written instructions as a court exhibit and shall read the instructions to the jury.

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

12. Residency Restrictions for Certain Sex Offenders.
(PL § 65.10(4-a)(a); Executive Law § 259-c(14))

The Committee recommends that the Criminal Procedure Law and the Executive Law be amended to more effectively address the issue of sex offender residency requirements for offenders convicted of a sex crime.

A convicted sex offender sentenced to probation or a conditional discharge, or who is on parole or subject to conditional release with respect to a sex crime where the victim was under the age of 18, or who is a level 3 sex offender under the Sex Offender Registration Act (SORA) is generally required to refrain from knowingly entering within 1000 feet of a school when a minor is present at the school (s*ee* PL § 65.10 (4-a)(a); Executive Law § 259-c(14)). "School grounds" is defined to include property within 1,000 feet of a school. In dense urban areas like New York City, there are few locations which are not within 1,000 feet of a school. Only 14 of 270 shelters in the New York City system have been determined to be compliant with the 1,000-foot rule. This means that enforcement of the current law forecloses many convicted sex offenders from being able to live in many appropriate residences.

In 2014, the New York City Department of Homeless Services began to enforce the statute with respect to its facilities. The result has been that the vast majority of homeless shelters, which are often the only housing option for many sex offenders being released from prison, are now unavailable to them. That problem, in turn, has led the Department of Correction and Community Supervision to hold some sex offenders past their mandatory release dates because of the absence of any housing options. In turn, that has prompted petitions for writs of *habeas corpus*, demanding the release of offenders notwithstanding the lack of any housing for them.[3]

There is scant evidence that sex offender residency requirements have any impact in reducing recidivism. The majority of children who are sexually abused are abused by someone well-known to them and studies which have attempted to determine whether sex offenders who live in proximity to schools are more likely to re-offend have failed to find a relationship. [4] Further, there is little question that in some cases public safety is being jeopardized by the limited housing options now available to convicted sex offenders. Offenders who have never evidenced any deviant sexual interest in children have sometimes been moved throughout the New York

[3] *See "Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates",* NY Times, August 21, 2014.

[4] According to a recent report, "only one study (Minnesota Department of Corrections, 2007) has investigated the potential effectiveness of sexual offender residence restrictions to reduce recidivism. The authors examined the offense patterns of 224 sexual offenders released between 1990 and 2005. The results demonstrated that residence restrictions would not have prevented any re-offenses. Of the 224 offenders, only 27 (12%) established contact with their victim(s) within one mile of the offenders' home and not one established contact near a school, park, or playground. The Colorado Department of Public Safety (2004) used mapping software to examine the residential proximity to school and daycare centers of 13 sexual offenders who sexually recidivated in a study of 130 sexual offenders over a 15-month follow-up period (15 offenses by 13 offenders). The results demonstrated that recidivists were randomly located and were not significantly more likely than non-recidivists to live within 1,000 feet of a school or daycare" ("Sex Offender Residence Restrictions," Association for the Treatment of Sexual Abusers - Public Policy Briefs, 2008).

City shelter system repeatedly, to the dismay of supervising parole officers, in order to comply with the 1,000-foot rule. The moves hinder the ability for such offenders to obtain employment and stable housing, goals whose fulfillment would reduce re-offense risk. Ironically then, the difficulty in finding housing makes it more difficult to establish appropriate living situations for this population and thus creates a greater risk of re-offense - clearly an unintended consequence of these laws.

Current reliance on the SORA risk level assessment system is also problematic. The accuracy of the SORA risk assessment process has been subject to significant criticism. [5] The process also fails to distinguish "high risk" sex offenders from offenders who are at substantial risk to offend against children. A sex offender who is at high risk to offend against an adult may have no sexual interest in children and may be at a very low risk to offend against a child. At the same time, an offender who may never have been convicted of a sex crime against a child and may have been deemed a moderate risk offender under SORA's risk assessment process may have a deviant sexual interest in children and be at a substantial risk to sexually offend against a minor. Under current law, such an offender would not be subject to the 1,000-foot rule.

This measure is designed to target the appropriate sex offender population at substantial risk to reoffend against children. It therefore eliminates the coverage of all Level 3 "high risk" offenders where the offender's sex crime did not involve a minor victim, and replaces it with a designation by the court that the offender poses a "substantial risk" to commit a sexual offense against a victim under the age of eighteen. In making that designation, the sentencing court may find such a risk exists based either on the offender's history of committing such a sexual offense or on a psychological assessment indicating such a risk. Moreover, although the court is permitted to consider the offender's risk level, it is not bound by that determination. The court is required to make the designation at the same time as the court determines the offender's risk level classification pursuant to Article 6-C of the Correction Law; however, it must make an interim finding if the SORA designation cannot be made at the time of sentence. In such a case, the court can refine its designation at the time of the SORA classification or at any other time upon a showing of changed circumstances.

Proposal

AN ACT to amend the criminal procedure law, in relation to sex offender residency requirements

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

Section 1. Paragraph (a) of subdivision 4-a of section 65.10 of the penal law, as amended

[5] *See, e.g.*, Association of the Bar of the City of New York: "Report on Legislation by the Criminal Courts Committee, The Criminal Justice Operations Committee and the Corrections and Community Reentry Committee: A-4591-A\S-3138-A" (discussing problems with the SORA risk assessment system and supporting legislation to reform it).

by chapter 67 of the laws of 2008, is amended as follows:

(a) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense defined in article one hundred thirty, two hundred thirty-five or two hundred sixty-three of this chapter, or section 255.25, 255.26 or 255.27 of this chapter, 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 168-1 of the correction law] by the court as being at a substantial risk to commit a sexual offense against a victim under the age of eighteen, the court shall require, as a mandatory condition of such sentence, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of this chapter, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her probation officer or the court and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the probation officer or the court and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

For the purpose of this section an offender shall be designated by the court as being at a substantial risk to commit a sexual offense against a victim under the age of eighteen when the court finds such a risk exists based on either the offender's history of committing such a sexual

offense or sexual offenses or a psychological assessment indicating such a risk. In making its determination, the court may consider the offender's risk level pursuant to article 6-C of the correction law but may make its determination pursuant to this subdivision notwithstanding the offender's risk level classification pursuant to such article. The court's determination pursuant to this subdivision shall be made at the same time as the court determines the offender's risk level classification pursuant to article 6-C of the correction law, provided, however, that if such risk level classification for any reason has not been made by the time the offender is sentenced, the court shall make the determination required by this subdivision at the time of sentencing and may modify that determination at the time a risk level classification pursuant to article 6-C is made. A party may petition the court at any time to modify the determination required by this subdivision based on changed circumstances.

§2. Subdivision 14 of section 259-c of the executive law, as amended by chapter 62 of the laws of 2011, is amended as follows:

14. notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25, 255.26 or 255.27 of the penal law and the victim of such offense was under the age of eighteen at the time of such offense, or such person has been [determined 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] by the court as being at a substantial risk to commit a sexual offense against a victim under the age of eighteen, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in

subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her parole officer and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the parole officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

For the purpose of this section an offender shall be designated by the court as being at a substantial risk to commit a sexual offense against a victim under the age of eighteen when the court finds such a risk exists based on either the offender's history of committing such a sexual offense or sexual offenses or a psychological assessment indicating such a risk. In making its determination, the court may consider the offender's risk level pursuant to article 6-C of the correction law but may make its determination pursuant to this subdivision notwithstanding the offender's risk level classification pursuant to such article. The court's determination pursuant to this subdivision shall be made at the same time as the court determines the offender's risk level classification pursuant to article 6-C of the correction law, provided, however, that if such risk level classification for any reason has not been made by the time the offender is sentenced, the court shall make the determination required by this subdivision at the time of sentencing and may modify that determination at the time a risk level classification pursuant to article 6-C is made. A party may petition the court at any time to modify the determination required by this subdivision

based on changed circumstances.

§3. This act shall take effect 120 days after it shall have become law.

69. Trial Order of Dismissal: Repealer
(CPL 290.10(2) and (3); 450.40(1) and (2)))

To conform to controlling law in the area of double jeopardy, the Committee recommends that sections 290.10 and 450.40 of the Criminal Procedure Law be amended by repealing statutory references to an appellate court's authority to review erroneously excluded evidence.

As originally enacted in 1970, CPL 290.10 and 450.40 authorized the People to appeal from a wrongly granted trial order of dismissal entered prior to the return of a guilty verdict. As part of its review of the trial court's granting the trial order of dismissal, the appellate court was authorized to consider whether the trial court had erroneously excluded admissible evidence that, had it been admitted properly, would have supplied evidence necessary to meet the People's burden of proof. Accordingly, in order to provide an adequate record for appeal, the statute permitted the prosecutor to place on the trial record an "offer of proof" summarizing the substance of the excluded evidence (*see* CPL 290.10(3); 450.40(2)).

Subsequently, the New York Court of Appeals, relying on U.S. Supreme Court precedent, held that double jeopardy principles prohibit any retrial of a case where a court terminated an action in the defendant's favor by wrongly granting a trial order of dismissal before the jury returned a verdict (*People v. Brown*, 40 N.Y.2d 381 (1976); s*ee also* Donnino, Practice Commentary to CPL § 290.10). The Court later recommended that trial courts "whenever practicable" reserve decision on a motion for a trial order of dismissal until after the verdict has been returned to preserve the People's right to appeal (*People v. Key*, 45 N.Y.2d 111 (1978)). By waiting until after a verdict is delivered to rule on the trial order of dismissal, any grant of the application does not implicate double jeopardy because the remedy on appeal is reinstatement of the verdict, not a retrial.

In the wake of these precedents, the Legislature eliminated the statutory authority for the People to appeal a pre-verdict grant of a trial order of dismissal, and instead restricted an appeal from a trial court's trial order of dismissal to instances where the court reserved decision until after the jury returned a verdict of guilty (CPL § 450.20 (2) (L.1983, c. 170 §3). However, in so doing, the Legislature neglected to repeal several provisions that relied on pre-*Brown* doctrines (*see e.g.*, CPL §§ 450.40. 290.10(2) and 290.10(3)). These provisions, involving the review of erroneously excluded evidence, are relics of a different era. They often confuse and at times mislead practitioners into believing these provisions have substantive impact. Incorporating these relics into a legal argument can be, at best, embarrassing to the unwary; worse, they can divert attention away from more substantive appellate arguments.

This measure repeals subdivisions 2 and 3 of section 290.10 of the Criminal Procedure Law,[1]

[1] CPL 290.10(2) and (3) provide as follows:

2. Despite the lack of legally sufficient trial evidence in support of a count of an indictment as described in subdivision one, issuance of a trial order of dismissal is not authorized and constitutes error when the trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people.

3. When the court excludes trial evidence offered by the people under such circumstances that the substance or content thereof does not appear in the record, the people may, in anticipation of a possible subsequent trial order of dismissal emanating from the allegedly improper exclusion and erroneously issued in violation of subdivision two, and in anticipation of a possible appeal therefrom pursuant to subdivision two of section 450.20, place upon the

repeals subdivision 2 of 450.40 of the criminal procedure law[2] and makes a conforming amendment to subdivision 1 of that section.

Proposal

AN ACT to amend the criminal procedure law in relation to erroneously excluded evidence and trial orders of dismissal, and repealing provisions thereof

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 290.10 of the criminal procedure law are REPEALED.

§2. Subdivision 1 of section 450.40 of the criminal procedure law, as added by chapter 996 of the laws of 1970, is amended to read as follows:

1. An appeal by the people from a trial order of dismissal, as authorized by subdivision two of section 450.20, may, as indicated by section 290.10, be based [either (a)] upon the ground that the evidence adduced at the trial was legally sufficient to support the count or counts of the accusatory instrument dismissed by the order[, or (b) upon the ground that, though not legally sufficient, such evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people].

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record, out of the presence of the jury, an "offer of proof" summarizing the substance or content of such excluded evidence. Upon the subsequent issuance of a trial order of dismissal and an appeal therefrom, such offer of proof constitutes a part of the record on appeal and has the effect and significance prescribed in subdivision two of section 450.40. In the absence of such an order and an appeal therefrom, such offer of proof is not deemed a part of the record and does not constitute such for purposes of an ensuing appeal by the defendant from a judgment of conviction.

[2] CPL 450.40(2) provides as follows:

2. If the appeal is based upon the ground specified in paragraph (b) of subdivision one, and if the appellate court determines that the evidence unsuccessfully offered by the people was improperly excluded, and if at the trial the people made on[1] offer of proof with respect thereto pursuant to subdivision three of section 290.10, the appellate court, in making its determination whether the people's evidence would have been legally sufficient had it not been for the improper exclusion, must treat the excluded evidentiary matter as it is summarized in the offer of proof as evidence constituting a part of the people's case.

§3. Subdivision 2 of section 450.40 of the criminal procedure law is REPEALED.

§4. This act shall take effect immediately.

70. Drug Law Reform Act of 2009
(CPL 216.00; 168.58(1))

The Drug Law Reform Act of 2009 (the Act) has been successful in promoting public safety by significantly reducing the recidivism rate of defendants who engage in criminal activity as a result of drug dependence. By reducing incarceration rates, it has also achieved significant cost savings to the state. The Committee recommends amending the Act by modestly expanding the definition of an "eligible defendant" under Article 216 of the Criminal Procedure Law. It further recommends extending the reach of conditional sealing under CPL 160.58 to those newly eligible defendants who successfully complete the judicial diversion program.

Under current law, to be considered for judicial diversion, a defendant must have an identified substance abuse problem, and be charged with a drug felony or felonies under Articles 220 and 221 of the Penal Law, or with a felony specified in CPL 410.91(4)[3]. A defendant charged with a misdemeanor drug felony, however, is not eligible. When the law was first enacted the Legislature modeled the law on the successful drug treatment alternative to prison program, which involved defendants charged with drug felonies. Yet, there is no continuing reason why a defendant identified with a substance abuse problem and charged with only a misdemeanor, should not be afforded the same potential beneficial opportunities and outcomes afforded a defendant charged with an enumerated felony or felonies. It makes little sense to use a rehabilitative model only for felony offenders.

Accordingly, this measure amends Criminal Procedure Law Article 216, to include as an "eligible defendant" those individuals with an identified substance abuse problem who are charged with misdemeanor offenses under Article 220 and 221 of the Penal Law. An "eligible defendant" would therefore include defendants charged with criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), criminally possessing a hypodermic instrument (Penal Law § 220.45), criminally using drug paraphernalia in the second degree (Penal Law § 220.50), criminal possession of methamphetamine manufacturing material in the second degree (Penal Law § 220.70), and criminal possession of marihuana in the fourth and fifth degrees (Penal Law §§ 221.35, 221.40).

For similar reasons, the measure also expands the definition of an "eligible defendant" to include defendants charged with lesser included offenses of the felonies enumerated in CPL 410.91 (4). A defendant with drug dependence ought not be denied consideration for judicial diversion simply because he or she committed an inclusory concurrent offense of lower grade than one enumerated in CPL 410.91. For instance, under current law a drug-dependent defendant charged with burglary of a commercial establishment is eligible for diversion but the same offender charged with *attempted* burglary of the same establishment is ineligible.

This measure also provides the court with discretion in appropriate cases to enroll certain drug dependent, non-violent felony offenders into the judicial diversion program. The intent of

[3] Prior to the effective date of Article 216, the Legislature repealed CPL 410.91(4). "It appears that the reference to CPL 410.91(4) was merely a typographical error and that the Legislature meant to cite CPL 410.91(5), which lists the specified offenses" (*Doorley v. DeMarco*, 106 A.D.3d 27, 31 [4th Dept. 2013], *citing* Peter Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL 216.00, 2012 Cumulative Pocket Part at 69–70). This measure corrects the typographical error.

the Legislature in creating the judicial diversion program was clearly set forth by its sponsors:

> [to] significantly reduce drug-related crime by addressing substance abuse that often lies at the core of criminal behavior. The bill would accomplish this goal by returning discretion to judges to tailor the penalties of the penal law to the facts and circumstances of each drug offense and authorizing the court to sentence certain non-violent drug offenders to probation and drug treatment rather than mandatory prison where appropriate. (Sponsor's Mem, Bill Jacket, L 2009, c. 56).

This language confirms the drafters' intent to substitute treatment for incarceration when addicted offenders are accused of non-violent crimes. It is also clear that the Legislature intended to cast a wide net of inclusion, and that their intent was to allow a court discretion to permit a defendant entry into the program, based upon a thorough review of all of the circumstances. All too often, defendants appear before the court with problems of drug dependence that can be addressed through the judicial diversion program, but are denied because the offense charged is not enumerated in the statute. This measure would provide a court the discretion to place such a defendant in judicial diversion. Notably, the measure leaves intact those provisions which would exclude certain defendants from a judicial diversion program without the prosecutor's consent.

Finally, this measure extends the reach of conditional sealing under CPL 160.58 to defendants who successfully complete judicial diversion in connection with any of the newly eligible offenses.

Proposal

AN ACT to amend the criminal procedure law, in relation to the drug law reform act of 2009

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

Section 1. Subdivision 1 of section 216.00 of the criminal procedure law is amended to read as follows:

1. "Eligible defendant" means any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense or misdemeanor information defined in article two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision [four] five of section 410.91 of this chapter or any lesser included offense, provided, however, a defendant is not an "eligible defendant" if he or she:

(a) within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, has previously been convicted of: (i) a violent felony offense as defined in section 70.02 of the penal law, or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law, or (iii) a class A felony offense defined in article two hundred twenty of the penal law; or

(b) has previously been adjudicated a second violent felony offender pursuant to section 70.04 of the penal law or a persistent violent felony offender pursuant to section 70.08 of the penal law.

A defendant who also stands charged with a violent felony offense as defined in section 70.02 of the penal law or an offense for which merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law for which the court must, upon the defendant's conviction thereof, sentence the defendant to incarceration in state prison is not an eligible defendant while such charges are pending. A defendant who is excluded from the judicial diversion program pursuant to this paragraph or paragraph (a) or (b) of this subdivision may become an eligible defendant upon the prosecutor's consent.

A defendant who is excluded from the judicial diversion program solely because he or she stands charged with a class B non-violent, C, D, or E felony offense defined outside of article two hundred twenty or two hundred twenty-one of the penal law, and who would not otherwise be excluded pursuant to paragraph (a) or (b) of this subdivision, may become an eligible defendant upon the court’s consent. Prior to granting consent, the court shall afford the prosecutor and the

defendant an opportunity to be heard and, where it grants consent, the court shall make findings setting forth its reasons therefor.

§2. Subdivision 1 of section 160.58 of the criminal procedure law is amended to read as follows:

1. A defendant convicted of any offense defined in article two hundred twenty or two hundred twenty-one of the penal law or a specified offense defined in subdivision five of section 410.91 of this chapter or any lesser included offense of such offense who has successfully completed a judicial diversion program under article two hundred sixteen of this chapter, or one of the programs heretofore known as drug treatment alternative to prison or another judicially sanctioned drug treatment program of similar duration, requirements and level of supervision, and has completed the sentence imposed for the offense or offenses, is eligible to have such offense or offenses sealed pursuant to this section.

§3. This act shall take effect immediately.

15. Sex Crimes Involving a Child or Children
(Penal Law §130.81)

The Committee recommends that the Penal Law be amended to address the conduct of pedophiles who direct children to commit sexual acts on themselves or each other.

Several recent cases have made it plain that the Penal Law does not adequately address certain sex crimes involving children. Although pedophiles often directly engage in sexual conduct with children, at times they exploit children by directing a child or children to perform some type of sexual act upon themselves or each other for the pedophile's sexual gratification or some other clearly wrongful purpose. Directing a child or children to perform sexual acts do not necessarily come within Penal Law Article 263, sexual performance by a child, because often there is no audience except the defendant and the acts are rarely recorded. Presently, the only crime that applies to such conduct is endangering the welfare of a child - a class A misdemeanor, which the Committee believes is inadequate to protect the public.

This measure creates a new offense against pedophiles who exploit children by directing them to perform an act or acts of sexual conduct upon themselves or each other. To be convicted of the offense, the person must direct children under the age of thirteen to engage in sexual conduct for the purpose of degrading or abusing the child or children, or for the purpose of gratifying the actor's sexual desire or for monetary gain. Moreover, recognizing the wide variety of sexual conduct that a pedophile may direct a child or children to engage in, the level of seriousness of the offense would be determined by the level of offense that the pedophile would have committed had he or she personally engaged in the acts he or she directed the child or children to engage in.

Proposal

AN ACT to amend the penal law, in relation to sex offenses against a child or children

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 130.81 to read as follows:

§130.81 Directing sexual conduct by or between children.

A person is guilty of directing sexual conduct by or between children when such person, being eighteen years old or more, for the purpose of degrading or abusing such child or children, or for the purpose of gratifying the actor's sexual desire or for monetary gain, directs a child or two or more children, less than thirteen years old, to perform an act or acts of sexual conduct upon themselves or each other.

A person directs a child or two or more children to perform an act or acts of sexual conduct upon themselves or each other when the person, acting with the intent that the child or children perform such an act or acts, solicits, requests, commands, importunes or uses physical force or threats of physical force to convince or compel the child or children to perform such act or acts.

Directing sexual conduct by or between children shall be deemed to be the highest offense level it would be had the actor, regardless of intent, personally engaged in the act or acts with the child or children that he or she directed the child or children to perform upon themselves or each other.

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

16. Aggravated Harassment of a Court Officer by an Accused
(Penal Law §§240.33; 70.06)

It is currently a felony for an inmate or detainee in a correctional facility or hospital to subject an employee of the facility to the danger and degradation of having blood and other bodily fluids directed at them by the inmate (PL§240.32).[4] The Committee recommends adding a new Penal Law provision that would afford protections to court officers who, while working in a courthouse, are subject to similar offensive conduct by a defendant charged with a criminal offense.

The existing statute protects correctional officers victimized by inmates who throw their bodily fluids such as urine, excrement or blood onto them. However, it only applies to "employees of a correctional facility, the board of parole or the office of mental health, or a probation department bureau or unit or a police officer." It does not include court officers acting in their public safety role in the courthouse. Unfortunately, there have been numerous incidents where court officers have been the target of attacks by defendants in courthouses around the State, with little criminal consequences to the defendant committing such offensive acts.

This measure would extend the protections now given corrections officers to court officers by creating a new offense – aggravated harassment of a court officer by an accused. To be convicted of this offense, the accused would have to act with the intent to harass, annoy, threaten or alarm a person whom he or she knows or reasonably should know is a court officer. Also, the offense must take place within the courthouse against a uniformed court officer. The measure is similar to PL §240.32 by identifying the noxious substance thrown, tossed or expelled as "blood, seminal fluid, urine, feces, or the contents of a toilet bowl." Finally, the measure also includes a conforming amendment to PL §70.06(3)(e) to provide that the sentence range for the crime would be identical to the range applicable to the existing aggravated harassment of an employee by an inmate.

Proposal

AN ACT to amend the penal law, in relation to the offenses committed by a defendant in a

[4] Penal Law section 240.32 provides as follows:

An inmate or respondent is guilty of aggravated harassment of an employee by an inmate when, with intent to harass, annoy, threaten or alarm a person in a facility whom he or she knows or reasonably should know to be an employee of such facility or the board of parole or the office of mental health, or a probation department, bureau or unit or a police officer, he or she causes or attempts to cause such employee to come into contact with blood, seminal fluid, urine, feces, or the contents of a toilet bowl, by throwing, tossing or expelling such fluid or material.

For purposes of this section, "inmate" means an inmate or detainee in a correctional facility, local correctional facility or a hospital, as such term is defined in subdivision two of section four hundred of the correction law. For purposes of this section, "respondent" means a juvenile in a secure facility operated and maintained by the office of children and family services who is placed with or committed to the office of children and family services. For purposes of this section, "facility" means a correctional facility or local correctional facility, hospital, as such term is defined in subdivision two of section four hundred of the correction law, or a secure facility operated and maintained by the office of children and family services.

Aggravated harassment of an employee by an inmate is a class E felony.

criminal proceeding against court employees

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 240.33 to read as follows:

§240.33 Aggravated harassment of a court officer by an accused.

A person who stands charged with a criminal offense is guilty of aggravated harassment of a court officer by an accused when, with intent to harass, annoy, threaten or alarm a person in a courthouse whom he or she knows or reasonably should know to be a court officer, he or she causes or attempts to cause such court officer to come into contact with blood, seminal fluid, urine, feces, or the contents of a toilet bowl, by throwing, tossing or expelling such fluid or material.

For purposes of this section, a court officer means a uniformed court officer of the unified court system, and a person charged with a criminal offense means a defendant against whom a criminal action is pending.

Aggravated harassment of a court officer by an accused is a class E felony.

§ 2. Paragraph (e) of subdivision 3 of section 70.06 of the penal law, as amended by chapter 7 of the laws of 2007 is amended to read as follows:

(e) For a class E felony, the term must be at least three years and must not exceed four years; provided, however, that where the sentence is for the class E felony [offense] offenses specified in [section] sections 240.32 and 240.33 of this chapter, the maximum term must be at least three years and must not exceed five years.

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

IV. Summaries of Temporarily Tabled 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). 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.[5]

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[6]

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

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

[6]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 N.Y.2d 56). As a result of the enactment of the Sexual Assault Reform Act (chapter 1 of the Laws of 2000), the Committee has removed this *Ranghelle* provision from its discovery reform proposal (see, section 48 of chapter 1 of 2000, which enacts a new CPL section 240.75 ["Discovery; certain violations"] to supersede *Ranghelle*).

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.

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.

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).

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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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. Cty.), 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 Cty. 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 Cty. 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.

11. 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).

12. 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.
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> * * * *
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> 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.

13. 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 to the Penal Law, which uses the term

[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).

"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 cumulating 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.[3]

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 A.D.2d 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 A.D.2d 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 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

[3]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.

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.

14. 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.

15. 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.

16. 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 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

[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).

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.

17. 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]

[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

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

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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, c. 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.

18. 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

[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).

Jury Project made the following recommendation:

> CPL 190.25(6) should be amended to make explicit that, upon request of a grand juror for further instruction with respect to a statute, the court or the prosecutor may give to the grand jury copies of the text of any statute which, in its discretion, the court or prosecutor deems proper. The amendment should include a requirement that a copy of any such text be made an exhibit in the proceeding in which it is furnished to the grand jury. However, the determination of a court or prosecutor of whether to submit the text of a particular statute should not be a ground for dismissing an accusatory instrument filed after an otherwise proper proceeding.

1999 Report of the Grand Jury Project, Volume I, at p.84.

As noted in the Report, the Grand Jury Project's proposed amendment to CPL section 190.25(6) would closely track the procedure set forth in CPL section 310.30, which applies to the deliberations of a trial jury. That section provides, in relevant part, as follows: "With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper." CPL section 310.30. Similar to section 310.30, the proposal would "permit the court or prosecutor to furnish the text of a statute when a grand juror requests further instruction concerning a statute and the court or the prosecutor, in the sound exercise of discretion, believes that the request is necessary or appropriate." 1999 Report of the Grand Jury Project, Volume I, at p.85.

While the Committee fully agrees with the conclusion reached by the Grand Jury Project that CPL section 190.25(6) ought to be amended to clarify the authority of the court and prosecutor to provide written substantive instructions under that section, it is the Committee's view that the measure proposed here, which is arguably broader and less cumbersome than the proposal recommended by the Grand Jury Project, would better assist grand jurors in meeting their obligations under CPL Article 190.

19. 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

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

> having been granted full immunity [citation omitted] and such indictment would not be barred by double jeopardy, he was not indicted for that crime, but, instead was indicted for his refusal to obey the order of ...[the Grand Jury Judge] on December 7, 1965, to return to the same Grand Jury and testify. Thus, defendant was indicted for the same act and offense for which he previously was punished by...[the Grand Jury Judge] for contempt of court pursuant to section 750 of the Judiciary Law. The same evidence proves the Judiciary Law contempt for which defendant was previously punished and the Penal Law contempt charged in the indictment, and the elements of the two contempt charges are the same. Since the Supreme Court of the United States has held that defendant's previous punishment for contempt...pursuant to the Judiciary Law was for "criminal" contempt under the particular facts of this case [citation omitted], defendant's subsequent indictment for the same offense under...the ...Penal Law is barred by the double jeopardy clause [citation omitted].

Colombo, supra, at 949; *see also, Matter of Capio v. Justices of the Supreme Court*, 34 N.Y.2d 603 (1974), affirming on the opinion at 41 A.D.2d 235.[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

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

> 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 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]

[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.

20. 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.

21. 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 inadmissible 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 inadmissible 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.

22. 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*.

23. 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 considered 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.

71. 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.

25. 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.

26. 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.

27. 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.

28. 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, c. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36**.** 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 "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.

37. 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

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

the defendant of the charge the defendant either tacitly or explicitly 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.

38. 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.

39. 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 A.D.3d 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.

40. 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.

41. 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.

42. GPS Warrants
(CPL 690.05; 690.60)

The Committee recommends that Article 690 of the of the Criminal Procedure Law be amended to add a statutory procedure for a court to issue a search warrant authorizing 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 New York 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 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 with 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 warrants, the Committee recommends that warrants for these devices be provided as a new class of search warrant. Therefore, this measure adds the installation, maintenance, and monitoring of a mobile tracking device to the definition of a search warrant in section 690.05. The measure also adds a new subdivision 690.60 to the criminal procedure law. This section sets forth the procedures the court must follow in issuing a mobile tracking device warrant.

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

The Committee recommends that section 265.15 of the Penal Law, be amended to provide an affirmative defense to the 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)). Such 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 a user can open them by the use of centrifugal force and lock into place. 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 who possess a common utility knife now face arrest and conviction for a class A misdemeanor. Where the person has previously been convicted of any crime in their life, 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 possession 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 both insure public safety while establishing an appropriate outcome for innocent possessors.

44. DNA Collection Where Prior Sample is in 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 index1 (L 2012, c. 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." A DNA profile, however, is unlike a fingerprint card because the DNA sample itself is never 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 the exact some 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 authorizing 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, this practice 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 taking duplicative DNA samples from a defendant who already has a DNA profile on file with the New York State identification index.

[1]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)).

45. 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 to affirm a judgment, sentence or order on a 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) prevents an intermediate appellate court from affirming 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 alternative grounds in support of 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 supported the search. 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 presented that legal ground to the trial court. 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 A.D.3d 1196(4th Dept. 2012); *People v. Spratley*, 96 A.D.3d 1420 (4th Dept. 2012); *People v. Santiago*, 91 A.D.2d 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 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 case are remitted for the trial court to make an appropriate record.

46. Risk-Level Recommendations under the Sex Offender Registration Act (Corrections 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 by the court (Correction Law § 168-d [1],). The statute requires that the court and the offender be served, prior to the risk-level determination hearing, with a recommendation of the risk level sought. Under current law, where an offender is not sentenced to a term of imprisonment, the District Attorney must provide the recommendation at least 15 days prior to the hearing (*see* Correction Law § 168-d [2], [3]). Where the offender is sentenced to a term of imprisonment, however, the responsibility to make the recommendation is placed on the Board of Sex Examiners (*see* Correction Law § 168-l [6]).

A problem routinely arises when a defendant is 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 prior to the defendant's release (*see* Correction Law § 168-n [1], [2]). If 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 defendant 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 of Sex Examiners has inadequate time to prepare the risk-determination recommendation prior to defendant's release. Therefore, hearings in those cases are invariably scheduled for after the defendant's release. Unfortunately, as a practical matter, courts do not schedule hearings until after receiving the Board's recommendation, and thus hearings are scheduled after a defendant has already been released.

It then becomes incumbent on the court to notify the defendant of the hearing date. Often the court will have no real means to do so other than to mail a letter to the defendant's last known address as reflected in the court file. If the defendant does not appear at the hearing, the court may 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.

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 determination 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.

47. Criteria for Determining Prior Felony Offender Status
(PL §§ 70.04; 70.06; 70.10)

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, in order for a defendant to be declared a second felony offender, second violent felony offender, or persistent felony offender, the sentence for the prior felony must have been imposed before commission of the present felony (PL §§ 70.04(1)(b)(ii); 70.06(1)(b)(ii)); 70.10(1)(b)(ii), and, except for a persistent felony offender, within ten years of the commission of the present felony, not counting periods of incarceration (PL §§ 70.04(1)(b)(iv); 70.06(1)(b)(iv)). Both requirements serve the 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 the person'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).

Recent cases involving post release supervision errors illustrate the potential for gamesmanship that the current wording of the statute engenders. In *People v. Acevedo*, (17 NY3d 297 (2011)), the Court of Appeals held that where a defendant seeks resentencing because the original sentencing court failed to add a period of post release supervision (*see People v. Sparber*, 10 NY3d 457 (2008)), no new sentence date will attach for purposes of determining defendant's predicate felony status. Critical to the Court's analysis was its finding that the only reason for defendant's resentencing motion was to alter his predicate status. Under closely similar facts, however, the Appellate Division, First Department, recently held that where the resentence proceeding was initiated by the New York State Division of Parole, the appropriate sentence date for purposes of determining his predicate status on a subsequent conviction is the date of the resentence (*People v. Butler*, 88 A.D.3d 470 (1st Dept. 2011); *c.f., People v. Naughton*, 93 A.D.2d 809 (2d Dept. 2012) *lv denied*, 19 NY3d 865 (2012); *People v. Boyer*, 91 A.D.3d 1183 (3d Dept. 2012) *lv granted*, 19 A.D.3d 1024 (2012)).

More importantly, the Committee believes that current law does not further the principle of enhancing the punishment of recidivists where a defendant successfully appeals only his sentence on the prior felony. A successful motion or appeal leading to a resentence does nothing to impair the "chastening effect" of the earlier judgment of conviction. When the conviction itself is not undermined, it is reasonable to subject a defendant to enhanced punishment for committing any new offense after the initial sentencing date and to measure the look-back period from that date forward, regardless of any subsequent resentencing. Moreover, it is equally unwarranted to reset the ten year look back when a court resentences a defendant as a result of an initial sentencing error. A defendant who has remained conviction free after the original sentence

benefits by keeping the original sentence date. Thus, arguably it is only the recidivist who benefits by the current rule.

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, the sentence date shall be considered the initial sentence following the conviction.

48. 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, never 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 is improper because it would "convey the message that these [portions] are of particular importance," and would subordinate 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 CPL 310.30 operates to limit the ability of a court to distribute the entire charge as well (*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 expressly permit a trial judge to respond to a deliberating jury's request for written instructions of the court's entire charge, and would not require the court to obtain the consent of the parties prior to such submission. 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.

49. 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 change would conform to federal practice and would give a court appropriate flexibility in determining good cause 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" upon 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 not made at the insistence of one of the parties is not permitted, even where there is good cause for severance (*see Matter of Brown v. Schulman*, 245 A.D.2d 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 for severance, 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.

50. 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 when a trial court changes the conditions of probation, a defendant's only recourse is an Article 78 proceeding to challenge the court's power to modify the conditions in the manner it did (*People v. Pagan*, 19 NY3d 368 (2012). In the Court's view, the issue was a simple one of statutory construction. 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 sentence "originally imposed" was the one issued when the court first sentenced the defendant and did not include the sentencing court's modification of a probation condition several months later. As the Court then 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 issue has significant consequences to a defendant because, while indigent defense providers are compensated for direct appeals, they are not compensated for Article 78 proceedings and thus do not handle such cases (the exception is the Legal Aid Society in New York City). Thus, for most of New York, indigent defendants will be without a practical recourse to challenge changes in conditions of probation. Ironically, an indigent defendant thus has counsel when he or she may least need it - appellate review of the standard conditions of probation imposed at the time of sentence - but not after any subsequent modification, which are often made more onerous than the standard conditions because the changes are presumably requested by the probation department in response to their perception that the defendant has engaged in negative behavior.

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.

51. Availability of a Pre-sentence Report
(CPL 390.50(2)(a))

The Committee recommends that section 390.50 of the Criminal Procedure Law be amended to provide that a defendant may receive a copy of the presentencing report prior to the time of his or her sentencing. The current statute is inconsistently applied and often prevents a defendant represented by counsel from receiving the report or even reading it, a practice the Committee believes is inappropriate.

Over 35 years ago, in the context of determining a defendant's constitutional right to disclosure of a pre-sentence report, the Court of Appeals reaffirmed the principle that "the sentencing process is a crucial stage of the criminal process which rises to constitutional dimension" (*People v. Perry*, 36 N.Y.2d 114, 119 (1975)). Although the Court also reaffirmed that disclosure of a pre-sentence report was discretionary with the court, it made the following statement:

> While fundamental fairness and indeed the appearance of fairness, may best be accomplished by disclosure of pre-sentence reports, certain material which is confidential, destructive of rehabilitation, or inconsequential may properly be withheld. Aside from such material, it is expected that sentencing courts will make increasing use of their discretion to disclose presenting reports." (*id., at* 120.)

After the Court of Appeals decided *Perry,* the Legislature amended CPL 390.50 by adding paragraph 2(a) to provide, in part, that "[n]ot less than one court day prior to sentencing . . . the pre-sentence report or memorandum shall be made available by the court for examination and for copying by the defendant's attorney, the defendant himself, if he has no attorney, and the prosecutor." The statute further provides that the court may withhold disclosure of any part or parts of the report and sets forth numerous factors the court may consider in exercising its discretion, including that disclosure would not be in the interest of justice. Although the statute thus plainly provides a mechanism to ensure that portions of the report that should remain confidential are not disclosed, it only expressly allows a defendant to have a copy of the report when proceeding *pro se*. It is unclear whether the Legislature, in permitting disclosure of the report to defendant's counsel, intended for the defendant to be prevented from receiving a copy or examining the report.

However, the lack of express language allowing a defendant to review the pre-sentence report is significant when read together with the confidentiality provision of paragraph (1) of section 390.50. That paragraph provides that pre-sentence reports are "confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the Court" (CPL 390.50 (1)). This confidentiality provision, and the limiting language of subdivision 2(a) has led some courts to prohibit a defense attorney from allowing a defendant to read or possess a copy of the pre-sentence report. In one county, a court has specifically directed members of the County Bar Association to refrain from allowing a defendant to have any direct access to the pre-sentence

report. Bar Association Attorneys have been advised they may "discuss the contents of pre-sentence reports with their clients [but] they may not otherwise disclose those reports by way of providing copies, or allowing the client to read, all or any portion thereof."

The Committee believes that such a technical reading of the statute undermines fundamental fairness in sentencing proceedings and inappropriately conditions access to a pre-sentence report on a defendant's self-representation. Moreover, the Committee perceives little risk that inappropriate material will be disclosed to a defendant if presenting reports are provided to a defendant at the time of sentencing. Defendants already receive a copy of their pre-sentence report in several circumstances. For instance, a defendant is statutorily authorized to receive the pre-sentence report when appearing *pro se* at sentencing or in preparing a *pro se* appeal, or "for use before the parole board for release consideration or an appeal of a parole board determination." Allowing a represented defendant to access the pre-sentence report at the time of sentencing promotes both fairness in sentencing proceedings without inhibiting the attorney-client relationship.

This measure directs that, subject to appropriate redaction, a pre-sentence report shall be made available to the defendant at the time of sentence.

52. Subpoena Duces Tecum Procedure
(CPL 610.40)

The Committee recommends that section 610.40 of the Criminal Procedure Law be amended to provide that when a party issues a subpoena *duces tecum* for certain personal records of a defendant or victim, the adversarial party must also be provided notice.

CPL Article 610 provides the statutory authority for issuing a subpoena *duces tecum* in a criminal case. The service requirements for such a subpoena is set forth in section 610.40, which provides: "A subpoena may be served by any person more than eighteen years old. Service must be made in the manner provided by the civil practice law and rules for the service of subpoenas in civil cases." Prior to 2003, there was no requirement in civil cases for service of a subpoena *duces tecum* on other parties in the litigation, and this practice therefore held true in criminal matters. In 2003, however, the Legislature amended the CPLR to provide that a subpoena *duces tecum* must be served on all parties. As a memorandum from the State Bar CPLR Committee explained, the purpose of the change was "to ensure that, in civil actions, items requested by the subpoena were properly subject to subpoena power and to allow opposing parties to test the validity of the subpoena by motion to the trial judge before such items were produced." However, after recognizing that the 2003 amendment, on its face, would apply to criminal proceedings, the Legislature amended the statute a year later to narrow the applicability of such notice to "civil judicial proceedings" (*see* CPLR 2303(a)). Although the intent of the Legislature was plain, no conforming change was made to CPL 610.40, which continues to provide that the procedures for serving a subpoena in a criminal case shall follow the manner of service used for civil cases under the CPLR. Thus, despite its best efforts, the Legislature did not fix the problem it identified after the 2003 amendment. In criminal cases, if a strict reading of the statutes is followed, a subpoena *duces tecum* is required to be served on all parties (*see People v. Lomma*, 35 Misc. 3d 395 (Sup Ct. NY County (2013)).

This measure is designed to correct this legislative oversight. Moreover, the Committee also proposes to amend the current rule that prevents an adversarial party in a criminal case from getting notice when a party issues a subpoena for certain personal records of a defendant or victim. Custodians of institutional records have little interest in upholding the privacy rights of the subject of the records, and without notice, the subject of the records is not able to raise appropriate objections to the subpoena. The Committee recognizes that such a rule in criminal cases would be inappropriate for investigatory subpoenas issued by a grand jury. However, after the commencement of a criminal action or proceeding, where a party issues a subpoena duces tecum for personal records of a defendant or victim, there is little reason to apply different rules in criminal and civil cases. Without notice, the subject of the records only learns of the subpoena if the material is attempted to be introduced at trial, thus providing no mechanism to object before the material is produced and no objection at all where the material is subpoenaed but used only for investigative purposes. The Committee believes the current rule in criminal cases needlessly delays judicial intervention or prevents it altogether by concealing potential abuses of the subpoena process.

This measure would alleviate these problems by requiring that the party issuing a

subpoena duces tecum for a defendant's or victim's financial, employment, educational or medical records provide notice of the subpoena to the adverse party.

53. Setting Bail in a City, Town and Village Court
(CPL 530.20(2)(a))

The Committee recommends that section 530.20 of the Criminal Procedure Law be amended to clarify that city, town and village courts are permitted to set bail or recognizance on a defendant charged with a felony except where a defendant qualifies for a sentence of life imprisonment.

Under current law, there are two occasions where a city, town or village court may not set bail when a defendant is charged by felony complaint with a felony: 1) where the defendant is charged with a class A felony; or 2) where "it appears that the defendant has two previous felony convictions" (CPL 530.20(2)(a)). Legislative history suggests that the intent of these limitations was to prevent certain city, town or village courts from setting bail for a defendant facing life imprisonment, either because the defendant was charged with a class A felony or otherwise would qualify for a life sentence as a persistent or persistent violent felony offender. It was never meant to preclude bail or recognizance for defendants who have more than one prior felony conviction, yet do not qualify for life sentences.

The predecessor draft to the current provision originated in a 1968 Criminal Procedure Law Study Bill. That draft prohibited all local criminal courts (except Superior Courts sitting as local criminal courts) from setting bail on a defendant accused of a felony when charged with a class A felony or who previously had two felony convictions, but was worded so that the prior felony convictions came "within the meaning of subdivision one of sections 70.10 of the penal law." The reference to PL § 70.10 (the only persistent felony statute at the time) effectively limited the reach of the proposed statute to offenders facing life imprisonment. The following year, the Temporary Revision of the Penal Law and Criminal Code revised the Criminal Procedure Law Study Bill and its draft reflects the current language of the provision, thus allowing District Courts and the Criminal Courts of the City of New York to set bail under these circumstances. The Temporary Revision draft eliminated the reference to section 70.10 of the Penal Law. However, there is no evidence to suggest that the 1969 revision was intended to broaden the previous limitation that the defendant be facing persistent felony status. In its memorandum in support and explanation of the 1969 bill, it is plain that the focus of the Temporary Commission was solely on the courts that would be given jurisdiction to set bail in this context:

> (14) The study bill provisions dealing with bail do not permit any local criminal court, other than a Supreme Court justice sitting as such, to fix bail or release on his own recognizance a defendant charged with a class A felony in or before such court or a defendant charged with a felony who has two prior felony convictions (S § 285.30[2]). The final bill changes this rule to some extent by authorizing District Courts and the New York City Criminal Court – but not city, town or village courts – to release defendants on bail or recognizance in such circumstances provided that the district attorney is accorded an opportunity to be heard in the matter (F § 530.20[2]).

As CPL 530.20(2)(a) is currently interpreted by some city, town and village courts, it

prohibits these courts from setting bail when the defendant has two previous felony convictions, regardless whether those convictions qualify for persistent felony status or persistent violent felony status (*see e.g.,* PL §§ 70.08, 70.10; *see also, People v. Morse,* 62 NY2d 205 (1984)). The Committee believes that the Legislature never intended that these courts be stripped of the jurisdiction to set bail unless a defendants prior felony convictions could be used for life imprisonment sentences.

Accordingly, this measure clarifies that the city, town and village courts may set bail except where a defendant is charged with a class A felony or is charged with a felony and has two previous felony convictions as provided in section 70.08 or 70.10 of the Penal Law.

54. Oral Search Warrant Applications
(CPL 690.36)

The Committee recommends that section 690.36 of the Criminal Procedure Law be amended to correct a cross reference error in the current law governing oral applications for search warrants.

Article 690 of the Criminal Procedure Law establishes the statutory mechanism for search warrants, with CPL 690.35 expressly prescribing what must be set forth in a warrant application, including that the applicant must supply a factual statement establishing reasonable cause to believe specified property will be found at the location or reasonable cause to believe a person who is the subject of an arrest warrant will be found in the designated premises. In a separate subdivision the section also allows the applicant to request nighttime entry into the premises and the authority to enter the premises without notice.

In 1982, the Legislature amended the Criminal Procedure Law to allow for oral applications for a search warrant (L. 1982, c. 679). It added a new section 690.36 regarding the special provisions necessary for an oral warrant application and provided, in a cross reference to subdivisions 2 and 3 of section 690.35, that the oral warrant application must contain a statement establishing reasonable cause to believe specified property will be found at the location or reasonable cause to believe a person who is the subject of an arrest warrant will be found in the designated premises.

The Legislature subsequently amended section 690.35 by adding a new subdivision 2 (related to court jurisdiction for issuing a warrant), and renumbering existing subdivisions 2 and 3 to subdivisions 3 and 4 respectively (L. 1992, c. 816). However, no conforming amendment was made to CPL 690.36, and the text of that section now cross references the wrong subdivisions of section 690.35.

This measure would amend section 690.36 to correct the cross reference.

55. Codifying People ex rel. McManus v. Horn
(CPL 520.10(2))

The Committee recommends amending section 520.10(2) of the Criminal Procedure Law to reflect current law regarding methods of setting bail.

Subdivision one of CPL 520.10 sets forth nine authorized forms of bail a court may use when fixing a defendant's bail. Included are: cash bail; an insurance company bail bond; a secured surety bond; a secured appearance bond; a partially secured surety bond; a partially secured appearance bond; and, a credit card or similar device.

Subdivision two of that section establishes the methods of fixing bail. Paragraph (a) provides that where the court does not designate the form in which bail may be posted, a defendant my chose either an unsecured surety bond or an unsecured appearance bond. Paragraph (b), provides that where the court does designate the method of posting bail "the court may direct that the bail be posted *in any one of two or more of the forms* specified in subdivision one."

The New York Court of Appeals recently held that this language requires a court to designate at least two methods of posting bail (*People ex rel. McManus v. Horn*, 18 NY3d 660 (2012)). The court acknowledged that the phrase "any one of two or more of the forms" was ambiguous, but determined that the intent of the statute was to provide more flexibility in posting bail, and held that a court fixing bail must provide the defendant with at least two alternative choices. As noted by the Court:

> "Providing flexible bail alternatives to pretrial detainees – who are presumptively innocent until proven guilty beyond a reasonable doubt – is consistent with the underlying purpose of article 520. The legislation was intended to reform the restrictive bail scheme that existed in the former Code of Criminal Procedure in order to improve the availability of pretrial release" (18 NY3d at 665).

To avoid future misapplication of the statute, the Committee believes that it should be amended to eliminate the ambiguity noted by the Court of Appeals. This measure therefore directs the court to set two or more methods of posting bail.

56. Adjournments in Contemplation of Dismissal (CPL 170.55)

The Committee recommends that section 170.55 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.

57. Counsel's Attendance at Pre-sentence Interviews
(CPL 390.30)

The Committee recommends that the Criminal Procedure Law be amended to provide that a defendant convicted after trial may request that his or her attorney be present at the pre-sentence interview conducted pursuant to CPL 390.30. Upon such a request, the court must direct that the defendant's attorney be provided with notice of the time and place of any interview and a reasonable opportunity to attend. This measure also codifies existing practice recognizing a court's discretion to allow defense counsel to attend a pre-sentence interview following conviction by negotiated plea.

Interviews conducted by probation officers after conviction are not considered adversarial, and most courts have held that there is no constitutional right to have counsel present (*see* e.g., *People v. Tisdale*, 952 F.2d 934, 939-940 (6th Cir. 1992); *People v. Cortijo*, 291 A.D.2d 352 (1st Dept. 2002)). Nonetheless, under federal law, if requested, a probation officer who interviews a defendant as part of a pre-sentence investigation must provide defense counsel with notice and a reasonable opportunity to attend the interview (*See* Fed.R.Crim.P. 32(c)(2)).[1] Similarly, many local probation departments in New York State voluntarily allow a defense attorney to attend the pre-sentence interview. Other departments will permit it only if required to do so by court order.[2]

Over 25 years ago, the Judicial Conference Committee on Probation Administration proposed allowing attorneys to attend pre-sentence interviews. Congress thereafter adopted their recommendation and by so doing recognized that the presence of counsel at a pre-sentence interview may protect important interests of a defendant. For instance, counsel can avoid unnecessary misunderstandings and protect defendant from making harmful statements if an appeal is likely or has other pending cases. Counsel also can ensure that defendant's responses are accurate, intelligible and truthful, and that the probation officer has a correct understanding of the defendant's version of the facts and circumstances surrounding the case.

The importance for counsel to be present at the pre-sentence interview in some cases after conviction by trial cannot be overstated. Defendants may be of below-average intelligence, inarticulate or distrusting of authority so that their responses are often not fully clear and not fully candid. Probation officers carry heavy caseloads and are often rushed. A trial is an extraordinarily stressful event, and defendants often maintain the same posture of innocence after trial, which is often perceived as a refusal to accept responsibility and show adequate remorse. The consequences for defendants who fail to fully cooperate in a probation interview may be severe. The presence of informed defense counsel, aware that inaccurate information can affect both the sentence and the defendant's future will provide a considerable safeguard to prevent inaccuracy.

The Committee recommends that New York provide a statutory right for counsel to attend the pre-sentence interview in cases where a defendant stands convicted after trial, and a

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[1] Fed.R.Crim.P. 32(c)(2) provides, "The probation officer who interviews a defendant as part of a pre-sentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview."

[2] An informal canvas of defense attorneys statewide indicated that at least 15 counties currently permit a defense attorney to attend the pre-sentence interview.

discretionary right where the conviction is the result of a negotiated plea. The Committee considered but in the end rejected the speculation that defense lawyers might interfere with questioning or prevent clients from speaking frankly at the pre-sentence interview. This has not been the experience of other probation offices, including those in the federal system, and fails to credit the professionalism of both defense lawyers and probation officers. Similar fears were expressed by prosecutors with respect to New York State law which allowed counsel to be present in the grand jury with clients who testify under a waiver of immunity and at line-ups and other identifying procedures. Those fears, virtually everyone in the criminal justice system agrees, have turned out to be unfounded. The presence of counsel at pre-sentence interviews, even if not constitutionally mandated, is fair to the defendant and the Committee believes will promote reliability and accuracy in reporting.

However, the Committee also recognizes that the sheer volume of cases in the state system would create an operational logjam if the right was extended to every conviction (over 20,000 probation reports were filed last year in NYC alone). Moreover, pre-sentence reports following negotiated pleas are often less critical than reports following a trial and the need for counsel usually less significant in most cases. Thus, the Committee proposes more limited protection in convictions by negotiated plea. After a plea of guilty, the decision to allow defense counsel to attend would be in the discretion of the court.

58. Mental Disease or Defect Excluding Fitness to Proceed *pro se* (CPL Article 731)

The Committee recommends that the Criminal Procedure Law be amended to provide a mechanism to determine whether a mentally ill defendant who is otherwise competent to stand trial is similarly competent to proceed *pro se*.

Under CPL Article 730, a defendant may not stand trial if he is an "incapacitated person," defined as one who "as a result of mental disease or defect lacks capacity to understand the proceedings against him or assist in his own defense." CPL 710.30 (1). The current statute, by measuring in part whether a defendant can "assist" in his defense seems to contemplate proceedings where a defendant is represented by counsel. Yet, the same standard also applies under current New York law where a defendant elects to proceed *pro se.*

In reality, however, the mental abilities necessary to provide assistance to an attorney are far different than those needed to represent oneself, and states are permitted to create different competency standards for *pro se* defendants (*see Indiana v. Edwards,* 554 US 164 (2008)). In *Edwards*, a state trial court found the defendant competent to stand trial with counsel but incompetent to represent himself. The court therefore denied defendant's request to proceed *pro se* and directed the trial to proceed with counsel over defendant's objection. The United States Supreme Court upheld the constitutionality of this approach acknowledging that a defendant can lack "the mental capacity to conduct his trial defense unless represented" (554 US at 174). The Court reaffirmed its seminal holding in *Dusky v. United States,* (362 US 402 (1960)), that the standards for mental competency must focus on a defendant's "present ability to consult with his lawyer" (554 US at 174 (*quotation omitted*)). The question of competence to represent oneself, the Court held, however, is quite different:

> [A]n individual may well be able to satisfy *Dusky's* mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel. . . . The American Psychiatric Association (APA) tells us without dispute in its *amicus* brief filed in support of neither party that "disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant" (554 US at 176 (*citations omitted*)).

The Court thus held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves." 554 US at 178.

The New York Court of Appeals recently considered the *Edwards* case and whether New York recognized a separate state standard for competency to proceed *pro se* (*see People v. Stone,* (22 NY3d 520 (2014)). The *Stone* Court found that the defendant's rights in that case had not been violated where the court allowed defendant to proceed *pro se* without conducting a mental competency inquiry. Although the Court held that *Edwards* did not require that states adopt a

two-tiered competency standard it acknowledged that a defendant who was competent to stand trial but unable to "knowingly, voluntarily and intelligently waive the right to counsel and proceed *pro se"* could be required to proceed with a lawyer (22 NY3d at 576). The Court found:

> Consistent with *Edwards,* New York courts can, in appropriate circumstances, deny a self-representation request if a severely mentally-ill defendant who is competent to stand trial otherwise lacks the mental capacity to waive counsel and proceed *pro se* (22 NY3d at 577).

However, the Court provided little guidance on the standard a trial court should use when confronting a mentally ill defendant, minimally competent to stand trial, who asks to proceed *pro se* because that precise issue was not presented (at the time of Stone's *pro se* request, there was no indication that he suffered severe mental illness). Thus in New York there remains no clear standard for a court to apply in cases involving mentally ill defendants who ask to proceed *pro se*. Article 730 is fundamentally unhelpful because it only applies to the issue of competency to stand trial, not competency to proceed *pro se*.

One obvious analytical difficulty in devising a different competency standard for *pro se* litigants is that such defendants have the right to present an incompetent defense (s*ee, e.g., People v. Vivenzio*, 62 NY2d 775 (1984); *People v. Providence,* 308 A.D.2d 200 (1st Dept. 2003), *aff'd,* 2 NY3d 579 (2004)). Indeed, it will be the rare case where a *pro se* criminal defendant does not put himself or herself at a severe disadvantage by foregoing representation. The question then becomes what justifies distinguishing a nominally sound *pro se* litigant who does a terrible job from a mentally ill litigant who engages in equivalent incompetent advocacy. The answer is severe mental illness. It might be argued that the vast majority of *pro se* defendants, by definition, evidence the propensity to make extraordinarily poor choices simply by proceeding without a lawyer. But, there is merit in distinguishing between the average, inept *pro se* litigant and a defendant who is severely impaired by schizophrenia, bi-polar disorder or some other serious mental illness. In such cases a defendant who is given the right to proceed *pro se* under current law may be denied his right to a fair trial. This measure seeks to remedy that problem.

The Committee recommends in this measure that a new Article 731 be adopted to provide a standard and procedures to be followed where a court is confronted with a mentally ill defendant seeking to proceed *pro se* who the court believes is a person incapacitated to proceed *pro se*. The Committee created a new Article rather than attempt to stitch the topic into the body of Article 730 to avoid any confusion of the two issues. Nonetheless, to the extent possible, the measure adopts by reference many of the definitions and procedures set forth in Article 730.

In developing a definition of an "person incapacitated to proceed *pro se*" the Committee, consulted with mental health professionals and incorporated provisions from the ABA Criminal Justice Mental Health Standards, *Indiana v. Edwards* (554 U.S. 164 (2008)) and CPL Article 730. Section 731.10(1) of the measure defines an person incapacitated to proceed *pro se* as a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or her, or to knowingly, voluntarily and intelligently waive the constitutional right to counsel, or to appreciate the consequences of the decision to proceed without representation by counsel, or to comprehend the range of applicable punishments or to carry out the basic tasks needed to present his or her own defense without the help of counsel.

This measure further provides specific factors that a psychiatric examiner should consider in forming an opinion as to the capacity of an accused to proceed *pro se*. These factors, suggested by the American Psychiatric Association and American Academy of Psychiatry and the Law, include evaluating the defendant's ability to formulate and communicate coherent thoughts, to make decisions in a trial context, to withstand the stress of trial, to relate to the court or a jury and to cooperate with standby counsel if one is appointed.

Finally, by adopting by reference the procedures used in Article 730, the measure affords appropriate due process protections in a framework that is very familiar to courts, criminal practitioners and mental health professionals. The measure is therefore readily adaptable to current practice.

59. Termination of an Action in Favor of an Accused
(CPL 160.60; 160.55(4))

The Committee recommends that sections 160.55(4) and 160.60 of the Criminal Procedure Law be amended to correct a cross reference error in the current law governing termination of an action in favor of an accused.

Section 160.50 of the Criminal Procedure Law provides for sealing records when an action terminates in favor of an accused. Subdivision 3 of that section provides, in separate paragraphs (a) – (k), the circumstances under which a criminal action or proceeding will be considered terminated in favor of the accused. Subdivision 3 had formerly been designated subdivision 2, but the Legislature amended 160.50 in 1991, by adding a new subdivision 2 (eliminating some supporting documentation required by the Division of Criminal Justice Services as a prerequisite to sealing), and renumbering existing subdivision 2 and 3 to subdivisions 3 and 4 respectively (L. 1991 c. 142 § 3). At the time, however, several other sections of the Criminal Procedure Law that referenced subdivision 2 were not amended to reflect the new renumbering. In 1994, one of those references was corrected (see L. 1994 c. 169 § 80). Two other cross referencing errors remain – one in section 160.55(4) and the other in 160.60 of the Criminal Procedure Law.

This measure would amend sections 160.55(4) and 160.60 of the Criminal Procedure Law to correct those cross references.

60. Imposition of Certain Fines under the Vehicle and Traffic Law (VTL 1193(1)(e))

The Committee recommends that section 1193(1)(e) of the Vehicle and Traffic Law be amended to correct an inconsistency occasioned when the Legislature enacted Leandra's Law in 2009.

The Vehicle and Traffic Law has consistently authorized a court, following conviction for driving while intoxicated as either a felony or a misdemeanor, to impose a jail sentence, a fine or both (*see* VTL §§ 1193(1)(b)(i)[3], 1193(1)(c)[4]). In contrast, where a court imposes a sentence of probation or conditional discharge, it must also impose a sentence of a fine (*see* VTL 1193(1)(e)[5]).

When the Legislature passed Leandra's Law, it did not amend these basic sentencing statutes. It did, however, enact Penal Law § 60.21, which mandated the imposition of either a sentence of conditional discharge or probation consecutively to any sentence of imprisonment in cases where a defendant is sentenced upon a conviction of VTL § 1192(2), (2-a), or (3). The clear purpose of this provision was to promote public safety by insuring that all convictions for these charges would include a condition requiring a defendant to install and maintain an ignition interlock device for a certain period after release where the court sentenced a defendant to a jail or prison term.

The result, however, was to inject a fundamental inconsistency in the sentencing statutes. Although it does not appear that the Legislature intended to alter the authority of a court to

[3] VTL §§ 1193(1)(b)(i) reads as follows: "Driving while intoxicated or while ability impaired by drugs or while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs; aggravated driving while intoxicated; misdemeanor offenses. (i) A violation of subdivision two, three, four or four-a of section eleven hundred ninety-two of this article shall be a misdemeanor and shall be punishable by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in a penitentiary or county jail for not more than one year, or by both such fine and imprisonment. A violation of paragraph (a) of subdivision two-a of section eleven hundred ninety-two of this article shall be a misdemeanor and shall be punishable by a fine of not less than one thousand dollars nor more than two thousand five hundred dollars or by imprisonment in a penitentiary or county jail for not more than one year, or by both such fine and imprisonment." (emphasis added)

[4] VTL § 1193(1)(c) provides: "A person who operates a vehicle (A) in violation of subdivision two, two-a, three, four or four-a of section eleven hundred ninety-two of this article after having been convicted of a violation of subdivision two, two-a, three, four or four-a of such section or of vehicular assault in the second or first degree, as defined, respectively, in sections 120.03 and 120.04 and aggravated vehicular assault as defined in section 120.04-a of the penal law or of vehicular manslaughter in the second or first degree, as defined, respectively, in sections 125.12 and 125.13 and aggravated vehicular homicide as defined in section 125.14 of such law, within the preceding ten years, or (B) in violation of paragraph (b) of subdivision two-a of section eleven hundred ninety-two of this article shall be guilty of a class E felony, and shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment." (emphasis added)

[5] VTL § 1193 (1)(e) provides: "Certain sentences prohibited. Notwithstanding any provisions of the penal law, no judge or magistrate shall impose a sentence of unconditional discharge for a violation of any subdivision of section eleven hundred ninety-two of this article nor shall a judge or magistrate impose a sentence of conditional discharge or probation unless such conditional discharge or probation is accompanied by a sentence of a fine as provided in this subdivision." (emphasis added)

impose a jail or fine alternative for the offenses covered under Leandra's Law, a strict reading of the statute can be construed as having created that result. This measure would restore the original statutory authorization for a court while at the same time maintaining the guiding principle of Leandra's Law that all defendants convicted of the specified offenses would be required to install and maintain an ignition interlock device on any vehicle they own or operate, even where a jail or prison sentence is imposed.

61. Defendants Confined for Examinations to Determine Capacity (CPL 730.30(1-a))

The Committee recommends that Article 730 of the Criminal Procedure Law be amended to expressly authorize a local criminal court to issue a securing order upon determining that a defendant will not voluntarily appear for a capacity examination. It also recommends, however, that where a defendant is incarcerated pending a fitness examination, the time period for releasing defendant pursuant to CPL 170.70 or 180.80 will commence on the first scheduled adjourned date after the court issues the securing order.

Upon arraigning a defendant on a felony complaint, if the court is of the opinion that he or she may be an incapacitated person, it must order a CPL 730.30 examination. In most cases, the court will confine defendant for the period of the examination, and adjourn the case approximately 30 days for the director of an appropriate hospital facility to prepare an examination report. In misdemeanor cases, however, a local criminal court has limited authority to remand a defendant, and is instead only authorized to either set bail or release defendant on his or her own recognizance (*see* CPL 530.20(1)). One exception to this rule is that a defendant who is found, after a hearing, to have violated an order of protection issued in a non-felony case may be committed to custody for the pendency of the criminal action (*see* CPL 530.12(11)(a); 530.13(8)(a)). Nonetheless, the Court of Appeals has held that the Criminal Procedure Law may allow a court to confine a defendant in a misdemeanor case for purposes of a CPL 730 fitness examination (*Matter of LaBelle*, 79 NY2d 350, 360-361 (1992)). In *LaBelle*, the Court noted that CPL 730.20 (2) and (3), dealing with procedures governing orders of examination, "provide some support for [the] position that [the court] is vested with discretion to determine whether a [non-felony] defendant should be confined, either in jail or in a hospital, pending a psychiatric report" (79 NY2d at 361). The Court did not rule on the question, however, and instead left resolution of the correct interpretation of the statutory scheme to "await a proper case and the proper parties" (id.). The Court has not yet revisited the issue.

When a mentally ill defendant appears in local criminal court for arraignment on non-felony charges, the court may be satisfied that the defendant will voluntarily appear in court, but may understand that it is very unlikely that defendant will voluntarily appear for a fitness examination. In such cases, courts commonly set high bail or remand under circumstances that are not clearly supported by statute. The Committee therefore recommends that Article 730 expressly provide for confinement of a defendant where the court determines that the defendant will not voluntarily appear for the examination.

In order to ameliorate the impact of such confinement, the Committee also recommends that strict time limits be set on the adjournment the court may fix to receive the examination report - 15 days for a misdemeanor and 30 days for a felony. To enforce the limit on incarceration, the proposed measure provides that the CPL 170.70 and 180.80 period will commence on the date of the first adjournment. Currently, there is no provision allowing the prosecutor to discontinue the prosecution while a defendant is being examined. Arguably, the Legislature intended the opposite because the Criminal Procedure Law provides that where a defendant is subject to an order of examination, a prosecutor may present the case to the grand jury without affording defendant the right to appear before the grand jury (see CPL 730.40(3)).

While a prosecutor is not charged with delay resulting from "proceedings for the determination of competency" in the context of speedy trial rules (see CPL 30.30(4)(a)), the Legislature has not provided a similar exclusion where a defendant is incarcerated following arraignment (see CPL 170.70, 180.80). Even so, this measure recognizes that it is appropriate to adopt a tolling period during the period of examination because the results of the examination may have a critical impact on the prosecution of the case. This measure therefore commences the CPL 170.70 or 180.80 time period for release on the first adjourned date following issuance of the securing order. In order to avoid gamesmanship, the measure expressly provides that a court's release order may be withheld if the examination report is not received by the court because of the willful conduct of the defendant.

62. 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.

63. Juvenile Offenders Apparently Eligible for Youthful Offender Treatment (CPL 720.15(3))

The Committee recommends that section 270.15(3) of the Criminal Procedure Law be amended to provide that an accusatory instrument charging a juvenile offender who is eligible for youthful offender status be filed as a sealed instrument with respect to the public while the case is pending in a local criminal court. If the youth is subsequently indicted, the preliminary sealing would end.

CPL Article 720 sets forth a youthful offender procedure, and authorizes the sealing of case records of criminal proceedings brought against persons between the ages of 13 and 19 for the purpose of preventing such youths from being stigmatized "with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals." *Capital Newspapers Division of the Hearst Corporation v. Moynihan*, 71 N.Y.2d 263, 267-268 (1988)(*quoting People v. Drayton*, 39 N.Y.2d 580, 584 (1976)). For youths 16-19 years old, "[w]hen an accusatory instrument is filed against a youth apparently eligible for youthful offender treatment, it shall be filed as a sealed instrument, though only with respect to the public" (CPL 720.15(1)). The court also has discretion to conduct the proceedings in private (CPL 720.15(1)). As noted in the Practice Commentary to section 720.15, this allows the youth to be insulated "from the adverse publicity that may cause a blot on their future." It is fitting because when a case is likely to end in a youthful offender adjudication, which automatically renders the case record confidential, the sealing of the case may be of little use if the proceedings are made public ahead of the youthful offender adjudication.

Juvenile offenders, however, are excluded from the protection of the statute because, although they are 13, 14 and 15-year-old youths prosecuted in adult criminal court, they stand accused of having committed a designated felony. Felony cases are expressly excluded from the statutory protections of CPL 720.15 (*see* CPL 720.15(3)). Nonetheless, in evaluating the spectrum of children society should want to avoid having the 'lifelong stigma of a criminal conviction,' the younger the child, the more compelling the need to insulate them from the 'adverse publicity that may cause a blot on their future.' This is especially true while cases against juvenile offenders are pending in local criminal court, prior to any indictment. It is during those proceedings that mitigating circumstances can be brought to the attention of the court and the prosecutor that may result in the case being removed to Family Court prior to indictment, by the court, the prosecutor or the grand jury (*see e.g.*, CPL Article 725).

The current measure extends preliminary protection to juvenile offenders in the local criminal court by requiring an accusatory instrument be filed against an apparently eligible juvenile offender as a sealed instrument. It also permits the court, on consent of the youth, to hold preliminary proceedings in private. Notably, the protection applies only while the case is pending in local criminal court. Thus, it is designed to protect the juvenile offender from public opprobrium at the outset of the case, and before the case is transferred to superior court as a result of indictment. This provision will therefore benefit the juvenile offender whose case is either dismissed or removed to Family Court prior to indictment.

64. Release of Pre-Sentence Investigation Reports for Post Judgment Motions (CPL 390.50(2))

The Committee recommends that section CPL 390.50(2) be amended to provide a defendant with access to his or her pre-sentence investigation report in connection with a post judgment motion.

Pursuant to CPL §390.50(1), a pre-sentence report "is confidential and may not be made available to any person . . . except where specifically required or permitted by statute or upon specific authorization of the court." Under CPL 390.50(2)(a), pre-sentence reports "shall be made available by the court for examination and copying in connection *with any appeal* in the case . . ." (emphasis added). Strictly construed, this does not authorize access to a pre-sentence investigation report for post-judgment motions, such as CPL Article 440 motions dealing with sentencing issues (*e.g.,* ineffective assistance of counsel at sentencing), or *coram nobis* applications (*e.g.,* ineffective assistance of appellate counsel).

Moreover, CPL 390.50 has been narrowly construed *(see e.g., People* v *Fishel III,* 128 A.D.3d 15 (3d Dept. 2015); *Matter of Thomas* v. *Scully,* 131 A.D.2d 488 (2d Dept. 1987)). Courts that have examined a defendant's right to a pre-sentence report for use in collateral proceedings have mostly done so in the context of parole hearings or an appeal from the denial of parole. These courts have held that disclosure of a presentence report in collateral proceedings may only be done on motion to the sentencing court and only after a factual showing of need (*see e.g., Matter of Shader v People*, 223 A.D.2d 717 (3d Dept 1996); *People v Wright,* 206 A.D.2d 337 (1st Dept 1994); *Matter of Thomas* v. *Scully, supra,* 131 A.D.2d 488 (2d Dept. 1987); *Matter of Legal Aid v. Armer,* 74 A.D.2d 737 (4th Dept 1980)); *see also People* v *Tevault,* 2010 WL 5574415 (N.Y. Sup. Ct. 2010); *People* v *Delatorre,* 2 Misc.3d 385 (Sup. Ct., N.Y. Cty. 2003)). As a result of these rulings, trial courts were inundated with motions for the release of pre-sentence reports for collateral proceedings. Relief finally came in a 2010 amendment to CPL 390.50(2) when the Legislature authorized a defendant to have access to the probation report "for use before the parole board for release consideration or an appeal of a parole board determination" (L.2010, c. 56, pt. 00, § 5). While this amendment settled the question of whether and under what circumstances a defendant could access a probation report in connection with a parole proceeding, by singling out parole hearings and their appeals, the statute may have undermined a defendant's opportunity to access the report in all other types of collateral proceedings. Courts continue to be inundated with motions for release of pre-sentence reports in cases where fundamental fairness would suggest that the subject of the report ought to have access to it for purposes of these collateral proceeding. Requiring a formal motion is needlessly wasteful of court resources and places an unnecessary barrier for defendants who need the report to prepare a post judgment application to the trial court.

This measure provides a defendant with access to the pre-sentence investigation report for "post judgment motions," by placing these collateral proceedings on par with appeals.

65. Amending the Definition of a "Licensing Officer" for Licensing Firearms (Penal Law 265.00(10))

The Committee recommends that county sheriffs replace judges or justices of a court of record for purposes of issuing firearms' licenses.

Under current law, a license to carry or possess a firearm must be issued by the appropriate licensing officer in the county where the applicant resides or, in certain cases, is principally employed or has a principal place of business (PL §400.00(3)). While in New York City, Nassau County, and Suffolk County, the licensing officer is a designated police official, in all upstate counties, the licensing officer is "a judge or justice of a court of record" (PL §265.00(10)).[1]

A judge acting in his or her administrative capacity as the firearms licensing officer is often required to perform acts that are more appropriately done by local police officials. For instance, before approving a license application, the licensing officer must authorize a background investigation of the license applicant, which is conducted by the "duly constituted police authority of the locality where such application is made," (PL §400.00(4)). This wide-ranging investigation of the applicant, usually conducted by the local sheriff, includes investigating all statements made in the application, whether the applicant has a prior state or federal criminal record and whether the applicant has any previous or current mental illness issues. Following the investigation, the sheriff must report the results to the licensing official, but the investigation conducted by the sheriff invariably dictates whether a license will be granted. Placing the authority in the office of the police agency conducting the investigation, as is done in New York City, Nassau and Suffolk Counties, is a more efficient and effective way to ensure public safety.

Additionally, a significant percentage of work for licensing officers focuses on applications to amend a firearms license. Most such amendments are submitted solely to add or remove a firearm to or from the already existing license. To the extent that this process should in some way be used to regulate the number or type of guns an individual possesses, a judge is particularly ill-suited to make that determination. When an amendment application is presented, the judge only receives the application itself, and not the background material about the applicant presented with the initial application. To the extent an amendment application might raise a public safety concern, it is the sheriff or state police who will likely be best informed about the issue. In fact, the judge, who may lack any information or expertise about the type of firearms at issue or the background of the applicant, may not be well suited to make the evaluation of the applicant's fitness for the additional firearm. This is particularly true when the original

[1] "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance (PL §265.00(10)).

application was approved by a different judge.

At the same time, license applications create a significant administrative burden for judges, who must process requests with limited staff and who in any event must often rely on the local sheriff to conduct an appropriate investigation of the applicant.

This measure would substitute the county sheriff as the licensing officer outside New York City, Nassau and Suffolk Counties. It thus puts the authority to issue firearms' licenses within the executive branch, and on the law enforcement agency most likely to know about a county resident's suitability for a license, as well as the agency with expertise in assessing whether the license holder is suitable for a license amendment. This measure would both streamline the process for applicants and ease the burden on courts.

66. SORA and the Sexually Motivated Felony
(Correction Law 168-a (2))

The Committee recommends that section 168-a of the Correction Law be amended to clarify that a defendant convicted of a sexually motivated felony will be considered a "sex offender" for purposes of the Sex Offender Registration Act (SORA)(Correction Law Article 6-C).

In 2007, when the legislature passed the Sex Offender Management and Treatment Act (SOMTA), it created a new class of crime denominated a "sexually motivated felony" (L. 2007, c. 7). A person is guilty of a sexually motivated felony when he or she commits a specified felony offense "for the purpose, in whole or substantial part, of his or her own direct sexual gratification." Specified offenses include several felonies whose definitions do not include a sexual component, such as burglary, assault and robbery, but whose commission may be "in whole or substantial part" for sexual gratification. If convicted under Penal Law § 130.91, the offender is subjected both to stiffer penalties and possible civil commitment under the sex offender management and treatment act. Additionally, the offender is subject to registration as a sex offender under SORA.

However, as it currently reads, SORA does not include all offenders convicted of a sexually motivated felony. When it modified section 168-a of the Correction Law in 2007, the Legislature inserted crimes denominated a sexually motivated felony within subparagraph (iii) of paragraph (a) of subdivision two. That subparagraph, which references hate crimes and crimes of terrorism, does not automatically make all sexually motivated felonies subject to SORA. Instead, crimes within that subparagraph require as a necessary precondition for coming with SORA, a conviction of one of the sex-related offenses defined in subparagraphs (i) or (ii) of paragraph (a) of subdivision two. As a result, convictions for non-sex related specified offenses – such as burglary, robbery and assault - do not qualify under for registration under SORA, even when the crime was determined to be "sexually motivated."

Many "sexually motivated" felonies which are not now subject to SORA include violent, sexually-motivated criminal conduct arguably far more serious than many sex offenses – including sex offense misdemeanors – that are currently subject to SORA registration.

The Sex Offender Registration Act is an important component of New York's comprehensive approach to protecting the public against sex offenders, through confinement in appropriate cases, community supervision, registration, community notification and sex offender treatment. The Committee believes the proposed amendment would strengthen that protective regimen in a manner which is fully consistent with New York's carefully considered approach to regulating sex offenders in the community.

This measure adds to the list of offenses defined as a "sex offense" under subparagraph (i) of Correction Law § 106-a(2)(a), any conviction for a sexually motivated felony under Penal Law § 130.91 The measure deletes the current reference to sexually motivated felonies under Penal Law § 130.91 in subparagraph (iii) of Correction Law § 106-a(2)(a).

The measure would take effect 90 days after enactment.

67. Sex Trafficking and the Rape Shield Law
(CPL 60.42)

The Committee recommends that section 60.42 of the Criminal Procedure Law be amended to expand the protection of New York's rape shield law to include victims of sex trafficking offenses.

Currently, the Criminal Procedure Law establishes a "rape shield law" in prosecutions involving a sex offense (CPL 60.42). Rape shield laws protect victims of sex offenses from having their past sexual conduct raised in the prosecution of their abuser. Such laws were enacted as a response to the widespread and improper tactic of using the victim's prior sexual activity as a character attack, thus presenting the victim to the jury as an immoral person and unworthy of belief. New York's rape shield law recognizes that a victim's prior sexual activity is, in most circumstances, irrelevant to the issues at a trial for a sex offense. In order to protect a defendant's constitutional right to confront his or her accusers, the law provides several exceptions if the defendant can establish the particular relevance that the victim's prior sexual conduct has to the defense of the charges (see CPL 60.42). Notably, however, CPL 60.42 expressly limits a sex offense to an offense "defined in article one hundred thirty of the penal law," thus excluding sex trafficking offenses, which are codified in section 230.34 of the Penal Law. As a result, in sex trafficking prosecutions, where key witnesses are often trafficked victims, introduction of evidence of the victim's prior sexual conduct is not prohibited by CPL 60.42. Instead, cross examination of the trafficked victim's prior sexual conduct is subject only to the sound discretion of the court to control the scope of cross-examination, and the requirement that the defense establish that the past sexual conduct is "relevant and admissible in the interest of justice" (*see* CPL 60.43). The Committee believes that sex trafficking should be recognized as a "sex offense" for the purpose of protection under the rape shield law.

Both California and Washington D.C. provide explicit protection for victims of sex trafficking from having their past sexual conduct, including past prosecutions for prostitution, paraded before a jury. California's statute provides that "[e]vidence of sexual history or history of any commercial sexual act of a victim of human trafficking, as defined in [the California] Penal Code, is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding" (Ca. Evidence Code § 1161(b)). Similarly, Washington D.C. enacted a statute that provides, "[i]n a criminal case in which a person is accused of trafficking in commercial sex, . . . sex trafficking of children, . . . or benefitting financially from human trafficking, . . . reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with [the Washington D.C. rape shield law]), and is constitutionally required to be admitted" (D.C. Code §22-1839).

The likelihood that the complainant in a sex trafficking case has a history of prior unlawful sexual conduct is self-evident. Unlike crimes that are usually unrelated to sexual misconduct (e.g., robbery, burglary, homicide, etc.), charges of sex trafficking will often involve victims with histories of prior sexual misconduct. It is therefore inevitable that a trafficker will

seek to use the past sexual conduct of his or her victim in ways that have no proper bearing upon the trafficker's own guilt or innocence. The sad reality is that victims of sex trafficking are often victimized over the course of months or years, often by different traffickers. Although prior acts of prostitution or other sexual conduct may superficially be relevant when testing a complainant's current claim that he or she is being trafficked, repeated victimization is, by itself, not a basis to allow impeachment. It would be a terrible irony if the long-term trafficking of a person is used by the trafficker to defeat the very charge of trafficking being prosecuted.

As is true in other sex offense prosecutions, evidence of a sex trafficking victim's prior sexual conduct would continue to be admissible for a number of reasons outlined in current law including that the victim was actually convicted of a prostitution offense within the past three years (CPL 60.42 (2)) or where evidence of the prior sexual conduct of the victim was "relevant and admissible in the interests of justice" as determined by the Court (CPL 60.42 (5)). This bill would simply treat the alleged victims of sex trafficking crimes in the same way other alleged sex offense victims were treated with respect to prior sexual conduct evidence.

68. Criminal Possession of a Weapon by Juvenile Offenders
(Penal Law §30.00)

The Committee recommends that section 30.00 of the Penal Law be amended to clarify that when charging a 14 or 15-year-old with possession of a weapon in the second degree as a juvenile offender, the prosecution must establish as an element of the offense that the possession occurred on school grounds.

Under current law, an adult commits criminal possession of a weapon in the second degree when "with intent to use the same unlawfully against another, such person possesses a machine-gun . . . or . . . loaded firearm" (PL §265.03). However, a 14 or 15-year-old accused of that offense, can only be prosecuted as an adult for that offense where "such machine gun or such firearm is possessed on school grounds . . ." (PL § 30.00(2)). The failure to have school grounds as an element of the substantive offense has engendered needless confusion for courts and parties applying the infancy statute. Under current law, it is unclear whether the prosecutor must plead the location of the weapon in the accusatory instrument to satisfy facial sufficiency and present evidence of a school ground location to a grand jury or, conversely, whether a prosecutor can await a request for a bill of particulars or perhaps even the trial itself before asserting a weapon was possessed on school grounds. While a defendant is generally required to affirmatively raise an infancy defense, the Committee believes it fundamentally unfair to allow the issue to be raised for the first time well after filing the accusatory instrument. Indeed, many prosecutors currently allege the issue in the felony complaint and present school grounds' evidence before the grand jury, just as they would any other substantive element of a felony charge. The Committee believes this practice should be codified in the statute.

This measure conforms the infancy statute to existing practice in most jurisdiction by requiring the prosecution to charge the location of the weapon on school grounds as a substantive element of the offense.

V. Conclusion

The Committee will continue to meet regularly to study and discuss all significant proposals affecting criminal law and procedure. We express our gratitude to the Chief Judge, the Chief Administrative Judge and the Judicial Conference for their support in achieving our shared objective of improving the criminal law.

Respectfully submitted,

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