8.36.1 Prior Testimony in Criminal Proceedings [CPL art 670]

(1) *Prior testimony.* Under circumstances prescribed in [CPL article 670], testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to [CPL] section 180.60, or (c) an examination of such witness conditionally, conducted pursuant to [CPL] article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape or photographic recording thereof played. Where any recording is received into evidence, the stenographic transcript of that examination shall also be received.

(2) *Subsequent proceedings, defined.* The subsequent proceedings at which such testimony may be received in evidence consist of:

> **(a) Any proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related; and**
>
> **(b) Any post-judgment proceeding in which a judgment of conviction upon a charge specified in paragraph (a) is challenged.**

(3) *Procedure in non-grand jury proceeding.* In any criminal action or proceeding other than a grand jury proceeding, a party thereto who desires to offer in evidence testimony of a witness given in a previous

action or proceeding, as provided [in subdivision one], must so move, either in writing or orally in open court, and must submit to the court, and serve a copy thereof upon the adverse party, an authenticated transcript of the testimony and any videotape or photographic recording thereof sought to be introduced. Such moving party must further state facts showing that personal attendance of the witness in question is precluded by some factor specified in [subdivision one]. In determining the motion, the court, with opportunity for both parties to be heard, must make inquiry and conduct a hearing to determine whether personal attendance of the witness is so precluded. If the court determines that such is the case and grants the motion, the moving party may introduce the transcript in evidence and read into evidence the testimony contained therein. In such case, the adverse party may register any objection or protest thereto that he would be entitled to register were the witness testifying in person, and the court must rule thereon.

(4) ***Procedure in grand jury proceedings.*** **Without obtaining any court order or authorization, a district attorney may introduce in evidence in a grand jury proceeding testimony of a witness given in a previous action or proceeding specified in [subdivision one], provided that a foundation for such evidence is laid by other evidence demonstrating that personal attendance of such witness is precluded by some factor specified in [subdivision one].**

Note

Except for the subdivision headings in italics, the words in brackets, and the substitution of "[CPL article 670]" for the words "this article" in the opening line of subdivision (1), this rule reproduces verbatim CPL 670.10 ("Use in a criminal proceeding of testimony given in a previous proceeding; when authorized") in subdivisions (1) and (2), and CPL 670.20 ("Use in a criminal proceeding of testimony given in a previous proceeding; procedure") in subdivisions (2) and (3).

The rule sets forth a hearsay exception governing the admissibility of testimony previously taken in certain, specified criminal proceedings in subsequent criminal proceedings.

Unlike its counterpart governing admissibility of former testimony in civil actions, its provisions are not supplemented by the common law (*People v Harding*, 37 NY2d 130 [1975]; *see* Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination" (*Crawford v Washington*, 541 US 36, 53-54 [2004]; *see People v Pealer*, 20 NY3d 447, 453 [2013]).

To the extent therefore that the witness is unavailable and there has been a full and fair opportunity for cross-examination by the party against whom the testimony is offered, the requirements of the Confrontation Clause are met. (*Compare People v Simmons*, 36 NY2d 126 [1975], *with People v Prince*, 66 NY2d 935 [1985], *affg for reasons stated below* 106 AD2d 521 [2d Dept 1984].)

As stated by the Court of Appeals: "Insofar as it allows a jury to convict a defendant based on a witness's previous testimony, CPL 670.10 (1) is an exception to the Sixth Amendment right of confrontation. Although the right of confrontation contemplates that testimony against an accused be 'delivered live within eyesight and earshot of the jurors,' the statute makes, and the Constitution allows, limited departures based on necessity and fairness." (*People v Diaz*, 97 NY2d 109, 114 [2001] [citations omitted]; *see also* Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause [*Crawford*] and accompanying note.)

Subdivision (1) states verbatim CPL 670.10 (1). It sets forth three specific types of former testimony which are admissible when the declarant is proved "unable to attend" trial for specified reasons: testimony that was given at a trial on the accusatory instrument, at a preliminary hearing on a felony complaint, or at a conditional examination under CPL article 660 (CPL 670.10 [1]).

The Court of Appeals, construing strictly this statutory provision, has observed that its " 'three carefully worded and enumerated exceptions' to the use of prior testimony of an unavailable declarant are essentially exclusive" *(People v Tapia*, 33 NY3d 257, 266 [2019] [citation omitted]). Thus, if the proffered testimony is given at a proceeding other than the three types stated in the statute, it is inadmissible under the exception. (*See e.g. People v Ayala*, 75 NY2d 422, 428-29 [1990]; *Harding*, 37 NY2d at 133.)

At the prior permitted proceeding, there must have been also, as noted, a full and fair opportunity to cross-examine the declarant. (*People v Simmons*, 36

NY2d 126 [1975]). "An adequate opportunity to cross-examine at the prior proceeding is an additional, constitutional requirement for the admissibility of prior testimony that otherwise satisfies CPL 670.10" (*Ayala*, 75 NY2d at 430).

Should the defendant, however, be the cause of the witness's absence, the defendant forfeits the limitations on the admission of former testimony irrespective of whether the defendant had an opportunity to cross-examine the witness. (S*ee People v Geraci*, 85 NY2d 359 [1995] [witness's Grand Jury testimony admitted].)

As to the triggering condition for the admissibility of permitted former testimony, the provision provides that the declarant must be "unable to attend . . . by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court." There is Appellate Division authority holding that the declarant may also be unavailable when the declarant invokes the Fifth Amendment privilege against self-incrimination. (*See e.g. People v Whitley*, 14 AD3d 403 [1st Dept 2005]; *People v Johns*, 297 AD2d 645 [2d Dept 2002]; *People v Snow*, 298 AD2d 985 [4th Dept 2002].) The Appellate Division, Third Department, has held that even if a witness does not assert his or her privilege against self-incrimination, the witness's persistent refusal to testify after threat of a contempt citation will render the witness unavailable for purposes of CPL 670.10 (1). (*People v Knowles*, 79 AD3d 16, 24-25 [3d Dept 2010].)

The People must demonstrate "due diligence" in attempting to secure the presence of a witness. (*People v Diaz*, 97 NY2d 109 [2001].) *Diaz* noted that the Court has required "that the prosecutor's failure to produce [a witness] . . . not [be] due to indifference or a strategic preference for presenting her testimony in the more sheltered form of [a transcript] rather than in the confrontational setting of a personal appearance on the stand." (*Id.* at 115 [internal quotation marks and citation omitted].)

Subdivision (1) concludes by providing that the former testimony when admissible may be read to the jury and any recording of the testimony may be played. When a recording is played, the stenographic transcript of the testimony must also be admitted.

Subdivision (2) states verbatim CPL 670.10 (2). It provides that the former testimony from any of the three types of specified proceedings may be used "at a subsequent proceeding in or relating to the action involved," including post-judgment proceedings.

Subdivision (3) states verbatim CPL 670.20 (1). It sets forth the procedure for the introduction of the former testimony into evidence in a criminal proceeding other than a grand jury proceeding. Of note, it requires the court to "conduct a hearing to determine whether personal attendance of the witness" is precluded by "some factor" specified in CPL 670.10 (1).

Subdivision (4) states verbatim CPL 670.20 (2). It sets forth the procedure for the introduction into evidence of the former testimony in grand jury proceedings.