



2021 Annual Conference

Niagara Falls, New York

Accusatory Instruments
Sufficiency and Motions to Dismiss

PowerPoint Slides

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Presented by:

Joshua S. Shapiro, Esq.

Stephen Ferri, Esq.

1.0/2.0 MCLE Professional Practice

This program has been approved for credit in New York State for all attorneys including those who are Newly Admitted (less than 24 months) and administered by the Onondaga County Bar Association.

Accusatory Instruments

Presented by

Joshua S. Shapiro
Special Counsel for Town and Village Courts
6th Judicial District
(607) 240-5372 (Office)
(607) 766-1079

2021 Edition

When does a criminal prosecution begin ?

With the filing of an
ACCUSATORY INSTRUMENT
with a local criminal court

With the last of Justice Court
CPL §100.05

The filing of an Accusatory Instrument:

1. Commences the criminal action for "speedy trial" purposes.
2. Confers jurisdiction on the court over the defendant.
3. Informs the defendant of the charges.
4. Jeopardy can attach.

Significance of Accusatory Instrument for Speedy Trial Time

1. Six Months from Filing of Felony Complaint
2. 90 Days from Filing of Class 'A' Misdemeanor
3. 60 Days from Filing of Class 'B' Misdemeanor;
4. 30 Days from Filing of Violation

7 Types

1. Simplified Information
2. Information (Long Form)
3. Prosecutor's Information
4. Misdemeanor Complaint
5. Felony Complaint
6. An Indictment (CPL Article 190)
7. A Superior Court Information

CPL §100.10

Where Filed

1. Except for Indictments and Superior Court Informations, all accusatory instruments are filed in the local criminal court.
2. Indictments and Superior Court Informations are filed in County Court (or theoretically in Supreme).

CPL §100.55

Where Filed

1. Misdemeanor charges must be filed in the local court having jurisdiction.
 - This must be the Town, Village or City where the crime occurred.
2. Felony complaints *can* be filed with any town or village court within the county where the crime occurred.

CPL §100.55(G)

Where Filed

1. Exception: If a warrant of arrest is sought, and the judge in the town/village is not available, an accusatory instrument may be filed with the town court of any adjoining town in the same county. CPL §120.30(2)
2. Exception: If a warrantless arrest is made and the judge in the town/village is not available, an accusatory instrument may be filed with the town court of any adjoining town in the same county. CPL §140.20(1)(a)

Where Filed

1. Exception: If a warrantless arrest is made in a county operating an off-hours arraignment part (CAP), then the accusatory instrument may be filed with the CAP. CPL §140.20(1)(e)

Local Courts

Accusatory Instruments
fall into 2 main categories:

- 1.COMPLAINTS
- 2.INFORMATIONS

The differences between an INFORMATION
and COMPLAINT are technical, but
important.

COMPLAINTS

- Felony Complaints are the primary instrument for beginning felony prosecutions.
- Misdemeanor Complaints do not convey trial jurisdiction upon a court absent the consent of the defendant.
- Purpose is solely to bring a defendant before the court for arraignment and to exercise temporary control, or to form the basis of issuing an arrest warrant.
- Unlike an information, a **COMPLAINT** can be based on hearsay.
- The People cannot declare "ready for trial" on a complaint.

Complaint v. Information

COMPLAINT can't be the basis of a prosecution unless defendant waives right to be prosecuted by an information. (Preliminary jurisdiction only)

The factual part of an INFORMATION must establish every element of the offense charged and the defendant's commission thereof.
(PRIMA FACIE case requirement)

An **INFORMATION (or INDICTMENT)** is the Accusatory Instrument upon which one proceeds to trial

Complaint v. Information

When the court has before it a misdemeanor complaint and the defendant is being committed to the custody of the sheriff in lieu of bail, the defendant is entitled upon application to ROR after 5 days not including Sundays unless the misdemeanor complaint has been converted to an information, or unless the defendant has waived prosecution via Information.

C.P.L. 170.70

Conversion of
COMPLAINT to INFORMATION

- Required to gain Trial Jurisdiction
- Non hearsay allegations needed
- Supporting Depositions
- Lab Report

Simplified Informations

1. **Simplified Traffic Information**
 2. **Simplified Parks Information**
 3. **Simplified Environmental Conservation Information**
- C.P.L. §100.10(2)(a-c)

SIMPLIFIED TRAFFIC INFORMATION

- A written accusation by a Police Officer charging a traffic infraction or misdemeanor related to traffic.
- Contains no factual allegations of an evidentiary nature supporting the charge.
- Essentially only needs to allege ID, Jurisdiction, and the name of the offense charged.

CPL §100.10(2)(a)

SIMPLIFIED TRAFFIC INFORMATION

- Need not provide on its face reasonable cause to believe defendant committed the offense.
- A timely request for a SUPPORTING DEPOSITION containing allegations of fact providing reasonable cause can be requested by defendant.

CPL §100.25(2)

SIMPLIFIED TRAFFIC INFORMATION
Supporting Depositions

• The Defendant may request a supporting deposition by mailing a request to the court prior to the entry of a plea of guilty and prior to the commencement of trial, but not later than thirty days after the date the return date.

CPL §100.25(2)

SIMPLIFIED TRAFFIC INFORMATION
Supporting Depositions

• Upon receipt of a request for a supporting deposition the court **must** order the complainant police officer or public servant to serve a copy of the supporting deposition upon the defendant (or his attorney if he is represented) within thirty days of the date such request is received by the court.

CPL §100.25(2)

SIMPLIFIED TRAFFIC INFORMATION
Supporting Depositions

• If a supporting deposition is not received within 30 days of the request, the charge can be dismissed upon motion of the defendant.

CPL §100.25(2)

REQUEST FOR A SUPPORTING DEPOSITION

- To be timely, the request must be made before the entry of a guilty plea and before commencement of trial;
- BUT no later than 30 days after the defendant is directed to appear; However, when one of the offenses charged in a simplified information is a misdemeanor, the court may, upon motion of the defendant, for good cause shown and consistent with the interest of justice, permit the defendant to request a supporting deposition beyond the thirty day request period, provided that not more than 90 days has elapsed.

C.P.L. §100.25(3)

REQUEST FOR A SUPPORTING DEPOSITION

- The supporting deposition must also be filed with the court along with an affidavit of service;
- A simplified information dismissed based upon a failure by the People to provide a supporting deposition may be refiled. *People v. Nuccio*, 78 N.Y.2d 102 (1991); *People v. Epakchi*, __ N.Y.3d __ (2021).

INFORMATION

A verified written accusation filed with a local criminal court, charging the commission of one or more offenses, none of which is a felony.

CPL §100.10(1)

INFORMATION

Filed: With the local criminal Court.

Purpose: Commences the criminal action and serves as the basis for prosecution
CPL §100.10(1)

INFORMATION

Two-fold purpose:

1. To inform the defendant of the nature of the charges against him/her.
2. To protect him/her from being prosecuted twice for the same crime (double jeopardy)

INFORMATION

May serve as a basis both for the commencement of a criminal action,
(Preliminary Jurisdiction)

and

for the basis for the prosecution,
(Trial Jurisdiction)

CPL §100.10(1)

Must contain

Name of the court filed with (Jurisdiction):
Binghamton City Court
Town of Union Court

Title of the action:
Misdemeanor Information

Must Contain

1. Accusatory Part
IN THAT
2. Factual Part
TO WIT

INFORMATION

Accusatory Part ("In that")

- Name of the defendant;
- Name of the Complainant;
- Name of Crime charged (and statutory language);
- Date and Location of offense

INFORMATION

Factual Part (“To Wit”)

- Assert facts that provide, that together with any supporting depositions provide reasonable cause to believe the defendant committed the crime.
CPL §100.40
- Non-hearsay allegations which establish, if true, every element of the offense charged.
CPL §100.40
People v Casey, 95 N.Y. 2d 354 (2000)

What is the test for legal sufficiency?

- If based on DIRECT KNOWLEDGE, the complainant must have direct knowledge of facts to establish each and every element of the crime and id of defendant
- If based on INFORMATION AND BELIEF, the witnesses who provide supporting depositions must have direct knowledge of the facts and id of defendant

FACTS + NONHEARSAY =
LEGALLY SUFFICIENT INSTRUMENT

FACTS =
ALLEGATIONS SUPPORTING DEFENDANT’S
COMMISSION OF EVERY ELEMENT OF THE
OFFENSE CHARGED

NON-HEARSAY =

FACTS COME FROM THE COMPLAINANT

(If the Complainant is the arresting officer, they must be based upon his/her personal knowledge, or they must be based upon information and belief, the source of which MUST BE ATTACHED TO THE ACCUSATORY INSTRUMENT)

HEARSAY=

FACTS COME FROM SOMEONE ELSE

"John told me the defendant punched him"

If the complainant was swearing that John told him, that is hearsay.

If John himself were the complainant on the instrument, his observations would be non-hearsay.

Non-hearsay may be provided by:

- Complainant
- Certified Laboratory Report (must be attached to Accusatory instrument)
- Witness giving sworn statement
- Certified Bank/Medical/Public Records
Should be attached to Accusatory Instrument

Factual Part ("To Wit")

This is the formal legal allegation using the language of the statute.

Stating the facts supporting every element of the offense charged, including the defendant's commission of the offense.

Factual Part ("To Wit")

Must contain:
The specific location.
GEOGRAPHIC JURISDICTION
Address, Cross Street, Mile Marker, Reference Point, etc.

Also **MUST** include (for example):

- ✓ Village of Endicott
- ✓ Town of Union
- ✓ County of Broome
- ✓ State of New York

Factual Part ("To Wit")

- ✓ The approximate date
- ✓ **Identification:** Must identify the defendant.
- ✓ What the defendant allegedly did to commit the offense
- ✓ In stating what the defendant did, the facts must support every element of the crime.

Parts of an Information (cont'd)

- Subscribed and Verified (CPL 100.30):
 - Sworn before the Court in which it is filed
 - Sworn to before a Notary Public
 - Signed and Affirmed with Penal Law Section 210.45 form notice
 - After an appearance ticket is issued, before a designated public servant
 - Sworn to before a desk sgt. or superior officer

STATE OF NEW YORK - COUNTY OF BRONX
FILE NO. 10-10000
THE PEOPLE OF THE STATE OF NEW YORK
Petitioner

vs.

Defendant

AFFIDAVIT

BEFORE ME, the undersigned, a Notary Public in and for the State of New York, on this _____ day of _____, 2007, at the City of New York, in the County of _____, the following person or persons, _____, being personally known to me, or being known to me by reliable persons, and being duly sworn, depose and say that the foregoing is a true and correct statement of the facts and circumstances set forth therein, and that the defendant is guilty of the crime charged in the Information.

Subscribed and sworn to before me on this _____ day of _____, 2007, at _____, New York, the said defendant.

Notary Public

(Penal Law Section 210.45)
IT IS A VIOLATION OF ARTICLE 60-A OF THE PENAL LAW OF THE STATE OF NEW YORK FOR A PERSON TO SIGN OR TO CAUSE TO BE SIGNED OR TO KNOWINGLY MAKE A STATEMENT OR TO MAKE A STATEMENT WHICH IS KNOWN TO BE FALSE OR MISLEADING.

Signature: _____
Notary Public

EMILY LUSANE

Legal Sufficiency (CPL 100.40)

- Substantially conforms to CPL 100.15
- Allegations contained in the factual part together with any supporting depositions provides reasonable cause to believe
- Non-hearsay allegations contained in the factual part together with any supporting depositions establish, if true, every element of the crime charged and defendant's commission of the crime

What is the test for legal sufficiency?

- If based on DIRECT KNOWLEDGE, the complainant must have direct knowledge of facts to establish each and every element of the crime and id of defendant
- If based on INFORMATION AND BELIEF, the witnesses who provide supporting depositions must have direct knowledge of the facts and id of defendant

Supporting Depositions (CPL 100.20)

- Definition: A written instrument which sets forth facts in a plain and concise manner which establishes the elements of the crime and/or ids defendant
- May be based on direct knowledge or upon information and belief
- Subscribed and Verified

STATE OF NEW YORK
IN SENATE
January 12, 2011

REPORT OF THE
COMMISSION ON THE JUDICIAL BRANCH

CHAPTER 100 OF THE LAWS OF 2010
SECTION 10.01

ARTICLE 100 OF THE CONSTITUTION OF THE STATE OF NEW YORK

SECTION 100.20

SECTION 100.21

SECTION 100.22

SECTION 100.23

SECTION 100.24

SECTION 100.25

SECTION 100.26

SECTION 100.27

SECTION 100.28

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SECTION 100.99

SECTION 100.100

Factual Part ("To Wit")

May include admissions made by the defendant, including to whom made.

No supporting deposition is needed for an admission to the complainant because it is personal knowledge.

Felony Complaints (CPL 100.10 (5))

- Definition: A verified written accusatory instrument charging a person with a felony grade crime
- Filed: In a local criminal court within the county where the crime occurred
- Purpose: Commences the criminal action (BUT does not serve as the basis of prosecution)

Parts of a Felony Complaint

- Jurisdiction
- Accusatory Part:
 - Name of defendant
 - Name of complainant
 - Title of Action
 - Name of crime charged (and statute)
 - Date and location of crime

Parts of a Felony Complaint (cont'd)

- **Factual Allegations:**
A statement by complainant alleging facts of an evidentiary nature supporting or tending to support the charge
AND
setting forth the basis of the allegations (i.e. direct knowledge, information and belief, admissions of defendant)

Parts of a Felony Complaint (cont'd)

- Unlike a misdemeanor information, the factual allegations can be based on hearsay
- **Subscribed and Verified**
(Using the same methods required for a misdemeanor information)

UNIVERSITY OF CALIFORNIA, BERKELEY
 DEPARTMENT OF CRIMINAL JUSTICE
 FELONY COMPLAINT

DEFENDANT
 NAME: [REDACTED]
 ADDRESS: [REDACTED]
 CITY: [REDACTED] STATE: [REDACTED] ZIP: [REDACTED]

CHARGE
 [REDACTED]

FILED
 [REDACTED]

SUBSCRIBED AND VERIFIED
 I, [REDACTED], being duly sworn, depose and say that the above is a true and correct copy of the complaint filed in the above entitled case.

Subscribed and sworn to before me on this [REDACTED] day of [REDACTED], 20[REDACTED].

Notary Public for the State of California
 My Commission Expires on [REDACTED]

What is the test for legal sufficiency?

Not the same as for a misdemeanor information

- Substantially conform to CPL 100.15
- Allegations contained in factual part together with any supporting depositions provide reasonable cause to believe the defendant committed the crime charged
- Basis of knowledge must be provided

Life Beyond Local Court

The only methods of prosecuting an offense in a superior court are by an Indictment or by Superior Court Information (SCI) filed by the district attorney

CPL § 210.05

Myth

Only felonies can be indicted.

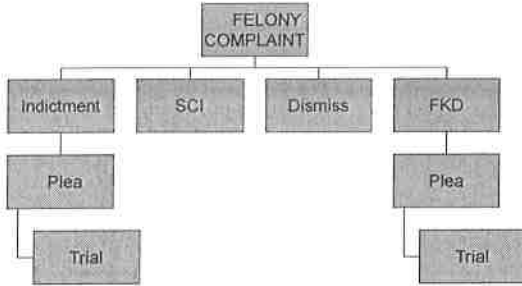
Truth

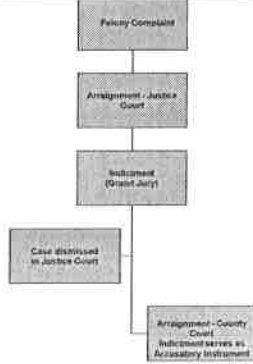
Both felonies and misdemeanors can be presented to the grand jury for indictment

Reality

Misdemeanors are typically not presented to a grand jury unless they are accompanying felony charges.

The Life of a Felony Complaint





Content over Form

The title of an Accusatory Instrument is NOT controlling

The character of an accusatory instrument is to be ascertained from its content

People v. Fernandez, 20 N.Y.3d 44 (2012);
See Also People v. Dumay, 23 N.Y.3d 518 (2014)

Sufficiency

The factual sufficiency of the INFORMATION is assessed against the 4 corners of the information document itself, including any supporting depositions.

Sufficiency

In the case of a jurisdictional defect, an accusatory instrument which is not legally sufficient does not confer jurisdiction upon the court and without jurisdiction a court is powerless to act.

Defective INFORMATIONS

Jurisdictional Defect
v
Non-jurisdictional (Hearsay) Defect

Jurisdictional Defects

Omission of an element of the offense charged, or facts supporting the element.

Results:

- Non-waivable - even after conviction and sentencing.
- Nullity – cannot commence criminal action
- Must be dismissed – cannot be “cured”

Options:

- No bar to re-filing a new, legally sufficient instrument

Time Concerns with Jurisdictional Defects

Statute of Limitations

CPL §30.10(4)(a)

Time period from filing of defective instrument until dismissal of instrument is excluded from statute of limitations period.

Speedy Trial

CPL §30.30 & *People v. Kendzia*, 64 N.Y.2d 331,337 (1985)

Jurisdictional Defects

Common Defects:

- Failure to prove one or more elements
- Wrong crime is charged
- Instrument filed in the wrong court
- ID - Defendant not identified as person committing the act.

Sufficiency

Where a criminal action has been commenced by the filing of an accusatory instrument, the court must make a determination of sufficiency before issuing any process, C.P.L. §120.20(1)

Where a warrantless arrest has been made, the court must inspect the accusatory instrument being filed to determine it's sufficiency. C.P.L. §140.45

Criminal Possession of a Weapon

- OPERABILITY of weapon is a fundamental element often not asserted.
- Renders information jurisdictionally defective.
- Can be established by attaching a certified ballistics report.
"Information and belief being the attached ballistics report"

Resisting Arrest

- Not sufficient to state simply that defendant "resisted a lawful arrest."
- Factual allegations needed establishing, if true, that the underlying arrest was authorized.

People v. Alejandro, 70 N.Y.2d 133 (1987)

Predicate Crimes

Where a prior conviction is a predicate for the current offense, it is an element of the crime, and must therefore be specifically mentioned in the accusatory instrument.

CPW3 / DWI

Nonjurisdictional Defects
Ministerial Errors

Most typically stem from failure to establish a non-hearsay basis for an element of the offense.

Can be "cured" by amendment

"Hearsay Defects"

Are waived unless & until raised by defendant/defense counsel in written motion to dismiss.

People v. Casey, 95 N.Y.2d 354 (2000)

Common Charging Mistakes

- VTL 319.1 Operating a motor vehicle without having insurance in effect.
- Failure to produce an insurance card raises a rebuttable presumption that the defendant does not have insurance. (V.T.L. 319.3)
- However, failure to produce an insurance card by itself (V.T.L. 319.3) is not a chargeable offense.

Common Charging Mistakes

- VTL 509.1 Operating a motor vehicle without a valid driver's license.
- Failure to produce a license raises a rebuttable presumption that the defendant does not have a license. (V.T.L. 507.2)
- However, failure to produce a license, by itself is not a chargeable offense, it merely allows for the charging of V.T.L. 509.1

Common Charging Mistakes

- PL 215.50(3) (Criminal Contempt in the second degree for violation of an order of protection).

The Motion To Dismiss

- **Must be in writing and upon reasonable notice to the People.** C.P.L. §§ 170.45 & 210.45
- However the People waive the requirement of a writing if they fail to object to an oral motion. People v. Jennings, 69 N.Y.2d 103, 113 (1986)
- Suppression of evidence is not a proper basis for a motion to dismiss. People v. Gordon, 88 N.Y.2d 92 (1996);

Contact Information

Joshua S. Shapiro
Special Counsel for the Town and Village
Courts
Office: (607) 240-5372
Cell Phone: (607) 766-1079
