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MAJOR PROVISIONS OF THE PROPOSED CRIMINAL PROCEDURE LAW

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Until 1881 New York State had no code addressed solely to the law of criminal procedure. In 1881 a Penal Code and Code of Criminal Procedure (CCP) both were passed. While the Penal Code was at least formally revised in 1909, the Code of Criminal Procedure never underwent an overall revision but was periodically updated by amendments over the last 88 years. As a result, the Code of Criminal Procedure became disorganized, confusing, and obsolete in many of its provisions.

In 1961 the Legislature created the Temporary Commission on Revision of the Penal Law and Criminal Code. The Commission first completely revised the Penal Law and a new Revised Penal Law was passed in 1965 with an effective date of September 1, 1967. After the enactment of the Revised Penal Law, the Commission began work on a new procedural code to replace the Code of Criminal Procedure. The proposed Criminal Procedure Law (CPL) submitted to the Legislature this year represents the third draft of the Commission's work, having been preceded by the publication of study bills in 1967 and 1968.

The proposed law (A. 6579, S. 4624) is constructed to conform with the Revised Penal Law. It represents major changes from the present Code in structure, substance, form, phraseology and general approach.

It was originally expected that the proposal would come up for a vote at the 1969 legislative session. However, printed copies of the 452-page bill did not become available until late in the session, and in response to requests from the New York Civil Liberties Union and others to allow more time for study, the Republican legislative leaders on March 25, 1969 agreed to defer bringing it to a vote this year.

Sections of the proposed law have been criticized by such groups as the New York Civil Liberties Union, the Legal Aid Society, the Vera Institute of Justice and the Citizens Union. The most controversial sections involve

1. the so-called "preventive detention" of accused criminals who are thought likely to break the law if released on bail;
2. bail procedures which broaden bail possibilities but do not break with the existing money-based bail system;
3. elimination of the present rule for corroboration of accomplice testimony; and
4. the relaxation of rules for preliminary hearings, including provision for use of hearsay evidence at such hearings and elimination of hearing requirements for misdemeanor cases in New York City.

According to the New York Times of March 26, 1969, the codes committees of the Assembly and Senate will conduct hearings on the proposed bill prior to the 1970 session of the Legislature.

Richard J. Bartlett of Glens Falls, Commission chairman and chairman of the State Crime Control Council, has described the proposed CPL as a "balanced" law.

"It affords us the opportunity of more effective operation of our courts, while at the same time providing fairly for the rights of the defendant," he said.\*

The bill as originally drawn was to take effect September 1 of the year following the year of its enactment, which would have made it effective in 1970 if adopted by the 1969 Legislature.

The purpose of this paper is to consider those areas in which major substantive changes have been proposed. It is not intended to draw a full comparison between the Code of Criminal Procedure and the proposed Criminal Procedure Law. Among other things, it does not deal with many proposed changes that are designed merely to eliminate obsolete provisions or to conform wording with the Revised Penal Law.

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\*Albany Knickerbocker News, March 24, 1969.

## MOST CONTROVERSIAL SECTIONS

"Preventive Detention"

One of the most controversial sections in the proposed CPL is § 510.30, which authorizes "preventive detention." Though never using that term, the section provides that in certain situations where the setting of bail is discretionary with the judge he may consider "the likelihood that [the defendant] would be a danger to society or to himself if at liberty during the pendency of the action." Should the judge determine that this element of danger exists, he may deny bail. In making such a determination, the judge must consider the defendant's character and reputation, the nature of the offense charged and his previous criminal record.

The Temporary Commission on Revision of the Penal Law and Criminal Code has maintained that this procedure is necessary for public protection and that it is currently being practiced in any event. Examples have been cited where judges, confronted with defendants charged with forcible rape and with prior records of sex crimes, will either deny bail or set it at a figure beyond the defendant's reach.

The "preventive detention" procedure, also supported by President Nixon for adoption in the federal courts, has been the target of attack on grounds ranging from fairness to constitutionality.

Constitutional Question -- The State's highest court, the Court of Appeals, pointed out in December 1967 (People ex rel Gonzalez v. Warden, Brooklyn House of Detention, 1967, 21 N.Y. 2d 18) that the problem of pretrial release stems from two conflicting interests: (1) the presumed innocence of the defendant, and (2) the need to assure his appearance at the trial. The Court held that in determining the level of bail or pretrial release of a defendant on his own recognizance, a judge was to consider the factors outlined in an earlier case (People ex rel Lobell v. McDonnell, 1947, 296 N.Y. 109):

"The nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction."

These are very similar to the factors that may be evaluated under the proposed CPL in determining when preventive detention is warranted, and some recent reports therefore have maintained that in Gonzalez v. Warden the Court of Appeals upheld the constitutionality of the preventive detention concept. However, the factors in Lobell were cited in reference to the question of reasonable bail as against release on recognizance, and the matter of preventive detention per se was not considered.

While preventive detention has in fact been practiced, the February 14, 1969 issue of Time Magazine reported that "constitutional experts agree that to keep an accused person in prison because of a judge's belief that he may commit a crime while at liberty could very well violate the due process clause of the Fifth Amendment." The same issue quoted U.S. Senator Sam Ervin, North Carolina Democrat, as saying that preventive detention is "inconsistent with a free society."

Time reported that proposals for pretrial jailing of dangerous persons accused of a crime were due in part to crowded court calendars which made it impossible to speedily bring the accused to trial and thereby left them free on bail for extended periods.

The New York Civil Liberties Union has argued that the element of danger in releasing the defendant on bail is "almost universally regarded as an illegal consideration in the determination of whether to set bail" (New York Times, February 23, 1969). The Civil Liberties Union also alleges that the preventive detention procedure would be discriminatory to poor people since they are more likely to commit violent crimes than affluent persons (NYCLU Legislative Memo #20, February 6, 1969).

Harry Subin, associate director of the privately-financed Vera Institute of Justice, which urges further liberalization of bail requirements, said preventive detention was

"... a dangerous concept to put into the law. There are not enough safeguards. No attempt has been made to define exactly whom you really want to detain under these provisions ..."

Vera Institute Criticized -- The Vera Institute, on the other hand, has come under criticism by New York City Criminal Court Judge Amos Basel on grounds that it was "too soft and poorly informed on the subject of bail for dangerous defendants," according to the New York Times of February 11, 1969. While agreeing that defendants often qualify for release pending trial, Judge Basel declared:

"Complainants, however, are also entitled to a little consideration."

President Nixon has stated that preventive detention is needed to permit the jailing of certain "hard-core" criminals while they await trial (New York Times, February 9, 1969).

The New York Times of February 2, 1969, quoted Federal Judge Charles W. Halleck as follows:

"We must face pragmatically the prospect of deciding whether to confine a potentially dangerous defendant without bond for a substantial period of time ... or alternatively releasing him to the community where in many instances he will commit depredations upon society."

Richard G. Denzer, executive director of the Commission, has described the preventive detention section as "desirable, salutary and a realistic acknowledgment of what is practiced by judges now." He added, according to the New York Times of February 23, 1969:

"I don't see why there isn't a valid reason for keeping in jail a defendant whose entire record indicates he's going to do it again -- I mean a defendant like a professional stick-up man or a sex criminal."

### Bail Revision

Articles 510 and 520 of the proposed Criminal Procedure Law provide for substantial changes in the present bail system.

At present, four types of bail are recognized: cash bail, insurance company or professional bail bonds, fully secured surety bonds, and fully secured appearance bonds. The proposed law includes four additional types: a partially secured surety bond, a partially secured appearance bond, an unsecured surety bond, and an unsecured appearance bond.

The unsecured bonds would be executed by a surety or the defendant. No deposit of security would be required, but the party would contract to pay a designated sum of money in case of the defendant's failure to appear. The partially secured bail bond differs only in that the surety or the defendant could deposit a fractional sum fixed by the court not to exceed 10 per cent of the total undertaking.

The new bail provision would broaden the possibilities available to the court to assure a defendant's future appearance. The additional forms would permit a judge to set bail in an amount high enough to serve its purpose (i.e., securing the defendant's presence). At the same time, they could enable the release on bail of some defendants who might be held in custody simply because for one reason or another they could not raise a reasonable level of bail or bail bond.

Opposition to the revision is based largely on the premise that it would preserve the financially oriented system of bail, which is sometimes alleged to be punitive and to discriminate against the poor.\* In attacking the new section, the New York Civil Liberties Union also contends (NYCLU Legislative Memo #20, February 6, 1969) that "no defendant unable to post bond under present conditions would be able to do so under the proposed code."

#### Accomplice Corroboration Rule

Section 300.20 of the proposed Criminal Procedure Law abandons the present rule that "[a] conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime" (CCP § 399).

The rule contained in the proposed CPL is similar to the more flexible federal rule which does not make such uncorroborated evidence insufficient as a matter of law. The provision differs from the federal rule in that it requires the judge to give a cautionary instruction to the jury that "accomplice testimony in general is inherently suspect owing to possible motives of self interest on the part of such witnesses, and that the jury must scrutinize and weigh such testimony with care and caution."

#### Preliminary Hearings

At present, a preliminary hearing is required for most misdemeanor charges in New York City under the New York City Criminal Court Act [§ 40(2)] while a preliminary hearing for misdemeanors is not required elsewhere in the State. The proposed Criminal Procedure Law would make the practice uniform throughout the State by repealing the appropriate sections of the New York City Criminal Court Act and not including any provisions for a preliminary hearing for misdemeanor charges.

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\*From time to time the courts have been asked to adopt a nonfinancially oriented bail system. The State Court of Appeals has held, however, (People ex rel Gonzalez v. Warden, 1967): "... the adoption of such a system is more properly within the province of the Legislature."

The requirement for a preliminary hearing for a felony charge is retained in the proposed law. While the Code of Criminal Procedure and case law are not clear, most judges require "legally sufficient" cause or a prima facie case to be shown at the preliminary hearing in order to hold a person on a felony charge pending grand jury action. The proposed CPL requires only that the preliminary hearing establish "reasonable cause" to believe the defendant committed a felony in order for the court to order the defendant held. Such reasonable cause may be shown by the use of hearsay evidence, which had not been allowed previously (CPL § § 180.60(8), 180.70).

The relaxation of these provisions is designed to conform with the practice in most other jurisdictions. The establishment of a prima facie case would be deferred from the initial screening process -- the preliminary hearing -- to the time the defendant's case is considered by the grand jury. In effect, therefore, the proposed law makes the preliminary hearing a check on the reasonable cause necessary for the making of an arrest, and not a check on the sufficiency of evidence for the grand jury.

The New York Civil Liberties Union has criticized both the abolition of preliminary hearings for misdemeanor cases and the authorization for admission of hearsay evidence at preliminary hearings for felony cases. NYCLU favors giving every defendant a prompt preliminary hearing to determine probable cause on grounds it would serve to weed out unfounded or malicious cases and prevent the detention of a person without requiring any showing. The organization believes the proposal would cause some accused persons to plead guilty to a reduced sentence in order to avoid extended custody while awaiting the outcome of a trial.

The proposed use of hearsay evidence was criticized by the NYCLU on grounds that it is inadmissible at trial and experience has not demonstrated that the prosecution would be subject to hardship by having to produce competent evidence at the hearing stage.

#### OTHER SECTIONS

##### Revamped Lower Court Structure

Article 10 of the proposed CPL divides criminal courts into two broad classifications: "superior court" and "local criminal court." The former includes the Supreme Court and county courts, and the latter all lower courts (city court, town court, etc.). This procedure allows the abandoning of the traditional "magistrate" and "special sessions" language used to describe the role in which a particular judge is sitting, in favor of a system that simply describes what the lower criminal courts are and what they do.

This article would include the New York City Criminal Court as a "local criminal court" thereby bringing that court within the proposed law. Under present law, the New York City Criminal Court operates almost entirely under its own New York City Criminal Court Act and its procedure is governed only in small part by the Code of Criminal Procedure. The proposed law would

"... provide as much procedural uniformity as possible in the state's lower court structure ... allowing for and specifying variations where necessary. ... The new proposals would, of course, replace and require the repeal of a number of provisions of the New York City Criminal Court Act." (1967 Commission Staff Notes, p. 34)

Article 10 also would grant trial jurisdiction of petty offenses to superior courts if they are charged and prosecuted by indictment in conjunction with a crime. Under present law superior courts have no jurisdiction of petty offenses.

### Police and Peace Officer Distinctions

The 1969 proposal creates distinction between "police officer" and "peace officer." Under present law, "peace officer" is an exceptionally broad term encompassing members of organized police departments down to court clerks and humane society agents.

As "peace officers," all of the enumerated groups have powers substantially beyond those of the average citizen. They include power to make an arrest without a warrant upon "reasonable cause" to believe that the arrested person has committed a felony (CCP § 177), whereas the average citizen's arresting power is valid only when the accused has in fact committed a crime (CCP § 183).

The proposed CPL limits the non-police peace officer's authority to make a "reasonable cause" arrest to those situations where he is "acting pursuant to his special duties" (CPL § 140.25). The Supreme Court Uniformed Officers Association, Uniformed Court Officers Association and New York State Court Clerks Association have attacked this restriction on the arresting power of a non-police peace officer when off-duty or outside the customary scope of his employment. They maintained it would "deter action and permit the offender to escape or would render the actor liable for all consequences regardless of the reasonableness of his action." (Associations' Memorandum on the Proposed CPL, February 1969.)

### Appearance Tickets

The use of an appearance ticket, as provided in the proposed Criminal Procedure Law (Article 150), would comprise a major innovation in the arrest procedure. At present, a form similar to the appearance ticket is allowed for traffic infraction cases (Vehicle and Traffic Law § 207), and in New York City certain non-police officials may serve a ticket to appear to answer charges for violations of the fire, building or health codes. Also in New York City, the appearance ticket is now being used experimentally in lieu of arrest for a wide variety of offenses including misdemeanors.

The proposed CPL provides that any police officer has blanket authorization to issue and serve an appearance ticket, instead of making an arrest without a warrant, in any case involving an offense less than a felony. The appearance ticket is a written notice directing the accused to appear at a designated local criminal court at a future time to answer a charged offense (CPL § § 150.20, 150.40).

Under current procedures, (1) the policeman arrests the defendant, takes him to the police station, and takes him to court for filing of a formal information, and the court arraigns the defendant and sets bail, or (2) the policeman goes to the court alone to file an information against the defendant and obtain a summons or warrant for the arrest, and then arrests the accused. The appearance ticket would enable a police officer to use a more simplified and less humiliating method to invoke the criminal process against a person whom the policeman believes will honor the ticket.

Use of the appearance ticket would be left to the discretion of the police officer except in situations where the person is not charged with a felony and, because of the unavailability of a local criminal court, the officer could not have him arraigned with reasonable promptness. Under these conditions, either an appearance ticket must be served unconditionally on the defendant or pre-arraignment bail must be fixed at the police station or county jail. However, if the defendant were under the influence of alcohol or drugs to the extent that he might endanger himself or others, he may be held in custody (CPL 140.20).

The proposed law also provides that an appearance ticket may be issued after arrest, in the police station, if the police officer believes it would be a better procedure than putting the defendant through the remaining post-arrest procedures. Pre-arraignment bail could be set by the desk officer at a police station, or county jail, or any of his superior officers, as a condition to release of the defendant on an appearance ticket. Such bail could be as much as \$100 for a petty offense, up to \$250 for a class B or unclassified misdemeanor, a maximum of \$500 for a class A misdemeanor (CPL § 150.30).

Appearance tickets also may be issued by non-police public employees having a specified law enforcement function (CPL § 150.20).

After a police officer or other authorized person has issued an appearance ticket, he must file an information or misdemeanor complaint in the appropriate local criminal court at or before the time the defendant must appear. If the defendant fails to appear a warrant of arrest is issued for him (CPL §§ 150.50, 150.60).

The value of the appearance ticket is summed up by the Commission as follows:

"... (1) an immense saving of police time, (2) elimination of much expense and embarrassment to defendants charged with minor offenses who are excellent risks to appear in court when required, and (3) above all, a significant reduction of that portion of our jail population consisting of unconvicted defendants awaiting trial or other disposition of their cases." (Commission Memorandum in Support of Proposed CPL, 1969)

### Accusatory Instruments

Under the present Code of Criminal Procedure, the term "information" is used to apply to an accusatory instrument (the writing which commences a criminal action) regardless of the crime alleged or who submits the instrument. This has led to confusion in other sections which apparently limit reference to an "information" to certain circumstances. Additional confusion arises over uncertainty as to the degree of proof which must be alleged in the instrument in order to be valid, due to the varied nature of crimes that may be alleged. The proposed Criminal Procedure Law divides accusatory instruments into five categories: information, simplified traffic information, prosecutor's information, misdemeanor complaint and felony complaint (CPL § 100.10).

An information is an accusation charging another person with an offense other than a felony. A simplified traffic information charges an infraction or misdemeanor relating to traffic. A prosecutor's information is an accusation by a district attorney charging an offense other than a felony. A misdemeanor complaint charges the commission of a misdemeanor, while a felony complaint charges the commission of a felony.

To clarify the degree of evidence necessary to validate the accusatory instrument, it is provided that a felony complaint and misdemeanor complaint need only demonstrate reasonable cause, not "legally sufficient" cause or a prima facie case, as now generally required (CPL § 100.40)

Safeguards -- Since an accusatory instrument may be used to hold a person in custody pending further action, it is provided as a safeguard that (1) a defendant charged in a felony complaint may not be confined for more than 72 hours (three days) without a hearing and (2) a defendant charged in a misdemeanor complaint may not be held more than five days if no information has been filed. If either safeguard is violated, the defendant must be released on his own recognizance. However, the charge against him need not be dropped and he would remain subject to subsequent criminal proceedings.

In both instances, there are provisions to cover special situations. These provide that the defendant may be held for a longer time without a hearing or the filing of a prosecutor's information, if the defendant has waived the safeguard or some "compelling fact or circumstance" is shown by the district attorney which convinces the court that release should not be granted. (CPL § § 170.70, 180.80).

Verification of Instruments -- To speed the criminal process and save time of the police and citizens assisting in a prosecution, the method of verifying instruments is liberalized in the proposed CPL.

Under present law, an instrument may only be verified by having the signer swear to it before a court. Under the proposed law, verification of an information, misdemeanor complaint, felony complaint, or a supporting deposition may be either made by (1) having the deponent swear to it before a court; (2) having the deponent swear to it before a police desk officer, a policeman of higher rank or certain non-police public servants, or (3) having the deponent sign a statement containing a notice that a false statement is punishable as a class A misdemeanor (CPL § 100.30). The verification of an instrument thereby would become a relatively simple act which would not have to be brought before a court. This is similar to the provision contained in Chapter 269 of the Laws of 1969 which amended the New York City Criminal Court Act to provide that a complaint signed with notice that a false statement is punishable as a misdemeanor has the same force and effect as verification of the complaint.\*

#### Arrest Without Warrant

The proposed legislation attempts to clarify when a police officer or peace officer may make an arrest without a warrant. This question requires determining the amount of evidence, or basis, which is needed by the officer before he may arrest without a warrant, the geographical area to which the arrest power will be limited, and the relative arrest power between a police officer and a peace officer.

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\*Chapter 1056 of 1969, meanwhile, provides for affirmation rather than verification of traffic informations, and for affirmation of bills of particulars in traffic cases, with each affirmation under penalty of perjury.

Under the Code of Criminal Procedure, a police officer or peace officer may arrest for a felony on reasonable cause without a warrant, but may not arrest for a misdemeanor without a warrant unless the crime was committed in the officer's presence.

A 1968 amendment (Chapter 684) specifically gave police officers the power of arrest without a warrant anywhere in the State if they had reasonable cause to believe the person committed a felony in their presence. The amendment did not deal with arrests for misdemeanors or the arrest powers of peace officers under similar circumstances.

Several provisions of the existing Code have come under criticism at times. One of these is the requirement that an arrest for a misdemeanor may not be made without a warrant unless committed in the presence of the arresting officer. This provision is sometimes said to be unreasonable inasmuch as the Penal Law makes many fine distinctions between when an act is a felony and when it is a misdemeanor. For example, the stealing of a pocketbook is a felony if it contains more than \$250 and a misdemeanor if it contains less than \$250. Another point at issue is the failure of the Code to make any distinction between the power to arrest without a warrant by a police officer and a peace officer -- an omission said to imply that every peace officer (e.g., a court attendant) has the same arrest power as a trained state trooper.

The proposed law attempts to solve these problems. It provides that a police officer may make an arrest without a warrant for an offense committed or believed to have been committed within his jurisdiction if he (1) has reasonable cause to believe the defendant committed the offense in his presence, or (2) has reasonable cause to believe the defendant committed a crime (felony or misdemeanor), whether or not in his presence. Such an arrest may be made anywhere in the county of the officer's jurisdiction or an adjoining county, or it may be made anywhere in the State if the officer's jurisdiction embraces either an entire county or city or the arrest is made by a police officer in close pursuit of the defendant (CPL § 140.10).

A police officer may make an arrest without a warrant within his geographical jurisdiction for an offense believed by him to have been committed outside his area, if so requested by a police officer authorized to make such an arrest, and for a felony when he has reasonable cause to believe that the defendant has committed a felony within the State and that unless apprehended immediately, it will be difficult to arrest him later (CPL § 140.10).

Outside his jurisdiction, any police officer may arrest a person for a felony when he has reasonable cause to believe that the person committed the felony in his presence, provided the arrest is made immediately after the alleged criminal act or during immediate flight by the alleged criminal. No provision is made for a police officer outside his jurisdiction to make an arrest without a warrant for misdemeanors or other lesser offenses committed outside the officer's jurisdiction (CPL § 140.10)

Peace Officer's Authority -- A peace officer, acting pursuant to his special duties, also may arrest without a warrant when he has reasonable cause to believe the defendant committed a crime. A peace officer acts according to his special duties when the arrest relates to the express provisions of the law the peace officer is required to enforce, or the arrest relates to an integral part of the peace officer's responsibilities. (CPL § 140.25)

Any person may arrest another person for a felony when the latter has in fact committed such felony, and for any offense when the latter has in fact committed such offense in his presence. Such an arrest, if for a felony, may be made anywhere in the State. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed (CPL § 140.30).

### Eavesdropping Warrants

Article 700 of the proposed Criminal Procedure Law, drafted in accordance with the requirements of the 1968 federal "Safe Streets Act," establishes the procedure to be followed with regard to the application for and use of eavesdropping warrants. The 1968 Legislature enacted Sections 814-825 of the CCP to conform the eavesdropping statute to the constitutional requirements set forth by the Supreme Court in Berger v. New York, 1967, 87 S. Ct. 1873, which held unconstitutional the former Section 813-a of the CCP. These sections, however, were enacted prior to the passage of the federal act. The 1969 Legislature again revised the CCP with the enactment of Chapter 1147, which is substantially the same as the CPL proposal.

In compliance with the federal requirements, both the CPL and Chapter 1147 of 1969 provide that only the attorney general or a district attorney may apply for an eavesdropping warrant. Under the 1968 legislation, it had been provided that the police commissioner of the New York City Police Department and the Superintendent of the State Police could also apply.

Chapter 1147 and the CPL also limit to certain "designated offenses" the crimes under investigation for which a warrant may be issued.

Emergency Provisions -- The proposed CPL differs from the CCP (as amended by Chapter 1147) in that the former makes provision for an emergency "tap." The CPL would give emergency authority to a district attorney or the attorney general to authorize eavesdropping without a warrant if "(i) [a]n emergency situation exists with respect to conspiratorial activities characteristic of organized crime that requires such action before an eavesdropping warrant could be issued; ... (ii) [t]here are grounds upon which an eavesdropping warrant could be issued..."; and, (iii) normal application procedure is begun as promptly as practicable thereafter. When emergency eavesdropping is done under this section it must be terminated as soon as any of the following occur: 1) the evidence is obtained; 2) the application is denied; or, 3) the non-warrant eavesdropping has lasted 48 hours. If no warrant is subsequently issued the evidence would be inadmissible in any criminal proceeding.

The CPL as well as Chapter 1147 requires that judges and applicants submit written reports on the application of this section to the administrative office of the United States Courts and the New York State Judicial Conference. Judges must submit these reports within 30 days after termination of an eavesdropping warrant and applicants must submit these reports in January of each year. The Commission is considering amending Article 700 of the CPL to conform its substance and language to Chapter 1147.

### Compulsion of Evidence by Grants of Immunity

Grand Jury -- Section 190.40 of the proposed CPL provides for the conferral on any grand jury witness of immunity from prosecution on the basis of compelled testimony. This provision would eliminate the present necessity for determining, among other things, whether or not the witness is a "target" of the investigation. The proposal also would extend such grants of immunity to investigations of any crimes, whereas under the present law only investigations of certain selected crimes may involve grants of immunity.

Criminal Proceedings Other than Grand Jury -- Section 50.30 of the proposed CPL contains a "blanket" immunity provision which makes the immunity procedure applicable in "any criminal proceeding, other than a grand jury proceeding, which involves prosecution or investigation of a crime," thus extending the procedure to any crime instead of merely those described in existing law (e.g., bribery or conspiracy). The court is made a "competent authority" to grant immunity from prosecution for any crime if the district attorney's consent is obtained. The rationale for this extension is that "the power to compel evidence by means of an immunity grant is a vital, salutary and fair law enforcement measure which should be available in investigations for all crimes." (1967 Commission Staff Notes, p. 63)

### Extension of Material Witness Status

Under the present Code of Criminal Procedure, only witnesses for the people may be adjudicated "material witnesses," thereby securing their attendance at a criminal proceeding. The proposed CPL extends such adjudication to one who may be a "material witness" for the defendant.

"If material witness adjudications are necessary to assure proper prosecutions," the Temporary Commission reported "they are no less necessary to assure proper defense." (1967 Commission Staff Notes, p. 367)

The proposal further provides that a person adjudicated a "material witness" and detained pending the posting of bail, may not be released when the posting occurs except upon his written consent. The Commission explained that, as a general rule, one who is detained earnestly desires his release, but in a material witness situation "it could well be that bail would be posted by someone hostile to the witness." In such case the witness might prefer to remain safely in official custody. (1967 Commission Staff Notes, p. 372)

### Pre-Trial Discovery

The Code of Criminal Procedure does not provide for pre-trial discovery by either the district attorney or the defendant, of the other party's evidence. Under case law, the right of pre-trial discovery is restricted only to instances where it is necessary to avert injustice, and may not be allowed merely because it would prove helpful to the defense (People ex rel. Lemon v. Supreme Court, 1927, 245 N.Y. 24, 33-34). While trial courts in recent years have taken a more liberal approach by allowing pre-trial discovery requests outside the guidelines established by the Court of Appeals in the Lemon case, such holdings are of little weight since they were not made by an appellate court (see, People v. Matera, 1967, 52 Misc. 2d 955; People v. D'Andrea, 1960, 20 Misc. 2d 1070).

The theory behind allowing pre-trial discovery is that if each side is more fully aware of the facts of the case and the evidence to be produced by the other party, each side will be better able to present his side of the issue. This in turn should increase the ability of the court to render a correct determination of the case -- or so the theory goes, at any rate.

The pre-trial discovery procedure contained in the proposed Criminal Procedure Law is virtually identical with the rules employed in federal courts (see Federal Rules of Criminal Procedure, Rule 16). Under § 240.20 of the proposed law, discovery may be allowed upon the motion of the defendant in respect to the following evidence:

1. Testimony given by the defendant before the grand jury which filed the indictment.
2. Written or recorded statements made by the defendant.
3. Specified types of reports and examinations such as physical or mental examinations and scientific tests or experiments.
4. Any other property specifically designated by the defendant, except exempt property,\* upon a showing that such discovery is reasonable and material to preparation of his defense.

Items 2, 3 and 4 above apply to any such evidence within the control of the district attorney, or known to the district attorney, or evidence that should be known to the district attorney through the exercise of reasonable diligence.

In respect to items 3 and 4 above, the court may condition discovery by the defendant upon an order allowing similar discovery by the district attorney of the defendant's comparable evidence. The court also would have the authority upon a showing by a party to deny, restrict or defer discovery in respect to the evidence under items 3 and 4.

Among other arguments advanced in favor of discovery is one that if both sides were more aware of each other's cases, it would encourage more pleas of guilty to the charged crime or a lesser crime, since the outcome of a trial would be obvious.

A criticism of the pre-trial discovery procedure is that it may give the defendant an added advantage in preparing his case, by enabling him to better anticipate the approach to be taken by the district attorney. Efforts to counter evidence known to be in the hands of the district attorney could lead to perjury, it has been argued.

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\*Exempt property is defined as (a) reports, memoranda or other internal documents or work papers made by district attorneys, police officers or other law enforcement agents, or by a defendant or his attorneys or agents, in connection with the investigation, prosecution or defense of a criminal action, and (b) records of statements made to such parties, attorneys or agents by witnesses or prospective witnesses in the case (CPL § 240.10).

## Omnibus Motions

Under the Code of Criminal Procedure, there are many scattered sections which cover different grounds for making the same basic motion. For example, CCP Sections 313-320, 321-331, 332(3) and 671 all pose grounds or contentions which may be raised under various types of motions to dismiss an indictment. Similar situations exist for motions to dismiss a complaint, suppress evidence, set aside the verdict and vacate the judgment or sentence. The availability of so many and varied motions at different times has led to the criminal defense technique of "motioning an action to death." Under this technique, the defense attorney makes as many separate motions as possible to delay the trial generally in an effort to cause the district attorney to lose his case on some technicality or because a witness or some other evidence is no longer available. It is also used in an effort to prod the district attorney into agreeing to allow a guilty plea to a lesser charge so that the action will be completed.

The proposed law adopts the omnibus motion technique to make the law less cumbersome by providing a single motion to cover all the various grounds under it and, in certain instances, requiring the defendant to make a single motion at one time encompassing all the grounds he wishes to put forward.

The motion to dismiss the charge contained in an indictment information or complaint is found in the omnibus motion to dismiss the indictment (CPL § 210.20) and the equivalent omnibus motion to dismiss an information or complaint (CPL § 170.30). These provisions do not, however, add any new grounds upon which a motion to dismiss may be predicated than are presently available under CCP. To prevent motion proliferation, each of the proposed omnibus sections contains a provision directing a defendant, when making such a motion to dismiss, to raise at one time every ground which he "is in a position adequately to raise" if he wishes to raise it at all. A subsequent motion based upon any ground not previously raised, may be denied, unless the court in its discretion wants to entertain it notwithstanding its lateness. (CPL §§ 170.30, 210.20)

Other Motions -- The omnibus motion to set aside the verdict (CPL § 330.30) brings together the motion for a new trial (CCP §§ 462-466), the motion in arrest of judgment (CCP §§ 467-470) and the motion to set aside the verdict because of newly discovered evidence (CCP § 465 (7)).

The omnibus post-judgment motion to vacate the sentence or judgment (CPL §§ 440.10, 440.20) brings together every contention which may be raised presently on coram nobis, a motion for a new trial based on newly discovered evidence, and State or federal habeas corpus. It does not offer new grounds for post-judgment relief.

A new provision gives the prosecution authorization to move the trial court to correct an illegally imposed sentence after service of the sentence has commenced (CPL § 440.40). At present, it is not clear if the prosecution can make such a motion.

The omnibus motion to suppress evidence is contained in Section 710.20 of the proposed Criminal Procedure Law. It covers the two grounds presently covered in the CCP relating to tangible evidence obtained by means of unlawful search or seizure, and evidence of confessions or other statements of the defendant made involuntarily (CCP §§ 813-c, 813-e, 813-f, 813-g). It adds a ground to cover evidence of conversations obtained by unlawful eavesdropping or wiretapping. This ground was added to the CCP as Section 813 l-m, by Chapter 1147 of the Laws of 1969. Previously it had been entertained under the court's inherent power to exclude improper evidence.

The omnibus motion to suppress evidence also codifies the claim that evidence should be suppressed because it emanates from an improper pre-trial identification of the defendant by a prospective witness (CPL § 710.20(5)).

### Court's Charge

The Code of Criminal Procedure provides in general terms that the trial court must deliver a charge to the jury upon matters of law and, where requested, specifically state that jurors are the exclusive triers of the facts and in making their decision the jury should not consider the possible punishment the defendant may receive (CCP § 420). The proposed Criminal Procedure Law greatly expands this area by clarifying what the court's charge should contain and the offenses (counts) with which the jury should be concerned.

While the present case law on charges is not clear, it is accepted that the trial judge must fully marshal the evidence in his charge (People v. Montesanto, 1923, 236 N.Y. 396; People v. Odell, 1920, 230 N.Y. 481). This has resulted in most judges presenting a thorough and time consuming review of the evidence. The rule proposed in the Criminal Procedure Law is that the court must, as far as practical, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for this explanation (CPL § 300.10). By reducing the summation of the evidence by the court, the change should reduce the possibility of the judge committing prejudicial error by his statement of the facts. The proposed Criminal Procedure Law requires the court to charge various fundamental principles of law such as the presumption of the defendant's innocence, the fact that guilt must be proved beyond a reasonable doubt and the fact that failure of the defendant to testify may not be used to draw an unfavorable inference (CPL § 300.10).

Rules on Offenses -- The Code of Criminal Procedure has no provision to guide the Court in determining the offenses, or counts, and levels thereof which should be presented to the jury. The proposed Criminal Procedure Law establishes a comprehensive set of rules concerning the counts and crimes which the court must submit to the jury. The rules cover consecutive counts (counts of an indictment for which consecutive sentences may be imposed), concurrent counts (counts in an indictment upon which concurrent sentences only may be imposed), inclusory concurrent counts (counts charged that are a lesser offense of a more serious crime charged) and inconsistent counts (guilt of one count necessarily precludes guilt of another). Submission of a count may be dispensed with if the district attorney consents or if the multiplicity of counts or the complexity of the indictment requires simplification by the court to prevent overburdening of the jury (CPL § § 300.30, 300.40).

The court is allowed to submit a lesser included offense than the offense charged if there is a reasonable view of the evidence which would support a finding that the defendant committed the lesser offense but did not commit the greater offense charged (CPL § 300.50). This is a codification of case law (People v. Mussenden, 1955, 308 N.Y. 558).

### Appellate Practice

A common law rule in New York is that an improper denial of a motion to dismiss an indictment on the ground of insufficient grand jury evidence requires a reversal of the judgment of conviction, no matter how strong and sufficient the trial proof (People v. Nitzberg, 1942, 289 N.Y. 523). The proposed CPL changes this rule by providing that a denial of the above motion is not reviewable by an appellate court if the judgment of conviction was based on legally sufficient evidence (CPL § 210.30(6)).

The objection to the present rule is obvious, since it requires a conviction be set aside because of an improper denial of a pre-trial motion. While this does not preclude a resubmission of the case by the district attorney to the grand jury and a retrial, such a move is often impossible by reason of lack of witnesses or other circumstances.

Proponents of the proposed rule change maintain the rights of a defendant would not be substantially harmed inasmuch as it would not affect his right to make a timely challenge to the sufficiency of grand jury evidence (CPL § § 210.20, 210.30).

A provision of the Code of Criminal Procedure, retained in the proposed Criminal Procedure Law, enables the trial court to make an order of dismissal of a case upon the completion of the people's case if the evidence is not sufficient to establish the offense charged or any lesser included offense (CPL § 290.10).

The district attorney under the CCP does not have any right to appeal from such an order granting a dismissal. The CPL would authorize an appeal by the district attorney in this instance and provide that the order be reversible not only upon a determination that the trial evidence was legally sufficient, but also upon a determination that, though insufficient, the evidence would have been sufficient had the trial court not improperly excluded admissible evidence offered by the district attorney (CPL § § 280.10, 450.20, 450.40). The effect of such a determination by an appellate court would be to require a new trial.

#### Incapacitated Persons

The proposed CPL provides that a defendant may be adjudicated "unfit to proceed" (i.e., not competent to stand trial) when he "lacks capacity to understand the proceedings against him or to assist in his own defense."

When an indicted defendant is so adjudged under present law, he may be sent to the Matteawan State Hospital, a penal institution, and held there until he is able to stand trial. Under the proposed CPL a defendant who is "incapacitated" is to be committed to the custody of the Commissioner of Mental Hygiene to be placed in an institution operated by the Department of Mental Hygiene.

Section 730.60 of the proposed CPL provides that the "incapacitated person" may not be placed in a Department of Correction facility (e.g., Matteawan State Hospital) unless he has been judicially adjudicated a "dangerous incapacitated person" (emphasis added), defined in § 730.10(2) as one

"who is so mentally ill or mentally defective that his presence in an institution operated by the department of mental hygiene is dangerous to the safety of other patients therein, the staff of the institution or the community."

Another important change from present law establishes a requirement of periodic judicial review of the need for continued hospitalization of a defendant committed to the custody of the Commissioner of Mental Hygiene. This review is guaranteed by § 730.50 which provides that orders of retention cannot be for periods of more than two years. At the expiration of that time, subsequent orders of retention must be obtained from the court.

Section 730.50 also changes present law by stating that a defendant under indictment may not be confined under a criminal order of commitment for a period in excess of two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment. The Commission explained that

"the two-thirds figure derives from the fact that under the revised Penal Law a defendant serving an indeterminate sentence may receive ... time allowances of one-third of his maximum term."

This section only prevents a criminal commitment from extending beyond the above term. If the defendant continued to be mentally ill, he could, of course, be re-committed under a civil order of commitment.

#### Youthful Offenders

Youthful offender treatment protects youth 16-18 years of age from the stigma of a conviction for crime.

The proposed Criminal Procedure Law provides a more simplified method for determining who should be accorded youthful offender treatment. It also regularizes procedure Statewide. It would retain the present provision that a defendant 16-18 years of age who is not charged with a class A felony and who does not have a prior conviction for a felony may be eligible for youthful offender treatment. (CPL § 720.05)

Under the present Code of Criminal Procedure, a person must be recommended for youthful offender treatment by the grand jury, district attorney or the court. The court before which the action is pending may approve or disapprove a recommendation. If the court approves, an investigation must be made of the defendant (usually by probation authorities) and the defendant must agree to submit to mental or physical examinations if they are ordered by the court. Upon receiving results of the investigation and examinations, the court may either grant or refuse youthful offender treatment for the defendant (CCP § 913).

The present procedure has been criticized for being too intricate and time consuming, and for its failure to make any differentiation between the crime with which the defendant is charged and the past record of the defendant.

Broader Application -- The proposed Criminal Procedure Law provides that all eligible youths shall be considered for youthful offender treatment. The court must tell each eligible youth the ramifications of youthful offender treatment at the time of his arraignment, and must give the youth the option of requesting or refusing such treatment. If he requests it, the defendant would be treated according to the category into which he falls. The categories are:

1. If the defendant has not been charged with a felony and has not had a prior conviction as either a youthful offender or a criminal, the court may either grant the defendant's request for youthful offender treatment without an investigation, or order an investigation.
2. If the defendant is charged with a felony and has been previously convicted as a criminal or a youthful offender, the court may either deny the request for youthful offender treatment without an investigation, or order an investigation.
3. If the defendant is either charged with a felony and has not been previously convicted as a criminal or youthful offender, or is not charged with a felony but has previously been convicted as a criminal or youthful offender, the court must order an investigation.

Upon completion of an investigation, the court may either order or deny youthful offender treatment.

The proposed change is expected to produce more uniformity by making every eligible youth a candidate for youthful offender treatment and by categorizing the terms under which a candidate for youthful offender treatment is to be considered. Time should be saved, moreover, by allowing the courts discretion in granting youthful offender treatment without an investigation or denying such treatment without an investigation in certain cases.

The proposal retains the existing provision that the defendant can be required to submit to either physical or mental examinations. The present CCP provisions for the sealing of certain records concerned with the treatment of a youthful offender are retained and expanded by the proposed Criminal Procedure Law to include a felony complaint if such had been made against the defendant (CPL § 720.15).

The format for filing a youthful offender information and for arraignment upon such information is included in the CPL in §§ 720.25 and 720.30. The Criminal Code section allowing for guilty or not guilty pleas to a youthful offender information is expanded to also allow a plea of guilty to a portion of a multi-count information (CPL § 720.35). The present provisions for juryless trials are retained (CPL § 720.40), and the standard of proof for a verdict of guilty beyond a reasonable doubt is a codification of present case law (People v. Corsetti, 1960, 10 A.D. 2d 685).