**New York State Temporary Commission on the Revision of the Penal Law and Criminal Code 1968 (1 of 5)**

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STATE OF NEW YORK

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# Seventh Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code

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**April 1, 1968**

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April 3, 1968

## Letter of Transmittal

To: Hon. Nelson A. Rockefeller, Governor of the
State of New York:
The Legislature of the State of New York:

Pursuant to the provision of Chapter 346 of the Laws of 1961 as amended by Chapter 548 of the Laws of 1962, Chapter 310 of the Laws of 1963, Chapter 251 of the Laws of 1964, Chapter 489 of the Laws of 1965, Chapter 446 of the Laws of 1966 and Chapter 308 of the Laws of 1967, submitted herewith is a report of the activities of this Commission for the period of February 1, 1966 to March 31, 1968.

Richard J. Bartlett, Chairman

## Introductory Comments

In 1962, this Commission, which was created the previous year, commenced work upon its two major aassignments of revising the Penal Law and the Code of Criminal Procedure. Six years of such endeavor have brought the Commission close to the completion of those tasks.

In 1965, following the submission to the Legislature in 1964 of a proposed new Penal Law in the form of a study bill, the Commission successfully submitted a Revised Penal Law for passage. That bill was approved by the Governor on July 20, 1965. Carrying an effective date of September 1, 1967, however, it has currently been operative for only a few months.

With respect to the Code of Criminal Procedure, the Commission has prepared a "Proposed Criminal Procedure Law" which, in October of 1967, was published by the Edward Thompson Company of Brooklyn, New York. Following the distribution of thousands of copies of that publication to the Bench, the Bar and other interested groups, agencies and individuals, public hearings thereon were held throughout the state. The Commission's future plans with respect to the proposal are as follows: after making numerous changes from the original product, it will submit a study bill at the 1968 legislative session; more public hearings will be held in the Fall of 1968, and, unquestionably with further substantial change, a bill embodying the final proposal will be submitted for passage at the 1969 legislative session, carrying an effective date of one year hence.

This report contains a few comments concerning the now effective Revised Penal Law and deals in some detail with the status and certain features of the proposed Criminal Procedure Law.

# I

## CONCERNING THE PENAL LAW

Since the Revised Penal Law has been in effect for only a brief time, no meaningful appraisal of its impact and operability is possible. Informal comment from judicial and prosecuting sources, however, indicates that little difficulty has been encountered in the adjustment to the new Penal Law and that the transition from the old one has been surprisingly smooth.

Through achieving the enactment of this revision in 1965, the Commission did not thereafter wash its hands of the project, but sought to improve it during the next two years by the submission of amendatory legislation. An extensive Commission bill was introduced, passed and enacted at the 1967 legislative session, which worked a number of changes in the Revised Penal Law, some of which are discussed in the Commission's sixth, or 1967, Interim Report (Leg. Doc. [1967] No. 6, p. 4). At the 1968 legislative session, the Commission has again submitted and sponsored additional bills of this nature. While most of these are not of broad significance, one of them—dealing with the defense of justification—merits explanatory comment.

Although no criticism of the justification provisions (contained in Article 35 of the Penal Law) was conveyed to the Commission from the time of the passage of the Revised Penal Law in 1965 until a short time before its effective date of September 1, 1967, considerable opposition to those provisions did develop immediately before and during the months following the effective date. As a result, the Commission reformulated and redrafted much of the Article in question and submitted a bill containing these innovations. The Codes Committees of the Senate and Assembly then made certain further changes and introduced another bill which incorporated these changes within the framework of the bill proposed by the Commission. The Codes Committee's bill was passed and approved by the Governor (L. 1968, ch. 73).

In tracing and explaining these changes, this report refers to the original Revised Penal Law provisions as the "1965" provisions; to the provisions of the Commission's bill as the "Commission" provisions; and to those ultimately enacted as the "final" provisions. With this terminology, the metamorphosis of the justification article is described in some detail below.

This first significant change is found in section 35.05 of the Penal Law, enunciating certain general principles of the defense of justification. The 1965 section contained, *inter alia*, a provision justifying

conduct, which would otherwise be criminal, when performed by a public servant pursuant to a law defining his duties and functions (subd. 1). The primary purpose of that provision was to assure that activity which might be criminal if engaged in by a private citizen would not be so regarded when performed by a public official in the course of his authorized duties (*e.g.*, a police officer purchasing narcotics for purposes of criminal prosecution of the seller). The provision, however, was criticized by some as too narrow in that it appeared to protect the public servant only when his conduct is explicitly "required or authorized by *a provision of law*" (1965 §35.05[1]), and not where it consists of a reasonable exercise of his duties of a sort that cannot be expressly justified by some specific statute or regulation. Accordingly, the Commission bill added a clause justifying conduct "performed by a public servant in the reasonable exercise of his official powers, duties or functions"—whether explicitly authorized by statute or otherwise (Commission bill §35.05[1]).

This change was adopted verbatim in the final bill ultimately enacted (final bill §35.05[1]).

Section 35.15 of the Penal Law, the statute dealing with justifiable use of physical force in defense of oneself or another person, was completely redrafted in the Commission bill. The changes, however, were almost entirely structural and formal, being made for purposes of clarity and precision. One item to be noted is that the 1965 version of section 35.15 treated the matters of when and how much physical force may be used by the occupant of a dwelling in a burglary situation (1965 §35.15[1b]), while the Commission bill transferred this subject to the following section, dealing with use of physical force in defense of premises (Commission bill §35.20[3]).

With one slight change of little consequence, the Commission bill's reformulation of section 35.15 was adopted verbatim in the final bill.

Section 35.20, defining justifiable use of physical force in defense of premises, was also completely redrafted in the Commission bill. Much of the alteration was of a structural and formal nature, but a change of substance with respect to the burglary area was made and inserted in this statute.

The 1965 article authorized an occupant of a dwelling to use deadly physical force against any person whom he reasonably believed to be "using or about to use physical force against" him "while committing or attempting to commit a burglary in such

dwelling" (1965 §35.15[1b]). Although this seemed to permit the householder to shoot the burglar in virtually any situation other than one in which the latter is in the process of fleeing the premises, the provision was, in the Commission bill, further slanted in favor of the occupant or burglary victim. First, the scope of the appropriate provision was expanded by including not only the householder or occupant of a dwelling within its protection but also any person rightfully present in any "occupied building," whether a dwelling or not; and, second, any such person was authorizezd to use deadly force merely on the basis of being "in fear" of physical force (deadly or otherwise) by the burglar and of a reasonable belief that deadly force is necessary to defend against such physical force (Commission bill §35.20[3]).

The final bill, however, altered this provision to an even greater extent in favor of the occupant. In brief, it does not even require a fear on his part of any physical force by the burglar but permits him to shoot the latter whenever he believes such to be necessary to prevent or terminate the burglary (final bill, *id.*).

The next important change from the 1965 provision appears in the addition of a new section introducing to New York law what is popularly know as the "no sock" principle.

Although no statute had ever dealt with the subject, the decisional law of New York always was that a person has a right to use physical force to resist an unauthorized or unlawful arrest by a peace officer. The "no sock" principle, on the other hand, forbids physical resistance by the arrestee, at least when he is aware that the arrester is a peace officer. The premise of the doctrine is that differences of opinion between them as to the validity of the arrest should not be permitted to lead to a street brawl; that the arrestee should be required to submit to duly constituted authority in the first instance, even though he believes the officer to be in error; and that if the officer is in error, the arrestee will have ample remedies for redress later on.

Believing the "no sock" doctrine to be eminently sound, the Commission included it in the Revised Penal Law submitted to the Legislature in 1965. The provision, however, was rejected and deleted by the Legislature (L. 1965, ch. 1039).

Nevertheless, the Commission revived the matter by again including the "no sock" rule in its 1968 bill addressed to the justification article (Commission bill §35.27). The final bill adopted the substance of the Commission provision and, accordingly, "no sock" has scribed in section 95.55, a grand jury may:

at last become the law of New York (final bill, *id.*). The only difference between the two bills with respect to this provision is that the Commission bill forbade an arrestee to use force against the arresting peace officer "when he *knows or believes* the latter to be a peace officer," while the final bill forbids such "when it *would reasonably appear* that the latter is a peace officer."

The statute which has undergone the greatest number of important changes is section 35.30, dealing with the use of physical force in making an arrest or preventing an escape. The most significant amendments involve the question of when a peace officer may use *deadly* physical force.

There are, in general, three types of situations in which a peace officer may use deadly force. One of these occurs when, regardless of the crime which is the subject of the arrest, the officer has reasonable cause to fear that the arrestee is using or about to use deadly force against him or a third person. Here, there has been no change, for all three versions—the 1965 provision (subd. 2a), the Commission provision (subd. 1c) and the final provision (subd. 1c)—agree that the officer may always use deadly force under such circumstances.

The second situation is one in which there is no danger or threat of danger to the officer or anyone else but the officer simply cannot apprehend the arrestee other than by shooting him. In this situation, the 1965 section authorized the officer to use deadly force (his revolver) only if the crime which was the subject of the arrest was reasonably believed by him to be a felony or attempted felony "involving the use or threatened use of *deadly* physical force" (1965 section [2b]). Because that provision was deemed by many to be too restrictive and imprecise, the Commission bill considerably expanded it. The proposed amendment authorized the use of deadly force to effect an arrest for any felony involving the use of *any* physical force—deadly or otherwise*—and also for any crime or attempted crime of kidnapping, arson, escape in the first degree or burglary in the first degree even though such may not have involved any physical force at all (Commission bill §35.30[1a]). This amending provision was adopted verbatim in the final bill (final bill, *id.*).

* The members of the Commission were not unanimous with respect to this phase of the bill. One of the main points of dissent was that the clause in question seems to authorize a peace officer in many instances to shoot a person if such be necessary to apprehend him for merely striking or attempting to strike the officer with his fist (see Penal Law §§ 120.05[3], 110.00, 110.05[4]).

The third situation of this area relates to a case in which the officer, though not threatened with deadly force by the arrestee, has reasonable cause to believe that the latter is armed. Here, the 1965 provision authorized the officer to use deadly force when he reasonably believed that the arrestee "is attempting to escape *by the use of* a deadly weapon" (1965 §35.20[2b]). The Commission bill broadened that provision in one respect by permitting the officer to use deadly force upon a reasonable belief that the arrestee "is *armed*" with a weapon, whether or not he is *using* or threatening to use it; but it narrowed the authorization in another respect by limiting it to cases in which the arrest is for a felony and the deadly weapon believed to be on the arrestee's person is a "pistol, revolver or other firearm" (Commission bill §35.30[1b]). The final bill made one further change in this provision by making the arrestee's possession or believed possession of any "deadly weapon"—whether of the firearm category or otherwise—sufficient justification for the officer's use of deadly force (final bill §35.30[1b]).

One further noteworthy change in section 35.30 appears in connection with the provision defining the right of a private person attempting to make an arrest on his own account to use physical force for that purpose. The general rule prescribed in the 1965 provision was that the private citizen arrester may use any necessary degree of physical force short of the deadly variety to effect an arrest for an offense reasonably believed by him to have been committed by the arrestee, but that he must be correct in his belief and the arrestee must in fact have committed the offense in question; and that deadly force is justifiable when the arrester reasonably believes such to be necessary to defend against deadly force or the imminent use thereof by the arrestee (1965 §35.30[6]).

The Commission bill did not alter those principles but added another situation in which deadly force by the arrester is justifiable: namely, when the arrestee "has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy in the actor's presence and . . . is in immediate flight therefrom" (Commission bill §35.30[4b]).

With one slight change—deletion of the words "in the actor's presence"—that proposed amendment was adopted in the final bill (final bill §35.30[4b]).

## II

## CONCERNING THE PROPOSED CRIMINAL PROCEDURE LAW

A proposed revision of the Criminal Code—renamed the "Crimi-

nal Procedure Law"—is, as indicated, being submitted by the Commission to the Legislature as a study bill at its 1968 session. This study bill derives from an earlier draft published by the Edward Thompson Company in October of 1967 and widely distributed to the judiciary, the legal fraternity, police and other law enforcement agencies and organizations, and to numerous other groups and individuals.

That proposal became the subject of several public hearings conducted by the Commission throughout the state during February of 1968. Hearings were held in Buffalo, Rochester, Syracuse, Albany, New York City and Mineola. These were well attended, with almost a hundred persons—most representing organizations but some appearing in an individual capacity—expressing views concerning various facets of the proposal. Many of the recommendations and suggestions advanced were perceptive and well taken, have proved most helpful to the Commission, and have resulted in changes from the original proposal which are now reflected in the study bill submitted to the Legislature.

The study bill represents, in effect, the second official draft of the proposal, but not the final one. It, also, will be subjected to public hearings, which the Commission plans to conduct in the Fall of 1968. Following those hearings, further changes will undoubtedly be made and, finally, a bill, representing a third draft, will be submitted for passage at the 1969 legislative session. This will bear an effective date extending into 1970.

By presenting three drafts of the proposal and conducting two series of public hearings over a two year period, and by extending the effective date of the final bill to a time one year beyond its submission and possible enactment, the Commission believes that more than ample time is being and will be accorded for any and all recommendations, criticism and change.

The study bill is incorporated in this report as an appendix. As indicated, many changes from the original proposal have been made, some of which emanate from the public hearings, some from other suggestions made to the Commission, and some from self-critical reappraisal by the Commission itself of certain of its earlier formulations. A few of the more important changes are treated below.

(1) Judging by the number of grievances and comments voiced to the Commission, both at the public hearings and otherwise, the most controversial subject in the entire proposal involves the question of what persons are to be designated or classified as "police officers."

The existing Criminal Code employs the term "peace officer," which includes but is by no means limited to "police" officers. Authorization to make arrests on "reasonable cause," exemption from penal provisions against possession of firearms, and other powers and privileges are accorded to "peace officers." Measured by these extensive and important powers and privileges, one would gather that a peace officer is virtually the same as a police officer; and, indeed, a genuine police officer is granted very little more authority under the Code than a non-police peace officer.

The fact of the matter is, however, that many of the "peace" officers enumerated in the Code (§154) bear little resemblance to "police" officers (§154-a). An interminable and growing list of peace officers includes a variety of building and markets inspectors, court clerks and officers, humane society agents and other personnel who do not conform to the concept of a "police" officer and who seemingly should not enjoy the gamut of police powers which the Code, realistically speaking, accords them through its authorizations and concessions to "peace officers."

The proposed Criminal Procedure Law's solution to this problem commences with the elimination of the term peace officer and the retention of the term police officer only (original draft §1.20[15]). Police officers are limited to persons having genuine police functions, such as members of city police forces, sheriffs, and the like. The list contained in the original draft is incomplete and expansion is intended after further study.

Concerning the non-police peace officers presently listed in the Code, the Commission intends to preserve every right and power of a "peace officer" nature which each group needs to carry out its functions. This is to be achieved by special statutes addressed to powers and duties of the particular agencies. Thus, for example, the Correction Law would contain provisions explicitly setting forth, among other matters, the arrest and weapon-carrying authority of state correction officers, and the Judiciary Law would do the same for court attendants and other court personnel. In this fashion, each group would enjoy all necessary powers of such nature without resort to the unsound device of according it blanket "police officer" status.

Much of the expressed criticism of this general proposal apparently stems from a lack of understanding of the overall scheme by the present non-police "peace officer" agencies (correction officers, court officers, probation officers, parole officers, etc.). Some of these groups do not seek full police officer status for its own sake but seem to labor under a misapprehension that, with the elimination of

the "peace officer," they will, unless re-designated "police officers," lose some of the powers essential to the proper execution of their specialized functions. Others of these groups, however, urge that they should be granted unqualified police officer classification. The position of each of the latter groups is that it would then constitute a sort of auxiliary police force which, in addition to performing its own duties, could give extracurricular assistance to the regular police and supplement them in their general law enforcement activities.

One difficulty with that position, which is vigorously opposed by the regular police, is that the members of these agencies do not have the police training essential to such work. The principal reason why they do not, of course, is that they are not required to perform regular police functions; and the logical thought persists that, in the absence of such an *obligation*, the *authority* should not exist. A city police officer, who is required to arrest for crime and to keep order at all times, whether he be on or off duty, obviously needs full time police authority. However, a court officer, for example, has no such obligation; and to accord him thoroughgoing police authority exercisable at his option on off-duty occasions does not seem salutary.

With this thought in mind, the study bill augments the provision defining a police officer by the further inclusion of "any other public servant who, *by express provision of law*, is under a *duty* in designated circumstances to make arrests or perform other police functions," but limits his police officer status to those times or occasions when he is actually "performing such designated statutory duties" (§1.20; study bill subd. 32; *cf.* original draft subd. 15).

The operation of that provision, equating authority to obligation, may be illustrated by visualizing its application to a court officer. By appropriate special statute outlining his duties, he would be obligated to perform certain arrest and other police functions in the course of his employment and would be fully authorized to act as a police officer in such matters. If a provision were added *requiring* such officers to make arrests for crime and keep public order whenever traveling on public conveyances, whether on or off duty, his police powers would extend to the occasions when, for instance, he is returning home from work by subway. Upon his departure from his subway station, they would cease and he would not have police status in his neighborhood, or in any restaurant or bar which he might happen to patronize in the evening.

A further amendment to the provision defining a police officer adds two new groups or classifications: (1) county parkway police, and (2) the Capital Buildings Police force operating in Albany

(§1.20 study bill, subd. 32 [b,e]). These changes, as indicated, do not complete the list of police officers, and further groups may well be added before the final proposal is submitted.

(2) Delving into previously uncharted fields, the proposal seeks to resolve what is sometimes referred to as the police "bailiwick" problem. This involves questions of where, geographically speaking, an offense must be committed in order to accord a police officer of a particular area or classification authority to make a warrentless police, or "reasonable cause," arrest; and, assuming such authority in a given case, how far beyond his own "bailiwick" or area of employment he may go in order to make the arrest.

With certain exceptions, the proposal limits the offenses for which such arrests may be made to those committed within the officer's bailiwick or "geographical area of ... employment"; and the distance which he may go beyond his bailiwick in order to make the arrest depends upon factors which include the kind of offense committed and the kind or classification of police force of which the officer is a member (§70.30).

These are very difficult and controversial issues. Most police groups favor a principle which would establish every police officer, no matter what his bailiwick or classification, as a police officer with full police powers everywhere in the state. Thus, a village police officer from St. Lawrence County vacationing in New York City would have as much police authority there as the New York City police themselves, and, indeed, every local officer of every town and village would enjoy the same powers as a state trooper.

Apart from certain general criticism of that proposition, its fiscal implications are most complex and perhaps dangerous. The police contend, however, that at the very least any police officer should be authorized to make a police arrest at any time and at any place where he observes the commission of felony.

Accepting this contention, the study bill adds a new provision to the appropriate section which incorporates the substance thereof (§70.30 [new subd. 4]).

(3) Under the proposal, a "felony complaint" (the accusatory instrument which commences a felony action in a local criminal court) need only demonstrate "reasonable cause to believe that the defendant committed the" felony in question (§50.35[3b]). However, an "information" (charging a misdemeanor or petty offense) must demonstrate both "reasonable cause" and a "legally sufficient" or prima facie case (*id.* [1-b,-c]—a much more demanding stand-

ard. The rationale of this distinction is, in part, that the felony complaint is not the instrument of ultimate prosecution and must be followed by a grand jury proceeding and an indictment based upon legally sufficient grand jury evidence; but that the information usually is the instrument of ultimate prosecution and, since no preliminary hearing or grand jury proceeding occurs, a prima facie case prior to pleading must be shown in the allegations of the information if it is to be shown at all.

While the logic of this scheme appears sound, a practical difficulty arises, which may be illustrated by two hypothetical cases: (1) A police officer arrests a man getting out of a car, worth about $200 and reported as stolen, for petit larceny. The defendant says nothing and the owner of the car is out of town for a few days.

(2) A police officer arrests a known heroin addict for misdemeanor possession of narcotics as a result of finding on his person some glassine envelopes containing white powder. The powder is delivered to the police chemistry laboratory for analysis, but the laboratory report will not be completed until five days later.

In each instance, the officer is required to take the defendant promptly to a local criminal court and to file an information therewith. The difficulty is that in neither case can he file a valid information: while his factual allegations will clearly provide reasonable cause to believe the commission by the defendant of the particular misdemeanor, they will not spell out the requisite prima facie case; and such cannot be demonstrated until, in one case, the owner of the car returns and submits a supporting deposition declaring that the car is his and that he did not give the defendant permission to take it, and, in the other case, until a verified chemist's report is filed attesting to the heroin content of the powder.

The study bill plugs this gap by creating a new local criminal court accusatory instrument, entitled a "misdemeanor complaint" (study bill §§50.10[3], 50.15). Like a felony complaint—and unlike an information—it need not demonstrate a legally sufficient or prima facie case, but only "reasonable cause" (*id.* §50.35[3]). It serves as a basis for arraigning and holding a defendant upon a misdemeanor charge but not as a basis for prosecution thereof. The defendant is not required to plead to the misdemeanor complaint, and for prosecution purposes it must be replaced by an information (*id.* §85.65). The defendant may, however, waive prosecution by information and consent to be prosecuted upon the misdemeanor complaint (*id.* §85.65[3]). If he does not so waive, and if he has been committed to and retained in the custody of the sheriff for a period

of five days without a replacing information having been filed, he is entitled to be released on his own recognizance (though not to a dismissal of the charge) unless some compelling reason for failure to file an information is shown (*id.* §85.70).

Applying this new scheme to the hypothetical stolen car case, the arresting officer would file a misdemeanor complaint in the local criminal court, the defendant would be arraigned thereon and would either be released on bail or his own recognizance or committed to the custody of the sheriff. Realizing that the case will be iron-clad upon the car owner's return, the defendant might decide to plead guilty to the misdemeanor complaint and waive prosecution by information (in which case the car owner would never have to appear). If the defendant does not so waive, the action is in effect abated until the car owner returns and an information based partly on his deposition is filed in replacement of the misdemeanor complaint. Upon that occurrence, the defendant is required to appear and enter a plea to the information. If the defendant is at liberty following his arraignment upon the misdemeanor complaint, the time of the car owner's return and deposition is relatively unimportant. If he is in jail, however, and the car owner does not return for two weeks, the defendant will ordinarily be entitled to be released on his own recognizance after five days of confinement. Upon the owner's subsequent return and the filing of an information, the defendant will be required to appear and the action will then proceed.

(4) It has always been the law, under the Criminal Code (§148), that an "information" (which term includes the proposal's "information," "misdemeanor complaint" and "felony complaint") as well as any supporting depositions must be sworn to before the magistrate or local criminal court in which they are filed. That rule—which the proposal in its original draft does nothing to change—requires personal court appearances for arraignment purposes by most of the important witnesses in a case and by a specific police officer. Especially in urban communities where volume of cases is a significant factor in the administration of criminal justice, that rule has caused much practical difficulty.

A bill aimed at alleviating some of these problems is currently pending in the Legislature. This would authorize police officers of certain rank to administer the oath to another police officer who has made an arrest without a warrant for a misdemeanor or petty offense and has subscribed an information or complaint therefor, thus obviating the necessity of that particular officer appearing in court at the arraignment.

While the thrust and direction of that bill are praiseworthy, it does not, in the opinion of the Commission, go nearly far enough. No logical reason appears why methods of non-judicial verification should not be permitted regardless of the grade of the offense involved; regardless of whether the instrument be an information, a misdemeanor complaint, a felony complaint or a supporting deposition; regardless of whether the subscriber be a police officer, another kind of public servant or a private citizen; and regardless of whether the case originates by an arrest without a warrant, by an appearance ticket or in any other manner.

Upon this premise, the study bill presents a new section authorizing three basic methods of verification of any of the indicated instruments (§50.27).

The first method consists of the traditional swearing before the court (*id.* [1a]).

The second method authorizes "a desk officer in charge at a police station or any of his superior officers" to administer the oath to the subscriber, whether the latter be a police officer or a non-police complainant or witness (*id.* [1b]). Similarly, another provision permits a non-police public servant (*e.g.*, a building inspector) who has issued and served an appearance ticket to subscribe and swear to an accusatory instrument before another non-police public servant who is by special statute authorized to administer the oath to him (*id.* [1c]).

The third method of verification does not require an oath but is satisfied by a subscription of an instrument containing "a form notice that false statements made therein are punishable as a class. A misdemeanor pursuant to section 210.45 of the Penal Law" (*id.* [1d]).

Not wishing to wrest control of the verification method from a court which may hold decided views on the subject, the section permits the court in any given case to insist upon any one of the stated forms (*id.* [2]). Thus, a judge may still require that the instrument be sworn to before him. If he says nothing on the subject, the method of verification is optional.

(5) It is a general proposition under the proposal that a police officer who has made an arrest without a warrant for an offense of less than felony grade committed in a town or village (other than one under the jurisdiction of a district court) must take the defendant to the town or village court of the town or village in which the offense was committed (§§50.50 [4,5], 70.50[1]). If such court is not available at the time, however, he may take the defendant to

another and neighboring court of town jurisdiction (*id.*). If the arrest is for a felony, he may take the defendant to any town or village court of the county, regardless of whether the felony was committed in such town or village (§§ 50.50[6], 70.50[1]). If the arrest is made under a warrant, the officer ordinarily must, regardless of the grade of the offense involved, take the defendant to the town or village court which issued the warrant and in which it is returnable, but in case of unavailability thereof he may take him to a neighboring court (§60.70).

In various instances, therefore, an arrested person may be taken to a town or village court which is not the one having normal trial, preliminary or geographical jurisdiction of the offense, or which, in the case of an arrest under a warrant, is not the one in which the warrant is returnable; and the police officer must there file or submit an information, misdemeanor complaint or felony complaint.

In all such cases, a troublesome and presently unanswered question arises as to which court—the "normal" court or what may be termed the "emergency" court—is to handle and dispose of the accusatory instrument or action from that point on. These problems also arise under the existing Criminal Code. Neither the Code nor the original draft of the proposed Criminal Procedure Law attempts to resolve them, but the study bill does.

Under the new formulations, the *emergency* court to which the defendant is taken must always arraign him upon the particular accusatory instrument (new §§85.20[1], 90.25[1]). Subsequent procedure depends upon whether the accusatory instrument is an information or misdemeanor complaint, on the one hand, or a felony complaint on the other.

In the case of an information or misdemeanor complaint, the emergency court may proceed with and dispose of the action only if the defendant wishes to plead guilty immediately. If he does not, the case must be transferred to the *normal* court for disposition (new §85.20[1]). The latter rule is designed to prevent judge shopping by police officers who are well aware of the identities of the "hard" and the "soft" town and village justices of their county, and to prevent a burdensome case load from being foisted upon the "hard" group with relatively few cases being presented to the "soft" justices.

That consideration, however, does not appear to be a factor in felony cases, which represent but a small fraction of the arrests. An "emergency" court which has arraigned a defendant upon a felony complaint, therefore, is given the option of either disposing of the

instrument itself or remitting the action to the "normal" court for such disposition (new §90.25).

(6) The proposal creates an omnibus "motion to dismiss [an] indictment" (§105.40) and an equivalent omnibus "motion to dismiss [an] information, prosecutor's information or misdemeanor complaint" (§85.25). Under each of these motions, one or more of a variety of contentions challenging the validity of the particular accusatory instrument may be advanced. They are characterized as *omnibus* motions because each accommodates under one banner a wide spectrum of contentions which, under the Criminal Code, must be raised by a series of separate motions and procedural devices (*e.g.*, demurrer, motion to dismiss an indictment on the ground of insufficient grand jury evidence, plea of former jeopardy, motion to dismiss an indictment in the interest of justice, etc.). One of the main purposes is, of course, to avoid motion proliferation by permitting every type of challenge to an accusatory instrument to be made under a single motion.

From that standpoint, the defect in the original draft of the proposal is that the provisions, though *permitting* a defendant to condense his contentions in one motion, do not *require* him to do so. Although there is but one label, nothing prevents a defendant from fragmenting his claim in a series of motions brought under that label, each advancing a different ground.

To remedy that situation, the study bill inserts in each of the appropriate statutes a provision directing a defendant who makes such a motion to raise every ground which he "is in a position adequately to raise" at the time if he wishes to raise it at all. A subsequent motion based upon any such ground not so advanced may be summarily denied, although the court has discretion to entertain and dispose of it on the merits notwithstanding (study bill §§85.25[3], 105.40[3]).

(7) Under both the Criminal Code and the proposal (§235.10), one desiring to appeal to an intermediate appellate court from a judgment or order of a criminal court is allowed thirty days in which to file a notice of appeal (or, in some cases, an affidavit of errors) with the criminal court. The Code provisions have always been very strictly construed, and a failure to file within the prescribed period is fatal regardless of the reason or excuse.

Where such failure results from clear neglect or misconduct by a defendant's attorney (*e.g.*, assigned counsel simply omitting to file a notice of appeal, or dissuading a defendant by misrepresentation from appealing) or by a public official (*e.g.*, a warden of a prison

in which the defendant is confined failing to mail his correspondence), the prevailing rigidity of the indicated rule seems most inequitable. The study bill, therefore, adds a provision authorizing a defendant whose time has elapsed, to move in the appellate court for an extension upon the ground that his failure to file in timely fashion "resulted from improper conduct by a public servant or by the defendant's attorney." The motion must be made within six months "after the time for the taking of such appeal has expired," and the extension period may not exceed thirty days beyond the date of the determination of the motion (new §235.25[1]).

The procedure and mechanics for handling this motion present certain problems. Logically, it should be made in the appellate court. If it is determinable upon the papers, no difficulty is encountered. As would often be the case, however, the determination may require resolution of facts, involving a hearing, sworn testimony, production of witnesses and the like; and an appellate court is ill-suited to conduct that type of proceeding.

Accordingly, the study bill section (§235.25) establishes the following procedure: the motion is made in the appellate court; if it may be determined upon purely legal grounds (on the papers), the appellate court simply does so; if, however, a hearing is necessary to resolve issues of fact, the appellate court orders the criminal court which entered the original judgment or order to conduct such a hearing and report its findings to the appellate court; and, finally, upon the basis of such report, the latter determines the motion.

(8) Under the Code of Criminal Procedure (§913-e), one of the factors rendering a "youth" (16 to 19 years of age) ineligible for treatment under the youthful offender process is a prior conviction for a "felony." The proposal, in its original draft (§400.05[2]), tightens the eligibility requirements by denying youthful offender treatment to a youth who has previously been convicted of a "crime," whether it be of felony or misdemeanor grade. The theory is that, since the primary purpose of youthful offender treatment is avoidance of the stigma of conviction for a "crime," little is to be achieved by according such treatment to one who already has such a conviction on his record.

As a result of comment and of reflection upon the matter, however, the Commission has reverted, in the study bill, to the Criminal Code position by depriving a youth of eligibility only when his prior conviction was for a "felony" (study bill §400.05[2]) and of extending eligibility to youths with misdemeanor records. For one thing, some advantages other than avoidance of the stigma of crimi-

nal conviction do inhere in the youthful offender scheme; and, for another, two convictions for a "crime" doubtless inflict a deeper brand than one.

This change, however, does not have the effect of placing a youth with a prior misdemeanor conviction in precisely the same category as every other eligible youth—as is the case under the Code. The Code, ignoring differentiating background factors, presents a single system of determining whether youthful offender treatment will be accorded to anyone eligible therefor, with every candidate required to obtain initial court approval for consideration, then to undergo investigation, and finally to obtain ultimate court approval. The proposal, on the other hand, creating three classifications of eligible youths, accords youthful offender treatment *automatically,* or as a matter of right, to one classification, while requiring a great deal-more in the way of investigation and court approval for the others (§400.20). The study bill does not place the youth with a prior misdemeanor conviction in the "automatic" category, which is confined to the candidate who is charged in the case at hand with a misdemeanor only and who has not previously either been convicted of a crime or adjudged a youthful offender (*id.*[2]). Though eligible, the prior misdemeanant must always be investigated and judicially approved (*id.*[3,4]).

## APPENDIX

**State of New York**

**5878**

**IN SENATE**

**May 16, 1968**

Introduced by COMMITTEE ON RULES—(at the request of Messrs. Brydges, Zaretski, Hughes, Dunne, B. C. Smith and Thaler)—read twice and ordered printed, and when printed to be committed to the Committee on Codes

**AN ACT**

To establish a criminal procedure law, constituting chapter eleven-A of the consolidated laws, and to repeal the code of criminal procedure

(to be appended when printed)

**STATE OF NEW YORK**

**5878**

**IN SENATE**

**May 23, 1968**

Introduced by COMMITTEE ON RULES—(at the request of Messrs. BRYDGES, ZARETZKI, HUGHES, DUNNE, B. C. SMITH, THALER)—read twice and ordered printed, and when printed to be committed to the Committee on Codes

**AN ACT**

To establish a criminal procedure law, constituting chapter eleven-A of the consolidated laws, and to repeal the code of criminal procedure

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

# CHAPTER 11-A OF THE CONSOLIDATED LAWS

## CRIMINAL PROCEDURE LAW

# PART I
GENERAL PROVISIONS

## TITLE A
SHORT TITLE, APPLICABILITY AND DEFINITIONS

## ARTICLE I
SHORT TITLE, APPLICABILITY AND DEFINITIONS



§ 1.00 Short title. This chapter shall be known as the criminal procedure law, and may be cited as "CPL".

§ 1.10 Applicability of chapter to actions and matter occurring before and after effective date.

1. The provisions of this chapter apply exclusively to:

(a) All criminal actions and proceedings commenced upon or after the effective date thereof and all appeals and other post-judgment proceedings relating or attaching thereto; and

(b) All matters of criminal procedure prescribed in this chapter which do not constitute a part of any particular action or case, occurring upon or after such effective date.

2. The provisions of this chapter apply to (a) all criminal actions and proceedings commenced prior to the effective date thereof but still pending on such date, and (b) all appeals and other post-judgment proceedings commenced upon or after such effective date which relate or attach to criminal actions and proceedings commenced or concluded prior to such effective date; provided that, if application of such provisions in any particular case would not be feasible or would work injustice, the provisions of the code of criminal procedure apply thereto.

3. The provisions of this chapter do not impair or render ineffectual any proceedings or procedural matters which occurred prior to the effective date thereof.

§ 1.20 Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in section 10.00 of the penal law are applicable to this chapter, and, in addition, the following terms have the following meanings:

1. "Accusatory instrument" means an indictment, an information,

a prosecutor's information, a misdemeanor complaint or a felony complaint. Every accusatory instrument, regardless of the subscribing person or agency designated therein as the accuser, constitutes an accusation on behalf of the state as plaintiff and must be entitled "the people of the state of New York" against a designated person, known as the defendant.

2. "Local criminal court accusatory instrument" means any accusatory instrument other than an indictment.

3. "Indictment" means a written accusation by a grand jury, more fully defined and described in article one hundred, filed in a superior court, which charges one or more defendants with the commission of one or more offenses, at least one of which is a crime, and which serves as a basis for prosecution thereof.

4. "Information" means a written accusation by a person, more fully defined and described in article fifty, filed with a local criminal court, which charges one or more defendants with the commission of one or more offenses, none of which is a felony, and which may serve both to commence a criminal action and as a basis for criminal prosecution thereof.

5. "Prosecutor's information" means a written accusation by a district attorney, more fully defined and described in article fifty, filed with a local criminal court, which charges one or more defendants with the commission of one or more offenses, none of which is a felony, and serves as a basis for prosecution thereof.

6. "Misdemeanor complaint" means a written accusation by a person, more fully defined and described in article fifty, filed with a local criminal court, which charges one or more defendants with the commission of one or more offenses, at least one of which is a misdemeanor and none of which is a felony, and which serves to commence a criminal action but which may not, except upon the defendant's consent, serve as a basis for prosecution of the offenses charged therein.

7. "Felony complaint" means a written accusation by a person, more fully defined and described in article fifty, filed with a local criminal court, which charges one or more defendants with the commission of one or more offenses, at least one of which is a felony, and which serves to commence a criminal action but not as a basis for prosecution thereof.

8. "Arraignment" means the occasion upon which a defendant

against whom an accusatory instrument has been filed appears before the court in which the criminal action is pending for the purpose of having such court acquire and exercise control over his person with respect to such action and of setting the course of further proceedings in the action.

9. "Plea," in addition to its ordinary meaning as prescribed in sections 115.10 and 175.20, means, where appropriate, the occasion upon which a defendant enters such a plea to an accusatory instrument.

10. "Trial." A jury trial commences with the selection of the jury and includes all further proceedings through the rendition of a verdict. A non-jury trial commences with the first opening address, if there be any, and, if not, when the first witness is sworn, and includes all further proceedings through the rendition of a verdict.

11. "Verdict" means the announcement by a jury in the case of a jury trial, or by the court in the case of a non-jury trial, of its decision upon the defendant's guilt or innocence of the charges submitted to or considered by it.

12. "Conviction" means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument or a count thereof.

13. "Sentence" means the imposition and entry of sentence upon a conviction.

14. "Judgment." A judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence.

15. "Criminal action." A criminal action (a) commences with the filing of an accusatory instrument against a defendant in a criminal court, as specified in subdivision sixteen; (b) includes the filing of all further accusatory instruments directly derived from the initial one, and all proceedings, orders and motions conducted or made by a criminal court in the course of disposing of any such accusatory instrument, or which, regardless of the court in which they occurred or were made, could properly be considered as a part of the record of the case by an appellate court upon an appeal from a judgment of conviction; and (c) terminates with the imposition of sentence or, if sentence was not reached or imposed, by some other final disposition in a criminal court of the last accusatory instrument filed in the case.

16. "Commencement of criminal action." A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court, and, if more than one accusatory instrument is filed in the course of the action, it commences when the first of such instruments is filed.

17. "Criminal proceeding" means any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or of any other jurisdiction, or involves a criminal investigation.

18. "Criminal court" means any court defined as such by section 5.10.

19. "Superior court" means any court defined as such by subdivision two of section 5.10.

20. "Local criminal court" means any court defined as such by subdivision three of section 5.10.

21. "Intermediate appellate court" means any court possessing appellate jurisdiction, other than the court of appeals.

22. "Judge means any judicial officer who is a member of or constitutes a court, whether referred to in another provision of law as a justice or by any other title.

23. "Trial jurisdiction." A criminal court has "trial jurisdiction" of an offense when an indictment, an information or a prosecutor's information charging such offense may properly be filed in or with such court, and when such court has authority to accept a plea to, try or otherwise finally dispose of such accusatory instrument.

24. "Preliminary jurisdiction." A criminal court has "preliminary jurisdiction" of an offense when, regardless of whether it has trial jurisdiction thereof, a criminal action for such offense may be commenced therein, and when such court may conduct proceedings with respect thereto which lead or may lead to prosecution and final disposition of the action in a court having trial jurisdiction thereof.

25. "Appearance ticket" means a written notice, more fully defined in section 75.10, requiring a person to appear before a local criminal court in connection with a criminal charge to be filed against him therein.

26. "Summons" means a process of a criminal court, more fully

defined in section 65.10, requiring a defendant to appear before a local criminal court for the purpose of arraignment upon an accusatory instrument filed therein by which a criminal action against him has been commenced.

27. "Warrant of arrest" means a process of a local criminal court, more fully defined in section 60.10, directing a police officer to arrest a defendant and to take him before such court for the purpose or arraignment upon an accusatory instrument filed therein by which a criminal action against him has been commenced.

28. "Superior court warrant of arrest" means a process of a superior court directing a police officer to arrest a defendant and to take him before such court for the purpose of arraignment upon an indictment filed therein by which a criminal action against him has been commenced.

29. "Bench warrant" means a process of a criminal court in which a criminal action is pending, directing a police officer to take into custody a defendant in such action who has previously been arraigned upon the accusatory instrument by which the action was commenced, and to bring him before such court. The function of a bench warrant is to achieve the court appearance of a defendant in a pending criminal action for some purpose other than his initial arraignment in the action.

30. "Prosecutor" means a district attorney or any other public servant who represents the people in a criminal action.

31. "District attorney" means a district attorney or an assistant district attorney, and, where appropriate, the attorney general or an assistant attorney general.

32. "Police officer." The following persons are police officers:

(a) A member of the division of state police;

(b) A member of an authorized county or county parkway police department. For purposes of this chapter, sheriffs' undersheriffs and deputy sheriffs of counties outside of New York city are deemed members of an authorized county police department;

(c) A member of an authorized police department or force of a city, town, village or police district;

(d) A member of an authorized police department or force of an authority or a regional state park commission;

(e) A member of the capital buildings police force of the office of general services;

(f) An investigator employed in the office of a district attorney;

(g) Any other public servant who, by express provision of law, is under a duty in designated circumstances to make arrests or to perform other police functions. Such a public servant acts as a police officer only in the course of performing such designated statutory duties.

33. "Commitment to the custody of the sheriff," when referring to an order of a court located in a county or city which has established a department of correction, means commitment to the commissioner of correction of such county or city.

34. "County" ordinarily means (a) any county outside of New York City or (b) New York City in its entirety. Unless the context requires a different construction, New York city, despite its five counties, is deemed a single county within the meaning of the provisions of this chapter in which that term appears.

35. "Lesser included offense." When one offense contains all the elements of another offense and at least one additional element, the offense with the fewer elements is, with respect to the other, a "lesser included offense."

36. "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.

37. "Petty offense" means a violation or a traffic infraction.

38. "Evidence in chief" means evidence, received at a trial or other criminal proceeding in which a defendant's guilt or innocence of an offense is in issue, which may be considered as a part of the quantum of substantive proof establishing or tending to establish the commission of such offense or an element thereof or the defendant's connection therewith, as distinguished from non-substantive evidence which may be considered only for its effect in bolstering or impairing the credibility of a witness in the case or for some other limited purpose of a collateral nature.

# TITLE B
## THE CRIMINAL COURTS

# ARTICLE 5
## THE CRIMINAL COURTS



§ 5.10 The criminal courts; enumeration and definitions.

1. The "criminal courts" of this state are comprised of the superior courts and the local criminal courts.

2. "Superior court" means:
(a) The supreme court; or
(b) A county court.

3. "Local criminal court" means:
(a) A district court; or
(b) The New York City criminal court; or
(c) A city court; or
(d) A town court; or
(e) A village court; or
(f) A supreme court justice sitting as a local criminal court; or
(g) A county judge sitting as a local criminal court.

4. "City court" means any court for a city, other than New York City, having trial jurisdiction of offenses of less than felony grade only committed within such city, whether such court is entitled a city court, a municipal court, a police court, a recorder's court or is known by any other name or title.

5. "Town court." A "town court" is comprised of all the town justices of a town.

6. "Village court." A "village court" is comprised of the justice of a village, or all the justices thereof if there be more than one, or, at a time when he or they are absent, an acting justice of a village who is authorized to perform the functions of a village justice during such absence.

7. Not withstanding any other provision of this section, a court specified herein which possesses civil as well as criminal jurisdiction does not act as a criminal court when acting solely in the exercise of its civil jurisdiction, and an order or determination made by such a court in its civil capacity is not an order or determination of a crim-

inal court even though it may terminate or otherwise control or affect a criminal action or proceeding.

§ 5.20 Superior courts; jurisdiction.

1. A superior court has trial jurisdiction of all offenses. It has:

(a) Exclusive trial jurisdiction of all felonies; and

(b) Trial jurisdiction of all misdemeanors concurrent with that of the local criminal courts; and

(c) Trial jurisdiction of all petty offenses, but only when such an offense is charged in an indictment which also charges a crime.

2. A superior court has preliminary jurisdiction of all offenses, but it exercises such jurisdiction only by reason of and through the agency of its grand juries.

§ 5.30 Local criminal courts; jurisdiction.

1. A local criminal court has trial jurisdiction of all offenses other than felonies. It has:

(a) Exclusive trial jurisdiction of all petty offenses except for the superior court jurisdiction thereof prescribed in paragraph (c) of subdivision one of section 5.20; and

(b) Trial jurisdiction of all misdemeanors concurrent with that of the superior courts but subject to divestiture thereof by the latter in any particular case.

2. A local criminal court has preliminary jurisdiction of all offenses subject to divestiture thereof in any particular case by the superior courts and their grand juries.

3. Notwithstanding the provisions of subdivision one, a supreme court justice or a county judge sitting as a local criminal court does not have trial jurisdiction of any offense, but has preliminary jurisdiction only, as provided in subdivision two.

# TITLE C

## GENERAL PRINCIPLES RELATING TO REQUIREMENTS FOR AND EXEMPTIONS FROM CRIMINAL PROSECUTION

## ARTICLE 10

### GEOGRAPHICAL JURISDICTION OF OFFENSES



§ 10.10 Geographical jurisdiction of offenses; definitions of terms.

The following definitions are applicable to this article:

1. "This state" means New York State as its boundaries are prescribed in the state law, and the space over it.

2. "County" means any of the sixty-two counties of this state as its boundaries are prescribed by law, and the space over it.

3. "Result of an offense." When a specific consequence is an element of an offense, the occurrence of such consequence constitutes the "result" of such offense. The result of an offense of homicide is the death of the victim.

§ 10.20 Geographical jurisdiction of offenses; offenses within jurisdiction of state.

Subject to the provisions of section 10.30, a person who has engaged in conduct constituting an offense defined by the laws of this state may be prosecuted for such offense in the criminal courts of this state when:

1. Such offense was wholly committed within this state.

An offense is wholly committed within this state when all the conduct comprising it and the result thereof, if there be such, occur within this state. Such an offense is no less wholly committed within this state because:

(a) It is an offense of criminal solicitation, conspiracy or attempt and the object crime is intended to be committed outside this state; or

(b) It is an offense of criminal facilitation and the felony facilitated is committed outside this state; or

(c) It is an offense of omission and the defendant is outside this state at the time of the omission. An offense consisting of an omission to perform within this state a duty imposed by the laws of this state is wholly committed within this state; or

2. Such offense was partly committed within this state.

An offense was partly committed within this state when, although some of the conduct comprising it or the result thereof, if there be such, occurs outside this state:

(a) Conduct amounting to an attempt to commit such offense occurs within this state; or

(b) Conduct occurs within this state which amounts to conspiracy or criminal solicitation to commit such offense, or which otherwise establishes the complicity therein of at least one of the persons liable therefor. The jurisdiction acquired by the courts of this state pursuant to this paragraph extends only to the prosecution of those persons whose conduct of complicity occurred within this state; or

(c) Conduct constituting an element of the offense occurs within this state; or

(d)The result of the offense, if there be such, occurs within this state. In a homicide case in which the body of the victim or a part thereof is found within this state, it is presumed that the result of the offense occurred within this state; or

3. Although such offense is not wholly or partly committed within this state within the meanings of subdivisions two and three:

(a) The statute defining such offense is designed to prevent the occurrence of a particular effect is this state and the conduct constituting the offense is performed with intent that it will have such effect herein; or

(b) Such offense consists of an attempt to commit within this state a crime defined by the laws of this state; or

(c) Such offense consists of a conspiracy to commit within this state a crime defined by the laws of this state and an overt act in furtherance of such conspiracy occurs within this state.

§ 10.30 Geographical jurisdiction of offenses; effect of laws of other jurisdictions upon this state's jurisdiction.

1. Notwithstanding the provisions of section 10.20, the courts of this state do not have jurisdiction to prosecute an alleged offense partly committed within this state but consummated in another jur-

isdiction, or an offense of criminal solicitation, conspiracy or attempt to commit a crime in another jurisdiction, or an offense of criminal facilitation of a crime committed in another jurisdiction, unless the conduct constituting the consummated offense or, as the case may be, the conduct constituting the crime solicited, conspiratorially contemplated or facilitated, constitutes an offense under the laws of such other jurisdiction as well as under the laws of this state.

2. The courts of this state are not deprived of the jurisdiction accorded them by section 10.20 to prosecute an offense partly committed in this state and partly in another jurisdiction, or to prosecute an offense of attempt or conspiracy in another jurisdiction to commit a crime in this state, by the circumstance that the conduct constituting the consummated offense or, as the case may be, the crime attempted or conspiratorially contemplated, does not constitute an offense under the laws of such other jurisdiction.

§ 10.40 Geographical jurisdiction of offenses; jurisdiction of counties.

A person who has committed an offense of which the criminal courts of this state have jurisdiction, may be prosecuted in the appropriate courts of a particular county when:

1. Such offense was wholly committed in such county.

An offense is wholly committed within a particular county when all the conduct comprising it and the result thereof, if there be such, occur within such county. Such an offense is no less wholly committed within such county because:

(a) It is an offense of criminal solicitation, conspiracy or attempt and the object crime is intended to be committed outside such county; or

(b) It is an offense of criminal facilitation and the felony facilitated is committed outside such county; or

(c) It is an offense of omission and the defendant is outside such county at the time of omission. An offense consisting of an omission to perform a duty imposed by a law of this state which can be performed in one county only, is wholly committed within such county; or

2. Such offense was partly committed in such county.

An offense is partly committed within a particular county when, although some of the conduct comprising it or the result thereof, if there be such, occurs outside such county:

(a) Conduct amounting to criminal solicitation, conspiracy

or an attempt to commit the offense occurs within such county; or

(b) Conduct constituting an element of such offense occurs within such county; or

(c) The result of the offense, if there be such, occurs within such county; or

(d) The offense is one of omission to perform a duty imposed by a law of this state and such duty can be performed either in such county or in another county.

3. Although such offense was neither wholly nor partly committed in such county within the meanings of subdivisions one and two:

(a) The statute defining the offense is designed to prevent the occurrence of a particular effect and such conduct is performed with intent that it will, or with knowledge that it is likely to, have such effect in such county; or

(b) The offense is criminal solicitation, conspiracy or attempt to commit a crime in such county, or criminal facilitation of a crime committed in such county; or

4. Jurisdiction of such offense is accorded to the courts of such county pursuant to the following rules:

(a) An offense of homicide may be prosecuted in any county in which the body of the victim or a part thereof is found.

(b) An offense of bigamy, abandonment of a child or non-support of a child may be prosecuted in any county in which the defendant is arrested for such offense.

(c) An offense committed within five hundred yards of the boundary of a particular county, and in an adjoining county of this state, may be prosecuted in either such county.

(d) An offense committed anywhere on the Hudson river southward of the northern boundary of New York City, or anywhere on New York bay between Staten Island and Long Island, may be prosecuted in any of the five counties of New York City.

(e) An offense committed upon any bridge or in any tunnel having terminals in different counties may be prosecuted in any terminal county.

(f) An offense committed on board a railroad train, aircraft or omnibus operating as a common carrier may be prosecuted in any county through or over which such common carrier

passed during the particular trip, or in any county in which such trip terminated or was scheduled to terminate.

(g) An offense committed in a private vehicle during a trip thereof extending through more than one county may be prosecuted in any county through which such vehicle passed in the course of such trip.

(h) An offense committed on board a vessel navigating or lying in any river, canal or lake flowing through or situated within this state, may be prosecuted in any county bordering upon such body of water, or in which it is located, or through which it passes; and if such offense was committed upon a vessel operating as a common carrier, it may be prosecuted in any county bordering upon any body of water upon which such vessel navigated or passed during the particular trip.

## § 10.50 Geographical jurisdiction of offenses; jurisdiction of cities, towns and villages.

1. The principles enunciated in section 10.40, governing geographical jurisdiction over offenses as between counties of this state, are, where appropriate, applicable to the determination of geographical jurisdiction over offenses as between cities, towns and villages within a particular county unless a different determination is required by the provisions of some other express provision of statute.

2. Where an offense prosecutable in a local criminal court is committed in a city other than New York city, or in a town or village, but within one hundred yards of any other such political subdivision, it may be prosecuted in either such political subdivision.

# ARTICLE 15

## TIMELINESS OF PROSECUTIONS AND SPEEDY TRIAL



### § 15.10 Timeliness of prosecutions; periods of limitation.

1. A criminal action must be commenced within the period of limitation as prescribed in the ensuing subdivision of this section.

2. Except as otherwise provided in subdivision three:

(a) A prosecution for a class A felony may be commenced at any time;

(b) A prosecution for any other felony must be commenced within five years after the commission thereof;

(c) A prosecution for a misdemeanor must be commenced within two years after the commission thereof;

(d) A prosecution for a petty offense must be commenced within one year after the commission thereof.

3. Notwithstanding the provisions of subdivision two, the periods of limitation for the commencement of criminal actions may be extended as follows in the indicated circumstances:

(a) A prosecution for larceny committed by a person in violation of a fiduciary duty may be commenced within one year after the facts constituting such offense are discovered or, in the exercise of reasonable diligence, should have been discovered by the aggrieved party or by a person under a legal duty to represent him who is not himself implicated in the commission of the offense.

(b) A prosecution for any offense involving misconduct in public office by a public servant may be commenced at any time during the defendant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two.

4. In calculating the time limitation applicable to commencement of a criminal action, the following periods shall not be included:

(a) Any period following the commission of the offense during which (i) the defendant was continuously outside this state or (ii) the whereabouts of the defendant were continuously unknown and continuously unascertainable by the exer-

cise of reasonable diligence. However, in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two.

(b) When a prosecution for an offense is lawfully commenced within the prescribed period of limitation therefor, and when an accusatory instrument upon which such prosecution is based is subsequently dismissed by an authorized court under directions or circumstances permitting the lodging of another charge for the same offense or an offense based on the same conduct, the period extending from the commencement of the thus defeated prosecution to the dismissal of the accusatory instrument does not constitute a part of the period of limitation applicable to commencement of prosecution by a new charge.

§ 15.20 Speedy trial.

After a criminal action is commenced, the defendant is entitled to a speedy trial.

# ARTICLE 20

## EXEMPTION FROM PROSECUTION BY REASON OF PREVIOUS PROSECUTION



### § 20.10 Previous prosecution; definitions of terms.

The following definitions are applicable to this article:

1. "Same offense." Two prosecutions are for the "same offense" when they are based upon a violation of the same statutory provision and upon the same facts.

2. "Offenses substantially the same in fact." Two prosecutions are for "offenses substantially the same in fact" when, although such offenses are defined by different statutory provisions, and although one or each of the offenses as defined contains an element or requires proof of a fact not contained in or required by the other, both offenses are based upon the same conduct, or are based upon the same general course of conduct and have a substantially common factual denominator.

### § 20.20 Previous prosecution; when a bar to second prosecution.

1. A person may not be prosecuted for an offense when he has previously been prosecuted for the same offense.

2. A person may not be prosecuted for an offense when he has previously been prosecuted for an offense substantially the same in fact, unless:

(a) Each of the offenses contains an element or requires proof of a fact not contained in or required by the other and the statutes defining the two offenses are intended to prevent substantially different kinds of harm or evil; or

(b) (i) The previous prosecution was for assault or some other offense which resulted in physical injury to a person, and (ii) the offense later sought to be prosecuted is one of homicide based upon death resulting from such physical injury, and (iii) such death occurred subsequent to the previous prosecution; or

(c) The previous prosecution occurred in another jurisdiction and was there terminated by a court order expressly founded upon insufficiency of evidence to establish some element of the offense there prosecuted which is not an element of the offense sought to be prosecuted in this state.

§ 20.30 Previous prosecution; what constitutes.

1. Except as otherwise provided in this section, a person has "previously been prosecuted" for an offense, within the meaning of section 20.20 when he has previously been charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminated in a conviction upon a plea of guilty; or

(b) Proceeded to the trial stage and a witness was sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have "previously been prosecuted" for an offense, within the meaning of section 20.20, when:

(a) Such previous action occurred in a court which lacked jurisdiction over the defendant or the offense; or

(b) Such previous action was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings, though barring a subsequent prosecution for the offense in issue under a new or different accusatory instrument, do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

§ 20.40 Separate prosecution of jointly prosecutable offenses; when barred.

1. Under circumstances prescribed in this section, a person may not be tried or prosecuted separately for two or more offenses of a kind that are joinable in a single accusatory instrument by reason of the fact that they are based upon the same conduct or that they form an integral part of a single incident or transaction.

2. When (a) one such offense is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred.

3. When (a) two or more of such offenses are charged in separate accusatory instruments filed in the same court, and (b) an application by the defendant for consolidation thereof for trial purposes, pursuant to subdivision five of section 100.20 or section 175.45, is improperly denied, the commencement of a trial of one such accusatory instrument bars any subsequent prosecution upon any of the other accusatory instruments with respect to any such offense.

# ARTICLE 25

## COMPULSION OF EVIDENCE BY OFFER OF IMMUNITY



### § 25.10 Compulsion of evidence by offer of immunity; definitions of terms.

The following definitions are applicable to this article:

1. "Immunity." A person has "immunity" when, by reason of having given evidence in a legal proceeding, (a) he cannot be prosecuted for any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence, and (b) neither such evidence nor any other evidence discovered as a result of the information contained therein may be received against him in any criminal proceeding. Notwithstanding the foregoing, a person who has immunity is not exempt from prosecution for or conviction of perjury based upon false testimony given by him in a legal proceeding, or from prosecution for or conviction of contempt based upon contumacious refusal to give evidence in a legal proceeding, and any evidence given by him in such a proceeding is admissible upon such a prosecution for perjury or contempt.

2. "Legal proceeding" means a proceeding in or before any court or grand jury, or before any body, agency or person authorized by law to conduct the same and to administer the oath or to cause it to be administered.

3. "Give evidence" means to testify or produce physical evidence.

### § 25.20 Compulsion of evidence by offer of immunity.

1. Any witness in a legal proceeding, other than a grand jury proceeding, may refuse to give evidence requested of him on the ground that it may tend to incriminate him and he may not, except as provided in subdivision two, be compelled to give such evidence.

2. Such a witness may be compelled to give evidence in such a proceeding notwithstanding an assertion of his privilege against self-incrimination if:

(a) The proceeding is one in which, by express provision of

statute, a person conducting or connected therewith is declared a competent authority to confer immunity upon witnesses therein; and

(b) Such competent authority (i) orders such witness to give the requested evidence notwithstanding his assertion of his privilege against self-incrimination, and (ii) advises him that upon so doing he will receive immunity.

3. A witness who is ordered to give evidence pursuant to the provisions of subdivision two and who complies with such order receives immunity. Such witness is not deprived of such immunity because such competent authority did not comply with statutory provisions requiring notice to a specified public servant of intention to confer immunity.

4. A witness who, without asserting his privilege against self-incrimination, gives evidence in a legal proceeding other than a grand jury proceeding does not receive immunity.

5. The rules governing the circumstances in which witnesses may be compelled to give evidence and in which they receive immunity therefor in a grand jury proceeding are prescribed in section 95.40.

§ 25.30 Authority to confer immunity in criminal proceedings; court a competent authority.

In any criminal proceeding other than a grand jury proceeding, which involves prosecution or investigation of a crime, the court is a competent authority to confer immunity in accordance with the provisions of section 25.20, but only when expressly requested by the district attorney to do so.

## TITLE D

### RULES OF EVIDENCE, STANDARDS OF PROOF AND RELATED MATTERS

### RULES OF EVIDENCE AND RELATED MATTERS

§ 30.10 Rules of evidence; in general.

Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings.

§ 30.15 Rules of evidence; what witnesses may be called.

1. Unless otherwise expressly provided, in any criminal proceeding in which evidence is or may be received, both the people and the defendant may as a matter of right call and examine witnesses, and each party may cross-examine every witness called by the other party.

2. A defendant may testify in his own behalf, but his failure to do so is not in itself a factor from which any inference unfavorable to him may be drawn.

§ 30.20 Rules of evidence; evidence given by children.

1. Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence.

2. Every witness more than twelve years old may testify only under oath. A child less than twelve years old may not testify under oath, but the court may permit him to give unsworn evidence if it is satisfied that he possesses sufficient intelligence and capacity to justify the reception thereof.

3. A defendant may not be convicted of an offense upon the unsworn evidence of a child or children less than twelve years old, given pursuant to subdivision two, unsupported by corroborative

evidence (a) demonstrating that the offense on trial was in fact committed and (b) tending to connect the defendant with the commission of such offense.

§ 30.30 Rules of evidence; identification by means of previous recognition, in absence of present identification.

1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He observed the commission of such offense or an incident related thereto, and the presence or conduct thereat of the person claimed by the people to be the defendant; and

(ii) On an occasion subsequent thereto, but prior to the criminal proceeding, he physically observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person whom he recognized as the same person whom he had observed on the first or incriminating occasion; and

(iii) He is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his recognition on such occasion.

2. Under circumstances prescribed in subdivision one, such witness may testify at the criminal proceeding that he is certain that the person whom he observed and recognized on the second occasion is the same person whom he observed on the first or incriminating occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized on the second occasion, constitutes evidence in chief.

§ 30.40 Rules of evidence; identification by means of previous recognition, in addition to trial identification.

In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness whose testimony demonstrates that (a) he observed the commission of such offense or an incident related thereto and the presence or conduct thereat of the perso

claimed by the people to be the defendant, and (b) he is certain, on the basis of present recollection, that the defendant is the person in question, and (c) on an occasion subsequent to such offense or incident but prior to the proceeding, he observed the defendant under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States and then also recognized him as the same person whom he had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he observed on the first or incriminating occasion, also describe his previous recognition of the defendant and testify that he is certain that the person whom he observed on such second occasion is the same person whom he had observed on the first or incriminating occasion. Such testimony constitutes evidence in chief.

§ 30.50 Rules of evidence; impeachment of own witness by proof of prior contradictory statement.

1. When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony.

2. Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

3. When a witness has made a prior signed or sworn statement contradictory to his testimony in a criminal proceeding upon a material issue of the case, but his testimony does not tend to disprove the position of the party who called him and elicited such testimony, evidence that the witness made such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts.

§ 30.60 Rules of evidence; proof of previous conviction; when allowed.

1. If any witness, including a defendant, testifies in a criminal proceeding and denies a specific previous conviction for an offense, the party adverse to the one who called the witness may independently prove such conviction. If such witness testifies that he has never been convicted of any offense, the adverse party may independently prove any previous conviction.

2. If a defendant in a criminal proceeding, through the testimony of a witness called by him, offers evidence of his good character, the people may independently prove any previous conviction of the defendant for an offense the commission of which would tend to negate any character trait or quality attributed to the defendant in such witness' testimony.

3. Subject to the limitations prescribed in section 100.50, the people may prove that a defendant has been previously convicted for an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

§ 30.70 Rules of evidence; accomplice testimony; instructions to jury.

1. Upon a jury trial of an offense, the court must determine whether any witness therein who gives testimony unfavorable to a defendant is an accomplice, as that term is defined in subdivisions two and three. Upon determining that a witness is an accomplice, the court must so instruct the jury, and it must further instruct that accomplice testimony in general is inherently suspect owing to possible motives of self interest on the part of such witnesses, and that the jury must scrutinize and weigh such testimony with care and caution.

2. 'An "accomplice" means a witness in a criminal action who, according to the evidence adduced in such action, has himself committed:

(a) The offense charged; or

(b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such accomplice engaged in the conduct consti-

tuting the offense with the mental state required for the commission thereof.

§ 30.80 Rules of evidence; admissibility of statements of defendants.

1. Evidence of a written or oral statement previously made by a defendant may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.

2. A statement is "involuntarily made" by a defendant within the meaning of subdivision one, when it is obtained from him.

(a) By any person:

(i) By the use of physical force upon the defendant or another person; or

(ii) By means of a threat, express or implied, to engage in any conduct of a kind specified in section 135.60 of the penal law; or

(iii) By means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or

(b) By a public servant engaged in law enforcement activity or by a person acting under his direction or in cooperation with him:

(i) By means of any promise, express or implied, made to him outside the presence of his counsel, that a confession, admission or other inculpatory statement by the defendant would result in a material benefit to himself or another person; or

(ii) By means of any false statement of fact which such public servant or person knew to be false and which is of a kind that creates a risk that the defendant might falsely incriminate himself; or

(iii) Without first effectively advising the defendant of and according him such rights as he may derive from the constitution of this state or of the United States with respect to the making of a statement.

§ 30.90 Rules of evidence; statements of defendants; corroboration.

A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed.

§ 30.95 Rules of evidence; psychiatric testimony in certain cases.

When, in connection with a defense of mental disease or defect, a

psychiatrist who has examined the defendant testifies concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he shall be permitted to make a statement as to the nature of the examination, the diagnosis of the mental condition of the defendant and his opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion, and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

**New York State Temporary Commission on the Revision of the Penal Law and Criminal Code 1968 (2 of 5)**

# ARTICLE 35

## STANDARDS OF PROOF



### § 35.10 Standards of proof; definitions of terms.

The following definitions are applicable to this chapter:

1. "Legally sufficient evidence" means evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent.

2. "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

### § 32.50 Standards of proof of conviction.

No conviction of an offense by verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant's commission thereof.

# PART II

## THE PRINCIPAL PROCEEDINGS

# TITLE H

## PRELIMINARY PROCEEDINGS IN LOCAL CRIMINAL COURT

# ARTICLE 50

## COMMENCEMENT OF ACTION IN LOCAL CRIMINAL COURT



§ 50.05 Commencement of action; in general.

1. A criminal action is commenced in a local criminal court by the filing therewith of:

(a) An information; or

(b) A prosecutor's information; or

(c) A misdemeanor complaint; or

(d) A felony complaint.

2. If more than one such accusatory instrument is filed in the course of the same criminal action, such action is commenced when the first of such instruments is filed.

§ 50.10 Local criminal court accusatory instruments; definitions *thereof.*

1. An "information" is a written accusation by a person, filed with a local criminal court, charging one or more other persons with the commission of one or more offenses, none of which is a felony. It may serve as a basis both for the commencement of a criminal action and for the prosecution thereof in a local criminal court. An information includes a "simplified traffic information."

2. A "prosecutor's information" is a written accusation by a district attorney, filed with a local criminal court, either (a) at the direction of a grand jury pursuant to section 95.70, or (b) at the direction of a local criminal court pursuant to section 90.40 or 90.60, or (c) at the district attorney's own instance pursuant to subdivision two of section 50.45, charging one or more persons with the commission of one or more offenses, none of which is a felony. It serves as a basis for the prosecution of a criminal action, but it may serve as a basis for commencement of a criminal action only where it results from a grand jury direction issued in a case not previously commenced in a local criminal court.

3. A "misdemeanor complaint" is a written accusation by a person, filed with a local criminal court, charging one or more other persons with the commission of one or more offenses, at least one of which is a misdemeanor and none of which is a felony. It serves as a basis for the commencement of a criminal action, but it may serve as a basis for prosecution thereof only where a defendant has waived prosecution by information pursuant to subdivision four of section 85.65.

4. A "felony complaint" is a written accusation by a person, filed with a local criminal court, charging one or more persons with the commission of one or more offenses, at least one of which is a felony. It serves as a basis for the commencement of a criminal action, but not as a basis for prosecution thereof.

§ 50.15 Information, misdemeanor complaint and felony complaint; form and content.

1. An information, a misdemeanor complaint and a felony complaint must each specify the name of the court with which it is filed and the title of the action, and must be subscribed and verified by a person known as the "complainant." The complainant may be any person having knowledge, whether personal or upon information and belief, of the commission and the manner thereof, of the offense or offenses charged.

2. Each instrument must contain an accusatory part and a factual

part. The accusatory part must specify the offense or offenses charged. The factual part must contain a statement by the complaintant alleging facts of an evidentiary character, whether upon personal knowledge or upon information and belief, which support or tend to support the offense or offenses charged.

3. Each instrument may, in its accusatory part, charge either a single offense or two or more offenses of a kind that a joinable pursuant to the principles prescribed in section 100.20, governing the joinder of offenses in an indictment. In the latter case, the separate offenses must be set forth in separate counts, and the factual part of the instrument may consist of a single factual account applicable to all the counts of the accusatory part.

4. Each instrument may charge either a single defendant or two or more defendants, provided that in the latter case all such defendants are jointly charged with every offense alleged in such instrument. In the case of a multiple defendant instrument, the court, upon motion of a defendant made at any time before trial, may, in the interests of justice and for good cause shown, order in its discretion that any one defendant be tried separately from the others, or that two or more defendants be tried jointly but separately from two or more other defendants.

§ 50.20 Supporting deposition; definition; form and content.

A supporting deposition is a written instrument accompanying an information, a misdemeanor complaint or a felony complaint, described and verified by a person having knowledge of the offense charged in such accusatory instrument, and containing factual allegations of an evidentiary character, based either upon personal knowledge or upon information and belief, which support or supplement those of the complainant appearing in the factual part of such accusatory instrument.

§ 50.25 Simplified traffic information; form and content; bill of particulars.

1. Notwithstanding the requirements of form and content for an information prescribed in section 50.15, a "simplified traffic information" may be filed with a local criminal court, in lieu of an information in the regular form, when the offense charged is a traffic infraction or a misdemeanor relating to traffic.

*2. A simplified traffic information should be in the form prescribed by the commissioner of motor vehicles pursuant to section two hundred seven of the vehicle and traffic law.*

3. A defendant arraigned upon a simplified traffic information is entitled as a matter of right to a bill of particulars. Upon request of the defendant, the court must direct the police officer complainant to file a bill of particulars and serve a copy thereof upon the defendant. A failure to comply with such direction renders the information insufficient.

4. The bill of particulars must be subscribed by the police officer and must contain the name of the court with which the simplified traffic information is filed, the title of the action and a statement, in ordinary language, without reciting items of evidence, of such factual particulars as are necessary to accord the defendant and the court reasonable information concerning the nature and character of the offense charged.

§ 50.27 Information, misdemeanor complaint, felony complaint and supporting deposition; verification.

1. An information, a misdemeanor complaint, a felony complaint and a supporting deposition may be verified in any of the following manners:

(a) Such instrument may be sworn to before the court in which it is filed.

(b) Such instrument may be sworn to before a desk officer in charge at a police station or police headquarters or any of his superior officers.

(c) Where such instrument is filed by a public servant, other than a police officer, following the issuance and service of an appearance ticket, and where by express provision of law another designated public servant is authorized to administer the oath with respect to such instrument, it may be sworn to before such public servant.

(d) Such instrument may bear a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law, and such form notice together with the subscription of the deponent constitutes a verification of the instrument.

2. An instrument specified in subdivision one may be verified in any manner prescribed therein unless the court expressly directs verification in a particular manner prescribed therein.

§ 50.30 Prosecutor's information; form and content.

1. A prosecutor's information must specify the local criminal court in which it is filed and the title of the action, and must be

subscribed by the district attorney by whom it is filed. Otherwise it should be in the form prescribed for an indictment, pursuant to section 100.45, and must, in one or more counts, allege the offense or offenses charged and a plain and concise statement of the conduct constituting each such offense.

2. The provisions of article one hundred relating to joinder of offenses in indictments and consolidation of indictments, to joinder of defendants in an indictment and consolidation of indictments against different defendants, to amendment of indictments, and to bills of particulars in connection with indictments, apply, wherever appropriate, to prosecutor's informations filed with local criminal courts.

§ 50.35 Local criminal court accusatory instruments; sufficiency on face.

1. An information other than a simplified traffic information, or a count thereof, is sufficient on its face when:

(a) It substantially conforms to the requirements prescribed in section 50.15; and

(b) The allegations of the factual part of the information together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and

(c) Such allegations would, if presented in the form of testimony at a trial of the information, constitute legally sufficient evidence to support a conviction of the defendant for the offense charged.

2. A simplified traffic information is sufficient on its face when it substantially conforms to the requirements prescribed in section 5025; provided that, when a bill of particulars is requested, such simplified traffic information is not thereafter deemed sufficient on its face unless and until such a bill of particulars is filed and served in accordance with the provisions of subdivisions three and four of said section 50.25.

3. A misdemeanor complaint or a felony complaint, or a count thereof, is sufficient on its face when:

(a) It substantially conforms to the requirements prescribed in section 50.15; and

(b) The allegations of the factual part of such accusatory instrument, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe

that the defendant committed the offense charged in the accusatory part of such instrument.

4. A prosecutor's information, or a count thereof, is sufficient on its face when it substantially conforms to the requirements prescribed in section 50.30.

§ 50.40 Information, prosecutor's information, misdemeanor complaint; amendment thereof

1. At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an information, or a prosecutor's information, or a misdemeanor complaint which is or is to become the subject of a trial, with respect to defects, errors or variances from the proof of a kind specified in section 100.60, relating to amendment of indictments, and the provisions of said section 100.60 are, wherever appropriate, applicable to the amendment of the other accusatory instruments specified herein.

2. At any time before the entry of a plea of guilty to or the commencement of a trial of an information, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of the accusatory part of such information by addition of a count charging an offense supported by the allegations of the factual part of such information and any supporting depositions which may accompany it. In such case, the defendant must be accorded any reasonable adjournment necessitated by the amendment.

§ 50.45 Superseding informations and prosecutor's informations.

1. If at any time before a plea of guilty to, or the commencement of a trial of, an information or a prosecutor's information another information or, as the case may be, another prosecutor's information, is filed with the same local criminal court charging the defendant with an offense charged in the first instrument, the first such instrument is superseded by the second and, upon the defendant's arraignment upon the latter, it must be dismissed by the court.

2. At any time before entry of a plea of guilty to or commencement of a trial of an information, the district attorney of the county may file with the local criminal court a prosecutor's information charging any offenses supported, pursuant to the standards prescribed in subdivision one of section 50.35, by the allegations of the factual part of the original information and any supporting depositions which may accompany it. In such case, the original informa-

tion is superseded by the prosecutor's information and, upon the defendant's arraignment upon the latter, is deemed dismissed.

3. A misdemeanor complaint must or may be replaced and superseded by an information pursuant to the provisions of section 85.65

§ 50.50 Local criminal court accusatory instruments; in what courts filed

1. Any local criminal court accusatory instrument may be filed in a district court when an offense charged therein was allegedly committed in the county or that part thereof over which such court has jurisdiction.

2. Any local criminal court accusatory instrument may be filed in the New York city criminal court when an offense charged therein was allegedly committed in New York city.

3. Any local criminal court accusatory instrument may be filed in a city court when an offense charged therein was allegedly committed in such city.

4. An information, a prosecutor's information or a misdemeanor complaint may be filed in a town court when an offense charged therein was allegedly committed anywhere in such town other than in a village thereof having a village court. If such town court is not available at the time the accusatory instrument is sought to be filed, it may be filed with the town court of an adjoining town of the county.

5. An information, a prosecutor's information or a misdemeanor complaint may be filed with a village court when an offense charged therein was allegedly committed in such village. If such village court is not available at the time the accusatory instrument is sought to be filed, it may be filed with the town court of the town in which such village is located. If such town court is not available at the time, it may be filed with a town court of an adjoining town of the county.

6. A felony complaint may be filed with any town court or village court of a particular county when a felony charged therein was allegedly committed in some town of such county. Such court need not be that of the town or village in which such felony was allegedly committed.

7. An information, a misdemeanor complaint or a felony complaint may be filed with a judge of a superior court sitting as a local

criminal court when an offense charged therein was allegedly committed in a county in which such judge is then present and in which he either resides or is currently holding, or has been assigned to hold, a term of a superior court.

8. Where it is otherwise expressly provided by law that a particular kind of accusatory instrument may under given circumstances be filed in a local criminal court other than one authorized by this section, nothing contained in this section precludes the filing of such accusatory instrument accordingly.

9. In any case where each of two or more local criminal courts is authorized as a proper count in which to file an accusatory instrument, such an instrument may, in the absence of an express provision of law to the contrary, be filed in any one of such courts but not in more than one.

10. For purposes of this section, an offense is "committed in" a particular county, city, town, village or other specified political subdivision or area, not only when it is in fact wholly or partly committed therein but also when it is, for other reasons specified in sections 10.40 and 10.50, prosecutable in the criminal courts having geographical jurisdiction over such political subdivision or area.

# ARTICLE 55

## REQUIRING DEFENDANT'S APPEARANCE IN LOCAL CRIMINAL COURT FOR ARRAIGNMENT



### § 55.10 Methods of requiring defendant's appearance in local criminal court for arraignment; in general.

1. After a criminal action has been commenced in a local criminal court by a filing of an accusatory instrument therewith, a defendant who has not been arraigned in the action and has not come under the control of the court may under certain circumstances be compelled or required to appear for arraignment upon such accusatory instrument by:

(a) The issuance and execution of a warrant of arrest, as provided in article sixty; or

(b) The issuance and service upon him of a summons, as provided in article sixty-five; or

(c) Procedures provided in articles three hundred five, three hundred ten, three hundred twenty, three hundred twenty-two and three hundred twenty-four for securing attendance of defendants in criminal actions who are not at liberty within the state.

2. Although no criminal action against a person has been commenced in any court, he may under certain circumstances be compelled or required to appear in a local criminal court for arraignment upon an accusatory instrument to be filed therewith at or before the time of his appearance by:

(a) An arrest made without a warrant, as provided in article seventy; or

(b) The issuance and service upon him of an appearance ticket, as provided in article seventy-five.

# ARTICLE 60

## WARRANT OF ARREST



### § 60.10 Warrant of arrest; definition, function, form and content.

1. A warrant of arrest is a process issued by a local criminal court directing a police officer to arrest a defendant designated in an accusatory instrument filed with such court and to take him before such court in connection with such instrument. The sole function of a warrant of arrest is to achieve a defendant's court appearance in a criminal action for the purpose of arraignment upon the initial accusatory instrument by which such action was commenced.

2. A warrant of arrest must be subscribed by the issuing judge and must state or contain (a) the name of the issuing court, and (b) the date of issuance of the warrant, and (c) the name or title of an offense charged in the underlying accusatory instrument, and (d) the name of the defendant to be arrested or, if such be unknown, any name or description by which he can be identified with reasonable certainty, and (e) the name or classification of the police officer or officers to whom the warrant is addressed, and (f) a direction that such police officer arrest the defendant and bring him before the issuing court.

3. When a warrant is addressed to a classification or classifications of police officers rather than to a designated individual police officer, multiple copies of such warrant may be issued.

### § 60.20 Warrant of arrest; when issuable.

1. When a criminal action has been commenced in a local criminal court by the filing therewith of an accusatory instrument, other than a simplified traffic information, against a defendant who has

not been arraigned upon such accusatory instrument and has not come under the control of the court with respect thereto, such court may, if such accusatory instrument is sufficient on its face, issue a warrant for such defendant's arrest.

2. Even though such accusatory instrument is sufficient on its face, the court may refuse to issue a warrant of arrest based thereon until it has further satisfied itself, by inquiry or examination of witnesses, that there is reasonable cause to believe that the defendant committed the offense charged. Upon such inquiry or examination, the court may examine, under oath or otherwise, any available person whom it believes may possess knowledge concerning the subject matter of the charge.

3. Notwithstanding the provisions of subdivision one, if a summons may be issued in lieu of a warrant of arrest pursuant to section 65.20, and if the court is satisfied that the defendant will respond thereto, it may not issue a warrant of arrest.

§ 60.30 Warrant of arrest; by what courts issuable and in what courts returnable.

A warrant of arrest may be issued only by the local criminal court with which the underlying accusatory instrument has been filed, and it may be made returnable in such issuing court only.

§ 60.35 Warrant of arrest; attaching accusatory instrument to warrant of town court or village court.

A town court or a village court which issues a warrant of arrest where there is a substantial possibility that such court will not be available at the time of the execution thereof must attach to the warrant a duplicate copy of the underlying accusatory instrument. If one or more duplicate copies of the warrant are issued, such court must attach a duplicate copy of the underlying accusatory instrument to the original warrant and may attach as many copies of such accusatory instrument to copies of such warrant as it chooses. In any case where, pursuant to subdivision three of section 60.70, a defendant arrested upon such a warrant is taken before a local criminal court other than the town court or village court in which the warrant is returnable, the attached copy of the accusatory instrument constitutes a valid basis for arraignment, as provided in subdivision two of section 85.20.

§ 60.40 Warrant of arrest; to what police officers addressed.

A warrant of arrest may be addressed to any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the

court by which the warrant is issued.

§ 60.45 Warrant of arrest; what police officers may execute.

1. A warrant of arrest may be executed by (a) any police officer to whom it is addressed, or (b) any other police officer delegated to execute it under circumstances prescribed in subdivisions two and three.

2. A police officer to whom a warrant of arrest is addressed may delegate another police officer to whom it is not addressed to execute such warrant as his agent when:

(a) He has reasonable cause to believe that the defendant is in a county other than the one in which the warrant is returnable; and

(b) The warrant is, pursuant to section 60.50, executable in such other county without endorsement by a local criminal court thereof; and

(c) The geographical area of employment of the delegated police officer embraces the locality where the arrest is to be made.

3. Under circumstances specified in subdivision two, the police officer to whom the warrant is addressed may inform the delegated police officer, by telecommunication, mail or any other means, of the issuance of the warrant, of the offense charged in the underlying accusatory instrument and of all other pertinent details, and may request him to act as his agent in arresting the defendant pursuant to such warrant. Upon agreeing to do so, the delegated police officer is, to the same extent as the delegating police officer, authorized to make such arrest pursuant to the warrant within the geographical area of such delegated officer's employment. Upon so arresting the defendant, he must proceed as provided in subdivisions two and four of section 60.70.

§ 60.50 Warrant of arrest; where executable.

1. A warrant of arrest issued by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state.

2. A warrant of arrest issued by a city court, a town court or a village court may be executed:

(a) In the county of issuance or in any adjoining county; or

(b) Anywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the arrest is to be made. When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.

§ 60.60 Warrant of arrest; when and how executed.

1. A warrant of arrest may be executed on any day of the week and at any hour of the day or night.

2. Unless encountering physical resistance, flight or other factors rendering normal procedure impractical, the arresting police officer must inform the defendant that a warrant for his arrest for the offense designated therein has been issued. Upon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible.

3. In order to effect the arrest, the police officer may use such physical force as is authorized by section 35.30 of the penal law.

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or

(b) Endanger the life or safety of the officer or another person; or

(c) Result in the destruction, damaging or secretion of material evidence.

5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

§ 60.70 Warrant of arrest; procedure after arrest.

1. Upon arresting a defendant for any offense pursuant to a warrant of arrest in the county in which the warrant is returnable or in any adjoining county, or upon so arresting him for a felony in any other county, a police officer, if he be one to whom the warrant is addressed, must without unnecessary delay take the defendant before the local criminal court in which such warrant is returnable.

2. Upon arresting a defendant for any offense pursuant to a warrant of arrest in a county adjoining the county in which the warrant is returnable, or upon so arresting him for a felony in any other county, a police officer, if he be one delegated to execute the war-

rant pursuant to section 60.45, must without unnecessary delay deliver the defendant or cause him to be delivered to the custody of the police officer by whom he was so delegated, and the latter must then proceed as provided in subdivision one.

3. Upon arresting a defendant for an offense other than a felony pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or in an adjoining county, a police officer, if he be one to whom the warrant is addressed, must inform the defendant that he has a right to appear before a local criminal court of the county of arrest for the purpose of being released on his own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the police officer must request him to endorse such fact upon the warrant, and upon such endorsement the police officer must without unnecessary delay take him to the court in which the warrant is returnable. If the defendant does desire to avail himself of such right, or if he refuses to make the aforementioned endorsement, the police officer must without unnecessary delay take him to a local criminal court of the county of arrest. Such court must release the defendant on his own recognizance or fix bail for his appearance on a specified date in the court in which the warrant is returnable. If the defendant is in default of bail, the police officer must without unnecessary delay take him to the court in which the warrant is returnable.

4. Upon arresting a defendant pursuant to a warrant of arrest under circumstances specified in subdivision three, a police officer, if he be one delegated to execute the warrant pursuant to section 60.45, may hold the defendant in custody in the county of arrest for a period not exceeding two hours for the purpose of delivering him to the custody of the police officer by whom he was delegated to execute such warrant. If the delegating police officer receives custody of the defendant during such period, he must proceed as provided in subdivision three. Otherwise, the delegated police officer must inform the defendant that he has a right to appear before a local criminal court for the purpose of being released upon his own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the officer must request him to make, sign and deliver to him a written statement of such fact, and if the defendant does so, the officer must retain custody of him but must without unnecessary delay deliver him or cause him to be delivered to the custody of the delegating police officer. If the defendant does desire to avail himself of such right, or if he refuses to make and deliver the aforementioned statement, the delegated or arresting

police officer must without unnecessary delay take him before a local criminal court of the county of arrest and must submit to such court a sworn written statement reciting the material facts concerning the issuance of the warrant, the offense involved, and all other essential matters relating thereto. Upon the submission of such statement, such court must release the defendant on his own recognizance or fix bail for his appearance on a specified date in the court in which the warrant is returnable. If the defendant is in default of bail, the police officer must retain custody of him but must without unnecessary delay deliver him or cause him to be delivered to the custody of the delegating police officer. Upon receiving such custody, the latter must without unnecessary delay take the defendant before the court in which the warrant is returnable.

5. Whenever a police officer is required pursuant to this section to take an arrested defendant before a local criminal court in which a warrant of arrest is returnable, and when such court is a town court which is not available at the time, such police officer must, if a copy of the underlying accusatory instrument has been attached to the warrant pursuant to section 60.35, instead take such defendant before the town court of an adjoining town of the county. When the court in which the warrant is returnable is a village court which is not available at the time, the police officer must in such circumstances take the defendant before the town court of the town embracing such village or, if such town court is not available either, before the town court of an adjoining town of the county.

6. Before taking an arrested defendant to a local criminal court pursuant to this section, a police officer must perform all recording, fingerprinting, photographing and other preliminary police duties required in the particular case, and if such duties are performed with reasonable promptness, the period of time required therefor does not constitute an unnecessary delay in taking the defendant to a court within the meaning of this section.

# ARTICLE 65

## THE SUMMONS



### § 65.10 Summons; definition, function, form and content.

1. A summons is a process issued by a local criminal court directing a defendant designated in an information, a prosecutor's information or a misdemeanor complaint filed with such court to appear before it at a designated future time in connection with such accusatory instrument. The sole function of a summons is to achieve a defendant's court appearance in a criminal action for the purpose of arraignment upon the initial accusatory instrument by which such action was commenced.

2. A summons must be subscribed by the issuing judge and must state or contain (a) the name the of issuing court, and (b) the name of the defendant to whom it is addressed, and (c) the name or title of an offense charged in the underlying accusatory instrument and (d) the date of issuance of the summons, and (e) the date and time when it is returnable, and (f) a direction that the defendant appear before the issuing court at such time.

### § 65.20 Summons; by what courts issuable and in what courts returnable.

A summons may be issued only by the local criminal court with which the accusatory instrument underlying it has been filed, and it may be made returnable in such issuing court only.

### § 65.30 Summons; when issuable.

A local criminal court may issue a summons in any case in which, pursuant to section 60.20, it is authorized to issue a warrant of arrest based upon an information, a prosecutor's information or a misdemeanor complaint.

### § 65.40 Summons; service.

1. A summons may be served by a police officer or by a complainant at least eighteen years old or by any other person at least eighteen years old designated by the court.

2. A summons may be served anywhere in the county of issuance

or anywhere in an adjoining county.

§ 65.50 Summons; defendant's failure to appear.

If after the service of a summons the defendant does not appear in the designated local criminal court at the time such summons is returnable, the court may issue a warrant of arrest.

# ARTICLE 70

## ARREST WITHOUT A WARRANT



### § 70.10 Arrest without a warrant; in general.

A person who has committed or is believed to have committed an offense and who is at liberty within the state may, under circumstances prescribed in this article, be arrested for such offense although no warrant of arrest therefor has been issued and although no criminal action therefor has yet been commenced in any criminal court.

### § 70.30 Arrest without a warrant; by police officer; when and where authorized.

1. Subject to the provisions of subdivision two, a police officer may arrest a person for an offense committed or believed by him to have been committed within the geographical area of such police officer's employment, as follows:

(a) He may arrest such person for a crime when he has reasonable cause to believe that he has committed such crime; and

(b) He may arrest such person for any offense when he has

reasonable cause to believe that he has committed such offense in his presence.

2. A police officer authorized to arrest a person pursuant to subdivision one may make such arrest anywhere in the county in which the offense was or is believed by him to have been committed or in an adjoining county, and he may make such arrest elsewhere under the following circumstances:

(a) He may make such arrest anywhere in the state if (i) the arrest is for a felony and (ii) such police officer's geographical area of employment embraces either the entire county in which such felony was, or is believed by him to have been, committed, or an entire city located in such county;

(b) Such a police officer may, for the purpose of arresting a person for any offense, follow him in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest such person in any county in which he apprehends him. He may also, if the attempted arrest is for a crime, continue such pursuit outside the state, if necessary, and may arrest such person in any state the laws of which contain provisions equivalent to those of section 70.80.

3. Notwithstanding any other provision of this section, a police officer may arrest a person within the geographical area of such police officer's employment for an offense committed or believed by him to have been committed elsewhere when another police officer who is authorized to make such arrest in such locality requests him to make such arrest as his agent.

4. Any police officer may arrest a person for a felony anywhere in the state, including any place not within the geographical area of such officer's employment, when he has reasonable cause to believe that such person has committed such felony in his presence, provided that such arrest is made during or immediately after the allegedly criminal conduct or during the alleged perpetrator's immediate flight therefrom.

§ 70.40 Arrest without a warrant; when and how made by police officer.

1. A police officer may arrest a person for an offense, pursuant to section 70.30, at any hour of any day or night.

2. The arresting police officer must inform the defendant of his

authority and purpose and of the reason for such arrest unless he encounters physical resistance, flight or other factors rendering such procedure impractical.

3. In order to effect such an arrest, such police officer may use such physical force as is authorized by section 35.30 of the penal law.

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes the defendant to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 60.60, if he were attempting to make such arrest pursuant to a warrant of arrest.

§ 70.50 Arrest without a warrant; procedure after arrest by police officer.

1. Upon arresting a defendant without a warrant, a police officer, after performing with reasonable promptness all recording, fingerprinting, photographing and other preliminary police duties required in the particular case, must, except as provided in subdivisions two, three and four, take the defendant or cause him to be taken without unnecessary delay to a local criminal court designated in section 50.50 as one with which an information, misdemeanor complaint or felony complaint for the offense in question may be filed, and must without unnecessary delay file therewith such an appropriate accusatory instrument.

2. If the arrest is for a traffic infraction or for a misdemeanor relating to traffic, the police officer may, instead of taking the defendant, pursuant to subdivision one, to a local criminal court of the political subdivision or locality in which the offense was allegedly committed, take him to the local criminal court of the same county nearest available by highway travel to the point of arrest, and file therewith the appropriate accusatory instrument.

3. If the arrest is for an offense other than a felony, the defendant need not be taken to a local criminal court as provided in subdivisions one and two, and the procedure may instead be as follows:

(a) A police officer may issue and serve an appearance ticket upon the defendant and release him from custody, as prescribed in subdivision two of section 75.20; or

(b) The desk officer in charge at a police station, county jail or police headquarters, or any of his superior officers, may, in such place fix pre-arraignment bail and, upon deposit thereof,

issue and serve an appearance ticket upon the defendant and release him from custody, as prescribed in section 75.30.

4. If (a) the arrest is for an offense other than a felony, and (b) owing to unavailability of a local criminal court the arresting police officer is unable to take the defendant to such a court with reasonable promptness, an appearance ticket must be served unconditionally upon the defendant or pre-arraignment bail fixed, as prescribed in subdivision three.

§ 70.53 Arrest without a warrant; by any person; when and where authorized.

1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any other offense when the latter has in fact committed such offense in his presence.

2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed.

§ 70.55 Arrest without a warrant; when and how made by person acting other than as a police officer.

1. A person may arrest another person for an offense pursuant to section 70.53 at any hour of any day or night.

2. Such person must inform the person whom he is arresting of the reason for such arrest unless he encounters physical resistance, flight or other factors rendering such procedure impractical.

3. In order to effect such an arrest, such person may use such physical force as is authorized by subdivision four of section 35.30 of the penal law.

§ 70.57 Arrest without a warrant; procedure after arrest made by person acting other than as a police officer.

1. A person making an arrest pursuant to section 70.53 must without unnecessary delay deliver or attempt to deliver the person arrested to the custody of an appropriate police officer, as defined in subdivision three. For such purpose, he may solicit the aid of any police officer and the latter, if he is not himself an appropriate police officer, must assist in delivering the arrested person to an appropriate officer. In any case, the appropriate police officer, upon receiving custody of the arrested person, must take him on behalf of the arresting person, before an appropriate local criminal court and the arresting person must without unnecessary delay file an appropriate accusatory instrument with such court.

2. Notwithstanding any other provision of this section, a police officer is not required to take an arrested person into custody or to take any other action prescribed in this section on behalf of the arresting person if he has reasonable cause to believe that the arrested person did not commit the alleged offense or that the arrest was otherwise unauthorized.

3. As used in this section:

(a) An "appropriate police officer" means one whose geographical area of employment is such that he would himself be authorized to make the arrest in question as a police officer under circumstances specified in section 70.30;

(b) An "appropriate local criminal court" means one with which an accusatory instrument charging the offense in question may properly be filed pursuant to the provisions of section 50.50.

§ 70.60 Arrest without a warrant; dismissal of insufficient information, misdemeanor complaint or felony complaint.

If an information, a misdemeanor complaint or a felony complaint filed in a local criminal court pursuant to section 70.50 or section 70.57 is not sufficient on its face, as prescribed in section 50.35, and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face, it must dismiss such accusatory instrument and discharge the defendant.

§ 70.70 Temporary questioning of persons in public places; search for weapons.

1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a class A misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

2. When upon stopping a person under circumstances prescribed in subdivision one a police officer reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reason-

ably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

§ 70.80 Arrest without a warrant, by peace officers of other states for offense committed outside state; uniform close pursuit act.

1. As used in this section, the word "state" shall include the District of Columbia.

2. Any peace officer of another state of the United States, who enters this state in close pursuit and continues within this state in such close pursuit of a person in order to arrest him, shall have the same authority to arrest and hold in custody such person on the ground that he has committed a crime in another state which is a crime under the laws of the state of New York, as police officers of this state have to arrest and hold in custody a person on the ground that he has committed a crime in this state.

3. If an arrest is made in this state by an officer of another state in accordance with the provisions of subdivision two, he shall without unnecessary delay take the person arrested before a local criminal court which shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with the provisions of subdivision two, and not of determining the guilt or innocence of the arrested person. If such court determines that the arrest was in accordance with such subdivision, it shall commit the person arrested to the custody of the officer making the arrest, who shall without unnecessary delay take him to the state from which he fled. If such court determines that the arrest was unlawful, it shall discharge the person arrested.

4. This section shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

5. Upon the taking effect of this section it shall be the duty of the secretary of state to certify a copy of this section to the executive department of each of the states of the United States.

6. This section shall apply only to peace officers of a state which by its laws has made similar provision for the arrest and custody of persons closely pursued within the territory thereof.

7. If any part of this section is for any reason declared void, it is declared to be the intent of this section that such invalidity shall not affect the validity of the remaining portions of this section.

[redacted] as the uniform act on close pursuit.

# ARTICLE 75

## THE APPEARANCE TICKET



### § 75.10 Appearance ticket; definition, form and content.

An appearance ticket is a written notice issued and subscribed by a police officer or other public servant authorized by law to issue the same, directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offense. A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title.

### § 75.20 Appearance ticket; when by whom issuable.

1. Whenever a police officer is authorized pursuant to section 70.30 to arrest a person without a warrant for an offense other than a felony, he may, subject to the provisions of subdivisions three and four of section 75.40, instead issue to and serve upon such person an appearance ticket.

2. Whenever a police officer has arrested a person without a warrant for an offense other than a felony pursuant to section 70.30, he may, in lieu of taking such person to a local criminal court and promptly filing an information or misdemeanor complaint therewith, issue to and serve upon such person an appearance ticket. The issuance and service of an appearance ticket under such circumstances may be conditioned upon a deposit of pre-arraignment bail, as provided in section 75.30.

3. A public servant other than a police officer, who is specially authorized by law to issue and serve appearance tickets with respect to a particular class of offenses of less than felony grade, may issue and serve upon a person an appearance ticket when he

has reasonable cause to believe that such person has committed a misdemeanor or has committed a petty offense in his presence.

§ 75.30 Appearance ticket; issuance and service thereof after arrest upon posting of pre-arraignment bail.

1. Issuance and service of an appearance ticket by a police officer following an arrest without a warrant, as prescribed in subdivision two of section 75.20, may be made conditional upon the posting of a sum of money, known as pre-arraignment bail. A desk officer in charge at a police station, county jail or police headquarters, or any of his superior officers, may, in such place, fix pre-arraignment bail, in an amount prescribed in subdivision two, and upon the posting thereof must issue and serve an appearance ticket upon the defendant, give a receipt for the bail, and release the defendant from custody. In such case, the bail becomes forfeit upon failure of the defendant to comply with the directions of the appearance ticket. A warning that such forfeiture will occur in the event of such noncompliance must be stated in the receipt.

2. Pre-arraignment bail may be fixed in the following amounts:

(a) If the arrest was for a class A misdemeanor, any amount not exceeding five hundred dollars.

(b) If the arrest was for a class B or an unclassified misdemeanor, any amount not exceeding two hundred fifty dollars.

(c) If the arrest was for a petty offense, any amount not exceeding one hundred dollars.

§ 75.40 Appearance ticket; where returnable; how and where served.

1. An appearance ticket must be made returnable in a local criminal court designated in section 50.50 as one with which an information for the offense in question may be filed.

2. An appearance ticket, other than one issued for a traffic infraction relating to parking, must be served upon the defendant personally.

3. An appearance ticket may be served anywhere in the county in which the designated offense was allegedly committed or in any adjoining county, and may be served elsewhere as prescribed in subdivision four.

4. A police officer may, for the purpose of serving an appearance ticket upon a person, follow him in continuous close pursuit, commencing either in the county in which the alleged offense was committed or in an adjoining county, in and through any county of the

state, and may serve such appearance ticket upon him in any county in which he overtakes him.

§ 75.50 Appearance ticket; filing an information or misdemeanor complaint; dismissal of insufficient instrument.

1. A police officer or other public servant who has issued and served an appearance ticket must, at or before the time such appearance ticket is returnable, file or cause to be filed in the local criminal court in which it is returnable an information or a misdemeanor complaint charging the person named in such appearance ticket with the offense specified therein.

2. If such information or misdemeanor complaint is not sufficient on its face, as prescribed in section 50.35, and if the court is satisfied that an information or misdemeanor complaint sufficient on its face cannot be drawn and filed on the basis of the available facts or evidence, it must dismiss such accusatory instrument.

§ 75.60 Appearance ticket; defendant's failure to appear.

If after the service of an appearance ticket and the filing of an information or misdemeanor complaint charging the offense designated therein the defendant does not appear in the designated local criminal court at the time such appearance ticket is returnable, the court may issue a summons or a warrant of arrest based upon the information or misdemeanor complaint filed.

# ARTICLE 80

## FINGERPRINTING AND PHOTOGRAPHING OF DEFENDANT AFTER ARREST—CRIMINAL IDENTIFICATION RECORDS AND STATISTICS



### § 80.10 Fingerprinting and photographing; duties of police with respect thereto

1. Following an arrest, the arresting police officer must take or cause to be taken fingerprints and a photograph of the defendant if the offense which is the subject of such arrest is:

(a) A felony; or

(b) A misdemeanor defined in the penal law; or

(c) A misdemeanor defined outside the penal law which would constitute a felony if such person had a previous judgment of conviction for a crime; or

(d) Prostitution, as defined in section 230.00 of the penal law.

2. For the purpose of maintaining the identity of photographs taken as prescribed in subdivision one, every police agency must use an identification numeral board or other similar apparatus or device, containing the name of the agency, the arrest-number and the date upon which the photograph is taken.

### § 80.20 Fingerprinting and photographing; forwarding of fingerprints and photographs to other agencies.

Upon the taking of fingerprints and a photograph as prescribed in section 80.10, the police officer who made the arrest, or the agency by which he is employed, must, not more than twenty-four hours after the arrest, forward such material and other matter to other agencies as follows:

1. Such police officer or agency must forward to the New York state identification and intelligence system at Albany:

(a) One copy of such fingerprints; and

(b) One copy of such photograph; and

(c) All available information concerning the defendant's pre-

vious record, if any, and concerning the facts and circumstances of the crime charged; and

(d) A request that such New York state identification and intelligence system transmit to such forwarding police officer or agency all information which it has on file concerning the previous record, if any, of the defendant.

2. Such police officer or agency must forward to the criminal identification unit of the United States department of justice at Washington:

(a) One copy of such fingerprints; and

(b) A request that such United States department of justice transmit to such forwarding police officer or agency all information which it has on file concerning the previous record, if any, of the defendant.

§ 80.30 Fingerprinting and photographing; duties of New York state identification and intelligence system.

1. Upon receiving fingerprints from a police officer or agency, pursuant to subdivision one of section 80.20, the New York state identification and intelligence system must, except as provided in subdivision two, classify them, if they are not already classified, search its records for information concerning a previous record of the defendant, and promptly transmit to such forwarding police officer or agency a report containing all information on file with respect to such defendant's previous record, if any, or stating that the defendant has no previous record according to its files. Such a report, if certified, constitutes presumptive evidence of the facts so certified.

2. If the fingerprints so received are not sufficiently legible to permit accurate and complete classification, they must be returned to the forwarding police officer or agency with an explanation of the defects and a request that the defendant's fingerprints be retaken if possible.

§ 80.40 Fingerprinting and photographing; transmission to district attorney of report received by police

Upon receipt of a report of the New York state identification and intelligence system as provided in section 80.30, the recipient police officer or agency must promptly transmit such report or a copy thereof to the district attorney of the county.

# ARTICLE 85

## PROCEEDINGS UPON INFORMATION, PROSECUTOR'S INFORMATION AND MISDEMEANOR COMPLAINT FROM ARRAIGNMENT TO PLEA



§ 85.02 Arraignment upon information, prosecutor's information or misdemeanor complaint; presence of defendant.

1. Following the filing of an information, a prosecutor's information or a misdemeanor complaint in a local criminal court, the defendant must be arraigned thereon. Except as provided in subdivisions two and three, the defendant must appear personally at such arraignment.

2. If the only offense or offenses charged are traffic infractions, the procedure provided in sections eighteen hundred five and eighteen hundred six of the vehicle and traffic law, relating to arraignments and pleas in such cases, is, where appropriate, applicable and controlling.

3. In any case in which the defendant's appearance is required by a summons or an appearance ticket, the court in its discretion may, for good cause shown, permit the defendant to appear by counsel instead of in person. In such case, the court must, unless the action is finally disposed of on the date of such appearance, issue an order releasing the defendant on his own recognizance.

§ 85.05 Arraignment upon information, prosecutor's information other than one charging traffic infractions only, or upon misdemeanor complaint; defendant's rights, court's instructions and bail matters.

1. Upon the defendant's arraignment before a local criminal court upon an information or prosecutor's information, other than one charging traffic infractions only, or upon a misdemeanor complaint, the court must immediately inform him of the charge or charges against him and furnish him with a duplicate copy of such accusatory instrument. If the pending accusatory instrument is a misdemeanor complaint, the court must further inform the defendant that, unless he consents to be prosecuted thereon pursuant to subdivision four of section 85.65, he will not be so prosecuted or required to enter a plea thereto but that, pursuant to subdivision one of said section 85.65, the misdemeanor complaint will subsequently be replaced and superseded by an information or a prosecutor's information which will constitute the basis of the prosecution.

2. The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the proceedings in the action, and, if he appears upon such arraignment without counsel, he has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense.

3. The court must, except as provided in subdivision four, inform the defendant:

(a) Of all rights specified in subdivision two; and

(b) Where appropriate, that a conviction for an offense charged, in addition to subjecting the defendant to the sentence provided therefor, will also render his license to drive a motor vehicle and his certificate of registration subject to suspension and revocation as prescribed by law; and that a plea of guilty to such offense constitutes a conviction thereof to the same extent as a verdict of guilty after trial; and

(c) Where the information is a simplified traffic information, that the defendant has a right to a bill of particulars, as provided in section 50.25

4. In any case where the defendant has appeared for arraignment in response to a summons or an appearance ticket, a printed statement upon such process containing the instructions specified in subdivision three constitutes compliance with the provisions of said subdivision three.

5. The provisions of subdivision six of section 85.05, relating to orders of recognizance or bail upon arraignment apply equally to arraignments conducted pursuant to this section.

§ 85.20 Removal of action from one local criminal court to another.

Under circumstances prescribed in this section, a criminal action based upon an information, a misdemeanor complaint or a prosecutor's information may be removed from one local criminal court to another:

1. When a defendant arrested by a police officer, acting either with or without a warrant of arrest, for an offense other than a felony allegedly committed in a town has, owing to special circumstances and as expressly provided by law, not been taken before the particular town court or village court which by reason of the situs of such offense has trial jurisdiction thereof, but, instead, before a town court which does not have trial jurisdiction thereof, and therein stands charged with such offense by information or misdemeanor complaint, such town court must arraign him upon such

accusatory instrument. If the defendant desires to enter a plea of guilty thereto immediately following such arraignment, such town court must permit him to do so and must thereafter conduct the action to judgment. Otherwise, it must remit the action, together with all pertinent papers and documents, to the town court or village court which has trial jurisdiction of the action, and the latter court must then conduct such action to judgment or other final disposition.

2. When a defendant arrested by a police officer, acting either with or without a warrant of arrest, for an offense other than a felony has been taken before a superior court judge sitting as a local criminal court for arraignment upon an information or a misdemeanor complaint charging such offense, such judge must, as a local criminal court, arraign the defendant upon such accusatory instrument. Such judge must then remit the action, together with all pertinent papers and documents, to a local criminal court having trial jurisdiction thereof. The latter court must then conduct such action to judgment or other final disposition.

3. At any time after arraignment of a defendant upon an information, a prosecutor's information or a misdemeanor complaint pending in a town court or a village court having trial jurisdiction thereof, and before entry of a plea thereto or commencement of a trial thereof, a judge of the county court of the county in which such town or village court is located may, upon motion of the defendant or the prosecutor, order that the action be transferred for disposition from such town court to another town court of the county or, as the case may be, from such village court to a town court of the county, upon the ground that disposition thereof within a reasonable time in the court from which removal is sought is unlikely owing to:

(a) Death, disability or other incapacity or disqualification of all of the judges of such court; or

(b) Inability of such court to form a jury in a case in which the defendant is entitled to and has requested a jury trial.

§ 85.21 Divestiture of jurisdiction by indictment; removal of case to superior court at prosecutor's instance.

1. If at any time before entry of a plea of guilty to, or the commencement of a trial of, a misdemeanor complaint, or an information or a prosecutor's information containing a charge of misdemeanor, an indictment charging the defendant with such misdemeanor is filed in a superior court, the local criminal court is

thereby divested of jurisdiction of such misdemeanor charge and all proceedings therein with respect thereto are terminated.

2. At any time before the entry of a plea of guilty to, or the commencement in local criminal court of a trial of an accusatory instrument specified in subdivision one, the district attorney of the county may apply for an adjournment of the proceedings in the local criminal court upon the ground that he intends to present the misdemeanor charge in question to a grand jury with a view to prosecuting it by indictment in a superior court. In such case, the local criminal court must adjourn the proceedings to a date which affords the district attorney reasonable opportunity to pursue such action, and may subsequently grant such further adjournments for that purpose as are reasonable under the circumstances. Following the granting of such adjournment or adjournments, the proceedings shall be as follows:

(a) If such charge is presented to a grand jury within the designated period and either an indictment or a dismissal of such charge results, the local criminal court is thereby divested of jurisdiction of such charge, and all proceedings in the local criminal court with respect thereto are terminated.

(b) If the misdemeanor charge is not presented to a grand jury within the designated period, the proceedings in the local criminal court must continue.

§ 85.22 Divestiture of jurisdiction by indictment; removal of case to superior court at defendant's instance.

1. At any time before the entry of a plea of guilty to, or the commencement of a trial of, a misdemeanor complaint, or of an information or a prosecutor's information containing a charge of a misdemeanor, a superior court having jurisdiction to prosecute such misdemeanor charge by indictment may, upon motion of the defendant made upon notice to the district attorney, showing good cause to believe that the interests of justice so require, order that such charge be prosecuted by indictment and that the district attorney of the county present it to the grand jury for such purpose.

2. If such motion is granted, the order of such superior court stays the proceedings in the local criminal court pending presentation of the charge to the grand jury. Upon the subsequent filing of an indictment in the superior court, the proceedings in the local criminal court terminate and the defendant must be required to appear for arraignment upon the indictment in the manner prescribed in subdivisions one and two of section 105.20. Upon the

subsequent filing of a grand jury dismissal of the charge, the proceedings in the local criminal court terminate and the superior court must, if the defendant is not at liberty on his own recognizance, discharge him from custody or exonerate his bail, as the case may be.

3. At any time before entry of a plea of guilty to, or the commencement in a local criminal court of a trial of an accusatory instrument specified in subdivision one, the defendant may apply to such local criminal court for an adjournment of the proceedings therein upon the ground that he intends to make a motion in a superior court, pursuant to subdivision one, for an order that the misdemeanor charge be prosecuted by indictment. In such case, the local criminal court must adjourn the proceedings to a date which affords the defendant reasonable opportunity to pursue such action, and may subsequently grant such further adjournments for that purpose as are reasonable under the circumstances. Following the granting of such adjournment or adjournments, the proceedings must be as follows:

(a) If the motion in a superior court is not made by the defendant within the designated period, the proceedings in the local criminal court must continue.

(b) If the motion in a superior court is made by the defendant within the designated period, such stays the proceedings in the local criminal court until the entry of an order determining such motion.

(c) If the superior court enters an order granting the motion, such order stays the proceedings in the local criminal court as provided in subdivision two; and upon a subsequent indictment or dismissal of such charge by the grand jury, the proceedings in the local criminal court terminate as provided in subdivision two.

(d) If the superior court enters an order denying the motion, the proceedings in the local criminal court must continue.

§ 85.25 Motion to dismiss information, prosecutor's information or misdemeanor complaint.

1. After arraignment upon an information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any count thereof upon the ground that:

(a) It is defective, pursuant to section 85.30; or

(b) The defendant has received immunity from prosecution

for the offense charged, pursuant to sections 25.20 and 95.40; or

(c) The prosecution is barred by reason of a previous prosecution, pursuant to section 20.20; or

(d) The prosecution is untimely, pursuant to section 15.10; or

(e) The defendant has been denied the right to a speedy trial; or

(f) There exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or

(g) Dismissal of such instrument or some count thereof is required in furtherance of justice.

2. A motion pursuant to this section should be made prior to the entry of a plea of guilty or commencement of trial. A motion made thereafter may be summarily denied, but the court, in the interest of justice and for good cause shown, may in its discretion entertain and dispose of the motion on the merits at any time before sentence.

3. Upon the motion, a defendant who is in a position adequately to raise more than one ground in support thereof should raise every such ground upon which he intends to challenge the accusatory instrument. A subsequent motion based upon a ground not so raised may be summarily denied, although the court, in the interest of justice and for good cause shown, may in its discretion entertain and dispose of such a motion on the merits notwithstanding.

§ 85.30 Motion to dismiss information, prosecutor's information or misdemeanor complaint; as defective.

1. An information, a prosecutor's information or a misdemeanor complaint, or a count thereof, is defective within the meaning of paragraph (a) of subdivision one of section 85.25 when:

(a) It is not sufficient on its face pursuant to the requirements of subdivision one, two or four of section 50.35; provided that such an instrument or count may not be dismissed as defective, but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment, pursuant to section 50.40, and where the people move to so amend; or

(b) The allegations demonstrate that the court does not have jurisdiction of the offense charged; or

(c) The statute defining the offense charged is unconstitutional or otherwise invalid.

2. An information is also defective when it is filed in replacement of a misdemeanor complaint pursuant to subdivision two of section 85.65 but without satisfying the requirements stated therein.

3. A prosecutor's information is also defective when:

(a) It is filed at the direction of a grand jury, pursuant to section 95.70, and the offense or offenses charged are not among those authorized by such grand jury direction; or

(b) It is filed by the district attorney at his own instance, pursuant to subdivision two of section 50.45, and the factual allegations of the original information underlying it and any supporting depositions are not legally sufficient to support the offense charged in the prosecutor's information or the defendant's commission thereof.

§ 85.35 Motion to dismiss information, prosecutor's information or misdemeanor complaint; in furtherance of justice.

1. An information, a prosecutor's information or a misdemeanor complaint, or any count thereof, may, upon motion of the defendant or of the people or of the court itself, be dismissed by the court in its discretion upon a ground other than one of those specified in paragraphs (a) through (f) of subdivision one of section 85.25, when such ground consists of a compelling factor, consideration or circumstance which clearly requires dismissal of the charge or charges in furtherance of justice.

2. Upon dismissing such an accusatory instrument, or a count thereof, upon such ground, the court must set forth its reasons therefor upon the record.

§ 85.40 Motion to dismiss information, prosecutor's information or misdemeanor complaint; procedure.

The procedural rules prescribed in section 105.65 with respect to the making, consideration and disposition of a motion to dismiss an indictment are also applicable to a motion to dismiss an information, a prosecutor's information or a misdemeanor complaint.

§ 85.45 Motion in superior court to dismiss prosecutor's information.

1. At any time after arraignment in a local criminal court upon a prosecutor's information filed at the direction of a grand jury and before either the entry of a plea of guilty thereto or commencement of a trial thereof, the superior court which impaneled such grand jury may, upon motion of the defendant, dismiss such prosecutor's information or a count thereof upon the ground that:

(a) The evidence before the grand jury was not legally

sufficient to support the charge; or

(b) The grand jury proceeding resulting in the filing of such prosecutor's information was defective.

2. The criteria and procedures for consideration and disposition of such motion are the same as those prescribed in sections 105.50 and 105.55 governing consideration and disposition of a motion to dismiss an indictment on the ground of insufficiency of grand jury evidence or of a defective grand jury proceeding; and, where appropriate, the general procedural rules prescribed in section 105.65 for consideration and disposition of a motion to dismiss an indictment are also applicable.

3. Upon dismissing a prosecutor's information or a count thereof pursuant to this section, the court may, in its discretion, direct that the charge or charges be resubmitted to the same or another grand jury. In the absence of such a direction of resubmission, the order of dismissal constitutes a bar to any further prosecution of such charge or charges.

§ 85.60 Requirement of plea to information or prosecutor's information.

Unless an information or a prosecutor's information is dismissed or the criminal action thereon terminated or abated pursuant to a provision of this article or some other provision of law, the defendant must be required to enter a plea thereto.

§ 85.65 Replacement of misdemeanor complaint by information or prosecutor's information, and waiver thereof.

1. A defendant against whom misdemeanor complaint is pending is not required to enter a plea thereto. For purposes of prosecution, such instrument must, except as provided in subdivision three, be replaced by an information, and the defendant must be arraigned thereon. If the misdemeanor complaint is supplemented by a supporting deposition and such instruments taken together satisfy the requirements for a valid information, such misdemeanor complaint is deemed to have been converted to and to constitute a replacing information.

2. An information which replaces a misdemeanor complaint need not charge the same offense or offenses, but at least one count thereof must charge the commission by the defendant of an offense based upon conduct which was the subject of the misdemeanor complaint. In addition, the information may, subject to the rules of joinder, charge any other offense which the factual allegations thereof or of any supporting affidavits accompanying it are legally

sufficient to support, even though such offense is not based upon conduct which was the subject of the misdemeanor complaint.

3. A defendant who has been arraigned upon a misdemeanor complaint may waive prosecution by information and consent to be prosecuted upon the misdemeanor complaint. In such case, the defendant must, except as provided in subdivision four, be required, either upon the date of the waiver or subsequent thereto, to enter a plea to the misdemeanor complaint.

4. Notwithstanding a waiver by the defendant of prosecution by information pursuant to subdivision three, the misdemeanor complaint may, at the instance of either the court or a prosecutor conducting the action for the people, be replaced, at any time before entry of a plea to the misdemeanor complaint, by an information as prescribed in subdivisions one and two, and the action must then proceed accordingly.

§ 85.70 Release of defendant upon failure to replace misdemeanor complaint by information or prosecutor's information.

Upon application of a defendant against whom a misdemeanor complaint is pending in a local criminal court, and who, either at the time of his arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff pending disposition of the action, and who has been confined in such custody for a period of more than five days, not including Sunday, without any information having been filed in replacement of such misdemeanor complaint, the criminal court must release the defendant on his own recognizance unless:

1. The defendant has waived prosecution by information and consented to be prosecuted upon the misdemeanor complaint, pursuant to subdivision three of section 85.65; or

2. The court is satisfied that there is good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded replacement of the misdemeanor complaint by an information or a prosecutor's information within the prescribed period.

# ARTICLE 90

## PROCEEDINGS UPON FELONY COMPLAINT FROM ARRAIGNMENT THEREON THROUGH DISPOSITION THEREOF



### § 90.10 Proceedings upon felony complaint arraignment; defendant's rights, court's instructions and bail matters.

1. Upon the defendant's arraignment before a local criminal court upon a felony complaint, the court must immediately inform him of the charge or charges against him and that the primary purpose of the proceedings upon such felony complaint is to determine whether the defendant is to be held for the action of a grand jury with respect to the charges contained therein. The court must furnish the defendant with a duplicate copy of the felony complaint.

2. The defendant has a right to a prompt hearing as provided in section 90.50, upon the issue of whether there is sufficient evidence to warrant the court in holding him for the action of a grand jury. The defendant may waive such right.

3. The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the proceedings in the action, and, if he appears upon such arraignment without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purpose of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to obtain the same.

4. The court must inform the defendant of all rights specified in subdivisions two and three. The court must accord the defendant opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them.

5. If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof. By proceeding at the arraignment without counsel, the defendant does not thereby waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the proceedings.

6. If the court is not satisfied that a defendant who desires to proceed without the aid of counsel made such decision with knowledge of the signifiance thereof, it may not proceed with the arraignment until the defendant is provided with counsel, either of his own choosing or by assignment.

7. Upon the arraignment, the court, unless it intends immediately thereafter to dismiss the felony complaint and terminate the action, must, as provided in subdivision two of section 285.30, either release the defendant on his own recognizance or fix bail or commit him to the custody of the sheriff for his future appearance in such action.

§ 90.25 Proceedings upon felony complaint; removal of action from one local criminal court to another.

Under circumstances prescribed in this section, a criminal action based upon a felony complaint may be removed from one local criminal court to another:

1. When a defendant arrested by a police officer, acting either with or without a warrant of arrest, for a felony allegedly committed in a town has, pursuant to express authorization of law, not been taken before the town court of the town, or as the case may be before the village court of the village, in which the felony charged was allegedly committed, but, instead, to another town court or vil-

lage court of the county and there stands charged with such offense by felony complaint, such latter court must arraign him upon such felony complaint. Such court must then either:

(a) Dispose of the felony complaint pursuant to this article. If such disposition results in a reduction of the felony charge and the filing of a prosecutor's information charging a misdemeanor or a petty offense pursuant to section 90.40 or subdivision two of section 90.60, such court must conduct the action to judgment or other final disposition; or

(b) Remit the action upon the felony complaint, together with all pertinent papers and documents, to the town court of the town, or as the case may be to the village court of the village, in which the felony charged was allegedly committed. In such case, the latter court must dispose of the felony complaint pursuant to this article.

2. When a defendant arrested for a felony by a police officer, acting either with or without a warrant of arrest, has been taken before a superior court judge sitting as a local criminal court for arraignment upon a felony complaint charging such felony, such judge must, as a local criminal court, arraign the defendant upon such felony complaint. Such court must then either:

(a) Dispose of the felony complaint pursuant to this article. If, however, such disposition results in a reduction of the charge and the filing of a prosecutor's information charging a misdemeanor or a petty offense, such judge, after arraigning the defendant upon such prosecutor's information, must remit the action, together with all pertinent papers and documents, to a local criminal court having trial jurisdiction of the offense charged, and the latter court must then conduct the action to judgment or other final disposition; or

(b) Remit the action upon the felony complaint, together with all pertinent papers and documents, to a local criminal court having geographical jurisdiction over the area in which the felony charged was allegedly committed. In such case, such latter court must dispose of the felony complaint pursuant to this article.

§ 90.30 Proceedings upon felony complaint; waiver of hearing; action to be taken.

If the defendant waives a hearing upon the felony complaint, the court may:

1. Order that the defendant be held for the action of a grand jury of the appropriate superior court with respect to the charge or

charges contained in the felony complaint. In such case, the court must promptly transmit to such superior court the order, the felony complaint, the supporting depositions and all other pertinent documents. Until such papers are received by the superior court, the action is deemed to be still pending in the local criminal court; or

2. Conduct a hearing upon the felony complaint notwithstanding the waiver; or

3. Make inquiry, pursuant to section 90.40 for the purpose of determining whether the felony complaint should be dismissed and a prosecutor's information filed with the court in lieu thereof.

§ 90.40 Proceedings upon felony complaint; inquiry; reduction of charge and substitution of prosecutor's information.

1. Whether or not the defendant waives a hearing upon the felony complaint, the court may, upon consent of the district attorney of the county, make inquiry for the purpose of determining whether the available facts and evidence fail to provide sufficient basis for holding the defendant for the action of a grand jury for a felony, but do provide sufficient basis for charging the defendant with an offense other than a felony in the local criminal court.

2. In making such determination, the court may question any person whom it believes may possess information relevant to the matter, including the defendant if he wishes to be questioned.

3. If after such inquiry the court is satisfied that (a) there is not reasonable cause to believe that the defendant committed a felony and (b) there is reasonable cause to believe that he committed an offense other than a felony and (c) the evidence available to the people is legally sufficient to establish such offense, it may direct the district attorney of the county to file with the court a prosecutor's information charging the defendant with the commission of such offense and, upon the filing thereof, must dismiss the felony complaint. In such case, the court must set forth on the record the reason for such action, and must then immediately arraign the defendant upon such prosecutor's information and inform him of his rights in connection therewith in the manner provided in section 85.05.

*4. Upon making any finding other than that specified in subdivision three, the court must either conduct a hearing upon the felony complaint or, in the case of a waiver thereof by the defendant, order that the defendant be held for the action of a grand jury.*

§ 90.50 Proceedings upon felony complaint; the hearing; conduct thereof.

A hearing upon a felony complaint must be conducted as follows:

1. The defendant may as a matter of right be present at such hearing.

2. The court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading.

3. Each witness, whether called by the people or by the defendant, must, unless he would be authorized to give unsworn testimony at a trial, testify under oath. Each witness, including any defendant testifying in his own behalf, may be cross-examined.

4. The court or prosecutor must call and examine witnesses and offer evidence in support of the charge.

5. The defendant may, as a matter of right, testify in his own behalf.

6. Upon request of the defendant, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.

7. Upon such a hearing, the ordinary exclusionary rules of evidence applicable to criminal proceedings are inapplicable to the extent that evidence tending to demonstrate reasonable cause to believe that the defendant committed a felony is admissible even though it is of a hearsay nature or otherwise incompetent by standards prescribed in article thirty.

8. The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings.

9. Such hearing must be completed at one session unless the court, for good cause shown, adjourn it. Except upon consent of the defendant, no such adjournment may be for more than one day.

§ 90.60 Proceedings upon felony complaint; disposition of felony complaint after hearing.

At the conclusion of a hearing, the court must dispose of the felony complaint as follows:

1. If there is reasonable cause to believe that the defendant committed a felony, the court must order that the defendant be held for the action of a grand jury of the appropriate superior court, and it

must promptly transmit to such superior court the order, the felony complaint, the supporting depositions and all other pertinent documents. Until such papers are received by the superior court, the action is deemed to be still pending in the local criminal court.

2. If there is not reasonable cause to believe that the defendant committed a felony but (a) there is reasonable cause to believe that he committed an offense other than a felony, and (b) the evidence is legally sufficient to establish such offense, the court may direct the district attorney of the county to file with the local criminal court a prosecutor's information charging such offense and, upon the filing thereof, it must dismiss the felony complaint. In such case, the court must immediately arraign the defendant upon such prosecutor's information and advise him of his rights in connection therewith in the manner provided in section 85.05.

3. If there is not reasonable cause to believe that the defendant committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody if he is in custody, or, if he is at liberty on bail, it must exonerate the bail.

§ 90.70 Proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition.

Upon application of a defendant against whom a felony complaint has been filed in a local criminal court, and who, either at the time of arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff pending disposition of such felony complaint, and who has been confined in such custody for a period of more than forty-eight hours, excluding Sunday, without either a disposition of the felony complaint or commencement of a hearing thereon as provided in section 90.50, the local criminal court must release him on his own recognizance unless:

1. The failure to dispose of the felony complaint or to commence a hearing thereon during such period of confinement was due to the defendant's request, action or condition, or occurred with his consent; or

2. Prior to the application, an indictment or a direction to file a prosecutor's information charging an offense based upon the conduct alleged in the felony complaint was filed by a grand jury; or

*3. The court is satisfied that the people have shown good cause why such order of release s hould not be issued. Such good cause must consist of some compelling fact or circumstance which precluded disposition of the felony complaint within the prescribed period or rendered such action against the interest of justice.*

# TITLE I

## PRELIMINARY PROCEEDINGS IN SUPERIOR COURT

## ARTICLE 95

### THE GRAND JURY AND ITS PROCEEDINGS



§ 95.05 Grand jury; definition and general functions.

A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting a part of such court, the functions of which are to hear and examine evidence concerning offenses and concerning non-criminal misconduct, nonfeasance and neglect in public office, and to take action with respect to such evidence as provided in section 95.60.

§ 95.10 Grand jury; for what courts drawn.

The appellate division of each judicial department shall adopt rules governing the number and the terms for which grand juries

shall be drawn and impaneled by the superior courts within its department; provided, however, that a grand jury may be drawn and impaneled for any extraordinary term of the supreme court upon the order of a justice assigned to hold such term.

§ 95.15 Grand jury; duration of term and discharge.

1. A term of a superior court for which a grand jury has been impaneled, upon the completion of the business before it is deemed to be adjourned to the opening date of the next term of such court for which a grand jury has been designated, and the grand jury is deemed in recess during such period of adjournment. Upon the opening date of such next term, the grand jury must, except as provided in subdivision three, be discharged.

2. If no other appropriate grand jury is in session in the county during the period of recess specified in subdivision one, the recessed grand jury may, upon application of the district attorney or of a defendant held by a local criminal court for action of the grand jury, be reconvened by order of the court for the purpose of dealing with any pending matter requiring grand jury action.

3. Upon the opening date of the next term of the court for which a grand jury has been drawn, the court may, upon declaration of the operating or recessed grand jury and of the district attorney that such grand jury has not yet completed certain business before it, adjourn the court term for which such grand jury was drawn to a specified future date. The court may subsequently order further adjournments or extensions for such purpose.

§ 95.20 Grand jury; formation, organization and other matters preliminary to assumption of duties.

1. The mode of selecting grand jurors and of drawing and impaneling grand juries is governed by the judiciary law.

2. Neither the grand jury panel nor any individual grand juror may be challenged, but the court may:

(a) At any time before a grand jury is sworn, discharge the panel and summon another panel if it finds that the original panel does not substantially conform to the requirements of the judiciary law; or

(b) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service pursuant to the judiciary law, or incapable of performing his duties because of bias or prejudice, or guilty of misconduct in the performance of his duties such as to impair the proper functioning of the grand

jury.

3. After a grand jury has been impaneled, the court must appoint one of the grand jurors as foreman and another to act as foreman during any absence or disability of the foreman. At some time before commencement of their duties, the grand jurors must appoint one of their number as secretary to keep records essential to the conduct of the grand jury's business.

4. The grand jurors must be sworn pursuant to any oath selected by the court which requires them to perform their duties faithfully.

5. After a grand jury has been sworn, the court must deliver or cause to be delivered to each grand juror a printed copy of all the provisions of this article, and the court may, in addition, give the grand jurors any oral instructions relating to the proper performance of their duties as it deems necessary or appropriate.

6. If two or more grand juries are impaneled at the same court term, the court may thereafter, for good cause, transfer grand jurors from one panel to another, and any grand juror so transferred is deemed to have been sworn as a member of the panel to which he has been transferred.

§ 95.25 Grand jury; proceedings and operation in general.

1. Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.

2. The foreman or any other grand juror may administer an oath to any witness appearing before the grand jury.

3. During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to witnesses, may, as the occasion requires, also be present:

(a) The district attorney;

(b) A clerk or other public servant authorized to assist the grand jury in the administrative conduct of its proceedings;

(c) A stenographer authorized to record the proceedings of the grand jury;

(d) An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well

enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will faithfully interpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge;

(e) A public servant holding a witness in custody. When a person held in official custody is a witness before a grand jury, a public servant assigned to guard him during his grand jury appearance may accompany him in the grand jury room. Such public servant must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

4. Grand jury proceedings are secret, and no grand juror or other person specified in paragraphs (a) through (e) of subdivision three may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding.

5. The grand jury is the exclusive judge of the facts with respect to any matter before it.

6. The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions shall be recorded in the minutes.

§ 95.30 Grand jury; rules of evidence.

1. Except as otherwise provided in this section, the provisions of article thirty, governing rules of evidence and related matters with respect to other criminal proceedings, are, where appropriate, applicable to grand jury proceedings.

2. Wherever it is provided in said article thirty that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may, in an equivalent situation in a grand jury proceeding, be made by the district attorney.

3. Wherever it is provided in said article thirty that a court presiding at a jury trial must instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.

4. A report or a copy of a report made by a public servant, or by a person employed by a public servant or agency, who is a physicist, chemist, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, may, when certified by such person as a report made by him or as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein.

§ 95.35 Grand jury; definitions of terms.

The term definitions contained in section 25.10 are applicable to sections 95.40, 95.45 and 95.50.

§ 95.40 Grand jury; witnesses, compulsion of evidence and immunity.

1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.

2. A witness who gives evidence in a grand jury proceeding receives immunity unless:

(a) He has effectively waived such immunity pursuant to section 95.50; or

(b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.

§ 95.45 Grand jury; who may call witnesses; defendant as a witness.

1. Except as provided in this section, no person has a right to appear as a witness in a grand jury proceeding.

2. The people may call as a witness in a grand jury proceeding any person believed by them to possess information or knowledge relevant thereto.

3. The grand jury may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury desires to hear any such witness who was not called by the people, it may direct the district attorney of the county to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction. At any time after service of such subpoena and before the return date thereof, however, the people may apply to the court which empaneled the grand jury for an order vacating or modifying the subpoena on the ground that such

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is in the public interest. Upon such application, the court may in its discretion vacate the subpoena, extend its return date, attach reasonable conditions to its directions, or make such other qualification thereof as is appropriate.

4. Notwithstanding the provisions of subdivision three, the district attorney may demand that any witness thus called at the instance of the grand jury, a person has a right to be a witness in a section 95.50 before being sworn, and upon such demand no oath may be administered to such witness unless and until he complies therewith.

5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein;

(b) Upon service upon the district attorney of a notice requesting appearance before a grand jury pursuant to paragraph (a), the district attorney must notify the foreman of the grand jury of such request, and must subsequently serve upon the applicant, at the address specified by him, a notice that he will be heard by the grand jury at a given time and place. *Upon appearing at such time and place, and upon signing and submitting to the grand jury a waiver of immunity pursuant to section 95.50, such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration. Upon giving*

such evidence, he is subject to examination by the people.

(c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made pursuant to section 85.45 or section 105.40, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment or, as the case may be, upon the prosecutor's information resulting from the grand jury's direction to file the same. If the contention is not so asserted in timely fashion, it is waived and the indictment or prosecutor's information may not thereafter be challenged on such ground.

6. A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.

§ 95.50 Grand jury; waiver of immunity.

1. A waiver of immunity is a written instrument signed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 95.40, as a result of giving evidence in such proceeding.

2. A waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceeding in which the subscriber has been called as a witness.

3. A person who is called by the people as a witness in a grand jury proceeding and requested by the district attorney to sign and swear to a waiver of immunity before giving evidence has a right to confer with counsel before deciding whether he will comply with such request, and, if he desires to avail himself of such right, he must be accorded a reasonable time in which to obtain and confer with counsel for such purpose. The district attorney must inform the witness of all such rights before obtaining his signature to such a waiver of immunity. Any waiver obtained, signed or sworn to in violation of the provisions of this subdivision is invalid and ineffective.

4. If a grand jury witness signs and swears to a waiver of immunity upon an express understanding with the district attorney that

the interrogation will be limited to certain specified subjects, matters or areas of conduct, and if after the commencement of his testimony he is interrogated concerning another subject, matter or area of conduct not included in the original understanding, he may withdraw or qualify his waiver of immunity accordingly by orally declaring before the grand jury his refusal to testify concerning such other matter unless he is granted immunity with respect thereto. Upon such declaration of withdrawal or qualification, the witness receives immunity with respect to any further testimony which he may give concerning such other matter and the waiver of immunity is to that extent ineffective.

§ 95.55 Grand jury; matters to be heard and examined.

1. A grand jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise.

2. District attorneys are required or authorized to present evidence to grand juries under the following circumstances:

(a) A district attorney must present to a grand jury evidence concerning a felony allegedly committed by a defendant who, on the basis of a felony complaint filed with a local criminal court of the county, has been held for the action of a grand jury of such county.

(b) A district attorney must present to a grand jury evidence concerning a misdemeanor allegedly committed by a defendant who has been charged therewith by an information or a prosecutor's information filed in a local criminal court of the county, in any case where a superior court of the county has, pursuant to section 85.22, ordered such misdemeanor charge to be prosecuted by indictment in a superior court.

(c) A district attorney may present to a grand jury any available evidence concerning an offense prosecutable in the courts of the county, or concerning non-criminal misconduct, nonfeasance or neglect in public office by a public servant as prescribed in section 95.85.

§ 95.60 Grand jury; action to be taken.

Upon hearing and examining any evidence or matter as prescribed in section 95.55, a grand jury may:

1. Indict the defendant for an offense, as provided in section 95.65;

2. Direct the prosecutor to file a prosecutor's information with a local criminal court, as provided in section 95.70;

3. Dismiss the charge before it, as provided in section 95.75;

4. Submit a grand jury report, as provided in section 95.85;

§ 95.65 Grand jury; when indictment is authorized.

1. An indictment must charge a crime and may, in addition thereto, charge a petty offense.

2. A grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense and (b) such grand jury is satisfied that there is reasonable cause to believe that such person committed such offense.

3. The offense or offenses for which a grand jury may indict a person in any particular case are not limited to that or those which may have been designated, at the commencement of the grand jury proceeding, to be the subject of the inquiry; and even in a case submitted to it upon a court order, pursuant to the provisions of section 85.22, directing that a misdemeanor charge pending in a local criminal court be prosecuted by indictment, the grand jury may indict the defendant for a felony if the evidence so warrants.

§ 95.70 Grand jury; direction to file prosecutor's information and related matters.

1. Except in a case submitted to it pursuant to the provisions of section 85.22, a grand jury may direct the district attorney to file in a local criminal court a prosecutor's information charging a person with an offense other than a felony when (a) the evidence before it is legally sufficient to establish that such person committed such offense, and (b) such grand jury is satisfied that there is reasonable cause to believe that such person committed such offense. In such case, the grand jury must file such direction with the court by which it was impaneled.

2. Such direction must be signed by the foreman. It must contain a plain and concise statement of the conduct constituting the offense to be charged, equivalent in content and precision to the factual statement required to be contained in an indictment pursuant to subdivision six of section 100.45. Subject to the principles prescribed in sections 100.20 and 100.40 governing joinder in a single indictment of multiple crimes and multiple defendants, such grand jury direction may, where appropriate, specify multiple offenses of

less than felony grade and multiple defendants, and may direct that the prospective prosecutor's information charge a single defendant with multiple offenses, or multiple defendants jointly with either a single offense or multiple offenses.

3. Upon the filing of such grand jury direction, the court must, unless such direction is insufficient on its face, make an order approving such direction and ordering the district attorney to file such a prosecutor's information in a designated local criminal court.

§ 95.75 Grand jury; dismissal of charge.

1. If upon a charge that a designated person committed a crime, either (a) the evidence before the grand jury is not legally sufficient to establish that such person committed such crime or any other offense, or (b) the grand jury is not satisfied that there is reasonable cause to believe that such person committed such crime or any other offense, it must dismiss the charge. In such case, it must present its finding of dismissal to the court by which it was impaneled.

2. If the defendant was previously held for the action of the grand jury by a local criminal court, the superior court to which such dismissal is presented must order the defendant released from custody if he is in the custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.

3. When a charge has been so dismissed, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury. If in such case the charge is again dismissed, it may not again be submitted to a grand jury.

§ 95.80 Grand jury; release of defendant upon failure of timely grand jury action.

Upon application of a defendant who on the basis of a felony complaint has been held by a local criminal court for the action of a grand jury, and who, at the time of such order or subsequent thereto, has been committed to the custody of the sheriff pending such grand jury action, and who has been confined in such custody for a period of more than forty-five days without the occurrence of any grand jury action or disposition pursuant to subdivision one, two or three of section 95.60, the superior court by which such grand jury was or is to be empaneled must release him on his own recognizance unless:

(a) The lack of a grand jury disposition during such period of confinement was due to the defendant's request, action or

condition, or occurred with his consent; or

(b) The people have shown good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded grand jury action within the prescribed period or rendered the same against the interest of justice.

§ 95.85 Grand jury; grand jury reports.

1. The grand jury may submit to the court by which it was impaneled, a report:

(a) concerning non-criminal misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action; or

(b) stating that after investigation of the public servant it finds no misconduct, nonfeasance or neglect in office by him provided that such public servant has requested the submission of such report; or

(c) proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one and that:

(a) The report is based upon facts revealed in the course of an investigation authorized by section 95.55 and is supported by the preponderance of the credible and legally admissible evidence; and

(b) When the report is submitted pursuant to paragraph (a) of subdivision one, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision one, it is not critical of an identified or indentifable person.

3. The order accepting a report pursuant to paragraph (a) of subdivision one, and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken pursuant to section 95.90, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the

appeal of the named public servant by the appellate division, whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report upon him. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges in said report, and, except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecessarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the district attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public servant or body having removal or disciplinary authority over each public servant named therein.

4. Upon the submission of a report pursuant to subdivision one, if the court finds that the filing of such report as a public record, may prejudice fair consideration of a pending criminal matter, it must order such report sealed and such report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision one is not satisfied that the report complies with the provisions of subdivision two, it may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report, and the report may not be filed as a public record, or be subject to subpoena or otherwise be made public.

§ 95.90 Grand jury; appeal from order concerning grand jury reports.

1. When a court makes an order accepting a report of a grand jury pursuant to paragraph (a) of subdivision one of section 95.85, any public servant named therein may appeal the order; and when a court makes an order sealing a report of a grand jury pursuant to subdivision five of section 95.85, the district attorney or other attorney designated by the grand jury may appeal the order.

2. When a court makes an order sealing a report of a grand jury pursuant to subdivision five of section 95.85, the district attorney or other attorney designated by the grand jury may, within ten days after service of a copy of the order and report upon each public servant named in the report, appeal the order to the appellate division of the department in which the order was made, by filing in duplicate a notice of appeal from the order with the clerk of the

court in which the order was made and by serving a copy of such notice of appeal upon each such public servant. Notwithstanding any contrary provision of section 95.85, a true copy of the report of the grand jury shall be served, together with such notice of appeal, upon each such public servant.

3. The mode of and time for perfecting an appeal pursuant to this section, and the mode of and procedure for the argument thereof, are determined by the rules of the appellate division of the department in which the appeal is brought. Such rules shall prescribe the matters referred to in subdivision one of section 235.60 and in section 235.70, except that such appeal is a preferred cause and the appellate division of each department shall promulgate rules to effectuate such preference.

4. The record and all other presentations on appeal shall remain sealed, except that upon affirmance of the order sealing the report or dismissal of the appeal of the named public servant by the appellate division, the report of the grand jury, with the appendix, if any, shall be filed as a public record as provided in subdivision three of section 95.85.

5. The procedure provided for in this section shall be the exclusive manner of reviewing an order made pursuant to section 95.85 and the appellate division of the supreme court shall be the sole court having jurisdiction of such an appeal. The order of the appellate division finally determining such appeal shall not be subject to review in any other court or proceeding.

6. The grand jury in an appeal pursuant to this section shall be represented by the district attorney unless the report relates to him or his office, in which event the grand jury may designate another attorney.

# ARTICLE 100

## INDICTMENT AND RELATED INSTRUMENTS



### § 100.05 Indictment; definition.

An indictment is a written accusation by a grand jury, filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more offenses, at least one of which is a crime.

### § 100.20 Indictment; what offenses may be charged; joinder of offenses and consolidation of indictments.

1. An indictment must charge at least one crime and may, in addition, charge in separate counts one or more other offenses of any classification, including petty offenses, provided that all such offenses are joinable pursuant to the principles prescribed in subdivision two.

2. Two offenses are "joinable" when:

(a) Though defined by different statutory provisions, they are based upon the same conduct; or

(b) Though based upon different or partially different conduct, such offenses are so related that either proof of the first would be material and admissible as evidence in chief upon a trial for the second, or proof of the second would be material and admissible as evidence in chief upon a trial for the first; or

(c) Though based upon different conduct, such offenses are defined by the same or similar statutory provisions and consequently are of the same or a similar legal character; or

(d) Though not directly joinable with each other pursuant to paragraph (a), (b) or (c), each is so joinable with a third offense contained in the indictment. In such case, each of the

three offenses may properly be joined not only with each of the other two but also with any further offense joinable with either of the other two, and the chain of joinder may be further extended accordingly.

3. In any case where two or more offenses or groups of offenses contained in an indictment are based upon different conduct, transactions or episodes, and their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are of the same or a similar legal character, as prescribed in paragraph (c) of subdivision two, the court, in the interest of justice and for good cause shown, may in its discretion order that any one of such offenses or groups of offenses be tried separately from the others, or that two or more thereof be tried together but separately from two or more others thereof.

4. When two or more indictments against the same defendant or defendants charge different offenses of a kind that are joinable in a single indictment pursuant to subdivision two, the court in its discretion may, upon application of either the people or a defendant, order that such indictments be consolidated and treated as a single indictment for trial purposes. If such indictments, in addition to charging offenses which are so joinable charge other offenses which are not so joinable, they may nevertheless be consolidated for the limited purpose of concomitantly trying the joinable offenses.

5. Upon an application by the defendant for consolidation of indictments, pursuant to subdivision four, with respect to joinable offenses which are based upon the same conduct or which form an integral part of a single indictment or transaction, the court must order such consolidation unless good cause to the contrary be shown.

§ 100.30 Indictment; duplicitous counts prohibited.

1. Each count of an indictment may charge one offense only.

2. For purposes of this section, a statute which defines the offense named in the title thereof by providing, in different subdivisions, different ways in which such named offense may be committed, defines a separate offense in each such subdivision, and a count of an indictment charging such named offense which, without specification of any particular subdivision of the statute, alleges facts which would support a conviction under more than one such subdivision, charges more than one offense.

§ 100.40 Indictment; joinder of defendants and consolidation of indictments against different defendants.

1. Two or more defendants may be jointly charged in a single ıdictment provided that all such defendants are jointly charged vith every offense alleged therein. Even in such case, the court, ıpon motion of a defendant made at any time before trial, may, in he interest of justice and for good cause shown, order, in its discreion, that any one defendant be tried separately from the others, or hat two or more defendants be tried jointly but separately from wo or more other defendants.

2. When two or more defendants are charged in separate indictnents with the same offense or offenses as that term is defined in ;ection 20.10, the court may, upon application of the people, order hat such indictments be consolidated and that such defendants be ıried jointly for such offense or offenses. If such indictments, in ıddition to charging the same offense or offenses against the differ-ənt defendants, charge other offenses not common to all, the indictments may nevertheless be consolidated for the limited purpose of jointly trying such defendants for an offense or offenses common to all.

§ 100.45 Indictment; form and content

An indictment must contain:

1. The name of the superior court in which it is filed; and

2. The title of the action; and

3. A separate accusation or count addressed to each offense charged, if there be more than one; and

4. A statement in each count that the grand jury accuses a designated defendant or defendants of a designated offense; and

5. A statement in each count that the offense charged therein was committed in a designated county; and

6. A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time; and

7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged, and with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the accusation; and

8. The signature of the foreman or acting foreman of the grand jury; and

9. The signature of the district attorney.

§ 100.50 Indictment; allegations of previous convictions prohibited.

1. When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment for such higher offense may not allege such previous conviction. If a reference to previous conviction is contained in the statutory name or title of such an offense, such name or title may not be used in the indictment, but an improvised name or title must be used which, by means of the phrase "as a felony" or in some other manner, labels and distinguishes the offense without reference to a previous conviction.

2. An indictment for such an offense must be accompanied by a special information, filed by the district attorney with the court, charging that the defendant was previously convicted of a specified offense. Except as provided in subdivision three, the people may not refer to such special information during the trial nor adduce any evidence concerning the previous conviction alleged therein.

3. After commencement of the trial and before the close of the people's case, the court, in the absence of the jury, must arraign the defendant upon such special information, and must advise him that he may admit the prior conviction alleged, deny it, or remain mute. Depending upon the defendant's response, the trial of the indictment must then proceed as follows:

(a) If the defendant admits the previous conviction, that element of the offense charged in the indictment is deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.

(b) If the defendant denies the previous conviction or remains mute, the people may prove that element of the offense charged before the jury as a part of their case.

4. Nothing contained in this section precludes the people from proving a prior conviction before the grand jury or relieves them from the obligation or necessity of so doing in order to submit a legally sufficient case.

§ 100.60 Indictment; amendment of.

1. At any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment with respect to defects, errors or variances from the proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not in any way change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits. Upon permitting such an amendment, the court must, upon application of the defendant, order any adjournment or postponement of the proceedings which may, by reason of such amendment, be necessary to accord the defendant adequate opportunity to prepare his defense.

2. An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it; nor may an indictment be amended for the purpose of curing:

(a) A failure thereof to charge or state an offense; or

(b) Legal insufficiency of the factual allegations; or

(c) A misjoinder of offenses; or

(d) A misjoinder of defendants.

§ 100.70 Indictment; superseding indictments.

If at any time before entry of a plea to an indictment or before commencement of a trial thereof, another indictment is filed with the superior court charging the defendant with an offense based upon the same conduct or transaction, the first indictment is superseded by the second and, upon the defendant's arraignment upon the latter, must be dismissed by the court.

§ 100.80 Bill of particulars.

1. Upon motion of the defendant, the superior court having jurisdiction of an indictment against such defendant may order the district attorney to file a bill of particulars with the court and to serve a copy thereof upon the defendant.

2. A motion for a bill of particulars must be in writing, must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the indictment, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

3. If the court is satisfied that any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, it must grant the motion as to every

such necessary item and order the district attorney to file and serve a bill of particulars accordingly. Nothing contained in this section, however, authorizes an order for a bill of particulars which requires the district attorney to recite matters of evidence.

4. A motion for a bill of particulars is not timely unless made prior to the commencement of trial. The court may deny a motion upon the ground that it is not timely, but it may, in the interest of justice and for good cause shown, grant such a motion made during trial.

5. Upon an order granting a motion pursuant to this section, the district attorney must file with the court a bill of particulars, reciting every item of information designated in the order, and serve a copy thereof upon the defendant. Pending such filing and service, the proceedings are stayed.

# ARTICLE 105

## PROCEEDINGS IN SUPERIOR COURT FROM FILING OF INDICTMENT TO PLEA



### § 105.05 Indictment exclusive method of prosecution.

The only method of prosecuting an offense in a superior court is by an indictment filed therein by a grand jury.

### § 105.10 Filing of indictment.

When an indictment has been found by a grand jury, it must be presented by the foreman to the court which impaneled such grand jury and must be filed with the clerk of such court.

### § 105.20 Requirement of defendant's appearance for arraignment upon indictment.

After an indictment has been filed in a superior court, the defendant may be required to appear for arraignment thereon, as follows:

1. If the defendant was previously held by a local criminal court for the action of the grand jury which filed the indictment, and if he is confined in the custody of the sheriff pursuant to a previous court order issued in the same criminal action, the superior court must direct the sheriff to produce the defendant for arraignment on a specified date and the sheriff must comply with such direction. The court must give at least two days notice of the time and place of the arraignment to an attorney, if any, who has previously filed a notice of appearance in behalf of the defendant in such superior

court, or if no such notice of appearance has been filed, to an attorney, if any, who filed a notice of appearance in behalf of the defendant in the local criminal court.

2. If the defendant was previously held by a local criminal court for the action of the grand jury which filed the indictment, and if he is at liberty on his own recognizance or on bail pursuant to a previous court order issued in the same criminal action, the superior court must, upon at least two days notice to the defendant and his surety, and to any attorney who would be entitled to notice under circumstances prescribed in subdivision one, direct the defendant to appear in the superior court for arraignment on a specified date. If the defendant fails to appear on such date, the court may issue a bench warrant for his immediate arrest and, in addition, may forfeit the bail, if any. Upon arresting the defendant upon such bench warrant, the executing police officer must without unnecessary delay take him before such superior court for arraignment.

3. If the defendant has not previously been held by a local criminal court for the action of the grand jury which filed the indictment and the filing of the indictment constituted the commencement of the criminal action, the superior court must order the indictment to be filed as a sealed instrument until the defendant is produced or appears for arraignment, and must issue a superior court warrant of arrest; except that if the indictment does not charge a felony the court may instead authorize the district attorney to direct the defendant to appear for arraignment on a designated date. A superior court warrant of arrest is executable anywhere in the state. Such warrant may be addressed to any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued. It must be executed in the same manner as an ordinary warrant of arrest, as provided in section 60.60, and following the arrest the executing police officer must without unnecessary delay take the defendant before the superior court in which it is returnable.

§ 105.30 Arraignment upon indictment; defendant's rights, court's instructions and bail matters.

1. Upon the defendant's arraignment before a superior court upon an indictment, the court must immediately inform him or cause him to be informed in its presence, of the charge or charges against him, and must cause him to be furnished with a copy of the indictment.

2. The defendant has a right to the aid of counsel at the arraign-

ment and at every subsequent stage of the proceedings in the action, and, if he appears upon such arraignment without counsel, has the following rights:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court in any case where he is financially unable to obtain the same.

3. The court must inform the defendant of all rights specified in subdivision two. The court must accord the defendant opportunity to exercise such rights and must itself take such affirmative action as is necessary to effectuate them.

4. If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof. By proceeding at the arraignment without counsel, the defendant does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the proceedings.

5. If the court is not satisfied that a defendant who desires to proceed without the aid of counsel made such decision with knowledge of the significance thereof, it may not proceed with the arraignment until the defendant is provided with counsel, either of his own choosing or by assignment.

6. Upon the arraignment, the court, unless it intends to make a final disposition of the action immediately thereafter, must, as provided in section 285.50, release the defendant on his own recognizance or fix bail or commit him to the custody of the sheriff for his future appearance in such action.

§ 105.40 Motion to dismiss indictment.

1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count *thereof upon the ground that:*

*(a) Such indictment or count is defective, pursuant to section 105; or*

*(b) The evidence before the grand jury was not legally*

sufficient to support the charge, pursuant to section 105.50; or

(c) The grand jury proceeding was defective, pursuant to section 105.55; or

(d) The defendant has immunity with respect to the offense charged, pursuant to section 25.20 or 95.40; or

(e) The prosecution is barred by reason of a previous prosecution, pursuant to section 20.20; or

(f) The prosecution is untimely, pursuant to section 15.10; or

(g) The defendant has been denied the right to a speedy trial; or

(h) There exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or

(i) Dismissal is required in the interest of justice pursuant to section 105.60.

2. A motion pursuant to this section should be made prior to the entry of a plea of guilty or prior to the commencement of trial following a plea of not guilty. A motion made thereafter may be summarily denied, and must be summarily denied if based upon a ground prescribed in paragraph (b) or (i) of subdivision one. If it is based upon any other ground, the court, in the interest of justice and for good cause shown, may, in its discretion, entertain and dispose of the motion on the merits at any time before sentence.

3. Upon the motion, a defendant who is in a position adequately to raise more than one ground in support thereof should raise every such ground upon which he intends to challenge the indictment. A subsequent motion based upon a ground not so raised may be summarily denied, although the court, in the interest of justice and for good cause shown, may in its discretion entertain and dispose of such a motion on the merits notwithstanding.

4. Upon dismissing an indictment or a count thereof upon any of the grounds specified in paragraphs (a), (b), (c) and (i) of subdivision one, the court may in its discretion direct that the charge or charges be resubmitted to the same or another grand jury. When the dismissal is based upon some other ground, the court may not so direct. In the absence of such a direction of resubmission, the order of dismissal constitutes a bar to any further prosecution of such charge or charges, by indictment or otherwise, in any criminal court within the county.

§ 105.45 Motion to dismiss indictment; as defective.

An indictment or a count thereof is defective within the meaning

of paragraph (a) of subdivision one of section 105.40 when:

1. It does not substantially conform to the requirements of sections 100.10, 100.20, 100.30, 100.40 and 100.50; provided that an indictment may not be dismissed as defective, but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment, pursuant to section 100.60, and where the people move to so amend; or

2. The allegations demonstrate that the court does not have jurisdiction of the offense charged; or

3. The statute defining the offense charged is unconstitutional or otherwise invalid.

§ 105.50 Motion to dismiss indictment on ground of insufficiency of grand jury evidence; motion to inspect grand jury minutes.

1. A motion to dismiss an indictment or a count thereof, based upon the ground that the evidence before the grand jury was not legally sufficient to support the charge or charges contained therein must be preceded or accompanied by a motion to inspect the grand jury minutes, as prescribed in subdivision two.

2. A motion to inspect grand jury minutes is a motion by a defendant requesting the court to examine the stenographic minutes of a grand jury proceeding resulting in an indictment for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charges or a charge contained in such indictment. Such motion must be in writing and the moving papers must allege that there is reasonable cause to believe that the grand jury evidence was not legally sufficient to support a specified count or counts of the indictment, and must contain sworn allegations of fact supporting such claim. Such allegations of fact may be based either upon personal knowledge of the affiant or affiants or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief must be stated.

3. If the court determines that there is reasonable cause to believe that the grand jury evidence may not have been legally sufficient, it must grant the motion to inspect the grand jury minutes. It must then proceed to examine the minutes and to determine the motion to dismiss the indictment.

4. If the court determines that there is not reasonable cause to believe that the evidence before the grand jury may have been

legally insufficient, it may in its discretion either (a) deny both the motion to inspect and the motion to dismiss, or (b) grant the motion to inspect notwithstanding and proceed to examine the minutes and to determine the motion to dismiss.

5. In any case, the court must place on the record its ruling upon the motion to inspect.

6. The validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence.

§ 105.55 Motion to dismiss indictment; defective grand jury proceeding.

1. An indictment must be dismissed upon motion when the grand jury proceeding which resulted in the indictment was defective.

2. A grand jury proceeding is defective when:

(a) The grand jury was illegally constituted; or

(b) The proceeding was conducted before fewer than sixteen grand jurors; or

(c) Fewer than twelve grand jurors concurred in the finding of the indictment; or

(d) The defendant was not accorded an opportunity to appear and testify before the grand jury in accordance with the provisions of section 95.45; or

(e) The proceeding otherwise fails to conform to the requirements of article ninety-five to such degree that the integrity thereof is impaired, and prejudice to the defendant thereby results.

§ 105.60 Motion to dismiss indictment; in furtherance of justice.

1. An indictment or any count thereof, may, upon motion of the defendant or of the people or of the court itself, be dismissed by the court in its discretion upon a ground other than one of those specified in paragraphs (a) through (h) of subdivision one of section 105.40, when such ground consists of a factor, consideration or circumstance which clearly requires dismissal of the charge or charges in furtherance of justice.

2. Upon dismissing an indictment or a count thereof upon such ground, the court must set forth its reasons therefor upon the record.

§ 105.65 Motion to dismiss indictment; procedure.

1. A motion to dismiss an indictment pursuant to section 105.40 must be made in writing and upon reasonable notice to the people. If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence supporting or tending to support the allegations of the moving papers.

2. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers, and may further submit documentary evidence refuting or tending to refute such allegations.

3. After all papers of both parties have been filed, and after all documentary evidence, if any, has been submitted, the court must consider the same for the purpose of determining whether the motion is determinable without a hearing to resolve questions of fact.

4. The court must grant the motion without holding a hearing if:

(a) The moving papers allege a ground constituting legal basis for the motion pursuant to subdivision one of section 105.40; and

(b) Such ground, if expressly or impliedly based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by documentary evidence.

5. The court may deny the motion without holding a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion pursuant to subdivision one of section 105.40; or

(b) The motion is expressly or impliedly based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all the essential facts; or

(c) An allegation of fact essential to support the motion is conclusively refuted by documentary evidence.

6. If the court does not determine the motion pursuant to subdivision four or five, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present in person at such hearing but may waive such right.

7. Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

8. If the court dismisses the indictment it must, unless it directs resubmission of the charge or charges to a grand jury, order the defendant released from custody if he is in the custody of the sheriff, or if he is at liberty on bail, exonerate the bail.

Unless an indictment is dismissed or the criminal action thereon terminated or abated pursuant to the provisions of this article or some other provision of law, the defendant must be required to enter a plea thereto.

# TITLE J

## PROSECUTION OF INDICTMENTS IN SUPERIOR COURTS—PLEA TO SENTENCE

## ARTICLE 115

### THE PLEA



§ 115.10 Plea; kinds of pleas.

The only kinds of pleas which may be entered to an indictment are those specified in this section:

1. The defendant may as a matter of right enter a plea of "not guilty" to the indictment.

2. Except as provided in subdivision three, the defendant may as a matter of right enter a plea of "guilty" to the entire indictment.

3. When a defendant desires to enter a plea of guilty to an indictment charging the crime of murder as defined in subdivision one or three of section 125.25 of the penal law, the court must determine, in the manner provided in subdivision three of section 165.10 of this chapter, whether a possibility exists that the defendant, following a verdict of guilty of murder after trial, could ultimately be sentenced to death pursuant to the provisions of sections 125.30 and 125.35 of the penal law. If the court finds that such a possibility does not exist, the defendant may as a matter of right enter a plea of guilty to the indictment. If the court finds that such a possibility does exist, the defendant may enter a plea of guilty to the indictment only with both the permission of the court and the consent of the people.

4. Where the indictment charges but one crime, the defendant may, with both the permission of the court and the consent of the people enter a plea of guilty of a lesser included offense.

5. Where the indictment charges two or more offenses in separate counts, the defendant may, with both the permission of the court and the consent of the people, enter a plea of:

(a) Guilty of one or more but not all of the offenses

charged; or

(b) Guilty of a lesser included offense with respect to any or all of the offenses charged; or

(c) Guilty of any combination of offenses charged and lesser offenses included within other offenses charged.

6. A plea of guilty which is entered pursuant to subdivision four or five is a "plea of guilty to part of the indictment."

§ 115.20 Plea; plea of guilty to part of indictment; plea covering other indictments.

1. A plea to an indictment, other than one against a corporation, indictment constitutes a disposition of the entire indictment and a dismissal of every count to which the defendant did not plead guilty.

2. A plea of guilty, whether to the entire indictment or to part of the indictment, may, with both the permission of the court and the consent of the people, be entered and accepted upon the condition that it constitutes a complete disposition and dismissal of one or more other indictments against the defendant then pending in the same court.

§ 115.30 Plea; plea of not guilty; meaning.

A plea of not guilty constitutes a denial of every allegation of the indictment.

§ 115.40 Plea; entry of plea.

1. A plea to an indictment, other than one against corporation, must be entered orally by the defendant in person; except that a plea to an indictment which does not charge a felony may, with the permission of the court, be entered by counsel upon submission by him of written authorization of the defendant.

2. A plea to an indictment against a corporation must be entered by counsel.

3. If a defendant who is required to enter a plea to an indictment refuses to do so or remains mute, the court must enter a plea of not guilty to the indictment in his behalf.

§ 115.50 Plea; change of plea.

1. Except as provided in subdivision two, a defendant who has entered a plea of not guilty to an indictment may as a matter of right withdraw such plea at any time before rendition of a verdict and enter a plea of guilty to the entire indictment.

2. A defendant who has entered a plea of not guilty to an indictment charging the crime of murder as defined in subdivision one or three of section 125.25 of the penal law may, before the rendition of a verdict, withdraw such plea and enter a plea of guilty to the indictment only under circumstances prescribed in subdivision three of section 115.10.

3. A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter a plea of guilty to part of the indictment pursuant to subdivision four or five of section 115.10.

4. At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event the entire indictment is restored.

# ARTICLE 120

## REMOVAL OF ACTION



### § 120.10 Removal of action; from supreme court to county court.

1. At any time after an indictment has been filed in the supreme court and before entry of a plea of guilty thereto or commencement of a trial thereof, such court may order that such indictment be prosecuted in the county court of the county in which the indictment was filed.

2. Upon the entry of such an order, the clerk of the supreme court must transmit to the county court all records and documents pertaining to the action. All determinations of the supreme court with respect to such action made prior to the order of removal are binding upon the county court. All determinations with respect to such action after such order of removal must be made by the county court; and for the purpose of determining motions addressed to the legal sufficiency of the grand jury evidence and the validity of the grand jury proceeding underlying the indictment, the county court is deemed to have control of the grand jury minutes.

### § 120.20 Removal of action; from county court to supreme court.

1. At any time after a plea of not guilty is entered in a county court to an indictment pending therein, and before trial, a justice of the supreme court holding a special term in the district, upon motion of either the defendant or the people, may, for good cause shown, order that the action be removed from such county court to a term of the supreme court held in the same county.

2. Such motion must be based upon papers stating the grounds therefor, and must be made upon five days notice thereof together with service of the moving papers upon, as the case may be, to (a) the district attorney or (b) either the defendant or his counsel. In any case, the motion must be made returnable at the next special term of the supreme court of the district following service of such moving papers.

3. If the court orders a removal of the action, a certified copy of such order must be filed with the clerk of the county court in which the indictment is pending. Such clerk must thereupon transmit such instrument, together with the pertinent papers and proceedings of the action, including all undertakings for appearance of the defendant and of the witnesses, or a certified copy or copies of the same, to the term of the supreme court to which the action has been removed. Such latter court must then proceed to conduct the action to judgment.

§ 120.30 Removal of action; change of venue.

1. At any time after a plea of not guilty is entered in a superior court to an indictment pending therein, and before trial, the appellate division of the department embracing such superior court, upon motion of either the defendant or the people for a change of venue, may, upon the ground that a fair and impartial trial cannot be had in the particular county, order that the action be removed from such superior court to a term of a superior court held in another county.

2. Such an order must, if the defendant be in custody at the time, include a provision for transfer of custody by the sheriff of the county of confinement to the appropriate public servant of the county to which the action is removed.

3. Upon issuing such an order on motion of the people, the appellate division may impose such conditions as it deems equitable and appropriate to insure that the removal does not subject the defendant to an unreasonable burden in making his defense.

4. A motion for a change of venue must be based upon papers stating the grounds therefor, and must be made upon five days notice thereof together with service of the moving papers upon, as the case may be, (a) the district attorney or (b) either the defendant or his counsel. In any case, the motion must be made returnable either during the appellate division term during which such moving papers are served or during the next trm threof.

5. If the appellate division grants the motion and orders a removal of the action, a certified copy of such order must be filed with the clerk of the superior court in which the indictment is pending. Such clerk must thereupon transmit such instrument, together with the pertinent papers and proceedings of the action, including all undertakings for appearances of the defendant and of the witnesses, or a certified copy or copies of the same, to the term of the superior

court to which the action has been removed. Such latter court must then proceed to conduct the action to judgment.

6. Any additional cost to the people incurred in complying with an order of change of venue must be borne by the county from which the action was removed.

§ 120.40 Removal of action; stay of trial pending motion therefor.

1. At any time when a timely motion for removal of an action from the county court to the supreme court or for a change of venue may be made pursuant to section 120.20 or 120.30, a justice holding a term of the supreme court in the district in which the indictment is pending, or a justice of the appellate division of the department in which the indictment is pending, upon application of either the defendant or the people, may, in his discretion and for good cause shown, order that the trial of such indictment be stayed for a designated period, not to exceed thirty days from the issuance of such order, to allow the applicant party to make a motion in the appropriate court for removal of the action from a county court to the supreme court or for a change of venue.

2. Such an order may be issued only upon an application made in writing and after reasonable notice and opportunity to be heard has been accorded the other party.

3. Upon granting such an application, the supreme court justice or appellate division justice must so indorse the moving papers and immediately cause them to be filed with the clerk of the court in which the indictment is pending. Thereafter, no further proceedings may be had in such court until a motion for removal or change of venue, as the case may be, if made within the designated period, has been determined, or until such designated period has expired without any such motion having been made.

4. When such an application for a stay has been made to and denied by a justice of the supreme court or a justice of the appellate division, a second such application may not be made to another such justice.

# ARTICLE 125

## DISCOVERY



### § 125.10 Discovery; definitions of terms.

As used in this article, the following terms have the following meanings:

1. "Order of discovery" means an order of a court in which a criminal action is pending, issued upon motion of a party thereto, directing the adverse party to permit such moving party to inspect property and to copy or photograph it.

2. "Property" means any tangible personal or real property, including books, records and papers.

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

### § 125.20 Discovery; when authorized.

Upon motion of a defendant against whom an indictment is pending, the court, under circumstances prescribed in this section, must or may issue an order of discovery:

1. Such discovery must be ordered with respect to property consisting of:

(a) A record of testimony given by such defendant before the grand jury which filed the indictment; or

(b) Written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the district attorney, the existence of which is known, or by the exercise of reasonable diligence should become known, to such district attorney.

2. Subject to the provisions of subdivisions four and five, such discovery may be ordered with respect to property consisting of reports and documents, or copies or portions thereof, concerning

physical or mental examinations or scientific tests and experiments made in connection with the case which are within the possession, custody or control of the district attorney, the existence of which is known, or by the exercise of reasonable diligence should become known, to such district attorney.

3. Subject to the provisions of subdivisions four and five, such discovery may be ordered with respect to any other property specifically designated by the defendant, except exempt property, which is within the possession, custody or control of the people upon a showing by the defendant that (a) discovery with respect to such property is material to the preparation of his defense, and (b) the request is reasonable.

4. Upon granting a defense motion for discovery with respect to property of a kind specified in subdivisions two and three, the court may, upon motion of the people showing such to be material to the preparation of their case and that the request is reasonable, condition its order of discovery by further directing discovery by the people of property, other than exempt property, of the same kind or character as that authorized to be inspected by the defendant, which is within the possession, custody or control of the defendant and which he intends or is likely to produce at the trial.

5. Upon a motion for discovery, whether made by a defendant or made by the people pursuant to subdivision four, the respondent party must be accorded an opportunity to be heard in opposition to the motion. At any time after issuance of an order of discovery and before complete compliance therewith, the court may, upon a sufficient showing by the party ordered to permit inspection, vacate, restrict, quality or defer the order of discovery or make any other order which is appropriate. Upon application of the people, the court may permit the people to make a showing in opposition to a motion for discovery, or in support of an application to restrict, qualify or defer such order, wholly or partly in the form of a written statement to be inspected by the court *in camera*. In such case, such statement must be sealed and preserved in the records of the court. Upon an appeal from an ensuing judgment of conviction in the action, such statement constitutes a part of the record to the extent that it must be made available to the appellate court for inspection thereby.

§ 125.30 Discovery; when motion made.

A motion for discovery by a defendant against whom an indictment is pending must be made with reasonable diligence prior to

the commencement of trial, and if not so made may be summarily denied. In the interest of justice and for good cause shown, however, the court may in its discretion entertain and determine such a motion at any time before trial or at any time during trial prior to the conclusion of the evidence.

§ 125.40 Discovery; continuing duty to disclose; failure to comply.

If after complying with an order of discovery a party finds, either before or during trial, additional property which is subject to or covered by such order, he must promptly notify the other party or the latter's attorney or the court of the existence thereof. Upon being apprised of any breach of such duty, the court may order the violating party to permit inspection of the subsequently discovered property, or grant an adjournment, or refuse to receive such property in evidence, or take any other appropriate action.

# ARTICLE 130

## PRE-TRIAL NOTICES OF DEFENSES



### § 130.10 Notice of defense of mental disease or defect.

Evidence of mental disease or defect of the defendant excluding criminal responsibility pursuant to section 30.05 of the penal law is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to rely upon such defense. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence.

### § 130.20 Notice of alibi.

1. At any time before trial, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within four days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely.

2. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

# ARTICLE 135

## JURY TRIAL GENERALLY



### § 135.10 Jury trial; requirement thereof.

Except as otherwise provided in section 165.10, every trial of an indictment must be a jury trial.

### § 135.15 Jury trial; defendant's presence at trial.

A defendant must be personally present during the trial.

### § 135.20 Jury trial; in what order to proceed.

The order of a jury trial, in general, is as follows:

1. The jury must be selected and sworn.
2. The court must deliver preliminary instructions to the jury.
3. The people must deliver an opening address to the jury.
4. The defendant may deliver an opening address to the jury.
5. The people must offer evidence in support of the indictment.
6. The defendant may offer evidence in his defense.
7. The people may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the people's rebuttal evidence. The court may in its discretion permit the parties to offer further rebuttal or sur-rebuttal evidence in this pattern. In the interests of justice, the court may permit either party to offer evidence upon rebuttal which is not technically of a rebuttal nature but more properly a part of the offering party's original case.
8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.
9. The people may then deliver a summation to the jury.
10. The court must then deliver a charge to the jury.
11. The jury must then retire to deliberate and, if possible, render a verdict.

# ARTICLE 140

## JURY TRIAL—REFORMATION AND CONDUCT OF JURY



### § 140.05 Trial jury; formation in general.

1. A trial jury consists of twelve jurors, but "alternate jurors" may be selected and sworn pursuant to section 140.30.

2. The panel from which the jury is drawn is formed and selected as prescribed in the judiciary law. The first twelve members of the panel returned for the term who appear as their names are drawn and called, and who are not excluded as prescribed by this article, must be sworn and thereupon constitute the trial jury.

### § 140.10 Trial jury; challenge to the panel.

1. A challenge to the panel is an objection made to the entire panel of prospective trial jurors returned for the term and may be taken to such panel or to any additional panel that may be ordered by the court. Such a challenge may be made only by the defendant and only on the ground that there has been such a departure from the requirements of the judiciary law in the drawing or return of the panel as to result in substantial prejudice to the defendant.

2. A challenge to the panel must be made before the selection of the jury commences, and, if it is not, such challenge is deemed to have been waived. Such challenge must be made in writing setting forth the facts constituting the ground of challenge. If such facts are denied by the people, witnesses may be called and examined by either party. All issues of fact and law arising on the challenge must be tried and determined by the court. If a challenge to the panel is

allowed, the court must discharge that panel and order another panel of prospective trial jurors returned for the term.

§ 140.15 Trial jury; examination of prospective jurors; challenges generally.

1. If no challenge to the panel is made as prescribed by section 140.10, or if such challenge is made and disallowed, the court must direct that the names of twelve members of the panel be drawn and called as prescribed by the judiciary law. Such persons must take their places in the jury box and must be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action. The court must permit both parties, commencing with the people, to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors. The scope of the examination is within the discretion of the court, and the court may disallow statements or questions by either party that are irrelevant to the examination or repetitious.

2. Upon the completion of such examination by both parties, each, commencing with the people, may challenge a prospective juror for cause, as prescribed by section 140.20. If such challenge is allowed, the prospective juror must be excluded from service. After both parties have had an opportunity to challenge for cause, the court must permit them to peremptorily challenge any remaining prospective juror, as prescribed by section 140.25, and such juror must be excluded from service. The people must exercise their peremptory challenges first and may not, after the defendant has exercised his peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box. The prospective jurors who are not excluded from service must retain their place in the jury box and must be immediately sworn as trial jurors. They must be sworn to try the action in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence.

3. The court must thereupon direct that the persons excluded be replaced in the jury box by an equal number from the panel. The process of jury selection as prescribed herein shall continue until twelve persons are selected and sworn as trial jurors. The juror whose name was first drawn and called must be designated by the court as the foreman, and no special oath need be administered to him.

4. A challenge for cause of a prospective juror which is not made before he is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial. If such challenge is allowed by the court, the juror shall be discharged and the selection of the trial jury shall be completed in the manner prescribed in this section, except that if alternate jurors have been sworn, the alternate juror whose name was first drawn and called shall take the place of the juror so discharged.

§ 140.20 Trial jury; challenge for cause of an individual juror.

1. A challenge for cause is an objection to a prospective juror and may be made only on the ground that:

(a) He does not have the qualifications required by the judiciary law; or

(b) He has a state of mind that will preclude him from rendering an impartial verdict based upon the evidence adduced at the trial; or

(c) He is related within the sixth degree by consanguinity or affinity to the defendant, or to the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or that he is or was a party adverse to any such person in a civil action; or that he has complained against or been accused by any such person in a criminal action; or that he bears some other relationship to any such person of such nature that it might reasonably be concluded that it will preclude him from rendering an impartial verdict; or

(d) He was a witness at the preliminary examination or before the grand jury or is to be a witness at the trial; or

(e) He served on the grand jury which found the indictment in issue or served on a trial jury in a prior civil or criminal action involving the same conduct charged in such indictment; or

(f) There is a possibility that the crime charged may be punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of the death penalty as to preclude him from rendering an impartial verdict or from properly exercising the discretion conferred upon him by law in the setting of the penalty upon a proceeding conducted pursuant to 125.35 of the penal law.

2. All issues of fact or law arising on the challenge must be tried ıd determined by the court. If the challenge is allowed, the court ıust exclude the person challenged from service. An erroneous ıling by the court allowing a challenge for cause by the people oes not constitute reversible error unless the people have khausted their peremptory challenges at the time or exhaust them efore the selection of the jury is complete. An erroneous ruling y the court denying a challenge for cause by the defendant does not onstitute reversible error unless the defendant has exhausted his ıeremptory challenges at the time or, if he has not, he peremptorily :hallenges such prospective juror and his peremptory challenges are :xhausted before the selection of the jury is complete.

§ 140.25 Trial jury; peremptory challenge of an individual juror.

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed the following number of peremptory challenges:

(a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected.

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

(c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

3. When two or more defendants are tried jointly, the number of peremptory challenges prescribed in subdivision two is not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed

§ 140.30 Trial jury; alternate jurors.

Immediately after the last trial juror is sworn, the court may in its discretion direct the selection of one or more, but not more than four additional jurors to be known as "alternate jurors." Alternate jurors must be drawn in the same manner, must have the same qualifications, must be subject to the same examination and challenges for cause and must take the same oath as the regular jurors.

After the jury has retired to deliberate, the court must direct the alternate jurors not to discuss the case and must further direct that they be kept separate and apart from the regular jurors.

§ 140.35 Trial jury; discharge of juror; replacement by alternate juror.

1. If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has retired to deliberate, the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 145.10.

2. If at any time after the trial jury has been sworn and before its rendition of a verdict the court is satisfied, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case, or that a juror has engaged in misconduct of a substantial nature but not of a kind to require the declaration of a mistrial pursuant to subdivisions one and two of section 145.10, the court may, if an alternate juror or jurors are available for service, discharged such trial juror and order that he be replaced by the alternate juror whose name was first drawn and called. If no alternate juror is available, such trial juror may not be discharged, and the trial must proceed.

§ 140.40 Trial jury; preliminary instructions by court.

After the jury has been sworn and before the people's opening address, the court must instruct the jury generally concerning its basic functions, duties and conduct. Such instructions must include, among other matters, admonitions that the jurors may not converse among themselves or with anyone else upon any subject connected with the trial; that they may not read or listen to any accounts or discussions of the case reported by newspapers or other publications or by television or radio; that they may not visit or view the premises or place where the offense or offenses charged were allegedly committed or any other premises or place involved in the case; and that they must promptly report to the court any incident within their knowledge involving an attempt by any person improperly to influence any member of the jury.

§ 140.45 Trial jury; when separation permitted.

During the period extending from the time the jurors are sworn to the time they retire to deliberate upon their verdict, the court may in its discretion either permit them to separate during recesses and adjournments or direct that they be continuously kept together during such periods under the supervision of an appropriate public servant or servants. In the latter case, such public servant or servants may not speak to or communicate with any juror concerning any subject connected with the trial nor permit any other person to do so, and must return the jury to the court room at the next designated trial session.

§ 140.50 Trial jury; viewing of premises.

1. When the court is of the opinion that a viewing or observation by the jury of the premises or place where an offense on trial was allegedly committed, or of any other premises or place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the commencement of the summations, order that the jury be conducted to such premises or place for such purpose in accordance with the provisions of this section.

2. In such case, the jury must be kept together throughout under the supervision of an appropriate public servant or servants appointed by the court, and the court itself must be present throughout. The prosecutor, the defendant and counsel for the defendant may as a matter of right be present throughout, but such right may be waived.

3. The purpose of such an inspection is solely to permit visual observation by the jury of the premises or place in question, and neither the court, the parties, counsel nor the jurors may engage in discussion or argumentation concerning the significance or implications of anything under observation or concerning any issue in the case.

# ARTICLE 145

## JURY TRIAL—MOTION FOR A MISTRIAL



### § 145.10 Motion for mistrial.

At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances:

1. Upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial. When such an error, defect or conduct occurs during a joint trial of two or more defendants and a mistrial motion is made by one or more but not by all, the court must declare a mistrial only as to the defendant or defendants making or joining in the motion, and the trial of the other defendant or defendants must proceed;

2. Upon motion of the people, when there occurs during the trial, either inside or outside the courtroom, gross misconduct by the defendant or some person acting on his behalf, or by a juror, resulting in substantial and irreparable prejudice to the people's case. When such misconduct occurs during a joint trial of two or more defendants, and when the court is satisfied that it did not result in substantial prejudice to the people's case as against a particular defendant and that such defendant was in no way responsible for the misconduct, it may not declare a mistrial with respect to such defendant but must proceed with the trial as to him;

3. Upon motion of either party or upon the court's own motion, when it is physically impossible to proceed with the trial in conformity with law.

### § 145.15 Motion for mistrial; status of indictment upon new trial.

Upon a new trial resulting from an order declaring a mistrial, the indictment is deemed to contain all the counts which it contained at the time the previous trial was commenced, regardless of whether any count was thereafter dismissed by the court prior to the mistrial order.

# ARTICLE 150

## JURY TRIAL—TRIAL ORDER OF DISMISSAL



### § 150.10 Trial order of dismissal.

At the conclusion of the people's case or at the conclusion of all the evidence, the court may, upon motion of the defendant or upon its own motion, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense. In such case, the court must immediately discharge the defendant from custody if he is in the custody of the sheriff, or, if he is at liberty on bail, it must exonerate the bail.

### § 150.20 Trial order of dismissal; review on appeal and offer of proof by people.

1. A trial order of dismissal may be reversed on appeal and vacated when the trail evidence was legally sufficient to establish the offense charged in the dismissed count or some lesser included offense, or when the trial evidence, though not legally sufficient in such respect, would have been legally sufficient had the court not erroneously excluded or stricken admissible evidence offered by the people.

2. When prospective evidence offered or sought to be adduced by the people is excluded by the court under such circumstances that the substance or content thereof does not appear in the record, the people may, in contemplation of a possible subsequent trial order of dismissal pursuant to section 150.10, and of a possible appeal therefrom pursuant to subdivision two of section 230.20, place upon the record, out of the presence of the jury, an "offer of proof" summarizing the substance and content of such excluded evidence. Upon an appeal by the people from such a trial order of dismissal, based upon a contention that the trial evidence would have been legally sufficient had such offered evidence not been erroneously excluded, the appellate court, if it determines that the same was admissible and improperly excluded, must, for the purpose of determining the issue of the legal sufficiency of the people's proof, regard the excluded evidence as it is summarized in the offer of proof as evidence constituting a part of the people's case.

# ARTICLE 155

## JURY TRIAL—COURT'S CHARGE AND INSTRUCTIONS TO JURY



### § 155.10 Court's charge and instructions; in general.

1. At the conclusion of the summations, the court must deliver a charge to the jury.

2. In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence, the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that such failure to testify is not in itself a factor from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation.

3. The court must specifically designate and submit, in accordance with the provisions of sections 155.30 and 155.40, those counts and offenses contained and charged in the indictment which the jury are to consider, and it must define each offense so submitted. Except as otherwise expressly provided, it must instruct the jury to render a verdict separately and specifically upon each count submitted to it, and with respect to each defendant if there be more than one, and must require that the verdict upon each such count be one of the following:

(a) "Guilty" of the offense submitted, if there be but one; or

(b) Where appropriate, "guilty" of a specified one of two or more offenses submitted under the same count in the alternative pursuant to section 155.40; or

(c) "Not guilty"; or

(d) "Not guilty by reason of mental disease or defect," where the acquittal is based solely upon such ground.

4. Both before and after the court's charge, the parties may submit requests to charge, either orally or in writing, and the court must rule upon each request. A failure to rule upon a request is deemed a denial of such request unless the substance thereof is or was incorporated in the charge.

§ 155.20 Court's submission of indictment to jury; definitions of terms.

The following definitions are applicable to this article:

1. "Submission of a count" of an indictment means submission of the offense charged therein, or of a lesser included offense, or submission in the alternative of both the offense charged and a lesser included offense or offenses. When the court "submits a count," it must, at the least, submit the offense charged therein if such is supported by legally sufficient trial evidence, or if it is not, the greatest lesser included offense which is supported by legally sufficient trial evidence.

2. "Consecutive counts" means two or more counts of an indictment upon which consecutive sentences may be imposed in case of conviction thereon.

3. "Concurrent counts" means two or more counts of an indictment upon which concurrent sentences only may be imposed in case of conviction thereon.

4. "Inclusory concurrent counts." Concurrent counts are "inclusory" when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater. All other kinds of concurrent counts are "non-inclusory."

5. "Inconsistent counts." Two counts are "inconsistent" when guilt of the offense charged in one necessarily negates guilt of the offense charged in the other.

§ 155.30 Court's submission of indictment to jury; counts to be submitted.

The court may submit to the jury only those counts of an indictment remaining therein at the time of its charge which are supported by legally sufficient trial evidence. Its determination as to

which of such counts must be submitted must be in accordance with the following rules:

1. If the indictment contains but one count, the court must submit such count.

2. If a multiple count indictment contains consecutive counts only, the court must submit every count thereof.

3. If a multiple count indictment contains concurrent counts only, the court must submit at least one such count, and may submit more than one as follows:

(a) With respect to non-inclusory concurrent counts, the court may in its discretion submit one or more or all thereof;

(b) With respect to inclusory concurrent counts, the court must submit the greatest or inclusive count and may or must, under circumstances prescribed in section 155.40, also submit, but in the alternative only, one or more of the lesser included counts. A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted.

4. If a multiple count indictment contains both concurrent and consecutive counts, or a group of concurrent counts which is consecutive as to another group of concurrent counts or as to another individual count, the court must submit every individual consecutive count and, as prescribed in subdivision three, at least one count of every group of concurrent counts.

5. If an indictment contains two inconsistent counts, the court must submit at least one thereof. If a verdict of guilty upon either would be supported by legally sufficient trial evidence, the court may submit both counts in the alternative and authorize the jury to convict upon one or the other depending upon its findings of fact, but not upon both. In such case, it must direct the jury that if it renders a verdict of guilty upon one such count it must render a verdict of not guilty upon the other. If the court is satisfied that a conviction upon one such count, though supported by legally sufficient trial evidence, would be against the weight of the evidence while a conviction upon the other would not, it may in its discretion submit the latter count only.

6. Notwithstanding any other provision of this section, the court is not required to submit any particular count to the jury when:

(a) The people consent that it not be submitted; or

(b) The number of counts or the complexity of the indictment requires selectivity of counts by the court in order to avoid placing an unduly heavy burden upon the jury in its consideration of the case and its endeavor to reach a proper verdict. In such case, the court may simplify the jury's task by submitting to it only a portion of the counts which are representative of the people's case.

7. Every count not submitted to the jury is deemed to have been dismissed by the court.

§ 155.40 Court's submission of lesser included offenses.

1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the highest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is waived by the defendant unless he objects thereto before the jury retires to deliberate.

2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so.

3. The principles prescribed in subdivisions one and two apply equally where the lesser included offense is specifically charged in another count of the indictment.

4. Whenever the court submits two or more offenses in the alternative pursuant to this section, it must instruct the jury that it may render a verdict of guilty with respect to any one of such offenses, depending upon its findings of fact, but that it may not render a verdict of guilty with respect to more than one. A verdict of guilty of any such offense is not deemed an acquittal of any lesser offense submitted, but is deemed an acquittal of every greater offense submitted.

# ARTICLE 160

## JURY TRIAL—DELIBERATION AND VERDICT OF JURY



### § 160.10 Jury deliberation; requirement of; where conducted.

Following the court's charge, the jury must retire to deliberate upon its verdict in a place outside the courtroom. It must be provided with suitable accommodations therefor and must be continuously kept together under the supervision of an appropriate public servant or servants. Except when so authorized by the court or when performing administerial duties with respect to the jurors, such public servant or servants may not speak to or communicate with them or permit any other person to do so.

### § 160.20 Jury deliberation; use of exhibits and other material.

Upon retiring to deliberate, the jurors may take with them:

1. Any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take; and

2. A written list prepared by the court containing the offenses submitted to the jury by the court in its charge and the possible verdicts thereon.

### § 160.30 Jury deliberation; request for information.

At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, give such requested information or instruction as the court deems proper.

§ 160.40 Verdict; rendition thereof.

1. The verdict must be rendered and announced by the foreman of the jury in the courtroom in the presence of both the court and the defendant. The prosecutor may as a matter of right be present but may waive such right.

2. Before rendering and announcing the verdict, the foreman of the jury must be asked whether the jury has agreed upon a verdict and must answer in the affirmative.

§ 160.50 Verdict; form; reconsideration of defective verdict.

1. The form of the verdict must be in accordance with the court's instructions, as prescribed in article one hundred fifty-five.

2. If the jury renders a verdict which in form is not in accordance with the court's instructions or which is otherwise legally defective, the court must explain the defect or error and must direct the jury to reconsider such verdict, to resume its deliberation for such purpose, and to render a proper verdict. If the jury persists in rendering a defective or improper verdict, the court may in its discretion either order that the verdict in its entirety as to any defendant be recorded as an acquittal, or discharge the jury and authorize the people to retry the indictment or a specified count or counts thereof as to such defendant; provided that if it is clear that the jury intended to find in favor of a defendant upon any particular count, the court must order that the verdict be recorded as an acquittal of such defendant upon such count.

3. If the court accepts a verdict which is defective or incomplete solely by reason of the jury's failure to render a verdict upon every count upon which it was instructed to do so, such verdict is deemed to constitute an acquittal upon every such count improperly ignored in the verdict.

§ 160.60 Discharge of jury before rendition of verdict and effect thereof.

1. A deliberating jury may be discharged by the court without having rendered a verdict only when:

(a) (i) The jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of the charges submitted and (ii) the court is satisfied that any such agreement is unlikely within a reasonable time; or

(b) The court, the defendant and the people all consent to such discharge; or

(c) A mistrial is declared pursuant to section 145.10.

2. When the jury is so discharged, the defendant or defendants may be retried upon the indictment. Upon such retrial, the indictment is deemed to contain all the counts which it contained at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial.

§ 160.70 Rendition of partial verdict and effect thereof.

1. If a deliberating jury declares that it has reached a verdict with respect to one or more but not all of the charges submitted to it, or with respect to one or more but not all of the defendants, the court must proceed as follows:

(a) If the possibility of ultimate agreement with respect to the other charges or defendants is so small and the circumstances are such that if they were the only matters under consideration the court would be authorized to discharge the jury pursuant to paragraph (a) of subdivision one of section 160.60, the court must terminate the deliberation and order the jury to render a partial verdict with respect to those counts and defendants upon which or with respect to whom it has reached a verdict, and judgment must eventually be imposed accordingly;

(b) If the court is satisfied that there is a reasonable possibility of ultimate agreement upon any of the unresolved charges with respect to any defendant, it may either:

(i) Order the jury to render its verdict with respect to those charges and defendants upon which or with respect to whom it has reached agreement and resume its deliberation upon the remainder; or

(ii) Refuse to accept a partial verdict at the time and order the jury to resume its deliberation upon the entire case.

2. Upon the rendition of a partial verdict pursuant to subdivision one, a defendant may be retried upon an unresolved count of an indictment when such unresolved count is consecutive, as that term is defined in subdivision two of section 155.20, as to every count upon which the jury did render a verdict, whether of guilty or not guilty.

§ 160.80 Recording and checking of verdict and polling of jury.

After a verdict has been rendered, it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their verdict. Even though no juror makes any declaration in the negative, the jury must, upon application of either party, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If upon either the collective or the separate inquiry any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case, except as otherwise provided in sections 125.30 and 125.35 of the penal law.

# ARTICLE 165

## WAIVER OF JURY TRIAL AND CONDUCT OF NON-JURY TRIAL



### § 165.10 Non-jury trial; when authorized.

1. Except where the indictment charges a crime for which a sentence of death may be imposed upon conviction, the defendant, subject to the provisions of subdivision two, may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending.

2. Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making. If the court disapproves the waiver, it must state upon the record its reasons for disapproval.

3. An indictment "charges a crime for which a sentence of death may be imposed," within the meaning of subdivision one, when:

(a) It charges the defendant with murder as defined in subdivision one or three of section 125.25 of the penal law; and

(b) There is some possibility that either (i) the victim of the alleged crime was a peace officer who was killed in the course of performing his official duties, or (ii) the defendant was at the time of the commission of the alleged crime confined in a state prison or otherwise in custody under a sentence specified in sub-paragraph (ii) of paragraph (a) of subdivision one of section 125.30 of the penal law; and

(c) There is some possibility that the defendant was more than eighteen years old at the time of the commission of the alleged crime.

In determining whether there is some possibility of the existence of the factors specified in this subdivision so as to preclude a waiver of a jury trial, the court must, in addition to examining the indictment, examine the minutes of the grand jury proceeding underlying the indictment and conduct any further inquiry which may be necessary to acquire the information essential to such determination.

§ 165.20 Non-jury trial; nature and conduct thereof.

1. A non-jury trial of an indictment must be conducted by one judge of the superior court in which the indictment is pending.

2. The court, in addition to determining all questions of law, is the exclusive trier of all questions of fact and must render a verdict.

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court gives such permission to one party it must give it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of section 135.20.

(c) The court may in its discretion permit the parties to deliver summations. If the court gives permission to one party, it must give it to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

4. The rules of evidence, motion practice and general procedure applicable to a jury trial are, wherever appropriate, equally applicable to a non-jury trial.

5. Before considering a multiple count indictment for the purpose of rendering a verdict thereon, the court must specify and state upon the record the courts upon which it will render a verdict and the particular defendant or defendants, if there be more than one, with respect to whom it will render a verdict upon any particular count. In determining what counts, offenses and defendants must be considered by it and covered by its verdict, and the form of the verdict is general, the court must be governed, so far as appropriate and practicable, by the provisions of article one hundred and fifty-five governing the court's submission of counts and offenses to a jury upon a jury trial.

# ARTICLE 170

## PROCEEDINGS FROM VERDICT TO SENTENCE



### § 170.10 Dispositon of defendant after verdict.

1. Upon a verdict of complete acquittal, the court must immediately discharge the defendant and exonerate his bail, if any.

2. Pending sentence upon a verdict convicting a defendant of any offense, the court must, as prescribed in section 285.50, either release him on his own recognizance or fix bail or commit him to the custody of the sheriff.

3. Upon a verdict of acquittal by reason of mental disease or defect, the court must commit the defendant to the custody of the commissioner of mental hygiene, pursuant to section 170.20.

### § 170.20 Commitment, confinement and release of defendant acquitted on ground of mental disease or defect.

1. Upon rendition of a verdict of acquittal by reason of mental disease or defect, the court must order the defendant to be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene or the state department of correction which has been approved by the heads of such departments, and the court must direct the sheriff if the court is located in a county outside the city of New York and the court must direct the department of correction of the city of New York if the court is located in the city of New York, to temporarily hold the defendant pending such approval of designation of an appropriate institution in which the defendant must be placed, and when notified by the commissioner of mental hygiene of the designated institution, the sheriff or the department of correction, as the case may be, must forthwith cause the defendant to be delivered to the head of such institution.

2. If the commissioner of mental hygiene is of the opinion that a person committed to his custody, pursuant to subdivision one of this section, may be discharged or released on condition without

danger to himself or to others, he must make application for the discharge or release of such person in a report to the court by which such person was committed and must transmit a copy of such application and report to the district attorney of the county from which the defendant was committed. The court may then appoint up to two qualified psychiatrists to examine such person, to report within sixty days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the court may cause such person to be confined in any institution located near the place where the court sits, which may hereafter be designated by the commissioner of correction or the commissioner of mental hygiene as suitable for the temporary detention of irresponsible persons.

3. If the court is satisfied that the committed person may be discharged or released on condition without danger to himself or others, the court must order his discharge, or his release on such conditions as the court determines to be necessary. If the court is not so satisfied, it must promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding. The committed person may offer the testimony of any qualified psychiatrist at such a hearing. After such a hearing, the committed person must be discharged, released on such conditions as the court determines to be necessary, or recommitted to the commissioner of mental hygiene. The commissioner of mental hygiene must make suitable provision for the care and supervision by the department of mental hygiene of persons released conditionally under this section.

4. If, within five years after the conditional release of a committed person, the court shall determine, after a hearing, that for the safety of such person or the safety of others his conditional release should be revoked, the court must forthwith order him recommitted to the commissioner of mental hygiene subject to discharge or release only in accordance with the procedure set forth in subdivisions two, three and five of this section.

5. A committed person may make application for his discharge or release to the court by which he was committed, and if, after receiving a report of the commissioner of mental hygiene, the court considers that there may be merit in the application, the court must follow the procedure prescribed in subdivisions two and three of this section.

6. A defendant committed to the custody of the commissioner of mental hygiene pursuant to the provisions of this section may at any time during the period of his commitment be transferred to an appropriate institution in the state department of mental hygiene or in the state department of correction, which has been approved by the heads of such departments.

§ 170.30 Motion to set aside verdict; grounds for.

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside the verdict upon any of the following grounds:

1. Any ground appearing in the record which, if raised upon an appeal from the prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

2. That during the trial there occurred, out of the presence of the court, improper conduct by the jurors or any one of them, or improper conduct by another person in relation to the jurors or any one of them, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; or

3. That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.

§ 170.40 Motion to set aside verdict; procedure.

1. A motion to set aside a verdict based upon a ground specified in subdivision one of section 170.30 need not be in writing, but the people must be given reasonable notice thereof and an opportunity to appear in opposition thereto.

2. A motion to set aside a verdict based upon a ground specified in subdivisions two and three of section 170.30 must be made and determined as follows:

(a) The motion must be in writing and upon reasonable notice to the people. The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the ground of the motion. Such sworn allegations may

be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief;

(b) The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers;

(c) After all papers of both parties have been filed, the court must consider the same and, if the motion is determinable pursuant to paragraphs (d) or (e), must or may, as therein provided, determine the motion without holding a hearing to resolve questions of fact;

(d) The court must grant the motion if:

(i) The moving papers allege a ground constituting legal basis for the motion; and

(ii) Such papers contain sworn allegations of all facts essential to support such ground; and

(iii) All the essential facts are conceded by the people to be true.

(e) The court may deny the motion if:

(i) The moving papers do not allege any ground constituting legal basis for the motion; or

(ii) The moving papers do not contain sworn allegations of all facts essential to support the ground of the motion;

(f) If the court does not determine the motion pursuant to paragraphs (d) or (e), it must conduct a hearing and make findings of fact essential to the determination thereof;

(g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

§ 170.50 Motion to set aside verdict; order granting motion.

1. Upon setting aside the verdict upon a ground specified in subdivision one of section 170.30, the court must take the same action as the appropriate appellate court would be required to take upon reversing a judgment of conviction upon the particular ground in issue.

2. Upon setting aside the verdict upon any ground specified in subdivisions two and three of section 170.30, the court must order a new trial.

# TITLE K

PROSECUTION OF INFORMATION IN LOCAL CRIMINAL COURTS
PLEA TO SENTENCE

## ARTICLE 175

PRE-TRIAL PROCEEDINGS



### § 175.10 Definitions of terms.

The following definitions are applicable to this title:

1. "Information," in addition to its meaning as defined in subdivision one of section 50.10, includes (a) a prosecutor's information and (b) a misdemeanor complaint upon which the defendant, by a waiver executed pursuant to subdivision four of section 85.65, has consented to be prosecuted.

2. "Single judge trial" means a trial in a local criminal court conducted by one judge sitting without a jury.

3. "Three-judge trial" means a trial in the New York city criminal

3. Upon a new trial resulting from an order setting aside a verdict, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except those upon or of which the defendant was acquitted or deemed to have been acquitted.

court conducted by a panel of three judges sitting without a jury.

4. "Jury trial" means a trial in a local criminal court other than the New York city criminal court conducted by one judge sitting with a jury.

### § 175.20 The plea.

1. Except as provided in subdivisions two and three, the provisions of article one hundred fifteen, governing the kinds of pleas to indictments which may be entered and related matters, are, to the extent that they can be so applied, applicable to pleas to informations, and changes of pleas thereto, in local criminal courts.

2. When a defendant wishes to enter or change a plea to an information under circumstances which, pursuant to section 115.10, 115.20 or 115.50, would require both the permission of the court and the consent of the people if the desired entry or change of plea related to an indictment pending in a superior court, and when the people are not represented by a prosecutor in the local criminal court, permission of the court alone is sufficient to authorize such entry or change of plea, and consent of the people is not required.

3. A plea to an information, other than one against a corporation, must be entered in the following manner:

(a) Subject to the provisions of paragraph (b), a plea to an information must be entered orally by the defendant in person unless the court permits entry thereof by counsel upon submission by him of written authorization of the defendant.

(b) If the only offense or offenses charged are traffic infractions, the procedure provided in sections eighteen hundred five and eighteen hundred six of the vehicle and traffic law, relating to pleas in such cases, is, when appropriate, applicable and controlling.

4. A plea to an information against a corporation must be entered by counsel.

§ 175.40 Pre-trial discovery and notices of defenses.

The provisions of article one hundred twenty-five, concerning pre-trial discovery by a defendant under indictment in a superior court, and article one hundred thirty, concerning pre-trial notice to the people by a defendant under indictment in a superior court who intends to advance a trial defense of mental disease or defect or of alibi, apply to any prosecution of an information in a local criminal court.

§ 175.45 Consolidation of informations.

The provisions of subdivisions four and five of section 100.20, and of subdivision two of section 100.40, relating to consolidation of indictments for purposes of trial, are applicable to prosecutions of informations in local criminal courts.

§ 175.50 Modes of trial.

1. Except as otherwise provided in this section, a trial of an information in a local criminal court must be a single judge trial.

2. In any local criminal court other than the New York city criminal court, a defendant who has entered a plea of not guilty to an

information which charges a misdemeanor must, upon timely request, be accorded a jury trial, conducted pursuant to article one hundred eighty-five.

3. After a defendant has entered a plea of not guilty in the New York city criminal court to an information which charges a misdemeanor, other than one defined in article two hundred twenty-five of the penal law or in the multiple dwelling law, either party must, upon timely request, be accorded a three-judge trial, conducted pursuant to section 180.20. Nothing contained in this subdivision precludes the establishment of court rules relating to what judges or panels of the New York city criminal court may conduct or dispose of pre-trial proceedings or motions in a case in which a three-judge trial has been ordered, or what judges or panels of the court may impose sentence or conduct other post-trial proceedings in such a case.

4. A defendant is entitled to a jury trial or a three-judge trial, pursuant to subdivisions two and three, of an information which charges a misdemeanor even though such information also charges a petty offense. In such case, the defendant is not entitled to such a trial upon the misdemeanor alone and a separate single judge trial upon the petty offense, and the court may not order such separate trials.

5. When two or more defendants are jointly charged in a single information with a misdemeanor for which a jury trial or a three-judge trial is authorized, and when one defendant makes a timely request for such a trial and the other or others do not, the court may in its discretion either (a) order a jury trial or a three-judge trial as the case may be, of all the defendants jointly, or (b) order such a trial of the defendant or defendants who request the same and a separate single judge trial of those who do not. When, however, the people make a timely request for a three-judge trial of such an information in the New York city criminal court, such court must order such a trial of all the defendants jointly regardless of a request by any defendant for a separate single judge trial. Nothing contained in this subdivision affects the court's power to order separate single judge trials, jury trials or three-judge trials of different defendants pursuant to the ordinary rules of severance prescribed in section 100.40.

6. Any request for a jury trial or a three-judge trial must be made before commencement of a single judge trial of the information. The appellate division of each department shall establish rules for

the local criminal courts within its department governing the time within which such a request must be made, the time and circumstances in which an order granting such a request may be vacated and like procedural matters; except that such rules with respect to the New York city criminal court shall be established jointly by the appellate divisions of the first and second departments.

§ 175.60 Defendant's presence at trial.

1. Except as provided in subdivision two, a defendant must be personally present during the trial.

2. On motion of a defendant represented by counsel, the court may, in the absence of an objection by the people, issue an order dispensing with the requirement that the defendant be personally present at trial. Such an order may be made only upon the filing of a written and subscribed statement by the defendant declaring that he waives his right to be personally present at the trial and authorizing his attorney to conduct his defense.

# ARTICLE 180

## NON-JURY TRIALS



### § 180.10 Conduct of single judge trial.

1. A single judge trial of an information in a local criminal court must be conducted pursuant to this section.

2. The court, in addition to determining all questions of law, is the exclusive trier of all questions of fact and must render a verdict.

3. The order of the trial must be as follows:

(a) The court may in its discretion permit the parties to deliver opening addresses. If the court gives such permission to one party, it must give it to the other also. If both parties deliver opening addresses, the people's address must be delivered first.

(b) The order in which evidence must or may be offered by the respective parties is the same as that applicable to a jury trial of an indictment as prescribed in subdivisions five, six and seven of section 135.20.

(c) The court may in its discretion permit the parties to deliver summations. If the court gives such permission to one party, it must give permission to the other also. If both parties deliver summations, the defendant's summation must be delivered first.

(d) The court must then consider the case and render a verdict.

4. The rules of motion practice and general procedure applicable to a jury trial of an indictment, as prescribed in articles one hundred forty-five and one hundred fifty, are, wherever appropriate, applicable to a non-jury trial of an information.

5. If the information contains more than one count, the court must render a verdict upon each count not previously dismissed or must otherwise state upon the record its disposition of each such count. A verdict which does not so dispose of each count constitutes a verdict of not guilty with respect to each undisposed of count.

6. In rendering a verdict of guilty upon a count charging a misdemeanor, the court may find the defendant guilty of such misdemeanor if it is established by legally sufficient trial evidence, or

guilty of any lesser included offense which is established by legally sufficient trial evidence.

§ 180.20 Conduct of three-judge trial.

1. The provisions of section 180.10, governing the conduct of a single judge trial in a local criminal court, are applicable to the conduct of a three-judge trial in the New York city criminal court.

2. The verdict and every other order, ruling and determination made by the court during or as a part of a three-judge trial must be concurred in by at least two of the three judges of the panel.

# ARTICLE 185

## JURY TRIALS



### § 185.05 Jury trial; order of trial.

The provisions of section 135.20, governing the order of proceedings of a jury trial of an indictment in a superior court, are applicable to a jury trial of an information in a local criminal court.

### § 185.10 Trial jury; formation in general.

1. A trial jury consists of six jurors, but "alternate jurors" may be selected and sworn pursuant to section 185.35.

2. The panel from which the jury is drawn is formed and selected as prescribed in the uniform district court act, uniform city court act, and uniform justice court act.

### § 185.15 Trial jury; challenge to the panel.

1. A challenge to the panel is an objection made to the entire panel of prospective trial jurors returned for the trial of the action and may be taken to such panel or to any additional panel that may be ordered by the court. Such a challenge may be made only by the defendant and only on the ground that there has been such a departure from the requirements of the appropriate law in the drawing or return of the panel as to result in substantial prejudice to the defendant.

2. A challenge to the panel must be made before the selection of the jury commences, and, if it is not, such challenge is deemed to have been waived. Such challenge must be made in writing setting

forth the facts constituting the ground of challenge. If such facts are denied by the people, witnesses may be called and examined by either party. All issues of fact and law arising on the challenge must be tried and determined by the court. If a challenge to the panel is allowed, the court must discharge that panel and order the return of another panel of prospective trial jurors.

§ 185.20 Trial jury; examination of prospective jurors; challenges generally.

If no challenge to the panel is made as prescribed by section 185.15, or if such challenge is made and disallowed, the court must direct that the names of six members of the panel be drawn and called. Such persons must take their places in the jury box and must be immediately sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the action. The procedural rules prescribed in section 140.15 with respect to the examination of the prospective jurors and to challenges are also applicable to the selection of a trial jury in a local criminal court.

§ 185.25 Trial jury; challenge for cause of an individual juror.

1. A challenge for cause is an objection to a prospective member of the jury and may be made only on the ground that:

(a) He does not have the qualifications required by the judiciary law; or

(b) He has a state of mind that will preclude him from rendering an impartial verdict based upon the evidence adduced at the trial; or

(c) He is related within the sixth degree of consanguinity or affinity to the defendant, or the person allegedly injured by the crime charged, or to a prospective witness at the trial, or to counsel for the people or for the defendant; or that he is or was a party adverse to any such person in a civil action; or that he has complained against or been accused by any such person in a criminal action; or that he bears some other relationship to any such person of such nature that it might reasonably be concluded that it will preclude him from rendering an impartial verdict; or

(d) He is to be a witness at the trial; or where a prosecutor's information was filed at the direction of a grand jury, he was a witness before the grand jury or at the preliminary hearing; or

(e) He served on a trial jury in a prior civil or criminal action involving the same conduct charged; or where a prosecutor's information was filed at the direction of a grand jury, he served on the grand jury which directed such filing.

2. All issues of fact or law arising on the challenge must be tried and determined by the court. The provisions of subdivision two of section 140.20 with respect to challenges are also applicable to the selection of a trial jury in a local criminal court.

§ 185.30 Trial jury; peremptory challenge of an individual juror.

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed three peremptory challenges. When two or more defendants are tried jointly, such challenges are not multiplied by the number of defendants, but such defendants are to be treated as a single party. In any such case, a peremptory challenge by one or more defendants must be allowed if a majority of the defendants join in such challenge. Otherwise, it must be disallowed.

§ 185.35 Trial jury; alternate juror.

1. Immediately after the last trial juror is sworn, the court may in its discretion direct the selection of either one or two additional jurors to be known as "alternate jurors." The alternate jurors must be drawn in the same manner, must have the same qualifications, must be subject to the same examination and challenges for cause and must take the same oath as the regular jurors. Whether or not a party has used its peremptory challenge in the selection of the trial jury, one peremptory challenge is authorized in the selection of the alternate jurors.

2. The provisions of section 140.35 with respect to alternate jurors are also applicable to a trial jury in a local criminal court.

§ 185.40 Trial jury; conduct of jury trial in general.

A jury trial of an information must be conducted generally in the same manner as a jury trial of an indictment, and the rules governing preliminary instructions by the court, supervision of the jury, motion practice and other procedural matters involved in the conduct of a jury trial of an indictment are, where appropriate, applicable to the conduct of a jury trial of an information.

§ 185.45 Court's charge and instructions; in general.

1. At the conclusion of the summations, the court must deliver a charge to the jury.

2. In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's inno-

cence, the requirement that guilt be proved beyond a reasonable doubt and that the jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment. Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that such failure to testify is not in itself a factor from which any inference unfavorable to the defendant may be drawn. The court must also state the material legal principles applicable to the particular case, and, so far as practicable, explain the application of the law to the facts, but it need not marshal or refer to the evidence to any greater extent than is necessary for such explanation.

3. The court must specifically designate and submit, in accordance with the provisions of section 185.50, those counts and offenses contained and charged in the information which the jury are to consider, and it must define each offense so submitted. Except as otherwise expressly provided, it must instruct the jury to render a verdict separately and specifically upon each count submitted to it, and with respect to each defendant if there be more than one, and must require that the verdict upon each such count be one of the following:

(a) "Guilty" of the offense submitted, if there be but one.

(b) Where appropriate, "guilty" of a specified one of two or more offenses submitted under the same count in the alternative pursuant to section 185.50; or

(c) "Not guilty"; or

(d) "Not guilty by reason of mental disease or defect," where the acquittal is based solely upon such ground.

4. Both before and after the court's charge, the parties may submit requests to charge, either orally or in writing, and the court must rule upon each request. A failure to rule upon a request is deemed a denial of such request unless the substance thereof is or was incorporated in the charge.

§ 185.50 Court's submission of information to jury; counts and offenses to be submitted.

1. The term definitions contained in section 155.20 are applicable to this section, except that the word "information" is to be substituted for the word "indictment" wherever the latter appears in said section 155.20.

2. The court may submit to the jury only those counts of an information remaining therein at the time of its charge which are sup-

ported by legally sufficient trial evidence. If the trial evidence is not legally sufficient to establish a misdemeanor charged in a particular count which the court would otherwise be required to submit pursuant to this section, but is legally sufficient to establish a lesser included offense, the court may submit such lesser included offense and, upon the people's request, must do so. In submitting a count charging a misdemeanor established by legally sufficient trial evidence, the court in its discretion may, in addition to submitting such misdemeanor, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offenses but did not commit the misdemeanor charged.

3. If the information contains but one count, the court must submit such count.

4. If a multiple count information contains consecutive counts only, the court must submit every count thereof.

5. In any case where the information may be more complex by reason of concurrent counts or inconsistent counts or other factors indicated in subdivisions three, four and five of section 155.30, relating to multiple count indictments, the court, in its submission of such information to the jury, should, so far as practicable, be guided by the provisions of the said subdivisions of said section 155.30.

6. Notwithstanding any other provision of this section, the court is not required to submit to the jury any particular count of a multiple count information if the people consent that it not be submitted.

7. Every count not submitted to the jury is deemed to have been dismissed by the court.

§ 185.55 Deliberation and verdict of jury.

The provisions of article one hundred sixty, governing the deliberation and verdict of a jury in a jury trial of an indictment in a superior court, are applicable to a jury trial of an information in a local criminal court.

# ARTICLE 190

## PROCEEDINGS FROM VERDICT TO SENTENCE

Section 190.10 Proceedings from verdict to sentence.

§ 190.10 Proceedings from verdict to sentence.

The provisions of article one hundred seventy, governing the proceedings from verdict to sentence in an action prosecuted by indictment in a superior court, are applicable to a prosecution by information in a local criminal court.

# TITLE L

## SENTENCE

## SENTENCING IN GENERAL

## ARTICLE 195



### § 195.10 Applicability.

1. In general. The procedure prescribed by this title shall apply to sentencing for every offense, whether defined within or outside of the penal law.

2. Exception. Whenever a different or inconsistent procedure is provided by any other law in relation to sentencing for a non-criminal offense defined therein, such different or inconsistent procedure shall apply thereto.

### § 195.20 Sentence required.

The court must pronounce sentence in every case where a conviction is entered. If an accusatory instrument contains multiple counts and a conviction is entered on more than one count the court must pronounce sentence on each count.

### § 195.30 Time for pronouncing sentence.

1. In general. Sentence must be pronounced without unreasonable delay.

2. Court to fix time. Upon entering a conviction the court must:

(a) Fix a date for pronouncing sentence; or

(b) Fix a date for one of the pre-sentence proceedings specified in article two hundred five; or

(c) Pronounce sentence on the date the conviction is entered in accordance with the provisions of subdivision three.

3. Sentence on date of conviction. The court may sentence the defendant at the time the conviction is entered if:

(a) A pre-sentence report or a fingerprint report is not required; or

(b) Where any such report is required, the report has been received.

Provided, however, that the court must not pronounce sentence at such time without inquiring as to whether an adjournment is desired by the defendant. Where an adjournment is requested, the defendant must state the purpose thereof and the court may, in its discretion, allow a reasonable time.

4. Time for pre-sentence proceedings. The court may conduct one or more of the pre-sentence proceedings specified in article two hundred five at any time before sentence is pronounced. Notice of any such proceeding issued after the date for pronouncing sentence has been fixed automatically adjourns the date for pronouncing sentence. In such case the court must fix a date for pronouncing sentence at the conclusion of such proceeding.

§ 195.40 Defendant's presence at sentencing.

1. In general. The defendant must be personally present at the time sentence is pronounced.

2. Exception. Where sentence is to be pronounced for a misdemeanor or for a petty offense, the court may, on motion of the defendant, dispense with the requirement that the defendant be personally present. Any such motion shall be accompanied by a waiver, signed and acknowledged by the defendant, reciting the maximum sentence that may be imposed for the offense and stating that the defendant waives the right to be personally present at the time sentence is pronounced.

3. Corporations. Sentence may be pronounced against a corporation in the absence of counsel if counsel fails to appear on the date of sentence after reasonable notice thereof.

§ 195.50 Statements at time of sentence.

At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence. The court must then accord counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant also has the right to make a statement personally in his own behalf and before pronouncing sentence the court must ask him whether he wishes to make such a statment.

The court may, either before or after receiving such statements, summarize the factors it considers relevant for the purpose of sentence and afford an opportunity to the defendant or his counsel to comment thereon.

§ 195.60 Authority for the execution of a sentence.

Except where a sentence of death is pronounced, a certificate of conviction showing the sentence pronounced by the court, or a certified copy thereof, shall constitute the authority for execution of the sentence and shall serve as the order of commitment, and no other warrant, order of commitment or authority is necessary to justify or to require execution of the sentence.

§ 195.70 Minutes of sentence.

In any case where a person receives an indeterminate sentence of imprisonment or a reformatory or an alternative local reformatory sentence of imprisonment, a certified copy of the stenographic minutes of the sentencing proceeding must be delivered to the person in charge of the institution to which the defendant has been delivered within thirty days from the date such sentence was imposed, provided however that a sentence or commitment shall not be deemed defective in the case of failure to comply with the provisions of this section.

# ARTICLE 200

## PRE-SENTENCE REPORTS



In any case where the defendant is convicted of an offense specified in section 80.10 as one for which fingerprinting is required upon arrest, the court must not pronounce sentence until it has received a fingerprint report.

[ 200.10 Requirement of fingerprinting report.

1. Requirement for felonies. In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and the court must not pronounce sentence until it has received a written report of such investigation.

2. Requirement for misdemeanors. Where a person is convicted of a misdemeanor a pre-sentence report shall not be required, but the court shall not pronounce any of the following sentences unless it has ordered a pre-sentence investigation of the defendant and has received a written report thereof:

(a) A sentence of probation;

(b) A reformatory or an alternative local reformatory sentence of imprisonment;

(c) A sentence of imprisonment for a term in excess of ninety days;

(d) Consecutive sentences of imprisonment for terms aggregating more than ninety days.

3. Permissible in any case. The court may, in its discretion, order a pre-sentence investigation and report in any case where it is pronouncing sentence, irrespective of whether such investigation and report is required by subdivision one or two of this section.

§ 200.30 Scope of pre-sentence investigation and report.

1. The investigation. The pre-sentence investigation shall consist of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter the agency conducting the investigation deems relevant to the question of sentence, and shall include any matter the court directs to be included.

2. Physical and mental examinations. Whenever information is available with respect to the defendant's physical and mental condition the pre-sentence investigation shall include the gathering of such information. In the case of a felony or of a class A misdemeanor, or in any case where a person under the age of twenty-one is convicted of a crime, the court may order that the defendant undergo a thorough physical or mental examination in a designated facility and may further order that the defendant remain in such facility for such purpose for a period not exceeding thirty days.

3. The report. The report of the pre-sentence investigation shall contain an analysis of such of the information gathered in the investigation as the agency that conducted the investigation deems relevant to the question of sentence. The report shall also include any other information that the court directs to be included.

§ 200.40 Defendant's pre-sentence memorandum.

The defendant may, at any time prior to the pronouncement of sentence, file with the court a written memorandum setting forth any information he may deem pertinent to the question of sentence. Such memorandum may include information with respect to any of the matters described in section 200.30 and the defendant may annex written statements by others in support of facts alleged in the memorandum.

§ 200.50 Confidentiality of pre-sentence reports and memoranda.

1. In general. Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence shall be confidential and shall not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court.

2. Public agencies within this state. A probation department shall make available a copy of its pre-sentence report and any medical, psychiatric or social agency report submitted to it in connection with its pre-sentence investigation or its supervision of a defendant to any court, or to the probation department of any court, within this state that subsequently has jurisdiction over such defendant for the purpose of pronouncing or reviewing sentence and to any state agency to which the defendant is subsequently committed or certified or under whose care and custody or jurisdiction the defendant subsequently is placed upon the official request of such court or agency therefor. In any such case, the court or agency receiving such material shall retain same under the same conditions of confidentiality as the probation department that made it available.

3. Public agencies outside this state. Upon official request of any probation, parole or public institutional agency outside this state, a probation department may make any information in its files available to such agency.

4. New York state identification and intelligence system. Nothing in this section shall be construed to prevent the voluntary submission by a probation department of data in its files to the New York state identification and intelligence system.

§ 200.60 Copy of reports to accompany defendant sentenced to imprisonment.

1. Cases where copy of report is required. Whenever a person is sentenced to a term of imprisonment in excess of ninety days or to consecutive sentences of imprisonment aggregating more than ninety days or to a reformatory or any alternative local reformatory sentence of imprisonment or to an indeterminate sentence of imprisonment, a copy of the pre-sentence report, a copy of any pre-sentence memorandum filed by the defendant and a copy of any medical, psychiatric or social agency report submitted to the court or to the probation department in connection with the question of sentence shall be delivered to the person in charge of the correctional facility to which the defendant is committed at the time the defendant is delivered thereto.

2. Effect of failure to deliver required report. A commitment shall not be deemed void in the case of failure to comply with the provisions of subdivision one of this section but the person in charge of the correctional facility to which the defendant has been delivered in execution of the sentence is authorized to refuse to accept custody of such person until the required report is delivered.

# ARTICLE 205

## PRE-SENTENCE PROCEEDINGS



### § 205.10 Pre-sentence conference.

1. Authorization and purpose. Before pronouncing sentence the court, in its discretion, may hold one or more pre-sentence conferences in open court or in chambers (i) to resolve any discrepancies between the pre-sentence report, or other information the court has received, and the defendant's pre-sentence memorandum submitted pursuant to section 200.40, or (ii) to assist the court in its consideration of any matter revelant to the sentence it will pronounce.

2. Attendance. Such conference may be held with defense counsel in the absence of the defendant or the court may direct that the defendant attend. The court may also direct that any person who has furnished or who can furnish information to the court concerning sentence attend. Reasonable notice of the conference shall be given to the prosecutor who shall be afforded an opportunity to participate therein.

3. Procedure at conference. The court may advise the persons present at the conference of the factual contents of any report or memorandum it has received and afford any of the participants an opportunity to controvert or to comment upon any fact. The court may also conduct a summary hearing at the conference on any matter relevant to sentence and for such purpose take testimony under oath. In the discretion of the court, all or any part of the proceedings at the conference may be recorded by a court stenographer and the transcript made part of the pre-sentence report.

### § 205.20 Procedure for determining whether defendant should be sentenced as a persistent felony offender.

1. Order directing a hearing. In any case where it appears, prior to sentencing, that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, the

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court shall consider whether the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest. If the court is of the opinion that such is the case, the court shall order a hearing to determine whether the defendant should be sentenced as a persistent felony offender. Such order shall be filed with the clerk of the court and shall specify the date for the hearing, which shall be not less than twenty days from the date the order is filed. The court shall annex to and file with the order a statement setting forth the following:

(a) The date and place of the previous convictions that bring the defendant within the definition of persistent felony offender specified in subdivision one of section 70.10 of the penal law; and

(b) The factors in the defendant's background and prior criminal conduct that the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender.

2. Notice of hearing. Upon receipt of the order and statement of the court is satisfied that (i) the uncontroverted allegations with defendant, his counsel and the district attorney. Such notice shall specify the time and place of the hearing and the fact that the purpose of the hearing is to determine whether or not the defendant should be sentenced as a persistent felony offender. Each notice required to be sent hereunder shall be accompanied by a copy of the statement of the court.

3. Preliminary examination. When the defendant appears for the hearing the court shall ask him whether he wishes to controvert any allegation made in the statement prepared by the court, and whether he wishes to present evidence on the issue of whether he is a persistent felony offender or on the question of his background and criminal conduct. If the defendant wishes to controvert any allegation in the statement of the court he shall specify the particular allegation or allegations he wishes to controvert. If he wishes to present evidence in his own behalf, he shall specify the nature of such evidence. Uncontroverted allegations in the statement of the court shall be deemed evidence in the record.

4. Cases where further hearing is not required. Where the uncontroverted allegations in the statement of the court are sufficient to support a finding that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law and the court is satisfied that (i) the uncontroverted allegations with

respect to the defendant's background and the nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender, and (ii) the defendant either has no relevant evidence to present or that the facts which could be established through the evidence offered by the defendant would not significantly affect the court's decision, the court may enter a finding that the defendant is a persistent felony offender and sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.

5. Cases where further hearing is required. Where the defendant controverts an allegation in the statement of the court and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, or where the uncontroverted allegations with respect to the defendant's history and the nature of his prior criminal record do not warrant sentencing him as a persistent felony offender, or where the defendant has offered to present evidence to establish facts that would significantly affect the court's decision on the question of whether a persistent felony offender sentence is appropriate, the court shall fix a date for a further hearing. Such hearing shall be before the court without a jury and either party may introduce evidence with respect to the controverted allegations or any other matter relevant to the issue of whether or not the defendant should be sentenced as a persistent felony offender. At the conclusion of the hearing the court shall make a finding as to whether or not the defendant is a persistent felony offender and shall also make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted. If the court finds that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and the court is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in accordance with the provisions of subdivision two of that section.

6. Burden and standard of proof; evidence. At any hearing held pursuant to this section the burden of proof shall be upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be

established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence and the standard of proof with respect to such matters shall be a preponderance of the credible evidence.

7. Constitutionality of prior convictions. A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the Constitution of the United States shall not be counted in determining whether the defendant is a persistent felony offender. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement of the court on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

8. Termination of hearing. At any time during the pendency of a hearing pursuant to this section, the court may, in its absolute discretion, terminate the hearing without making any finding. In such case, unless the court recommences the proceedings and makes the necessary findings, the defendant shall not be sentenced as a persistent felony offender.

§ 205.30 Procedure for determining the amount of a fine based upon the defendant's gain from the offense.

1. Order directing a hearing. In any case where the court is of the opinion that the sentence should consist of or include a fine and that the amount of the fine should be based upon the defendant's gain from the commission of the offense, the court may order a hearing to determine the amount of such gain. The order shall be filed with the clerk of the court and shall specify the date for the hearing, which shall be not less than ten days from the date of the filing.

2. Notice of hearing. Upon the receipt of the order, the clerk of the court shall send a notice of hearing to the defendant, his counsel and the district attorney. Such notice shall specify the time and place of the hearing and the fact that the purpose of the hearing is to determine the amount of the defendant's gain from the commission of the offense so that an appropriate fine can be imposed.

3. Hearing. When the defendant appears for the hearing the court shall ask him whether he wishes to make any statement with respect to the amount of his gain from commission of the offense. If the defendant does make a statement, the court may accept such statement and base its finding thereon. Where the defendant does not make a statement, or where the court does not accept the defendant's statement, the court shall proceed with the hearing.

4. Burden and standard of proof; evidence. At any hearing held pursuant to this section the burden of proof shall be upon the people. A finding as to the amount of the defendant's gain from the commission of the offense must be based upon a preponderance of the credible evidence. Any relevant evidence, not legally privileged, may be received regardless of its admissibility under the exclusionary rules of evidence.

5. Termination of hearing. At any time during the pendency of a hearing pursuant to this section the court may, in its absolute discretion, terminate the hearing without making any finding.

§ 205.40 Procedure for determining prior convictions for the purpose of sentence in certain cases.

1. Applicability. Where a conviction is entered for an unclassified misdemeanor or for a traffic infraction and the authorized sentence depends upon whether the defendant has previously been convicted of an offense, or where a conviction is entered for a violation defined outside the penal law and the amount of the fine authorized by the law defining such violation depends upon whether the defendant has previously been convicted of an offense, the question of whether the defendant has previously been so convicted shall be determined as provided in this section.

2. Statement to be filed. If it shall appear that the defendant has previously been so convicted and if the court is required, or in its discretion desires, to impose a sentence that would not be authorized in the absence of such previous conviction, a statement shall be filed after conviction and before sentence setting forth the date and place of the previous conviction or convictions and the court shall conduct a hearing to determine whether the defendant is the same person mentioned in the record of such conviction or convictions. In cases where an increased sentence is mandatory, the statement may be filed by the court or by the prosecutor. In cases where an increased sentence is discretionary, the statement may be filed only by the court.

3. Preliminary examination. The defendant shall be given a copy of such statement and the court shall ask him whether he admits or denies such prior conviction or convictions. If the defendant denies such prior conviction or convictions, or remains silent, the court shall proceed with the hearing.

4. Time for hearing. In any case where a copy of the statement was not received by the defendant at least two days prior to the preliminary examination, the court must upon request of the defendant grant an adjournment of at least two days before proceeding with the hearing.

5. Manner of conducting hearing. A hearing pursuant to this section shall be before the court without a jury. The burden of proof shall be upon the people and a finding that the defendant has been convicted of any offense alleged in the statement must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to trial of the issue of guilt.

# ARTICLE 210

## SENTENCES OF PROBATION AND OF CONDITIONAL DISCHARGE



### § 210.10 Specification of conditions of the sentence.

When the court pronounces a sentence of probation or of conditional discharge it must specify as part of the sentence the conditions to be complied with. When the sentence is one of probation, the defendant must be given a written copy of the conditions at the time sentence is imposed. In any case where the defendant is given a written copy of the conditions, a copy shall be filed with and shall become part of the record of the case and it shall not be necessary to specify the conditions orally.

Commission of an additional offense, other than a traffic infraction, after imposition of a sentence of probation or of conditional discharge shall be grounds for revocation of such sentence irrespective of whether such fact is specified as a condition of the sentence.

### § 210.20 Modification or enlargement of conditions.

The court may modify or enlarge the conditions of a sentence of probation or of conditional discharge at any time prior to the expiration or termination of the period of the sentence. Such action shall not however be taken unless the defendant is personally present. In any such case the modification or enlargement shall be specified in the same manner as the conditions originally imposed and shall become part of the sentence.

The procedure set forth in this section shall apply to the imposition of an additional period of conditional discharge as authorized by subdivision three of penal law section 65.05.

### § 210.30 Notice to appear, warrants, arrests, search.

1. Notice to appear. The court may at any time order that a person who is under a sentence of probation or of conditional discharge appear before it. Such direction may be in the form of a

notice, specifying the time and place of appearance, which shall be mailed to or served personally upon the defendant as the court may direct. Failure to appear as ordered without reasonable cause therefor shall be deemed a violation of the conditions of the sentence irrespective of whether such requirement is specified as a condition thereof.

2. Warrants. If at any time during the period of a sentence of probation or of conditional discharge the court has reasonable grounds to believe the defendant has violated a condition of the sentence the court may issue a warrant for his arrest and/or a warrant for a search of his person or of any premises in which he resides or is found or of any personal property which he owns or which is in his possession.

3. Arrest and search without warrant. When a probation officer has reasonable grounds to believe that a person under his supervision pursuant to a sentence of probation has violated a condition of the sentence such officer may, without a warrant, arrest the probationer and search his person. In executing such arrest the probation officer may be assisted by a police officer.

4. Appearance before court. A person who has been arrested pursuant to this section must forthwith be brought before the court that imposed the sentence.

5. Commitment. Whenever the court has reasonable grounds to believe that a person appearing before the court has violated or is or was about to violate the conditions of a sentence of probation or of conditional discharge the court may submit such person with or without bail.

§ 210.40 Declaration of delinquency.

If at any time during the period of a sentence of probation or of conditional discharge the court has reasonable grounds to believe that the defendant has violated a condition of the sentence, the court may declare the defendant delinquent and file such declaration of delinquency with the clerk. Upon filing a declaration of delinquency, the court shall promptly take reasonable and appropriate steps to cause the defendant to appear before it and to make a final determination as to the delinquency.

§ 210.50 Hearing on violation.

1. In general. The court shall not revoke a sentence of probation or a sentence of conditional discharge unless (i) the court has found that the defendant has violated a condition of the sentence and (ii) the defendant has had an opportunity to be heard. The defendant shall be entitled to a hearing in accordance with this section promptly after the court has filed a declaration of delinquency or has committed him pursuant to this article.

2. Statement; preliminary examination. The court shall file or cause to be filed with the clerk of the court a statement setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred. The defendant must appear before the court and the court must apprise him of the contents of the statement and furnish him with a copy thereof. At the time of such appearance the court shall ask the defendant whether he wishes to make any statement with respect to the violation. If the defendant does make a statement, the court may accept such statement and base its decision thereon. Where the defendant does not make a statement, or where the court does not accept the defendant's statement, the court shall proceed with the hearing. Provided, however, that upon request of the defendant, the court shall grant a reasonable adjournment to the defendant to enable him to prepare for the hearing.

3. Manner of conducting hearing. The hearing shall be a summary one by the court without a jury and the court may receive any relevant evidence not legally privileged. The defendant shall have the right of confrontation and cross examination and shall have the right to present evidence on his own behalf. A finding that the defendant has violated the conditions of his sentence must be based upon a preponderance of the credible evidence.

4. Counsel. The defendant shall be entitled to counsel at all stages of any proceeding under this section and the court must advise him of his right to counsel at the outset of the proceeding.

5. Revocation; modification; continuation. At the conclusion of the hearing the court may revoke, continue or modify the sentence of probation or conditional discharge. Where the court revokes the sentence, it must impose sentence as specified in subdivision two of penal law section 60.10.

§ 210.60 Custody and supervision of probationers.

1. Custody. A person who is under a sentence of probation shall be in the legal custody of the court that imposed the sentence pending expiration or termination of the period of the sentence.

2. Supervision. The probation department serving the court that imposed a sentence of probation shall have the duty of supervising the defendant during the period of such legal custody.

§ 210.70 Transfer of supervision of probationers.

1. Authority to transfer supervision. In any case where a sentence of probation is pronounced, if the defendant resides or desires to reside in a place other than one within the jurisdiction of the probation department that serves the sentencing court, such court may designate any other probation department within the state to perform the duties of probation supervision and may transfer supervision of the defendant thereto. Any such designation must be in accordance with rules adopted by the director of the state division of probation.

2. Transfer of powers. Where supervision of a probationer is transferred pursuant to subdivision one, the agency designated shall have the same powers and duties as the probation department serving the sentencing court would have had, and the county court for the county in which the defendant resides, or if the defendant resides in the city of New York the supreme court for the county in which the defendant resides, shall have all of the powers specified in section 210.30. If it appears that the defendant has violated a condition of his sentence, such court may file a declaration of delinquency in accordance with section 210.40 and may proceed as follows:

(a) Commit the defendant to the custody of the sheriff, and direct such official to bring the defendant before the court that imposed the sentence;

(b) Conduct a hearing on the violation pursuant to subdivisions one through four of section 210.50 and make findings of fact after which it may either (i) continue or modify the sentence, or (ii) commit the defendant as provided in subparagraph (a) and send a certified copy of the transcript of the hearings and its findings to the court that imposed the sentence.

3. Procedure upon return of the defendant. When a defendant is returned to the court that imposed the sentence the transfer shall be deemed terminated and such court shall proceed in accordance

with its own discretion. In any case where a hearing was conducted pursuant to paragraph (b) of subdivision two, the hearing and findings shall have the same effect as a hearing conducted by and findings made by the sentencing court. No person who has been so returned shall be transferred back to supervision in the county that returned him without consent of the court that returned him.

4. Costs of returning a probationer. The costs incurred by a county in returning a probationer transferred thereto, including any costs necessary for a hearing conducted in such county shall be charges upon and paid by the county in which the sentencing court is located.

5. Interstate compact. Nothing contained herein shall affect or limit the provisions of section two hundred twenty-four of the correction law relating to out-of-state probation supervision.

§ 210.80 Termination of sentence.

The court may at any time terminate a period of probation or of conditional discharge.

# ARTICLE 215

## FINES



### § 215.10 Collection of fines.

1. Alternative methods of payment. When the court imposes a fine upon an individual, the court may direct as follows:

(a) That the defendant pay the entire amount at the time sentence is pronounced;

(b) That the defendant pay the entire amount of the fine at some later date;

(c) That the defendant pay a specified portion of the fine at designated periodic intervals, and in such case may direct that the fine be remitted to a designated official who shall report to the court on any failure to comply with the order;

(d) Where the defendant is sentenced to a period of probation as well as a fine, that the payment of the fine be a condition of the sentence.

2. Imprisonment for failure to pay. Where the court imposes a fine, the sentence may provide that if the defendant fails to pay the fine in accordance with the direction of the court, the defendant must be imprisoned until the fine is satisfied. Such provision may be added at the time sentence is pronounced or at any later date while the fine or any part thereof remains unpaid, provided, however, that if the provision is added at a time subsequent to the pronouncement of sentence the defendant must be personally present when it is added. In any case where the defendant fails to pay a fine as directed the court may issue a warrant for his arrest.

3. Period of imprisonment. When the court directs that the defendant be imprisoned until the fine be satisfied, the court must specify a maximum period of imprisonment subject to the following limits:

(a) Where the fine was imposed for a felony, the period shall not exceed one year;

(b) Where the fine was imposed for a misdemeanor, the period shall not exceed one-third of the maximum authorized term of imprisonment;

(c) Where the fine was imposed for a violation or a traffic infraction the period shall not exceed fifteen days; and

(d) Where a sentence of imprisonment as well as a fine was imposed the aggregate of the period and the term of the sentence shall not exceed the maximum authorized term of imprisonment.

4. Application for resentence. In any case where the defendant is unable to pay a fine imposed by the court, the defendant may at any time apply to the court for resentence. In such case, if the court is satisfied that the defendant is unable to pay the fine, the court must:

(a) Adjust the terms of payment; or

(b) Lower the amount of the fine; or

(c) Where the sentence consists of probation or imprisonment and a fine revoke the portion of the sentence imposing the fine; or

(d) Revoke the entire sentence imposed and resentence the defendant. Upon such resentence the court may impose any sentence it originally could have imposed, except that the amount of any fine imposed shall not be in excess of the amount the defendant is able to pay.

5. Civil proceeding for collection. Notwithstanding that the defendant was imprisoned for failure to pay a fine or that he has served the period of imprisonment imposed, a fine may be collected in the same manner as a judgment in a civil action. The district attorney may, in his discretion, and must, upon order of the court, institute proceedings to collect such fine.

§ 215.20 Collection of fines imposed upon corporations.

Where a corporation is sentenced to pay a fine, the fine must be paid at the time sentence is imposed. If the fine is not so paid, it may be collected in the same manner as a judgment in a civil action and if execution issued upon such judgment be returned unsatisfied an action may be brought in the name of the people to procure a judgment sequestering the property of the corporation, as provided by the general corporation law. It shall be the duty of the district attorney to institute proceedings to collect such fine.

§ 215.30 Remission of fines.

1. Applicability. The procedure specified in this section shall govern remission of fines in all cases not covered by subdivision four of section 215.10.

2. Procedure. Any superior court which has imposed a fine for any offense, shall have power in its discretion, on five days notice to the district attorney of the county in which such fine was imposed, to remit such fine, or any portion thereof. In case of a fine imposed by a local criminal court for any offense whatever, a superior court judge of the county in which the fine was imposed upon five days notice to the district attorney of the county in which such fine was imposed, shall have the same power.

# ARTICLE 220

## SENTENCES OF IMPRISONMENT



### § 220.10 Sentence of imprisonment not to be changed after commencement.

Except as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law such sentence cannot be changed, suspended or interrupted once the term or period of the sentence has commenced.

### § 220.20 Commitment of the defendant.

1. In general. When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the proper agency or officer and detained until the sentence is complied with.

2. Indeterminate sentence. In the case of an indeterminate sentence of imprisonment commitment shall be to the custody of the state department of correction as provided in subdivision one of penal law section 70.20 and the order of commitment shall specify the institution, designated by the commissioner of correction in accordance with correction law section eight hundred one, to which the defendant shall be delivered.

3. Reformatory sentence. In the case of a reformatory sentence of imprisonment commitment shall be to the custody of the state department of correction as provided in penal law section 75.05 and the order of commitment shall specify, in accordance with correction law section eight hundred one, as follows:

(a) If the defendant is a male, the order shall specify that he be delivered to the reception center at Elmira;

(b) If the defendant is a female, the order shall specify that she be delivered to an institution designated by the state commissioner of correction.

4. Definite sentence. In the case of a definite sentence of imprisonment, commitment shall be as follows:

(a) In counties contained within the city of New York, or in

any county that has a county department of correction, commitment shall be to the custody of the department of correction of such city or county;

(b) In any other case, commitment shall be to the county jail, workhouse or penitentiary, or to a penitentiary outside the county and the order of commitment shall specify the institution to which the defendant shall be delivered.

5. Alternative local reformatory sentence. In the case of an alternative local reformatory sentence of imprisonment, commitment must be to and the sentence must be served in the local reformatory as provided in subdivision three of penal law section 75.20.

6. Mentally defective defendants. In any case where the defendant may be committed upon a certificate of mental defect, as provided in sections four hundred thirty-eight and four hundred fifty-one of the correction law, the court may, notwithstanding any other provision of this section, commit the defendant to the custody of the state department of correction and in such case the order of commitment shall specify, in accordance with correction law section eight hundred one that the defendant be delivered as follows:

(a) If the defendant is a male, to the Beacon state institution; and

(b) If the defendant is a female, to the Albion state training school.

7. Commitment for failure to pay fine. Where the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, commitment shall be as follows:

(a) If the sentence also includes a term of imprisonment, commitment shall be to the same institution as is designated for service of the term of imprisonment, and the period of commitment shall commence at such time as the term of imprisonment is satisfied or at such time as the defendant becomes eligible for parole or conditional release whichever occurs first, provided, however, that if the court so directs the period of imprisonment for the fine shall run concurrently with the term of imprisonment; and

(b) In any other case commitment shall be to the agency or institution that would be designated in the case of a definite sentence.

§ 220.30 Duty to deliver defendant.

1. Outside the city of New York. In counties other than those contained within the city of New York, it shall be the duty of the sheriff of the county to deliver the defendant forthwith to the proper institution in accordance with the commitment.

2. Within the city of New York. In counties contained within the city of New York it shall be the duty of the commissioner of correction of such city to deliver the defendant forthwith to the proper institution in accordance with the commitment.

# TITLE M

## PROCEEDINGS AFTER JUDGMENT

## ARTICLE 225

### POST-JUDGMENT MOTIONS



### § 225.10 Motion to vacate judgment.

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction over the action or over the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not with due diligence have been produced by the defendant at the trial and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground

must be made with due diligence after the discovery of such alleged new evidence; or

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant did not adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right; or

(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment.

§ 225.20 Motion to set aside sentence; by defendant.

1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.

2. Notwithstanding the provisions of subdivision one, the court must deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

3. Notwithstanding the provisions of subdivision one, the court may deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or

proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court. Despite such circumstances, however, the court in the interest of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious.

4. An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.

§ 225.30 Motion to vacate judgment and to set aside sentence; procedure.

1. A motion to vacate a judgment pursuant to section 225.10 and a motion to set aside a sentence pursuant to section 225.20 must be made in writing and upon reasonable notice to the people. If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, if any, an answer denying or admitting any or all of the allegations of the moving papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

2. If it appears by conceded or uncontradicted allegations of the moving papers or of the answer, or by conclusive documentary evidence or information, that there are circumstances which require denial thereof pursuant to subdivision two of section 225.10 or subdivision two of section 225.20, the court must summarily deny the motion. If it appears that there are circumstances authorizing, though not requiring, denial thereof pursuant to subdivision three of section 225.10 or subdivision three of section 225.20, the court may in its discretion either (a) summarily deny the motion, or (b) proceed to consider the merits thereof.

3. Upon considering the merits of the motion, the court must grant it and vacate the judgment or set aside the sentence, as the case may be, if:

(a) The moving papers allege a ground constituting legal basis for the motion; and

(b) Such ground, if expressly or impliedly based upon the existence or occurrence of facts, is supported by sworn allegations thereof; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by documentary evidence or information.

4. Upon considering the merits of the motion, the court may deny it if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is expressly or impliedly based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

(c) An allegation of fact essential to support the motion is conclusively refuted by documentary evidence or information.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

6. At such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

7. The court must set forth on the record its findings of fact and the reasons for its determination.

§ 225.40 Motion to set aside sentence; by people.

1. At any time not more than one year after the entry of a judgment, the court in which it was entered may, upon motion of the people, set aside the sentence upon the ground that it was invalid as a matter of law.

2. Notwithstanding the provisions of subdivision one, the court must summarily deny the motion when the ground or issue raised thereupon was previously determined on the merits upon an appeal from the judgment or sentence, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue.

3. Notwithstanding the provisions of subdivision one, the court may summarily deny such a motion when the ground or issue raised thereupon was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment or sentence. Despite such circumstance, however, the court, in the interests of justice and for good cause shown, may in its discretion grant the motion if it is otherwise meritorious.

4. The motion must be made upon reasonable notice to the defendant and to the attorney if any who appeared for him in the last proceeding which occurred in connection with the judgment or sentence, and the defendant must be given adequate opportunity to appear in opposition to the motion. The defendant has a right to be present at such proceeding but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at the proceeding upon the motion.

5. An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.

# ARTICLE 230

## APPEALS—IN WHAT CASES AUTHORIZED AND TO WHAT COURTS TAKEN



### § 230.10 Appeal by defendant to intermediate appellate court; in what cases authorized.

An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment and orders of a criminal court:

1. A judgment other than one including a sentence of death;

2. A sentence other than one of death, as prescribed in section 230.30;

3. An order denying a motion to vacate a judgment other than one including a sentence of death, entered pursuant to section 225.10;

4. An order denying a motion by the defendant to set aside a sentence other than one of death, entered pursuant to section 225.20.

5. An order setting aside a sentence other than one of death upon motion of the people, entered pursuant to section 225.40.

### § 230.20 Appeal by people to intermediate appellate court; in what cases authorized.

An appeal to an intermediate appellate court may be taken as of right by the people from the following judgment and orders of a criminal court:

1. An order dismissing an accusatory instrument or a count thereof, entered pursuant to section 85.25, 85.45 or 105.40;

2. A trial order of dismissal, entered pursuant to section 150.10 or 185.40;

3. An order setting aside a verdict, entered pursuant to section 170.30 or 190.10;

4. A sentence other than one of death, as prescribed in subdivisions two and three of section 230.30;

5. An order vacating a judgment other than one including a sentence of death, entered pursuant to section 225.10;

6. An order setting aside a sentence other than one of death, entered pursuant to section 225.20;

7. An order denying a motion by the people to set aside a sentence other than one of death, entered pursuant to section 225.40;

8. An order suppressing evidence, entered before trial pursuant to section 375.40; provided that the people file a statement in the appellate court pursuant to section 230.40.

§ 230.30 Appeal from sentence.

1. An appeal by the defendant from a sentence, as authorized by subdivision two of section 230.10, may be based upon the ground that such sentence either was (a) invalid as a matter of law, or (b) harsh or excessive. A sentence is invalid as a matter of law not only when the terms thereof are unauthorized but also when it is based upon an erroneous determination that the defendant had a previous valid conviction for an offense or, in the case of a resentence following a revocation of a sentence of probation or conditional discharge, upon an improper revocation of such original sentence.

2. An appeal by the people from a sentence, as authorized by subdivision four of section 230.20, may be based only upon the ground that such sentence was invalid as a matter of law.

3. An appeal from a sentence, within the meaning of this section and sections 230.10 and 230.20, means an appeal from either the sentence originally imposed or from a resentence following an order vacating the original sentence. For purposes of appeal, the judgment consists of the conviction and the original sentence only, and when a resentence occurs more than thirty days after the original sentence, a defendant who has not previously filed a notice of appeal from the judgment may not appeal therefrom, but only from the resentence.

§ 230.40 Appeal by people from order suppressing evidence; filing of statement in appellate court.

1. In taking an appeal, pursuant to subdivision eight of section 230.20, to an intermediate appellate court from an order of a criminal court suppressing evidence, the people must file, in addition to a notice of appeal or, as the case may be, an affidavit of errors, a statement asserting that the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court, or which the people propose to file or to cause to be filed in the court, either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

2. The taking of an appeal by the people, pursuant to subdivision eight of section 230.20, from an order suppressing evidence constitutes a bar to the filing of any accusatory instrument, or to the prosecution of any existing accusatory instrument, against the defendant or moving party involving the evidence ordered suppressed unless and until such suppression order is reversed upon appeal and vacated.

§ 230.50 Appeal to intermediate appellate court; to what court taken.

The particular intermediate appellate courts to which appeals authorized by sections 230.10 and 230.20 must be taken are as follows:

1. An appeal from a judgment or order of the supreme court must be taken to the appellate division of the department in which such judgment of order was entered.

2. An appeal from a judgment or order of a county court must, except as otherwise provided in this subdivision, be taken to the appellate division of the department in which such judgment or order was entered.

If the appellate division of any department has established an appellate term of the supreme court for such department, it may direct that an appeal be taken to such appellate term instead of to the appellate division from any judgment or order of a county court located in such department, entered in a case in which no felony was charged in the indictment or in a case which resulted in a conviction of an offense or offenses of less than felony grade only; and in such case such an appeal must be so taken.

3. An appeal from a judgment or order of a local criminal court located outside of New York city must, except as otherwise provided in this subdivision, be taken to the county court of the county in which such judgment or order was entered.

If an appellate division of the second, third or fourth department has established an appellate term of the supreme court for its department, it may direct that appeals from such judgments and orders of such local criminal courts, or of particular classifications of such local criminal courts, be taken to such appellate term of the supreme court instead of to the county court; and in such case such an appeal must be so taken.

4. An appeal from a judgment or order of the New York city criminal court must be taken, if such judgment or order was entered at a term of such court held in New York or Bronx County, to the appellate division of the first department, and, if entered at a term of such court in Kings, Queens or Richmond County, to the appellate division of the second department; except that if the appellate division of either such department has established an appellate term of the supreme court for its department, it may direct that all such appeals be taken thereto; and in such case such an appeal must be so taken.

§ 230.60 Appeal by defendant directly to court of appeals; in what cases authorized.

An appeal directly to the court of appeals may be taken as of right by the defendant from the following judgment and orders of a superior court:

1. A judgment including a sentence of death;

2. An order denying a motion to vacate a judgment including a sentence of death, entered pursuant to section 225.10;

3. An order denying a motion to set aside a sentence of death, entered pursuant to section 225.20.

§ 230.70 Appeal by people directly to court of appeals; in what cases authorized.

An appeal directly to the court of appeals may be taken as of right by the people from the following orders of a superior court:

1. An order vacating a judgment including a sentence of death, entered pursuant to section 225.10;

2. An order setting aside a sentence of death, entered pursuant to section 225.20.

§ 230.80 Appeal to court of appeals from order of intermediate appellate court; in what cases authorized.

1. Provided that a certificate granting leave to appeal is issued pursuant to section 235.20, an appeal may, except as provided in subdivision two, be taken to the court of appeals by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to section 230.10 or 230.20. An order of an intermediate appellate court is adverse to the party who was the appellant in such court when it affirms the judgment or order appealed from, and is adverse to the party who was the respondent in such court when it reverses the judgment or order appealed from. An appellate court order which modifies the judgment or order appealed from is partially adverse to each party.

2. An appeal to the court of appeals from an order of an intermediate appellate court reversing or modifying a judgment or order of a criminal court may be taken only if:

(a) The intermediate appellate court's order expressly states the determination of reversal or modification to be on the law alone; or

(b) The appeal is based upon a contention that corrective action, as that term is defined in section 240.20, taken or directed by the intermediate appellate court was illegal.

# ARTICLE 235

## APPEALS—TAKING AND PERFECTION THEREOF AND STAYS DURING PENDENCY THEREOF



### § 235.10 Appeal; how taken.

1. Except as provided in subdivisions two and three, an appeal to an intermediate appellate court or directly to the court of appeals from a judgment or order of a criminal court is taken as follows:

(a) Within thirty days after entry of a judgment sought to be appealed, or within thirty days after service upon the appellant of a copy of an order sought to be appealed, the appellant must file with the clerk of the court in which such judgment or order was entered a written notice of appeal, in duplicate, stating that the appellant appeals from such judgment or order;

(b) If the defendant is the appellant, he must serve a copy of such notice of appeal upon the district attorney of the county embracing the criminal court in which the judgment or order being appealed was entered. If the appeal is to the court of appeals, the district attorney, following such service upon him, must immediately give written notice thereof to the public servant having custody of the defendant;

(c) If the people are the appellant, they must serve a copy of such notice of appeal upon the defendant or upon the attorney who last appeared for him in the court in which the order being appeal was entered;

(d) Upon filing and service of the notice of appeal as prescribed in paragraphs (a), (b) and (c), the appeal is deemed to have been taken;

(e) Following the filing with him of the notice of appeal in duplicate, the clerk of the court in which the judgment or order

being appealed was entered must endorse upon such instruments the filing date and must transmit the duplicate notice of appeal to the clerk of the court to which the appeal is being taken.

2. An appeal to a county court from a judgment or order of a local criminal court in a case in which the proceedings underlying such judgment or order were stenographically recorded is taken in the manner provided in subdivision one; except that where no clerk is employed by such local criminal court the appellant must file the notice of appeal with the judge of such court who entered such judgment or order, and must further file a copy thereof with the county clerk. Upon such filing, the appeal is deemed to have been taken.

3. An appeal to a county court from a judgment or order of a local criminal court in a case in which the proceedings underlying such judgment or order were not stenographically recorded is taken as follows:

(a) Within thirty days after entry in such local criminal court of the judgment or order being appealed, the appellant must file with such court, either (i) an affidavit of errors, setting forth alleged errors or defects in the proceedings which are the subjects of the appeal, or (ii) a notice of appeal. Where a notice of appeal is filed, the appellant must serve a copy thereof upon the respondent in the manner provided in paragraphs (b) and (c) of subdivision one, and, within thirty days after the filing thereof, must file with such court an affidavit of errors;

(b) Not more than three days after the filing of the affidavit of errors, the appellant must serve a copy thereof upon the respondent or the respondent's counsel or authorized representative. If the defendant is the appellant, such service must be upon the district attorney of the county in which the local criminal court is located. If the people are the appellant, such service must be upon the defendant or upon the attorney who appeared for him in the proceedings in the local criminal court;

(c) Upon filing and service of the affidavit of errors as prescribed in paragraphs (a) and (b), the appeal is deemed to have been taken;

(d) Within ten days after the appellant's filing of the affidavit of errors with the local criminal court, such court must file with the county clerk both the affidavit of errors and the court's return, and must deliver a copy of such return to each party or

a representative thereof as indicated in paragraph (b). The court's return must set forth or summarize evidence, facts or occurrences in or adduced at the proceedings resulting in the judgment or order, which constitute the factual foundation for the contentions alleged in the affidavit of errors;

(e) If the local criminal court does not file a return with the county clerk within the prescribed period, or if it files a defective return, the county court must order it to file a return or an amended return, as the case may be, within a time which such county court deems reasonable.

4. An appeal to the court of appeals from an order of an intermediate appellate court is taken as follows:

(a) Within thirty days after service upon the appellant of a copy of the order sought to be appealed, the appellant must make application, pursuant to section 235.20, for a certificate granting leave to appeal to the court of appeals.

(b) If such application is granted and such certificate issued, the appellant, within fifteen days after service upon him of a copy of such certificate, must file with the clerk of the intermediate appellate court in which the order being appealed was entered a written notice of appeal, in duplicate, stating that the appellant appeals to the court of appeals from such order;

(c) If the defendant in the original proceeding in the criminal court is the appellant, he must, in addition to filing such notice of appeal with such intermediate appellate court clerk, serve a copy thereof upon the district attorney who appeared for the people in the intermediate appellate court. If the people are the appellant, they must serve a copy of such notice of appeal upon the defendant-respondent or upon an attorney who appeared for him in the intermediate appellate court;

(d) Upon filing and service of the notice of appeal and the copies thereof as prescribed in paragraphs (b) and (c), the appeal is deemed to have been taken;

(e) Following the filing of the notice of appeal in duplicate, the clerk of the intermediate appellate court must endorse the filing date upon such instruments and must transmit the duplicate notice of appeal to the clerk of the court of appeals.

5. Where a notice of appeal, an affidavit of errors or an application for leave to appeal to the court of appeals is premature or contains an inaccurate description of the judgment or order being or sought to be appealed, the appellate court, in its discretion, may, in

the interest of justice, treat such instrument as valid.

§ 235.20 Certificate granting leave to appeal to court of appeals.

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order of a judge or justice granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.

2. Such certificate may be issued by the following judges or justices in the indicated situations:

(a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) a judge of the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed;

(b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by a judge of the court of appeals.

3. An application for such a certificate must be made in the following manner:

(a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent.

(b) An application seeking such a certificate from a judge of the court of appeals must be made to the chief judge of such court by submission thereof, either in writing or first orally and then in writing, to the clerk of the court of appeals. The chief judge must then designate a judge of such court to determine the application. The clerk must then notify the respondent of the application and must inform both parties of such designation.

4. A justice of the appellate division to whom such an application has been made, or a judge of the court of appeals designated to determine such an application, may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

§ 235.25 Extension of time for taking appeal.

1. Upon motion to an intermediate appellate court of a defendant who desires to take an appeal to such court from a judgment or order of a criminal court but has failed to file a notice of appeal or, as the case may be, an affidavit of errors, with such criminal court

within the prescribed period, such intermediate appellate court may, if such motion be made not more than six months after the time for taking such appeal has expired, order that the time for the taking of such appeal be extended to a date not more than thirty days subsequent to the determination of such motion, upon the ground that the failure to file such notice of appeal or affidavit of errors in timely fashion resulted from improper conduct by a public servant or by the defendant's attorney.

2. The motion must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must contain sworn allegations of facts claimed to establish the improper conduct, and the people may file papers in opposition thereto. After all papers have been filed, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

3. If the motion papers allege facts constituting a legal basis for the motion, and if the essential allegations are either conclusively substantiated by documentary evidence or information or are conceded by the people to be true, the court must grant the motion.

4. If the motion papers do not allege facts constituting a legal basis for the motion, or if an essential allegation is conclusively refuted by documentary evidence or information, the court may deny the motion.

5. If the court does not determine the motion pursuant to subdivision three or four, it must order the criminal court which entered the judgment or order sought to be appealed to conduct a hearing and to make and report findings of fact essential to the determination of such motion. Upon receipt of such report, the intermediate appellate court must determine the motion.

§ 235.30 Effect of taking of appeal upon judgment or order of courts below; when stayed.

1. The taking of an appeal by the defendant directly to the court of appeals, pursuant to section 230.60, from a superior court judgment including a sentence of death stays the execution of such sentence.

2. The taking of an appeal by the people directly to the court of appeals, pursuant to section 230.70, from an order of a superior court vacating a judgment or setting aside a sentence of death does not stay or suspend the execution or affect the status of such order.

3. The taking of an appeal, by either party, to an intermediate appellate court from a judgment or order of a criminal court does not stay or suspend the execution or affect the status of such judgment or order.

4. The taking of an appeal, by either party, to the court of appeals from an order of an intermediate appellate court does not stay or suspend the execution or affect the status of either (a) the intermediate appellate court order from which the appeal has been taken, or (b) any judgment or order of a criminal court which was affirmed by such intermediate appellate court order.

§ 235.40 Stay of judgment pending appeal to intermediate appellate court.

1. Upon application of a defendant who pursuant to section 235.10 has taken an appeal to an intermediate appellate court from a judgment including a sentence of imprisonment, or from a sentence of imprisonment, of a criminal court, a judge designated in subdivision two may issue an order both (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article two hundred eighty-five. That phase of the order staying or suspending execution of the judgment does not become effective until the defendant is released, either on his own recognizance or upon the posting of bail.

2. An order as prescribed in subdivision one may be issued by the following judges and justices in the indicted situations:

(a) If the appeal is to the appellate division from a judgment or a sentence of either the supreme court of the New York city criminal court, such order may be issued by (i) a justice of the appellate division of the department in which such judgment or sentence was entered, or (ii) a justice of the supreme court holding a term thereof in the county in which such judgment or order was entered;

(b) If the appeal is to the appellate division from a judgment or a sentence of a county court, such order may be issued by (i) a justice of the appellate division of the particular department, or (ii) a judge holding a term of the county court in the county in which such judgment or sentence was entered;

(c) With respect to appeals to county courts from judgments or sentences of local criminal courts, and with respect to appeals to appellate terms of the supreme court from judgments or sentences of any criminal courts, the judges or justices

who may issue such orders in any particular situation are determined by rules of the appellate division of the department embracing the county court or appellate term of the supreme court to which the appeal has been taken.

3. Notwithstanding the provisions of subdivision one, if within one hundred twenty days after the issuance of such an order the appeal has not been brought to argument in or submitted to the intermediate appellate court, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced or resumed; except that this subdivision does not apply where the intermediate appellate court has (a) extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days, and (b) upon application of the defendant, expressly ordered that the operation of the order continue until the date of the determination of the appeal or some other designated future date or occurrence.

§ 235.50 Stay of judgment pending appeal to court of appeals from intermediate appellate court.

1. A judge who, pursuant to section 235.20, has issued an order granting a defendant leave to appeal to the court of appeals from an order of an intermediate appellate court affirming or modifying a judgment including a sentence of imprisonment, or a sentence of imprisonment, of a criminal court, may, upon application of such defendant-appellant issue an order both (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article two hundred eighty-five. Such an order does not become effective until the appeal is actually taken, as prescribed in subdivision two, and that phase of the order staying or suspending execution of the judgment does not become effective until the defendant is released, either on his own recognizance or upon the posting of bail.

2. An application pursuant to subdivision one must be made upon reasonable notice to the people, and the people must be accorded opportunity to appear in opposition thereto. Such an application may be made immediately after the issuance of the underlying certificate granting leave to appeal to the court of appeals, or at any subsequent time during the pendency of the appeal.

3. Notwithstanding the provisions of subdivision one, if within one hundred twenty days after the first to occur of (a) the issuance

of an order pursuant to this section or (b) the filing of a notice of appeal, the appeal or prospective appeal has not been brought to argument in or submitted to the court of appeals, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the original judgment was entered in order that execution of such judgment be commenced or resumed; except that this subdivision does not apply where the court of appeals has (a) extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days and (b) upon application of the defendant expressly ordered that the operation of such order continue until the date of the determination of the appeal or some other designated future date or occurrence.

§ 235.60 Appeal; how perfected.

1. Except as provided in subdivision two, the mode of and time for perfecting an appeal which has been taken to an intermediate appellate court from a judgment or order of a criminal court are determined by rules of the appellate division of the department in which such appellate court is located. Among the matters to be determined by such court rules are the times when the appeal must be noticed for and brought to argument, the content and form of the records and briefs to be served and filed, and the time when such records and briefs must be served and filed.

When an appeal is taken by a defendant pursuant to section 230.10, the criminal court in which the judgment or order being appealed was entered must, within two days after the filing of the notice therein, direct the stenographer to make and to file with the court, within twenty days, two transcripts of the stenographic minutes of the proceedings constituting the record on appeal. The expense of such transcripts is a county charge or city charge, as the case may be, payable to the stenographer out of the court fund, or out of the jurors' fund or out of any other available fund, upon the certificate of the criminal court. The appellate court may, where such is necessary for perfection of the appeal, order that the criminal court furnish one of such transcripts to the defendant or his counsel.

2. An appeal which has been taken to a county court from a judgment or order of a local criminal court pursuant to subdivision three of section 235.10 is perfected as follows:

(a) After the local criminal court has, pursuant to paragraph (d) of subdivision three of section 235.10, filed its return with

the county clerk and delivered a copy thereof to the appellant, the appellant must file with the county clerk, and serve a copy thereof upon the respondent, a notice of argument, noticing the appeal for argument at the term of such county court immediately following the term being held at the time of the appellant's receipt of the return. Upon motion of the appellant, however, such county court may for good cause shown enlarge the time to a subsequent term, in which case the appellant must notice the appeal for argument at such subsequent term;

(b) The appellant must further comply with all court rules applicable to the mode of perfecting such appeals.

(c) If the appellant does not file a notice of argument as provided in paragraph (a) or does not comply with all applicable court rules as provided in paragraph (b), the county court may, either upon motion of the respondent or upon its own motion, dismiss the appeal.

3. The mode of and time for perfecting any appeal which has been taken to the court of appeals are determined by the rules of the court of appeals. Among the matters to be determined by such court rules are the times when the appeal must be noticed for and brought to argument, the content, form and number of the records and briefs and copies thereof to be served and filed, and the times when such records and briefs must be served and filed.

When an appeal is taken by a defendant pursuant to section 230.60, the criminal court in which the judgment or order being appealed was entered must, as promptly as practicable, cause to be prepared and printed or otherwise duplicated pursuant to rules of the court of appeals the record on appeal and the required number of copies thereof. The expense thereof is a county charge payable out of the court fund upon the certificate of the county clerk approved by the criminal court.

§ 235.70 Appeal; argument and submission thereof.

The mode of and procedure for arguing or otherwise litigating appeals in criminal cases are determined by rules of the individual appellate courts. Among the matters to be determined by such court rules are the circumstances in which oral argument is required and those in which the case may be submitted by either or both parties without oral argument; the consequences or effect of failure to present oral argument when such is required; the amount of time for oral argument allowed to each party; and the number of counsel entitled to be heard.

# ARTICLE 240

APPEAL—DETERMINATION THEREOF



## § 240.10 Determination of appeals; general criteria.

1. An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties.

2. For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered by the appellant at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the appellant made his position known to the court. A party who by objection, request or otherwise seeks a particular ruling or instruction of the court is, in the event of the court's fail-

ure or refusal to rule or instruct accordingly deemed to have made his position in the matter known to the court.

§ 240.20 Determination of appeals; definitions of terms.

The following definitions are applicable to this article:

1. "Reversal" by an appellate court of a judgment or order of another court means the vacating of such judgment or order.

2. "Modification" by an appellate court of such judgment or order means the vacating of a part thereof and affirmance of the remainder.

3. "Corrective action" means affirmative action by the appellate court upon reversing or modifying a judgment or order of another court, taken or directed by such appellate court for the purpose of concluding or continuing the criminal action which is the subject of the appeal.

§ 240.30 Determination of appeals by intermediate appellate courts; scope of review.

1. Upon an appeal to an intermediate appellate court from a judgment or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

2. Upon such an appeal, the intermediate appellate court must either affirm or reverse or modify the criminal court judgment or order. The ways in which it may modify a judgment include, but are not limited to, the following:

(a) Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense.

(b) Upon a determination that the trial evidence is not legally sufficient to establish the defendant's guilt of all the offenses of which he was convicted but is legally sufficient to establish his guilt of one or more of such offenses, the court may modify the judgment by reversing it with respect to the unsupported counts and otherwise affirming it;

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

3. A reversal or a modification of a judgment must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

(a) That a ruling or instruction of the court, duly protested by the defendant, as prescribed in subdivision two of section 240.10, at a trial resulting in a judgment, deprived the defendant, of a fair trial;

(b) That evidence adduced at a trial resulting in a judgment was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted;

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the credible evidence.

6. The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following:

(a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 240.10 so as to present a question of law, deprived the defendant of a fair trial;

(b) That a sentence, though legal, was unduly harsh or severe.

§ 240.40 Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification.

Upon reversing or modifying a judgment or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to provide a remedy to the appellant for the error or defect which is the subject if the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or directed is governed in part by the following rules:

1. Upon a reversal of a judgment after trial for error or defect which resulted in prejudice to the defendant or deprived him of a fair trial, the court must, whether such reversal be on the law or as a matter of discretion in the interest of justice, order a new trial of the accusatory instrument and remit the case to the criminal court for such action.

2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.

3. Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defendant was convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment. In such case, it must either reduce the total sentence to that imposed by the criminal court upon the counts with respect to which the judgment is affirmed or remit the case to the criminal court for resentence upon such counts; provided that nothing contained in this paragraph precludes further sentence reduction in the exercise of the appellate court's discretion pursuant to subdivision six.

4. Upon a modification of a judgment after trial which reduces a conviction of a crime to one for a lesser included offense, the court must remit the case to the criminal court with a direction that the latter sentence the defendant accordingly.

5. Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the weight of the trial evidence, the court must dismiss the accusatory instrument or any reversed count.

6. Upon modifying a judgment or reversing a sentence as a matter of discretion in the interest of justice upon the ground that the sentence is unduly harsh or severe, the court must itself impose some legally authorized lesser sentence.

§ 240.50 Determination of appeals by intermediate appellate courts; form and content of order.

1. An order of an intermediate appellate court which affirms a judgment or order of a criminal court need only state such affirmance.

2. An order of an intermediate appellate court which reverses or modifies a judgment or order of a criminal court must contain the following:

(a) A statement of whether the determination was upon the law or upon the facts or as a matter of discretion in the interest of justice, or upon any specified two or all three of such bases; and

(b) If the decision is rendered without opinion, a brief statement of the specific grounds of the reversal or modification; and

(c) A statement of the corrective action taken or directed by the court; and

(d) If the determination is exclusively upon the law, a statement of whether or not the facts upon which the criminal court's judgment or order is based have been considered and determined to have been established. In the absence of such a statement, it is presumed that the intermediate appellate court did not consider or make any determination with respect to such facts.

§ 240.60 Determination by court of appeals of appeals taken directly thereto from judgments and orders of criminal courts.

1. Wherever appropriate, the rules set forth in sections 240.30 and 240.40, governing the consideration and determination by intermediate appellate courts of appeals thereto from judgments and orders of criminal courts, and prescribing their scope of review and the corrective action to be taken by them upon reversal or modification, apply equally to the consideration and determination by the court of appeals of appeals taken directly thereto, pursuant to sections 230.60 and 230.70, from judgments and orders of superior criminal courts; except that the court of appeals may not as a matter of discretion in the interest of justice set aside, reduce or change a sentence of death as being unduly harsh or severe.

2. Upon affirming a judgment including a sentence of death, the court of appeals, by an order signed by a majority of the judges thereof, must fix the week during which such sentence of death is to be executed, and the sentence must be executed according to law. The entry of an order granting a motion for reargument of such an appeal, however, stays the execution of the judgment. If the judgment is thereafter reaffirmed a new execution date must be fixed by the court.

§ 240.70 Determination by court of appeals of appeals from orders of intermediate appellate courts; scope of review.

1. Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment or order of a criminal court, the court of appeals may consider and determine not only questions of law which were raised or considered upon the appeal to the intermediate appellate court, but also any question of law involving alleged error or defect in the criminal court proceedings resulting in the original criminal court judgment or order, regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.

2. Upon an appeal to the court of appeals from an order of an intermediate appellate court reversing or modifying judgment or order of a criminal court, the court of appeals may consider and determine:

(a) Any question of law which was determined by the intermediate appellate court and which, as so determined, constituted a basis for such court's order of reversal or modification; and

(b) Any other question of law involving alleged or possible error or defect in the criminal court proceedings resulting in the original judgment or order which may have adversely affected the party who was appellant in the intermediate appellate court and who is respondent in the court of appeals. The court of appeals is not precluded from considering and determining such a question by the circumstances that it was not considered or determined by the intermediate appellate court, or that it did not constitute a basis for such court's reversal or modification of the criminal court judgment or order, or that the party who may have been adversely affected thereby is the respondent rather than the appellant in the court of appeals; and the court of appeals, even though rejecting the intermediate appellate court's reasons for its order of reversal or modification, may affirm or modify such order upon the basis of such other questions; and

(c) Any question concerning the legality of the corrective action taken by the intermediate appellate court.

3. Upon such an appeal, the court must affirm, reverse or modify the intermediate appellate court order.

§ 240.80 Determination by court of appeals of appeals from intermediate appellate courts; corrective action upon reversal or modification.

1. Upon reversing or modifying an order of an intermediate appellate court affirming a criminal court judgment or order, the court of appeals must take or direct such corrective action as the intermediate appellate court would, pursuant to section 240.40, have been required or authorized to take or direct had it reversed or modified the criminal court judgment or order upon the same ground or grounds.

2. Upon reversing an order of an intermediate appellate court reversing or modifying a criminal court judgment or order upon the ground that questions of law were erroneously determined by the intermediate appellate court in favor of the party appellant therein, the court of appeals must take or direct corrective action as follows:

(a) If the facts underlying the original criminal court judgment or order were considered and determined to have been established by the intermediate appellate court, the court of appeals must reinstate and affirm the original criminal court judgment or order and remit the case to such criminal court for whatever further proceedings may be necessary to complete the action therein;

(b) If the facts underlying the original criminal court judgment or order were not, or are presumed not to have been, considered and determined by the intermediate appellate court, the court of appeals must remit the case to such intermediate appellate court for determination of the facts.

3. Upon modifying an intermediate appellate court order reversing or modifying a criminal court judgment or order, upon the ground that corrective action taken or directed by the intermediate appellate court was illegal, the court of appeals must either (a) itself take or direct the appropriate corrective action or (b) remit the case to the intermediate appellate court for appropriate corrective action by the latter.

§ 240.85 Remission of case by appellate court to criminal court upon reversal of judgment; action by criminal court.

1. Upon reversing a judgment and either dismissing the underlying accusatory instrument or ordering a new trial thereof, an appellate court must remit the case to the criminal court in which the judgment was entered and direct that the latter take appropriate action in accordance with its decision.

2. Upon remission of a case to a criminal court as provided in subdivision one, such criminal court must execute the direction of the appellate court and must, depending upon the nature of such direction, either discharge the defendant from custody, exonerate his bail or issue a securing order, as follows:

(a) If the underlying accusatory instrument was dismissed by the appellate court, the criminal court must order the defendant released from custody if he is in custody; or if he is at liberty on bail, it must exonerate the bail.

(b) If a new trial was ordered by the appellate court, the criminal court must issue a securing order, either releasing the defendant on his own recognizance, fixing bail or committing him to the custody of the sheriff.

§ 240.90 Reargument of appeal; motion and criteria for.

At any time after its determination of an appeal taken pursuant to article two hundred thirty, an appellate court, in the interest of justice and for good cause shown, may in its discretion, upon motion of a party adversely affected by its determination, or upon its own motion, order a reargument or reconsideration of the appeal. Upon such an order the court may either direct further oral argument by the parties or confine its reconsideration to re-examination of the issues as previously argued or submitted upon the appeal proper. Upon ordering a reargument or reconsideration of an appeal, the court must again determine the appeal pursuant to the provisions of this article.

§ 240.95 Status of indictment upon order of new trial.

Upon a new trial of an accusatory instrument resulting from an appellate court order reversing a judgment and ordering such new trial, such accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed upon appeal.

§ 240.97 Dismissal of appeal.

1. At any time after an appeal has been taken and before determination thereof, the appellate court in which such appeal is pending may, upon motion of the respondent or upon its own motion, dismiss such appeal upon the ground of lack of jurisdiction to determine it, failure of timely prosecution thereof or mootness.

2. Such motion must be made upon reasonable notice to the appellant and opportunity to be heard. If the people are the appellant, such notice must be served upon the appropriate district attorney either personally or by ordinary mail. If the appellant is a defendant, such notice must be served upon him by ordinary mail at his last known place of residence or, if he is imprisoned, at the

institution in which he is confined, and similar notice must be served upon the attorney, if any, who last appeared for him. Upon determination of the motion, a copy of the order entered thereon must similarly be served.

# PART III

## SPECIAL PROCEEDINGS AND MISCELLANEOUS PROCEDURES

## TITLE P

## PROCEDURES FOR SECURING ATTENDANCE AT CRIMINAL ACTIONS AND PROCEEDINGS OF DEFENDANTS AND WITNESSES UNDER CONTROL OF COURT—RECOGNIZANCE, BAIL AND COMMITMENT

## ARTICLE 270

### RECOGNIZANCE, BAIL AND COMMITMENT—DEFINITIONS OF



### § 270.10 Recognizance, bail and commitment; definitions of terms.

As used in this title, the following terms have the following meanings:

1. "Principal" means a defendant in a criminal action or proceeding, or a person adjudged a material witness therein, or any other person involved therein that he may by law be compelled to appear before a court for the purpose of having such court exercise control over his person to secure his future attendance at the action or proceeding when required, and who in fact either is before the court for such purpose or has been before it and been subjected to such control.

2. "Release on own recognizance." A court releases a principal on his own recognizance when, having acquired control over his person, it permits him to be at liberty during the pendency of the criminal action or proceeding involved upon condition that he will appear thereat whenever his attendance may be required and will at all times render himself amenable to the orders and processes of the court.

3. "Fix bail." A court fixes bail when, having acquired control over the person of a principal, it designates a sum of money and stipulates that, if bail in such amount is posted on behalf of the principal and approved, it will permit him to be at liberty during the pendency of the criminal action or proceeding involved.

4. "Commit to the custody of the sheriff." A court commits a principal to the custody of the sheriff when, having acquired control over his person, it orders that he be confined in the custody of the

sheriff during the pendency of the criminal action or proceeding involved.

5. "Securing order" means an order of a court committing a principal to the custody of the sheriff, or fixing bail, or releasing him on his own recognizance.

6. "Order of recognizance or bail" means a securing order fixing bail or releasing a principal on his own recognizance.

7. "Application for recognizance or bail" means an application by a principal that the court, instead of committing him to or retaining him in the custody of the sheriff, either release him on his own recognizance or fix bail.

8. "Post bail" means to deposit bail in the amount and form fixed by the court, with the court or with some other authorized public servant or agency.

9. "Bail" means cash bail or a bail bond.

10. "Cash bail" means a sum of money, in the amount designated in an order fixing bail, posted by a principal or by another person on his behalf with a court or other authorized public servant or agency, upon the condition that such money will become forfeit to the state if the principal does not comply with the directions of a court requiring his attendance at the criminal action or proceeding involved or does not otherwise render himself amenable to the orders and processes of the court.

11. "Obligor" means a person who executes a bail bond on behalf of a principal and thereby assumes the undertaking described therein. The principal himself may be an obligor.

12. "Surety" means any obligor who is not a principal.

13. "Bail bond" means a written undertaking, executed by one or more obligors, that the principal designated in such instrument will, while at liberty as a result of an order fixing bail and of the posting of the bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required and otherwise render himself amenable to the orders and processes of the court, and that in the event that he fails to do so the obligor or obligors will pay to the state a specified sum of money, in the amount designated in the order fixing bail.

14. "Appearance bond" means a bail bond in which the only obligor is the principal.

15. "Surety bond" means a bail bond in which the obligor or obligors consist of one or more sureties or of one or more sureties and the principal.

16. "Insurance company bail bond" means a surety bond, executed in the form prescribed by the superintendent of insurance, in which the surety-obligor is a corporation licensed by the superintendent of insurance to engage in the business of executing bail bonds.

17. "Secured bail bond" means a bail bond secured by either:

(a) Personal property which is not exempt from execution and which, over and above all liabilities and encumbrances, has a value equal to or greater than the total amount of the undertaking; or

(b) Real property having a value of at least twice the total amount of the undertaking. For purposes of this paragraph, value of real property is determined by dividing the last assessed value of such property by the last given equalization rate of the assessing municipality wherein the property is situated and by deducting from the resulting figure the total amount of any liens or other encumbrances upon such property.

18. "Partially secured bail bond" means a bail bond secured in part by a deposit of a sum of money not exceeding ten percent of insurance company bail bond, not secured by any deposit of or lien the total amount of the undertaking.

19. "Unsecured bail bond" means a bail bond, other than an insurance company bail bond, not secured by any deposit of or lien upon property.

20. "Court" includes, where appropriate, a judge authorized to act as described in a particular statute, though not as a court.

# ARTICLE 275

## RECOGNIZANCE, BAIL AND COMMITMENT—DETERMINATION OF APPLICATION FOR RECOGNIZANCE OR BAIL, ISSUANCE OF SECURITY ORDERS, AND RELATED MATTERS



### § 275.10 Securing order; when required.

When a principal, whose future court attendance at a criminal action or proceeding is or may be required, initially comes under the control of a court, such court must, by a securing order, either release him on his own recognizance, fix bail or commit him to the custody of the sheriff. When a securing order is revoked or otherwise terminated in the course of an uncompleted action or proceeding but the principal's future court attendance still is or may be required and he is still under the control of a court, a new securing order must be issued.

### § 275.20 Application for recognizance or bail; making and determination thereof in general.

1. Upon any occasion when a court is required to issue a securing order with respect to a principal, or at any time when a principal is confined in the custody of the sheriff as a result of a previously issued securing order, he may make an application for recognizance or bail.

2. Upon such application, the principal must be accorded an opportunity to be heard and to contend that an order of recognizance or bail must or should issue, that the court should release him on his own recognizance rather than fix bail, and that if bail is fixed it should be in a suggested amount and form.

### § 275.30 Application for recognizance or bail; rules of law and criteria controlling determination.

1. Determinations of applications for recognizance or bail are not in all cases discretionary but are subject to rules, prescribed in article two hundred eighty-five and other provisions of law relating to

specific kinds of criminal actions and proceedings, providing (a) that in some circumstances such an application must as a matter of law be granted, (b) that in others it must as a matter of law be denied and the principal committed to or retained in the custody of the sheriff, and (c) that in others the granting or denial thereof is a matter of judicial discretion.

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application must be determined on the basis of the following factors and criteria:

(a) The kind and degree of control or restriction of the principal that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vi) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(vii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

(b) Where the principal is a defendant in a criminal action or proceeding or a defendant-appellant in a pending appeal from a judgment of conviction, the likelihood that he would be a danger to society or to himself if at liberty during the pendency of the action or proceeding. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The defendant's character, reputation, habits, and mental condition; and

(ii) The nature of the offense or offenses with which he

is charged or of which he has been convicted in the action or proceeding involved;

(iii) His previous criminal record if any, and the nature number of offenses of which he has been convicted and with which he has been charged.

(c) Where the principal is a defendant-appellant is a pending appeal from a judgment of conviction, the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in paragraphs (a) and (b).

§ 275.40 Application for recognizance or bail determination thereof, form of securing order and execution thereof.

1. An application for recognizance or bail must be determined by a securing order which either:

(a) Grants the application and releases the principal on his own recognizance; or

(b) Grants the application and fixes bail; or

(c) Denies the application and commits the principal to, or retains him in, the custody of the sheriff.

2. Upon ordering that a principal be released on his own recognizance, the court must direct him to appear in the criminal action or proceeding involved whenever his attendance may be required and to render himself at all times amenable to the orders and processes of the court. If such principal is in the custody of the sheriff or at liberty upon bail at the time of the order, the court must direct that he be discharged from such custody or, as the case may be, that his bail be exonerated.

3. Upon the issuance of an order fixing bail, and upon the posting thereof, the court must examine the bail to determine whether it complies with the order. If it does, the court must, in the absence of some factor or circumstance which in law requires or authorizes rejection thereof, approve the bail and must issue a certificate of release, authorizing the principal to be or to remain at liberty, and, if he is in the custody of the sheriff at the time, directing the sheriff to discharge him therefrom. If the bail fixed is not posted, or is not approved after being posted, the court must order that the principal be committed to the custody of the sheriff.

§ 275.50 Enforcement of securing order.

When the attendance of a principal confined in the custody of the sheriff is required at the criminal action or proceeding at a particular time and place, the court may compel such attendance by directing the sheriff to produce him at such time and place. If the principal is at liberty on his own recognizance or on bail, his attendance may be achieved or compelled by various methods, including notification and the issuance of a bench warrant, prescribed by law in provisions governing such matters with respect to the particular kind of action or proceeding involved.

# ARTICLE 280

## BAIL AND BAIL BONDS



### § 280.10 Bail and bail bonds; fixing of bail and authorized forms thereof.

1. The only authorized forms of bail are the following:

(a) Cash bail.
(b) An insurance company bail bond.
(c) A secured surety bond.
(d) A secured appearance bond.
(e) A partially secured surety bond.
(f) A partially secured appearance bond.
(g) An unsecured surety bond.
(h) An unsecured appearance bond.

2. The methods of fixing bail are as follows:

(a) A court may designate the amount of bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in any of the forms specified in paragraphs (a), (b), (c) and (d) of subdivision one, but in no other form;

(b) A court may direct that the bail be posted in any one of two or more forms designated in the alternative, and may designate different amounts varying with the forms.

### § 280.20 Bail and bail bonds; posting of bail bond and justifying affidavits; form and contents thereof.

1. When a bail bond is to be posted in satisfaction of bail, the obligor or obligors must submit to the court a bail bond in the amount fixed, executed in the form prescribed in subdivision two, accompanied by a justifying affidavit of each obligor, executed in the form prescribed in subdivision four.

2. A bail bond must be subscribed and sworn to by each obligor and must state:

(a) The name, residential address and occupation of each obligor; and

(b) The title of the criminal action or proceeding involved; and

(c) The offense or offenses which are the subjects of the action or proceeding involved, and the status of such action or proceeding; and

(d) The name of the principal and the nature of his involvement or connection with such action or proceeding; and

(e) That the obligor, or the obligors jointly and severally, undertake that the principal will appear in such action or proceeding whenever required and will at all times render himself amenable to the orders and processes of the court; and

(f) That in the event that the principal does not comply with any such requirement, order or process, such obligor or obligors will pay to the state of New York a designated sum of money fixed by the court.

3. A bail bond executed in the course of a criminal action in the form prescribed in subdivision two is effective and binding upon the obligor or obligors until the imposition of sentence or other termination of the action, regardless of whether such action is partially conducted or prosecuted in a court or courts other than the one which originally fixed bail, unless prior to such termination such order of bail is vacated or revoked or the principal is surrendered, or unless the terms of such bonds expressly limit its effectiveness to a lesser period.

4. A justifying affidavit must be subscribed and sworn to by the obligor-affiant and must state his name, residential address and occupation. Depending upon the kind of bail bond which it justifies, such affidavit must contain further statements as follows:

(a) An affidavit justifying an insurance company bail bond must state:

(i) The amount of the premium paid to the obligor; and

(ii) All security and all promises of indemnity received by the surety-obligor in connection with its execution of the bond, and the name, occupation and residential and business addresses of every person who has given any such indemnifying security or promise.

An action by the surety-obligor against an indemnitor, seeking retention of security deposited by the latter with the former or enforcement of any indemnity agreement of a kind described in this sub-paragraph, will not lie except

with respect to agreements and security specified in the justifying affidavit.

(b) An affidavit justifying a secured bail bond must state every item of personal property deposited and of real property pledged as security, the value of each such item, and the nature and amount of every lien or encumbrance thereon.

(c) An affidavit justifying a partially secured bail bond or an unsecured bail bond must state the place and nature of the obligor-affiant's business or employment, the length of time he has been engaged therein, his income during the past year, and his average income over the past five years.

§ 280.30 Bail and bail bonds; examination as to sufficiency.

1. Following the posting of a bail bond and the justifying affidavit or affidavits, the court may conduct an inquiry for the purpose of determining the reliability of the obligors, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy. The court may inquire into any matter stated or required to be stated in the justifying affidavits, and may also inquire into other matters appropriate to the determination, which include but are not limited to the following:

(a) The background, character and reputation of any obligor, and, in the case of an insurance company bail bond, the qualifications of the surety-obligor and its executing agent; and

(b) The source of any money or property deposited by any obligor as security, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and

(c) The source of any money or property delivered or agreed to be delivered to any obligor as indemnification on the bond, and whether any such money or property constitutes the fruits of criminal or unlawful conduct; and

(d) The background, character and reputation of any person who has indemnified or agreed to indemnify an obligor upon the bond; and whether any such indemnitor, not being licensed by the superintendent of insurance in accordance with the insurance law, has within a period of one month prior to such indemnity transaction given indemnification or security for like purpose in more than two cases not arising out of the same transaction.

2. Upon such inquiry, the court may examine, under oath or otherwise, the obligors and any other persons possessing material information. The district attorney of the county has a right to attend

such inquiry, to call witnesses and to examine any witness in the proceeding. The court may, upon application of the district attorney, adjourn the proceeding for a reasonable period to allow him to investigate the matter.

3. At the conclusion of the inquiry, the court must issue an order either approving or disapproving the bail.

# ARTICLE 285

## ORDERS OF RECOGNIZANCE OR BAIL WITH RESPECT TO DEFENDANTS IN CRIMINAL ACTIONS AND PROCEEDINGS—WHEN AND BY WHAT COURTS AUTHORIZED



### § 285.10 Order of recognizance or bail; in general.

Under circumstances prescribed in this article, a court, upon application of a defendant charged with or convicted of an offense, is required or authorized to order bail or recognizance for the release or prospective release of such defendant during the pendency of either:

1. A criminal action based upon such charge; or

2. An appeal taken by the defendant from a judgment of conviction or from an order of an intermediate appellate court affirming or modifying a judgment of conviction.

### § 285.30 Order of recognizance or bail; by local criminal court when action is pending therein.

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, must or may order recognizance or bail as follows:

1. When the defendant is charged by information, prosecutor's information or misdemeanor complaint, with an offense or offenses of less than felony grade only, the court must order recognizance or bail.

2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order recognizance or bail except as otherwise provided in this subdivision:

(a) Unless such court consists of a superior court judge sitting as a local criminal court, it may not order recognizance or bail when the defendant:

(i) Is charged with a class A felony; or

(ii) Has two previous felony convictions within the meaning of subdivision one of section 70.10 of the penal law;

(b) No local criminal court may order recognizance or bail unless and until:

(i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and

(ii) The court has been furnished with a report of the New York state identification and intelligence system concerning the defendant's criminal record if any, as prescribed in section 80.30.

§ 285.40 Order of recognizance or bail; by superior court judge when action is pending in local criminal court.

1. When a criminal action is pending in a local criminal court, other than one consisting of a superior court judge sitting as such, a judge of a superior court holding a term thereof in the county, upon application of a defendant, may order recognizance or bail when such local criminal court:

(a) Has denied an application for recognizance or bail; or

(b) Lacks authority to issue such an order, pursuant to paragraph (a) of subdivision two of section 285.30; or

(c) Has fixed bail in an excessive amount. In such case, such superior court judge may vacate the order of such local criminal court and release the defendant on his own recognizance or fix bail in a lesser amount.

2. Notwithstanding the provisions of subdivision one, when the defendant is charged with a felony in a local criminal court, a superior court judge may not order recognizance or bail unless and until the district attorney has had an opportunity to be heard in the matter and such judge has been furnished with a report of the defendant's criminal record, as provided in paragraph (b) of subdivision two of section 285.30.

3. Not more than one application may be made pursuant to this section.

§ 285.50 Order of recognizance or bail; by superior court when action is pending therein.

When a criminal action is pending in a superior court, such court, upon application of a defendant, must or may order recognizance or bail as follows:

1. When the defendant is charged with an offense or offenses of less than felony grade only, the court must order recognizance or bail.

2. When the defendant is charged with a felony, the court may, in its discretion, order recognizance or bail. In any such case in which an indictment (a) has resulted from an order of a local criminal court holding the defendant for the action of the grand jury, or (b) was filed at a time when a felony complaint charging the same conduct was pending in a local criminal court, and in which such local criminal court or a superior court judge has issued an order of recognizance or bail which is still effective, the superior court's order may be in the form of a direction continuing the effectiveness of the previous order.

3. Notwithstanding the provisions of subdivision two, a superior court may not order recognizance or bail, or permit a defendant to remain at liberty pursuant to an existing order, after he has been convicted of a class A felony, but must commit or remand the defendant to the custody of the sheriff.

4. Notwithstanding the provisions of subdivision two, a superior court may not order recognizance or bail when the defendant is charged with a felony unless and until the district attorney has had an opportunity to be heard in the matter and such court has been furnished with a report of the defendant's criminal record, as provided in paragraph (b) of subdivision two of section 285.30.

§ 285.60 Order of recognizance or bail; during pendency of appeal.

A judge who is otherwise authorized pursuant to sections 235.40 and 235.50 to issue an order of recognizance or bail pending the determination of an appeal, may do so unless:

1. The judgment being appealed includes a conviction of the defendant for a class A felony; or

2. The judgment being appealed includes a conviction of the defendant for a felony and the defendant, after being adjudged a persistent felony offender, received a sentence of imprisonment authorized for a class A felony.

§ 285.70 Order of recognizance or bail; revocation thereof.

Whenever in the course of a criminal action or proceeding a defendant is at liberty as a result of an order of recognizance or bail issued pursuant to this article, the court may for good cause shown revoke it and may, if necessary, issue a bench warrant to secure the defendant's attendance. Upon such revocation, such court must issue another order of recognizance or bail if the defendant is entitled to recognizance or bail as a matter of right. If he is not, the court may either issue such an order or commit the defendant to the custody of the sheriff.

§ 285.80 Order of recognizance or bail; bench warrant.

1. A bench warrant issued by a superior court, by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state. A bench warrant issued by a city court, a town court or a village court may be executed in such place as is prescribed for a warrant of arrest in subdivision two of section 60.50.

2. A bench warrant may be addressed to any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued. It must be executed in the same manner as an ordinary warrant of arrest, as provided in section 60.60, and following the arrest the executing police officer must without unnecessary delay take the defendant before the court in which it is returnable.

# TITLE R

## PROCEDURES FOR SECURING ATTENDANCE AT CRIMINAL ACTIONS AND PROCEEDINGS OF DEFENDANTS NOT UNDER CONTROL OF COURT AND NOT AMENABLE TO ORDINARY PROCESS—AND RELATED MATTERS

## ARTICLE 300

### SECURING ATTENDANCE OF DEFENDANTS—IN GENERAL

Section 300.10 Securing attendance of defendants; in general.

§ 300.10 Securing attendance of defendants; in general.

Depending upon the status of a criminal action pending against a defendant, the geographical location of the defendant at the time and other factors, his attendance thereat for purposes of arraignment or prosecution may be secured by the following methods:

1. If the defendant has never been arraigned in the action or come under the control of the court, and if he is at liberty within the state, his attendance may, under given circumstances, be secured by a warrant of arrest, as prescribed in article sixty, a superior court warrant of arrest, as prescribed in subdivision three of section 105.20, or a summons, as prescribed in article sixty-five.

2. If the defendant has been arraigned in the action and is under the control of the court by virtue of a securing order issued therein, his attendance may be secured as follows:

(a) If the defendant is confined in the custody of the sheriff, the court may direct the sheriff to produce him;

(b) If the defendant is at liberty within the state as a result of an order releasing him on his own recognizance or on bail, the court may cause the defendant to be notified to attend at a designated time. If the defendant fails to appear after such notification the court may issue a bench warrant for his immediate arrest.

3. If the defendant does not fall within any of the categories described in subdivisions one and two, either because he is outside the state or because he is confined in an institution within the state as a result of an order issued is some other action, proceeding or matter, his attendance may, under indicated circumstances, be secured by procedures prescribed in the ensuing articles of this title.

# ARTICLE 305

## SECURING ATTENDANCE OF DEFENDANTS CONFINED IN INSTITUTIONS WITHIN THE STATE

Section 305.10 Securing attendance of defendants confined in institutions within the state.

## § 305.10 Securing attendance of defendants confined in institutions within the state.

1. When a criminal action is pending against a defendant who is confined in an institution within the state pursuant to a court order issued in a different action, proceeding or matter, the following courts and judges may, under the indicated circumstances, order that the defendant be produced in the court in which the criminal action is pending for the purposes of arraignment or prosecution therein:

(a) If the action is pending in a superior court or with a superior court judge sitting as a local criminal court, such court may, upon application of the district attorney, order the production therein of a defendant confined in any institution within the state;

(b) If the action is pending in a district court or the New York city criminal court, such court may, upon application of the district attorney, order the production therein of a defendant confined in any institution within the state other than a state prison. Production therein of a defendant confined in a state prison may, upon application of the district attorney, be ordered by a judge of a superior court holding a term thereof in the county in which the action is pending;

(c) If the action is pending in a city court or a town court or a village court, such court may, upon application of the district attorney, order production therein of a defendant confined in a county jail of such county. Production therein of a defendant confined in any other institution within the state may, upon application of the district attorney, be ordered by a judge of a superior court holding a term thereof in the county in which the action is pending.

2. An application by a district attorney, pursuant to subdivision one, for production of a defendant confined in an institution located in another county in connection with a criminal action or proceeding pending in such other county, must be made upon reasonable notice to the district attorney of such other county and to the attor-

ney representing such defendant in or in connection with the action or proceeding pending therein, and the court or judge must accord them reasonable opportunity to be heard in the matter. If such court or judge determines that production of the defendant would result in an unreasonable interference with the conduct of the action in such other county, it must deny the application. If an order of production is issued, a justice of the appellate division, of either the department embracing the county of issuance thereof or of the department embracing the county of the defendant's confinement, upon application of the district attorney of the county of confinement or of the attorney representing the defendant in or in connection with the action pending therein, may for good cause shown vacate such order of production.

# ARTICLE 310

## SECURING ATTENDANCE OF DEFENDANTS WHO ARE OUTSIDE THE STATE BUT WITHIN THE UNITED STATES—RENDITION TO OTHER JURISDICTIONS OF DEFENDANTS WITHIN THE STATE—UNIFORM CRIMINAL EXTRADITION ACT

§ 310.02 Short title.

This article may be cited and referred to as the uniform criminal extradition act.

§ 310.04 Definitions.

As used in this article, the following terms have the following meanings:

1. "Governor" includes any person performing the functions of governor by authority of the law of this state.

2. "Executive authority" includes the governor, and any person performing the functions of governor in a state other than this state.

3. "State," when referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

§ 310.06 Fugitives from justice; duty of governor.

Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

§ 310.08 Demand; form.

No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, except in cases arising under section 310.14 or 310.16, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon, or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the

executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

§ 310.10 Investigation by governor.

When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney-general or any district attorney in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

§ 310.12 Extradition of persons imprisoned or awaiting trial in another state.

When it is desired to have returned to this state a person charged in this state with a crime and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

§ 310.14 Extradition of persons who left the demanding state under compulsion.

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state who is charged in the manner provided in section 310.08 with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

§ 310.16 Extradition of persons not present in demanding state at the time of commission of crime.

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 310.08 with committing an act in this state or in a third state, intentionally resulting in a crime in the state whose executive authority

is making the demand, when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom; provided, however, that the governor of this state may, in his discretion, make any such surrender conditional upon agreement by the executive authority of the demanding state, that the person so surrendered will be held to answer no criminal charges of any nature except those set forth in the requisition upon which such person is so surrendered, at least until such person has been given reasonable opportunity to return to this state after acquittal, if he shall be acquitted, or if he shall be convicted, after he shall be released from confinement. Nothing in this section shall apply to the crime of libel.

§ 310.18 Issuance of warrant of arrest by governor; recitals therein.

If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any police officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

§ 310.20 Execution of warrant; manner and place thereof.

Such warrant shall authorize the police officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all police officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this article to the duly authorized agent of the demanding state.

§ 310.22 Authority of arresting officer.

Every such police officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused to command assistance therein, as police officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

§ 310.24 Rights of accused person; application for writ of habeas corpus.

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a justice or judge of a court of record in this state, who shall

inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the justice or judge of such court of record shall fix a reasonable time to be allowed within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the district attorney of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

§ 310.26 Noncompliance with preceding section; penalties for violation.

Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in disobedience of the proceeding section, shall be guilty of a felony.

§ 310.28 Confinement of the accused in jail when necessary.

The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

§ 310.30 Confinement of extradited persons passing through this state.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping, provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state or waiver

thereof. Such person shall not be entitled to demand a new requisition while in this state.

§ 310.32 Arrest of accused before making of requisition.

Whenever any person within this state shall be charged on the oath of any credible person before any local criminal court of this state with the commission of any crime in any other state and, except in cases arising under section 310.14 or 310.16, with having fled from justice, or, with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or, whenever complaint shall have been made before any local criminal court in this state settling forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such other state with the commission of the crime, and, except in cases arising under section 310.14 or 310.16, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement or having broken the terms of his bail, probation or parole and is believed to be in this state, the local criminal court shall issue a warrant directed to any police officer directing him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other local criminal court which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to such warrant.

§310.34 Arrest of accused without warrant therefor.

The arrest of a person in this state may be lawfully made also by any police officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year; but when so arrested the accused must be taken before a local criminal court with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and, thereafter, his answers shall be heard as if he had been arrested on a warrant.

§ 310.36 Commitment to await requisition; bail.

If from the examination before the local criminal court it appears that the person held is the person charged with having committed the crime alleged, and, except in cases arising under section 310.14 or 310.16, that he has fled from justice, the local criminal court must, by a warrant reciting the accusation, commit him to the

county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in the next section, or until he shall be legally discharged.

§ 310.38 Bail; in what cases; conditions of bond.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a justice of the supreme court or county judge in this state may admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking but not later than thirty days after the examination referred to in section 310.36 and for his surrender, to be arrested upon the warrant of the governor of this state.

§ 310.40 Extension of time of commitment; adjournment.

If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond or undertaking, a local criminal court may discharge him or may recommit him for a further period of sixty days, or for further periods not to exceed in the aggregate sixty days, or a supreme court justice or county judge may again take bail for his appearance and surrender, as provided in section 310.38 but within a period not to exceed sixty days after the date of such new bond or undertaking.

§ 310.42 Bail; when forfeited.

If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond or undertaking, the justice of the supreme court or county judge, by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond or undertaking in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

§ 310.44 Persons under criminal prosecution in this state at time of requisition.

If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, may either surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

§ 310.46 Guilt or innocence of accused; when inquired into.

The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the governor, or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

§ 310.48 Alias warrant of arrest.

The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

§ 310.50 Written waiver of extradition proceedings.

Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole, may waive the issuance and service of the warrant provided for in sections 310.18 and 310.20 and all other procedure incidental to extradition proceedings by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state, provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 310.24.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the secretary of state of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent. Provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

§ 310.52 Fugitives from this state; duty of governor.

Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United

States, he shall issue a warrant under the seal of this state to some agent commanding him to receive the person so charged, if delivered to him, and convey him to the proper officer of the county in this state in which the offense was committed.

§ 310.54 Application for issuance of requisition; by whom made; contents.

1. When the return to this state of a person charged with crime in this state is required, the district attorney of the county in which the offense was committed, or, if the offense is one which is cognizable by him, the attorney-general shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said district attoney or attorney-general the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

2. When there is required the return to this state of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the district attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time the application is made.

3. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the accusatory instrument stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The district attorney, attorney general, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the accusatory instrument, or of the judgment of conviction or the

sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

§ 310.56 Expense of extradition.

The expenses of extradition must be borne by the county from which the application for a requisition comes or, where the application is made by the attorney general, by the county in which the offense was committed. In the case of extradition of a prson who has been convicted of a crime in this state and has escaped from a state prison or reformatory, the expense of extradition shall be borne by the state department of correction. Where a person has broken the terms of his parole from a state prison or reformatory, the expense of extradition shall be borne by the state division of parole. Where a person has broken the terms of his bail or probation, the expense of extradition shall be borne by the county. Where a person has been convicted but not yet confined to a prison, or has been sentenced for a felony to a county jail or penitentiary and escapes, the expenses of extradition shall be charged to the county from whose custody the escape is effected.

§ 310.58 Immunity from service of process in certain civil actions.

A person brought into this state on or after waiver of extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned until he has been convicted in the criminal proceeding, or if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

§ 310.60 No immunity from other criminal prosecution while in this state.

After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other offenses which he may be charged with having committed here as well as that specified in the requisition for his extradition.

§ 310.62 Non-waiver by this state.

Nothing in this article contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for offenses committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any offense committed within this state, nor shall any proceedings had under this article which result in, or fail to

result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

§ 310.64 Interpretation.

The provisions of this article shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

§ 310.66 Constitutionality.

If any part of this article is for any reason declared void, such invalidity shall not affect the validity of the remaining portions thereof.

# ARTICLE 320

SECURING ATTENDANCE OF DEFENDANTS CONFINED AS PRISONERS IN INSTITUTIONS OF OTHER JURISDICTIONS OF THE UNITED STATES—RENDITION TO OTHER JURISDICTIONS OF PERSONS CONFINED AS PRISONERS IN THIS STATE—AGREEMENT ON DETAINER



§ 320.10 Securing attendance of defendants confined as prisoners in institutions outside the state; methods.

The attendance in a criminal action pending in a court of this state of a defendant confined as a prisoner in an institution of another jurisdiction may, under prescribed circumstances, be secured pursuant to:

1. Section 310.12 of article three hundred ten, known as the uniform criminal extradition act; or

2. Section 320.20, known as the agreement on detainers; or

3. Section 320.30.

§ 320.20 Agreement on detainers.

The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

## TEXT OF THE AGREEMENT ON DETAINERS

The contracting states solemnly agree that:

### ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party

states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agrement to provide such cooperative procedures.

## ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article three hereof or at the time that a request for custody or availability is initiated pursuant to article four hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint, pursuant to article three or article four hereof.

## ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissionor of correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph

shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

## ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

## ARTICLE V

(a) In response to a request made under article three or article four hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article three of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period

provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state

and its subdivisions, as to the payment of costs, or responsibilities therefor.

## ARTICLE VI

(a) in determining the duration and expiration dates of the time periods provided in articles three and four of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

## ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

## ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

## ARTICLE IX

1. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the

remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, meany any court with criminal jurisdiction.

3. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purposes.

4. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.

5. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

6. The governor is hereby authorized and empowered to designate an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by article seven of the agreement on detainers.

7. In order to implement article four (a) of the agreement on detainers, and in furtherance of its purposes, the appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request, notify the prisoner and the governor in writing that a request for temporary custody has been made and such notification shall describe the source and contents of said request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the governor within thirty days, and to contest the legality of his delivery.

§ 320.30 Securing attendance of defendants confined in federal prisons.

1. A defendant against whom a criminal action is pending in a court of record of this state, and who is confined in a federal prison or custody either without or outside this state, may, with the consent of the attorney general of the United States, be produced in such court for the purpose of criminal prosecution, pursuant to the provisions of:

(a) Section four thousand eighty-five of title eighteen of the United States Code; or

(b) Subdivision two of this section.

2. When such a defendant is in federal custody as specified in subdivision one, a superior court, at a term held in the county in which the criminal action against him is pending, may, upon application of the district attorney of such county, issue a certificate, known as a writ of habeas corpus ad prosequendum, addressed to the attorney general of the United States, certifying that such defendant has been charged by the particular accusatory instrument filed against him the specified court with the offense or offenses alleged therein, and that attendance of the defendant in such court for the purpose of criminal prosecution thereon is necessary in the interest of justice and requesting the attorney general of the United States to cause such defendant to be produced in such court, under custody of a federal public servant, upon a designated date and for a period of time necessary to complete the prosecution. Upon issuing such a certificate, the court may deliver it, or cause or authorize it to be delivered, together with a certified copy of the accusatory instrument upon which it is based, to the attorney general of the United States or to his representative authorized to entertain the request.

# ARTICLE 322

## SECURING ATTENDANCE OF DEFENDANTS WHO ARE OUTSIDE THE UNITED STATES



### § 322.10 Securing attendance of defendants who are outside the United States.

1. When a criminal action for an offense committed in this state is pending in a criminal court of this state against a defendant who is in a foreign country with which the United States has an extradition treaty, and when the accusatory instrument charges an offense which is specified in such treaty as an extraditable one, the district attorney of the county in which offense was allegedly committed may make an application to the Governor, requesting him to make an application to the President of the United States to institute extradition proceedings for the return of the defendant to this country and state for the purpose of prosecution of such action. The district attorney's application must comply with any rules, regulations and guidelines established by the Governor for such applications and must be accompanied by all the accusatory instruments, affidavits and other documents required by such rules, regulations and guidelines.

2. Upon receipt of the district attorney's application, the Governor, if satisfied that the defendant is in the foreign country in question, that the offense charged is an extraditable one pursuant to the treaty in question, and that there are no factors or impediments which in law preclude such an extradition, may in his discretion make an application, addressed to the secretary of state of the United States, requesting that the President of the United States institute extradition proceedings for the return of the defendant from such foreign country. The Governor's application must comply with any rules, regulations and guidelines established by the secretary of state for such applications and must be accompanied by all the accusatory instruments, affidavits and other documents required by such rules, regulations and guidelines.

3. If the Governor's application is granted and the extradition is achieved or attempted, all expenses incurred therein must be borne by the county from which the application emanated.

4. The provisions of this section apply equally to extradition or

attempted extradition of a person who is a fugitive following the entry of a judgment of conviction against him in a criminal court of this state.

# ARTICLE 324

## SECURING ATTENDANCE OF CORPORATE DEFENDANTS AND RELATED MATTERS



### § 324.00 Corporate defendants; securing attendance.

1. The court attendance of a corporation for purposes of commencing or prosecuting a criminal action against it may be accomplished by the issuance and service of a summons or an appearance ticket if such action has been or is about to be commenced in a local criminal court, and by a corporate summons if such action has been commenced in a superior court. Such process must be served upon the corporation by delivery thereof to an officer, director, managing or general agent, or cashier or assistant cashier of such corporation or to any other agent of such corporation authorized by appointment or by law to receive service of process.

2. A "corporate summons" is a process issued by a superior court directing a corporate defendant designated in an indictment to appear before it at a designated future time in connection with such indictment. A corporate summons must be generally in the form of a summons as prescribed in subdivision two of section 65.10. A corporate summons may be served by a public servant designated by the issuing court, and may be served anywhere in the state.

### § 324.05 Corporate defendants; prosecution thereof.

At all stages of a criminal action, from the commencement thereof through sentence, a corporate defendant must appear by counsel. Upon failure of appearance at the time such defendant is required to enter a plea to the accusatory instrument, the court may enter a plea of guilty and impose sentence.

# TITLE S

## PROCEDURES FOR SECURING ATTENDANCE OF WITNESSES IN CRIMINAL ACTIONS

## ARTICLE 325

### SECURING ATTENDANCE OF WITNESSES BY SUBPOENA



### § 325.10 Securing attendance of witnesses by subpoena; in general.

1. Under circumstances prescribed in this article, a person at liberty within the state may be required to attend a criminal court action or proceeding as a witness by the issuance and service upon him of a subpoena.

2. A "subpoena" is a process of a court directing the person to whom it is addressed to attend and appear as a witness in a designated action or proceeding in such court, on a designated date and any recessed or adjourned date of the action or proceeding. If he is given reasonable notice of such recess or adjournment, no further process is required to compel his attendance on the adjourned date.

3. As used in this article, "subpoena" includes a "subpoena duces tecum." A subpoena duces tecum is a subpoena requiring the witness to bring with him and produce specified physical evidence.

### § 325.20 Securing attendance of witnesses by subpoena; when and by whom subpoena may be issued.

1. Any criminal court may issue a subpoena for the attendance of a witness in any criminal action or proceeding in such court.

2. A district attorney, or other prosecutor where appropriate, as an officer of a criminal court in which he is conducting the prosecution of a criminal action or proceeding, may issue a subpoena of such court, subscribed by himself, for the attendance in such court or a grand jury thereof of any witness whom the people are entitled to call in such action or proceeding.

3. An attorney for a defendant in a criminal action or proceeding, as an officer of a criminal court, may issue a subpoena of such court, subscribed by himself, for the attendance in such court of any witness whom the defendant is entitled to call in such action or proceeding. An attorney for a defendant may not issue a subpoena duces tecum of the court directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof. Such a subpoena duces tecum may be issued in behalf of a defendant upon order of a court pursuant to the rules applicable to civil cases as provided in section two thousand three hundred seven of the civil practice law and rules.

§ 325.30 Securing attendance of witnesses by subpoena; where subpoena may be served.

1. A subpoena of any criminal court, issued pursuant to section 325.20, may be served anywhere in the county of issuance or anywhere in an adjoining county.

2. A subpoena of a superior court, issued pursuant to section 325.20, may be served anywhere in the state.

3. A subpoena of a district court or of the New York City criminal court, issued pursuant to section 325.20, may be served anywhere in the state; provided that, if such subpoena is issued by a prosecutor or by an attorney for a defendant, it may be served in a county other than the county of issuance or an adjoining county only if such court, upon application of such prosecutor or attorney, endorses upon such subpoena an order for the attendance of the witness.

4. A subpoena of city court or a town court or a village court, issued pursuant to section 325.20, may be served in a county other than the one of issuance or an adjoining county if a judge of a superior court, upon application of the issuing court or the district attorney or an attorney for the defendant, endorses upon such subpoena an order for the attendance of the witness.

§ 325.40 Securing attendance of witnesses by subpoena; how and by whom subpoena may be served.

A subpoena may be served by any person more than eighteen years old. Service must be by personal delivery thereof to the witness, or by showing it to him and delivering to him a copy thereof.

# ARTICLE 330

## SECURING ATTENDANCE OF WITNESSES BY MATERIAL WITNESS ORDER



§ 330.10 Material witness order; defined.

A material witness order is a court order (a) adjudging a person a material witness in a pending criminal action and (b) fixing bail to secure his future attendance thereat.

§ 330.20 Material witness order; when authorized; by what courts issuable; duration thereof.

1. A material witness order may be issued upon the ground that there is reasonable cause to believe that a person whom the people or the defendant desire to call as a witness in a pending criminal action:

(a) Possesses information material to the determination of such action; and

(b) Will not be amenable or responsive to a subpoena at a time when his attendance will be sought.

2. A material witness order may be issued only when:

(a) An indictment has been filed in a superior court and is currently pending therein; or

(b) A grand jury proceeding has been commenced and is currently pending; or

(c) A felony complaint has been filed with a local criminal court and is currently pending therein.

3. The following courts may issue material witness orders under the indicated circumstances:

(a) When an indictment has been filed, or a grand jury pro-

ceeding has been commenced, or a defendant has been held by a local criminal court for the action of a grand jury, a material witness order may be issued only by the superior court in which such indictment is pending or which impaneled such grand jury;

(b) When a felony complaint is currently pending in a district court or in the New York city criminal court or before a superior court judge sitting as a local criminal court, a material witness order may be issued either by such court or by the superior court which would have jurisdiction of the case upon a holding of the defendant for the action of the grand jury;

(c) When a felony complaint is currently pending in a city court or a town court or a village court, a material witness order may be issued only by the superior court which would have jurisdiction of the case upon a holding of the defendant for the action of the grand jury.

4. Unless vacated pursuant to section 330.60, a material witness order remains in effect during the following periods of time under the indicated circumstances:

(a) An order issued by a superior court under the circumstances prescribed in paragraph (a) of subdivision three remains in effect during the pendency of the criminal action in such superior court;

(b) An order issued by a district court or the New York city criminal court or a superior court judge sitting as a local criminal court, under circumstances prescribed in paragraph (b) of subdivision three, remains in effect (i) until the disposition of the felony complaint pending in such court, and (ii) if the defendant is held for the action of the grand jury, during the pendency of the grand jury proceeding, and (iii) if an indictment results, for a period of ten days following the filing of such indictment, and (iv) if within such ten day period such order is indorsed by the superior court in which the indictment is pending, during the pendency of the action in such superior court. Upon such indorsement, the order is deemed to be that of the superior court.

(c) An order issued by a superior court under circumstances prescribed in paragraph (c) of subdivision three remains in effect (i) until the disposition of the felony complaint pending in the city, town or village court, and (ii) if the defendant is held for the action of the grand jury, during the pendency of the action in the superior court.

§ 330.30 Material witness order; commencement of proceeding by application; procurement of appearance of prospective witness.

1. A proceeding to adjudge a person a material witness must be commenced by application to the appropriate court, made in writing and subscribed and sworn to by the applicant, demonstrating reasonable cause to believe the existence of facts, as specified in subdivision one of section 330.20, warranting the adjudication of such person as a material witness.

2. If the court is satisfied that the application is well founded, the prospective witness may be compelled to appear in response thereto as follows:

(a) The court may issue an order directing him to appear therein at a designated time in order that a determination may be made whether he should be adjudged a material witness, and, upon personal service of such order or a copy thereof within the state, he must so appear.

(b) If in addition to the allegations specified in subdivision one, the application contains further allegations demonstrating to the satisfaction of the court reasonable cause to believe that (i) the witness would be unlikely to respond to such an order, or (ii) after previously having been served with such an order, he did not respond thereto, the court may issue a warrant addressed to a police officer, directing such officer to take such prospective witness into custody within the state and to bring him before the court forthwith in order that a proceeding may be conducted to determine whether he is to be adjudged a material witness.

§ 330.40 Material witness order; arraignment.

1. When the prospective witness appears before the court, the court must inform him of the nature and purpose of the proceeding, and that he is entitled to a prompt hearing upon the issue of whether he should be adjudged a material witness. The prospective witness possesses all the rights, and is entitled to all the court instructions, with respect to right to counsel, opportunity to obtain counsel and assignment of counsel in case of financial inability to retain such, which, pursuant to subdivisions three through six of section 90.10, accrue to a defendant arraigned upon a felony complaint in a local criminal court.

2. If the proceeding is adjourned at the prospective witness' instance, for the purpose of obtaining counsel or otherwise, the

court must order him to appear upon the adjourned date. The court may further fix bail to secure his appearance upon such date or until the proceeding is completed and, upon default thereof, may commit him to the custody of the sheriff for such period.

§ 330.50 Material witness order; hearing, determination and execution of order.

1. The hearing upon the application must be conducted as follows:

(a) The applicant has the burden of proving by a preponderance of the evidence all facts essential to support a material witness order, and any testimony so adduced must be given under oath;

(b) The prospective witness may testify under oath or may make an unsworn statement;

(c) The prospective witness may call witnesses in his behalf, and the court must cause process to be issued for any such witness whom he reasonably wishes to call, and any testimony so adduced must be given under oath;

(d) Upon the hearing, the ordinary exclusionary rules of evidence applicable to criminal proceedings are inapplicable to the extent that any evidence tending to demonstrate that the prospective witness does or does not possess information material to the criminal action in issue, or that he will or will not be amenable or respond to a subpoena at the time his attendance will be sought, is admissible even though of a hearsay nature or otherwise incompetent by trial standards.

2. If the court is satisfied after such hearing that there is reasonable cause to believe that the prospective witness (a) possesses information material to the pending action or proceeding, and (b) will not be amenable or respond to a subpoena at a time when his attendance will be sought, it may issue a material witness order, adjudging him a material witness and fixing bail to secure his future attendance.

3. Upon the issuance of such order, it must be executed as follows:

(a) If the bail is posted and approved by the court, the witness must, as provided in subdivision three of section 275.40, be released and be permitted to remain at liberty; provided that, where the bail is posted by a person other than the witness himself, he may not be so released except upon his signed written consent thereto;

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(b) If the bail is not posted, or if though posted it is not approved by the court, the witness must, as provided in subdivision three of section 275.40, be committed to the custody of the sheriff.

§ 330.60 Material witness order; vacation, modification and amendment thereof.

1. At any time after a material witness order has been issued the court must, upon application of such witness, with notice to the party upon whose application the order was issued, and with opportunity to be heard, make inquiry whether by reason of new or changed facts or circumstances the material witness order is no longer necessary or warranted, or, if it is, whether the original bail currently appears excessive. Upon making any such determination, the court must vacate the order. If its determination is that the order is no longer necessary or warranted, it must, as the situation requires, either discharge the witness from custody or exonerate the bail. If its determination is that the bail is excessive, it must issue a new order fixing bail in a lesser amount or on less burdensome terms.

2. At any time when a witness is at liberty upon bail pursuant to a material witness order, the court may, upon application of the party upon whose application the order was issued, with notice to the witness if possible and to his attorney if any and opportunity to be heard, make inquiry whether, by reason of new or changed facts or circumstances, the original bail is no longer sufficient to secure the future attendance of the witness at the pending action. Upon making such a determination, the court must vacate the order and issue a new order fixing bail in a greater amount or on terms more likely to secure the future attendance of the witness.

§ 330.70 Material witness order; compelling attendance of witness who fails to appear.

If a witness at liberty on bail pursuant to a material witness order cannot be found or notified at the time his appearance as a witness is required, or if after notification he fails to appear in such action or proceeding as required, the court may issue a warrant, addressed to a police officer, directing such officer to take such witness into custody anywhere within the state and to bring him to the court forthwith.

# ARTICLE 335

## SECURING ATTENDANCE OF WITNESSES CONFINED IN INSTITUTIONS WITHIN THE STATE



### § 335.10 Securing attendance of witnesses confined in institutions within the state; in general.

Under circumstances prescribed in this article, a person confined in an institution within this state pursuant to a court order may upon application of a party to a criminal action or proceeding, demonstrating reasonable cause to believe that such person possesses information material thereto, be produced by court order and compelled to attend such action or proceeding as a witness.

### § 335.20 Securing attendance of witnesses confined in institutions within the state; when and by what courts order may be issued.

The following courts and judges may, under the indicated circumstances, order production as witnesses of persons confined by court order in institutions within the state.

1. If the criminal action or proceeding is one pending in a superior court or with a superior court judge sitting as a local criminal court, such court may, except as provided in subdivision four, order the production as a witness therein of a person confined in any institution in the state.

2. If the criminal action or proceeding is one pending in a district court or the New York city criminal court, such court may order the production as a witness therein of a person confined in any institution within the state other than a state prison. Production therein of a prospective witness confined in a state prison may, except as provided in subdivision four, be ordered, upon application of the party desiring to call him, by a judge of a superior court holding a term thereof in the county in which the action or proceeding is pending.

3. If the criminal action or proceeding is one pending in a city court or a town court or a village court, such court may order the production as a witness therein of a person confined in a county jail of such county. Production therein of a prospective witness confined in any other institution within the state may, except as provided in

subdivision four, be ordered, upon application of the party desiring to call him, by a judge of a superior court holding a term thereof in the county in which the action or proceeding is pending.

4. Regardless of the court in which the criminal action or proceeding is pending, production as a witness therein of a prisoner who has been sentenced to death may be ordered, upon application of the party desiring to call him, only by a justice of the appellate division of the department in which the action or proceeding is pending. The application for such order, if made by the defendant, must be upon notice to the district attorney of the county in which the action or proceeding is pending, and an application made by either party must be based upon a showing that the prisoner's attendance is clearly necessary in the interests of justice. Upon issuing such an order, the appellate division justice may fix and include therein any terms or conditions which he deems appropriate for execution thereof.

# ARTICLE 340

## SECURING ATTENDANCE AS WITNESS OF PERSONS AT LIBERTY OUTSIDE THE STATE—RENDITION TO OTHER JURISDICTIONS OF WITNESSES AT LIBERTY WITHIN THE STATE—UNIFORM ACT TO SECURE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE IN CRIMINAL CASES

Section 340.10 Securing attendance of witness from within and without the state in criminal proceedings.

§ 340.10 Securing attendance of witnesses from within and without the state in criminal proceedings.

1. As used in this section the following words shall have the following meanings unless the context requires otherwise.

"Witness" shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

"State" shall include any territory of the United States and the District of Columbia.

"Subpoena" shall include a summons in any state where a summons is used in lieu of a subpoena.

2. Subpoenaing witness in this state to testify in another state. If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to a justice of the supreme court or a county judge in the county in which such person is, such justice or judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at such hearing the justice or judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, will give to him protection from arrest and the service of civil and criminal process, he shall issue a subpoena, with a copy of the certificate attached,

directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the subpoena. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state such justice or judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the justice or judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is subpoenaed as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile and five dollars for each day that he is required to travel and attend as a witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

3. Witness from another state subpoenaed to testify in this state. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he

may be released by bail, recognizance, or order of the judge issuing the certificate.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile and five dollars for each day that he is required to travel and attend as a witness. Such fees shall be a proper charge upon the county in which such criminal prosecution or grand jury investigation is pending. A witness who has appeared in accordance with the provisions of the subpoena shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

4. Exemption from arrest and service of process. If a person comes into this state in obedience to a subpoena directing him to attend and testify in this state he shall not while in this state pursuant to such subpoena or order be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.

If a person passes through this state while going to another state in obedience to a subpoena or order to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena or order.

5. Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

6. Short title. This section may be cited as "Uniform act to secure the attendance of witnesses from without the state in criminal cases."

7. Constitutionality. If any part of this section is for any reason declared void, such invalidity shall not affect the validity of the remaining portions thereof.

# ARTICLE 345

## SECURING ATTENDANCE AS WITNESSES OF PRISONERS CONFINED IN INSTITUTIONS OUTSIDE THE STATE OR IN FEDERAL INSTITUTIONS—RENDITION TO OTHER JURISDICTIONS OF PRISONERS CONFINED IN INSTITUTIONS WITHIN THE STATE



### § 345.10 Securing attendance of prisoner as witness in proceeding without the state.

If a judge of a court of record in any other state, which by its laws has made provision for commanding a prisoner within that state to attend and testify in this state, certifies under the seal of that court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced, and that a person confined in a New York state correctional institution or prison within the department of correction, other than a person confined as criminally insane, or as a defective delinquent, or confined in the death house awaiting execution, is a material witness in such prosecution or investigation and that his presence is required for a specified number of days, upon presentment of such certificate to a judge of a superior court in the county where the person is confined, upon notice to the attorney general, such judge, shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that such prisoner be produced at the hearing.

If at such hearing the judge determines that the prisoner is a material and necessary witness in the requesting state, the judge shall issue an order directing that the prisoner attend in the court where the prosecution or investigation is pending, upon such terms and conditions as the judge prescribes, including among other things, provision for the return of the prisoner at the conclusion of his testimony, proper safeguards on his custody, and proper financial reimbursement or other payment by the demanding jurisdiction for all expenses incurred in the production and return of the prisoner.

The attorney general is authorized as agent for the state of New York, when in his judgment it is necessary, to enter into such agree-

ments with the appropriate authorities of the demanding jurisdiction as he determines necessary to ensure proper compliance with the order of the court.

§ 345.20 Securing attendance of prisoner outside the state as witness in criminal action in the state.

1. When (a) a criminal action is pending in a court of record of this state by reason of the filing therein or therewith of an accusatory instrument or by reason of the commencement of a grand jury proceeding or investigation, and (b) there is reasonable cause to believe that a person confined in a correctional institution or prison of another state, other than a person awaiting execution of a sentence of death or one confined as mentally ill or as a defective delinquent, possesses information material to such criminal action, and (c) the attendance of such person as a witness in such action is desired by a party thereto, and (d) the state in which such person is confined possesses a statute equivalent to section 345.10, a judge of the court in which such action is pending may issue a certificate under the seal of such court, certifying all such facts and that the attendance of such person as a witness in such court is required for a specified number of days.

2. Such a certificate may be issued upon application of either the people or defendant demonstrating all the facts specified in subdivision one.

3. Upon issuing such a certificate, the court may deliver it, or cause or authorize it to be delivered, to a court of such other state which, pursuant to the laws thereof, is authorized to initiate or undertake legal action for the delivery of such prisoners to this state as witnesses.

§ 345.30 Securing attendance of prisoner in federal institution as witness in criminal action in the state.

When (a) a criminal action is pending in a court of record of this state by reason of the filing therein or therewith of an accusatory instrument, or by reason of the commencement of a grand jury proceeding or investigation, and (b) there is reasonable cause to believe that a person confined in a federal prison or other federal custody, either within or outside this state, possesses information material to such criminal action, and (c) the attendance of such person as a witness in such action is desired by a party thereto, a superior court, at a term held in the county in which such action is pending, may issue a certificate, known as a writ of habeas corpus ad testificandum, addressed to the attorney general of the United

States, certifying all such facts and requesting the attorney general of the United States to cause the attendance of such person as a witness in such court for a specified number of days under custody of a federal public servant.

2. Such a certificate may be issued upon application of either the people or a defendant demonstrating all facts specified in subdivision one.

3. Upon issuing such a certificate, the court may deliver it, or cause or authorize it to be delivered, to the attorney general of the United States or to his representative authorized to entertain the request.

# TITLE T

## PROCEDURES FOR SECURING TESTIMONY FOR FUTURE USE, AND FOR USING TESTIMONY GIVEN IN A PRIOR PROCEEDING

## ARTICLE 350

### SECURING TESTIMONY FOR USE IN A SUBSEQUENT PROCEEDING—EXAMINATION OF WITNESS CONDITIONALLY



§ 350.10 Examination of witnesses conditionally; in general.

After a defendant has been arraigned upon an accusatory instrument, and under circumstances prescribed in this article, a criminal court may, upon application of either party, order that a witness or prospective witness in the action be examined conditionally under oath in order that such testimony may be received and read into evidence at subsequent proceedings in or related to the action.

§ 350.20 Examination of witnesses conditionally; grounds for order.

An order directing examination of a witness conditionally must be based upon the ground that there is reasonable cause to believe that such witness:

1. Possesses information material to the criminal action or proceeding in issue; and

2. Will not be amenable or responsive to legal process or available as a witness at a time when his testimony will be sought, either because he is:

(a) About to leave and remain outside the state for a substantial period of time; or

(b) Physically ill or incapacitated.

§ 350.30 Examination of witnesses conditionally; when and to what courts application may be made.

1. An application to examine a witness conditionally may be made at any time after the defendant has been arraigned upon an accusatory instrument and before termination of the action, or of a proceeding therein or related thereto, in which the witness's testimony is sought.

2. Such application must be made to and determined by the following courts under the indicated circumstances:

(a) If the action is pending in a local criminal court as a result of an accusatory instrument filed therewith, the application must be made to and determined by such local criminal court;

(b) If the defendant has been held by a local criminal court for the action of a grand jury on the basis of a felony complaint, or if an indictment has been filed against him, the application must be made to and determined by the superior court by which the grand jury was or is to be impaneled or in which the indictment is pending.

§ 350.40 Examination of witnesses conditionally; application and notice.

1. An application to examine a witness conditionally must be made in writing, must be subscribed and sworn to, and must contain:

(a) The title of the action, the offense or offenses charged, the nature and status of the action, and the name and residential address of the witness sought to be examined; and

(b) A statement that there is reasonable cause to believe that grounds for such an examination, as specified in section 350.20, exist, together with allegations of fact supporting such statement. Such allegations of fact may be those of the applicant, or those of another person in an accompanying deposition, or both. They may be based either upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the ground of such belief are stated.

2. A copy of the application, with reasonable notice and opportunity to be heard, must be served upon the other party to the action. If the defendant is the applicant, such service must be upon the district attorney. If the people are the applicant, such service must be upon the defendant and upon his attorney if any. The respondent

party may file and serve a sworn written answer to the application.

§ 350.50 Examination of witnesses conditionally; determination of application.

1. Before ruling upon the application, the court may, in addition to examining the papers and hearing oral argument, make any inquiry it deems appropriate for the purpose of making findings of fact essential to the determination. For such purpose, it may examine witnesses, under oath or otherwise, subpoena or call witnesses and authorize the attorneys for the parties to do so.

2. If the court is satisfied that grounds for the application exist, it must order an examination of the witness conditionally at a designated time and place. Such examination must be conducted by the same court; except that, if it is to be held in another county, it may be conducted by a designated superior court of that county.

3. Upon ordering the examination, the court must cause a copy of the order to be served upon the respondent party and, if the defendant be such, upon his attorney also, and must either issue a subpoena for the witness' attendance thereat or authorize the applicant party's attorney to do so.

§ 350.60 Examination of witnesses conditionally; the examination proceeding.

1. The examination proceeding must be conducted and recorded in the same manner as would be required were the witness testifying at a trial. The witness must testify under oath. The applicant party must first examine the witness and the respondent party may then cross-examine him, with each party entitled to register objections and to receive rulings of the court thereon.

2. Upon conclusion of the examination, a transcript thereof must be certified and filed with the court which ordered the examination.

# ARTICLE 355

## USE IN A CRIMINAL PROCEEDING OF TESTIMONY GIVEN IN A PREVIOUS PROCEEDING



### § 355.10 Use in a criminal proceeding of testimony given in a previous proceeding; when authorized.

1. Under circumstances prescribed in this article, testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to section 90.50, or (c) an examination of such witness conditionally, conducted pursuant to article three hundred fifty, may, where relevant, be received and read into evidence at a subsequent proceeding in 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 within the state.

2. 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 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.

### § 355.20 Use in a criminal proceeding of testimony given in a previous proceeding; procedure.

1. 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 section 355.10, 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 sought to be introduced. Such moving party must further state facts showing that personal attendance of the witness in question is precluded by death, illness or incapacity or by the fact that he cannot

with due diligence be found within the state. In determining the motion, the court, with opportunity for both parties to be heard, may make any inquiry which it deems appropriate 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 objections thereto which he would be entitled to register if the witness were testiying in persons, and the court must rule thereon.

2. 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 as provided in section 350.20 provided that a foundation for such evidence is laid by other evidence demonstrating that personal attendance of such witness is precluded by death, illness or incapacity or by the fact that he cannot with due diligence be found within the state.

3. Previous testimony introduced in evidence pursuant to this section has, if accepted as true, the same force and effect as similarly accepted testimony given by a witness in person.

# ARTICLE 360

## SECURING TESTIMONY OUTSIDE THE STATE FOR USE IN PROCEEDING WITH THE STATE—EXAMINATION OF WITNESSES ON COMMISSION



### § 360.10 Examination of witnesses on commission; in general.

1. Under circumstances prescribed in this article, testimony material to a trial or pending trial of an accusatory instrument which charges a crime, may be taken by "examination on a commission" outside the state and received in evidence at such trial.

2. A "commission" is a process issued by a superior court designating one or more persons as commissioners and authorizing them to conduct a recorded examination of a witness or witnesses under oath, primarily on the basis of interrogatories annexed to the commission, and to remit to the issuing court the transcript of such examination.

### § 360.20 Examination of witnesses on commission; when commission issuable; form and content of application.

1. Upon a pre-trial application of a defendant who has pleaded not guilty to an indictment or other accusatory instrument which charges a crime, the superior court in which such indictment is pending, or a superior court in the county in which such other accusatory instrument is pending, may issue a commission for examination of a designated person as a witness in the action, at a designated place outside this state, if it is satisfied that (a) such person possesses information material to the action which in the interest of

justice should be disclosed at the trial, and (b) resides outside the state.

2. The application and moving papers must be in writing and must be subscribed and sworn to by the defendant or his attorney. A copy thereof must be served on the district attorney, with reasonable notice and opportunity to be heard. The moving papers must allege:

(a) The offense or offenses charged; and

(b) The status of the action; and

(c) The name of the prospective witness; and

(d) A statement that such prospective witness resides outside the state, and his address in the jurisdiction in which the examination sought is to occur; and

(e) A statement that he possesses information material to the action which in the interest of justice should be disclosed at the trial, together with a brief summary of the facts supporting such statement.

3. An application for issuance of a commission may request examination pursuant thereto of more than one person residing in the particular jurisdiction. In such case, it must contain allegations specified in subdivision two with respect to each such person, and the court must make separate rulings as to each.

§ 360.30 Examination of witnesses on commission; application by people for examination of witnesses.

1. Upon granting the defendant's application for issuance of a commission, the court may, upon application of the people, determine that the commission shall also authorize examination of a person or persons designated by the people, who reside in the jurisdiction in which the examination proceeding is to occur, if it is satisfied that such person or persons possess material information, reside outside the state and otherwise meet the standards for examination of witnesses on a commission as prescribed in subdivision one of section 360.20.

2. Such application and the the moving papers must be in writing, must be subscribed and sworn to by the district attorney, and copies thereof must be served upon the defendant and his attorney, with reasonable notice and opportunity to be heard. The moving papers must contain all of the allegations required upon a defendant's application, as specified in subdivision one of section 360.20.

§ 360.40 Examination of witnesses on commission; when commission issuable upon application of people.

When a commission has been issued upon application of a defendant pursuant to section 360.20, the court may, upon application of the people, issue another commission for examination, either in the same or another jurisdiction, of a person designated by the people, under the same conditions as prescribed in said section 360.20. In such case, the court may, upon application of the defendant, determine, in the manner provided in section 360,30, that such commission shall also authorize examination of a person or persons designated by the defendant.

§ 360.50 Examination of witnesses on commission; interrogatories.

1. Following an order for the issuance of a commission and the court's designation of the witness to be examined thereon, each party must prepare interrogatories or questions to be asked of each witness who is to be examined upon his or its request, and must submit the same to the court and serve a copy thereof upon the other party. Following such submission and service, such other party may in the same manner submit and serve cross-interrogatories or questions, to be asked of the witness following his examination upon the direct inquiry.

2. After all such interrogatories and cross-interrogatories have been submitted and served, the court may examine them and, with opportunity for counsel to be heard, exclude and strike any question which it considers irrelevant, incompetent or otherwise improper or violative of the rules of evidence which prevail at a criminal trial.

§ 360.60 Examination of the witnesses on commission; form and content of the commisssion.

1. The commission must be subscribed by the court and must contain:

(a) The name and address of each witness to be examined; and

(b) The name, or a descriptive title, of a commissioner or commissioners who, pursuant to subdivision two, are authorized to conduct the examination; and

(c) A statement authorizing such commissioner or commissioners to administer the oath to witnesses; and

(d) A direction that, upon completion of such examination, such commissioner or commissioners cause it to be transcribed and remit to the court the transcript, the commission, the interrogatories and all other pertinent instruments and documents.

2. The following persons may be designated commissioners:

(a) If the examination is to occur within the United States or any territory thereof, any attorney authorized to practice law in the specified jurisdiction or any other person authorized to administer oaths therein;

(b) If the examination is to occur in a foreign country, any diplomatic or consular agent or representative of the United States employed in such capacity in such country, or any officer of the armed forces.

3. The court must cause the commission to be delivered to a commissioner designated therein, together with a copy of this article.

§ 360.70 Examination of witnesses on commission; the examination.

The examination on the commission must be conducted as follows:

1. Each witness must testify under oath, and the examination must be recorded and transcribed.

2. Each witness must first be asked all the questions contained in the interrogatories submitted by the party requesting his examination. He must then be asked all the questions contained in the cross-interrogatories, if any, submitted by the other party.

3. The defendant has a right to be represented by counsel at the examination, and the district attorney also has a right to be present, but both such rights may be waived. Upon the conclusion of the questioning of a witness upon the written interrogatories, he may be further examined by the attorney or representative of the party who requested his examination, and may then be cross-examined by the attorney or representative of the adverse party. Each such attorney or representative may register objections to the authority or qualifications of the commissioner, to the manner in which the examination is conducted, and to the admissibility of evidence, and all such objections must be recorded and transcribed.

4. Documentary or other physical evidence may be produced and submitted by a witness. Such evidence must be subscribed or otherwise identified by the witness, and certified by a commissioner and annexed to the transcript of the examination as a part of the record.

5. After the examination is transcribed, the commissioner or commissioners must subscribe and certify the transcript as an accurate record of the proceedings, and must then remit such transcript and

all other pertinent instruments, documents and evidence to the court which issued the commission, in accordance with the directions thereof.

§ 360.80 Examination of witnesses on commission; use at trial of transcript of examination.

1. When the transcript and record of the examination on commission are received by the superior court, they must be filed therein if such court be the trial court, and, if it is not, transmitted to the trial court. A copy of the transcript must be delivered by the trial court to each party.

2. Upon the trial of the action, either party may, subject to the provisions of subdivision three, introduce and read into evidence the transcript or that portion thereof containing the testimony of a witness examined on the commission.

3. At any time prior to the introduction of such evidence, the trial court may examine the transcript and, upon according both parties opportunity to be heard and to register objections, may exclude and strike therefrom irrelevant, incompetent or otherwise inadmissible testimony. While the transcript or any portion thereof is being read into evidence at the trial by a party, the other party may register any objection or protest that he would be entitled to register were the witness testifying in person, regardless of whether such protest has previously been raised and passed upon by the court.

# TITLE U

## PROCEDURES FOR SECURING EVIDENCE BY MEANS OF COURT ORDER AND FOR SUPPRESSING EVIDENCE UNLAWFULLY OR IMPROPERLY OBTAINED

## ARTICLE 365

### SEARCH WARRANTS



§ 365.05 Search warrants; in general; definition.

1. Under circumstances prescribed in this article, a local criminal court may, upon application of a police officer, a district attorney or other public servant acting in the course of his official duties, issue a search warrant.

2. A search warrant is a court order and process directing a police officer to conduct a search of designated premises, or of a designated vehicle, or of a designated person, for the purpose of seizing designated property or kinds of property, and to deliver any property so obtained to the court which issued the warrant.

§ 365.10 Search warrants; property subject to seizure thereunder.

Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it:

1. Is stolen; or
2. Is unlawfully possessed; or
3. Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or
4. Constitutes evidence or tends to demonstrate that an offense

was committed or that a particular person participated in the commission of an offense.

§ 365.15 Search warrants; what and who are subject to search thereunder.

1. A search warrant must direct a search of any or all of the following:

(a) A designated or described place or premises;

(b) A designated vehicle, as that term is defined in section 10.00 of the penal law;

(c) A designated person.

2. A search warrant which directs a search of a designated or described place, or premises or vehicle, may also direct a search of any or all persons present therein.

§ 365.20 Search warrants; where executable.

1. A search warrant issued by a superior court judge sitting as a local criminal court may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

2. A search warrant issued by any other local criminal court may authorize a search to be conducted only in the county of issuance or an adjoining county and may be executed pursuant to its terms only in such counties.

§ 365.25 Search warrants; to whom addressable and by whom executable.

1. A search warrant must be addressed to a police officer whose geographical area of employment embraces or is embraced or partially embraced by the county of issuance. The warrant need not be addressed to a specific police offcer but may be addressed to any police officer of a designated classification, or to any police officer of any classification employed or having general jurisdiction to act as a police officer in the county.

2. A police officer to whom a search warrant is addressed, as provided in subdivision one, may execute it pursuant to its terms anywhere in the county of issuance or an adjoining county, and he may execute it pursuant to its terms in any other county of the state in which it is executable if (a) his geographical area of employment embraces the entire county of issuance or (b) he is a member of the police department or force of a city located in such county of issuance.

§ 365.30 Search warrants; when executable.

1. A search warrant must be executed not more than ten days after the date of issuance and it must thereafter be returned to the court without unnecessary delay.

2. A search warrant may be executed on any day of the week and in the absence of express authorization in the warrant, as provided in section 364.55, it may be executed only between the hours of 6:00 A.M. and 9:00 P.M.

§ 365.35 Search warrants; the application.

1. An application for a search warrant must be in writing and must be made, subscribed and sworn to by a public servant specified in subdivision one of section 365.05.

2. The application must contain:

(a) The name of the court and the name and title of the applicant; and

(b) A statement that there is reasonable cause to believe that property of a kind or character described in section 365.10 may be found in designated premises or in a designated vehicle or upon a designated person; and

(c) Allegations of fact supporting such statements. Such allegations of fact may be based upon personal knowledge of the applicant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The applicant may also submit depositions of other persons containing allegations of fact supporting or tending to support those contained in the application; and

(d) A request that the court issue a search warrant directing a search for and seizure of the property in question.

3. The application may also contain:

(a) A request that the search warrant be made executable at any hour of the day or night, upon the ground that there is reasonable cause to believe that (i) it cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith; and

(b) A request that the search warrant authorize the executing police officer to enter premises to be searched without giving notice of his authority and purpose, upon the ground that there is reasonable cause to believe that (i) the property sought may be easily and quickly destroyed or disposed of, or

(ii) the giving of such notice may endanger the life or safety of the executing police officer or another person.

Any request made pursuant to this subdivision must be accompanied and supported by allegations of fact of a kind prescribed in paragraph (c) of subdivision two.

§ 365.40 Search warrants; determination of application.

1. In determining an application for a search warrant the court may examine under oath any person whom it believes may possess pertinent information. Any such examination must be either recorded or summarized on the record by the court.

2. If the court is satisfied that there is reasonable cause to believe that property of a kind or character described in section 365.10, and designated in the application, may be found in the place, premises or vehicle or upon the person designated in the application, it may grant the application and issue a search warrant directing a search of the appropriate premises, vehicle or person and a seizure of the designated property. If the court is further satisfied that grounds exist for authorizing the search to be made at any hour of the day or night, or without giving notice of the police officer's authority and purpose, as prescribed in subdivision three of section 365.35, it may make the search warrant executable accordingly.

§ 365.45 Search warrants; form and content.

A search warrant must contain:

1. The name of the issuing court and the subscription of the issuing judge; and

2. The name, department or classification of the police officer to whom it is addressed; and

3. A description of the property which is the subject of the search; and

4. A designation of the premises, vehicle or person to be searched, by means of address, ownership, name or any other means essential to identification with certainty; and

5. A direction that the warrant be executed between the hours of 6:00A.M. and 9:00 P.M., or, where the court has specially so determined, an authorization for execution thereof at any time of the day or night; and

6. An authorization, where the court has specially so determined, that the executing police officer enter the premises to be searched without giving notice of his authority and purpose; and

7. A direction that the warrant and any property seized pursuant thereto be returned and delivered to the court without unnecessary delay.

§ 365.50 Search warrants; execution thereof.

1. In executing a search warrant directing a search of premises or a vehicle, a police officer must, except as provided in subdivision two, give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof before entry and show him the warrant or a copy thereof upon request. If he is not thereafter admitted, he may forcibly enter such premises or vehicle and may use against any person resisting his entry or search thereof as much physical force, other thand eadly physical force, as is necessary to execute the warrant; and he may use deadly physical force if he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

2. In executing a search warrant directing a search of premises or a vehicle, a police officer need not give notice to anyone of his authority and purpose, as prescribed in subdivision one, but may promptly enter the same if:

(a) Such premises or vehicle are at the time unoccupied or reasonably believed by the officer to be unoccupied; or

(b) The search warrant expressly authorizes entry without notice.

3. In executing a search warrant directing or authorizing a search of a person, a police officer must give, or make reasonable effort to give, such person notice of his authority and purpose and show him the warrant or a copy thereof upon request. If such person thereafter resists or refuses to permit the search, the officer may use, against him or any other person aiding in the resistance, as much physical force, other than deadly physical force, as is necessary to execute the warrant.

4. Upon seizing property pursuant to a search warrant, a police officer must write and subscribe a receipt itemizing the property taken and containing the name of the court by which the warrant was issued. If property is taken from a person, such receipt must be given to such person. If property is taken from premises or a vehicle, such receipt must be given to the owner thereof if he is present, or if he is not, to an occupant or person who is present; or if no person is present, the officer must leave such a receipt in the premises or vehicle from which the property was taken.

5. Upon seizing property pursuant to a search warrant, a police officer must without unreasonable delay return to the court the warrant and the property, and must file therewith a written inventory of such property, subscribed and sworn to by such officer.

§ 365.55 Search warrants; disposition of seized property.

1. Upon receiving property seized pursuant to a search warrant, the court must either:

(a) Retain it in the custody of the court pending further disposition thereof pursuant to subdivision two or some other provision of law; or

(b) Direct that it be held in the custody of the person who applied for the warrant, or of the police officer who executed it, or of the governmental or official agency or department by which either such public servant is employed, upon condition that it be returned to such court upon order thereof or delivered to any court upon order thereof.

2. A local criminal court which retains custody of such property must, upon request of another criminal court in which a criminal action involving or relating to such property is pending, cause it to be delivered thereto.

# ARTICLE 370

## EAVESDROPPING WARRANTS



### § 370.00 Eavesdropping warrants; definitions of terms.

1. An "eavesdropping warrant" means an order of a judge of a superior court authorizing wiretapping or mechanical overhearing of conversation, as those terms are defined in section 250.00 of the penal law.

2. "District attorney", "attorney general" and "chairman of the state commission of investigation", for purposes of this article only, mean the incumbent in such public office, or that person designated to act for such officer and perform his official function in and during his actual absence or disability.

3. "Evidence essential to the prosecution" means factual material which in itself constitutes legally admissible evidence, or which may lead with a high degree of probability to other facts which will constitute legally admissible evidence, without which evidence it is reasonable to believe that a criminal action cannot be successfully prosecuted.

4. "Information essential to the apprehension of the perpetrator" means factual material which may lead with a high degree of probability to the arrest of a person who there is reasonable cause to believe committed a particular crime.

5. "Nature of the conversation" means its subject, import or purpose.

6. "Private place or premises" means an enclosure, including a vehicle as defined by section 10.00 of the penal law, not open to the public, from which a police officer would be barred in the absence of a lawful warrant.

7. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

§ 370.05 Eavesdropping warrants; in general.

Under circumstances prescribed in this article, a judge of a superior court may, upon ex parte application of a district attorney, of the attorney general, or of the chairman of the state commission of investigation, issue an eavesdropping warrant.

§ 370.10 Eavesdropping warrants; when issuable.

An eavesdropping warrant may issue only upon a sworn application in conformity with this article, and upon reasonable cause to believe that evidence essential to the prosecution of a particular crime, or information essential to the apprehension of the perpetrator thereof, may be thereby obtained.

§ 370.15 Eavesdropping warrants; application.

1. An application ex parte for an eavesdropping warrant must be in writing, subscribed and sworn to by an applicant authorized by this article.

2. The application must contain:

(a) A statement of facts establishing reasonable cause to believe that a particularly described crime has been, is being, or is about to be committed; and

(b) A statement of facts establishing reasonable cause to believe that conversation of a particularly described person which will constitute evidence of such crime, or which will aid in the apprehension of the perpetrator, will occur in a particularly described place or premises, or over particularly described telephone or telegraph lines; and

(c) A particular description of the nature of the conversation sought to be overheard; and

(d) A statement that the conversation sought constitutes evidence essential to the prosecution of a particular crime or to the apprehension of the perpetrator thereof, and that such conversation is not legally privileged; and

(e) A statement of the period of time for which the eaves-

dropping is required to be maintained. If practicable, the application should designate hours of the day or night during which the conversation may be reasonably expected to occur. If the nature of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described conversation has been first obtained, the application must specifically state facts establishing reasonable cause to believe that additional conversation of the same nature will occur thereafter; and

(f) If it is reasonably necessary to make a secret entry upon a private place or premises in order to install an eavesdropping device to effectuate the purposes of the application, a statement to such effect describing generally the device to be installed; and

(g) If a prior application has been submitted or a warrant previously obtained for eavesdropping, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

(h) A statement of the belief of the applicant that the crime being investigated or prosecuted is of serious significance to the welfare of the community or involves the risk of substantial harm to individuals, and that the issuance of the eavesdropping warrant would be in the interests of justice.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the fact alleged, it must be so stated. If the facts establishing such reasonable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informant, or the reliability of the informantion supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof must be made available for examination by the judge, if requested. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source thereof and reason therefor specified.

§ 370.25 Eavesdropping warrants; application; to whom made.

Application for an eavesdropping warrant may be made to a judge of a superior court in the county where the eavesdropping is to occur or of the county where the office of the applicant is located; except that for these purposes the office of the attorney general shall be deemed to be located in both New York and Albany counties and the office of the chairman of the state commission of investigation shall be deemed to be located in New York county.

§ 370.30 Eavesdropping warrants; application; how determined.

1. If the application conforms to section 370.15, the judge may examine under oath or otherwise interrogate any person for the purpose of determining whether grounds exist for the issuance of the warrant pursuant to section 370.10. Any such examination or interrogation must be either recorded or summarized in writing.

2. If satisfied that grounds exist for the issuance of a warrant pursuant to section 370.10, the judge may grant the application and issue an eavesdropping warrant, in accordance with section 370.35. Copies of both such instruments must be retained by the issuing judge.

3. If the application does not conform to section 370.15, or if the judge is not satisfied that grounds exist for the issuance therefor, the application must be denied.

§ 370.35 Eavesdropping warrants; form and content. An eavesdropping warrant must contain:

1. The subscription and title of the issuing judge; and

2. The date of issuance, date of effect, and termination date. The effective period of the warrant from the date of effect to the termination date shall not exceed fifteen days. If the effective period of the warrant is not to terminate upon the acquisition of particular evidence or information, the warrant must so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which eavesdropping may be conducted; and

4. A particular description of the nature of the conversation sought to be obtained by eavesdropping, including a statement of the crime to which it relates; and

5. An express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if such entry is necessary to execute the warrant.

§ 370.40 Eavesdropping warrants; renewals.

1. At any time prior to the expiration of an eavesdropping warrant or a renewal thereof, the applicant may apply to any judge of a superior court in the county where the original warrant was issued for a renewal thereof with respect to the same person, place, premises, or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the eavesdropping thus far conducted. In addition, it must set forth present grounds for extension in conformity with the requirements of section 370.10.

2. Upon such application, the judge may issue an order renewing the eavesdropping warrant and extending the authorization for a specified period, as provided in subdivision two of section 370.35. Such an order shall specify the basis for the finding of present reasonable cause for the issuance thereof.

§ 370.45 Eavesdropping warrants; manner and time of execution.

1. An eavesdropping warrant may be executed pursuant to its terms anywhere in the state.

2. Such warrant may be executed by the authorized applicant personally or by another public servant designated by him for the purpose.

3. The warrant may be executed only according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof; provided, however, that unless specifically otherwise ordered, the authorization must terminate upon the acquisition of the conversations described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, eavesdropping must cease at once, and any device installed for the purpose of the eavesdropping must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

§ 370.50 Eavesdropping warrants; return.

Within ten days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant, which shall consist of a report in writing, subscribed and sworn by the authorized person who conducted or supervised the execution of the warrant, summarizing the conversations overheard or recorded, which may be thereafter used in criminal prose-

cution, lead to other evidence, or information leading to the apprehension of the perpetrator of a crime.

§ 370.52 Eavesdropping warrants; notice.

Within thirty days after the filing of the return pursuant to section 370.50, the applicant must serve upon the person whose conversation was overheard pursuant to an eavesdropping warrant notice of the issuance and execution of such warrant, together with a statement of the subject matter of the investigation; except that, upon a showing of exigent circumstances, the issuing judge may authorize deferment of the notice until such time as may be just and appropriate in the circumstances.

§ 370.55 Eavesdropping warrants; reports.

All superior courts shall make annual reports on the operation of this article to the judicial conference; provided, however, that no report under this section shall be made on any eavesdropping until after the return thereon has been made pursuant to section 370.50. Upon application of the applicant, and for good cause shown, a report on a particular eavesdropping may be deferred by the judge until such time as the investigation has been concluded, but in no case may it be omitted from more than two successive annual reports. The reports must contain (1) the number of applications made; (2) the number of warrants issued; (3) the effective periods of such warrants; (4) the number and duration of any renewals thereon; (5) the crime in connection with which the conversation was sought; (6) the name of the applicant; and (7) such other and further particulars as the judicial conference may require.

# ARTICLE 375

## MOTION TO SUPPRESS EVIDENCE



§ 375.10 Motion to suppress evidence; definitions of terms.

As used in this article, the following terms have the following meanings:

1. "Defendant" means a person who has been, or is about to be, or is likely to be charged by an accusatory instrument with the commission of an offense.

2. "Evidence," when referring to matter in the possession of or available to a prosecutor, means any tangible property or potential testimony which may be offered in evidence in a criminal action.

3. "Potential testimony" means information or factual knowledge of a person who is or may be available as a witness.

§ 375.20 Motion to suppress evidence; in general; grounds for.

Upon motion of a defendant claiming to be aggrieved by unlawful or improper acquisition of evidence, and having reasonable cause to believe that such evidence may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant; or

2. Consists of a record or potential testimony reciting or describing declarations or conversations overheard or recorded by means of unlawful eavesdropping, as defined in sections 250.00 and 250.05 of the penal law, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant; or

3. Consists of a record or potential testimony reciting or describing a statement of such defendant involuntarily made within the meaning of section 30.80; or

4. Was obtained as a result of other evidence unlawfully or improperly obtained in a manner specified in subdivisions one, two and three.

§ 375.30 Motion to suppress evidence; notice to defendant of intention to offer evidence.

1. Whenever the people intend to offer at a trial evidence which if unlawfully or improperly obtained would be suppressable upon motion of the defendant pursuant to subdivisions two or three of section 375.20, or other evidence obtained as a result of such evidence which would be similarly suppressable pursuant to subdivision four of section 375.20, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

2. Such notice must be served before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 375.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice during trial, and in such case it must accord the defendant reasonable opportunity to make a suppression motion during trial pursuant to subdivision two of section 375.40.

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible pursuant to subdivision two of section 375.70.

§ 375.40 Motion to suppress evidence; when made and determined.

1. A motion to suppress evidence must, except as provided in section 375.30 and in subdivision two of this section, be made with reasonable diligence prior to the commencement of any trial in which it is allegedly to be offered, and it may be made before as well as after a criminal action has been commenced against the defendant.

2. The motion may be made for the first time during trial when, owing to previous unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable

opportunity to make the motion before trial, or when the evidence which he seeks to suppress is of a kind specified in section 375.30 and he was not served by the people, as provided in said section 375.30, with a pretrial notice of intention to offer such evidence at the trial.

3. When the motion is made before trial, the trial may not be commenced until determination of the motion; except that in the case of a pre-trial motion made in a local criminal court, such court must, upon request of the people, determine it during trial.

4. If after a pre-trial determination and denial of the motion the court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial.

§ 375.50 Motion to suppress evidence; in what courts made.

1. The particular court in which a motion to suppress evidence must be made are as follows:

(a) If (i) an indictment has been filed, or (ii) the defendant has been held by a local criminal court for the action of a grand jury, or (iii) the action is otherwise pending or in progress before a grand jury, the motion must be made in the superior court in which such indictment is pending or which impaneled such grand jury;

(b) If a currently undetermined felony complaint has been filed with a local criminal court, the motion must be made in the superior court which would have trial jurisdiction of the offense or offenses charged were an indictment therefor to result;

(c) If an information, a prosecutor's information or a misdemeanor complaint has been filed with a local criminal court, the motion must be made in such court;

(d) In any other circumstances, the motion must be made in a superior court of the county in which a criminal action involving the evidence in question is allegedly about to be commenced.

2. If after a motion has been made in and determined by a superior court a local criminal court acquires trial jurisdiction of the action by reason of an information or a prosecutor's information filed therewith, such superior court's determination is binding upon

such local criminal court. If, however, the motion has been made in but not yet determined by the superior court at the time of the filing of such information or prosecutor's information, the superior court may not determine the motion but must refer it to the local criminal court of trial jurisdiction.

§ 375.60 Motion to suppress evidence; procedure.

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three of section 375.20.

4. If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath. Upon such hearing, the ordinary exclusionary rules of evidence applicable to trials of criminal actions are inapplicable to the extent that evidence tending to demonstrate that the evidence sought to be suppressed was or was not unlawfully or improperly obtained in a manner

specified in section 375.20 is admissible even though of a hearsay nature or otherwise incompetent by trial standards.

5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.

6. Upon any hearing as prescribed in subdivisions four and five, the people have the burden of proving by a preponderance of the evidence that the evidence sought to be excluded was not obtained in an unlawful or improper manner or under circumstances precluding admissibility thereof as specified in section 375.20.

7. In determining the motion on the basis of a hearing, the court must set forth upon the record its finding of fact.

§ 375.70 Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

1. Upon granting a motion to suppress evidence, the court must order that the evidence in question be excluded from evidence in any pending or prospective criminal action against the defendant. When the order is based upon the ground specified in subdivision one of section 375.20 and excludes tangible property unlawfully taken from the defendant's possession, and when such property is not otherwise subject to lawful retention, the court may, upon request of the defendant, further order that such property be restored to him.

2. An order finally denying a motion to suppress evidence renders such evidence admissible in any pending or prospective criminal action against the defendant. Such an order may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

3. A motion to suppress evidence made pursuant to this article is the exclusive method of assailing the admissibility of evidence claimed to have been unlawfully or improperly obtained in a manner specified in section 375.20, and a defendant who does not make such a motion before or in the course of a criminal action waives his right to judicial determination of any such contention.

4. Nothing contained in this article precludes a defendant from attempting to establish at a trial that evidence introduced by the

people of a pre-trial statement made by him should be disregarded by the jury or other trier of the facts on the ground that such statement was obtained in an improper manner as specified in subdivision three of section 375.20. Even though the issue of the admissibility of such evidence was not submitted to the court, or was determined adversely to the defendant upon motion, the defendant may adduce trial evidence and otherwise contend that the statement was improperly obtained. In the case of a jury trial, the court must submit such issue to the jury under instructions to disregard such statement or evidence upon a finding that it was improperly obtained.

# TITLE W

## SPECIAL PROCEEDINGS WHICH REPLACE, SUSPEND OR ABATE. . CRIMINAL ACTIONS

## ARTICLE 400

### YOUTHFUL OFFENDER TREATMENT



§ 400.05 Youthful offender treatment; definitions of terms.

As used in this article, the following terms have the following meanings:

1. "Youth" means a person charged by indictment or information with a crime who was at least sixteen years old and less than nineteen years old at the time of his alleged commission of such crime.

2. "Eligible youth" means a youth who is eligible for youthful offender treatment. Every youth is so eligible unless he (a) is charged by indictment with a class A felony, or (b) has a previous judgment of conviction for a felony.

3. "Youthful offender information" means an instrument defined in section 400.25.

4. "Youthful offender verdict" means a decision of a court after a trial of a youthful offender information pronouncing the defendant guilty or not guilty of being a youthful offender as charged in such information or a count thereof.

5. "Youthful offender conviction" means the entry of a plea of guilty to or a verdict of guilty upon a youthful offender information or a count thereof.

6. "Youthful offender adjudication" means or consists of a youthful offender conviction and the sentence imposed thereon.

7. "Youthful offender treatment" means the substitution of a youthful offender information for an indictment or an information, and the prosecution of such youthful offender information to adjudication or other final disposition.

8. "Information" means (a) an information which charges a misdemeanor, or (b) a prosecutor's information which charges a misdemeanor, or (c) a misdemeanor complaint.

§ 400.10 Youthful offender treatment; in general.

Under circumstances prescribed in this article, a person charged with a crime by indictment or information may, instead of being prosecuted criminally thereon, be accorded youthful offender treatment.

§ 400.15 Youthful offender treatment; sealing of accustory instrument.

When an indictment, information or felony complaint against an eligible or apparently eligible youth is submitted to a court, the court must order that it be filed as a sealed instrument, though only with respect to the public, pending a determination whether the defendant is to be accorded youthful offender treatment.

§ 400.20 Youthful offender treatment; when accorded.

1. Upon arraignment of a defendant who is an eligible youth upon an indictment or an information, the court, in addition to informing the defendant of his rights with respect to the criminal action, as required by section 85.05 and 105.30, must inform him that he is eligible for youthful offender treatment, and the court must, in the absence of a waiver of such instructions by a defendant represented by counsel, explain to him the nature, consequences and significance of youthful offender treatment. The court must then ask the defendant whether he requests youthful offender treat-

ment instead of criminal prosecution. The defendant may make such request at any time before entry of a plea to the accusatory instrument. If the defendant does not so request, the criminal action upon the indictment or information must proceed. If the defendant does request youthful offender treatment, the action must proceed as provided in subdivisions two, three and four.

2. If the defendant (a) is not charged with a felony, and (b) has not previously been convicted of a crime or adjudged a youthful offender, he must be accorded youthful offender treatment.

3. If either the defendant (a) is not charged with a felony but has previously been convicted of a crime or been adjudged a youthful offender, or (b) though charged with a felony, has not previously been convicted of a crime or adjudged a youthful offender, the court must, subject to the provisions of subdivision five, order an investigation of the defendant and, upon completion thereof, either approve or disapprove the request for youthful offender treatment.

4. If the defendant both (a) is charged with a felony and (b) has previously been convicted of a crime or adjudged a youthful offender, the court may, subject to the provisions of subdivision five, either order an investigation of the defendant and proceed in the manner prescribed in subdivision three, or decline to order such investigation and deny the request for youthful offender treatment.

5. Upon ordering an investigation of the defendant pursuant to subdivision three or four, the court may direct that it include a physical and mental examination of the defendant. If the defendant does not consent to such examination, the court may retract its order of examination and deny the request for youthful offender treatment.

6. No statement made by a defendant in the course of an examination or investigation ordered pursuant to this section is admissible as evidence against him in any criminal action or other legal proceeding; provided that upon any subsequent sentencing of the defendant, either as a youthful offender or upon a conviction for an offense, either in the action being prosecuted or in a subsequent action, the sentencing court may take such a statement into consideration.

§ 400.25 Youthful offender treatment; youthful offender information.

1. Upon ordering that a defendant be accorded youthful offender

treatment, the court must direct the district attorney to file with the court a youthful offender informaion agains the defendant, and the filing thereof constitutes a dismissal of the original indictment or information.

2. A youthful offender information is a written instrument, subscribed by the district attorney of the county, charging a youth with being a youthful offender by reason of having engaged in designated conduct which, though not charged as such, constitutes a crime. The factual allegations charging such conduct must be the same as or equivalent to those of the indictment or information from which the youthful offender information is derived, or if the latter was a multiple count instrument, the same as or equivalent to the factual allegations of at least one count thereof which charged a crime. A youthful offender information derived from a multiple count indictment or information may, in the manner of the latter, contain two or more counts, each charging the defendant with being a youthful offender. It may also charge two or more defendants jointly pursuant to the rules governing joinder of defendants in a single indictment or information.

§ 400.27 Youthful offender treatment; arraignment upon youthful offender information.

1. Upon the filing of the youthful offender information, the defendant must be arraigned thereon. Upon such arraignment, the court must furnish him with a duplicate copy of the youthful offender information. If the defendant is not represented by counsel, the court must remind him, by instructions equivalent to those required upon arraignment upon the original indictment or information, of his rights to the aid of counsel, to an adjournment for the purpose of obtaining counsel, to communicate with persons for such purpose and to assignment of counsel in case of financial inability to obtain the same.

2. Upon such arraignment, the court must issue an order either releasing the defendant on his own recognizance or fixing bail. The provisions of title P of this chapter, governing, with respect to criminal actions and proceedings, the issuance of securing orders, applications for recognizance or bail, the fixing of bail, forms of bail and bail bonds and other such matters, are, wherever appropriate, applicable to prosecutions of youthful offender informations. With respect to such matters, the youthful offender prosecution is deemed a continuation of the criminal action from which it is derived, and the court's order of recognizance or bail upon arraign-

ment on the youthful offender information may be in the form of a direction continuing the effectiveness of the last previous order issued during the pendency of the criminal action upon the indictment or information, and in such case a bail bond posted in satisfaction of a previous order which fixed bail remains effective during the youthful offender prosecution unless it is revoked or vacated prior to the termination thereof or unless the terms of such bond expressly limit its effectiveness to the purely criminal phases of the action.

§ 400.30 Youthful offender treatment; the plea; pre-pleading and pre-trial procedure.

1. The following pleas may be entered to a youthful offender information:

(a) Not guilty; or

(b) Guilty of being a youthful offender as charged; or

(c) In the case of a multiple count instrument, guilty of being a youthful offender as charged in one or more, but not all, of the counts contained therein, provided that the court approves and the people consent to the entry of such plea.

2. All pre-pleading and pre-trial motion practice and procedure applicable to criminal prosecutions of indictments and informations is, where appropriate, applicable to prosecutions of youthful offender informations.

§ 400.35 Youthful offender treatment; the trial.

A trial of a youthful offender information must be conducted by one judge of the court in which it is pending, without a jury. Such trial must be conducted pursuant to the rules of evidence applicable to criminal proceedings, as prescribed in article thirty, and pursuant to the same motion practice and general procedure applicable to a non-jury trial of an indictment or a non-jury single judge trial of an information, as prescribed in subdivisions one through four of section 165.20 and subdivisions one through four of section 180.10.

§ 400.40 Youthful offender treatment; verdict.

1. The court's verdict upon a trial of a youthful offender information must be one of the following:

(a) Guilty as charged; or

(b) Guilty as charged in one or more, but not all, of the counts of a multiple count instrument. In such case, the court must specify on the record the count or counts upon which the

defendant is found guilty, and the verdict upon every other count is deemed to be "not guilty"; or

(c) Not guilty.

2. A verdict of guilty with respect to any count of a youthful offender information must be based upon a finding that every fact alleged in such count which is essential to establish commission by the defendant of the crime involved was proved beyond a reasonable doubt.

§ 400.45 Youthful offender treatment; procedure from verdict to sentence.

The provisions of article one hundred seventy, governing procedure in criminal actions upon indictments from verdict to sentence, are, wherever appropriate, applicable to youthful offender actions conducted pursuant to this article.

§ 400.50 Youthful offender treatment; sentence.

1. Upon a youthful offender conviction, the court must impose one of the following sentences prescribed by the penal law:

(a) A sentence of probation;

(b) A sentence of conditional discharge;

(c) A sentence of unconditional discharge;

(d) A reformatory or alternative local reformatory sentence of imprisonment;

(e) A sentence of imprisonment authorized for a class B misdemeanor;

(f) Where otherwise authorized, a sentence of certification to the care and custody of the narcotic addiction control commission.

2. For the purposes of determining the period of the sentence, the criteria to be used, the conditions to be imposed, the manner of revocation, the place of commitment and other such incidents of sentence, the sentences provided in paragraphs (a), (b), (c), (d) and (f) of subdivision one are governed by the penal law provisions applicable in the case of a sentence for a felony.

§ 400.55 Youthful offender treatment; post-judgment motions and appeals.

The provisions of title M of this chapter, governing the making and determination of post-judgment motions and the taking and determination of appeals in criminal cases, apply to youthful offender actions and proceedings conducted pursuant to this article wherever such provisions can reasonably be so applied.

§ 400.60 Youthful offender treatment; privacy of proceedings.

1. Upon the filing of a youthful offender information pursuant to this article, all proceedings thereon may, in the discretion of the court, be conducted in private.

2. When an elibible or apparently eligible youth is arraigned upon an indictment, an information or a felony complaint, such arraignment and all proceedings in the action from the time thereof to the time such defendant is accorded or denied youthful offender treatment may, in the discretion of the court, be conducted in private.

§ 400.65 Youthful offender treatment; effect of adjudication; records, finger-prints and photographs.

1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority.

2. Police and court records concerning a person adjudged a youthful offender are not open to public inspection. Fingerprints, photographs and physical descriptions of a youth arrested for a crime and ultimately adjudged a youthful offender, and statistical data of a kind ordinarily received by the New York state identification and intelligence system with respect to arrests of persons for offenses, must be forwarded to such agency and retained by it in its files as confidential information. Such records and papers may be inspected only (a) by an institution to which a person adjudged a youthful offender has been committed, or (b) upon order of the court in which the youthful offender adjudication occurred.

# ARTICLE 405

## MENTAL DISEASE OR DEFECT EXCLUDING FITNESS TO PROCEED



Section 405.10 Fitness to proceeding; definitions.

As used in this article, the following terms have the following meanings:

1. "Incapacitated person" means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.

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

3. "Order of examination" means an order issued to an appropriate director by a criminal court wherein a criminal action is pending against a defendant, directing that such defendant be examined for the purpose of determining if he is an incapacitated person.

4. "Commissioner" means the state commissioner of mental hygiene.

5. "Director" means (a) the director of a state hospital operated by the department of mental hygiene, or (b) the director of the division of psychiatry of the department of hospitals of the city of New York, or (c) the director of a hospital operated by any local government of the state that has been certified by the commissioner as having adequate facilities to examine a defendant to determine if he is an incapacitated person, or (d) the director of community mental health services.

6. "Qualified psychiatrist" means a physician who is certified as a qualified psychiatrist under section twenty-seven of the mental hygiene law.

7. "Certified psychologist" means a person who is registered as a certified psychologist under article one hundred fifty-three of the education law.

8. "Psychiatric examiner" means a qualified psychiatrist or a certified psychologist who has been designated by a director to examine a defendant pursuant to an order of examination.

9. "Examination report" means a report made by a psychiatric examiner wherein he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his own defense. Where an order of examination has been issued by a superior court, the psychiatric examiner must also set forth his opinion as to whether the defendant is or is not a dangerous incapacitated person, and if he finds that the defendant is a dangerous incapacitated person, he must set forth detailed statement of the reasons for his opinion. The judicial conference and the commissioner must jointly adopt the form of the examination report and prescribe the number of copies thereof that must be submitted to the court by the director.

§ 405.20 Fitness to proceed; generally.

1. The appropriate director to whom a criminal court issues an order of examination must be determined in accordance with rules jointly adopted by the judicial conference and the commissioner. Upon receipt of an examination order, the director must designate two qualified psychiatrists, of whom he may be one, to examine the defendant to determine if he is an incapacitated person, except that if the director is of the opinion that the defendant may be mentally defective, he may designate one qualified psychiatrist and one certified psychologist to examine the defendant. In conducting their examination, the psychiatric examiners may employ any method which is accepted by the medical profession for the examination of persons alleged to be mentally ill or mentally defective. The court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination.

2. When the defendant is not in custody at the time a court issues an order of examination, because he was theretofore released on bail or on his own recognizance, the court may direct that the examination be conducted on an out-patient basis, and at such time and place as the director shall designate. If, however, the director informs the court that hospital confinement of the defendant is necessary for an effective examination, the court may direct that the defendant be confined in a hospital designated by the director until the examination is completed.

3. When the defendant is in custody at the time a court issues an order of examination, the examination must be conducted at the place where the defendant is being held in custody. If, however, the director determines that hospital confinement of the defendant is necessary for an effective examination, the sheriff must deliver the defendant to a hospital designated by the director and hold him in custody therein, under sufficient guard, until the examination is completed.

4. Hospital confinement under subdivisions two and three shall be for a period not exceeding sixty days, except that, upon application of the director, the court may authorize confinement for an additional period not exceeding thirty days if it is satisfied that a longer period is necessary to complete the examination. During the period of hospital confinement, the physician in charge of the hospital may administer or cause to be administered to the defendant such emergency psychiatric, medical or other therapeutic treatment as in his judgment should be administered.

5. Each psychiatric examiner, after he has completed his examination of the defendant, must promptly prepare an examination report and submit it to the director. If the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, the director must designate another qualified psychiatrist to examine the defendant to determine if he is an incapacitated person. Upon receipt of the examination reports, the director must submit them to the court that issued the order of examination. The court must furnish a copy of the reports to counsel for the defendant and to the district attorney.

6. When a defendant is subjected to examination or treatment pursuant to an order issued by a criminal court in accordance with this article, any statement made by him for the purpose of such examination or treatment shall be inadmissible in evidence against him in any criminal action on any issue other than that of his

mental condition, but such statement is admissible upon that issue whether or not it would otherwise be deemed a privileged communication.

§ 405.30 Fitness to proceed; order of examination.

1. At any time after a defendant is arraigned upon an indictment, an information, a misdemeanor complaint, or a prosecutor's information and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he is held for the action of the grand jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person.

2. When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by counsel for the defendant or by the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed; if the court is not so satisfied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director.

3. When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, or when the examination reports submitted to the superior court show that each psychiatric examiner is of the opinion that the defendant is a dangerous incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity or dangerousness and it must conduct such hearing upon motion therefor by counsel for the defendant or by the district attorney.

4. When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior courts show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.

§ 405.40 Fitness to proceed; local criminal court accusatory instrument.

1. When a local criminal court, following a hearing conducted pursuant to subdivision three or four of section 405.30, is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed. If it is satisfied that the defendant is an incapacitated person, or if no motion for a hearing is made, such court must issue a final or temporary order of observation committing him to the custody of the commissioner for observation, care and treatment in an appropriate institution for a period not to exceed ninety days from the date of the order. When an information, a misdemeanor complaint or a prosecutor's information has been filed against the defendant, such court must issue a final order of observation; when a felony complaint has been filed against the defendant, such court must issue a temporary order of observation, except that, with the consent of the district attorney, it may issue a final order of observation.

2. When a local criminal court has issued a final order of observation, it must dismiss the accusatory instrument filed in such court against the defendant and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such accusatory instrument. When the defendant is in the custody of the commissioner at the expiration of the period prescribed in a temporary order of observation, the proceedings in the local criminal court that issued such order shall terminate for all purposes and the commissioner must promptly certify to such court and to the appropriate district attorney that the defendant was in his custody on such expiration date. Upon receipt of such certification, the court must dismiss the felony complaint filed against the defendant.

3. When a local criminal court has issued an order of examination or a temporary order of observation, and when the charge or charges contained in the accusatory instrument are subsequently presented to a grand jury, such grand jury need not hear the defendant pursuant to section 95.45 unless, upon application by defendant to the superior court that impaneled such grand jury, the superior court determines that the defendant is not an incapacitated person.

4. When an indictment is filed against a defendant after a local criminal court has issued an order of examination and before it has issued a final or temporary order of observation, the defendant must be promptly arraigned upon the indictment, and the pro-

ceedings in the local criminal court shall thereupon terminate for all purposes. The district attorney must notify the local criminal court of such arraignment, and such court must thereupon dismiss the accusatory instrument filed in such court against the defendant. If the director has submitted the examination reports to the local criminal coura, such court must forward them to the superior court in which the indictment was filed. If the director has not submitted such reports to the local criminal court, he must submit them to the superior court in which the indictment was filed.

5. When an indictment is timely filed against the defendant after the issuance of a temporary order of observation or after the expiration of the period prescribed in such order, the superior court in which such indictment is filed must direct the sheriff to take custody of the defendant at the institution in which he is confined and bring him before the court for arraignment upon the indictment. After the defendant is arraigned upon the indictment, such temporary order of observation or any order issued pursuant to the mental hygiene law after the expiration of the period prescribed in the temporary order of observation shall be deemed nullified. Notwithstanding any other provision of law, an indictment filed in a superior court against a defendant for a crime charged in the felony complaint is not timely for the purpose of this subdivision if it is filed more than six months after the expiration of the period prescribed in a temporary order of observation issued by a local criminal court wherein such felony complaint was pending. An untimely indictment must be dismissed by the superior court unless such court is satisfied that there was good cause for the delay in filing such indictment.

§ 405.50 Fitness to proceed; indictment.

1. When a superior court, following a hearing conducted pursuant to subdivision three or four of section 405.30, is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed. If it is satisfied that the defendant is an incapacitated person or a dangerous incapacitated person, or if no motion for a hearing is made, it must adjudicate him an incapacitated person or a dangerous incapacitated person, and must issue final or temporary order of commitment committing him to the custody of the commissioner for care and treatment in an appropriate institution for a period not to exceed one year from the date of the order. When the indictment does not charge a felony or when the defendant has been convicted of an offense other than a felony, such court must issue a final order of commitment; when the indict-

ment charges a felony or when the defendant has been convicted of a felony, it must issue a temporary order of commitment.

2. When a defendant is in the custody of the commissioner immediately prior to the expiration of the period prescribed in a temporary order of commitment and the superintendent of the institution wherein the defendant is confined is of the opinion that the defendant continues to be an incapacitated person or a dangerous incapacitated person, such superintendent must apply to the court that issued such order for an order of retention. Such application must be made within sixty days prior to the expiration of such period on forms that have been jointly adopted by the judicial conference and the commissioner. The superintendent must give written notice of the application to the defendant and to the mental health information service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine the issue of capacity or dangerousness, and it must conduct such hearing if a demand therefor is made by the defendant or the mental health information service within ten days from the date that notice of the application was given them. If, at the conclusion of a hearing conduced pursuant to this subdivision, the court is satisfied that the defendant is no longer an incapacitated person, the criminal action against him must proceed. If it is satisfied that the defendant continues to be an incapacitated person or is or continues to be a dangerous incapacitated person, or if no demand for a hearing is made, the court must adjudicate him an incapacitated person or a dangerous incapacitated person and must issue an order of retention which shall authorize continued custody of the defendant by the commissioner for a period not to exceed one year.

3. When a defendant is in the custody of the commissioner immediately prior to the expiration of the period prescribed in the first order of retention, the procedure set forth in subdivision two shall govern the application for and the issuance of any subsequent order of retention, except that any subsequent orders of retention must be for periods not to exceed two years each; provided, however, that the aggregate of the periods prescribed in the temporary order of commitment, the first order of retention and all subsequent orders of retention must not exceed two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment or for the highest class felony of which he was convicted.

4. When a defendant is in the custody of the commissioner at the expiration of the period prescribed in a final order of commitment

or at the expiration of the authorized period prescribed in the last order of retention, the criminal action pending against him in the superior court that issued such order shall terminate for all purposes, and the commissioner must promptly certify to such court and to the appropriate district attorney that the defendant was in his custody on such expiration date. Upon receipt of such certification, the court must dismiss the indictment, and such dismissal constitutes a bar to any further prosecution of the charge or charges contained in such indictment.

§ 405.60 Fitness to proceed; procedure following custody by commissioner.

1. When a local criminal court issues a final or temporary order of observation, or when a superior court issues a final or temporary order of commitment, the court must forward such order and a copy of the examination reports to the commissioner. Upon receipt thereof, the commissioner must designate an appropriate institution operated by the department of mental hygiene in which the defendant is to be placed; provided, however, that when a defendant has been adjudicated a dangerous incapacitated person by a superior court, the commissioner may designate an appropriate institution operated by the department of correction in which the defendant is to be placed. The sheriff must hold the defendant in custody pending such designation by the commissioner, and when notified of the designation, the sheriff must deliver the defendant to the superintendent of such institution. The superintendent must promptly inform the appropriate director of the mental health information service of the defendant's admission to such institution. If a defendant escapes from the custody of the commissioner, the escape shall interrupt the period prescribed in any order of observation, commitment or retention, and such interruption shall continue until the defendant is returned to the custody of the commissioner.

2. Except as otherwise provided in subdivisions five and six, when a defendant is in the custody of the commissioner pursuant to a temporary order of observation or a final or temporary order of commitment or an order of retention, the criminal action pending against the defendant in the court that issued such order is suspended until the superintendent of the institution in which the defendant is confined determines that he is no longer an incapacitated person. In that event, the court that issued such order and the appropriate district attorney must be notified, in writing, by the superintendent of his determination. The court must thereupon direct the sheriff to take custody of the defendant at such institution

and bring him before the court, whereupon the criminal action against him must proceed.

3. When a defendant is in the custody of the commissioner pursuant to a final or temporary order of observation or commitment or an order of retention, the commissioner may transfer him to any appropriate institution operated by the department of mental hygiene; provided, however, that when a defendant is in custody pursuant to a final or temporary order of commitment or an order of retention and he has been adjudicated a dangerous incapacitated person, the commissioner may transfer him to any appropriate institution operated by the department of mental hygiene or the departmnt of correction. When a defendant is in custody pursuant to a final or temporary order of observation, the commissioner may transfer him to an appropriate institution operated by the department of correction. When a defendant is in custody pursuant to a or section one hundred thirty-five of the mental hygiene law.

4. When a defendant is in the custody of the commissioner pursuant to a final or temporary order of commitment or an order of retention, and he has not been adjudicated a dangerous incapacitated person, the superintendent of the institution in which the defendant is confined may, if he determines that the defendant is a dangerous incapacitated person, apply to the court that issued such order of commitment or retention for an order adjudicating the defendant a dangerous incapacitated person. Such application must be made on forms that have been jointly adopted by the judicial conference and the commissioner. The superintendent must give written notice of the application to the defendant and to the mental health information service. Upon receipt of such application, the court may, on its own motion, conduct a hearing to determine the issue of dangerousness, and it must conduct such hearing if a demand therefor is made by the defendant or the mental health information service within ten days from the date that notice of the application was given them. If, following a hearing, the court is satisfied that the defendant is a dangerous incapacitated person, or if no demand for a hearing is made, the court must adjudicate him a dangerous incapacitated person.

5. When a defendant is in the custody of the commissioner pursuant to a final or temporary order of commitment or an order of retention, he may make any motion authorized by this chapter which is susceptible of fair determination without his personal participation. If the court denies any such motion it must be without

prejudice to a renewal thereof after the criminal action against the defendant has been ordered to proceed. If the court enters an order dismissing the indictment and does not direct that the charge or charges be resubmitted to a grand jury, the court must direct that such order of dismissal be served upon the commissioner.

6. When a defendant is in the custody of the commissioner pursuant to a final or temporary order of commitment or an order of retention, the superior court that issued such order may, after giving the district attorney and the commissioner an opportunity to be heard, dismiss the indictment upon motion of the defendant or upon its own motion, when it is satisfied that (a) the defendant is a resident or citizen of another state or country and that he will be removed thereto upon dismissal of the indictment, or (b) the defendant has been continuously confined in the custody of the commissioner for a period of more than two years. Before granting a motion under this subdivision, the court must be further satisfied that dismissal of the indictment is consistent with the ends of justice and that custody of the defendant by the commissioner pursuant to a final or temporary order of commitment or an order of retention is not necessary for the protection of the public and that care and treatment can be effectively administered to the defendant without the necessity of such order. If the court enters an order of dismissal under this subdivision, it must set forth in the record the reasons for such action, and must direct that such order of dismissal be served upon the commissioner. The dismissal of an indictment pursuant to this subdivision constitutes a bar to any further prosecution of the charge or charges contained in such indictment.

§ 405.70 Fitness to proceed; procedure following termination of custody by commissioner.

When a defendant is in the custody of the commissioner on the expiration date of a final or temporary order of observation or commitment, or on the expiration date of the last order of retention, or on the date an order dismissing an indictment is served upon the commissioner, the superintendent of the institution in which the defendant is confined may retain him for observation, care and treatment for a period of thirty days from such date. The procedure governing the continued confinement of the defendant shall be as follows:

1. If the superintendent determines that the defendant is so mentally ill or mentally defective as to require continued care and treatment in an institution, he may, before the expiration of such thirty day period, apply for an order of certification in the manner pre-

scribed in section seventy-three or section one hundred twenty-four of the mental hygiene law.

2. If the defendant is confined to an institution in the department of correction, and if the superintendent of such institution determines that the defendant is so dangerously mentally ill or dangerously mentally defective as to require continued care and treatment in an institution in the department of correction, he must, before the expiration of such thirty day period, apply for an order of certification in the manner prescribed in section eighty-five or section one hundred thirty-five of the mental hygiene law.

# TITLE Z

LAWS REPEALED—TIME OF TAKING EFFECT

## ARTICLE 500

LAWS REPEALED—TIME OF TAKING EFFECT



§ 500.05 Laws repealed.

Chapter four hundred forty-two of the laws of eighteen hundred eighty-one, entitled "An act to establish a code of criminal procedure," and all act amendatory thereof and supplemental thereto are hereby repealed.

§ 500.10 Time of taking effect.

This act shall take effect September first, nineteen hundred seventy.

NOTE.—This bill, which is intended to replace the Code of Criminal Procedure, is being introduced at the 1968 Legislative Sessions at the request of its draftsmen, the Temporary Commission on Revision o fthe Penal Law and Crminal Code, for study purposes only.

# DISTRIBUTION TABLE

The left column of this table lists each section of the Code of Criminal Procedure; the right column shows the disposition of each such section. The numbers in the right column refer to the appropriate section of the Criminal Procedure Law which specifically or generally covers the same or approximately the same subject matter. The word "Omitted" indicates that the Code section has not been included in the revision because it has no further utility, or because it duplicates a provision in another body of law. Sections of the Code that are to be relocated in other chapters of the Consolidated Laws are so designated.

Section 500.05 repeals the present Code of Criminal Procedure in its entirety.

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 1 | 1.00 |
| 2 | Omitted |
| 2-a | 1.20 |
| 3 | Omitted |
| 4 | Omitted |
| 5 | 1.20(15) |
| 5-a | Omitted |
| 6 | 1.20(1) |
| 7 | 1.20(1) |
| 7-a | See: C.P.L.R. §3403(a) (i) |
| 8(1) | 15.20 |
| 8(2) | 85.05(2), 85.10(2), 90.10(3) 105.30(2) |
| 8(3) | 90.50(6), 355.10 |
| 8-a | 30.50 |
| 9 | Article 20 |
| 10 | 25.20 |
| 10-a | Omitted |
| 10-b | 305.10 |
| 10-c | Article 335 |
| 10-d | Omitted |
| 10-e | Omitted |
| 10-f | Omitted |
| 10-h | 1.20(31) |
| 11 | See: 5.10 |
| 11-a | Under study |
| 12 thru 20 | Transfer to Judiciary Law |
| 22(1) | See: 5.20, 95.10 |
| 22(2) | 5.20(1) |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 22(3) | Omitted |
| 22(4) | 120.20, 120.30 |
| 22(5) | Omitted |
| 22(6) | 120.10 |
| 22(7) | See: 170.50 |
| 22(8) | 285.40, 285.50 |
| 22(9) | Omitted |
| 22-a | Transfer to C.P.L.R. |
| 24 | Omitted |
| 39(1) | See: 5.20, 95.10 |
| 39(2) | 5.20(1) |
| 39(2-a) | See: 120.10(2) |
| 39(5) | Omitted |
| 39(6) | Omitted |
| 39(7) | Omitted |
| 39(8) | Omitted |
| 39(9) | Omitted |
| 39(10) | 285.40, 285.50 |
| 39(12) | See: 95.80 |
| 39(13) | Omitted |
| 39(14) | See: 170.50 |
| 39(15) | Omitted |
| 41 | Omitted |
| 42 | Omitted |
| 44 | Omitted |
| 45 | Omitted |
| 46 | Omitted |
| 48 | Omitted |
| 50 | Transfer to Judiciary Law |
| 57 | 85.22 |
| 58 | 85.22 |
| 59 | 85.21 |
| 60 | 85.20(3), see: 60.70(3), 70.50(1) |
| 61 | 95.70, see: 50.10(2) |
| 62 | See: title K |
| 63 | See: 5.10(4) |
| 74 | 5.10(6) |
| 78 | Omitted |
| 82 | Omitted |
| 83 | Omitted |
| 84 | Omitted |
| 85 | Omitted |
| 86 | Omitted |
| 87 | Omitted |
| 88 | Omitted |
| 89 | Omitted |
| 90 | Omitted |
| 91 | Omitted |
| 92 | Omitted |

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|---|---|
| 93 | Omitted |
| 94 | Omitted |
| 95 | Omitted |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 96 | Omitted |
| 97 | Omitted |
| 98 | Omitted |
| 99 | Omitted |
| 100 | Omitted |
| 101 | Omitted |
| 102 thru 117 | To be transferred |
| 117-a thru 117-f | Transfer to Agriculture & Markets Law |
| 118 thru 131 | Transfer to Judiciary Law |
| 132 | Transfer to Judiciary Law |
| 133 | Omitted |
| 134 | 10.40(2) |
| 134-a | 10.40(4) (a) |
| 135 | 10.40(4) (c) |
| 135-a | 10.40(4) (e) |
| 135-b | 10.40(4) (b) |
| 136 | 10.40(4) (h) |
| 136-a | 10.40(4) (d) |
| 137 | 10.40(4) (f) |
| 139 | See: Article 20 |
| 140 | See: Article 20 |
| 141 | 15.10(2) (a) |
| 141-a | 15.10(2) (a) |
| 142(1) | 15.10(2) (b), (c), (d) |
| 142(2) | 15.10(3) (a) |
| 142(3) | Transfer to Labor Law |
| 143 | 15.10(4) (a) |
| 144 | 1.20(16) |
| 144-a | 15.10(4) (b) |
| 145(1) | 50.10 |
| 145(2) | Omit, but See: 205.40 |
| 146 | Omitted |
| 147 | Omitted |
| 147-a | 50.25 |
| 147-b | 50.25 |
| 147-c | 50.25 |
| 147-d | 50.25 |
| 147-e | 50.25 |
| 147-f | 50.25 |
| 147-g | 50.25 |
| 148 | See: 60.20(2) |
| 149 | Omitted |
| 150 | See: Article 65 |
| 150-a | 50.27(1) (b) |

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|---|---|
| 151 | 60.10 |
| 151-a | See: 60.35 |
| 152 | 60.10 |
| 153 | See: 60.10(3), 60.40 |
| 154 | Omitted |
| 154-a | See: 1.20(32) |
| 155 | 60.40, 60.50 |
| 156 | 60.40, 60.50 |
| 157 | Omitted |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 158 | 60.70(1), (2) |
| 159 | 60.70(3) |
| 160 | See: 60.70(3) |
| 161 | See: 60.70(3) |
| 162 | Omitted |
| 163 | Omitted |
| 164 | 60.70(5), see: 70.50 |
| 165 | See: 60.70 |
| 166 | 60.35 |
| 167 | Omitted |
| 168 | See: 60.10, 70.10 |
| 169 | Omitted; but see: P. L. 195.10 |
| 170 | 60.60(1) |
| 171 | See: 60.60, 70.40 |
| 172 | See: 60.60, 70.40 |
| 173 | 60.60(2) |
| 174 | See: 60.60(3) |
| 175 | 60.60(4), (5) |
| 176 | 60.60(4), (5) |
| 177 | 70.30 |
| 178 | 70.40(4) |
| 179 | See: 70.30, 70.40(1) |
| 180 | 70.40(2) |
| 180-a | 70.70 |
| 181 | 70.57 |
| 182 | Omitted |
| 182-a | 70.30(2) (b), 75.40(4) |
| 183 | 70.53 |
| 184 | 70.55(2) |
| 185 | 70.57(1) |
| 186 | See: 70.30(2) |
| 187 | See: 70.40(4) |
| 188 | 90.10 |
| 190 | 90.10, 90.30 |
| 190-a | Omitted |
| 191 | 90.50(9) |
| 192 | 90.10(7) |
| 193 | Omitted |

| | |
|---|---|
| 194 | See: 90.50 |
| 195 | 90.50(3) |
| 196 | See: 90.50(5) |
| 197 | Omitted |
| 198 | Omitted |
| 199 | Omitted |
| 200 | Omitted |
| 201 | See: 90.50(6) |
| 202 | Omitted |
| 203 | 90.50(1), (8) |
| 204 | Omitted |
| 204-a | Transfer to Town Law & Village Law |
| 205 | See: 90.60(1) |
| 206 | Omitted |
| 207 | 90.60(3) |

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| Code of Criminal Procedure Section | Disposition |
|---|---|
| 207-a | Omitted |
| 208 | 90.60(1) |
| 209 | Omitted |
| 210 | Omitted |
| 212 | Omitted |
| 213 | See: 90.10(7) |
| 214 | Omitted |
| 215 | Omitted |
| 216 | Omitted |
| 218 | Omitted |
| 219 | Article 350 |
| 220 | Transfer to U. J. C. A. |
| 221 | See: 90.60(1) |
| 221-a | See: 280.20 |
| 221-b | Transfer to Judiciary Law |
| 222 | 105.05 |
| 222-a | Omitted |
| 222-b | Omitted |
| 222-c | Omitted |
| 222-d | See: 95.80 |
| 223 | 95.05 |
| 224 | 95.05, 95.25(1) |
| 225 | See: 95.10 |
| 225-a | See: 95.10 |
| 226 | See: 95.10 |
| 226-a | 95.20(6) |
| 227 | Omitted |
| 228 | Omitted |
| 229 | 95.20(1) |
| 230 | See: 95.20(2) |
| 231 | See: 95.20(2) (a) |

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|---|---|
| 232 | See: 95.20(2) (b) |
| 233 | Omitted |
| 234 | Omitted |
| 235 | Omitted |
| 236 | Omitted |
| 237 | 95.20(3) |
| 238 | See: 95.20(4) |
| 239 | See: 95.20(4) |
| 240 | See: 95.20(4) |
| 241 | See: 95.20(5) |
| 242 | Omitted |
| 243 | 95.20(3) |
| 244 | 95.15 |
| 245 | 95.05, 95.55(1) |
| 246 | 95.25(2) |
| 247 | 1.20(3), 100.05 |
| 248(1) | 95.30 |
| 248(2) | 355.20(2) |
| 248(3) | 95.30(4) |
| 249 | 95.30(1) |
| 250 | 95.45 |
| 251 | 95.65(2) |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 252 | Omitted |
| 253(1) | See: 95.55(1) |
| 253(2) | See: 95.55(1) |
| 253(3) | Omitted |
| 253-a | 95.85 |
| 254 | Omitted |
| 255 | 95.25(3), (6) |
| 256 | 95.25(3-d), (4) |
| 257 | 95.25(3-e), (4) |
| 258 | 95.25(4) |
| 259 | Omitted |
| 259-a | Omitted |
| 260 | Omitted |
| 268 | 95.25(1), 100.45(8) |
| 269 | 95.75(1) |
| 270 | 95.75(3) |
| 272 | 105.10 |
| 273 | Omitted |
| 274 | Omitted |
| 275 | 100.45 |
| 275-b | 100.50 |
| 276 | See: 100.45 |
| 277 | See: 100.60(1) |
| 278 | See: 100.20 |
| 279 | See: 100.20 |

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|---|---|
| 279-a | Omitted |
| 280 | 100.45(6) |
| 281 | See: 105.45(1) |
| 282 | Omitted |
| 283 | Omitted |
| 284 | See: 105.45 |
| 285 | See: 105.45(1) |
| 286 | Omitted |
| 287 | Omitted |
| 288 | Omitted |
| 290 | Omitted |
| 291 | Omitted |
| 292 | 155.10(3), 160.50(1) |
| 292-a | 100.70 |
| 293 | 100.60 |
| 294 | See: 100.60 |
| 295 | See: 100.60 |
| 295-a thru 295-k | Omitted |
| 295-l | 130.20 |
| 296 | 105.20 |
| 296-a | See: 105.20 |
| 297 | See: 105.20, 105.30 |
| 298 | 105.20(1) |
| 298-a | 305.10 |
| 298-b | 305.10 |
| 299 | 105.20(2) |
| 300 | Omitted |
| 301 | Omitted |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 302 | Omitted |
| 303 | Omitted |
| 304 | Omitted |
| 305 | Omitted |
| 306 | See: 105.30(6) |
| 307 | 105.20(2) |
| 308 | 105.30 |
| 308-a | Omitted |
| 309 | See: 105.30, 1.20(8) |
| 310 | See: 100.60(1) |
| 311 | Omitted |
| 312 | See: 105.40, 105.70 |
| 312-a | 305.10 |
| 313(1) | 105.40(1-a), 105.45(1) |
| 313(2) | 105.40(1-c), 105.55(2-e) |
| 314 | See: 105.40(2) |
| 315 | See: 105.40(2) |
| 316 | 105.70 |
| 317 | See: 105.65(8) |

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|---|---|
| 318 | Omitted |
| 319 | Omitted |
| 320 | See: 105.40(4) |
| 321 | See: 105.40, 115.10 |
| 322 | See: 105.40(2), 105.70 |
| 323 | See: 105.40(1-a), 105.55 |
| 324 | See: 105.65 |
| 325 | See: 105.65 |
| 326 | See: 105.65 |
| 327 | See: 105.40(4) |
| 328 | See: 105.65(8) |
| 329 | Omitted |
| 330 | 105.70, 115.40(3) |
| 331 | See: 105.40(2) |
| 332 | 115.10 |
| 333 | 115.40 |
| 334 | Omitted |
| 335(1) | 115.40, 175.20, 324.05 |
| 335(2) | Transfer to Vehicle & Traffic Law |
| 335-a(1) | 85.10(3-b), (4) |
| 335-a(2) | Transfer to Vehicle & Traffic Law |
| 335-b | Transfer to Vehicle & Traffic Law |
| 335-c | Omitted |
| 336 | 130.10, 175.40 |
| 337 | 115.50(4) |
| 338 | 115.30 |
| 339 | Omitted |
| 340 | See: Article 20 |
| 341 | See: Article 20 |
| 342 | 115.40(3) |
| 342-a | Omitted |
| 343 | Omitted |
| 344 | 120.20, 120.30 |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 345 | See: 120.20, 120.30 |
| 346 | 120.20(2), 120.30(1), (4) |
| 347 | 120.40(1), (2) |
| 348 | 120.40(3) |
| 349 | 120.40(4) |
| 350 | Omitted |
| 351 | 120.20(3), 120.30 (5) |
| 352 | 120.30(2) |
| 353 | See: 120.20(1), 120.30(1) |
| 354 | Omitted |
| 355 | Omitted |
| 356 | See: 135.15 |
| 357 | Omitted |
| 358 | See: 140.05(2) |
| 358-a | 140.30, 140.35 |

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|---|---|
| 359 | |
| 360 | Omitted |
| 361 | 140.25(3) |
| 362 | 140.10(1) |
| 363 | 140.10(1) |
| 364 | 140.10(2) |
| 365 | 140.10(2) |
| 366 | 140.10(2) |
| 367 | 140.10, 160.60(2) |
| 368 | 140.10(2) |
| 369 | 140.10(2) |
| 370 | Omitted |
| 371 | See: 140.15 |
| 372 | 140.15 |
| 373 | 140.25(1) |
| 374 | 140.25(2) |
| 375 | 140.20 |
| 376 | 140.20(1) |
| 377 | 140.20(1) |
| 378 | 140.20(1) |
| 379 | 140.20(1) |
| 380 | 140.20(1) |
| 381 | 140.15(2) |
| 382 | 140.20(2) |
| 383 | 140.20(2) |
| 384 | 140.20(2) |
| 385 | 140.20(2) |
| 386 | 140.15(2) |
| 387 | Omitted |
| 388 | 140.05(2) |
| 389 | 135.20 |
| 390 | 35.20, 155.10(2) |
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| 393 | Omitted |
| 393-a | See: 155.10(2), 185.45(2) |
| 393-b | Omitted |
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| 394 | 30.60(2) |
| 395 | Omitted |
| 396 | 30.80, 30.90 |
| 397 | Omitted |
| 398-b | Omitted |
| 399 | 30.95 |
| 400 | See: 30.70 |
| 401 | Omitted |
| 402 | Omitted |
| | 105.40(1), 105.45(2), See: 105.40(2) |

| Code of Criminal Procedure Section | Disposition |
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|---|---|
| 403 | Omitted |
| 404 | Omitted |
| 405 | Omitted |
| 406 | Omitted |
| 407 | Omitted |
| 408 | Omitted |
| 409 | Omitted |
| 410 | See: 150.10 |
| 411 | 140.50 |
| 412 | 140.50 |
| 413 | Omitted |
| 414 | 140.45 |
| 415 | See: 135.20(2), 140.40 |
| 416 | 140.35(1) |
| 417 | Omitted |
| 418 | Omitted |
| 419 | See: 155.10(2) |
| 420 | See: 155.10 |
| 420-a | 240.10(2) |
| 421 | 160.10 |
| 422 | See: 285.70 |
| 423 | 160.10 |
| 424 | 160.10 |
| 425 | 160.20(1) |
| 426 | Omitted |
| 427 | 160.30 |
| 428 | 160.60 |
| 429 | See: 160.60 |
| 430 | 140.10, 160.00(2) |
| 431 | Omitted |
| 432 | Omitted |
| 433 | 160.40 |
| 434 | 160.40(1) |
| 435 | 160.40(2) |
| 436 | Omitted |
| 437 | See: 160.50(1) |
| 438 | Omitted |
| 439 | Omitted |
| 440 | Omitted |
| 441 | Omitted |
| 442 | Omitted |
| 443 | Omitted |
| 443-a | See: 155.10(3), 160.50(1) |

| Code of Criminal Procedure Section | Disposition |
|---|---|
| 444 | 20.20(2-b), 155.40, 160.50(1) |
| 445 | 155.40, 160.50(1) |
| 446 | 160.70 |
| 447 | 160.50(2) |

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|---|---|
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| 449 | 160.50(2) |
| 450 | 160.80 |
| 451 | 160.80 |
| 452 | 170.10(1) |
| 453 | 170.10(2) |
| 454 | 170.20 |
| 455 | See: 240.10(2) |
| 456 | 235.60(1) |
| 457 | Omitted |
| 458 | See: 235.60 |
| 459 | Omitted |
| 460 | See: 235.60 |
| 461 | Omitted |
| 462 | See: 170.40 |
| 463 | See: 170.40 |
| 464 | See: 170.50 |
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| 466 | See: 170.30, 255.10(1-g) |
| 467 | See: 170.30 |
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| 469 | 170.30, 170.40 |
| 470 | 170.50 |
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| 470-b | See: 205.20(5) |
| 470-c | 205.30 |
| 470-d | 215.10 |
| 470-e | 215.30 |
| 471 | 195.30 |
| 472 | See: 195.30(2) |
| 473 | 195.40 |
| 474 | 300.10 |
| 475 | 300.10(2-b) |
| 476 | 300.10(2-b) |
| 477 | Omitted |
| 478 | See: 300.15 |
| 479 | See: 300.15 |
| 480 | See: 195.50 |
| 481 | See: 170.30, 405.30(1) |
| 482 | See: 200.10, 200.20, 220.10 |
| 482-a | Omitted |
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| 485 | See: 235.60 |
| 485-b | Transfer to Judiciary Law |
| 486 | 195.60 |
| 487 | 220.20(1) |
| 488 | 220.20(4), (7-b), 220.30 |
| 489 | See: 195.60, 195.70 |
| 489-a | Transfer to Correction Law |

| Code of Criminal Procedure Section | Disposition |
|---|---|
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| 490-a | Omitted |
| 491 thru 509 | Transfer to Correction Law |
| 515 | Omitted |
| 516 | Omitted |
| 517 | 230.10, 230.60 |
| 517-a | 95.90 |
| 518 | 230.20, 230.70 |
| 518-a | 230.40 |
| 519 | 230.80 |
| 520 | 235.20 |
| 520-a | Omitted |
| 521 | 235.10 |
| 521-a | See: 235.20 |
| 522 | 235.10(1), (2), (4) |
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| 240.90 | New |
| 240.95 | See: 544 |
| 240.97 | See: 533, 534, 537-a, 760-a |
| 270.10 thru 285.70 | See, generally: 550 thru 606, 737 |
| 300.10 | See: 474, 475, 476 |
| 300.15 | See: 478, 479 |
| 305.10 | 10-b, 298-a, 298-b, 312-a |
| 310.02 thru 310.66 | 827 thru 859 |
| 320.10 | New |
| 320.20 | 669-b |
| 320.30 | New |
| 322.10 | New |
| 324.00 | See: 335(1), 675 thru 681 |
| 324.05 | See: 335(1), 675 thru 681 |
| 325.10 | See: 607, 610-a, 613 |
| 325.20(1) | 608, 729 |
| 325.20(2) | 609, 610 |
| 325.20(3) | 610-b |
| 325.30 | See: 618 |
| 325.40 | See: 614, 615, 615-a |
| 330.10 thru 330.70 | See: 618-b |
| 335.10 | 10-c |
| 335.20 | 10-c |
| 340.10 | 618-a |
| 345.10 | 618-c |
| 345.20 | New |
| 345.30 | New |
| 350.10 thru 350.60 | See: 219, 620 thru 630, 632, 634 |
| 355.10 | See: 8(3), 631 |
| 355.20 | See: 248(2), 633 |

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| 360.10 thru 360.80 | See: 636 thru 657 |
| 365.05 | See: 791 |
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| 365.15 | New |
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| 370.00 thru 370.55 | See: 813-a, 813-b |
| 375.10 thru 375.70 | See: 813-c thru 813-i |
| 400.05 | See: 913-e, 913-p |
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| 400.20 | See: 913-g, 913-i |
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| 500.05 | New |
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