ACADEMY OF THE JUDICIARY Thursday, January 16, 1969

1. Most judges recommended that the Penal Law contain more sentencing options. One judge recommended that when a reformatory sentence is imposed, the court should be authorized to recommend the period of incarceration before parole. Another judge recommended the development of the "half-way house" concept. The judges specifically recommended that the "split sentence" be authorized, e.g., six months in jail and then a certain number of years on probation.

2. Before a YO information is filed there should be a pre-pleading investigation in every case, i.e., there should be no mandatory YO treatment.

3. Most judges agree with the commission's proposal abolishing the so called investigative summons.

4. Where the court imposes a sentence of more than three months, there should be no absolute requirement of a pre sentence report in every case. The judges recommended requiring a pre sentence report only for first offenders or those with one prior conviction.

5. One judge recommended that every felony complaint arraignment should be in Supreme Court. Some judges noted that this proposal is unrealistic.

6. The New York City Criminal Court should have discretion to fix bail in all felony cases if the district attorney is present.

7. The violation of prostitution should be reclassified as a class B misdemeanor. Also, public health law secion 2300 should be reexamined.

8. All motions and requests for a three-judge bench should be made thirty days after arraignment.

9. The defendant should not have an option of a three judge bench in class B misdemeanor cases.

10. The judges recommended that the D.O.R. be statutorily authorized.

A. New York State Post-Judgment Remedies

In addition to the right of appeal from a judgment of conviction (meaning a conviction upon which sentence has been imposed), New York State provides the following post-judgment remedies to convicted defendants:

1. Coram nobis (motion to vacate a judgment of conviction in the nature of error coram nobis).

This motion, which must be made in the court of conviction, derives from case law (see Lyons v. Goldstein, 1943, 290 N.Y. 19) and has not been codified, although it is mentioned in provisions of the Code of Criminal Procedure dealing with appeals from orders denying or granting such motions (CCP §§ 517, 518[4]).

It is a rather broad remedy accommodating a variety of contentions, including claims that the judgment was procured by fraud on the part of the prosecutor, the court or some other public official; that perjured testimony was knowingly used at the trial by the prosecutor; that prejudicial error not appearing in the record occurred at or during trial, either inside or outside the courtroom; and that the defendant was deprived of any of a number of constitutional rights (chief of which, from a utility or practical standpoint) is the right to counsel.

An adverse determination (whether advise to the defendant or to the People) is appealable (CCP §§517, 518[4]).

2. Motion for a new trial on the ground of newly discovered evidence.

This motion, also made in the court of conviction, is provided by the Code of Criminal Procedure (§§465[7], 466). It labors under a statute of limitations, the requirement being that the motion be made not more than one year after judgment (CCP§466).

The motion requires a showing that new evidence has been discovered, since the trial resulting in the judgment, which could not have been produced by the defendant at the trial even with due diligence on his part; which is not "cumulative" in nature; and which, had it been produced at the trial, "would probably have changed the result" (§465[7]).

An order denying this motion is reviewable on an appeal from the judgment of conviction. If the latter has already been argued and the judgment affirmed, the order denying the motion may be reviewed by means of a reargument of the main appeal. If the time for taking an appeal from the judgment has expired, no appeal from the order denying the motion may be taken.

3. Motion for re-sentence.

This motion, similarly made by the defendant in the court of conviction, has not been codified but, by judicial construction, rests upon the inherent power of a court to correct an illegal sentence imposed by it. Its scope, therefore, is restricted to contentions

of illegality and does not embrace claims of harshness or excessiveness (People ex rel. Emanuel v. McCann, 1960, 7 N.Y. 2d 342, 345; People v. Stodesocki, 1963 20 App. Div. 2d 551). An adverse determination has been held not to be appealable by the defendant (People v. Stodesocki, supra).

4. Habeas corpus.

The writ of habeas corpus may be used in New York, by a prisoner, to challenge the validity of a judgment of conviction responsible for the incarceration. It is, of course, a civil remedy, provision therefor being made in Article 70 of the Civil Practice Law and Rules, which prescribes the procedure both for pursuing the remedy at nisi prius and for Appeals from orders or determinations there made. The petition ordinarly must be made at a term of the Supreme Court or a County Court located in the county of incarceration.

The grounds for challenge cognizable on habeas corpus are said, generally, to involve questions of "jurisdiction" over the person and subject matter. In actuality, the scope of the remedy (at least this phase of it) is not overly clear, and the demarcation lines between habeas corpus and coram nobis in the post judgment area are in some respects quite blurred. This causes much difficulty and confusion, especially since these motions or petitions are brought in different courts. A defendant who errs in this regard may find that he is not only pursuing the wrong remedy, but that he is in the wrong court.

B. Proposed Omnibus Motions

The New York Code of Criminal Procedure is in the process of thoroughgoing revision (by a New York State Temporary Commission), and a proposed new "Criminal Procedure Law" is to be submitted to the Legislature for passage at the 1970 session. This presents two "omnibus" motions in the post judgement area, each of which must be made in the court of conviction, one being a motion to vacate judgment (§440.10) and the other a "motion to set aside sentence" (§440.20). Taken together, they accommodate every contention cognizable upon any of the four previously discussed existing motions or remedies; and, in addition, every claim which may be advanced in a federal court upon a federal habeas corpus petition attacking a New York judgment of conviction.