Legal Aid Memo re CPL *

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Memorandum for the Commission on Revision of the Penal Law and Criminal Code: Comments on the 1968 Study Bill for the proposed New York Criminal Procedure Law

This memorandum is submitted in accordance with the undertaking of Anthony F. Marra and Edward Carr, Jr., at the Commission hearings in December 1968 upon the proposed new Criminal Procedure Law. The comments and suggestions represent the views of the Legal Aid staff on the criminal side, in most instances views which had been expressed to the Commission in February 1968 at the hearings upon the previous draft bill. We would be happy to discuss the recommendations with the Commission and its staff.

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Article 15 Statute of Limitations

§15.10(4)(a) This provision tolls the period of limitations for the time when a defendant is continuously outside the state or when his whereabouts were unknown or unascertainable.

We fail to see what bearing the availability of the defendant has upon the question whether the People should be required to commence the prosecution within the normal period of limitations.

Smith v. Hoey

If the whereabouts of a defendant are unknown, no detriment occurs to the People by prompt commencement of the prosecution.

With respect to the provision tolling the statute while the defendant is continuously without the state, we regard this provision as unconscionable. The main thrust of this provision would be with respect to persons incarcerated in other jurisdictions. Under the interstate compact (Present Code, §669-b; Proposed CPL §320.20) such persons have the right to demand prompt disposition of pending criminal charges 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, subsection 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 subsection a prosecutor can delay the commencement of a prosecution up to ten years from the commission of a felony and seven years after the commission of a misdemeanor.

Article 30 Rules of Evidence

§30.15 - Failure to testify. This section states that the failure of a defendant to testify is not "in itself" a factor from which an unfavorable inference may be drawn. The term "in itself" suggests that an unfavorable inference might be drawn if the silence is coupled with some other unstated condition. If this is what is meant, then the statute would be patently unconstitutional. We see no reason for departing from the tried and true formulation of the rule: "No unfavorable inference may be drawn from the defendant's failure to testify".

§30.50(1)(2) Impeachment of One's Own Witness

This section would allow a party to call a witness with reason to believe that the witness will give unfavorable testimony and then impeach that witness by prior inconsistent statements. The only purpose for calling such a witness would be to place before the jury "for impeachment purposes only" a prior statement helpful to that party. A party could have no legitimate interest in calling an unfavorable witness solely for the purpose of impeaching him.

We have no objection, and indeed recommend, that the party calling a witness be allowed to impeach that witness upon a showing that after diligent preparation the witness' trial testimony was a surprise. Any lesser requirement would permit a cynical kind of gamesmanship in a criminal trial.

§30.60 Prior Convictions

One of the most difficult policy problems of criminal procedure involves the extent to which a prosecutor may examine a testifying defendant as to his prior criminal convictions. On the one hand, the fear that exposure of a past conviction would strongly prejudice the jury keeps many defendants from the witness stand, thereby defeating the free flow of testimony to the jury. On the other hand certain kinds of criminal convictions certainly would be relevant to the credibility of a defendant-witness.

The proposed section, declaratory of existing law, regrettably fails to balance these competing interests or take into account the current learning and common experience of prosecutors and defense counsel alike. See, American Law Institute, Model Code of Evidence, Rule 106; Uniform Rule of Evidence, Rule 21.

We urge reconsideration of this section and elimination of the admissibility of those convictions which are so remote in time and are of such a character as to have no legitimate bearing upon the purpose for which they would be received.

§30.70 Accomplice Testimony

The proposed section would do away with the requirement in present Code §399 that an accomplice's testimony must be corroborated and substitutes therefor a requirement that the jury be instructed that such testimony is "inherently suspect".

The rule requiring corroboration of accomplice's testimony is a sound one; it recognizes that a person who has committed a crime may be all too willing to point the finger of guilt at anyone in return for an offer of immunity or more lenient treatment which flows from his testimony.

We believe it shocking that there should be a rule of

law which allows a defendant to be found guilty 'beyond a reasonable doubt' solely upon testimony which, as a matter of law, is 'inherently suspect'. Our experience with the operation of such a rule in the federal courts gives us every reason to urge that it not be adopted in New York.

Articles 50, 85 Pre-Trial Misdemeanor Procedures

The major shortcoming of our present system is the prolonged pre-trial imprisonment of accused persons who are ultimately found to be innocent or, if convicted have spent more time in jail prior to trial than the sentence which would be imposed. Apart from bail reform, the two ways of dealing with this problem are

(1) to speed up the pre-trial proceedings so as to offer an accused an almost immediate trial; or,

(2) to condition pre-trial confinement upon judicial evaluation of the sufficiency of the People's case.

The proposed CPL fails to deal with this problem, not only does it remove the present barely adequate palliatives but it gives legislative approval to prolonged pre-trial incarceration with no judicial intervention.

We reluctantly assume that the present "system" of prosecution and trial cannot be adopted to offer all misdemeanor defendants an immediate trial.

If we accept this assumption, then there must be some meaningful preliminary judicial screening of the sufficiency of the case against the unbailed defendant. Under existing law, this screening takes place by examination of the sufficiency of complaint and by the preliminary hearing. The proposed CPL does away with the preliminary hearing altogether in misdemeanor cases and makes a slim instrument of the new misdemeanor complaint.

We believe that as a bare minimum the new procedure law must contain provisions guaranteeing without equivocation or qualification that no alleged misdemeanant may be

see 85.70 (only dif. is "good cause")

held in pre-trial confinement for more than a very short period (ideally 48 hours, certainly not more than 5 days) without a judicial screening of probable cause and legal sufficiency of the case against him. In default of such a trial or hearing, the defendant must be released.

It would be appropriate to include a provision allowing for a hearing to be continued upon proof by the prosecution of the temporary unavailability of an essential witness.

As to the unavailability of the victim or other essential deponent with respect to the preparation of the accusatory instrument, the misdemeanor complaint is satisfactory, but only to the extent that the complainant's affidavit shows that the essential deponent is physically unavailable. To the extent that the misdemeanor complaint allows a misdemeanant to be held for five days (or more) upon a concededly legally insufficient accusatory instrument, without requiring a showing of absolute necessity, it is gratuitously excessive.

Article 80 Fingerprints

In view of the widened practice of pre-trial fingerprinting directed by the proposed CPL, a provision requiring the return of prints after an acquittal or dismissal of charges is called for. Such a provision exists in the present Code (§552-a) and its deletion from the CPL is unexplained and unnoted in the Staff Comments. Our experience has shown us the importance of this action to many defendants. We also recommend that any delivery of prints to other agencies, such as the FBI, would be done with the understanding that such prints would be made available only for the purposes of law enforcement.

Article 90 Felony Complaint

§90.30(2) This subsection allows a local criminal court to conduct a hearing upon a felony complaint notwithstanding the fact that the defendant has waived a hearing and consented that the case be held for grand jury action.

The staff comment to the September 1967 draft states that this provision is designed to protect a defendant from the improvident act of his counsel who waives the

case to the grand jury. We believe that this solicitude is misplaced.

We should also note that pursuant to §355.10(b) the testimony adduced at such a hearing becomes preserved testimony which may be subsequently introduced at trial on the indictment.

While we agree that there should be a procedure for conditional examination of witnesses of doubtful future availability, Section 90.30(2), with its ostensible purpose of protecting defendants from their own lawyers, is not the way to go about it. Sections 350 and following make adequate provision for this need.

A conditional examination requires both notice to the defendant and opportunity for his counsel to prepare for the hearing. The procedure authorized by this Section would allow testimony to be taken at a time when counsel has just been retained or assigned and may be totally unprepared for a critical proceeding. If the section is not eliminated from the Code, it should provide for at least 48 hours notice of the hearing.

Article 95 Grand Jury

§95.30 rules of evidence, etc. Subsection (1) provides that the rules of evidence are applicable to grand jury proceedings. Subsections (2) and (3) provide that the district attorney is to rule upon the competency of witnesses (under Article 30) and that he is to advise the grand jury of the legal effect and significance of the evidence adduced.

The Staff comment to the September 1967 draft states:

> "Erroneous instructions by the district attorney would, of course, appear in the [Grand Jury] minutes and, hence, would to a certain extent be reviewable by the court upon a motion to dismiss the indictment" (see §110[1b,c], 110.30, 110.40)

Under Section 952-t of the present Code the duty of the grand jury stenographer is limited to the taking of

testimony only. The Distribution Table at p. 299 of the Study Bill indicates that §952-t is to be transferred to the Judiciary Law, however there is no indication that the section is to be amended to reflect the necessity of recording non-testimonial matter (such as rulings, instructions, and argument) made by the district attorney and which are subject to review upon a motion to dismiss.

We believe that 952-t, when transferred to the Judiciary Law should be amended to require the recording of all such matters by the stenographer.

§95.80 Release of defendant upon failure to indict promptly. This section provides that upon the failure to indict a defendant in detention who has been held more than 45 days upon a felony complaint, the defendant shall be released upon his own recognizance unless good cause is shown for the People's failure to indict.

We recognize that the problem of "how long is too long" to hold an unindicted defendant to some extent defies anything but the most arbitrary of solutions. However we are of the view the 45 days is per se too long.

Our view upon this is fortified by several factors. First, the principal reason for prolonged delay (other than that delay exempted by 'good cause') is that prosecutors just do not present their cases to the grand jury with any degree of diligence. If the indictment process were put upon a workmanlike basis, it should be the rare case that was not ready for indictment or "no bill" within ten working days.

A second factor making a shorter period desirable for those cases where there is not "good cause" for delay, is that under the CPL §90.30(7) the test for holding a defendant upon a felony complaint is only "reasonable cause," which permits the use in a felony hearing of testimony or evidence which would be inadmissible at trial. Under present practice there must be a judicial determination of a legally sufficient case upon competent evidence. Thus under the CPL a defendant could be held in custody upon substantially less showing than is presently required.

While we do not approve of the practice of holding defendants for the grand jury upon the minimal showing

authorized by §90.60(7), such practice requires a reappraisal and a tightening up of the permissible period in any grand jury delay not shown to be for good cause.

While there may be a number of other satisfactory solutions, including a period shorter than 45 days, we suggest the following:

1. A variable scale of time limitations based upon the seriousness of the offense alleged in the felony complaint (Eg., 35 days for a Class A felony; 25 days for Class B, etc.); and

2. Requiring the arraigning judge to fix an outside date within the cutoff period, based upon inquiry of the prosecutor as to the availability of witnesses. In fixing such a date, the arraigning judge will be familiar with both the complexity of the case and possibility of indictment, and thereby he can fix his time limit accordingly.

Article 100 Indictment

§100.20 Joinder of offenses. Subsection 2(a) and 2(b) permit joinder of two offenses in a single indictment (or consolidation of two indictments for trial) where the offenses are based upon the same conduct or where proof of one offense is material to the proof of the other. Such joinder is logical and necessary.

However subsections 2(c) and 2(d) permit joinder of separate and distinct offenses if both are offenses of similar legal character or if they both were joinable with a third offense.

We believe 2(c) and 2(d) are inimical to a fair trial and create a substantial risk of leading to an incorrect or unjust verdict.

For example, two robberies are committed six months apart in the same county. The two victims are shown the defendant in a line-up and identify the defendant as the perpetrator of the respective crimes. At trial the

identification of the defendant by the victims is attacked based upon the victims' limited capacity to observe the culprit, the suggestive nature of the line-up, etc. If these cases were tried completely separately, the jury would have to independently determine the worth of each identification. However at a consolidated trial the natural tendency must be that one identification will bolster the other. Thus two weak cases joined together might result in two convictions, whereas separate trials might result acquittals.

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

The September 1967 draft, in its subdivision 2(c) at least required that the two separate offenses be part of a common scheme or plan. Such a joinder would have a colorable legal basis. We would be in favor of that earlier version of 2(c), subject of course to the discretionary power of severance under §100.20(3).

However the change in 2(c) from the 1967 draft to the Study Bill creates a grave risk of unfairness with no commensurate virtue.

§105.50 Motion to Inspect and Dismiss Indictment for Legal Insufficiency

Subsection (2) The moving papers This subsection requires counsel to move upon affidavit to inspect the grand jury minutes, alleging that he has reasonable cause to believe that the evidence is insufficient. His assertion must be supported by affidavit setting forth "sworn allegations of fact supporting such claim."

We join with Chief Judge Fuld and former Presiding Justice Botein in being completely unable to understand how a defendant, or his counsel, is supposed to know the facts supporting his belief or guess that the sealed evidence before the Grand Jury was insufficient. As Justice Botein wrote (quoted in People v. Howell, 3 N.Y. 2d 672, at 680, dissenting opinion, Fuld, J.):

> "to demand any clearer showing would virtually require the defendant from extrinsic sources and without access to the minutes, not only to present

a reconstruction of the evidence before the Grand Jury, but to secure a certification of its faithfulness from the district attorney. Except in a bizarre situation... this is manifestly impossible."

Subsection 6 Appealability. Subsection 6 provides that there shall be no appellate review of the correctness of an order denying a motion to dismiss, when there has been a subsequent conviction upon legally sufficient evidence.

The Staff Comment to this provision, appearing under §110.30(6) of the September 1967 draft, states that this provision for non-reviewability is designed to work a change in a 'widely criticized principle of New York Law' which has been "regarded by many as shocking."

Clearly none of the judges of the Court of Appeals have so regarded this principle. When, in People v. Jackson, 18 N.Y. 2d 516 (1966), the Court of Appeals was asked to change this non-statutory principle to achieve the result sought by this proposed law, the Court unanimously answered that such a suggestion was "unthinkable" (18 N.Y. 2d at 520).

The Constitution of this State requires that no person be held to answer for a felony except upon a sufficient indictment validly obtained. There is no other ruling of constitutional significance which is insulated from appellate review. We believe that this State is and should be firmly committed to complete judicial review of the legal sufficienty of an indictment, whether the resulting judgment is based upon plea or verdict. Anything less subverts the integrity of the indictment process.

Article 115 The Plea

Although there are numerous statutory rules governing the procedures surrounding pre-trial, trial, and post-trial events, the proposed CPL is noteworthy for its absence of any procedural standard governing the manner of taking of a guilty plea. In this respect we believe the law is sorely deficient.

We strongly urge that as a bare minimum the record

of every guilty plea be required to show that:

1. the court has inquired on the record and is satisfied that the plea is knowingly and understandingly entered;

2. the plea is substantially in accord with the conduct of the defendant which is confessed in open court; or if the defendant refuses to acknowledge guilty conduct, he has been affirmatively advised by the Court of his right to trial to the court or jury;

3. the defendant has been specifically advised by the court of the grade of offense or offenses to which he has pleaded guilty and the maximum punishment therefore.

4. the defendant has been specifically advised by the court of any liability or exposure to punishment, custody, or rehabilitative treatment in additional or different from that provided in Penal Law, §70.00(2) or §70.15;

5. the court has specifically stated the terms of any promises, or the absence of the same, with respect to sentence and the defendant, his counsel, and the prosecutor have acknowledged the accuracy of this statement.

Article 130 Pre-Trial Notice of Defenses

§130.20 Notice of Alibi. This section restates 295-1 of the CCP in that it requires a defendant, upon demand of the People, to divulge any alibi defense and the names and addresses of his witnesses. Failure to supply this information within four days of the people's pre-trial demand may result in the exclusion of all alibi evidence.

We think this section is as bad as its predecessor.

By this provision the people are entitled to a discovery of key defense witnesses under penalty of depriving the defendant of the opportunity to use such witnesses.

While we might not object to a general rule requiring pre-trial disclosure of the names and addresses of all witnesses for both sides, we believe this one-sided discovery is unfair. If the present provision is to be retained, it should be coupled with a requirement that any interview of such a witness by the prosecutor must be preceded by notice to defense counsel, who should have an opportunity to attend.

Article 140

§140.20(1)(f) Challenging Jurors. We believe this section, authorizing the challenge for cause of a prospective juror who entertains conscientious scruples against the death penalty, is unconstitutional, at least insofar as the guilt finding process is concerned.

Article 155 Instructions to Jury

§155.10(2). We believe the requirement that the court charge with respect to the defendant's failure to testify only upon request of the defendant is salutory. However the nature of the charge to be given, as set forth in subdivision 2, is unnecessary and probably unconstitutional for the reasons indicated in our comments upon Section 30.15.

Sections 155.30 - 155.40. Although we note and regret the CPL's failure to require a ruling upon requests to charge prior to the summations of counsel, we believe it essential that the court, at the very least, announce prior to summations the counts and lesser charges which it will submit to the jury.

Apart from the fact that this would enable both sides to argue for or against the inclusion or exclusion of certain counts or charges, it would allow the prosecution and defense to focus their arguments upon those matters which the jury will be asked to resolve.

§170.10 Disposition of Defendant after Verdict. Subsection 2 provides that after verdict the court must

release the defendant on bail or recognizance or commit him pending sentence. §195.30 deals with fixing the time of sentence and generally leaves the time of sentence to the court's discretion.

In a number of instances, particularly those involving violations it is possible - and has happened in the past - the date of sentence for an unbailed defendant may be fixed beyond the maximum term of imprisonment. There should be provision inserted in §170.10 requiring release upon recognizance if the date for sentence would involve detention for a period longer than the sentence which might be imposed.

Article 220 Sentences of Imprisonment

§220.10 Changing Sentence. This section restates existing law which deprives a sentencing court of the power to change, suspend, or interrupt a sentence once service has commenced.

While we agree with the general principle, there are a number of instances where hardship and injustice may and have resulted from this restriction.

The most typical situation involves the defendant who has been out on bail pending appeal and, during the period of appeal prosecution materially mends his ways. If the defendant was immediately released on appeal bail, and thereby never commenced service of the sentence, under existing law and CPL §220.10, the court has the power to reconsider and modify the sentence any time prior to the defendant's surrender after the last appellate action. However if the defendant served as much as one day prior to his release on bail pending appeal, there is no way that the trial court can reconsider sentence.

In view of the delicate and difficult nature of sentencing we would think it appropriate that the trial court be allowed to retain limited jurisdiction to modify sentences of imprisonment.

Although Federal Rule of Criminal Procedure, Rule 35, allowing reduction of sentence up to 120 days after judgment or final appellate action is perhaps too broad, we believe it represents a valid and salutory principle.