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 2021 Report, the Committee recommends 7 new measures for enactment by the Legislature. Also included are several measures previously submitted during the 2020 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 Criminal Procedure Law to authorize an official drug treatment court to impose up to seven days of therapeutic remand for violation of the non-monetary condition of mandatory treatment;

2. amend the Criminal Procedure Law to reduce the number of peremptory challenges to increase trial capacity in response to the COVID-19 ongoing public health emergency and resultant backlog;

3. amend the Criminal Procedure Law to expand and better regulate the use of electronic appearances;

4. amend the Criminal Procedure Law and the General Business Law to adjust the monetary thresholds for Grand Larceny, Theft of Services, and Securities Fraud;

5. amend the Criminal Procedure Law to allow courts to sentence predicate felony offenders to the mandatory minimum sentences applicable to offenders without such predicate convictions with the consent of the prosecutor, defendant and the court;

6. amend the Criminal Procedure Law to allow courts to accept pleas below current statutory plea reduction thresholds with the consent of the prosecutor, defendant, and the court; and

7. amend the Penal Law to standardize the allocation of jail time credit for defendants charged with a new felony and subject to an undischarged term of imprisonment or post-release supervision.

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. Supporting Effective Treatment Mandated through Designated Drug and Opioid Courts (Criminal Procedure Law Section 510.40).

New York has been a national leader in implementing and expanding the use of drug treatment courts across the state. There are approximately 141 drug courts in operation statewide. These courts use a collaborative approach to treatment, involving defense attorneys, prosecutors, treatment and education providers, and law enforcement officials. In traditional drug courts, non-violent offenders voluntarily enter these designated court-based programs in which rules are clearly defined by a contract signed by the offender, his/her defense counsel, the District Attorney, and the Court. In 2017, the Unified Court System opened the first opioid intervention court in the nation in Buffalo. Opioid courts uniquely provide immediate emergency intervention, treatment, and medication for defendants who screen positive for opioids and whom professional staff believe are at risk of overdose or addiction. These courts, which have since expanded to downstate counties, such as the Bronx, provide daily case management for program participants and link those participants to medication assisted treatment (MAT) within 48 hours of arraignment when deemed necessary.

Where drug court participants fail to comply with mandated conditions prior to the entry of any guilty plea, courts may employ numerous methods to help improve compliance. These include conferences with the court, the imposition of additional non-monetary release conditions and adjustments in the treatment program. In some cases where these measures are not sufficient, however, courts may also seek to impose a very brief jail term to attempt to obtain compliance with treatment requirements. Under the new Bail Reform Law, however, where a defendant is charged with a "non-qualifying offense", including any narcotics crime below the Class A-1 felony level, a remand for even a single day is not authorized, unless the defendant has committed certain new crimes while at liberty or "persistently and willfully" failed to appear in court after notice of scheduled court appearances.

This proposal amends section 510.40 of the CPL to allow exclusively a trained judge in a designated drug treatment court to order short defined periods of incarceration specifically in response to the failure of a principal to comply with the non-monetary condition of mandatory drug treatment in hopes of being able to induce drug-addicted individuals to access the services a court has deemed necessary and appropriate to prevent overdose and other negative consequences of their addiction. The detention is capped at 7 days as it is primarily envisioned as being used as a deterrent or tool of effective immediate intervention—commonly referred to as "therapeutic remand."

This proposal would only be applicable to drug treatment courts established in accordance with the rules of the Chief Administrative Judge and would include requirements for notice, an opportunity to be heard, and statutory findings by the court prior to imposing any period of brief, authorized remand.

The Proposal

AN ACT to amend the criminal procedure law in relation to the imposition of limited periods of remand for a principal who violates the non-monetary condition of release of mandatory participation in drug or substance abuse treatment

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

Section 1. Section 510.40 of the penal law is amended to create a new subdivision 6 to read as follows:

6. Where: (i) a principal who, pursuant to sections 170.15 (4) or 180.20 (3) of the Criminal Procedure Law, is before a drug treatment or opioid court so designated by the chief administrator of the courts; (ii) a non-monetary condition of such a principal's release is mandatory placement in drug or substance abuse treatment; (iii) the court finds that there is clear and convincing evidence that the principal violated the terms of such mandatory placement in an important respect; and (iv) the court determines that a brief remand to custody is the least restrictive alternative which will reasonably assure the principal's successful continuation or completion of such mandatory treatment, the court may commit the principal to the custody of the sheriff for a period not to exceed seven days with respect to any such determination. The court shall provide the parties with an opportunity to be heard on any issue relevant to such finding and shall explain the reasons for any such determination on the record or in writing.

The provisions of this section shall not be deemed to abrogate or limit any other authority a court has to remand a principal to the custody of the sheriff for a violation of non-monetary conditions, including any such authority with respect to defendants who stand charged with a "qualifying offense" under the criminal procedure law or for defendants who stand convicted of a crime pursuant to which such non-monetary conditions have been imposed as release conditions.

§ 2. This act shall take effect on the thirtieth day after it becomes law and shall expire and be deemed repealed one year after its effective date. Prior to the date of such repeal, the office of court administration shall file with the governor, the legislature, and the chief judge of the state a report documenting the number of commitments that have been ordered by the courts pursuant to subdivision (6) of section 510.40 of the criminal procedure law, as added pursuant to section one of this act, the ultimate treatment outcomes in a case wherein such a commitment was ordered and any other information such office concludes might be useful to the legislature in determining whether or how this act should be extended after its expiration.

2. Reducing the Number of Peremptory Challenges to Increase Trial Capacity in Response to the COVID-19 Ongoing Public Health Emergency and Resultant Backlog.
(Criminal Procedure Law Section 270.25)

To facilitate the return of petit juries during the COVID-19 pandemic and to increase trial capacity to help ameliorate the litigation backlog the criminal courts will experience in its aftermath, this measure seeks to amend section 270.25 of the Criminal Procedure Law to reduce temporarily the number of peremptory challenges for all felony trial proceedings. This would, in turn, decrease the number of prospective jurors needed to commence a jury trial and shorten the time required to complete voir dire. The follow-on reduction in foot traffic in the criminal courthouses would support OCA's efforts to maintain the necessary health and safety protocols that must remain in place as we work to control COVID-19 while resuming some in-person operations as the pandemic recedes with the hopeful distribution and administration of effective vaccines.

Though deeply enmeshed in our legal history, peremptory challenges are not constitutionally protected as fundamental rights under either the United States or the New York State constitutions. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *People v. Kern*, 75 N.Y.2d 638, 648 (1990). The New York jury system, in its current form, permits more peremptory challenges than the majority of states and more than the number recommended by the American Bar Association. Under normal circumstances, our exceptionally large number of peremptory challenges uses up an inordinate number of jurors, over-taxing the pool and rendering peremptory challenges, at best, a strategically useful inefficiency. Yet, the long history of their abuse to further discrimination in the criminal justice system by facilitating the removal of minority prospective jurors suggests that they are also a dangerous source of ongoing systemic bias. Supreme Court Justice Thurgood Marshall concluded in his concurrence in the seminal *Batson* case that "[t]he inherent potential of peremptory challenges to distort the jury process … should ideally lead the Court to ban them entirely from the criminal justice system." *Batson v. Kentucky*, 476 U.S. 76, 106-07 (1986) (Marshall, J., concurring) (emphasis added).

Although this measure does not wholly eliminate peremptory challenges, the significant reduction in their number would not only reduce the number of prospective jurors necessary for criminal trials in light of COVID but also have a concurrent benefit of mitigating discrimination in the jury system.

For regular jurors, this measure would reduce the number of peremptory challenges from twenty to seven, where the highest crime charged is a class A felony; from fifteen to five, where the highest crime charged is a class B or C felony; and from ten to four for all other cases. The number of peremptory challenges for alternate jurors would be reduced from two to one for each alternate juror for all levels of felonies.

This measure would take effect immediately and expire on April 1, 2022.

The Proposal

AN ACT to amend the criminal procedure law, in relation to reducing the number of peremptory challenges which may be exercised in order to facilitate jury trials during the COVID-19 pandemic

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

Section 1. Subdivision 2 of section 270.25 of the criminal procedure law is amended to read as follows:

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

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

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

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

§2. This act shall take effect immediately; provided, however, (i) it shall only apply to proceedings commenced on or after such effective date, and (ii) it shall expire and be deemed repealed on April 1, 2022 except that it shall continue in effect on and after such date as to actions commenced prior to such date in which jury selection has commenced.

3. Permitting Expanded Use of Electronic Appearances (Criminal Procedure Art. 182)

The COVID pandemic initially required New York's courts to cease in-person operations and handle only essential matters virtually. With the gradual reopening of the courts in response to improved public health measures, in-person proceedings resumed in the summer and early fall only again to be scaled back as the virus resurged this winter. Nevertheless, virtual proceedings are continuing and expanding and will likely be necessary for some time to come. Unfortunately, the Criminal Procedure Law generally prohibits electronic appearances, except for discrete types of appearances where a defendant consents. This has forced the Courts to be wholly reliant on a regime of temporary measures imposed by executive order to carry out virtual proceedings.

Although there is a reasonable argument that, notwithstanding the Criminal Procedure Law's prohibitions, parties are able to consent to electronic appearances, without statutory authorization, some courts have been reluctant to fully leverage this technology to increase access to justice. Additionally, the absence of statutory authorization has also raised questions about whether electronic appearances on consent that have proceeded without any clear authorization could be vulnerable to challenge.

This legislation would provide clarity, certainty, and defendant protections for electronic appearances going forward. A particular complaint of the defense bar during virtual proceedings has been that, depending on the system being used, it is extremely difficult for lawyers to communicate with clients during a proceeding without interrupting the appearance and reconvening after a conversation—a limitation which may discourage such private communications. This legislation would address that problem by providing a new statutory right for defendants to confidentially consult with lawyers or legal advisors <u>during</u> proceedings. This would both encourage the development of systems that easily allowed such communication and mandate that courts allow it even where it might cause some delay or inconvenience.

This legislation would authorize any criminal proceeding, other than a jury trial or a grand jury, to be conducted through an electronic appearance. With respect to any plea, sentence, evidentiary hearing, or non-jury trial, this legislation would only allow an electronic appearance to be utilized with the consent of the parties. Even where consent would not be required, such as at an arraignment, calendar call or argument, a party could oppose use of a virtual proceeding for good cause.

The measure would require that any such appearance would have to provide an appropriate opportunity for defendants to confidentially consult with attorneys or legal advisors <u>during</u> the proceeding. It would also require the Court to adjourn any proceeding for good cause, and require such a good cause adjournment if the proceeding could not be properly conducted or a defendant did not have an appropriate opportunity to confidentially consult with a lawyer or legal advisor during a proceeding due to technological problems.

The final section removes the arbitrary list of counties in which electronic appearances are allowed, permitting their use statewide in accordance the rules of the Chief Administrative Judge.

The bill would take effect immediately and expire on April 1, 2022.

The Proposal

AN ACT to amend the criminal procedure law in relation to allowing electronic appearances during the COVID-19 pandemic and providing for the repeal of such provisions upon expiration thereof

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

Section 1. Section 182.30 of the criminal procedure law is amended by adding a new subdivision (7) to read as follows:

Notwithstanding any contrary provision of this chapter, where the chief administrator of the courts has authorized the use of electronic appearances, the court, in its discretion:

(a) may dispense with the personal appearance of any party or the defendant and conduct any appearance, including an arraignment, calendar call or argument, but not including any plea, sentence, evidentiary hearing or trial, unless otherwise authorized by law, by electronic appearance. In the event any party objects to the conduct of any such proceeding by electronic appearance, the court shall allow such party to be heard on the matter and consider whether the proceeding shall not be conducted through an electronic appearance for good cause shown.

(b) may dispense with the personal appearance of any party, the defendant or any witness, except with respect to a grand jury proceeding or a jury trial, and conduct any plea, sentence, evidentiary hearing or non-jury trial by electronic appearance, provided that the defendant, after consultation with counsel or a legal advisor, if any, and the prosecutor consent on the record to conducting any such proceeding by electronic appearance.

(c) Any proceeding under this subdivision must provide an appropriate opportunity for any defense attorney to confidentially consult with his or her client or for a pro se defendant to confidentially consult with his or her legal advisor, if any, during the proceeding.

(d) The provisions of this article shall be applicable to any proceeding under this subdivision except to the extent such provisions are inconsistent with the grant of authority provided by this subdivision and provided further that where a party requests that an electronic appearance be terminated and adjourned pursuant to subdivision (2) of section 182.20 of this article after it has commenced under this subdivision, the court shall have the discretion to grant that termination and adjournment request for good cause shown or deny the request. Good cause is established if a court determines, among other possible reasons, that the proceeding cannot be properly conducted, an attorney does not have an appropriate opportunity to confidentially consult with a client or a pro se defendant does not have an appropriate opportunity to confidentially consult with a legal advisor, if any, due to technological problems. Where a court grants a request to terminate and adjourn a proceeding pursuant to this subdivision and subdivision (2) of section 182.20 of this article, the proceeding shall continue on the adjourned date pursuant to any consent previously given, provided, however, that any party may make a new request for termination and adjournment under the provisions of this subdivision at any such adjourned proceeding.

§ 2. Section 182.20 of the Criminal Procedure Law is amended to read as follows:

1. Notwithstanding any other provision of law and except as provided in section 182.30 of this article, the court, in its discretion, may dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action pending in [Albany, Bronx, Broome, Erie, Kings, New York,

Niagara, Oneida, Onondaga, Ontario, Orange, Putnam, Queens, Richmond, St. Lawrence, Tompkins, Chautauqua, Cattaraugus, Clinton, Essex, Montgomery, Rensselaer, Warren, Westchester, Suffolk, Herkimer or Franklin] any county, provided that the chief administrator of the courts has authorized the use of electronic appearance and the defendant, after consultation with counsel, consents on the record. Such consent shall be required at the commencement of each electronic appearance to such electronic appearance.

§ 3: This act shall take effect immediately provided that section one of this Act shall be deemed repealed on April 1, 2022.

4. Adjusting the Monetary Thresholds in the Penal and General Business Law (PL §§ 155.20, 155.30, 155.35, 165.15; GBL § 352-c)

This proposal originated from recommendations of the Criminal Court Judges Association. It updates and seeks to harmonize some of the monetary thresholds for the crimes of grand larceny, theft of services, and securities fraud.

Increasing (and, in the case of theft of services, creating) minimal threshold amounts reflects both the realities of inflation and better prioritizes serious acts of fraud, theft, and property damage for the courts and law enforcement more generally. For example, the $250 threshold for felony criminal mischief—mirrored in the statutory presumption for property of unknown value in PL § 150.20 and the threshold for Securities Fraud under GBL § 352-c(6)—has remained unchanged since 1915. In 2020 dollars, that would be roughly the equivalent of $6,500 today. Previously, the legislature has taken some limited steps to address this issue by, for example, in 1986, raising the monetary threshold for the class E felony of grand larceny in the fourth degree from $250 to $1000. Presently, there is separate pending legislation in both houses addressing felony thresholds for criminal mischief. This current proposal complements those efforts and builds on previous reforms to make the following further incremental changes:

- Grand larceny in the fourth degree (PL § 155.30): $1,000 → $3,000
- Grand larceny in the third degree (PL § 155.35): $3,000 → $10,000
- Theft of services (PL § 165.15): No minimum → $100 for a class A misdemeanor for bus, railroad, or subway services
- Securities fraud (GBL § 352-c): $250 → $3000

The proposal also updates the treatment of stolen property whose value cannot easily be ascertained under PL § 155.20(4), increasing the presumption to less than $3,000 to align it with the minimum felony threshold amount.

The Proposal

AN ACT to amend the penal law and general business law in relation to increasing monetary thresholds for the crimes of grand larceny, theft of services, and securities fraud.

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

Section 1. Subdivision 4 of Section 155.20 of the penal law is amended to read as follows:

4. When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in subdivisions one and two of this section, its value shall be deemed to be an amount less than [two hundred fifty]three thousand dollars.

§ 2. Subdivision 1 of Section 155.30 of the penal law is amended to read as follows:

1. The value of the property exceeds [one]three thousand dollars; or

§ 3. Subdivision 1 of Section 155.35 of the penal law is amended to read as follows:

1. when the value of the property exceeds [three]ten thousand dollars

§ 4. The final unnumbered paragraph of Section 165.15 of the penal law is amended to read as follows:

Theft of services is a class A misdemeanor, provided, however, that where the payment or service at issue concerns railroad, subway or bus services and is less than one-hundred dollars, such theft of services shall be a violation, that theft of cable television service as defined by the provisions of paragraphs (a), (c) and (d) of subdivision four of this section, and having a value not in excess of one hundred dollars by a person who has not been previously convicted of theft of services under subdivision four of this section is a violation, that theft of services under subdivision nine of this section by a person who has not been previously convicted of theft of services under subdivision nine of this section is a violation, that theft of services under subdivision twelve of this section by a person who has not previously been convicted of theft of services under subdivision twelve of this section is a violation, and provided further, however, that theft of services of any telephone service under paragraph (a) or (b) of subdivision five of this section having a value in excess of one thousand dollars or by a person who has been

previously convicted within five years of theft of services under paragraph (a) of subdivision five of this section is a class E felony.

§ 5. Subdivision 6 of Section 352-c of the general business law is amended to read as follows:

6. Any person, partnership, corporation, company, trust or association, or any agent or employee thereof who intentionally engages in fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale, or who makes any material false representation or statement with intent to deceive or defraud, while engaged in inducing or promoting the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of any securities or commodities, as defined in this article, and thereby wrongfully obtains property of a value in excess of [two hundred fifty]three thousand dollars, shall be guilty of a class E felony.

§ 6. This act shall take effective immediately and shall apply to any crime committed on or after such effective date as well as any crime committed prior to such date where a sentence for that crime has not yet been imposed.

5. Allowing courts to sentence predicate felony offenders to the mandatory minimum sentences applicable to offenders without such predicate convictions with the consent of the prosecutor, defendant and the court (Criminal Procedure Law § 220.10)

Current law imposes mandatory minimum sentences which increase if a defendant has one or more "predicate" felony convictions. There are cases, however, where the court, the defendant and the prosecutor agree that the circumstances of a crime and the defendant's criminal history should allow a guilty plea with a sentence lower than required for such "predicate" felony offenders. For example, a defendant pleading guilty with a predicate felony conviction to a Class D non-violent felony (other than a narcotics crime), must receive a minimum indeterminate sentence of 2-4 years, even if the prosecutor, defendant and court believe a lower sentence is appropriate. In such circumstances, under current law, the court is powerless to accept a plea with a promised sentence of less than the statutory 2-4 year minimum term.

This legislation would allow the court, on consent of the People, to accept a guilty plea with a promised sentence below current mandatory minimum predicate thresholds "when, upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant the prosecutor and the court are of the opinion that the plea is in the interests of justice." When such a lesser sentence is appropriate, the Court may then impose a sentence as if the offender were not a predicate. Notwithstanding, the prosecution is explicitly permitted to condition such a plea on the defendant being adjudicated as a second felony, second felony drug, second violent felony, and persistent violent felony offender as appropriate, to allow for more serious penalties to be imposed were such a defendant to subsequently reoffend despite being offered this leniency.

The Proposal

AN ACT to amend the criminal procedure law in relation to allowing predicate felony offenders to be sentenced as first felony offenders with the consent of the district attorney and the court.

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

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

(j) Notwithstanding any contrary provision of article 70 of the penal law, in any case where the defendant appears to be a second felony offender or a second felony drug offender

pursuant to section 400.21 of this chapter, a second violent felony offender pursuant to section 400.15 of this chapter or a persistent violent felony offender pursuant to section 400.16 of this chapter, the defendant may enter a plea of guilty with a promised lawful sentence for such conviction which is applicable to a conviction without any such predicate status, under the conditions outlined in this subdivision. The court shall treat any such promise in the same manner it would any other lawful sentence promise in connection with a plea.

The sentencing of a defendant pursuant to any such plea shall not impact whether any conviction is considered a predicate felony or predicate violent felony conviction under the penal law or the criminal procedure law for any reason other than the lawful term of the imposed sentence under this subdivision. The people may require, as a condition of any such plea, that the defendant be adjudicated as a second felony offender, second felony drug offender, second violent felony offender or persistent violent felony offender, as the case may be, or may waive any such adjudication, provided, however, that if the people require any such adjudication and the defendant has not agreed to it as a condition of the plea, the defendant may withdraw any guilty plea prior to the imposition of the sentence.

A plea of guilty may only be entered under this subdivision with both the permission of the court and the consent of the people when, upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interests of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

§ 2: This act shall take effect immediately and shall apply to pleas entered on or after such date.

6. Allowing courts to accept pleas below current statutory plea reduction thresholds with the consent of the prosecutor, defendant and the court.
(Criminal Procedure Law § 220.10)

This proposal originated with the now inactive New York State Sentencing Reform Commission and has been adopted by the Committee. Our Criminal Procedure Law contains multiple—mostly post-indictment—plea restrictions that often frustrate the Court and the parties' ability to negotiate acceptable, fair, and just dispositions due to incumbent sentencing restrictions triggered by required pleas to more serious crimes—i.e., CPL 220.10(5)(d) requiring "[w]here the indictment charges a Class B violent felony offense which is also an armed felony offense then a plea of guilty must include at least a plea of guilty to a Class C violent felony offense." Over time, these restrictions have proliferated and created a byzantine system that, counterintuitively, is easily evaded through pre-indictment plea bargaining, by dismissing specific charges, or even dismissing the indictment in its entirety and proceeding under a different accusatory instrument after a "re-arrest." The biggest problem arising under the current system is the circumstance where the only way in which an agreed-upon plea can be taken is to dismiss an indictment and re-arrest the defendant and commence a new criminal case for the same alleged criminal conduct with lesser charges. Sometimes, however, prosecutors are simply unwilling to commence such a new case and so the agreed-upon plea cannot be taken. Even where prosecutors are willing to take this step, however, the current system wastes the resources of prosecutors, corrections agencies, the police and the courts who must go through all the formalities of a new arrest and the commencement of a new criminal case just to arrive at the same result they were all willing to accomplish with a plea to a lesser charge under an already existing indictment.

This proposal seeks to ameliorate the unfairness and inefficiency of the present statutory scheme by simply allowing a plea to go forward despite the restrictions mandating a more serious plea and penalty when the court and the prosecution agree that it is just to do so. With the concurrence of the People, the Court may determine that the plea is in the interest of justice in light of the nature and circumstances of crime, the available evidence, and the history and character of the defendant. This multi-factored assessment and finding must be placed on the record to better ensure responsible use of this new discretion.

The Proposal

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

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

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

(i) A defendant, with both the permission of the court and the consent of the people, may enter a plea of guilty as authorized by this section, notwithstanding the provisions of paragraphs (a), (b), (c), (d), (f) and (h) of this subdivision, when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

§ 2. Paragraph (b) of subdivision 3 of section 220.30 of the criminal procedure law is amended by adding a new subparagraph (x) to read as follows:

(x) A defendant, with both the permission of the court and the consent of the people, may enter a plea of guilty as authorized by this section, notwithstanding the provisions of subparagraphs (i), (ii), (iii), (iv), (v), (vi), (vii) and (ix) of this paragraph, when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

§ 3. This act shall take effect immediately and shall apply to pleas entered on or after such date.

7. Standardizing the allocation of jail time credit for defendants charged with a new felony and subject to an undischarged term of imprisonment or post-release supervision
(PL § 70.30(3))

When a person is subject to an undischarged term of imprisonment or post-release supervision and is charged with a new felony, the Department of Corrections and Community Supervision ("DOCCS") typically files a declaration of delinquency, which effectively stops the running of the previously imposed sentence (Penal Law §70.40 (3)). Because bail is not authorized for parole/prs violations, the defendant will invariably be held in pre-trial custody on the new felony charge too. If the defendant is convicted of the new felony and sentenced to a state prison term, the time spent in pre-trial custody on that charge will be credited as jail time on the new sentence. The time owed on the old sentence ("delinquent time") is added to the new term of imprisonment. For example, if a defendant was sentenced to 2 to 4 years after 11 months in pre-trial detention, while still owing 1 year on an undischarged sentence, the new felony sentence would be an aggregate term of 2-5 years. (The sentences must run consecutively under Penal Law § 70.25 (2-a))

The final declaration of delinquency on the parole/prs violation occurs by operation of law (*i.e.,* without a hearing) once the new felony sentence is imposed. *See* Executive Law § 259-i (3)(d)(iii). In this example, with 11 months of jail time credit, the defendant would be eligible for parole release consideration after serving 13 months in state prison. However, DOCCS adopted a new interpretation of jail time accounting rules approximately 10 years ago. Under DOCCS' current interpretation, whenever a new felony charge remains pending on the previously established maximum expiration date of the old sentence, DOCCS will cancel the declaration of delinquency and treat all the time the defendant spent in pre-trial custody as "time credited to a previously imposed sentence." Because time credited to a previously imposed sentence is not available as jail time, the defendant's pre-trial detention time will not be credited to the new term of imprisonment.[1]

The consequences of this change can be severe with defendants having to serve much longer periods in prison. In the above example, if the defendant had spent 1 year (instead of 11 months) in pre-trial detention before disposition of the new felony, all the pre-trial custody time would be disallowed as jail time credit. The time would instead be allocated to the 1 year the defendant owed on the old sentence. The resulting sentence would be 2- 4 years, but with zero jail time credit, the defendant would have to serve 24 months in state prison (instead of 13 months) before parole release eligibility. Few defense attorneys, prosecutors, or judges are aware of this when felony sentences are negotiated.

Courts have sustained DOCCS' interpretation (*see e.g., Matter of Parker v. Annucci*, 130 A.D.3d 1115 (3d Dept. 2015); *Matter of Graham v. Walsh,* 108 A.D.3d 1230 (4th Dept. 2013)), but the issue is not without some lingering controversy (*see e.g., Matter of Padilla v. Brann* (Sup. Ct. Bronx County-Index No. 260242/19) (Guzman, J.) (When petitioner waived a preliminary hearing on parole violation charges, he was declared delinquent and the underlying sentence was

[1] DOCCS accomplishes this by requesting the New York City Department of Corrections and county sheriffs to decertify time periods included in jail time certificates when those periods overlap with time DOCCS has credited to the old sentence.

automatically interrupted. The sentence "remained interrupted for the entirety of petitioner's time" on Rikers so pretrial custody time was available as jail time credit on the new felony sentence.)).

These disparate outcomes are solely attributable to the pace of proceedings in criminal court. This is arbitrary and inequitable. The committee proposes an amendment to Penal Law 70.30(3) to allocate jail time credit in the same manner, regardless of when a prior felony sentence was initially scheduled to expire.

Proposal

AN ACT to amend the Penal Law in relation to the allocation of jail time credit

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

Section 1. Subdivision 3 of section 70.30 of the penal law is amended as follows:

3. Jail time. The term of a definite sentence, a determinate sentence, or the maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject: provided however that when a person is subject to an undischarged term of imprisonment or post-release supervision following parole release, presumptive release or conditional release from an indeterminate sentence, or conditional release or maximum expiration of a determinate sentence, and is held in pre-trial custody in a local correctional facility on a new charge or charges that culminate in an indeterminate or determinate term of

imprisonment, the time spent in pre-trial custody in a local correctional facility on such charge or charges, from the date custody commenced to the date of commencement of the subsequently imposed indeterminate or determinate sentence, shall be credited as jail time: and provided further that when jail time is credited in such manner the time spent in pre-trial custody shall not be credited to the previously imposed sentence to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

§2. This act shall take effect immediately.

III. Previously Endorsed Measures

1. Vacating Convictions of Human Trafficking Victims (Criminal Procedure Law 440.10)

The Committee recommends that the Criminal Procedure Law be amended to expand the authority of a court to vacate the conviction of a person whose participation in the criminal conduct underlying their conviction was a result of having been the victim of human trafficking.

Under current law, section 440.10 of the Criminal Procedure Law permits a court to vacate the conviction of a trafficking victim where the "arresting charge" was for certain prostitution offenses. The statute seeks to relieve trafficked victims of the stigma of prostitution-related offenses and to ensure that "trafficked persons . . . not suffer ongoing punishment for acts they committed unwillingly under coercion" (*People v P.V.,* 64 Misc.3d 344 (Queens Crim Ct. 2019)). But the current law is unnecessarily restrictive in application. Conditioning relief on arrest charges is both arbitrary and inconsistent, as was recognized in the Governor's signing memorandum when the provision was enacted in 2010:

> "First, the bill bases eligibility for relief on whether the defendant has prostitution-related 'arrest charges,' rather than convictions. This could create anomalous results due to the vagaries of the initial arrest processing. For example, a defendant arrested for prostitution, but ultimately convicted of assault or murder, could theoretically have his or her convictions vacated, while a defendant arrested for a non-prostitution offense but ultimately convicted of prostitution could not obtain relief. It is difficult to understand or justify this result, and I urge the Legislature to clarify this language to ensure that the intent of the bill is achieved."

This measure broadens the statute by maintaining the focus on whether the defendant's criminal conduct was the result of being trafficked. The measure therefore allows a court to vacate any misdemeanor conviction where the court determines that the criminal conduct was the result of the victim being trafficked. The measure also permits the court to vacate certain felony convictions where, after considering the nature and circumstances of the crime and the impact on a victim or victims, if any, and the history, character and condition of the defendant, the court determines that the interest of justice support vacating the conviction. Where the court makes such a finding, it must make specific findings on the record or in writing supporting its determination.

The measure does not apply to enumerated serious felonies such as manslaughter in the first degree, aggravated manslaughter in the first degree, murder in the first and second degree, aggravated murder, kidnapping in the first degree, robbery in the first degree where serious physical injury is caused to a non-participant, terrorism or crimes that would result in sex offender registration. In its view, the Committee determined that it would be against public policy to permit vacating a conviction for such offenses - most of which require the death or other serious physical injury to another - on the basis of the defendant's status as a trafficking victim.

Proposal

AN ACT to amend the criminal procedure law, in relation to victims of human trafficking

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

Section 1. The opening paragraph of paragraph (i) of subdivision (1) of section 440.10 of the criminal procedure law, as amended by L. 2019 c 55 §3 Pt. OO, is amended to read as follows:

(i) The judgment is a conviction of a violation, misdemeanor or felony offense, other than a felony offense defined in sections 125.20, 125.22, 125.25, 125.26, 125.27, 135.25, and subdivision one of section 160.15, or article 490 of the penal law, or for an offense which would require such person to register as a sex offender pursuant to article six-C of the correction law, or an attempt to commit any such offense, where [the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a person for prostitution or promoting prostitution) or 230.00 (prostitution) or 230.03 (prostitution in a school zone) of the penal law, and]the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law, sex trafficking of a child under section 230.34-a of the penal law, labor trafficking under section 135.35 of the penal law, aggravated labor trafficking under section 135.37 of the penal law, compelling prostitution under section 230.33 of the penal law, or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided, that where the conviction was for a felony offense the court has determined and made specific findings on the record or in writing that having regard for the nature and circumstances of the crime and the impact on a victim or victims, if

any, and the history, character and condition of the defendant, that the interest of justice warrants that the conviction be vacated, and provided further that

§2. This act shall take effect immediately.

2. Conditions for an Adjournment in Contemplation of Dismissal (CPL 170.55)

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

Currently, when granting an adjournment in contemplation of dismissal, the law allows a court to impose conditions in only a few limited circumstances. 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 limited 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, in many instances, cases do not fall within one of these enumerated circumstances or are inappropriate for defendants who are not good candidates for the specific programs set forth in the statute. In those instances, the court is powerless to craft more appropriate conditions.

In order to better accommodate the individual circumstances of each case, it is appropriate to provide the court and the parties greater leeway to fashion conditions in connection with an adjournment in contemplation of dismissal. This measure is designed to provide defendants a better chance of earning complete dismissal and sealing of the charges, while at the same time promoting public safety and a reduced risk of re-offense.

For instance, many cases involve minor damage to a victim where all parties agree that it is appropriate to dismiss the case if the victim or business owner can be made whole. Moreover, in many jurisdictions, social service organizations are available to provide counseling tailored to the needs of the individual defendant, including work readiness training, substance abuse counseling and referrals. District Attorneys and the defense bar often favor such remedial programs as a mechanism to address the misconduct of an individual short of full prosecution. Yet directing a defendant to attend such programs is not considered "community service" and therefore resolving the case with an adjournment in contemplation dismissal with a condition of attendance in a program or restitution to the victim is unavailable.

Programs addressing issues of substance abuse or criminal behavior, or efforts to place a defendant in work training or educational advancement are regularly used in connection with sentences of probation or conditional discharge, and the Committee finds it appropriate to use such programs in the context of an adjournment in contemplation of dismissal. There is little benefit in restricting anger management or violence prevention programs to family offenses when they may be equally or more appropriate in nonfamily 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 is a waste of judicial resources as cases are repeatedly calendared and defendants made to return to court until payment is made. The Committee recognizes, however, that some defendants may be unable to afford full restitution or reparation, and the proposal grants the court authority only to impose restitution or reparation in an amount a defendant can afford to pay.

Proposal

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

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

Section 1. Subdivision 6 of section 170.55 of the criminal procedure law, as amended by chapter 39 of the laws of 1998, is amended to read as follows:

6. The court may as a condition of an adjournment in contemplation of dismissal order, require the defendant to perform services for a public or not-for-profit corporation, association, institution or agency or participate in an educational program, treatment program or other program reasonably related to the defendant's rehabilitation or require defendant to pay restitution of the fruits of his or her offense or make reparation in an amount he or she can afford to pay of the actual out-of-pocket loss caused by the offense. Such condition may only be imposed where the defendant has consented to the amount and conditions of such service. The court may not impose such conditions in excess of the length of the adjournment.

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

3. Availability of a Presentence Report (CPL 390.50(2)(a))

The Committee recommends that section 390.50 of the Criminal Procedure Law be amended to provide unequivocally that a defendant may receive a copy of his or her presentencing report, subject only to the redaction of confidential information. The current statute is inconsistently applied and often prevents a defendant from receiving the report or even reading it, a practice the Committee believes is inappropriate.

The Court of Appeals has long upheld 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]). In the context of a presentence report, the Court made the following statement:

> While fundamental fairness and indeed the appearance of fairness, may best be accomplished by disclosure of presentence 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 presentence 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, in subsequently amending CPL 390.50, the Legislature has recognized the unfairness that can be visited on a defendant who is unable to access the presentence report after being sentenced. Thus, it has gradually reduced the restrictions on defendant access to the report. In 2009, the Legislature enacted reform to permit defendant access to the report when being resentencing for certain controlled substance offenses (*see* L. 2009, c 56, pt. AAA, §9). In 2010, the statute was again amended, and allowed defendant access when appearing before the parole board or on appeal of a parole board determination (*see* L. 2010, c 56, pt. OO, §5). More recently, the statute was amended to provide defendant access to the presentence report in connection with resentencing applications under the Domestic Violence Survivors Justice Act (*see* L. 2019, c 31).

The necessity to repeatedly amend the statute only highlights the need for comprehensive reform of the statute. There are other specific areas where a defendant would benefit by access to the report, including sealing applications under CPL 160.59 or conditional sealing applications under CPL 160.58. However, rather than petition the Legislature with additional piecemeal legislation, the Committee believes that the statute should be amended by providing defendants with a copy of the probation report when being sentenced and thereafter as necessary.

This measure would continue the court's discretion to except from disclosure any portion of the report that is confidential or for which disclosure would not be in the interest of justice. Presentence reports would therefore continue to be subject to appropriate redaction before being released to a defendant.

Proposal

AN ACT to amend the criminal procedure law, in relation to availability of presentence reports

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

Section 1. Subdivision 1 of section 390.50 of the criminal procedure law, as amended by chapters 224 and 369 of the laws of 1996, is amended to read as follows:

1. In general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is 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. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available; provided however that the confidentiality provisions of this paragraph shall not apply to the defendant who shall be provided a copy of the presentence report, other than a part or parts of the report redacted by the court pursuant to paragraph two, prior to sentencing and at any time thereafter upon request.

§2. Paragraph (a) of subdivision 2 of section 390.50 of the criminal procedure law, as amended by chapter 31 of the laws of 2019, is amended to read as follows:

(a) Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, 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. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are not disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review.[The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case, including an appeal under this subdivision. Upon written request, the court shall make a copy of the presentence report, other than a part or parts of the report redacted by the court pursuant to this paragraph, available to the defendant for use before the parole board for release consideration or an appeal of a parole board determination or an application for resentencing pursuant to section 440.46 or 440.47 of this chapter. In his or her written request to the court the defendant shall affirm that he or she anticipates an appearance before the parole board or intends to file an administrative appeal of a parole board determination or meets the eligibility criteria for and intends to file a motion for resentencing pursuant to 440.46 of this chapter or has received notification from the court which received his or her request to apply for

resentencing pursuant to section 440.47 of this chapter confirming that he or she is eligible to submit an application for resentencing pursuant to section 440.47 of this chapter. The court shall respond to the defendant's written request within twenty days from receipt of the defendant's written request.]

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

4. Appeal by Permission of an Intermediate Appellate Court (CPL 460.10)

The Committee recommends that section 460.10 of the Criminal Procedure Law be amended to provide that the permission to appeal granted by an intermediate should serve as the taking of the appeal without further filing by a defendant.

Currently, when a criminal defendant moves to vacate a judgment of conviction pursuant to CPL 440.10 or to set aside a sentence pursuant to CPL 440.20 and the motion is denied, the defendant is not entitled to appeal the order as a matter of right, but must instead persuade a judge or justice of the intermediate appellate court to grant permission to appeal from the lower court's order (*see* CPL 450.15(1), (2); 460.15). Where a defendant is successful in convincing a judge of the intermediate appellate court, the defendant must file with the lower court, in duplicate, a notice of appeal and the certificate granting permission to appeal *within 15 days from the date on the certificate* (see CPL 460.10(4)(b)). This is in sharp contrast to the situation where a defendant or the prosecutor is granted permission to appeal to the Court of Appeals from an order of the intermediate appellate court, where "the issuance of the certificate granting leave to appeal shall constitute the taking of the appeal" (CPL 460.10(5)(b)). It is also unlike the appeal of civil case when permission to appeal to the Appellate Division is granted, and where "the appeal is taken when such order [granting permission to appeal] is entered" (CPLR 5515(1)).

Thus, it appears that the formality of actually filing a notice of appeal where permission to appeal is granted is required *only* of criminal defendants who have been granted permission to appeal from CPL 440.10 and CPL 440.20 denials. The Committee considers the burden placed only on this group of litigants both unnecessary and inappropriate. Defendants who make motions in a court of intermediate appeal for permission to appeal from CPL article 440 denials are, for the most part, *pro se* inmates. As a practical matter, by the time the intermediate appellate court informs the *pro se* inmate that permission to appeal has been granted, and the inmate has, in turn, prepared and mailed a notice of appeal along with the certificate granting leave, the filing is frequently late. This then requires the making of another motion for an extension of time to file the notice of appeal and certificate.

This measure ends this inefficient and unnecessary procedure by amending CPL 460.10(4)(b) to provide that the issuance of the certificate granting leave to appeal constitutes the taking of the appeal.

Proposal

AN ACT to amend the criminal procedure law, in relation to taking an appeal by permission of an intermediate appellate court

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

Section 1. Paragraph (b) of subdivision 4 of section 460.10 of the criminal procedure law, as enacted by chapter 671 of the laws of 1971, is amended to read as follows:

(b) If such application is granted, the issuance of the certificate granting leave to appeal shall constitute the taking of the appeal[and such certificate is issued, the defendant, within fifteen days after issuance thereof, must file with the criminal court in which the order sought to be appealed was rendered the certificate granting leave to appeal together with a written notice of appeal, or if] the appeal is from a local criminal court in a case in which the underlying proceedings were not recorded by a court stenographer, either (i) an affidavit of errors, or (ii) a notice of appeal]. In all other respects the appeal shall be taken as provided in subdivisions one, two and three.

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

5. Resentencing for Violating a Condition of an Ignition Interlock Device (PL §§60.21; 65.00)

The Committee recommends that the Penal Law be amended to authorize a court to impose a jail term of up to 364 days where a defendant violates an ignition interlock condition that had been imposed consecutive to a term of imprisonment.

Penal Law § 60.21 was created in 2009 as part of the Child Passenger Protection Act, also known as "Leandra's Law" (see L. 2009, c 496). Leandra's Law dramatically expanded the use of ignition interlock devices in New York. The law requires that any driver convicted of misdemeanor or felony DWI offenses under VTL §1192(2), (2-a) or (3), install and maintain an ignition interlock device on any motor vehicle the driver owns or operates, regardless of whether a child was in the vehicle at the time of the offense. To carry out this directive, courts are required to sentence defendants convicted of one of these offenses to a period of probation or conditional discharge *consecutive* to any jail or prison term, and must include a condition that defendants install and maintain vehicle ignition interlock devices.

Leandra's Law significantly changed the sentencing structure of New York because it created consecutive sentences involving the combination of probation and a jail sentence, extending the concept of a "split" sentence (see PL §60.01(2)(d)). Nonetheless, several recent appellate division cases have held that a defendant who violates an ignition interlock device condition of probation that was imposed as consecutive to a period of incarceration cannot be further incarcerated if the defendant has already served the maximum term of incarceration of the original sentence (*People v Coon*, 156 AD3d 105 (3rd Dept 2017); *People v Arvidson*, 159 AD3d 1198 (3rd Dept 2018); *People v Zribel*, 159 AD3d 1545 (4th Dept 2018)). Thus, a consecutive term of probation is not a revocable sentence in the same manner as a typical sentence of probation where the court imposes an initial jail term that runs concurrently with a probation sentence. In that scenario, the court may revoke the sentence of probation and resentence the defendant to whatever term of imprisonment would have been lawful under the original conviction. In contrast, with a consecutive term of probation or conditional discharge the court may only impose a jail term for whatever segment of the originally imposed term remains. It is not a revocable sentence, but more akin to post release supervision.

Leandra's Law was designed to ensure that an ignition interlock device would be mandatory for anyone convicted of a misdemeanor or felony DWI under 1192(2), (2-a) or (3) and sentenced to a term of imprisonment. The statute evinces the Legislature's clear understanding that defendants who have been sentenced to a term of imprisonment for these offenses continue to pose a risk of re-offense after finishing their imprisonment and should be required to have an ignition interlock device on any vehicle they own or operate. However, where is sentenced to a short jail term and serves the full term of his or her incarceration, the statute prevents the court from imposing any meaningful sanction on the offender.

This measure closes this loophole by allowing the court to impose a sentence of up to 364 days for violating the ignition interlock condition of a consecutive term of probation or conditional discharge. The measure allows jail time credit for time already served, so there is no risk that a defendant will suffer a longer term of imprisonment than would have been authorized by the underlying conviction. As a practical matter, this measure would have the most impact on defendants initially sentenced to a short jail term sentences who then violated the ignition interlock condition of their consecutive term or probation or conditional discharge. For defendants

sentenced to a term of state prison, the failure to comply with a consecutive condition of probation or conditional discharge will continue to be most often handled as a violation of parole.

Proposal

AN ACT to amend the penal law, in relation to authorized sentences where a person violates conditions of probation of a sentence imposed for driving while intoxicated

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

Section 1. Section 60.21 of the penal law is amended to read as follows:

Notwithstanding paragraph (d) of subdivision two of section 60.01 of this article, when a person is to be sentenced upon a conviction for a violation of subdivision two, two-a or three of section eleven hundred ninety-two of the vehicle and traffic law, the court may sentence such person to a period of imprisonment authorized by article seventy of this title and shall sentence such person to a period of probation or conditional discharge in accordance with the provisions of section 65.00 of this title and shall order the installation and maintenance of a functioning ignition interlock device. Such period of probation or conditional discharge shall run consecutively to any period of imprisonment and shall commence immediately upon such person's release from imprisonment provided, however, that the revocation, modification or continuation of any such sentence of probation or conditional discharge shall be governed by the provisions of article 65 of this chapter and article 410 of the Criminal Procedure Law.

§2. Subdivision 5 of section 65.00 of the penal law, as amended by chapter 264 of the laws of 2003 and renumbered by chapter 556 of the laws of 2013, is amended to read as follows:

5. In any case where a court pursuant to its authority under subdivision four of section 60.01 or section 60.21 of this chapter revokes probation and sentences such person to

imprisonment and probation, as provided in paragraph (d) of subdivision two of section 60.01 of this chapter, the period of probation shall be the remaining period of the original probation sentence or one year whichever is greater.

§3. Section 65.00 is amended by adding a new subdivision 6 to read as follows:

6. In any case where a court revokes a period of probation or conditional discharge imposed pursuant to section 60.21 of this chapter for a violation of a condition related to installation, maintenance or use of an ignition interlock device, the court may impose a revocable definite term of imprisonment of not more than 364 days and shall sentence such person to a period of probation or conditional discharge in accordance with this article, and shall order the installation and maintenance of a functioning ignition interlock device. Such period of probation or conditional discharge shall run consecutively to any period of imprisonment and shall commence immediately upon such person's release from imprisonment; provided, however, that the aggregate period of sentence for a definite sentence shall not exceed 364 days and the person shall receive jail time credit for any previous term of imprisonment imposed pursuant to this subdivision.

§4. This act shall take effect immediately and shall apply to all convictions on or after such effective date.

6. Repeal of Unlawful Possession of Marijuana in the First and Second Degree (PL §§221.05; 221.10)

The Committee recommends repeal of the recently enacted Penal Law offenses of unlawful possession of marijuana in the first and second degree. These two non-criminal offenses were enacted as part of comprehensive reform that also allowed for "expungement" of marijuana convictions instead of traditional sealing (L. 2019, c 131). The initial law became the subject of a chapter amendment because of significant inconsistencies and errors (L. 2019, c 132). However, even with the chapter amendment, there are significant flaws in the law that are not easily remedied. The Committee therefore recommends repeal.

The new law has several components, including two new offfenses of unlawful possession of marijuana. The previous offense of unlawful possession of marijuana (PL §221.05) has been amended and renamed unlawful possession of marijuana in the second degree, with the only permissible sentence being a maximum fine of not more than $50. Criminal possession of marijuana in the fifth degree (PL §221.10) was renamed unlawful possession of marijuana in the first degree and the offense redefined to apply only to possession of between one and two ounces of marijuana. It was reclassified from a class B misdemeanor to a violation, with the only permissible sentence being a maximum fine of not more than $200.

In an effort to eliminate collateral consequences of convictions for PL §§221.05 and 221.10, for offenses committed prior to enactment or afterwards, the law provides for automatic expungement of the convictions by classifying a conviction for PL 221.05 and 221.10 as one that "terminates in favor of the accused" (160.50(3)(k)). Accordingly, a conviction for the new offenses of unlawful possession of marijuana in the first or second degree now qualifies for sealing immediately upon conviction. The law goes further, however, and mandates "expungement" of these convictions (CPL 160.50(5)). Upon conviction under either section 221.05 or 221.10, the court must vacate and dismiss the convictions "and all records of such conviction or convictions and related to such conviction or convictions shall be expunged." Moreover, the conviction is "deemed a nullity, having been rendered . . . legally invalid." Finally, the new law provides, "upon the written request of the individual whose case has been expunged or their designated agent, such records shall be destroyed" (CPL 1.20(45)).

The Legislature clearly intended by this complex scheme to ensure that individuals convicted of low-level marijuana offenses will suffer no collateral consequences from a conviction. But the procedures are significantly cumbersome and unworkable. While the statute requires the court to vacate and dismiss the case upon conviction, a "conviction" occurs upon a guilty plea or entry of a verdict (see CPL 1.20(13)). If read literally, the new law prevents a court from ever sentencing a defendant because the case must be dismissed and vacated before sentence. Even if the statute is interpreted to require the case to be dismissed and vacated only upon sentence there are insurmountable legal and operational challenges. The only sentence permitted under the new statutes is a fine, and courts generally provide defendants time to pay the fine and any court surcharge. This is now an unsound practice where the court is required to dismiss and vacate the conviction immediately. Moreover, for defendants who pay the fine at the time of sentence, the court presumably must thereafter return to the defendant the fine and any fees imposed upon vacating and dismissing the case and declaring the conviction a nullity. Not only is this required for the cases prosecuted under the newly created offenses, it also applies to any previous conviction of a PL §221.05 or §221.10.

Additionally, the Committee recommends repeal of the provision of the new law that provides for destruction of all records of the case upon written notification of the defendant (see CPL 160.50(5)(b)(i)). The Committee believes that without further qualification of what constitutes a "record" or what manner of "destruction" is required, the plain language used in the new statute will impose a process that will have unintended consequences. Full destruction of records eliminates any trace of the prosecution process. If electronic data is destroyed, it will frustrate legitimate research studies about marijuana arrests and prosecution, prohibit law enforcement and the courts from defending civil actions, inhibit defendants from bringing legitimate civil actions and prevent a defendant from securing appropriate certificates of conviction when needed to explain arrests that may be in the public domain.

Although the Committee considered an attempt to craft a statute that would continue to provide a sanction for unlawful possession of marijuana and simultaneously eliminate collateral consequences for a conviction, it ultimately decided that the better solution was to repeal the new Penal Law offenses, amend the provisions involving expungement and destruction of records and provide for limited return of fines and fees previously paid by defendants.

Section one and two of this measure repeals Penal Law sections 221.05 and 221.10, respectively. Section three repeals CPL 160.50(3)(k)(iii), necessitated by the repeal of the new penal law offenses. Section four makes a related amendment to CPL 160.50(5)(a) dealing with expungement of the offense repealed in sections one and two. Section five provides that records need not be marked "expunged" until they are accessed by a covered entity, thus permitting stored files to remain unmarked until accessed. Section six adds a new paragraph (e) to CPL 160.50(5) that permits a return of fines or fees upon written application to the sentencing court within one year of the date of enactment of this paragraph made in a sworn motion by the person who paid such fine, fee or surcharge. The measure would be effective immediately upon enactment.

Proposal

AN ACT to amend the penal law in relation to possession of marijuana

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

Section 1. Section 221.05 of the penal law, as amended by chapter 131 of the laws of 2019, is REPEALED.

§2. Section 221.10 of the penal law, as amended by chapter 131 of the laws of 2019, is REPEALED.

§3. Subparagraph (iii) of paragraph k of subdivision 3 of section 160.50 of the criminal procedure law is REPEALED.

§4. Paragraph (a) of subdivision 5 of section 160.50 of the criminal procedure law, as amended by chapter 132 of the laws of 2019, is amended to read as follows:

5. (a) Expungement of certain marihuana-related records. A conviction for an offense described in paragraph (k) of subdivision three of this section shall[, on and after the effective date of this paragraph,] in accordance with the provisions of this paragraph, be vacated and dismissed, and all records of such conviction or convictions and related to such conviction or convictions shall be expunged, as described in subdivision forty-five of section 1.20 of this chapter, and the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered by this paragraph legally invalid. All such records for an offense described in this paragraph where the conviction was entered on or before the effective date of the chapter of the laws of 2019 that amended this paragraph shall be expunged promptly and, in any event, no later than one year after such effective date.

§5. Subparagraphs (i) and (ii) of paragraph (b) of subdivision 5 of section 160.50 of the criminal procedure law, as amended by chapter 132 of the laws of 2019, is amended to read as follows:

(i) the chief administrator of the courts shall promptly notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments, district attorney's offices and other law enforcement agencies of all convictions that have been vacated and dismissed pursuant to paragraph (a) of this subdivision and that all records related to such convictions shall be expunged and the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered legally invalid. Upon receipt of notification of such vacatur, dismissal and expungement, all records relating to such conviction or convictions, or the criminal action or proceeding, as the case may be, shall <u>whenever accessed by</u>

such department, office or agency be marked as expunged by conspicuously indicating on the face of the record and on each page or at the beginning of the digitized file of the record that the record has been designated as expunged. [Upon the written request of the individual whose case has been expunged or their designated agent, such records shall be destroyed.] Notwithstanding paragraph (d) of subdivision 1 of this section, such [Such] records and papers shall not be made available to any person, except the individual whose case has been expunged or such person's designated agent; and

(ii) where automatic vacatur, dismissal, and expungement, [including record destruction if requested,]is required by this subdivision but any record of the court system in this state has not yet been updated to reflect same (A) notwithstanding any other provision of law except as provided in paragraph (d) of subdivision one of this section and paragraph (e) of subdivision four of section eight hundred thirty-seven of the executive law: (1) when the division of criminal justice services conducts a search of its criminal history records, maintained pursuant to subdivision six of section eight hundred thirty-seven of the executive law, and returns a report thereon, all references to a conviction for an offense described in paragraph (k) of subdivision three of this section shall be excluded from such report; and (2) the chief administrator of the courts shall develop and promulgate rules as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the office of court administration contains information relating to a conviction for an offense described in paragraph (k) of subdivision three of this section; and (B) where court records relevant to such matter cannot be located or have been destroyed, and a person or the person's attorney presents to an appropriate court employee a fingerprint record of the New York state division of criminal justice services, or a copy of a court disposition record or other relevant court record, which

indicates that a criminal action or proceeding against such person was terminated by conviction of an offense described in paragraph (k) of subdivision three of this section, then promptly, and in any event within thirty days after such notice to such court employee, the chief administrator of the courts or his or her designee shall assure that such vacatur, dismissal, and expungement, including record destruction if requested, have been completed in accordance with subparagraph (i) of this paragraph.

§6. Subdivision 5 of section 160.50 of the criminal procedure law, as amended by chapter 132 of the laws of 2019, is amended to add a new paragraph (e) to read as follows:

(e) Any outstanding civil judgment for payment of fines, fees or surcharges owed as a result of a conviction vacated, dismissed and expunged in accordance with this subdivision shall be vacated. Any fines, fees or surcharges collected in connection with a conviction vacated, dismissed and expunged in accordance with this subdivision shall be subject to remittance only upon written application to the sentencing court within one year of the date of enactment of this paragraph made in a sworn motion by the person who paid such fine, fee or surcharge.

§7. This act shall take effect immediately.

7. 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 the on 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 are 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. Often, parties will not consent to additional annotation for tactical reasons unrelated to the interest of clarifying the verdict sheet to assist the jury. Judges are therefore too often 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; 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.

8. 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 the same or 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 prosecutor.

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.[2] 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 jurisdictions 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 prosecutor.

[2] *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

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

Section 1. 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 to another local criminal court in the same county or an adjoining county that has been designated a veteran's court by the chief administrator of the courts, and such drug court or veterans 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 f ive days after the date the order is issued unless, prior to such effective date, the drug court or veterans 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 court shall promptly give notice to the defendant, his or her counsel and the district attorney.

§2. 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 to another court in the same county or an adjoining county that has been designated a veteran's court by the chief administrator of the courts, and such drug court or veterans 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 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 court shall promptly give notice to the defendant, his or her counsel and the district attorney.

§3. This act shall take effect immediately.

9. 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 . . . " (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 apparent reason for the differing language is found in much broader circumstances where sealed records may be made available to law enforcement agencies. Unlike CPL 160.50 and 160.55, there is a 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)). Thus, to the drafters of these sections, it was likely thought irrelevant to include law enforcement agencies in the primary sealing provision.

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 measure leaves intact that a federal and state

law enforcement agency may access the sealed record when acting in the scope of their law enforcement duties.

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.

10. 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 the initial filing of an adolescent offender accusatory instrument be 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.

11. 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 who 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 defendant is held on another matter does not allow them 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 toward an individual who 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 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 else 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, whether

this informal opinion is sound is open to question, but even if correct, 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 subject the court to 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 who the peace officer reasonably believes is the subject of an outstanding arrest warrant. The 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.

12. 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 Correction and Community Services ("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.

2. 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 supersede 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 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.

3. 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.

4. 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.

13. Poor Person Relief on Appeal
(CPL 380.55)

The Committee recommends that CPL 380.55 of the Criminal Procedure Law be amended to plainly provide that the statute applies to cases where the defendant is convicted by plea. It further proposes that a new paragraph be added to the section that would permit an incarcerated defendant to establish his or her indigency for poor person relief on appeal through an attorney affirmation filed with the appropriate appellate court.

Section 380.55 of the Criminal Procedure Law, added in 2016, amended the procedure for determining poor person relief on appeal by allowing the sentencing court discretion to entertain an application to grant the relief (*see* L. 2016, c 497). Response to the new procedure has been favorable in the two years since the statute was enacted, although the Committee recommends two changes to further promote the expedited assignment of appellate counsel in appropriate cases.

Under the current statute, a sentencing court has authority to entertain an application for poor person relief on appeal "where counsel has been assigned to represent a defendant at trial." The use of the phrase "at trial" has led to confusion over whether the authority is limited to cases following trial. The intent of the statute, submitted to the Legislature by the Judiciary, was to require that the application for poor person relief be made by a defendant represented by assigned counsel in the trial-level court. It was not intended to be limited to cases where an actual trial occurred, yet the use of the word "trial" has fostered confusion and an inconsistent application of the statute. This measure eliminates that confusion by changing the reference to counsel assignments "at trial" to those made in a "criminal action." A criminal action commences on the filing of an accusatory instrument and generally terminates with the imposition of sentence (*see* CPL 1.20(16)).

The measure also sets forth an alternative procedure for poor person relief where defendant is sentenced to a term of incarceration. Currently, when an application for poor person relief is made before the appropriate appellate court, assigned counsel must secure an affidavit from the defendant. In practice, this procedure often proves difficult where a defendant is incarcerated, especially where the defendant does not read or write English, suffers from mental illness or generally has difficulty understanding the forms. Moreover, where an indigent defendant has appointed counsel in the trial-level court, it is extremely rare that defendant's indigency status will change once that defendant is sentence to a term of incarceration. This measure recognizes that assigned counsel is competent to inform the appellate court of any change in defendant's indigency status and that an application for poor person relief on appeal should be decided based on an attorney affirmation. Finally, the measure recognizes that the appellate division maintains an interest in the content of any affirmation, and therefore provides that the affirmation must be in a form approved by the appellate court.

Proposal

AN ACT to amend the criminal procedure law, in relation to granting poor person relief on appeal

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

Section 1. Section 380.55 of the criminal procedure law, as added by chapter 459 or the laws of 2016, is amended and a new subdivision 2 is added to read as follows:

1. Where counsel has been assigned to represent a defendant [at trial] in a criminal action on the ground that the defendant is financially unable to retain counsel, the court may in its discretion at the time of sentencing entertain an application to grant the defendant poor person relief on appeal. As part of an application for such relief, assigned counsel must represent that the defendant continues to be eligible for assignment of counsel and that granting the application will expedite the appeal. If the court grants the application, it shall file a written order and shall provide a copy of the order to the appropriate appellate court. The denial of an application shall not preclude the defendant from making a de novo application for poor person relief to the appropriate appellate court.

2. Notwithstanding subdivision one, where counsel has been assigned to represent defendant in a criminal action because defendant is financially unable to retain counsel, the appellate court may grant poor person relief on appeal to an incarcerated defendant without further proof of eligibility if counsel provides an affirmation, in a form approved by the appropriate appellate court, that defendant continues to be eligible for assignment of counsel.

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

14. 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.

15. 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.[3]

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 follows:

3 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.

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.

16. Providing Written Instructions to Jurors Upon Request (CPL 310.30)

The Committee recommends that section 310.30 of the Criminal Procedure Law be amended to allow a trial judge, without the consent of the parties, to provide a deliberating jury, upon its request therefor, with written instructions regarding the elements of the crime or crimes charged, or of any defense or affirmative defense submitted in relation thereto.

Sections 310.20 and 310.30 of the Criminal Procedure Law specify the materials that may be provided by the court to a deliberating jury, which include exhibits received in evidence as may be permitted by the court (CPL section 310.20(1)), a verdict sheet (CPL section 310.20(2)), a written list of the names of the witnesses whose testimony was presented during the trial (CPL section 310.20(3)) and, under certain circumstances and with the consent of the parties, copies of the text of a statute (CPL section 310.30).

It is not uncommon, especially in complex prosecutions involving numerous counts with multiple defendants, for a deliberating jury to ask the trial judge to provide it with written instructions on elements of some or all of the offenses submitted, and any related defenses. 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.

17. 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.[4]

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.[5] 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 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

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

[5] 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).

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. [6] 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.

[6] *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).

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 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.

18. 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)7. 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 the Legislature in creating the judicial diversion program was clearly set forth by its sponsors:

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[7] 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.

> [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.

19. 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.

20. 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).[8] 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.

[8] 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.

Proposal

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

1. Reporting Convictions of Certain Medical Professionals (CPL 380.85)

The Committee recommends that section 380.85 of the Criminal Procedure Law be amended to require the People to serve notice on the court when a defendant is subject to mandatory reporting to the Office of Professional Medical Conduct. Where the court receives such notice, the court will continue to be responsible for reporting the conviction.

In 2008, the Legislature mandated that courts report any criminal conviction of a defendant who is a licensed physician, physician assistant, specialist assistant or a physician who is practicing under a limited permit or as a medical resident to the Office of Professional Medical Conduct (L. 2008, c. 477, section 26). At the time of its enactment, the judiciary recognized the operational challenge of the reporting requirement because the statute did not confer on any individual or agency the duty to report to the court that a defendant was a member of one of these professions. While the judiciary provided training to court personnel and set up a reporting system, over time the procedure has repeatedly exposed the practical difficulty courts face in trying to comply with the statute. Courts rarely have knowledge of a defendant's licensing responsibilities, and there is no workable procedure for learning of the reporting duty without a mandate that someone officially bring these cases to the court's attention. The Legislature has provided redundancy in reporting such convictions by probation departments (see CPL 390.50(6)). Nonetheless, reporting lapses remain a continuing problem.

The Committee believes that the natural agency to report the licensing requirement to the court should be the prosecutorial agency. This measure therefore requires the prosecutor to file a notice with the court after conviction and before sentence whenever a defendant comes within the statute. The measure leaves intact the court's ultimate responsibility to report the convictions to the Office of Professional Medical Conduct.

2. 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.

3. 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.[9]

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

[9] 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).

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, 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.

4. 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.[10]

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,

[10] 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)).

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.

5. 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,[11] repeals subdivision 2 of 450.40 of the criminal procedure law[12] and makes a conforming amendment to subdivision 1 of that section.

6. 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.

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[11] 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 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.

[12] 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.

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.

7. 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.

8. 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).

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. Anonymous Jury
(CPL 270.15)

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

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

Although there are no reported New York State appellate cases addressing the propriety of withholding the names and addresses of jurors and prospective jurors, an anonymous jury was selected in the celebrated 1983 Brinks case in Orange County. *See also People v. Watts*, 173 Misc. 2d 373, 377 (Sup. Ct., Richmond Cty. 1997) (holding that a defendant's statutory right to knowledge of jurors' names and addresses may be forfeited where defendant's acts represent a "clear threat to either the safety or integrity of the jury"). Moreover, the Federal courts are in agreement that a trial judge has the discretion to protect the identities of jurors and prospective jurors in an appropriate case. *See United States v. Scarfo*, 850 F.2d 1015, 1021-1023 (3rd Cir.), *cert. denied*, 488 U.S. 910 (1988) (motion to impanel an anonymous jury granted where alleged boss of organized crime group was charged with conspiracy and extortion, prospective witness and judge had been murdered in the past and attempts had been made to bribe other judges); *United States v. Persico*, 832 F.2d 705, 717 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988) (upholding decision to impanel anonymous jury based on violent acts committed in normal course of Columbo

Family business, the Family's willingness to corrupt and obstruct criminal justice system and extensive pretrial publicity); *United States v. Ferguson*, 758 F.2d 843, 854 (2d Cir.), *cert. denied*, 474 U.S. 841 (1985) (trial court justified in keeping jurors' identities secret where evidence that defendants had discussed killing five government witnesses and "Wanted: Dead or Alive" poster of another government witness had been circulated); *United States v. Thomas*, 757 F.2d 1359, 1362-1365 (2d Cir. 1985), *cert. denied*, 479 U.S. 818 (1986) (anonymous jury impaneled where defendants charged with narcotics, firearm and RICO violations and government submitted evidence that defendants had bribed a juror at a prior trial and had put out a contract on the life of the chief government witness); *United States v. Barnes*, 604 F.2d 121, 140-141 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (court properly directed jurors not to disclose their names and addresses where notwithstanding that no actual threats were received, the seriousness of the charges, the extent of pretrial publicity and the history of attempts to influence and intimidate jurors in multi-defendant narcotics cases tried in the Southern District of New York was sufficient to put the court on notice that safety precautions should be taken). See generally United States v. Gambino, 809 F. Supp. 1061, 1064-1065 (S.D.N.Y. 1992).

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

> [P]rotection of jurors is vital to the functioning of the criminal justice system. As a practical matter, we cannot expect jurors to "take their chances" on what might happen to them as a result of a guilty verdict. Obviously, explicit threats to jurors or their families or even a general fear of retaliation could well affect the jury's ability to render a fair and impartial verdict. Justice requires that when a serious threat to juror safety reasonably is found to exist, precautionary measures must be taken.
>
> * * * *
>
> Nevertheless, we do not mean to say that the practice of impaneling an anonymous jury is constitutional in all cases. As should be clear from the above analysis, there must be, first, strong reason to believe that the jury needs protection and, second, reasonable precaution must be taken to minimize the effect that such a decision might have on the jurors' opinions of the defendants. 757 F.2d at 1364-1365. Accord United States v. Scarfo, 850 F.2d at 1021-1023 (selection of anonymous jury did not impair defendant's right to exercise peremptory challenges or infringe on the presumption of innocence).

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

> Juror's fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented .... As judges, we are aware that, even in routine criminal cases, veniremen are often uncomfortable with disclosure of their names and addresses to a defendant. The need for such information in preparing an effective defense is not always self-evident. If, in circumstances like those in Barnes, jury anonymity promotes impartial decision making, that result is likely to hold equally true in less celebrated cases.
>
> The virtue of the jury system lies in the random summoning from the community of twelve "indifferent" persons - "not appointed till the hour of trial" - to decide a dispute, and in their subsequent, unencumbered return to their normal pursuits. The lack of continuity in their service tends to insulate jurors from recrimination for their decisions and to prevent the occasional mistake of one panel from being perpetuated in future deliberations. Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept. In short, we believe that the probable merits of the anonymous jury procedure are worthy, not of a presumption of irregularity, but of disinterested appraisal by the courts. 850 F.2d at 1023 (citations omitted).

These considerations, together with the lack of any constitutional bar to impaneling an anonymous jury, warrant passage of legislation that expressly would permit the court to protect the identities of jurors from disclosure.

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

To balance any adverse effect on defendant of withholding the identities of jurors, this measure permits the court to enlarge the scope and duration of voir dire. *See* United States v. Scarfo, 850 F.2d at 1017 (potential jurors completed written questionnaires encompassing wide range of personal demographics and jurors questioned personally by court and counsel); United States v. Persico, 832 F.2d at 717 (searching voir dire conducted by trial judge alleviated risk that use of anonymous jury would cast unfair aspersions on defendants); United States v. Barnes, 604

F.2d at 142 (no denial of right to exercise challenges where parties had "arsenal of information" about prospective jurors based on extensive voir dire).

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

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

16. 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)),[13] the authority to impose fines and/or jail as sanctions for contemptuous conduct, and the

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

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

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

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

The court also has the authority, under proposed section 752 ("Remedial contempt; sanctions"), to impose a *remedial* sanction for a contempt in order to "protect or enforce a right or remedy of a party to an action or proceeding or to enforce an order or judgment." As with the punitive contempt sanction, this remedial sanction would be in the form of a fine (including successive fines) or imprisonment, or both (section 752). The measure requires, however, that in imposing a remedial fine or term of imprisonment, the court must direct that the imprisonment, and the 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

[14] 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).

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.[15]

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 Civil Practice Law and Rules (*see*, section 3 of the measure [amending CPLR section 7801(2) to conform that section to proposed Judiciary Law

[15]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.

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.

17. 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.

18. 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.

[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).

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 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.

19. 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 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

[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).

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.

20. Raising the Monetary Threshold for Felony Criminal Mischief and Securities Fraud
(Penal Law §§145.05(2), 145.10; GBL § 352-c(6))

The Committee recommends that Penal Law sections 145.05(2) (criminal mischief in the third degree) and 145.10 (criminal mischief in the second degree), and General Business Law section 352-c(6) (securities fraud) be amended to raise the existing monetary thresholds for commission of these felony offenses.

Under Penal Law section 145.05(2), a person is guilty of the class E felony of criminal mischief in the third degree when,

> with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she...damages property of another person *in an amount exceeding two hundred fifty dollars.*

Penal Law section 145.05(2); emphasis added.

Pursuant to Penal Law section 145.00(1), a person is guilty of criminal mischief in the fourth degree, a Class A misdemeanor, when "having no right to do so nor any reasonable ground to believe that he has such a right, he...[i]ntentionally damages property of another person..." Penal Law section 145.00(1).

A review of the legislative history of the crime of criminal mischief reveals that the current distinction between misdemeanor and felony-level criminal mischief dates back to the 1881 Penal Law, which provided for a felony-level punishment of up to four-years imprisonment for a person who "unlawfully and willfully destroys or injures any real or personal property of another...[i]f the value of the property destroyed, or the diminution in the value of the property by the injury is more than twenty-five dollars." *See*, Laws of 1881, chapter 676. The minimum threshold amount for property damage for this felony-level offense was raised to $50 in 1912 (*see*, Laws of 1912, chap. 163), and to $250 in 1915 (*see*, Laws of 1915, chap. 342), where it has remained for the past 90 years.

While the current $250 property damage threshold for felony-level criminal mischief has remained unchanged since 1915, the corresponding minimum thresholds for felony-level treatment of certain *other* property and theft-related offenses have, in recent years, been significantly increased. Thus, for example, in 1986, the Legislature amended the class E felony offenses of grand larceny in the third degree (PL section 155.30(1)), criminal possession of stolen property in the second degree (PL section 165.45(1)) and insurance fraud in the second degree (PL section 176.15) to increase from $250 to $1000 the monetary threshold needed to establish those offenses. See, Laws of 1986, chap. 515, sections 1, 5 and 8.[1]

In addition, the Legislature, in 1986, amended the class D felony offenses of grand larceny in the third degree (PL section 155.35), criminal possession of stolen property in the third degree (PL section 165.50) and insurance fraud in the third degree (PL section 176.20) to raise from $1500 to $3000 the monetary threshold for commission of those class D felony offenses, but failed to make any corresponding change to the $1500 threshold for commission of the class D felony offense of criminal mischief in the second degree under Penal Law section 145.10. *See*, Laws of 1986, chap. 515, sections 2, 6 and 8.[2]

The Committee believes that the current monetary thresholds for criminal mischief in the third and second degrees (Penal Law sections 145.05(2) and 145.10, respectively) are too low and should be raised to conform to the higher thresholds established by the Legislature in 1986 for comparable theft and stolen property-related felony offenses such as grand larceny, criminal possession of stolen property and insurance fraud. Accordingly, this measure would amend Penal Law section 145.05(2)(criminal mischief in the third degree) to raise the current $250 monetary damage threshold for commission of that class E felony offense to match the existing ($1000) monetary threshold for the class E felony offenses of grand larceny in the fourth degree (PL section 155.30(1)), criminal possession of stolen property in the fourth degree (PL section 165.45(1)) and insurance fraud in the fourth degree (PL section 176.15).

Further, the measure would amend Penal Law section 145.10 (criminal mischief in the second degree) to raise the current $1500 monetary threshold for commission of that class D felony offense to match the existing $3000 threshold for the class D felony offenses of grand larceny in the third degree (PL section 155.35), criminal possession of stolen property in the third degree (PL section 165.50) and insurance fraud in the third degree (PL section 176.20).

Finally, the measure would correct a related anomaly in the law by amending subdivision six of General Business Law section 352-c to raise to $1000 the current $250 threshold for the class E felony securities fraud offense defined in that section.[3]

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[1]As with the crime of criminal mischief in the third degree under Penal Law section 145.05(2), each of these class E felony offenses represents, in effect, an aggravated form of a Class A misdemeanor offense, with the sole aggravating factor being the value of the stolen property in question. See, Penal Law sections 155.25 (defining the Class A misdemeanor of petit larceny); 165.40 (defining the Class A misdemeanor of criminal possession of stolen property in the fifth degree) and 176.10 (defining insurance fraud in the fifth degree).

[2] Note that the Legislature, by Chapter 515 of the Laws of 1986, also changed the degree (but not the "D" and "E" felony classifications or section numbers) of several of the aforementioned offenses.

[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,

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.

21. 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.

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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.

Notably, there is nothing in existing CPL section 190.65, or elsewhere in the CPL, that expressly precludes a prosecutor or the impaneling court from providing grand jurors with the applicable substantive law in writing. Further, while the Court of Appeals, relying on CPL section 310.30, has expressly disapproved the practice of providing a deliberating *petit* jury, over the defendant's objection, with a written copy of all or a portion of the court's charge (*see, e.g., People v. Owens*, 69 N.Y.2d 585, and *People v. Johnson*, 81 N.Y.2d 980), there appears to be no reported appellate or trial level decision that addresses the propriety of providing a *grand* jury with written substantive instructions. Nonetheless, it appears that, in at least some jurisdictions in the State, there is a reluctance on the part of impaneling courts and prosecutors to provide any written substantive materials, such as relevant Penal Law offense definitions, to a grand jury when giving instructions pursuant to section 190.25(6).

This measure would remove any doubt as to the propriety of providing grand jurors with substantive written instructions under subdivision six of section 190.25 by amending that subdivision to expressly permit the practice.[1] To ensure a reviewable record of the written grand jury instructions, the measure would further provide that "the complete text of any such written instructions must, following the distribution of such written instructions to the grand jury, be read into the record by the district attorney, who shall state on the record that such written instructions have been so distributed." In addition, the measure would clarify that nothing contained in the proposed amendment to subdivision six of section 190.25 "shall be deemed to affect the court's obligation, pursuant to subdivision five of [CPL] section 190.20...to deliver or cause to be delivered to each grand juror a printed copy of all the provisions of...[CPL] article [190], or the giving of oral or written instructions pursuant to such subdivision five."[2]

The Committee recognizes that the idea of amending CPL Article 190 to expressly authorize the practice of providing written substantive instructions to a grand jury is not a new one. Indeed, in its 1999 Report to the Chief Judge and the Chief Administrative Judge, the Grand Jury Project made 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.

[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).

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.

22. 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

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

> sentencing the defendant shall take the previous punishment into consideration.

Penal Law section 215.54.

In *People v. Columbo* (31 N.Y.2d 947, 949 (1972)), the Court of Appeals, following a second remand of the case to that Court from the United States Supreme Court for reconsideration of a double jeopardy issue (*see, Columbo v. New York*, 405 U.S. 9, 11 (1972)), held that the defendant's previous punishment for contempt of court under the Judiciary Law for refusing to obey an order to testify before the grand jury barred a subsequent indictment for the same offense under the Penal Law. The Court of Appeals, in *Columbo*, stated as follows:

> Although defendant could have been properly indicted for his refusal to testify before the Grand Jury on October 14, 1965, after having been granted full immunity [citation omitted] and such indictment 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

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

> omitted]. The "applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not" [*citing Blockburger*]. If each of the offenses contains an element which the other does not, they are not the "same offense" under the rule enunciated by Blockburger and any claim of constitutional double jeopardy necessarily fails [citation omitted]. The test focuses on "the proof necessary to prove the statutory elements of each offense charged against the defendant, not on the actual evidence 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]

23. Prosecution by Superior Court Information After Dismissal of Indictment (CPL

[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.

195.10(1)(a); 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.

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

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

The Court of Appeals recently affirmed the dismissal of a perjury prosecution stemming from an out-of state deposition where the defendant was questioned by the New York State Attorney General's office in connection with an ongoing New York State antitrust investigation

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

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

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

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

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

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

infraction to a misdemeanor on the basis of the defendant's prior driving record. This results in an undeserved windfall for defendants who have a history of impaired driving.

The following proposed legislation insures that the defendant's prior driving history is 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.

26. 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.

27. 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.

28. Authority to Unseal Records in the Interest of Justice (CPL 160.50; 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 ensure 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.

29. 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.

30. 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.

31. 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.

32. 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 ensure 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 examine 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.

33. 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 factfinders at a single trial simply because one of the charges does not provide a right to a jury trial.

34. 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.

35. 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.

36. 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 narrower 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.

37. 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.

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

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

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

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

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

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.

39. 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.

40. 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.

41. 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 clearer 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.

42. 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.

43. 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.

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 index[16] (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

[16] 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)).

(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.

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. 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.

52. 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.

53. 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.

54. 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)).[17] 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.[18]

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 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

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[17] 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."

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

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.

55. 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.

56. 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.

57. 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)[19], 1193(1)(c)[20]). 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)[21]).

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

[19] 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)

[20] 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)

[21] 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)

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 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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)).[22]

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.

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[22] "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)).

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 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.

63. 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.

64. 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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