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Committee on Criminal Courts, Law and Procedure

1969 LEGISLATIVE BULLETINS

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SPECIAL REPORT ON PROPOSED CRIMINAL PROCEDURE LAW (1969 Bill)

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

Committee on Criminal Courts, Law and Procedure

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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
COMMITTEE ON CRIMINAL COURTS,
LAW AND PROCEDURE

SPECIAL REPORT ON PROPOSED CRIMINAL PROCEDURE LAW (1969 Bill)

INTRODUCTION

The several reports accompanying this memorandum reflect our views with respect to various provisions of the proposed Criminal Procedure Law. Of necessity we were compelled to work with the 1969 version of the bill (A-6579/1969; S-4624), which may differ in some respects from the Bill which will be reported out of the respective Senate and Assembly Codes Committees. Moreover, we were unable to deal with every provision in the proposed Code, and rather have selected what appeared to us to be significant aspects of the Bill, which we believe require reconsideration.

The passage of eighty years since the enactment of the present Code, together with piecemeal amendment over the intervening years, has made on overall revision highly desirable. The simplified and coherent organization of the proposed CPL and its general application to all types of prosecutions in all courts renders it a vast improvement over the existing law.

Nevertheless we are unable to recommend its adoption.

The cumulative effect of the deficiencies in the Bill, particularly in the area of pre-trial and post-

trial procedures, far outweigh any of the CPL's specific improvements over the existing Code.

It has been suggested by some that the need for overall revision of the Code requires the adoption of the package regardless of its specific inadequacies and that the objectionable provision can be amended out at some later time. We are unable to accept this suggestion.

We believe the revision should be the best that can be written at this time; it should not include known defects which would be left to an indefinite future modification.

STANLEY S. ARKIN

February, 1970
New York, N.Y.

Article 30

Timeliness of Prosecution and Speedy Trial

1. We recommend the deletion of section 30.10-4(a)(i) so that the statute of limitations is not tolled while a person is out of state and his whereabouts are known and he is subject to extradition.

Section 30.10-2 provides the time limitations within which period a criminal action must be commenced (unlimited period for class A felony; five years for other felonies; two years for misdemeanor and one year for petty offense).

Subdivision 4(a) (i) of section 30.10 provides that these periods shall not include any period (up to five years) that the defendant was continuously outside the state.

This subdivision makes no distinction between persons whose whereabouts outside the state are known or unknown.

To the extent that the whereabouts of the person are known, we believe the tolling of the statute of limitations is grossly unfair and probably unconstitutional.

The main thrust of the provision is with respect to persons incarcerated in other jurisdictions. Under the Interstate Compact on Detainers (present Code §669b; Proposed Code, §580.20, Art. III) such persons have the right to demand prompt disposition of criminal charges pending in jurisdictions other than the one of detention. By delaying the commencement of proceedings by a period even greater than that authorized by the statute of limitations, section 30.10(4) (a) (i) not only defeats the intent of the Interstate Compact but unfairly and unreasonably

interferes with a defendant's capacity to defend himself. Under this provision a prosecutor can delay the commencement of a prosecution to ten years from the commission of a felony, seven years from the commission of a misdemeanor, and six years after an offense.

Although the question of the applicability of the speedy trial provision and the due process clauses of the Federal Constitution to the period prior to the commencement of a criminal action has not yet been finally resolved, it would appear that under *Smith* v. *Hooey,* 393 U.S. 374 (1969) the proposed law would be unconstitutional. In that case the Supreme Court held that a state was required to attempt to promptly bring an indicted defendant to trial, notwithstanding his incarceration in another jurisdiction.

2. We recommend modification of section 30.20 so as to provide for a meaningful and enforceable statement as to the right to a speedy trial.

The proposed CPL states that "The defendant is entitled to a speedy trial." (§30.20) This section is identical to the existing provision in Code of Criminal Procedure, §8.

We believe the existing and proposed sections are inadequate statements of the fundamental right to prompt disposition by trial of a criminal charge. We endorse the American Bar Association's recommendation that:

> "A defendant's right to a speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delay should be excluded in computing the time for trial, and these

> should be specifically identified by rule or statute insofar as practical."*

Similar recommendations for a specific time limit between charge and trial have been made by the President's Commission on Law Enforcement** and in the Vera Institute of Justice report to the Mayor's Criminal Justice Coordinating Council***.

Perhaps conceptually there should be no distinction between the bailed and unbailed defendant; nevertheless there is a realistic distinction which should be drawn. We would recommend that there be a specific provision requiring the release on recognizance of any defendant held in custody for more than a stated period (three months is suggested for Felonys, ten days for Class B Misdemeanors and 20 days for Class A Misdemeanors), excluding from the computation such periods where the delay was at the request of the defendant. Although the problem is not as pressing in the case of the bailed defendant, no person should be required to have an unresolved charge hanging over his head for a prolonged period of time. We therefore recommend dismissal with prejudice of untried felony charges after one year, and misdemeanor charges after six months of chargeable time have elapsed from the commencement of the action.

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* American Bar Association, Minimum Standards of Criminal Justice: *Standards Relating to Speedy Trial,* §2.1.

** See, Task Force Report: *The Courts,* pp. 86-87; and President's Commission Report, *The Challenge of Crime in a Free Society,* p. 155 (1967). Both reports suggest a *maximum* nine week period between arraignment and trial.

*** The problem of overcrowding in the Detention Institutions of New York City: *An Analysis of Causes and Recommendations for Alleviation* (Vera Inst. of Justice, Jan. 1969).

Article 60

Rules of Evidence

3. §60.35—We recommend approval of the section which seeks to clarify the instances where a party may impeach his own witness by proof of prior inconsistent statements.

This provision of the proposed new Criminal Procedure Law would restrict the use by a party for impeachment purposes of prior inconsistent sworn or written and subscribed statements by his own witnesses, which use is presently statutorily sanctioned by Code of Criminal Procedure §8-a, to use of such prior statements which are not only inconsistent with but "contradictory" to the witness' present testimony and then only when that testimony "tends to disprove the position of such party" on a material issue of the case. The use of prior inconsistent statements would be similarly restricted for purposes of refreshing the recollection of a party's own witness.

Present Code of Criminal Procedure §8-a, as construed by the courts, permits the use by either party of any prior inconsistent sworn or written and subscribed statement of a witness, including the party's own witness, for the purpose of impeachment. Section 8-a has been held not to restrict the then existing practice of using any prior inconsistent statement, oral or written, sworn or unsworn, for the purpose of refreshing any witness' recollection, *People* v. *Freeman,* 9 N.Y.2d 600 (1961), or to impeach the other party's witnesses. See *People* v. *D'Andrea,* 26 Misc.2d 95, 207 N.Y.S.2d 215, 226 (Sup. Ct. Kings Co. 1960); *People* v. *Konopka,* 5 Misc.2d 507, 164 N.Y.S.2d 139, 141 (County Ct. Suffolk Co. 1957). In no case can the prior inconsistent statement be used as affirmative evidence to prove the facts stated.

People v. *Freeman, supra.*

The purpose of proposed Section 60.35 is to restrict the use by a party of prior inconsistent statements of his own witness, either for the ostensible purposes of impeaching the witness or refreshing his recollection, to statements which are not only inconsistent with his testimony but also contradictory to it, and then only when the testimony sought to be impeached or recalled tends to disprove the position of that party.

The principal effect of the change would be to preclude use by a prosecutor of a witness' prior sworn statement—such as his grand jury testimony— or written and signed statements, such as a complaining witness' statement to the police—to effectively establish a fact when the witness who made such statement disappoints the prosecutor because the witness is not presently so convinced of the fact or otherwise does not prove helpful in establishing such fact by his noncommital testimony. When the witness' present testimony is not only disappointing or unhelpful but positively damaging, on the other hand, the proposed new section would permit the prosecutor to use the witness' prior contradictory statements to offset the effect of such damaging surprise testimony, and incidentally to explain why the presently damaging witness was called to testify as to the issue. In sum, a prior inconsistent statement might be used to neutralize a party's own witness' surprising and damaging testimony but not to establish a fact when the witness' testimony actually turns out to be merely equivocal and neutral.

Where the witness has made a sworn or signed contradictory statement which does not tend to disprove the party's own position it would not be

admissible in any form for any purpose, but the proposed new section would permit the party to use a physical record of such statement to attempt to refresh the witness' recollection, but not in such manner as to disclose its contents to the trier of facts. This express restriction on use of anything to refresh a witness' recollection is entirely new. Under the present law virtually anything can be used to refresh a witness' recollection and the only restraint is that imposed by the court's discretion.

(*People* v. *Freeman, supra,* 9 N.Y. 2d 600)

The proposed new rule would also clarify present law by permitting evidence of such statements introduced for impeachment purposes to be "received" physically into evidence but not as evidence in chief, *i.e.*, not as evidence of the facts in issue. The rule provides that a jury must be instructed to that effect.

We approve the proposed new section because it realistically permits a party to impeach his own witness who has proven himself unreliable by making contradictory statements, without permitting, under the guise of impeachment or refreshing recollection, the use of prior out-of-court statements of such an unreliable witness to effectively establish the very facts of which he has proven himself an unreliable witness. The rule would continue to protect a party against the surprise of his own inconsistent witness. Whether a witness makes inconsistent statements because of pressure, external or internal, or because of his inherent unreliability, the probative value of either of his present testimony or prior inconsistent statements is very questionable and on balance it is probably fairest to let his testimony be neutralized but nothing more, which would be the effect of the proposed new section.

Although the proposed new section is not explicit on the point it is evident that it does not purport to change the law with respect to the greater latitude afforded for use of prior inconsistent statements of the other party's witnesses. See proposed Criminal Procedure Law Section 60.10, which in effect provides for the continued application of existing rules of evidence where not affected by the proposed new Criminal Procedure Law.

The application of such new standards as "contradictory" and "tends to disprove the position of such party" may, of course, require judicial refinement on a case by case basis, but these standards are as clear as could reasonably be formulated for present purposes and the import of the section as now drafted is sufficiently clear so that the Courts should have no real difficulty in applying it.

For the reasons stated, the proposed section is approved.

4. §60.40—We recommend the modification of the rule allowing virtually unlimited use of prior convictions for impeachment purposes by substituting a rule limiting impeachment to those prior convictions which tend to reflect upon credibility.

The Committee disapproves section 60.40, principally because it is silent on the significant question of when a defendant may be cross-examined concerning prior convictions.

Although New York decisions recognize limitations upon a trial court's discretion as to the latitude of cross-examination into a defendant's prior acts of misconduct not resulting in conviction, see e.g. *People v. Schwartzman*, 24 N.Y.2d 241 (1969), courts in New York and many other jurisdictions

have routinely permitted the prosecution to bring out the fact of a defendant's prior criminal conviction for impeachment purposes. See, e.g., *People v. Schwartzman, supra; People v. Sorge*, 301 NY 198 (1950). See also *Comment, Use of Bad Character and Prior Convictions to Impeach a Defendant—Witness*, 34 Fordham L. Rev. 107 (1965). However recently in a number of jurisdictions courts have mistrusted the effectiveness of limiting instructions as a means of insuring that juries use such conviction evidence only on the issue of credibility, and have required the trial court to weigh the possible prejudicial effect of the conviction against its relevance to credibility before permitting its use on cross-examination, e.g. *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). See also *United States v. Palumbo*, 401 F.2d 270 (2nd Cir., 1968).

As indicated in the Commission's comment on this section, the CPL is purposely silent on the circumstances under which such impeachment would be proper, providing only, in Subdivision 1 of Section 60.40, for independent proof of a conviction by the prosecution where proper inquiry is met by a denial. This Committee endorses the position taken by the District of Columbia Court of Appeals in *Luck* v. *United States, supra*, and believes the statute should provide that impeachment use of a defendant's prior convictions is a matter within the proper exercise of the trial court's discretion, requiring the court to take into account the length of time since the conviction and the extent to which its bearing on credibility is outweighed by its tendency to prejudice the jury.

Article 170

Proceedings on Misdemeanor Complaint, etc.

5. We recommend retention of misdemeanor preliminary hearings in New York City.

The 1969 Bill failed to provide for preliminary hearings in misdemeanors in New York City or the remaining counties of the state. The Revisor's notes indicate that Section 40(2) of the New York City Criminal Court Act is to be repealed, thereby eliminating the present requirement for such hearings in New York City.

This Committee is of the opinion that the misdemeanor preliminary hearing is an essential and critical part of the misdemeanor procedure in New York City and should be retained. We also believe the extension of the practice throughout the balance of the state is desirable.*

The preliminary hearing in misdemeanor cases serves a number of vital functions, serving the interests of both the defendant and the people.

In New York City, the hearing serves to promptly remove from the criminal process those cases which do not belong in the courts. Out of 119,000 non-traffic misdemeanor arraignments in 1967, the Criminal Court was able to dismiss 22,000 cases without trial and another 12,000 upon consent of the district

* The members of this Committee have had only limited experience as prosecutors or defense counsel in the lower criminal courts outside of the City of New York. To the extent that our recommendations are based upon the practical realities of practice, we would ordinarily hesitate to make a judgment as to the desirability of a particular practice in those courts. However, we are fortified in our judgment by the fact that the New York State Bar Association, with state-wide membership, has recommended the extension of the existing New York City practice througout the state.

attorney.* Although it is impossible to ascertain from these reports how many of the 22,000 dismissals were because of the failure of the complainant to appear, the death of the defendant, etc., it seems clear that the majority of the dismissals were due to the failure to make out a prima facie case at a preliminary hearing. It would appear that the estimate made by the Legal Aid Society of a dismissal rate of slightly more than 10% of the total complaints is a modest estimate.

The prompt removal of over 10% of the misdemeanor charges is absolutely essential to the continued functioning of a system already strained to the breaking point.

First and foremost it gives the defendant against whom even a prima facie case cannot be proven, the opportunity to be relieved of the spectre of a pending criminal charge and gives him prompt justice.

Secondly, it prevents the unjust incarceration of such a defendant if he is unable to raise bail—with the concommitant easing of overcrowding in the jail facilities.

Thirdly, it saves the repeated trial and motion calendering of a case that would most assuredly result in eventual acquittal or dismissal at trial.

Fourthly, even in the case of the defendant held for trial after a preliminary hearing, there would appear to be a substantial time saving to everyone concerned. It has been demonstrated time and again that it is only the rare defendant who insists upon going to trial after he has been confronted at a preliminary hearing with the evidence against him. There is perhaps no factor more signaficant in the

* 1967 Annual Report of the Criminal Court of the City of New York, Tables 1 and 10.

determination by a defendant to plead guilty than the realization that the prosecution has the evidence necessary to convict. This realization generally can be only by a preliminary processing where the defendant is brought face-to-face with reality.

6. We recommend extension of misdemeanor preliminary hearing throughout the entire State.

We also believe that these consideration, generally, are also applicable to the counties outside of New York City, although, as we have indicated we do not presume to expertise in the practice before the courts involved. We note one further factor which might make such hearing even more desirable in the out-City counties, and that is the presence of misdemeanor jury trials.

In counties where jury trials are available for misdemeanor charges, it makes even more sense to have the legal sufficiency of the people's case preliminarily screened by a court. The time and expense of many a jury trial would be saved if charges could be summarily heard at a preliminary hearing.

Article 180

Proceedings on the Felony Complaint

7. We recommend the retention of the present requirement that the people must establish a legally sufficient or prima facie case in order to hold a defendant for the grand jury, and, therefore, we recommend the rejection of the "reasonable cause" test set forth in proposed CPL 180.70.

8. We recommend the retention of the present requirement that the felony hearing be conducted only with such evidence as would be admissible at trial and therefore we recommend the rejection of CPL §180.60(8) which would permit the use of hearsay evidence.

Article 180 of the proposed Criminal Procedure Law would incorporate two basic changes from existing procedure. Section 180.70 would substitute as a standard for the quantum of evidence required to hold the defendant for the action of a grand jury after a felony hearing "reasonable cause" to believe that the defendant committed a crime. Section 180.60 (8) would allow the introduction of hearsay evidence against the defendant at a felony hearing.

In substance the proposed changes make the standard used by a committing magistrate for holding a defendant, the same standard as is now authorized for arrest.

We believe it unsound legally to permit judicial incarceration for up to forty-five days upon the same slight standard of evaluation used to permit an arrest in the field by a police officer. Further, we believe it unwise administratively to dilute the existing hearing procedures, which although time-consuming, are directly responsible for dismissals, reduction of charges and guilty pleas–which in the long

run save the judicial system more time and money than the time-money cost of the hearings.*

A. The Required Weight of Evidence at the Felony Hearing.

Present section 208 of the Code of Criminal Procedure has been interpreted by the courts to require proof of a prima facie case by the people to sustain a criminal charge at the preliminary hearing. *People* v. *Smith,* 45 Misc. 2d 265, 256 NYS 2d 422, *People ex rel Adler* v. *Bieber,* 100 NYS 2d 821. The proposed bill would substitute as the test "reasonable cause" to believe that the defendant committed a crime, CPL §180.70. In its March, 1969 Memorandum the Commission asserts that the modified procedure will accelerate the criminal process and avoid a double screening on a "prima facie" standard by both the lower court and grand jury. The 1967 Staff Comment amplifies this by stating that the existing prima facie standard "leads to confusion and corner-cutting" and the holding of the defendant for a considerable time during investigation so that a prima facie complaint and case can be prepared, often using the "short-affidavit" to stall proceedings in the interim.

It is the opinion of this Committee that the laws should require proof upon legally competent evidence of a prima facie case by the people to sustain a criminal charge at the felony hearing. A defendant in custody awaiting action of the grand jury could remain there for at least 45 days under the proposed law. §190.80. A defendant free on bond or parole

* In New York City alone 5,521 felony cases were dismissed by the Criminal Court judges, and 7,597 were dismissed on consent of the district attorney. An additional 22,210 cases were reduced either with consent or after hearing or both. Thus over one-half the 57,000 felony complaints were disposed of at the magistrate level. See, Annual Report, N.Y.C. Crim Ct, 1967, pp 4, 18, 27.

may wait for months after the conclusion of the preliminary hearing for grand jury action. Moreover, the weeding out of unfounded and malicious complaints which is a major function of the preliminary hearing (*People* v. *White,* 18 Misc 2d 56, 188 NYS 2d 585) is not as easily accomplished in the secrecy of a grand jury proceeding where no cross-examinnation by the defense is possible, despite the prima facie case requirement. As we have noted, over one-half the 'felony' cases are presently screened out at the preliminary hearing.

The Commission has made an earnest effort to speed up pre-indictment felony proceedings by tinkering with the preliminary hearing machinery. This hoped for speed-up is unlikely in the congested metropolitan courts. Calendars of 100 cases and even 150 cases are common in the New York City Criminal Court. If the proposed lighter "reasonable cause" test were adopted it would subject many defendants to additional expense, anxiety and pretrial incarceration, often with loss of their employment.

B. The Use of Hearsay Evidence Against the Defendant at the Felony Hearing.

Only legally competent evidence can be introduced at a preliminary hearing under the existing Code. The proposed bill would allow the introduction of hearsay evidence against the defendant at a felony hearing. §180.60 (8)

It is the opinion of this Committee that only legally competent evidence should be admissable at a preliminary hearing. This would exclude hearsay evidence.

This point was ably stated in "The Preliminary

Hearing–An Interest Analysis" 51 Iowa Law Review 164 (1965):

> "It is no answer that the accused has the rights of confrontation and cross-examination at trial. If the complaints cannot withstand these evidentiary tests at the preliminary hearing they should not be presented at trial. The accused should not be subject to the anxiety and embarrassment of trial unless proper judicial safeguards are employed to reduce the chances that he will be held on an unsubstantiated complaint. The accused should at least be able to confront and cross-examine those witnesses upon whose evidence the prosecution relies at the preliminary hearing. A recent case supports this view on the theory that the importance of the accused's freedom dictates that he should not be held on hearsay evidence, even if merely until trial. The accused should also not be denied the psychological effect generated by his meeting an accuser face-to-face."

Indeed it is the reality of this confrontation which ultimately may be the deciding factor in the defendant's decision to plead guilty or go to trial. In the case of the defendant against whom the hearing evidence is clear and convincing, a realistic appraisal of the evidence by the defendant and his counsel will in all likelihood result in a guilty plea. On the other hand, no such realistic appraisal can be made if the felony hearing is based upon hearsay 'evidence.' As with the proposed elimination of preliminary hearings in misdemeanor cases, the proposed devices for saving time at the initial stages of the proceeding, create difficulties at the later stages which will offset any earlier gains in time and effort.

In short, we believe the full preliminary hearing

upon legally competent evidence is a critical aspect of the criminal process. By making it a meaningless formality, the hearsay hearing fosters prolonged incarceration without close judicial scrutiny as the price for what at best is an unsubstantiated expectation that the overall process will be improved. We welcome experimentation and innovation in this highly troublesome area; but even if this experiment were to fulfill the hopes of its proponents, which we think doubtful, we believe the price is too high.

Article 200

Indictment and Related Instruments

9. We recommend the deletion of subdivisions (c) and (d) of section 200.20-2 so that several legally unrelated offenses may not be joined for purposes of a single trial.

Section 200.20-2 permits, under subdivisions (a) and (b), the joinder of two offenses in a single indictment or consolidation for trial of several indictments where the several offenses are based upon the same conduct or where proof of one offense is admissible to prove the other or others.

Such joinder or consolidation is logical and necessary.

However subdivisions (c) and (d) permit joinder of distinct and separate offenses if both are offenses of similar legal character of if they both were joinable with a third offense. We believe these provisions are inimical to a fair trial and create a substantial risk of leading to an incorrect or unjust verdict.

For example, if a defendant is charged in one indictment with armed robbery, assault and grand larceny all arising out of the same transaction, such an indictment may be consolidated for trial with other indictments charging any grand larceny, assault or robbery. Thus a defendant charged with an armed robbery in one indictment and a theft from his employer under a second indictment, may find that he has to defend both charges at the same trial merely because each indictment contains one similar charge (i.e., larceny).

Even where the separate offenses are in all respects of the same legal character (e.g. two robberies) it is essentially unfair to allow a jury to hear two

distinct and separate cases against one defendant and then ask it to compartmentalize the evidence of each to arrive at separate verdicts. In such a situation there is a grave risk that two weak cases may improperly bolster each other. For example, two robberies occur in the same county several months apart. In each case there is a weak identification of the defendant as the perpetrator as the entire evidence of guilt. If the cases were tried completely separately, each jury would have to independently assess the worth of each identification. However at a joint trial the natural tendency must be that one identification will bolster the other.

The possible prejudicial effect of such a joinder or consolidation is an inexcusable and unwarranted risk; particularly so in view of the fact that there is no legal or practical reason why the offenses should be joined.

We wish to emphasize that our objections to consolidation or joinder do not apply to those separate crimes where the proof of one is admissible to prove the other. Such consolidation is permitted under section 200.20-2(b) and is a problem relating to the rules of evidence. We note on this score that the evidentiary rules with respect to when one series of acts resulting in a charged crime can be considered as proof of a second crime have been thrown into confusion by the language in *People* v. *Lombardi,* 20 N.Y.2d 266,273 (1967) which seems to reject the 'common scheme or plan' theory of admissibility. We believe Article 60 should include an evidentiary rule allowing admissibility of acts or conduct evincing a common scheme or plan, even though resulting in separate crimes. If the rule of evidence is broadened, then joinability will likewise be broadened under subdivision (b).

Article 210

Preliminary Proceedings — Indictment

10. We recommend modification of subsection 2 of proposed CPL 210.30 to eliminate the provision which would permit the denial of a motion to inspect grand jury minutes because the movant was unable to factually swear to the legal insufficiency of the evidence before the grand jury.

Section 210.30(2) incorporates the much debated discretionary requirement of *People* v. *Howell,* 3 N.Y. 2d 672, which held it permissible to require of a defendant that he allege facts to support his assertion or suggestion that the indictment was not supported by legally sufficient evidence presented to the grand jury. Chief Judge Fuld's dissent in *Howell* points out the impossibility for a defendant or his lawyer to make such allegations of fact since they have no access to the grand jury minutes.

In view of the fact that the indictment is a holding instrument and many months may be spent in jail awaiting ultimate trial, we believe that there must be some meaningful and nearly automatic judicial screening of the legal sufficiency of the people's case prior to eventual trial. Such screening can take the form of a preliminary hearing under currently accepted standards or it may take the form of examination of the evidence before the grand jury.

Although we would be in favor of the *Howell* standards for inspection where there has been a preliminary hearing, upon legally sufficient evidence, which resulted in the defendant being held for the grand jury, we cannot recommend approval of such a standard where there has been no preliminary hearing or where the hearing is the watered-down hearsay hearing proposed by the CPL.

Article 220

The Plea

11. We recommend the inclusion of a section setting forth the standards and procedures for the giving and acceptance of guilty pleas. The proposed CPL is deficient because of the absence of any stated standards or procedures.

The proposed Criminal Procedure Law does not contain any provision for the manner in which guilty pleas are to be taken by the court. It is the opinion of this Committee that the law should include provisions embodying the standards set out in the case law in this area, to insure that each defendant who pleads guilty does so knowledgeably and voluntarily.

It is clear that, at the very least, the Federal Constitution requires that a guilty plea by a defendant in a state court be knowingly and intelligently entered. In its most recent pronouncement on the subject, the Supreme Court has said that such a plea, embodying as it does the waiver of certain valuable constitutional rights (*i.e.*, the right to trial by jury, the privilege against self-incrimination and the right to confront one's accusers) must be shown *on the record* to have been a knowledgeable and voluntary one. The waiver of these important federal constitutional rights is governed by federal standards; such a waiver cannot be presumed from a silent record. It is therefore incumbent upon the state judge to make a record adequate to demonstrate that the defendant who wishes to plead guilty before him does so with full knowledge of the consequences of his actions. *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

There has been some discussion as to whether

Boykin made incumbent upon the states, as a matter of federal constitutional law, the procedure for the acceptance of a guilty plea set out in Rule 11 of the Federal Rules of Criminal Procedure.* Whether or not *Boykin* does so enshrine the procedure of Rule 11, it does indicate that state judges have an obligation to inquire of the defendant in such a way to insure that it appears on the record that the defendant knows what he is doing and is aware of the rights which he has, and of the consequences of his plea.

In discussing the procedures to be followed on the entry of a guilty plea, the New York Court of Appeals prior to the *Boykin* decision has said,

> "it is highly doubtful that a uniform mandatory catechism of pleading defendants should be required. . . . The circumstances are too various. There are knowledgeable and criminally experienced defendants and there are cases where the seriousness of the crime, the competency and experience of counsel, the actual intensive participation by counsel, the nature of the crime as clearly understood by laymen, the rationality of the "plea bargain," and the speed or slowness of procedure in the particular criminal court provide ample data as to how far the court should go in questioning defendants before taking a guilty plea. These are all matters best left to the discretion of the court. In some instances even the most rigorous standards thus far suggested, either in the American Bar Association project or by the Federal rule, are hardly adequate; in others the standards become an unnecessary formalism." *People* v. *Nixon*, 21 N.Y.2d 338, 353-4 (1967).

* That Rule provides, in pertinent part "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The difficulty with this approach is that many of the factors which the Court lists as relevant to how far the questioning of the defendant should go do not appear on the record, and often, indeed, may not be known to the judge before whom the plea is entered (e.g., the competency and experience of counsel, the active participation of counsel, the rationality of the plea bargain). These factors do not therefore provide a reliable guide for the pleading judge, and create rather than eliminate, opportunities for appellate challenges to the propriety of a guilty plea.

It is the opinion of this Committee that the Criminal Procedure Law should include those standards which a pleading colloquy must fulfill. The areas to be covered by the colloquy fall into two categories:

1) Advice to the defendant with respect to his rights, the nature of the charge against him, possible maximum punishment and other liability to rehabilitative custody.

2) Determination of the voluntariness of the plea, including any agreement reached by defense and prosecution attorneys.

These categories seem to be adequately covered by a combination of the standards of the ABA project* and those recommended to the Temporary Commission and the Code Committee by the Legal Aid Society with some additions by this Committee. The Committee therefore suggests that the following be included

* American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (1967).

in the Criminal Procedure Law (the source of each section is indicated):

1) Defendant be advised by court.

The court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally and

(a) determining that he understands the nature of the charge;

(b) informing him that by his plea of guilty . . . he waives his right to trial by jury, his right to confront his accusers and his privilege against self-incrimination; and

(c) informing him:

(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;

(ii) of the mandatory minimum sentence, if any, on the charge; and

(iii) When the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

ABA project, §1.4

(iv) of the liability or exposure, if any, of defendant to any punishment, custody, or rehabilitative treatment in addition to or

different from that provided in Penal Law, Section 70.00(2) or Section 70.15.

Recommendations of the Legal Aid Society

2) Determining the voluntariness of the plea.

The Committee recommends that the record of each guilty plea show every promise with respect to sentence, or any other consideration offered the defendant, or the absence of same. To achieve that end, the judge should state "the terms of any promises, or the absence of the same, with respect to sentence or any other consideration that has been offered the defendant," and the defendant, his counsel, and the prosecutor should acknowledge the accuracy of this statement.

Recommendations of the Legal Aid Society

If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

ABA project §1.5

There is strong support for the view that the plea agreement be placed on the record, *e.g.*, The President's Commission on Law Enforcement and Administration of Justice, THE COURTS, page 12. The present practice is to ask the defendant whether any promises or threats were made to induce him to

plea guilty. Since an agreement is often reached between defense counsel and prosecutor, and often the judge, with respect to the sentence to be requested or imposed, or other considerations to be given in exchange for the guilty plea, the negative answer expected from the pleading defendant is often untrue. The difficulty with a truthful acknowledgment of the bargain that has been struck is that it frequently embodies factors which neither side is eager to make public. However, it would seem that the result of the bargain might well be put on record with no great loss to either side. This would make the pleading colloquy more honest since the defendant would no longer be called upon to deny the existence of an agreement which, in fact, induced him to plead guilty. It would also insure that the more vulnerable party to the bargain is aware of the full consequences of his agreement and make a record which appellate courts, and society as a whole could use in judging the propriety of the agreement that had been reached.

The Committee recommends that no inquiry as to the factual basis of the plea be included in the standards for the pleading colloquy.

Article 300

Instructions to Jury
(Accomplice Testimony)

12. We recommend the retention of the present rule with respect to corroboration of accomplice testimony.

Proposed CPL §300.20 eliminates the New York rule requiring corroboration of accomplice testimony (CCP 399) and replaces it with the requirement that the court instruct the jury that accomplice testimony is generally inherently suspect and the jury must "scrutinize and weigh such testimony with care and caution." This section is disapproved and we would restore the existing rule by addition of a section to that effect immediately following CPL §60.50.

This Committee has consistently disapproved a fundamental change in the New York law which would permit conviction of persons upon the unsupported testimony of accomplices, with or without a cautionary instruction. Thus, in 1936 the Committee twice voted unfavorably upon similar legislation: in Report No. 6 of 1936, the Committee disapproved legislation which would have abolished the requirement of corroboration; and in Report No. 69, the Committee disappproved a bill similar in tenor to the present proposed changes in the law which, though abolishing the requirement of corroboration of accomplice testimony, would have required a "cautionary instruction" to the jury. This Committee last year in an unpublished report disapproved of similar legislation.

The proposed legislation essentially adopts the practice prevailing in the federal courts, although

it makes the "cautionary" instructions mandatory rather than optional.

Nearly half the jurisdictions in the United States require a corroboration of accomplices. 7 *Wigmore on Evidence*, §2056 at page 319 (see footnote 10).

Without necessarily reaching the appropriateness of the rule for the Federal Court system, we think that there are compelling reasons why New York should not change its long standing statutory rule. The fear of accomplice testimony has special cogency in regard to the prosecution of political and social deviants. The infamous case of "The Popish Plot", in which the accomplice-informer, Titus Oates, caused the death of a number of Jesuits and other alleged plotters against the Crown, is a dark part of our legal history.

The uncorroborated evidence of informers suffers from the special defect that it is often difficult, even for a conscientious prosecutor, to be sure of its validity, for in a great many cases the informer himself knows quite well what sort of testimony may be desired from him and can often determine from police questioning the outlines of the kind of testimony which will produce favorable treatment for him.

As this Committee noted in 1936, the judicial construction placed on the requirement of corroboration has been relatively modest. The availability of corroboration may have been significantly increased by the authorization of law of various forms of electronic surveillance which, whatever their other defects, tend to produce evidence whose inherent reliability is not generally suspect. Within a jurisdiction like our own, where prosecution is a county-by-county function in the hands of an elected officer,

there exist real grounds of difference from the federal system, where prosecutors are appointed by and responsible to a cabinet officer. The effectiveness with which District Attorney's offices like the New York County District Attorney's office have been able to prosecute organized crime and official corruption cases would tend to indicate that the rule in present §399, requiring corroboration by other evidence which tends to connect the defendant with the commission of the crime, does not impose, in fact, an unrealistically severe burden upon the effective prosecution of crime, yet it guards against the enormous risks inherent in prosecution on the wholly uncorroborated testimony of accomplices.

The modest nature of the required corroboration may be seen from the recent opinion of the Court of Appeals, *People* v. *Morhouse*, 21 N.Y. 2d 66, at 74 (1967) where the Court wrote:

> "The defendant's claim that the accomplice testimony given in evidence against him on his trial was insufficiently corroborated must also be rejected. As we indicated in People v. Fiore, (12 N.Y. 2d 188, 201), the corroboration requirement of Section 399 of the Code of Criminal Procedure is fully met when there is some non-accomplice evidence 'fairly tending to connect the defendant with the commission of the crime' (quoting from People v. Elliott, 106 N.Y. 288, 292). The corroboration need not, as must circumstantial evidence, lead exclusively to the inference of the defendant's guilt. As this court has noted, even 'Matters in themselves of seeming indifference. . . may so harmonize with the accomplice's narrative as to have a tendency to furnish the necessary connection between the defendant and the crime.'

(People v. Dixon, 231 N.Y. 111, 116-117; see, also, People v. Crum, 272 N.Y. 348, 353-354; People v. Malizia, 4 N.Y. 2d 22, 27; People v. Reddy, 261 N.Y. 479, 484.) The corroboration present here far exceeds this standard."

It is the widespread view of both prosecutors and defense lawyers that cases involving single-witness identifications and cases involving the non-corroborated testimony of accomplices are two areas of prosecution which are fraught with the danger of substantial injustices.

Accordingly, we disapprove of the proposed change in well-established New York law.

Article 390

Presentence Reports

13. We recommend modification of section 390.20 so as to eliminate the mandatory requirement of a presentence report in every felony case and certain misdemeanors.

Section 390.20 of the proposed Criminal Procedure Law clarifies the law as to the types of cases in which the court is required to have a pre-sentence report. In short, a pre-sentence report is to be required in any case where a person is convicted of a felony; or where a person is convicted of a misdemeanor and a sentence of probation, a reformatory sentence, a term in excess of 90 days, or consecutive sentences for terms aggregating more than 90 days, is imposed. Additionally, the court in its discretion may order a report in any other case. Subdivision 1, although new in form, codifies the virtually uniform practice of requiring a pre-sentence investigation and report before imposing sentence for a felony. Subdivision 2(a) restates the requirement in former Penal Law Section 2188 which had provided that the court could not place a person on probation or, in the case of a felony, suspend sentence without having received a pre-sentence report. The remaining 3 subdivisions of the new section are derived from Code Section 931 which states that probation officers shall investigate and report to the court "when directed by the court" and that the court shall have such information prior to sentence.

This new section should not be approved insofar as it mandates that a pre-sentence report be required in every felony case. While as a general rule, a court should not impose sentence for a felony without a pre-sentence report, there are many occasions when

such a report is unnecessary and would constitute a waste of energy, time and resources. The statute should provide only that a pre-sentence report is required if requested by the defendant, leaving the judge free in all other instances to order one if in his discretion he deems it necessary.

14. We recommend modification of section 390.50 so as to provide for disclosure to the defense of the presentence report.

Section 390.50—Confidentiality of Pre-Sentence Reports and Memoranda

This section continues the present practice of permitting the court to keep confidential any communication made to it in connection with the question on sentence. CCP §931(2).

This section should be disapproved. The issue of confidentiality has been widely debated and is perhaps the most serious aspect of the sentencing proceeding. While the Supreme Court has yet to hold that the Constitution requires disclosure, many state legislatures and courts have granted that right on considerations of fundamental fairness. Ala. Code, Tit. 42, S. 23 (1959); Minn. Stat. Ann. S. 609.115(4) (1965); Va. Code, S. 53-278.1 (1967); Ariz. Rev. Stat. Ann., R. Crim. P. 336 (1956); Idaho Code Ann. Secs. 10-2515, 19-2516 (Supp. 1965); N.D. Cent. Code, Secs. 29-26-17, 18, 19 (1965); Okla. Stat. Ann., Tit. 22, S. 973 (1961); Ore. Rev. Stat. S. 137-080-.110 (Supp. 1965); *State* v. *Harmon,* 147 Conn. 125, 157 A. 2d 594, 596 (1960); *Driver* v. *State,* 201 Md. 25, 92 A. 2d 570, 573 (1952); *State* v. *Pope,* 257 N.C. 326, 126 S.E. 2d 126 (1962).

Most recently, in an extensive and thorough opinion, the New Jersey Supreme Court overruled past

practices and held that disclosure was required as a matter of rudimentary fairness apart from constitutional requirements. *State* v. *Kunz,* — N.J. —, (December 16, 1969).

In its decision, the New Jersey court put to rest all the arguments that have long been uttered in favor of non-disclosure. It pointed out that apprehensions of sources of information drying up have not materialized in the jurisdictions which have provided for disclosure; it concluded that not only would disclosure not protract proceedings, but when coupled with a pre-sentence conference (which the proposed CPL provides for) matters would be expedited, and in any event, sentencing was so critical that extensive care devoted to it was essential. The court also doubted that disclosure would adversely affect the defendant's rehabilitative possibilities.

The court further pointed out that full disclosure of the contents of the probation report was inextricably intertwined with the defendant's right to the effective assistance of counsel at sentencing and was even more important in a jurisdiction such as New Jersey which provided for appellate review of sentencing. Intermediate appellate courts in New York have similar powers of review. However, under present practice, without disclosure and discussion of the contents of the probation report, there is no meaningful record upon which to appeal the sentenc-in gissue in the vast majority of cases.

In the background of the argument for disclosure is the Supreme Court decision in *Townsend* v. *Burke,* 334 U.S. 447 (1947) which held that it was a denial of due process to sentence a defendant upon erroneous information. Without disclosure a defendant's right to be protected from such an occurrence is purely fortuitous and depends upon such error being disclosed inadvertently by the sentencing court.

As noted by the New Jersey Supreme Court, the scholarship on the subject is vastly in favor of disclosure and the American Bar Association Report on Sentencing Alternatives and Procedures has concluded that disclosure should be required.

Thus, the CPL provision which merely perpetuates the status quo is antiquated and should not be frozen into a new codification subject only to excision upon grounds of unconstitutionality.

Section 390.60—Copy of Reports to Accompany Defendant Sentenced to Imprisonment

This new section restates existing law now in the Code of Criminal Procedure Sections 931(1), 943 and in the Correction Law Section 601.

This section cannot be approved in its present form because it is related to the previous section concerning confidentiality of probation reports. Should that section be rewritten in accordance with our views favoring mandatory disclosure, it would have to provide for the excision of all matter contested by defense counsel and not relied upon by the court for that reason.

Article 440

Post-judgment Motions

15. We recommend expansion of the grounds for summary refusal to grant a post-conviction hearing to include instances where an essential allegation of fact is contrary to the recorded facts or where there is no reasonable probability that a defendant's uncorroborated allegation is true.

With respect to the motion to vacate judgment, §440.30(4)(c) provides that the court may deny the motion without a hearing if "An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof." Thus, the bill would codify the test established in *People* v. *Richetti*, 302 N.Y. 290, 296-297 (1951). However, the bill, despite its otherwise excellent provisions on the motion to vacate, does not incorporate another test, also suggested in *Richetti*, and subsequently announced in *People* v. *White*, 309 N.Y. 636, 640-641 (1956):

> "Bare allegations not confirmed by the recorded facts and contrary to the conduct of the defendant and his attorney, are insufficient in law to warrant the granting of a hearing. The defendant is not entitled to a hearing on charges lacking factual support. Due process does not require a court to accept every sworn alegation as true. Many sworn allegations are palpably untrue. (*Taylor* v. *Alabama*, 335 U.S. 134.) . . . "We have stated 'that Federal due process requires no trial if the State courts be convinced, *on the record*, that there is no reasonable probability at all, that defendant's averments are true.' (*People* v. *Richetti*, *supra*, pp. 295-296.) . . ."

Thus, *White* tended to restore to the courts a degree of discretion that *Richetti* had seemingly removed. In *White* the Court appeared willing to recognize that the extraordinary writ of coram nobis was being abused by a growing number of petitioners who were subjecting the courts to a continuous tide of patently false and frivolous coram nobis petitions, that in fact petitioners were constantly attempting to tailor the facts of their cases to new or newly discovered decisions of the courts, and that at the very least petitioners seek hearings to gain a temporary respite from the routine of state prison. Accordingly, *White* indicated to the courts that even though a petition may state a claim normally cognizable by coram nobis, a hearing could be denied, if on the records before the court, there was "no reasonable probability" of truthfulness, or conversely, that the record "convincingly" demonstrated the falsity of the claim.

The sound rationale underlying *White* has been recognized by the federal courts. The Supreme Court in *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962), while granting Machibroda a post-conviction hearing, held that its decision was

> "not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute [28 U.S.C. 2255] does not strip the district courts of all discretion to exercise their common sense." [See also *United States ex rel. Rambert* v. *New York*, 358 F. 2d 715, 716-7 (2 Cir. 1966); *Young Hee Choy* v. *United States*, 344 F. 2d 126 (9th Cir. 1965), *cert. denied* 382 U.S. 871 (1965); *United States* v. *Orlando*, 327 F. 2d 185 (6th Cir. 1964) and cases cited therein, *cert. denied* 379 U.S. 825 (1964); *Malone* v. *United States*, 299 F. 2d 254 (6th Cir. 1962); *cert. denied* 371 U.S. (1962); *United States* v. *McNicholas*, 298 F. 2d 914, 916 (4th Cir. 1962), *cert. denied* 369 U.S. 878 (1962)].

The *White* test is a valuable safety valve, permitting the lower courts to deny hearings even though the sworn allegations in the petitions are not conclusively refuted by unquestionable documentary proof, in cases where the allegations are unsupported, and it is clear to everyone that the defendant's allegations are unworthy of belief. The *White* test adds beneficial, necessary flexibility to the rigid *Richetti* test, and should not be effectively abolished by the Criminal Procedure Law. There are many cases in which a petitioner's claim is not indisputably controverted by documentary evidence, but the lower court is satisfied upon the petition and the entire record that there is no reasonable probability that the petition is true. A *coram nobis* hearing is not a device to be invoked by the utterance of certain magical words, even though they are under oath. Before a petition or, under the new Criminal Procedure Law, a motion to vacate judgment, should merit the further expenditure of public resources in the form of a hearing, the trial court should have the discretion to determine not simply whether the claim is cognizable by a post-conviction motion, but further, whether the claim possesses "some probability of verity." *Malone* v. *United States*, 299 F. 2d 254 (6th Cir. 1962).

The provisions of Section 440.30, read as a whole, might also be construed as requiring a hearing on sworn allegations of the defendant alone, even if readily available substantiating proof is not pre-

sented, and its absence is unexplained. However, *People* v. *Scott,* 10 N.Y. 2d, 380 (1961) has been construed to permit a court, in its discretion, to deny a hearing on a claim of sentence promise conveyed by the attorney, if no affidavit from the attorney is supplied, and its absence is not explained. See, *e.g., People* v. *Withridge,* — A.D. 2d — (2d Dept. 1969), N.Y.L.J., Nov. 13, 1969, p. 15, col. 1. The 1969 bill appears to remove that discretion.

Accordingly, we recommend that §440.30 be amended as follows:

> *"(d) An allegation of fact essential to support the motion is contrary to the recorded facts, or rests entirely on the defendant's affidavit, and there is no reasonable probability that the allegation of fact is true."*

Article 450

Appeals

16. We recommend the elimination of the section providing a separate appeal from sentence (§450.10-2) because such appeals should be included in the appeal from judgment.

An appeal from sentence may be taken by the defendant from the initial sentence; a resentence following the granting of the People's motion to set aside an illegal sentence; or the sentence imposed after the revocation of probation or conditional discharge.

Upon such appeal the defendant may claim that the sentence is harsh, excessive, or invalid as a matter of law. The assertion of legal invalidity includes claims that probation or conditional discharge had been "improperly" revoked and that there had been an erroneous determination that defendant had a valid conviction for a prior offense.

We believe that the appeal from sentence provision (450.10-2) is in part unnecessary and in part misleading and should be modified. The staff comment to the comparable section (230.10) in the 1967 Study Bill states that since harshness or illegality of sentence may be reviewed upon the appeal from the judgment itself [450.10(1)], the appeal-from-sentence provision will be rarely invoked. It seems to us that this section is a trap for the unwary or unsophisticated defendant or counsel. In effect what it does is restrict the defendant to his one assignment of error, a principle foreign to New York law and falling into disrepute elsewhere. The creation of this restrictive appeal would serve to prevent appellate review in those cases where the trial, pre-trial, or

pleading errors are unknown to the defendant, who, not realizing what he is giving up, takes an appeal against sentence only. The most glaring example of when an appeal from the sentence can turn into an appeal against the conviction is in the guilty plea cases. e.g., *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *People* v. *Serrano*, 15 N.Y. 2d 304 (1964); United *States* v. *Steele*, 413 F. 2d 967 (2d Cir., 1969).

All of those cases started out as appeals against an allegedly illegal or excessive sentence. Only in the appellate court was it for the first time urged that the conviction (i.e., plea) was invalid. Had the defendants in those cases taken their appeals under a provision comparable to sec. 450.10-2, it is likely their convictions would have been immune from direct appellate review.

The 1967 staff comment states that the appeal from sentence provision is intended to clearly permit the appeal from the sentence imposed upon resentence.* We think this intent should be spelled out by limiting section 450.10-2 to *re*sentence and not by the overbroad provision now in the Bill.

17. We recommend the deletion of the section allowing the defendant the right to appeal from an order granting the people's motion to set aside an illegal sentence (§450.10-5) since the order setting aside the sentence can be adequately reviewed after the defendant is resentenced.

Section 450.10(5) gives the defendant the right to appeal from an order granting the People's motion

* Existing law on this is already clearly to the effect that a resentence results in an "amended judgment" from which an appeal can be taken bringing up for review only those issues relating to the resentence. *People* v. *Williams*, 6 N.Y. 2d 193 (1964). The design of the CPL is such that a 'resentence' is characterized neither as an 'order,' 'judgment,' or 'amended judgment.' It is just a 'sentence' and is appealable as such.

to set aside an illegal sentence. The defendant also has the right to appeal from the resentence itself. The CPL makes no attempt—perhaps consciously—to tie these two related actions together. It would appear that the CPL not only authorizes but perhaps requires separate appeals.

As a practical matter some defendants may file a notice of appeal from the order, wait for imposition of resentence, then file a second notice of appeal and consolidate the two appeals. Others may seek a stay of resentence while they litigate the correctness of the order, and others may not realize that a notice of appeal has to be filed from the order itself, thinking the challenge to the underlying order can be raised on appeal from the ultimate sentence.

However we look at it, the dual appeal provision is an unnecessary and complicating process. There is no greater need for a defendant to appeal from the order setting aside an illegal sentence than there is for a defendant to appeal from a verdict before imposition of sentence. Subsection 5 should be eliminated but the appeal from the resentence should also bring up for review the underlying order vacating the prior sentence. See, e.g., *United States* v. *Nagelberg*, 413 F. 2d 708 (2d Cir., 1969); *People* v. *Williams*, 6 N.Y. 2d 193 (1964); *People* v. *Ronald W.*, 21 N.Y. 2d 74 (1968).

18. We recommend the deletion of the section granting a defendant an appeal of right from the denial of a post-conviction motion (§450.10-3), substituting therefor a new section permitting such appeal only upon the granting of permission by the trial court or a judge of the reviewing court.

The motion to vacate a judgment, prescribed in §440.10 of the proposed Criminal Procedure Law, is

an omnibus post-conviction motion combining the present coram nobis motion with some of the scope of the present state habeas corpus applications. The motion to set aside sentence prescribed in §440.20 is similar to the present motion for re-sentence. Section 450.10 of the proposed Criminal Procedure Law, which sets forth the cases in which an appeal by a defendant to an intermediate appellate court is authorized, provides that an appeal may be taken as of right from an order denying such motions. It is unnecessary to require appellate review of every post-conviction proceeding, no matter how frivolous. The bill should be amended to require a certificate of probable cause to be issued by the lower court that denied the motion before an unsuccessful applicant on a motion to vacate judgment may appeal to an intermediate appellate court.

Approximately 50% of the criminal appeals in the Appellate Divisions, First and Second Departments involve post-conviction proceedings. If there were merit in a reasonable percentage of the petitioners' claims, the expenditure of resources for this would be justified, but most of the claims lack merit. In very few of these cases does the defendant gain ultimate victory. Too much time, talent and money are spent looking for the needle in the haystack—the case of injustice in which the defendant should be vindicated. There is no constitutional requirement for an appeal in every post-conviction proceeding, and indeed it was once the rule in this state that *no* appeal could be taken from an order granting or denying coram nobis relief. *People* v. *Gersewitz,* 294 N.Y. 163 (1945).

Since most post-conviction applicants are unrepresented by counsel until the appeal, it is reasonable to argue that it would be unfair to limit the right to

appeal unless the applicant is given counsel at the initial stage of his case. Undeniably, it makes more sense to transfer the assigned counsel resources which are now expended in the appellate divisions to the initial stage of the proceeding in the lower court, either when the petition is filed or when it is denied and application for leave to appeal is made. However, the large proportion of frivolous petitions filed in the lower courts indicates that the post-conviction motion to vacate should be subject to disposition without a requirement that counsel be assigned to represent the defendant.

The availability of legal assistance to post-conviction petitioners should be concentrated in the prisons before the motions are drafted. Conscientious, responsible counsel at the pre-filing stage can assist in the preparation of proper motion papers and dissuade prisoners from filing patently frivolous motions. Providing professional legal counsel to prisoners could assist the criminally convicted in the protection of their constitutional rights, and could reduce the number of frivolous and unprofessional motions that add to the congestion in the administration of justice. In New York State, the Mental Hygiene Program includes the availability of legal assistance to patients who are hospitalized for mental illness. The sane person should be entitled to the same aid. Overburdened judges, prosecutors and defense attorneys should be spared the onerous task of reviewing and responding to innumerable unprofessional applications for post-conviction relief.

In any event, as a separate matter the bill should be amended to remove the provisions for an absolute right of appeal, and require a certificate of probable cause.

The procedure which we recommend is similar to that which has worked effectively in the federal courts since 1948. (28 U.S. Code §2253). In essence, under the federal practice, a petitioner for post-conviction relief who has had his application denied has no right to appeal the denial unless he first obtains a 'certificate of probable cause' either from the judge who denied the petition or from a circuit judge. The certificate must be first sought from the trial judge and, if denied, the application may be renewed by motion to the appellate court.

The advantage of such a procedure are many. By removing, what we estimate to be almost 250 frivolous appeals from the appellate calendars of the appellate divisions, those already overburdened courts, and prosecutors and defenders will have more time to devote to the more substantial cases.

By adopting the federal practice of summary evaluation, upon a certificate motion, of the merits of a proposed appeal, the federal courts have struck a reasonable compromise between the arbitrary non-review embodied in the former New York rule (*People* v. *Gersewitz, supra*) and the wasteful unlimited review of the present New York law.

19. We recommend abolition of the direct appeal to the Court of Appeals in the case of a post-conviction motion brought by a defendant under a commuted sentence of death (§450.70) and the re-routing of the appeal to the appellate division.

Section 450.70 provides for direct appeal of right to the Court of Appeals from a judgment including a sentence of death and from denial of defendant's section 440 motions to vacate the judgment or sentence of death. Upon such an appeal the clerk is

required to print or otherwise duplicate the record on appeal (Sec. 460.70-3).

Under existing law a defendant seeking to appeal a coram nobis denial must first seek a CCP 520 certificate allowing an appeal to the Court of Appeals, just as would any defendant who has had his coram nobis denial affirmed by the Appellate Division. This has resulted in the anomalous situation where a non-capital defendant has one appeal of right to the appellate division plus the discretionary further appeal to the Court of Appeals, but the capital defendant has *no* appeal of right to any court from his coram nobis denial.

The proposed CPL provision giving an appeal of right to the capital defendant who has been denied his coram nobis type section 440 motion very well may be required by the equal protection clause.*

The difficulty, not adequately provided for by the CPL is that under the present and proposed law "a judgment including a sentence of death" also includes a commuted sentence of death (See, *People* v. *Brabson,* 28 A.D. 2d 989 [1st Dep't., 1967]).* As such, an appeal from a section 440 denial will go directly to the Court of Appeals of right and upon a printed record. There are presently a considerable number of prisoners held under commuted sentences of death. Experience has taught, that as a class, these

* The complete elimination of appeals of right from the denial of sec. 440 applications for all defendants would obviate any equal protection argument. Compare with 28 U.S.C. sec. 2253 which provides that there shall be no appeal of right in federal habeas corpus proceedings. We have recommended doing away altogether with the appeal of right from the denial of a section 440 application. If that recommendation is adopted then conforming changes would be required here.

* We understand that there are several cases now pending in the Court of Appeals which may involve reevaluation of the correctness of the *Brabson* decision (*People* v. *Pereira* & *Cruz*; *People* v. *Terry*).

are the most litigious writ-writers in the prison system. In doing away with the present unfair, and probably illegal, limitation on appeal the CPL has created an equally undesirable situation by automatically dumping these cases onto the already overloaded Court of Appeals calendar.

We believe the notion that a commuted judgment of death remains a judgment of death for all purposes but execution is one which can and should be modified to prevent the unpalatable choice between denying one class of defendants an appeal of right or overloading the Court of Appeals with direct appeals.

The only substantial argument against rerouting these cases into the Appellate Division is that the appeal from the 440 denial should go to the court of appeals as this was the court which initially heard the appeal from the judgment. This argument has a superficial attraction in that the Court of Appeals will have available its confidential case reports and there will be no problem of a lower court reviewing a challenge to a conviction already affirmed by the highest court in the state.

However by a parity of reasoning every coram nobis type application would have to be made directly to the highest court which had heard the case, for if a judgment had been affirmed by an appellate court the lower court should not disturb it.* Similarly, if the Court of Appeals had sustained the conviction, by either reversing or affirming the appellate division, it could be said with equal force that the appeal from the section 440 motion should go directly to the Court of Appeals, rther than the Appellate Division.

* Indeed it appears that in the dark past, common law coram nobis proceedings did commence in the appellate court.

In sum then, we agree with the proposal to give a death judgment defendant the same status with respect to an appeal of right on collateral attack held by non-capital defendants. However we would modify the definition of a "judgment of death" by a provision making a commutation of sentence directly affect the judgment so that the judgment is no longer treated as a judgment of death.**

20. We recommend the deletion of the provision giving the people the right to appeal from a trial order of dismissal (§450.20-2).

The only controversial provision in CPL 450.20 is that relating to the allowance of a people's appeal from trial orders of dismissal.

A trial order of dismissal must be based upon the trial court's finding that the evidence adduced at trial is legally insufficient to sustain the accusatory instrument (or a count thereof) or some lesser included offense (§290.10). The people's appeal may be based upon the ground that the evidence was legally sufficient *or*, although insufficient, the evidence would have been sufficient but for an erroneous trial ruling which resulted in the exclusion of evidence.

The argument advanced in support of the proposed change is, essentially, that a defendant should not receive the windfall benefit of an unreviewable dismissal flowing from the trial judge's erroneous legal reasoning. The superficial appeal of this approach is offset by a number of factors.

** Because the State Constitution (Art. 6, sec. 7) requires an appeal be to the court of appeals, ". . . directly from a court of original jurisdiction where the judgment is of death . . ." it appears doubtful that the appellate division could be given jurisdiction without the 'judgment' being directly affected by the commutation.

First, it is of dubious constitutional validity and may run afoul of the double jeopardy provision of the Constitution; Second, the situations contemplated by the section will be extremely rare; and Third, in all, or practically all such situations the case would have resulted in an acquittal had the case gone to the jury.

In the past, numerous Bills have been submitted to, and rejected by, the Legislature which would have given the people the right to appeal from dismissals such as involved here.*

Although some of us are of the opinion that the proposed section is unconstitutional, or, because of the prior legislative rejections, should not be submitted as part of a package bill, we base our objection upon a broader ground.

We believe the proposed section is unwise and should not be adopted without a clear showing that such a provision is necessary to the proper administration of justice. The isolated instance of a possibly erroneous dismissal is an insufficient showing to require the abandonment of the basic and traditional concept of the finality of a dismissal after the people have been given the opportunity to prove a legally sufficient case.

21. We recommend revision of the sections defining the scope of review by the Court of Appeals to the end that the Court of Appeals, in its discretion, may review the correctness of any dispositive legal determination made by an intermediate appellate court.

The principal defect of the appeals provisions of the proposed CPL is that it starts with the existing

* See, e.g., Our Prior Legislative Bulletins: 1957 Bull. No. 74; 1958 Bull. No. 52; 1961 Bull. Nos. 9, and 37.

law and tries to rationalize it, when what is really needed is a true 'revision' of concepts and approach.

The fundamental problem with existing law is in the definitions of "the law" and "question of law." Under existing cases a question of law arises only when there has been a ruling by a trial court. From such a ruling the losing party can urge the incorrectness of the ruling as a question of law to the intermediate appellate court. The disposition by that appellate court is subject to further review by the Court of Appeals because a question of law is involved.*

However if there has been no objection in the trial court, and hence no ruling, no question of law is presented.

> Example 1: During the course of trial the people offer into evidence a document under theory X. The court admits the document.
>
> On appeal the appellate division determines that there is no such theory as X, or, if there is, the theory is inapplicable.

If an objection was taken at trial the Appellate Division may reverse 'on the law' if it finds the error deprived the defendant of a fair trial. Such a reversal would be reviewable by the Court of Appeals on the question of law relating to the admissibility of the document.

However if no objection to the admission of the document was made in the trial court the Appellate Division may reverse not 'on the law,' but only "as a matter of discretion and in the interests of justice." The following examples are illustrative:

* Under Article 6, §7 of the N.Y. Constitution the court of appeals, except in capital cases, may only review "questions of law."

Example 2: If the Appellate Division finds the document erroneously admitted and reverses the conviction, the people may not appeal to the Court of Appeals in order to urge the document was properly offered and admitted.

Example 3: If the Appellate Division finds the document was properly admitted and affirms, the defendant cannot appeal to the Court of Appeals in order to urge the document was inadmissible.

In neither example is there any reason why the Court of Appeals should lack the power to determine the correctness of the intermediate appellate court's determination with respect to the legal question presented by the appellate challenge to the admissibility of the document.

The situation is compounded by the third type of reversal; "on the facts", which likewise precludes review by the Court of Appeals.

Even if the Appellate Division erroneously rules upon a question 'of law', that determination is insulated from Court of Appeals review if the complete appellate division action is coupled with a question of fact.

Example 4: If objection had been taken to the admissibility of the document in Example 1, and the intermediate appellate court, after finding error in its admission, determines that the conviction is against the weight of the remaining evidence.

* §450.90-2(2) provides the people may obtain leave to appeal to the court of appeals *only* if the intermediate appellate court's order "expressly states the determination of reversal or modification to be on the law only."

§470.15 lists three grounds for reversal or modification: on the law, on the facts, and as a matter of discretion in the interest of justice.

Such a reversal is "on the law and on the facts" (See, 470.15-5) and may not be reviewed by the Court of Appeals because it is not 'only on the law' [§450.90-2(a)].

Numerous other examples could be cited where Court of Appeals review of possibly dispositive legal questions is precluded because the intermediate appellate court based its ultimate order upon multiple grounds or even if the court erroneously determines that its decision rested on a question of fact or interests of justice when in reality it rested upon a question of law.

We believe the distinctions between "law," "facts," and "interests of justice" are illusory ones, and almost any decision must involve an interplay of all three types of determination. Nor is it to be overlooked that the Commission has refused to define these terms, leaving it to Section 417.15 to give a few examples of each type of disposition.

We propose that the scope of review by the Court of Appeals should be substantially clarified and enlarged to include review of any legal issue presented by the case which affected the outcome in the intermediate appellate court. In this connection it should be noted that broadening the review by the court does not necessarily work an increase in caseload since the court itself can insulate itself from unwarranted appeals by the denial of leave to appeal.

Article 710

Motion to Suppress Evidence

Article 710—Motion to Suppress Evidence

The proposed Article 710—motion to suppress evidence is an Omnibus suppression motion designed to codify in one statute, defendant's rights to suppress the following kinds of evidence: (1) tangible property allegedly obtained by means of unlawful search and seizure, (2) eavesdrop and wiretap evidence, (3) confessions and/or admissions alleged to have been made involuntarily, (4) leads and/or fruits obtained as a result of (1), (2) or (3) above, and (5) inadmissible identification testimony.

The Concept of the Omnibus Motion in General

This Omnibus motion became inevitable since the United States Supreme Court decided *Mapp* v. *Ohio,* 367 U.S. 643, in 1961. It was not until April 29, Procedure became effective providing for suppres-1962 that Section 813c of the Code of Criminal sion of tangible property allegedly seized unlawfully.

After *Jackson* v. *Denno,* 378 U.S. 368 decided on June 22, 1964, and related cases including *People* v. *Huntley,* 15 N.Y. 2d 72 (1965), Section 813g of the Code of Criminal Procedure became effective July 16, 1965, providing for the suppression of confessions and/or admissions alleged to have been obtained involuntarily.

There is no express statutory procedure at present for the suppression of allegedly inadmissible eavesdrop and wire-tap evidence or improper identification testimony, in criminal cases.

Some Highlights of Proposed Article 710
Motion to Suppress Evidence

1. The new statute perpetuates the traditional requirement of standing. 710.10(5) and 710.20(b).

2. The motion must be made only *after the commencement of a criminal action,* in which the evidence is allegedly about to be offered. 710.40(1).

3. The motion papers must state the grounds of the motion, and must contain sworn allegations of fact supporting such grounds, although such allegations need not be made by the defendant; the allegations may be based upon personal knowledge of the deponent or upon information and belief providing the sources of such information and the grounds of such belief are stated. 710.60(1).

4. The people *may* file an answer denying or admitting any/or all of the allegations of the defendant's moving papers. 710.60(1).

5. The motion may be summarily denied if the motion papers do not allege a ground constituting a legal basis for the motion, or the sworn allegations of fact do not as a matter of law support the ground alleged. However, no summary denial of the motion can be made in the case of an alleged involuntarily made confession or admission. 710.60(3).

6. The motion is the exclusive method of challenging the admissibility of evidence upon the grounds specified in Section 710.20 and failure to make the motion before or in the course of a criminal action operates as a waiver with the exception of a confession and/or admission alleged to be involuntarily made. In the case of confessions and admissions the question of voluntariness is always left to the trier of the facts regardless of whether or not

an adverse determination by the court on a pretrial motion to suppress have already been made. 710.70(3).

22. We recommend modification of section 710.10-5 to broaden the standing requirement for a motion to suppress evidence so as to give standing to all persons where the unlawful police conduct has been wilfull and egregious.

Section 710.10(5) provides that standing to make the motion ". . . includes, but is in no wise limited to, an 'aggrieved person' as defined in subdivision two of section forty-five hundred six in the Civil Practices Law and Rules." Except in the area of electronic surveillance, wherein it provides in effect that one must be the victim of an intrusion to have standing, CPLR 4506 does not deal with the requirements for standing. This deficiency coupled with the uncertainty created by the use in the proposed statute of the language "in no wise limited to" leads us to disapprove the section.

Standing has been a much litigated and controversial question. See *Standards Relation to Electronic Surveillance,* ABA Project on Minimum Standards for Criminal Justice, §2.3 pp. 116-18 (1968). Basically, the issue involves the balancing of the respective deterrence values of the traditional rule limiting suppression to the victim of an unlawful intrusion, and the California rule which excludes all evidence derived by virtue of an infringement, irrespective of whether the applicant is a victim or not, against the desirability of aborting otherwise meritorious prosecutions. However, recent cases in the United States Supreme Court reaffirmed the traditional rule—that one must be a victim to have the requisite standing—even to the point of

holding that a co-defendant in a conspiracy case has no standing to move the exclusion of evidence obtained as a result of a violation of the defendant's constitutional rights. See e.g. *Alderman* v. *United States,* 394 U.S. 165 (1969). Moreover, the rule in New York as forged by the courts is clear in its limitation of standing to the victims of unlawful intrusions. See *People* v. *Morhouse,* 21 N.Y. 2d 66 (1967).

Accordingly, unless the legislation proposes to modify what now appears to be settled law, there is no reason to leave the question appear to be open as does the statute. If there is a desire on the part of the legislature to depart from the established rule, the proposed section should reflect the changes intended.

The Committee recommends that the section be redrafted to expand the conventional rule, and accord standing to individuals other than those traditionally considered to be aggrieved where the conduct of the authorities is shocking to the conscience of the court (cf., *Rochin* v. *California,* 342 U.S. 165 [1952]). By so expanding the definition of "aggrieved person," the deterence value of the exclusionary rule will be enhanced without an undue negative effect on the prosecutorial function.

23. We recommend that broader provision be made in section 710.20-3 (with conforming changes in section 60.45-2) allowing for the suppression of statements given to non-law enforcement officers acting under color of authority granted by the General Business Law.

Section 710.20(3) provides for suppression of involuntary statements made to public servants engaged in "law enforcement activities" or to persons

"acting under [their] direction or in cooperation with [them]."

The Committee is of the opinion that this section should be redrafted to include within its purview licensed private police and private detectives as well as owners or employees of "mercantile establishments" who exercise the statutory rights to detain and interrogate under General Business Law, §218. In the instance of a person being detained pursuant to section 218 any interrogation is clearly custodial interrogation under color of law. Apart from the fact such that interrogation is custodial, the secret interrogation by civilians who are perhaps unconcerned with the rights of individuals may well result in some of the most egregious infringements of the rights protected by judicial decisions. We also believe and recommend that private detectives and investigators, licensed under General Business Law, §70 *et seq.*, should be required to comply with the same interrogation and seizure standards as are applicable to "a public servant engaged in law enforcement activity."

These private police officers are licensed by the state, allowed to carry guns and badges and wear uniforms. Certainly their conduct can be no less intimidating than that of a regular law enforcement officer. Confessions and evidence obtained from persons by such private officers should be admitted in evidence only if comporting with the standards laid down for regular law enforcement personnel.

24. We recommend more explicit language delimiting the circumstances under which a prosecutor's failure to give pre-trial notice of his intention to use confession or identification evidence may be excused.

Section 710.30(2) requires the prosecutor in ad-

vance of trial to furnish notice of his intention to utilize confession evidence or identification evidence on the trial except that "for good cause shown . . . the court may permit the people to serve such notice during trial."

The Committee approves the good cause shown standard. However, the Committee is of the opinion that good cause shown should be specifically delimited to those situations where such evidence was either unknown to the prosecution or where some unforseeable circumstance or an otherwise compelling fact prevented the people from giving such notice. The committee refers to Section 170.70(2) as an example of limiting language for the standard of good cause. Unless good cause is so limited, it may well be that the protection afforded defendant would evaporate via a liberal interpretation by the courts of that phrase.

Section 710.40-3—When a Motion to Suppress Is Made and Determined

With respect to Section 710.40(3), the proposed CPL provides that the omnibus motion *must* be heard at trial, rather than pre-trial, when the people so request in misdemeanor prosecutions.

Since this committee has not sufficiently explored the ramifications of this proposed change in existing law, we do not at this time make any recommendations with respect to approval or disapproval.

We note however that there are serious reservations concerning the wisdom and practicality of the proposed change.

First: In counties outside of New York City where there are jury trials available for misdemeanor cases, the proposed section might result in

an increase in trials, since a defendant will be unable to litigate the suppression question separately. (It has been the overwhelming experience of both the prosecution and defense attorneys on this committee, that where a motion to suppress is denied, the vast majority of defendants then plead guilty.)

Second: In New York City, the proposed change will result in the undesirable situation whereby the trier of guilt or innocence will also be hearing evidence which would be inadmissible on the merits.

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