2023 Annual Conference

Syracuse, New York

Operation of Centralized Arraignment Parts: Administrative and Legal Issues

Date: Tuesday, October 3, 2023
Instructors:
Joshua Shapiro, Esq.
Hon. Sherry Davenport
MCLE: 1.0 Professional Practice

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PRESENTERS

Joshua S. Shapiro Esq. is the Special Counsel for the Town and Village Courts to the Administrative Judge of the Sixth Judicial District. In that role he primarily works with the District Supervising Judges, providing support and assistance to the 174 Town and Village Courts located within the Sixth District. Prior to that position Joshua spent 11 years as an Assistant District Attorney, beginning his career with the Suffolk County District Attorney and ending with the Broome County District Attorney, where he prosecuted violent felony offenses and homicides. During his career he has tried numerous criminal cases in Village, Town, District, County, and Supreme Courts in both Suffolk and Broome counties, running the gamut from simple misdemeanors up to and including murder cases. Joshua graduated from Binghamton University in 2003 and earned his JD from the University of Richmond School of Law in 2006. Joshua is admitted to practice law in New York State.

Hon. Sherry R. Davenport – Sherry is a Past-President of the New York State Magistrates Association (2016-2017) and has served on the Executive Board since 2011. Serving as the Town Justice for the Town of Summerhill in Cayuga County for the past 28 years, she began work in the courts during college as a court clerk for the Town of Cortlandville and then as court clerk for the Village and Town of Homer (Cortland County). Sherry was employed as paralegal in the Cortland County Attorney's Office for over 20 years, providing legal research to the County Legislature and county departments, and assisting in that office's prosecution of juveniles in Family Court. In "retirement" she moved to private practice as an estate planning and real estate paralegal with Pomeroy, Armstrong & Casullo, LLP in Cortland. Judge Davenport has a B.S. in Political Science with a minor in Economics (SUNY Cortland).

New York Official Reports

88 N.Y.2d 92, 666 N.E.2d 203, 643 N.Y.S.2d 498

The People of the State of New York, Respondent,
v.
Eric Gordon, Appellant.

Court of Appeals of New York
82
Argued March 20, 1996;
Decided April 25, 1996

CITE TITLE AS: People v Gordon

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered April 28, 1995, which (1) reversed, on the law, an order of the Supreme Court (Vincent E. Doyle, J.), entered in Erie County, granting a motion by defendant to dismiss the indictment charging him with robbery in the first degree, criminal possession of stolen property in the fifth degree and criminal possession of a weapon in the fourth degree, (2) denied the motion to dismiss, (3) reinstated the indictment, and (4) remitted the matter to Supreme Court for further proceedings on the indictment.

People v Gordon, 214 AD2d 1029, affirmed.

HEADNOTES

Crimes
Indictment
Sufficiency of Evidence before Grand Jury--Suppression of Identification of Defendant

(1) The indictment of defendant for robbery in the first degree and related crimes arising from the armed holdup of the victim was not rendered legally insufficient *(see,* CPL 210.20 [1] [b]) due to the suppression of the victim's identification of defendant. In the context of a Grand Jury proceeding, legally sufficient evidence means proof of a prima facie case, not proof beyond a reasonable doubt. If competent prima facie evidence underlying an indictment is subsequently rendered inadmissible by extrinsic proof, the legal sufficiency of the indictment is not undermined as the court's function on a motion to dismiss an indictment pursuant to CPL 210.20 (1) (b) is limited to an assessment of the legal sufficiency of the evidence at the time of the indictment, not in light of subsequent events. The relevant inquiry on a motion to dismiss an indictment pursuant to CPL 210.20 (1) (b) is whether the evidence before the Grand Jury, viewed most favorably to the People, would support a determination of guilt. Here, the victim's positive identification of defendant, together with the arresting officer's testimony, as presented to the Grand Jury, satisfied this threshold standard.

Crimes
Indictment
Dismissal Based on Legal Impediment to Conviction--Suppression of Identification Evidence

(2) The indictment of defendant for robbery in the first degree and related crimes arising from the armed holdup of the victim need not be dismissed on the ground that the suppression of the victim's identification of defendant constitutes a legal impediment to defendant's conviction *(see,* CPL 210.20 [1] [h]). Suppression of the identification evidence simply diminishes the ***93** quantum of proof against defendant but does not negate any elements of the charged crimes. While the absence of the identification may create difficulty for the prosecution at trial, it certainly does not render it impossible for the People to obtain a conviction against defendant.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Indictments and Informations, §§ 27, 28, 91.

Carmody-Wait 2d, Criminal Procedure §§ 172:1034, 172:2005, 172:2006, 172:2020.

CPL 210.20 (1) (b), (h).

NY Jur 2d, Criminal Law, §§ 1048, 1050, 1052, 1152, 1179.

ANNOTATION REFERENCES

See ALR Index under Indictments and Informations.

POINTS OF COUNSEL

Vincent F. Gugino, Buffalo, *Linda S. Reynolds* and *Barbara J. Davies* for appellant.

The Court below erroneously reversed the order of the lower court and reinstated the indictment under the provisions of CPL 210.20 (1) (h). (*People v Swamp,* 84 NY2d 725; *People v Franco,* 196 AD2d 357; *People v Goodman,* 31 NY2d 262; *People v Frisbie,* 40 AD2d 334; *People v Groh,* 97 Misc 2d 894; *People v Maksymenko,* 105 Misc 2d 368; *People v Bussey,* 155 Misc 2d 916; *People v Rickert,* 58 NY2d 122; *Matter of Holtzman v Goldman,* 71 NY2d 564.)

Kevin M. Dillon, District Attorney of Erie County, Buffalo *(J. Michael Marion* and *John J. DeFranks* of counsel), for respondent.

The Court below correctly reversed the order of the trial court and reinstated the indictment against defendant. (*People v Swamp,* 84 NY2d 725; *People v Oakley,* 28 NY2d 309.)

OPINION OF THE COURT

Ciparick, J.

(1, 2) Defendant was indicted for one count of robbery in the first degree, one count of criminal possession of stolen property in the fifth degree and one count of criminal possession of a weapon in the fourth degree for his role in the armed holdup of the manager of a restaurant in Buffalo. After the manager's identification of defendant was suppressed, defendant moved to dismiss the indictment pursuant to CPL 210.20 (1) (b) and (h) on the grounds that the evidence before the Grand Jury was ***94** legally insufficient and that there was a legal impediment to conviction, arguments defendant presses on this appeal. For the reasons that follow, we conclude that the indictment is not rendered legally insufficient due to the suppression of the identification evidence nor is there a legal impediment to conviction simply because the People's case is weakened without that identification.

I.

On October 31, 1992, two officers on radio patrol responded to the report of the armed robbery. When they arrived at the restaurant, the officers encountered the manager, Libo Liu. Liu described the two robbers as males, one dressed in a red sweatsuit and the other wearing a black jacket with a plastic bag over his face. Liu said that the man in the black jacket brandished a gun and that the man in the red sweatsuit removed between $300 to $500 from the cash register and demanded his wristwatch. With this information, the officers canvassed the immediate neighborhood in search of the armed bandits.

The officers spotted two individuals generally fitting the description, and approached them for purposes of conducting a patdown. After a pellet gun was recovered from the waistband of the man wearing the red sweatpants--not the defendant--the two were informed that they were suspects in a robbery. The officers transported them to the restaurant, and one officer went into the restaurant and brought Liu out to the patrol car. That officer then brought defendant out of the back of the patrol car and asked Liu whether he recognized him. Liu hesitated for a moment but ultimately identified defendant as the robber.

At the *Wade* hearing, it was revealed that Liu positively identified defendant after the officer placed the gun in defendant's hand and requested that he point it in the direction of Liu. The hearing court ruled that Liu's identification of defendant should be suppressed because it was the result of an improper, unconstitutional and unduly suggestive procedure.

Subsequently, defendant moved, *inter alia,* to dismiss the indictment pursuant to CPL 210.20 (1) (b) and (h). Defendant argued that because the identification by Liu was suppressed and the arresting officer's knowledge flowed directly from this improper identification, there was nothing linking defendant to the crime. Defendant declared that the indictment, based only on his presence a quarter of a mile from the crime scene ***95** in the company of an individual identified as a participant in the robbery and his possession of $135 in cash, does not establish every element of the crimes charged and is therefore legally insufficient. Defendant also asserted that neither the alleged weapon nor the watch reportedly stolen from the restaurant manager was recovered from him. In addition, defendant contended that without the testimony of Liu, the People lacked evidence that he participated in the robbery, acted as a principal or accomplice, possessed the gun during the robbery or immediate flight therefrom, or of the source of his cash. Thus, defendant maintained that because the People's evidence was no longer competent, there existed a legal impediment to his conviction.

Supreme Court agreed and granted defendant's motion to dismiss the indictment, noting that in the absence of Liu's identification testimony it was not persuaded that the evidence presented to the Grand Jury was legally sufficient to justify the indictment. The Appellate Division reversed, on the law,

denied the motion, reinstated the indictment and remitted to Supreme Court for further proceedings on the indictment (*see, People v Gordon,* 214 AD2d 1029). Relying on this Court's decision in *People v Swamp* (84 NY2d 725), the Appellate Division ruled that although the identification evidence was determined unreliable and incompetent at the *Wade* hearing, it nevertheless supported a prima facie case at the Grand Jury stage (*see, People v Gordon,* 214 AD2d 1029, *supra).* Additionally, the Court held that under the authority of *Swamp* there was no legal impediment to conviction even though the People's case was weakened without Liu's identification testimony (*see, id.*). A Judge of this Court granted defendant leave to appeal and we now affirm.

II.

CPL 190.65 (1) provides that a Grand Jury may indict a person for an offense when the evidence before it (a) establishes all the elements of the crime and (b) also establishes reasonable cause to believe that the accused committed the crime to be charged. The first prong of the statute requires that the People present prima facie proof that the charged crime has been committed by defendant; the second dictates the degree of certitude grand jurors must possess to indict (*see, People v Jennings,* 69 NY2d 103, 115).

In the context of Grand Jury procedure, we have held that legally sufficient evidence means proof of a prima facie case, ***96** not proof beyond a reasonable doubt (*see, id.; People v Mayo,* 36 NY2d 1002, 1004; *People v Haney,* 30 NY2d 328, 335-336; *People v Peetz,* 7 NY2d 147, 149; *see also,* CPL 70.10). Evidence that is legally sufficient to establish a prima facie case in the Grand Jury may nevertheless be inadequate to prove guilt beyond a reasonable doubt at trial (*see, People v Sabella,* 35 NY2d 158, 167). If competent prima facie evidence underlying an indictment is subsequently rendered inadmissible by extrinsic proof--for example, evidence of an unduly suggestive identification procedure proffered at a *Wade* hearing--the legal sufficiency of the indictment is not undermined (*see, People v Swamp,* 84 NY2d, at 731-732, *supra; People v Brewster,* 63 NY2d 419, 422-423; *People v Oakley,* 28 NY2d 309, 312). Competent prima facie evidence stands sufficient until nullified, and can supply a necessary element in a prima facie case unless nullified before an indictment is secured (*see, People v Swamp,* 84 NY2d, at 731, *supra; People v Oakley,* 28 NY2d, at 312, *supra).*

(1) We have recognized a distinction between evidence subject to a per se exclusionary rule that is never sufficient to support an indictment and evidence that is sufficient to support a prima facie case before the Grand Jury but is later proven unreliable (*see, People v Swamp,* 84 NY2d, at 731-732, *supra; People v Oakley,* 28 NY2d, at 312, *supra).* In the latter situation, we have declined to undo the work of the Grand Jury because the court's function on a motion to dismiss pursuant to CPL 210.20 (1) (b) is limited to an assessment of the legal sufficiency of the evidence at the time of the indictment, not in light of subsequent developments. The relevant inquiry on a motion to dismiss an indictment pursuant to CPL 210.20 (1) (b) is whether the evidence before the Grand Jury, viewed most favorably to the People, would support a determination of guilt (*see,* CPL 190.65 [1] [a]; *People v Jennings,* 69 NY2d, at 115, *supra).* Here, Liu's positive identification of defendant, together with the arresting officer's testimony, as presented to the Grand Jury, satisfied this threshold standard (*see, People v Brewster,* 63 NY2d, at 422-423, *supra; People v Oakley,* 28 NY2d, at 312, *supra*). To hold otherwise would convert the reviewing court's function into a summary judgment evaluation of the quality and quantum of the People's evidence, a function reserved to the petit jury.

Defendant further contends that the legal insufficiency of the evidence relied upon by the Grand Jury creates a legal impediment to conviction within the meaning of ***97** CPL 210.20 (1) (h) which independently requires dismissal of the indictment. Defendant asserts that this pretrial failure of the prosecution's evidence constitutes the legal impediment identified in *Swamp,* where this Court held that if the chemical field test used to indict defendant for possession of a controlled substance was subsequently contradicted there would "exist[ ] a 'legal impediment to conviction of the defendant for the offense charged,' since it would be impossible for the People to obtain a conviction based on the result of a field test that has been conclusively contradicted" (*People v Swamp,* 84 NY2d, at 732, *supra,* quoting CPL 210.20 [1] [h]). Defendant's reliance on *Swamp* is misplaced.

In *Swamp,* we specifically ruled that the positive preliminary field test result indicating the presence of cocaine presented to the Grand Jury satisfied the threshold standard of legal sufficiency to establish a prima facie case of unlawful possession of a controlled substance under Penal Law § 220.06 (5) (*see, id.; see also,* CPL 190.30 [2]; 715.50 [1]). Consequently, we rejected defendant's arguments to dismiss under CPL 210.20 (1) (b) on the grounds that such preliminary determination was insufficient to establish a prima facie case and that a formal laboratory analysis was required to support the indictment (*see, People v Swamp,* 84 NY2d, at 729, *supra).* The legal impediment to conviction for unlawful possession of cocaine referred to in *Swamp* arises when a subsequent, formal laboratory test yields a negative result for the presence of cocaine in direct contradiction to the only other evidence of possession--the positive result from the field test performed immediately after the substance was retrieved from defendant. This strips the People of the only demonstrable evidence of defendant's possession of an unlawful quantity of cocaine. Absent any proof to support the statutory element of possession of 500 milligrams or more of cocaine, there is a legal impediment to conviction within the contemplation of CPL 210.20 (1) (h) (*see, People v Franco,* 86 NY2d 493, 498-499).

(2) This sharply contrasts with the circumstances of the instant case, where the suppression of the identification evidence simply diminishes the quantum of proof against defendant but does not negate any elements of the charged crimes. While the absence of the identification may create difficulty for the prosecution at trial, it certainly does not render it impossible for the People to obtain a conviction against defendant (*see, People v Avant,* 33 NY2d 265, 271). Indeed, it is always possible that another witness may surface or that evidence ***98** previously unavailable to the Grand Jury may be produced at trial. Therefore, there is no legal impediment to conviction.

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Levine concur.
Order affirmed. ***99**

69 N.Y.2d 103, 504 N.E.2d 1079, 512 N.Y.S.2d 652

The People of the State of New York, Respondent,
v.
John Jennings, Appellant. (Indictment No. 638/83.)
The People of the State of New York, Appellant,
v.
John Jennings and Angela Fiumefreddo,
Respondents. (Indictment No. 640/83.)
The People of the State of New York, Appellant,
v.
Sentry Armored Courier Corp. and Sentry Investigations
Corp., Respondents. (Indictment No. 4379/83.)
The People of the State of New York, Appellant,
v.
John Finnerty, Respondent. (Indictment No. 4380/83.)
The People of the State of New York, Respondent,
v.
John Jennings and Angela Fiumefreddo,
Appellants. (Indictment No. 369/84.)
The People of the State of New York, Appellant,
v.
John Jennings, Respondent. (Indictment No. 370/84.)

Court of Appeals of New York
378
Argued October 9, 1986;
decided December 18, 1986

CITE TITLE AS: People v Jennings

SUMMARY

Appeals, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 20, 1985, which (1) affirmed four orders of the Supreme Court (Howard E. Goldfluss, J.; opn 123 Misc 2d 560), entered in Bronx County, dismissing, respectively, indictments Nos. 4380/83, 4379/83, 370/84 and 640/83, (2) reversed two orders of that court (Harold E. Goldfluss, J.; opn 123 Misc 2d 560), entered in Bronx County, dismissing, respectively, indictments Nos. 638/83 and 369/84, and (3) reinstated indictments Nos. 638/83 and 369/84.

People v Jennings, 111 AD2d 678, modified.

HEADNOTES

Crimes
Indictment
Motion to Dismiss Indictment--Waiver of People's Right to Written Notice of Motion

(1) Under CPL 210.45 (1), a defendant must provide the People with written notice of and a reasonable opportunity to respond to a motion to inspect and dismiss an indictment made under CPL 210.20. However, by failing to complain of the flaws now asserted (i.e., that the corporate defendants did not make written motions to dismiss the new indictments against them and defendant Fiumefreddo failed to move in writing either to dismiss the new indictment or to reargue a prior denial of her motion to ***104** dismiss, and that defendant Jennings' written dismissal motion referred, in part, to an indictment that had been superseded, rather than to the replacement indictment), by either raising the problem before the Presiding Judge made his decision or moving for reargument within a reasonable time thereafter, the People waived their right to insist upon conformity with the procedural requirements of CPL 210.45 (1). Inasmuch as the requirements of CPL 210.45 (1) are designed primarily to protect the People from unfair surprise, no overriding public policies are offended by treating the People's silence as a waiver of their right to written notice under that statute. Further, the People have not shown how they were prejudiced either by the failure of Fiumefreddo and the corporate defendants to make formal written submissions or by the failure of defendant Jennings correctly to identify by number each indictment he was challenging.

Judges
Review of Matter Previously Decided by Judge of Coordinate Jurisdiction
Rule against Collateral Vacatur

(2) Although Justice Goldfluss should not have dismissed the counts of indictments against defendants that Justice Vitale had previously upheld unless Justice Vitale was unavailable for referral, because of the People's failure timely to protest Justice Goldfluss' action, the record is barren of facts from which it might be concluded that Justice Vitale was available and able to entertain the motion had it been transferred to him by his colleague *(see,* CPLR 2221). Hence, it cannot be said that the rule against collateral vacatur was violated.

Crimes
Indictment
Motion to Dismiss--Standard for Determining Sufficiency of Circumstantial Evidence--"Reasonable Cause"

(3) The Criminal Procedure Law provides that a Grand Jury may indict a person when the evidence before it both establishes all the elements of the crime and also establishes reasonable cause to believe that the accused committed the crime to be charged (CPL 190.65 [1]). Accordingly, in granting the motions to dismiss all of the indictments charging the corporate defendants and the individual defendants with various counts of larceny and misapplication of property, the reviewing Justice erroneously applied a higher standard to determine whether the People's circumstantial evidence of a larcenous intent was sufficient by demanding that the People's evidence be wholly inconsistent with innocent intent or belief. It is clear from the statute that the applicable degree of certitude grand jurors must possess to indict is "reasonable cause," not "beyond a reasonable doubt" or "moral certainty" where the principal proof of guilt is circumstantial. Furthermore, on a motion to dismiss an indictment under CPL 210.20 (1) (b), the inquiry of the reviewing court is limited to the legal sufficiency of the evidence; the court may not examine the adequacy of the proof to establish reasonable cause, since that inquiry is exclusively the province of the Grand Jury.

Crimes
Larceny
Intent to Deprive or Appropriate--Economic Value or Benefit of Money Entrusted to Defendants for "Fine Counting" and Invested for Profit

(4) Where Chemical Bank (Chemical) and the corporate defendant (Sentry) entered into an agreement under which Sentry was to pick up from Chemical's offices certain "bulk deposits", "fine count" this money and then deliver it within 72 hours to Chemical's account at the Federal Reserve Bank, evidence presented to the Grand Jury, which indicates only that Sentry and the individual defendants, principals of Sentry, exercised control over Chemical's money to the extent of using the funds to make short-term, ***105** profitable investments and, as a result, appropriated some portion of its economic benefit for themselves, is legally insufficient to support the charges of second degree grand larceny based on the claim that by investing Chemical's money for periods up to 48 hours, defendants evinced an intent to deprive its true owner of the money's "economic value or benefit," that is, the interest that the money was capable of generating. The People's proof lacks evidence demonstrating an "intent to deprive * * * or appropriate" (Penal Law § 155.05 [1]). In light of the fact that defendants' unauthorized use of Chemical's money extended over no more than a series of discrete 48-hour periods, the proof was insufficient to show that they intended to use Chemical's money for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit. Moreover, inasmuch as Chemical had ceded possession of its money to the corporate defendant for various 72-hour periods, it had no legal rights during those periods to the money's economic value or benefit, which is an incident of possession. Thus, to the extent that defendants intended to appropriate to themselves the economic value or benefit of Chemical's money, it cannot be said that their intentions were unlawful or even inconsistent with the terms of the bailment.

Crimes
Larceny
Intentional and Permanent Taking of Interest Earned on Money Entrusted to Defendants for "Fine Counting"

(5) Where Chemical Bank (Chemical) and the corporate defendant (Sentry) entered into an agreement under which Sentry was to pick up from Chemical's offices certain "bulk deposits", "fine count" this money and then deliver it within 72 hours to Chemical's account at the Federal Reserve Bank, evidence presented to the Grand Jury, which indicates only that Sentry and the individual defendants, principals of Sentry, exercised control over Chemical's money to the extent of using the funds to make short-term, profitable investments

and, as a result, appropriated some portion of its economic benefit for themselves, is legally insufficient to support the charges of second degree grand larceny based on the claim that defendants intentionally and permanently stole the interest earned on Chemical's money, as distinguished from the money itself. Absent proof of an agreement to the contrary, Chemical cannot be deemed the true owner of the interest earned while its money was in defendants' custody pursuant to the parties' "fine counting" agreement. Further, it would be inconsistent with the statutory design to treat defendants' concededly permanent taking of the interest earned on Chemical's funds as a larceny within the meaning of Penal Law §§ 155.00, 155.05 and 155.35. In these circumstances, the statute must be read to apply only to a taking of the property itself and not to a permanent taking of what is, in essence, only the economic value of its use during the short time the property has been withheld.

Crimes
Larceny
Larcenous Intent

(6) Where Chemical Bank (Chemical) entrusted money to the corporate defendant (Sentry) for "fine counting" and delivery within 72 hours to Chemical's account at the Federal Reserve Bank, and the individual defendants, principals of Sentry, used the money during that 72-hour period to make short-term profitable investments without Chemical's authorization by means of "repurchase agreements" with Hudson Valley National Bank, neither Sentry's patently false response to Chemical's inquiry concerning the rerouting of its money, that the rerouting had been initiated for insurance purposes, nor Sentry's disobedience when ordered by Chemical to deliver the money directly to Chemical's account at the Federal Reserve ***106** Bank are sufficient to establish that Sentry was acting with the larcenous intent required by Penal Law § 155.00 (3), (4) and § 155.05 (1) to support a charge of larceny against defendants arising out of the "repurchase agreement" plan.

Crimes
Misapplication of Property
Risk of Loss

(7) The thrust of Penal Law § 165.00 (1), which defines the crime of misapplication of property, is to make it a crime to alienate in any way property belonging to another under circumstances creating a risk of loss; the statute requires proof of a risk that is more than a far-fetched or wholly speculative possibility. Accordingly, where Chemical Bank (Chemical) entrusted money to the corporate defendant (Sentry) for "fine counting" and delivery within 72 hours to Chemical's account at the Federal Reserve Bank, but during that 72-hour period the individual defendants, principals of Sentry, used the money to make short-term, profitable investments without Chemical's authorization by means of "repurchase agreements" with Hudson Valley National Bank (Hudson), the evidence before the Grand Jury was sufficient to support a finding that the "repurchase agreements" were the equivalent of a "loan" to Hudson within the meaning of section 165.00 (1), but that evidence was insufficient to support the misapplication of property charge against defendants because of the absence of proof that these loans were made "in such manner as to create a risk" of loss. There was no actual risk that the money would not be repaid, since even in the unlikely event of a default by Hudson, the loans to Hudson were secured by A-rated bonds held in Hudson's Federal Reserve Bank vault.

Crimes
Misapplication of Property
Risk of Loss--Use of Wire Transfers of Funds

(8) Where Chemical Bank (Chemical) entrusted money to the corporate defendant (Sentry) for "fine counting" and delivery within 72 hours to Chemical's account at the Federal Reserve Bank, and during that 72-hour period, the individual defendants, principals of Sentry, used the money to make short-term, profitable investments without Chemical's authorization, the use of wire transfers to return the principal amount to Chemical's account at the Federal Reserve Bank did not create a legally cognizable risk of loss through electronic accident or deliberate computer hijacking sufficient to support a charge of misapplication of property (Penal Law § 165.00 [1]). There is nothing in the record to demonstrate that such a risk in fact existed and, absent meaningful proof, such an alleged source of risk is far too speculative and remote to support an indictment under Penal Law § 165.00 (1). Nor was the statute violated because defendants encumbered Chemical's money in such a way as to create a risk that the exact same bills entrusted to Sentry would not be recovered.

Inasmuch as money is quintessentially fungible property, the certainty that the exact same amount of money will be recovered is enough to defeat application of the statute.

Crimes
Misapplication of Property
Recovery of Possession and No Material Economic Loss as Defense

(9) Where defendants used money entrusted to the corporate defendant (Sentry) by Chemical Bank (Chemical) for "fine counting" to make short-term, profitable investments without Chemical's authorization by means of "repurchase agreements" with Hudson Valley National Bank, and the principal amount was returned to Chemical's account at the Federal Reserve Bank, the defense set forth in Penal Law § 165.00 (2) to counts of misapplication of property against defendants was established before the ***107** Grand Jury as a matter of law. As the undisputed evidence showed, defendants had promptly "recovered possession" of all of Chemical's money and Chemical "suffered no material economic loss" as a result of the "repurchase agreements".

Crimes
Appeal
Preservation of Issue for Appellate Review--Protest by Party--Express Decision as to Question Raised on Appeal

(10) Under the amended version of CPL 470.05 (2), a preserved "question of law" exists "if in response to a protest by a party, the court expressly decided the question raised on appeal." Thus, although defendant's motion sought dismissal of the "indictments", and recited as one of the grounds for dismissal that the evidence was legally insufficient, but the caption of his motion papers cited only three of the four extant indictments, omitting for no apparent reason the indictment which covered larceny charges arising from a "compensatory balance" account arrangement, the intent issue in regard to that larceny count presents a question of law reviewable by the Court of Appeals under the current version of CPL 470.05 (2) since there exist both a "protest" in the form of defendant's incomplete motion to dismiss, a dismissal of all counts including the one omitted from the motion and an opinion in which the trial court expressly describes its reasons for doing so.

Crimes
Larceny
Intent Permanently to Deprive Owner of Money--Loss of Major Portion of Economic Value or Benefit of Money

(11) Where defendants deposited some $100,000, which they allegedly took out of a "rolling inventory" of dollar bills and coins kept for Chemical Bank (Chemical) by the corporate defendant (Sentry), in a "compensatory balance" account at Citibank to enable Sentry to obtain a lower interest rate on a refinanced equipment loan it had with Citibank, and Sentry returned Chemical's "rolling inventory" with a substantial shortage after Citibank called in the demand portion of Sentry's equipment loan, freezing the "compensatory balance" account in an apparent preliminary attempt to set off its claim against Sentry, the facts before the Grand Jury do not support an inference of larcenous intent, as that element is defined in Penal Law § 155.00 (3), (4) and § 155.05 (1). Lacking here is the intent permanently to deprive the owner of the funds or to exercise control over the money "for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost." There is no indication that defendants intended to appropriate the money in such a way as to sap it of the "major portion" of its economic benefit. The fact that the money was ultimately lost as a result of Citibank's exercise of its rights as a creditor does not alter this analysis, since defendants were not parties to and had apparently not even anticipated Citibank's actions.

Crimes
Misapplication of Property
Encumbrance of Funds--Tangible Risk That Funds Would Not Be Recovered

(12) Where defendants deposited some $100,000, which they allegedly took out of a "rolling inventory" of dollar bills and coins kept for Chemical Bank (Chemical) by the corporate defendant (Sentry), in a "compensatory balance" account at Citibank to enable Sentry to obtain a lower interest rate on a refinanced equipment loan it had with Citibank, and Sentry returned the "rolling inventory" to Chemical with a substantial shortage after Citibank called in the demand portion of Sentry's loan, freezing the "compensatory balance" account in an apparent preliminary attempt to set off its

***108** claim against Sentry, the elements of a misapplication of property count (Penal Law § 165.00 [1]) were satisfied by the evidence showing that defendants had encumbered Chemical's funds in such a manner as to place them at risk. Although there was no showing that the funds in the "compensatory balance" account were expressly deposited as security for Citibank's loan to Sentry, the bank's right of setoff made those funds the indirect equivalent of security. As a consequence, there was a sufficient basis for the Grand Jury to infer that defendants had both "encumbered" the funds within the meaning of the statute and created a tangible risk that those funds would not be recovered.

Crimes
Larceny
Failure of Insured to Pay Insurance Proceeds to Parties Whose Loss Gave Rise to Insurance Claim

(13) The failure of defendant, the president of a corporation (Sentry) principally engaged in transporting and storing large sums of cash, to use the proceeds of an insurance settlement to reimburse two of Sentry's clients for losses sustained when one of Sentry's armored cars was robbed cannot serve as the basis for a larceny prosecution since Sentry, and not the clients, was the rightful owner of the insurance proceeds. It was Sentry that had paid for the insurance coverage, and it was Sentry, rather than its clients, that the insurer was obligated to pay in the event of loss. While Sentry may have had a civil obligation to reimburse its clients for their loss, its failure to meet that obligation cannot be transformed into liability for criminal larceny because nothing belonging to the clients was converted.

Crimes
Larceny
Failure of Insured to Pay Insurance Proceeds to Parties Whose Loss Gave Rise to Insurance Claim--Constructive Trust

(14) Although a larceny prosecution might lie against a person who had converted to his own use funds that were given to him in trust for another, and a bailee who receives casualty insurance payments in reimbursement for the loss of bailed property holds those payments in trust for the bailor, these principles do not provide a basis for the imposition of criminal liability on defendant, the president of a corporation (Sentry), who failed to use all of the proceeds of Sentry's insurance coverage to reimburse three of Sentry's clients for losses sustained when one of Sentry's armored cars was robbed giving rise to Sentry's insurance claim. The People have neither claimed that Sentry held the proceeds of its insurance coverage in trust for those clients nor made an effort to show that the insurance policy under which payment was made was a casualty policy rather than one merely insuring against liability. Even more importantly, the trust imposed on casualty insurance proceeds is one that exists, if at all, by operation of equitable principles, and an alleged misuse of funds on which only an equitable or constructive trust has been imposed cannot support a larceny prosecution.

Crimes
Larceny
Larcenous Intent

(15) The Grand Jury could have rationally returned indictments charging defendants, two of the principals of a corporation (Sentry) engaged principally in transporting and storing large sums of cash, with second degree larceny arising out of a series of incidents in which Sentry simply failed to deliver money with which it had been entrusted. Defendants' larcenous intent could have been inferred from such circumstances as participation in a paper-shredding incident and the evidence of an ongoing practice of ***109** commingling clients' funds, as well as from the unexplained disappearance of the money itself.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Indictments and Informations, §§21, 31, 34, 239-241; Larceny, §§9, 44-46, 62, 78.

Carmody-Wait 2d, Motions, Petitions, and Orders 8:76, 8:77, 8:82, 8:116-8:118.

CLS, CPLR 2221; CPL 190.65 (1); 210.20, 210.45 (1); 470.05 (2); Penal Law §§155.00, 155.05 (1); §§155.35, 165.00.

NY Jur 2d, Business Relationships, §§313, 1004, 1005, 1030, 1088; Criminal Law, §§261,645-848, 1280-1282, 1905, 2196, 2197, 2251,2281-2291.

ANNOTATION REFERENCES

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act. 19 ALR4th 959.

Embezzlement, larceny, false pretenses or allied criminal fraud by a partner. 82 ALR3d 822.

What conduct amounts to an overt act or acts done toward commission of larceny so as to sustain charge of attempt to commit larceny. 76 ALR3d 842.

Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 ALR3d 1297.

POINTS OF COUNSEL

Mario Merola, District Attorney (Peter D. Coddington and *Steven R. Kartagener* of counsel), for appellant in indictments Nos. 640/83, 4379/83, 4380/83 and 370/84.

I. The court below lacked jurisdiction to dismiss the charges against defendants who did not bring written motions to inspect and dismiss. *(People v Lawrence,* 64 NY2d 200; *People v Fanelli,* 92 AD2d 573; *People v Rao,* 53 AD2d 904.) II. The court below erroneously granted defendant Jennings' inadequate motion for reargument of his earlier motion to inspect and dismiss indictments Nos. 638/83 and 640/83. *(American Trading Co. v Fish,* 87 Misc 2d 193; *People v Jenkins,* 39 AD2d 924; *Martin v City of Cohoes,* 37 NY2d 162; *People v Finley,* 104 AD2d 450.) III. The evidence before the Grand Jury was legally sufficient to ***110** support the indictments relating to the repurchase agreement scheme and the missing money scheme which were erroneously dismissed by the nisi prius court. *(Nichols v People,* 17 NY 114; *People v McDonald,* 43 NY 61; *Harrison v People,* 50 NY 518; *Smith v People,* 53 NY 111; *People v Felber,* 264 App Div 181; *People v Alamo,* 34 NY2d 458; *People v Olivo,* 52 NY2d 309; *People v Warner-Lambert Co.,* 51 NY2d 295; *People v Haney,* 30 NY2d 328; *People v Eckert,* 2 NY2d 126.)

Joseph M. Darby for John Jennings, respondent, appellant.

I. The court below acted upon a written motion on notice as to the charges that were included in the indictment. II. The District Attorney is appealing as to matters that were not raised by him in his opposing motion papers. *(People v Qualls,* 55 NY2d 733; *People v Gonzalez,* 55 NY2d 720; *People v Liccione,* 50 NY2d 850.) III. The evidence before the Grand Jury is legally insufficient to show misapplication of property or grand larceny. IV. The facts as set forth before the Grand Jury were insufficient to satisfy all of the elements of the crime of grand larceny in the second degree. *(People v Kenney,* 135 App Div 380; *People v Guzman,* 68 AD2d 58; *People v Pelchat,* 62 NY2d 97.)

Francine Seiden for Angela Fiumefreddo, respondent, appellant.

I. The evidence before the Grand Jury was insufficient to support the indictments properly dismissed by the court below. *(People v Mayo,* 36 NY2d 1002; *People v Fellman,* 35 NY2d 158; *People v Kirnon,* 39 AD2d 666, 31 NY2d 877; *People v Fagg,* 86 Misc 2d 1046; *People v Bray,* 99 AD2d 470; *People v Harris,* 47 AD2d 385; *People v Bearden,* 290 NY 478; *People v Shanklin,* 59 AD2d 588.) II. The People waived their right to written motions by defendant, Fiumefreddo, by failing to object to the joinder of the parties on the written motion before the court. *(People v Bermudez,* 84 Misc 2d 1071; *People v Singleton,* 42 NY2d 466; *People v Rao,* 53 AD2d 904; *People v Dedmon,* 53 AD2d 646; *People v Eason,* 45 AD2d 863; *People v Waters,* 45 AD2d 823.) III. The People cannot raise an issue for the first time on appeal. *(Mastronardi v Mitchell,* 109 AD2d 825; *Mercado v Rockefeller,* 502 F2d 666; *Blue Giant Equip. Corp. v Tec-Ser, Inc.,* 92 AD2d 630; *Meyers v Fifth Ave. Bldg. Assoc.,* 90 AD2d 824; *Matter of Van Wormer v Leversee,* 87 AD2d 942; *Terkildsen v Waters,* 481 F2d 201; *Telaro v Telaro,* 25 NY2d 433; *Tomaino v Tomaino,* 68 AD2d 267; *Simcuski v Saeli,* 57 AD2d 711.)

Richard M. Asche and *Russell M. Gioiella* for Sentry Armored ***111** Courier Corp. and another, respondents.

I. The Grand Jury proof was legally insufficient to make out the charge of grand larceny. *(People v Ward,* 37 AD2d 174; *People v Pelchat,* 62 NY2d 97; *People v Barnes,* 50 NY2d 375; *People v Yannett,* 49 NY2d 296; *People v Robinson,* 284 NY 75; *People v Gelo,* 32 AD2d 661; *People v Blacknall,* 63 NY2d 912; *People v Matthews,* 61 AD2d 1017.) II. Sentry's failure to address motions to the indictment did not prevent the lower court from considering the merits of the charges.

Kevin P. Gilleece for John Finnerty, respondent.

The evidence presented to the Grand Jury was legally insufficient to support the indictment. *(People v Pelchat,*

62 NY2d 97; *People v Chesler,* 50 NY2d 203; *People v Meadows,* 199 NY 1; *People v Shears,* 158 App Div 577, 209 NY 610; *People v Kaye,* 295 NY 9; *People v Cole,* 97 AD2d 886; *People v Alaxanian,* 89 AD2d 700; *People v Barnes,* 50 NY2d 375; *People v Shealy,* 51 NY2d 933.)

Mario Merola, District Attorney (Peter D. Coddington and *Marianne Karas* of counsel), for respondent in indictments Nos. 638/83 and 369/84.

The evidence was legally sufficient to sustain all of the indictments handed down by the Grand Jury. (*People v Lawrence,* 64 NY2d 200; *People v Key,* 45 NY2d 111; *People v Pelchat,* 62 NY2d 97; *People v Warner-Lambert Co.,* 51 NY2d 295; *People v Mayo,* 36 NY2d 1002; *Matter of Anthony M.,* 63 NY2d 270; *Jackson v Virginia,* 443 US 307; *People v Contes,* 60 NY2d 620; *People v Schwartzman,* 24 NY2d 241; *People v Kaye,* 295 NY 9.)

OPINION OF THE COURT

Titone, J.

On December 13, 1982, the Sentry Armored Courier Corp. warehouse in Bronx County was burglarized and robbed of some $11 million by individuals unconnected to Sentry, who were later apprehended and prosecuted. In the aftermath of the robbery, the Bronx County District Attorney's office focused its attention on Sentry's-own business practices. A series of indictments charging Sentry and its principals with various counts of larceny and misapplication of property ensued. The question presented for our consideration is whether the indictments' allegations concerning defendants' handling of the money entrusted to their care would, if proven, support convictions for the crimes charged. ***112**

I. PROCEDURAL HISTORY

The six indictments presently before us collectively charge defendants John Jennings, Angela Fiumefreddo, John Finnerty, Sentry Armored Courier Corp. and Sentry Investigations Corp. with several counts of grand larceny in the second degree and misapplication of property. At the time the indictments were issued, Sentry was principally engaged in transporting and storing large sums of cash and performing related services on behalf of its clients. Defendant Jennings was the president of the Sentry Armored Courier Corp., defendant Fiumefreddo was the senior vice-president of that corporation, and defendant John Finnerty was the vice-president and cashier of the Hudson Valley National Bank, which played a role in one of the alleged misappropriation "schemes."

The case has a complex factual and procedural history. The larceny and misapplication charges arose out of four separate courses of conduct, which the People claim demonstrate defendants' criminal mishandling of their clients' funds. The first Grand Jury to consider the People's evidence handed up five indictments. Of these, three were dismissed entirely by Justice Vitale, with leave to re-present. The other two indictments were sustained against defendants Jennings and Fiumefreddo but dismissed against the only named corporate defendant, Sentry Armored Courier Corp. The second Grand Jury handed up four new indictments, naming Jennings, Fiumefreddo, Finnerty, Sentry Armored Courier Corp. and Sentry Investigations Corp. as defendants. All six outstanding indictments were dismissed by the then Presiding Judge, Justice Goldfluss, on the ground that the proof before the Grand Jury was legally insufficient *(see,* 123 Misc 2d 560). Two of the indictments, which named Jennings and Fiumefreddo as defendants, were reinstated on the People's appeal to the Appellate Division, and the People, as well as defendants Jennings and Fiumefreddo, were granted leave to take cross appeals to this court.

II. THE THRESHOLD PROCEDURAL ISSUES

Initially, the People advance a number of procedural arguments in support of their position. First, they contend that all counts against Fiumefreddo and the corporate defendants should be reinstated because, unlike defendants Jennings and Finnerty, the corporate defendants did not make written motions to dismiss the new indictments against them and ***113** Fiumefreddo failed to move in writing either to dismiss the new indictment or to reargue Justice Vitale's prior denial of her motion to dismiss *(see,* CPL 210.45 [1]). Second, the People contend that defendant Jennings' written dismissal motion was flawed because it referred, in part, to an indictment that had been superseded, rather than to the replacement indictment. Finally, the People argue that those counts remaining from the first Grand Jury presentment, which had survived a dismissal motion before Justice Vitale, should not have been dismissed by Justice Goldfluss but instead should have been referred to Justice Vitale for reargument under the mandate of CPLR 2221.

(1) We agree with the People that under CPL 210.45 (1) a defendant must provide them with written notice of and a reasonable opportunity to respond to a motion to inspect and dismiss an indictment made under CPL 210.20. However, by failing to complain of the flaws they now assert, by either raising the problem before Justice Goldfluss made his decision or moving for reargument within a reasonable time thereafter, the People in this case waived their right to insist upon conformity with the procedural requirements of CPL 210.45 (1) *(see, People v Singleton,* 42 NY2d 466, 470-471). Unlike the timing requirements of CPL 210.20 (2) and 255.20, the written notice requirement of CPL 210.45 (1) is not directly related to "the strong public policy to further orderly trial procedures and preserve scarce trial resources" *(People v Lawrence,* 64 NY2d 200, 207; *see also, Matter of Veloz v Rothwax,* 65 NY2d 902; *People v Key,* 45 NY2d 111; *People v Selby,* 53 AD2d 878, *affd* 43 NY2d 791). Rather, the rule's principal purpose is to ensure that the People have fair notice of the claims that the moving defendant intends to present to the court. Inasmuch as the requirements of CPL 210.45 (1) are designed primarily to protect the People from unfair surprise, no overriding public policies are offended by treating the People's silence as a waiver of their right to written notice under that statute *(cf. People v Lawrence, supra)*. We note that the People here have not shown how they were prejudiced either by the failure of Fiumefreddo and the corporate defendants to make formal written submissions or by the failure of defendant Jennings correctly to identify by number each indictment he was challenging.

(2) Similarly, while we agree that, unless Justice Vitale was unavailable for referral, Justice Goldfluss should not have dismissed the counts that Justice Vitale had previously upheld ***114** *(see, People v Petgen,* 55 NY2d 529, 534; *see also,* CPLR 2221), we conclude that the People's present argument presents no ground for reversal. Because of the People's failure timely to protest Justice Goldfluss' action, the present record is barren of facts from which we might conclude that Justice Vitale was available and able to entertain the motion had it been transferred to him by his colleague *(see,* CPLR 2221). Hence, we cannot say that the rule against collateral vacatur was violated here *(see, Spahn v Griffith,* 101 AD2d 1011; *cf. Hess v Wessendorf,* 102 AD2d 926; *Willard v Willard,* 194 App Div 123; *see also, Blasi v Boucher,* 30 AD2d 674). [1]

III. THE PROPER STANDARD FOR REVIEW

Having determined that there are no procedural grounds for upsetting the Appellate Division order, we turn now to the proper standard for reviewing the sufficiency of evidence before a Grand Jury. The Grand Jury may not indict unless the People present evidence establishing a prima facie case of criminal conduct *(see, People v Dunleavy,* 41 AD2d 717, *affd* 33 NY2d 573). The sufficiency of the People's presentation is properly determined by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury *(see, People v Pelchat,* 62 NY2d 97, 105).

(3) In granting the motions to dismiss all of the indictments in this matter, however, the reviewing Justice erroneously applied a higher standard to determine whether the People's circumstantial evidence of a larcenous intent was sufficient. Citing *People v Ryan* (41 NY2d 634), *People v Borrero* (26 NY2d 430), *People v Cleague* (22 NY2d 363), *People v Bearden* (290 NY 478) and *People v Newman* (80 Misc 2d 975, *affd* 85 Misc 2d 761), the court demanded that the People's evidence be " ' "wholly inconsistent with innocent intent or belief" ' " (123 Misc 2d 560, 564). The cases cited to justify this heightened scrutiny, however, only addressed the question whether the circumstantial evidence of larcenous intent adduced *at trial* supported a petit jury's finding that guilt was established beyond a reasonable doubt. Manifestly, such cases are not controlling on a motion to dismiss an indictment prior to trial ***115** *(see, People v Dunleavy,* 41 AD2d 717, *affd* 33 NY2d 573, *supra)*. [2]

The Criminal Procedure Law provides that a Grand Jury may indict a person when the evidence before it both establishes all the elements of the crime and also establishes reasonable cause to believe that the accused committed the crime to be charged (CPL 190.65 [1]). The first prong requires that the People present a prima facie case; the second dictates the degree of certitude grand jurors must possess to indict. It is thus clear from the statute that the applicable degree of certitude is "reasonable cause," not "beyond a reasonable doubt" or "moral certainty" where the principal proof of guilt is circumstantial. Furthermore, on a motion to dismiss an indictment under CPL 210.20 (1) (b), the inquiry of the reviewing court is limited to the legal sufficiency of the evidence; the court may not examine the adequacy of

the proof to establish reasonable cause, since that inquiry is exclusively the province of the Grand Jury. As we said in *People v Sabella* (35 NY2d 158, 167): " ' "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof * * *' In determining whether the People have reached this stage, all questions as to the quality or weight of the proof should be deferred. In other words if the prosecutor has established a prima facie case, the evidence is legally sufficient 'even though its quality or weight may be so dubious as to preclude indictment or conviction pursuant to other requirements.' To further illustrate the point the Commission Staff noted that 'evidence may be "legally sufficient" to support a charge although it does not prove guilt "beyond a reasonable doubt," and for that matter, although it does not even provide "reasonable cause" to believe that the defendant committed the crime charged.' (See Commission Staff Comment to Proposed CPL 35.10, now CPL 70.10.)" *(See, also, People v Mayo,* 36 NY2d 1002, 1004.) ***116**

With these standards in mind, we will now address the substantive arguments raised by the parties on these cross appeals. Since the various counts we have been asked to consider arise from four discrete sets of facts, we deem it appropriate to evaluate each group of charges separately.

IV. THE REPURCHASE AGREEMENT PLAN

Indictments Nos. 4379/83, 4380/83 and 370/84, on which the named defendants are John Jennings, John Finnerty, Sentry Armored Courier Corp. and Sentry Investigations Corp., all concern a business practice that the People have dubbed the "Repurchase Agreement Scheme." All of the counts in these indictments were dismissed by the trial court, and the dismissals were upheld on the People's appeal to the Appellate Division. We agree with the Appellate Division that the facts presented to the Grand Jury were legally insufficient to support the charges of second degree grand larceny and misapplication of property that were contained in these indictments.

Taken in the light most favorable to the People, the evidence before the Grand Jury showed that Sentry had an agreement with its client, Chemical Bank, under which Sentry was to pick up from Chemical's Water Street offices certain "bulk deposits" that Chemical had received from its commercial customers. Sentry was to "fine count" this money in its warehouse and then deliver it within 72 hours to Chemical's account at the Federal Reserve Bank in lower Manhattan, reporting any overages or shortages discovered in the counting process.[3] In fact, Sentry was able to perform the "fine counting" task in approximately 24 hours, considerably less time than the 72 hours its agreement with Chemical allowed.

Reluctant to retain all of the cash on Sentry's premises for the full 72-hour period, defendant Jennings met with defendant Finnerty, an officer of Hudson Valley National Bank, and arranged for the "fine counted" money to be delivered to Hudson's account at the Federal Reserve Bank, with the funds ***117** to be credited to Sentry's newly created escrow account with Hudson. Once the funds were delivered, an employee of Sentry was to call Hudson and specify the amount that was to be used to buy "repurchase agreements" from that bank. Under these "repurchase agreements," which were analogous to loans or bonds, Hudson was given the right to invest the money, while Sentry's account was debited in an appropriate amount. The loan was secured by A-rated bonds held in Hudson's Federal Reserve Bank vault. At the conclusion of the 72-hour period Sentry had to deposit Chemical's money in its Federal Reserve account, Hudson would " repurchase" the bonds from Sentry by crediting Sentry's escrow account with the principal amount plus a portion of the interest Hudson had earned on its investments. On telephone orders from Sentry's employee, Hudson would then wire transfer the principal amount to Chemical's account at the Federal Reserve Bank, leaving Sentry's account enriched by the amount of the interest payment.

The "repurchase agreement" plan was implemented in July of 1981. By late August, Chemical had noticed that its funds were being routed through Hudson and demanded an explanation. Although an officer of Sentry told Chemical's representative that the rerouting had been initiated for "insurance purposes, " Chemical was evidently unsatisfied and directed Sentry, both orally and in writing, to deliver the "fine counted" money directly to Chemical's account at the Federal Reserve Bank. Despite this admonition, Sentry continued its practice of routing the money through Hudson until November of 1981, when Chemical decided it could "fine count" its bulk deposits internally. During the period when its arrangement with Hudson was in effect, Sentry gained a total of nearly $17,000 in interest earned on over 40 "repurchase agreements." The full amount of the principal belonging to Chemical, however, was always returned to its owner within the allotted 72-hour time frame.

The People have advanced several theories in support of their larceny charge, including a "breaking of the bale" and an unlawful "separat[ion] of the value of the money from its engraved ink and paper container." None of the theories the People have proffered, however, would support a larceny conviction under our modern statutes defining that crime. While Sentry's conduct may have provided a basis for civil liability in some form, that conduct did not constitute criminal larceny. ***118**

The crime of larceny consists of an unauthorized taking, coupled with the " intent to deprive another of property or to appropriate the same" (Penal Law § 155.05 [1]). The terms "deprive" and "appropriate" are specifically defined in Penal Law § 155.00:

"3. 'Deprive.' To 'deprive' another of property means (a) to withhold it or cause it to be withheld from him *permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit* is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

"4. 'Appropriate.' To 'appropriate' property of another to oneself or a third person means (a) to exercise control over it * * * *permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit,* or (b) to dispose of the property for the benefit of oneself or a third person" (emphasis supplied).

As one commentator has noted, the concepts of "deprive" and "appropriate," which "are essential to a definition of larcenous intent," "connote a purpose * * * to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof" (Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 155.00, p 103). The intent element of larceny is therefore very different in concept from the "taking" element, which is separately defined in the statute (Penal Law § 155.05 [1], [2]; *see,* Penal Law § 155.00 [2]) and is satisfied by a showing that the thief exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights *(see, People v Olivo,* 52 NY2d 309, 318; *People v Alamo,* 34 NY2d 453, 457-458). Indeed, in *People v Olivo (supra,* at pp 315-319), where we discussed the principles underlying the "taking" element at length, we noted that "the intent prescribed by [Penal Law § 155.05 (1)]" must be separately considered (52 NY2d, at p 318, n 6).

The "taking" element of the crime of larceny was established prima facie here, since for certain periods, however temporary, defendants exercised dominion and control over Chemical's funds in a manner that could be found to be wholly inconsistent with Chemical's ownership *(see, People v* ***119** *Olivo, supra,* at pp 316-318; *People v Alamo, supra,* at pp 457-458). Such a finding could be based on the facts that defendants used Chemical's money for their own purposes and continued to do so even after Chemical specifically directed them to stop. What is lacking here from the People's proof is evidence demonstrating an "intent to deprive * * * or to appropriate" (Penal Law § 155.05 [1]).

The gist of the People's claim is that by investing Chemical's money for periods up to 48 hours, defendants evinced an intent to deprive its true owner of the money's "economic value or benefit," that is, the interest that the money was capable of generating. The mens rea element of larceny, however, is simply not satisfied by an intent temporarily to use property without the owner's permission, or even an intent to appropriate outright the benefits of the property's short-term use.

(4) The problem presented in this case is similar to that presented in "joy-riding" cases, in which it was held that the intent merely to borrow and use an automobile without the owner's permission cannot support a conviction for larceny *(e.g., Van Vechten v American Eagle Fire Ins. Co.,* 239 NY 303, 305; *People v Kenney,* 135 App Div 380, 382-383).[4] An analysis of the evidence before the Grand Jury in this case indicates only that defendants exercised control over Chemical's money to the extent of using it to make short-term, profitable investments and, as a result, appropriated some portion of its economic benefit for themselves. However, in light of the fact that their unauthorized use of Chemical's money extended over no more than a series of discrete 48-hour periods, the proof was insufficient to show that they intended to use Chemical's money "for so extended a period

or under such circumstances as to acquire the *major portion* of its economic value or benefit" (emphasis supplied).[5] ***120**

Moreover, the "economic value or benefit" to be derived from the money was the interest or other financial leverage that could be gained by the party who possessed it. Inasmuch as Chemical had ceded possession of its money to Sentry for various 72-hour periods, it had no legal rights during those periods to the money's "economic value or benefit," which is an incident of possession *(see, Matter of* Surrey Strathmore Corp. v Dollar Sav. Bank, 36 NY2d 173). Thus, to the extent that defendants intended to appropriate to themselves the "economic value or benefit" of Chemical's money, it cannot be said that their intentions were unlawful or even inconsistent with the terms of the bailment. Significantly, the People did not place the agreement between Sentry and Chemical before the Grand Jury. As a consequence, not only was there no proof of any express restrictions on Sentry's disposition of Chemical's money during the 72-hour period allotted for "fine counting," but there was not even proof that Chemical had a right to expect early return of its money if the "fine counting" process were completed before the expiration of that period.

(5) For similar reasons it cannot be said that defendants committed larceny by intentionally and permanently stealing the interest earned on Chemical's money, as distinguished from the money itself. First, absent proof of an agreement to the contrary, Chemical cannot be deemed the true owner of the interest earned while its money was in defendants' custody pursuant to the parties' "fine counting" agreement *(see, Matter of Surrey Strathmore Corp. v Dollar Sav. Bank, supra).*[6] Indeed, there is really no practical difference between the contention that defendants stole the interest on Chemical's money and the contention that they stole the money itself by intentionally appropriating its "economic value or benefit." ***121**

Second, it would be inconsistent with the statutory design to treat defendants' concededly permanent taking of the interest earned on Chemical's funds as a larceny within the meaning of Penal Law §§ 155.00, 155.05 and 155.35. It is clear that an individual who "joy-rides" and thereby deprives the automobile's owner of the value arising from its temporary use is not liable in larceny for stealing that intangible "value" under article 155 of the Penal Law *(see, Van Vechten v American Eagle Fire Ins. Co., supra).* By parity of reasoning, an individual who temporarily invests another's money and thereby gains interest or profit cannot be deemed guilty of larceny for appropriating that interest or profit. Consistent with our long-held view that criminal liability " ' "cannot be extended beyond the fair scope of the statutory mandate" ' " *(People v Gottlieb,* 36 NY2d 629, 632), we hold that in these circumstances the statute must be read to apply only to a taking of the property itself and not to a permanent taking of what is, in essence, only the economic value of its use during the short time the property has been withheld.

(6) Finally, we note that neither Sentry's patently false response to Chemical's inquiry concerning the rerouting of its money through Hudson nor Sentry's disobedience when ordered by Chemical to deliver the money directly are sufficient to establish that Sentry was acting with the larcenous intent required by Penal Law § 155.00 (3), (4) and § 155.05 (1). At worst, Sentry's conduct demonstrates its unwillingness to relinquish what was obviously a profitable short-term use of Chemical's money. It does not, however, alter the inescapable and uncontradicted inference that Sentry was merely emulating the behavior of many reputable financial institutions by taking advantage of the "float" on the temporarily idle money in its possession.

Having determined that the People's proof did not establish a larceny, we turn now to the question whether it was sufficient to establish the lesser crime of misapplication of property, which is defined in Penal Law § 165.00 (1) as follows: "A person is guilty of misapplication of property when, knowingly possessing personal property of another pursuant to an agreement that the same will be returned to the owner at a future time, he loans, leases, pledges, pawns or otherwise encumbers such property without the consent of the owner thereof in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss." ***122**

The obvious thrust of this statute, which we have not previously construed, is to make it a crime to alienate in any way property belonging to another under circumstances creating a risk of loss. While the created risk of loss need not rise to the level of "likelihood" or even mere "probability," the statute does require proof of a risk that is more than a far-fetched or wholly speculative possibility.

(7) In this case, although the evidence before the Grand Jury was sufficient to support a finding that the "repurchase agreements" were the equivalent of a "loan" to Hudson Valley Bank within the meaning of this statute, that evidence, even

when viewed in the light most favorable to the People, was insufficient to support the misapplication charge because of the absence of proof that these loans were made "in such manner as to create a risk " of loss. There was no actual risk here that the money would not be repaid, since even in the unlikely event of a default by Hudson, the "loans" to Hudson were secured by A-rated bonds held in Hudson's Federal Reserve Bank vault. Indeed, these "agreements" were deemed so secure by the industry that, as the undisputed testimony shows, no FDIC insurance was required. [7]

(8) We reject the People's present contention that the use of wire transfers created a legally cognizable risk of loss through electronic accident or deliberate computer hijacking. There is nothing on the present record to demonstrate that such a risk in fact existed and, absent meaningful proof, such an alleged source of risk is far too speculative and remote to support an indictment under Penal Law § 165.00 (1). Similarly, we decline to adopt the People's view that the statute was violated because defendants encumbered Chemical's money in such a way as to create a risk that the exact same bills entrusted to Sentry would not be recovered. Inasmuch as money is quintessentially fungible property, the certainty that the exact same amount of money will be recovered is enough to defeat application of the statute.

(9) Finally, we note that even if the "creation of risk" element of Penal Law § 165.00 (1) had been satisfied, we would nonetheless affirm the dismissal of the misapplication counts in indictments Nos. 4379/83, 4380/83 and 370/84, since the ***123** defense set forth in Penal Law § 165.00 (2) was established before the Grand Jury as a matter of law. As the undisputed evidence showed, defendants had promptly "recovered possession" of all of Chemical's money and Chemical "suffered no material economic loss" as a result of the "repurchase agreements." Furthermore, indictment No. 4380/83 against defendant Finnerty was properly dismissed for the additional reason that there was absolutely no evidence to show that he had knowledge of any breach of agreement by Sentry, assuming that there was such a breach *(see,* Penal Law § 165.00 [1]).

In short, however unethical defendants' conduct may have been, it did not constitute the crimes of larceny or misapplication of property. Accordingly, the indictments charging those crimes were properly dismissed.

V. THE COMPENSATORY BALANCE MATTER

Another set of charges against Jennings and Fiumefreddo arises from a second business arrangement that Sentry had with Chemical Bank. Under this arrangement, Sentry kept a "rolling inventory" of Chemical's dollar bills and coins in a segregated area of its money room. This money was to be delivered to various branches of Waldbaum's supermarket, Chemical's customer, whenever a need for additional cash arose. Defendants allegedly took some $100,000 out of this "rolling inventory" and deposited it in a "compensatory balance" account at Citibank. Their apparent purpose in opening this account was to enable Sentry to obtain a lower interest rate on a refinanced equipment loan it had with Citibank. There were no restrictions on Sentry's use of the "compensatory balance" account, and Sentry's principals had full access to its funds at all times.

In late 1982, discrepancies began to appear in the amount of coins in the " rolling inventory" Sentry was storing for Chemical. An audit revealed substantial shortages in the "rolling inventory," and, as a consequence, the chairman of Sentry's board of directors attempted to withdraw the funds in the Citibank account. Citibank, however, refused his request and instead called in the demand portion of Sentry's equipment loan, freezing the "compensatory balance" account in an apparent preliminary attempt to set off its claim against Sentry. On January 11, 1983, Sentry returned Chemical's "rolling inventory" with a shortage of over $122,000. An ***124** additional $25,000 in dimes was returned the following day, but Chemical never recovered the remaining $97,000. [8]

(10) These are the basic facts that led the second Grand Jury to hand up indictment No. 369/84, which charged Jennings and Fiumefreddo with second degree grand larceny and misapplication of property. The indictment was dismissed by Justice Goldfluss, but was reinstated on the People's appeal to the Appellate Division. We conclude, however, that the larceny count arising from the "compensatory balance" account arrangement has the same flaw as the larceny count involving the "repurchase agreement" plan, and, accordingly, we reverse the Appellate Division's order to the extent that it resuscitated the former count. [9]

As in the case of the "repurchase agreement" indictment, the facts underlying the "compensatory balance" account indictment demonstrate, at best, a short-term taking of the money entrusted to Sentry by its true owner, Chemical Bank. By removing the money from the storage area where the "rolling inventory" was kept and placing it in a bank account

in Sentry's name, defendants could be found to have exercised dominion and control over the money in a manner that was inconsistent with Chemical's ownership *(see, e.g., People v Olivo, supra)*.

(11) The facts before the Grand Jury, however, do not support an inference of larcenous intent, as that element is defined in Penal Law § 155.00 (3), (4) and § 155.05 (1). Again, what is lacking here is the intent *permanently* to deprive the owner of the funds or to exercise control over the money "for so extended a period or under such circumstances that the ***125** major portion of its economic value or benefit is lost". [10] As is true with respect to their "repurchase agreement" plan, defendants' manifest intention here was to use the money they were holding for Chemical to their own advantage by placing it in a bank account rather than retaining it in a storage area, thereby obtaining some portion of the money's economic value. There is no indication, however, that they intended to appropriate the money in such a way as to sap it of the "major portion" of its economic benefit. The fact that the money was ultimately lost as a result of Citibank's exercise of its rights as a creditor does not alter this analysis, since, as the evidence before the Grand Jury made clear, defendants were not a party to and had apparently not even anticipated Citibank's actions *(cf. Van Vechten v American Eagle Fire Ins. Co., supra* [larceny prosecution against one who "borrowed" automobile without the owner's consent would not lie, even though "borrower" had accident and severely damaged vehicle]). Accordingly, the dismissal of the larceny count against the defendants Jennings and Fiumefreddo should have been sustained.

(12) We reach a different conclusion with respect to the count charging those defendants with misapplication of property in connection with the " compensatory balance" account matter. The elements of that count were satisfied by the evidence showing that defendants had encumbered Chemical's funds in such a manner as to place them at risk. Although there was no showing that the funds in the "compensatory balance" account were expressly deposited as security for Citibank's loan to Sentry, the bank's right of setoff *(see, e.g., Marine Midland Bank v Graybar Elec. Co.,* 41 NY2d 703) made those funds the indirect equivalent of security. [11] As a ***126** consequence, there was a sufficient basis for the Grand Jury to infer that defendants had both " encumbered" the funds within the meaning of the statute and created a tangible risk that those funds would not be recovered. Thus, unlike the misapplication of property charge associated with the well-secured "repurchase agreements, " the misapplication charge in indictment No. 369/84 is legally supportable.

VI. ALLEGED MISAPPROPRIATION OF INSURANCE PROCEEDS

Defendant Jennings was also charged, in indictment No. 638/83, with having committed second degree larceny by failing to remit insurance proceeds to the intended beneficiaries. [12] This charge was dismissed by Justice Goldfluss but reinstated on the People's appeal to the Appellate Division. We conclude that the Appellate Division's disposition of this charge was incorrect and that the indictment against defendant Jennings should be dismissed.

On September 3, 1982, one of Sentry's armored cars was robbed of more than $231,000 after having made several cash pick-ups. About two months after this robbery, which does not appear connected to the later warehouse robbery, Sentry Investigations' insurer sent it a $20,985.54 check in full settlement of its insurance claim. This check represented payment for the losses sustained by three of Sentry's clients. Sentry reimbursed one of those clients, Queensboro Farm Products, for the full amount of its $18,620 loss, but did not distribute the remainder of the insurance proceeds to its other two clients, Amity Westchester and City Hospital Center of Elmhurst, each of which had sustained losses in excess of the $2,365 balance and had submitted proof of loss. Instead, Sentry retained the excess proceeds for itself, an act which led to the present second degree grand larceny charge against defendant Jennings. ***127**

(13) Defendant Jennings' failure to use the insurance proceeds to reimburse Sentry's clients for their losses, however, cannot serve as the basis for a larceny prosecution for the simple reason that Sentry, and not the clients, was the rightful owner of the insurance proceeds. It was Sentry that had paid for the insurance coverage, and it was Sentry, rather than its clients, that the insurer was obligated to pay in the event of loss. When the insurer met its obligation by making payment to Sentry in full satisfaction of its claim, the proceeds became Sentry's property to dispose of as it wished. While Sentry may have had a civil obligation to reimburse its clients for their loss, its failure to meet that obligation cannot be transformed into a liability for criminal larceny because nothing belonging to the clients was converted. As we stated in *People v Yannett* (49 NY2d 296, 301), "[a] distinction must be drawn between the refusal to pay a valid debt and the crime of larceny by embezzlement."

(14) It is true that in *Yannett* we stated that a larceny prosecution might lie against a person who had converted to his own use funds that were given to him in trust for another (49 NY2d, at p 303; *cf. People v Valenza,* 60 NY2d 363, 368-369). It is also true that our prior decisions indicate that a bailee who receives casualty insurance payments in reimbursement for the loss of bailed property holds those payments in trust for the bailor *(see, Waring v Indemnity Fire Ins. Co.,* 45 NY 606; *Stillwell v Staples,* 19 NY 401). However, these principles do not provide a basis for the imposition of criminal liability in this case.

First, the People have neither claimed that Sentry held the proceeds of its insurance coverage in trust for the clients whose property was lost nor made an effort to show that the insurance policy under which payment was made was a casualty policy rather than one merely insuring against liability. Even more importantly, the trust that our cases impose on casualty insurance proceeds is one that exists, if at all, by operation of equitable principles and not by express agreement of the parties *(see, Stillwell v Staples, supra,* at pp 406-407; *cf. People v Robinson,* 284 NY 75). It is clear that an alleged misuse of funds on which only an equitable or constructive trust has been imposed cannot support a larceny prosecution *(People v Yannett, supra,* at pp 303-304; *see, People v Epstein,* 245 NY 234, 242-243). This conclusion follows from the fact that the "beneficiaries" of a constructive trust "simply ***128** do not have the requisite pre-existing interest, superior to that of the legal owner of those funds, which is necessary to support a larceny conviction " *(People v Yannett, supra,* at p 304; *see,* Hechtman, *op. cit.,* Penal Law § 155.00, p 104).

As the named holder of the insurance policy, Sentry was the legal owner of the funds paid to it by the insurer. While its clients may have had a civil claim against Sentry, and even a right in the funds superior to Sentry's creditors, they did not have a right superior to that of Sentry to possess the proceeds of Sentry's insurance policy. Moreover, if the insurer had wanted assurance that the funds would be given directly to the companies that had actually sustained loss, it could have simply issued individual checks jointly payable to them and Sentry. In any event, there was no unlawful taking of funds from their rightful owner here, and the indictment charging defendant Jennings with larceny because of his failure to pay all of the insurance proceeds to Sentry's clients should not have been reinstated.

VII. THE MISSING COINS AND MONEY

The final set of charges, consisting of three counts of second degree larceny asserted against defendants Jennings and Fiumefreddo in indictment No. 640/83, arises out of a series of incidents in which Sentry simply failed to deliver money with which it had been entrusted. In one instance, Sentry allegedly failed to deliver to Chemical Bank's Water Street offices some $38,000 in coins that it had picked up on January 5, 1983 from a concern called Hercules Coinomatic Company. Instead, it deposited a check, which was subsequently dishonored, in Hercules' account at Chemical. In a second instance, Sentry had been given two checks by its client, Freedom National Bank, which checks were supposed to have been used by Sentry to purchase an assortment of coins for delivery to two of Freedom National's branch offices on January 12, 1983. The checks, written in the amounts of $31,500 and $40,500, were negotiated by Sentry, respectively, on December 31, 1982 and January 7, 1983. The coins, however, were never delivered and Freedom National was never reimbursed for its advance payments. The third charged incident involved Sentry's alleged mishandling of payroll money belonging to the New York Telephone Company, resulting in a loss to that company of some $133,141 over the period from December 29, 1982 to January 13, 1983. ***129**

The People's theory, broadly stated, is that defendants were guilty of routinely commingling their clients' money and that, in the aftermath of the warehouse robbery, they found it necessary to convert their clients' money to meet immediate obligations and cover for the shortages that had accumulated in their clients' accounts. The foregoing three incidents of unexplained loss, the People claim, exemplify defendants' larcenous practices. The three counts embodying this theory were dismissed by Justice Goldfluss on his consideration of the Grand Jury evidence, and the Appellate Division affirmed, without comment. We conclude, however, that the counts in indictment No. 640/83 should have been sustained.

Defendants' primary contention with respect to each of these counts is that they had both been relieved of their authority at Sentry by January 3 or 4, 1983 and therefore could not have been responsible for the losses, all of which had come to light thereafter. There are, however, two difficulties with their position. First, the proof regarding when these defendants were actually relieved of their corporate duties was not conclusive. Second, regardless of their formal status, there was affirmative evidence of defendants' continued participation in the activities of the corporation, including

a paper-shredding episode involving defendant Fiumefreddo and defendant Jennings' presence at an audit, both occurring after the date when their ties to the company were supposed to have been severed.

(15) Hence, if we view the evidence before the Grand Jury in the light most favorable to the People, as we must *(People v Pelchat, supra),* we are led to the conclusion that the Grand Jury could have rationally returned indictments charging defendants with larceny in connection with the Hercules Coinomatic, Freedom National Bank and New York Telephone Company shortages. Defendants' larcenous intent could have been inferred from such surrounding circumstances as the paper-shredding incident and the evidence of an ongoing practice of commingling clients' funds *(see, People v Meadows,* 199 NY 1), as well as from the unexplained disappearance of the money itself *(see, People v Olivo,* 52 NY2d, at p 320, n 8, *supra)*. Accordingly, the dismissal of indictment No. 640/83 against defendants Jennings and Fiumefreddo was error. [13] ***130**

VIII. CONCLUSION

To summarize our conclusions, we hold that the Appellate Division correctly affirmed the dismissal of indictments Nos. 4379/83, 4380/83 and 370/84, charging defendants Jennings, Finnerty, Sentry Armored Courier Corp. and Sentry Investigations Corp. with second degree grand larceny and misapplication of property arising out of the "repurchase agreement" plan. We further hold that the misapplication of property count in indictment No. 369/84, involving the " compensatory balance" account, was properly reinstated. Our disagreement with the Appellate Division lies in its disposition of the counts in indictment No. 640/83, involving the various "missing money " incidents, and the larceny count in indictment No. 638/83, involving the alleged misappropriation of insurance proceeds, as well as the larceny count in indictment No. 369/84. The counts in the "missing money" indictment, asserted at this point against defendants Jennings and Fiumefreddo alone, should have been reinstated, while the dismissal of the larceny counts asserted in the " compensatory balance" account indictment and the indictment involving the insurance proceeds should have been affirmed.

Accordingly, the order of the Appellate Division should be modified by reversing so much thereof as affirmed the dismissal of indictment No. 640/83 against defendants John Jennings and Angela Fiumefreddo, reversed the dismissal of the larceny count against those defendants in indictment No. 369/84 and reversed the dismissal of the larceny count against Jennings in indictment No. 638/83; indictment No. 640/83 should be reinstated and the matter remitted for further proceedings on that indictment, as well as on the misapplication of property count in indictment No. 369/84.

Simons, J.

(dissenting in part). I cannot concur in the majority's remarkably indulgent determination that defendants were merely emulating the practices of "reputable financial institutions" (majority opn, at p 121), and that Sentry's use of Chemical Bank's money for esoteric investment schemes or to secure favored loan conditions for itself amounted to little more than a noncriminal financial " joy-ride" (majority opn, at pp 121, 125). Investing the "float" may be legal in a debtor-creditor relationship, but a bailee for hire undertakes to protect and preserve the bailor's property with ***131** only such use of the property as the parties to the bailment agree upon. The bailee does not have *carte blanche* to risk the bailor's property for its own gain. There is no dispute in this case that Chemical Bank bailed its property to Sentry intending that Sentry securely store the funds on is premises, safely transfer them to the bailor's customer, Waldbaum, or perform related services for Chemical, such as coin counting, before depositing the funds in Chemical's account at the Federal Reserve Bank. Defendants not only performed those services badly, but while doing so they lost thousands of dollars of Chemical's funds and risked the loss of millions more by these illegal schemes and use of their bailor's insurance funds. I agree with the two Grand Juries that found sufficient evidence that defendants' conduct was criminal, and I would sustain the indictments.

My differences with the majority are more fundamental than the significance attributed to the evidence, however. In my view, the majority and the courts below have given an overly restrictive interpretation to the applicable statutes. Thus, while I agree with the court's findings that the People have failed to preserve their claimed procedural errors, and with the rulings discussed in parts I., III. and VII. of the majority opinion, I disagree with its interpretation of the pertinent statutes and the disposition of the counts of the indictment charging larceny involving the repurchase agreements (except as to defendant Finnerty) discussed in part IV., the compensatory balance scheme discussed in part V., and the misappropriation of insurance proceeds discussed in part VI. I, therefore, dissent.

I

Turning first to the larceny counts, the majority concedes, as to the repurchase agreement scheme and compensatory balance scheme, that the evidence supports the Grand Jury's finding that defendants wrongfully took substantial sums of money from Chemical Bank, the rightful owner, by depositing them in Hudson Valley National Bank and Citibank. Defendants did so by exercising " control over property inconsistent with the continued rights of the owner " (*People v Olivo,* 52 NY2d 309, 316; *People v Alamo,* 34 NY2d 453, 457-458). However, the majority does not find sufficient evidence before the Grand Jury of defendants' larcenous intent in those takings. ***132**

The statute provides that the requisite intent for the crime of larceny is an "intent to deprive another of property *or* to appropriate the same to himself or to a third person" (Penal Law § 155.05 [1] [emphasis added]). The charges involving the repurchase agreements and the compensatory balance scheme rest on the second statutory alternative. The intent to appropriate is defined in several ways, but includes the intent to exercise control over property "under such circumstances as to acquire the major portion of [the] economic value or benefit [of the property]" (Penal Law § 155.00 [4]). I disagree with the majority's analysis of what constitutes "an intent to appropriate" because it fails to differentiate between a property's economic value and its economic benefit, and because it mistakenly construes the statutory definition to require a permanent or near permanent appropriation.

The majority finds it necessary that the People show defendants intended to appropriate the economic value of the property although the statute clearly provides a legally sufficient alternative: the appropriation of "a major portion of its economic * * * benefit" *(id.),* i.e., its ability to make more money. There can be little doubt that defendants intended to use Chemical's money to their own financial advantage; they invested it with Hudson Valley National Bank, and earned $17,000 in the process, and they also used it to collateralize a loan with Citibank. This evidence was more than sufficient to establish defendants' intent to acquire the economic benefits of Chemical Bank's funds within the literal language of Penal Law § 155.00 (4); § 155.05 (1).

The majority also claim that the necessary mens rea for the larceny was lacking because any intent to appropriate the economic benefit of the funds was only the intent to deprive Chemical of its property temporarily or "short term " (majority opn, at p 121). The statute does not specify how long a defendant must intend the appropriation to last, it merely requires, *inter alia,* an intent to appropriate "for so extended a period *or* under such circumstances" as to acquire a major portion of its economic benefit (Penal Law § 155.00 [4] [emphasis added]). Regardless of the limited time involved in diverting the funds involved in the repurchase agreement or the compensatory balance schemes, the defendants appropriated the property "under * * * circumstances" in which they acquired *all* the economic benefit of the property for the time they held it. That being so, the time and/or the circumstances were sufficient to establish the crime. The majority finds little difference ***133** between defendants "short term" use of the bank's money and "joy-riding" in an automobile. There is a cognizable distinction, however, between using another's property with the intent to return it and appropriating property to acquire a major portion of its economic benefit--which may never be returned--even if the appropriation is for a short time.

The conclusory assertion of the majority, based upon the Practice Commentary *(see,* Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 155.00, p 103), that there must be a "purpose * * * to exert permanent or virtually permanent control over the property taken" is not only without legal support, it is contrary to our decisions *(see, People v Shears,* 158 App Div 577, 582, *affd no opn* 209 NY 610 [construing Penal Law of 1909 § 1302, now incorporated in Penal Law § 155.05 (2)]; *People v Meadows,* 199 NY 1, 7), and to the clearly manifested broad sweep of the statute which does not limit the intent to appropriate in terms of the time involved. Rather, the statute defines the crime as an appropriation "under such circumstances" as to acquire the economic benefit of the property.

The general nature of the repurchase agreements is set forth in the majority opinion, but it has not delineated the five discrete steps taken on each of the more than 40 occasions when defendants transferred Chemical Bank's money to Hudson Valley. According to the plan between Sentry and Hudson Valley: (1) Sentry would deposit the "fine count" funds into Hudson Valley National Bank's account at the Federal Reserve; (2) Hudson Valley National Bank would credit the amount of such deposit to the newly created escrow account for Sentry Armored Courier Corporation; (3) the

principal in the escrow account was then used to buy A-rated bonds owned by Hudson Valley National Bank and stored at the Federal Reserve; (4) Hudson Valley National Bank would later repurchase these bonds and credit Sentry's escrow account for the amount of the principal plus interest, less Hudson Valley National Bank's broker's fee (the interest was then transferred to another account at Hudson Valley National Bank held in the name of Sentry Investigations Corp.); and finally (5) prior to the expiration of the 72-hour period allotted to Sentry for the "fine counting", an employee of Sentry Investigations Corp. would telephone Hudson Valley National Bank and authorize a wire transfer of the principal in the escrow account held by Sentry Armored Courier Corp. to Chemical Bank's account at the Federal Reserve. A wire transfer fee ***134** was then deducted from the Sentry Investigations Corp. account.

Chemical had retained Sentry to "fine count" in early 1981; the repurchase agreement scheme started in July 1981 and the contract between Sentry and Chemical was terminated in November of the same year. During the months that the scheme existed, Sentry and Hudson Valley invested approximately $26 million of Chemical's funds in the repurchase agreements.

The majority makes the unwarranted assumption that, absent production of the written bailment contract, the Grand Jury could not find that Sentry's acts in these transactions were contrary to its provisions. The speculation is rebutted by testimony not only by the Bank's officers but by that of Sentry's own employees as well. Thus, Chemical's officer, David Williams, testified that when he discovered Sentry was using Chemical's funds contrary to the Bank's wishes, in August 1981, he called Mr. Mead, an officer of Sentry, to inquire about it. When Mead gave a patently pretextual excuse that the transfers were dictated by insurance considerations, Williams instructed him that Sentry was to stop these transactions immediately. After the telephone conversation, Williams wrote a letter to Sentry confirming his demand that Sentry stop using Chemical's money in a manner contrary to the contract. The Grand Jury could reasonably conclude from all of this not only that Sentry's investment of Chemical's funds was contrary to the bailment agreement but also, because of the false excuse given by Sentry's officers, that Sentry knew that to be so. Moreover, the Grand Jury could reasonably assume that Sentry's confirmed possession of Chemical's funds was conditioned on its acceptance of this direction and that, had Sentry not indicated that it would discontinue the practice, Chemical would have terminated the agreement. Notwithstanding Chemical's instructions given by telephone and letter, however, Sentry continued the repurchase scheme until the coin counting contract was terminated in November. This evidence was sufficient, prima facie, to establish defendants' larcenous intent to appropriate the economic benefit of Chemical Bank's funds to itself.[1] It is irrelevant that Chemical ***135** Bank had no expectation or plan of realizing for itself the interest potential of the moneys during the 72 hours that they were in the hands of Sentry. The statute sets forth no such requirement *(see,* Penal Law § 155.00 [4]). Nor is it a defense that Chemical Bank's moneys were intended to be returned--and, in fact, were returned--within the 72 hour time period *(see, People v Kaye,* 295 NY 9, 13; *People v Shears,* 158 App Div 577, 582, *affd no opn* 209 NY 610, *supra; People v Meadows,* 199 NY 1, 7, *supra).*

Similarly, there was more than enough evidence to permit the jury to find defendants possessed the requisite larcenous intent when Sentry improperly took Chemical's funds and deposited them in Citibank to its own credit in its compensatory balance scheme. By so depositing the money, Sentry obtained the major portion of the economic benefit of the funds during the period of the deposit because it, in effect, collateralized its loan from Citibank with Chemical's money and it also received a reduced interest rate on the loan. This improper transfer and deposit notwithstanding, defendant Fiumefreddo claims that the evidence was insufficient to connect her to the crime, or to establish the requisite intent as to her. Fiumefreddo participated in the transfer of Chemical Bank's funds to the Citibank account, however, and she signed the account's signature card. Moreover, she was in charge of Sentry's money room, and its daily audit reports showed falsely that the $100,000 deposited in the Citibank account was located at Sentry. Fiumefreddo was also the Sentry officer who told the independent auditor that $100,000 of the Chemical Bank shortfall in the Sentry money room deposits was located in a Citibank account. Manifestly, such evidence is sufficient to establish Fiumefreddo's knowledge of the crime, her connection with it and her requisite larcenous intent.[2] ***136**

II

Furthermore, I disagree with the majority's discussion of the misapplication of property statute as applied to the repurchase agreement indictments against Jennings and the corporate defendants. I would dismiss those indictments, however,

because Chemical Bank suffered no loss from these particular transactions *(see,* Penal Law § 165.00 [2]).

The misapplication of property statute provides that: "1. A person is guilty of misapplication of property when, knowingly possessing personal property of another pursuant to an agreement that the same will be returned to the owner at a future time, he loans, leases, pledges, pawns or otherwise encumbers such property without the consent of the owner thereof in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss" (Penal Law § 165.00 [1]). The statute apparently has never been judicially construed and the legislative history of the present provision, the substance of which dates back to the 1881 Penal Code, is scant. As now codified, the crime was substantially derived from the Penal Law of 1909 §§ 941 and 1310. The Staff Notes of the Temporary State Commission on the Revision of the Penal Law and Criminal Code (proposed § 170.00) state merely that it "restates existing Penal Law § 941" and that "the specified loaning, leasing and encumbering activity, it should be noted, does not reach the stature of larceny because it does not necessarily entail an intent to 'deprive' or 'appropriate' *[see,* proposed § 160.00 (3), (4); § 160.05 (1)]."

The curious thing about the majority's decision on this count of the indictment is that it questions whether defendants encumbered Chemical Bank's property, and thus violated the misapplication statute, yet it finds defendants did commit the greater intrusion of taking the Bank's property. If the majority finds a "taking" of the property for purposes of the larceny charges *(see,* majority opn, at p 118), I do not ***137** understand why it has any reservations about placing the repurchase agreement transfers within the terms of the statute defining misapplication of funds. In fact, the arrangement did not result in a mere "loan" to Hudson Valley National Bank, as the majority finds (at p 122); rather it resulted in an outright transfer of Chemical Bank's title to the funds to Hudson Valley's account at the Federal Reserve, a retransfer by Hudson Valley by crediting the funds to Sentry Armored Courier Corporation's escrow account, and the use of such funds to purchase from Hudson Valley bonds it owned. There was a taking beyond doubt, as the majority conceded in analyzing the larceny counts.

The majority, finding the transfers were "loans" within the meaning of Penal Law § 165.00 (1) for purposes of discussion, nevertheless finds the statute was not violated because there was no risk of pecuniary loss to Chemical as the statute requires. To fail to perceive any risk in these multiple transactions, however, is to blink the realities of modern life. There were in all five different transfers by wire and paper entries made during the 72 hours of each repurchase agreement transaction. The potential risk can be inferred from the sheer intricacy of the transactions, and the number of employees at both Sentry and Hudson Valley upon whose accuracy and honesty those transactions depended (to say nothing of the possible risk of computer errors or crimes). Moreover, the claim that risk was nonexistent because Chemical Bank's funds were secured by the A-rated bonds ignores the People's evidence which established that the bonds were issued to Sentry as security for only a portion of the time that Chemical Bank's currency was in Hudson Valley National Bank's account at the Federal Reserve. The funds were held in Sentry's escrow account during the rest of the time.[3] Finally, ***138** the ultimate transfer to return the funds from Sentry's escrow account to the Chemical Bank account at the Federal Reserve via Hudson Valley depended upon, of all things, a simple unverifiable telephone call by a Sentry employee authorizing this transfer.

The Grand Jury was entitled to conclude from the evidence presented concerning the repurchase agreement scheme in particular, and Sentry's gross mismanagement of funds entrusted to its care, in general, that the repurchase agreement transactions created a risk of loss to Chemical Bank within the meaning of the misapplication statute.

III

Finally, I would affirm the Appellate Division's order insofar as it reinstated the count charging grand larceny of insurance proceeds. There was sufficient evidence before the Grand Jury to permit it to find that the insurance proceeds belonged to the injured parties and that, contrary to their rights, defendants misappropriated some of the funds to their own use.

The larceny statute provides that, when property is withheld by one person from another person, an "owner" thereof is any person who can establish a right to possession of it superior to that of the withholder (Penal Law § 155.00 [5]). It has been settled law for at least 100 years that a bailee for hire who receives casualty insurance payments for the loss of bailed property holds those payments in trust for the bailor *(see, Waring v Indemnity Fire Ins. Co.,* 45 NY 606; *Stillwell v Staples,* 19 NY 401, 406-407). We indicated in *People*

v Yannett (49 NY2d 296, 303) that a prosecution will lie against a person who has converted funds for his own use that were given to him specifically in trust for another *(see, also, People v Shears,* 158 App Div 577, 582, *affd no opn* 209 NY 610, *supra; People v Meadows,* 199 NY 1, 7, *supra).*

In this case, there was evidence that Sentry was contractually obligated to reimburse its clients for their losses, as well as documentary proof that Sentry's insurer had made the payment in accordance with the proof of loss submitted by those clients. This evidence was sufficient to establish prima facie that the insurance proceeds were paid to Sentry in trust for the bailor-clients who had sustained losses in the robbery, and that defendant intentionally withheld them from the bailor claimants *(see, People v Newman,* 85 Misc 2d 761, *affg* ***139** 80 Misc 2d 975). Given the evidence of a trust existing by operation of law, the alleged conversion by defendant Jennings of a portion of the insurance proceeds for his own or Sentry's use would support a conviction for larceny by embezzlement *(People v Yannett, supra).* That a petit jury might resolve the factual issues against the People after trial does not warrant this court in dismissing the indictment.

In conclusion, it is worth noting the concern other branches of our State government have expressed over the enormous increase in large scale white-collar crimes. Thus, in 1986 the State Executive Department recommended comprehensive efforts to "deter the extraordinary increase in sophisticated, economic crime" by proposing the amendment of five different articles of the Penal Law *(see,* 1986 McKinney's Session Law News, at A-836-837). The Legislature acted upon these recommendations by enacting several new statutes, including a statute increasing larceny penalties, which expanded, rather than contracted, the methods of fighting white-collar crimes *(see,* L 1986, ch 515; *see also,* L 1986, ch 514 [computer offenses]; and L 1986, ch 516 [Organized Crime Control Act]). Apparently the Governor's staff and the Legislature found the existing larceny statutes adequate to deter and punish peculations, such as those with which defendants are charged, since substantive changes in the provisions of the larceny statutes were not recommended or enacted. In contrast to this concern over the problem, the majority has trivialized the seriousness of defendants' conduct and interpreted the statutes narrowly, virtually excising important and operative language from them.

Accordingly, I dissent from so much of the majority's decision as (1) affirms the order dismissing indictments Nos. 4379/83 and 370/84 against the Sentry Corporation and Jennings and would reverse and reinstate those indictments, (2) as affirms the order dismissing the larceny counts against Jennings and Fiumefreddo in indictment No. 369/84 and would reverse the order, reinstating those counts and (3) which reverses and dismisses indictment No. 638/83 which charges defendant Jennings with two counts of grand larceny involving the insurance proceeds and would affirm the order reinstating that indictment.

Chief Judge Wachtler and Judges Kaye and Hancock, Jr., concur with Judge Titone; Judge Simons dissents in part and ***140** votes to modify in accordance with his separate opinion in which Judges Meyer and Alexander concur.

Order modified and case remitted to Supreme Court, Bronx County, for further proceedings on indictments Nos. 640/83 and 369/84 in accordance with the opinion herein and, as so modified, affirmed. ***141**

Footnotes

1 The same analysis might not be applicable in a case where a party has moved entirety ex parte before a second Judge after having been denied identical relief by the first.

2 True, there is "moral certainty" language in one of our decisions *(see, People v Eckert,* 2 NY2d 126, 129), but that decision is ambiguous and internally inconsistent. The *Eckert* language has not been cited by this court in the context of a review of an indictment since that case was decided, although we have cited the case in reviewing convictions after trial *(see, e.g., People v Eisenman,* 39 NY2d 810, 811; *People v Wachowicz,* 22 NY2d 369, 372). To the extent that the case contains language inconsistent with our subsequent decisions

and the plain terms of the statute governing review of indictments, it is no longer viable and is not to be followed.

3 Before Sentry picked up the deposits, Chemical would complete a "bulk count" by verifying the numbers of bundles its customers had deposited. Sentry would then "fine count" the deposits by counting the individual bills within each bundle. The agreement required Sentry to deliver to Chemical's Federal Reserve Bank account the amount that was necessary to satisfy Chemical's deposit requirements; the remainder of the cash, if any, was to be returned directly to Chemical.

4 It was because larceny was held to include the element of an intent *permanently* to deprive or appropriate that the Legislature enacted Penal Law § 1293-a (since replaced by Penal Law §§ 165.00, 165.05, 165.06 and 165.08) to bring intentional temporary misuse of another's property within the purview of the criminal law *(see,* Hechtman, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 165.05, p 219; *see also, id.,* § 155.00, pp 103-104).

5 Although a person who "borrows" a vehicle without the owner's consent unquestionably appropriates its *entire* economic benefit during the time he is using it, our case law does not recognize such conduct as larceny if it was accompanied by an intention to return the vehicle to its true owner *(see, Van Vechten v American Eagle Fire Ins. Co.,* 239 NY 303, 305). Thus, contrary to the dissent's view (dissenting opn, at p 132), we do not deem defendants' conduct larcenous because they "acquired *all* the economic benefit of [Chemical's money] for the time they held it." Indeed, if that proposition were true, there would be no distinction between the crime of larceny and the crime of misapplication of property under Penal Law § 165.00.

6 Contrary to the dissenters' conclusion (dissenting opn, at pp 134-135, n 1), our holding in *Matter of Surrey Strathmore Corp. v Dollar Sav. Bank* (36 NY2d 173, 177) was not based on an interpretation of the particular contract between the parties. Rather, our holding in *Surrey* was that, in the absence of an "explicit provision * * * with respect to payment of interest", the law does not provide the party whose money is being held with a right to the interest earned while that money is in another's possession.

7 That the funds were also held in Sentry's account at Hudson for short periods of time did not increase the risk of loss, since Sentry retained total control over the funds and the funds were in no way encumbered during those periods *(compare, infra,* at p 125-126, n 11, n 10).

8 There was evidence that money was actually due on both sides, with Chemical also owing Sentry for unreimbursed services rendered. It appears from the evidence, however, that a substantial net balance was owed to Chemical by Sentry.

9 (10) Although defendant Jennings' motion addressed to Justice Goldfluss sought dismissal of the "indictments" and recited as one of the grounds for dismissal that the evidence was legally insufficient, the caption of his motion papers cited only three of the four extant indictments, omitting for no apparent reason indictment No. 369/84, which covered the "compensatory balance account" charges. Under the amended version of CPL 470.05 (2), a preserved "question of law" exists "if in response to a protest by a party, the court expressly decided the question raised on appeal." Here, we have both a " protest" in the form of Jennings' incomplete motion to dismiss, a dismissal of *all* counts including the one omitted from the motion and an opinion in which the trial court expressly describes its reasons for doing so (123 Misc 2d 560). Accordingly, under the current version of CPL 470.05 (2), the intent issue presents a question of law reviewable in our court.

10 There is no indication that defendants intended to "dispose of the property in such a manner or under such circumstances as to render it unlikely that [the] owner will recover [it]" (Penal Law § 155.00 [3] [b]; [4] [b]; § 155.05 [1]). While subsequent events did result in the loss of the money through Citibank's actions in freezing the account, it cannot be said that such an eventuality was likely or within the contemplation of the parties during the time the "compensatory balance " account was opened and maintained. Hence, the alternative theory of larcenous intent set forth in Penal Law § 155.00 (3) (b) and incorporated by reference in Penal Law § 155.05 (1) is unavailable to the prosecution in this case.

11 Indeed, it is Citibank's status as a creditor of Sentry that differentiates the risk arising from the "compensatory balance" account from the risk arising from the "repurchase agreements" with Hudson Valley. Although, as the dissenters note, Sentry's accounts with both Citibank and Hudson were " escrow" accounts and not generally reachable by ordinary creditors, the fact that Citibank was both a depository bank and a creditor enhanced the risk that the funds would be seized, however wrongfully, and thereby took that risk out of the realm of sheer speculation. The same cannot be said for the fact, noted in the dissenting opinion (at p 137, n 3), that Hudson had lost money as a result of a theft by a Sentry employee and therefore might have had a cause of action against Sentry.

12 The indictment originally charged Jennings and Sentry Armored Courier Corp. with insurance fraud, misapplication of property and conspiracy, as well as grand larceny. None of these counts survived the first dismissal motion made to Justice Vitale.

13 Justice Vitale dismissed the indictment against the corporate defendant, Sentry Armored Courier Corp., on the first dismissal motion, and the People did not appeal that determination. Accordingly, our reinstatement of the indictment affects only Jennings and Fiumefreddo, the defendants who remained when the indictment came before Justice Goldfluss.

1 The majority's reliance on *Matter of* *Surrey Strathmore Corp. v Dollar Sav. Bank* (36 NY2d 173) is misplaced. That case involved payments made by a mortgagor to a mortgagee to secure the payment of real property taxes on the mortgaged property. It was decided solely on the contractual arrangements made between the parties and expressly disavowed any reliance on relationships of bailor-bailee, creditor-debtor or the like *(see,* *id.,* at p 176). Its holding that the mortgagee could have invested the funds was not based upon any generally applicable principles, as the majority suggest (majority opn, at p 120), but solely on the court's interpretation of the particular contract between the parties.

2 There is nothing in the record to establish that defendants Jennings or Fiumefreddo ever challenged the sufficiency of the evidence supporting the indictment charging them with larceny in the compensatory balance scheme, indictment No. 369/84. Defendant Jennings' motion to dismiss the indictments against him for insufficiency did not include this indictment and defendant Fiumefreddo filed no motion papers at all, but relied entirely on Jennings' submission. Defendant Jennings' attorney appeared for oral argument, but Fiumefreddo's did not. The transcript of the hearing submitted to us contains no oral argument addressed to the sufficiency of the evidence supporting this indictment, suggesting that the Trial Justice relied solely on the motion papers. There is nothing in them which can be even broadly construed as a protest by defendants to the sufficiency of the evidence supporting this indictment and nothing in the trial court's peremptory dismissal of the charges to indicate that the matter was ever protested. The lack of any conduct challenging this issue can hardly be deemed a "protest" sufficient to preserve a question of law for this court, even under the relaxed standards of new CPL 470.05 (2) (L 1986, ch 798).

3 Sentry claims that the use of Chemical Bank's moneys was risk-free partly because Sentry was credited in the amount of their value as deposited in an escrow account which could not be reached by creditors of Sentry. When arguing against the ”compensatory balance scheme“ indictments, however, defendants claim that clients' moneys were lost because Citibank impermissibly invaded an escrow account to satisfy Sentry's demand loan *(see also,* majority opn, n 5, at pp 119-120, and n 9, at p 124). Significantly, Hudson Valley National Bank employed Sentry to securely store racing receipts deposited with it by Yonkers Raceway. $225,000 in such receipts were stolen, apparently by an employee of Sentry, a circumstance which could have given rise to a setoff of the repurchase agreement funds by Hudson Valley, in much the same fashion as Citibank seized Chemical's funds to secure its loan to Sentry, had the robbery of the racing receipts occurred while the repurchase agreement scheme was in effect.

Issuing Securing Orders in Town and Village Courts

Updated May 2023 – CHANGES EFFECTIVE JUNE 2, 2023

Purpose: This document explains when a Court is required or permitted to issue a securing order to: (1) remand; (2) release a Defendant on recognizance; (3) impose non-monetary conditions; (4) impose monetary bail; or (5) impose monetary bail and non-monetary conditions.,

Standard: Except as otherwise required by law, the court shall make an individualized determination as to whether the principal poses a risk of flight to avoid prosecution, consider the kind and degree of control or restriction necessary to reasonably assure the principal's return to court, and select a securing order consistent with its determination. *CPL §§ 510.10(1).*

Important Notes: CPL §510.10(4) states that crimes "involving" escaping from custody (under Penal Law §§205.05, 205.10, and 205.15), witness tampering (under Penal Law §§215.11, 215.22, 215.13), witness intimidation (under Penal Law §215.15), bail jumping (under Penal Law §§215.55, 215.56, and 215.57), and incest (under Penal Law §§255.25, 255.26, and 255.27) are qualifying offenses (CPL §510.10[4][b], [c], [e], and [q]). Additionally, CPL §510.10(4) states that "a sex trafficking offense defined in section 230.34 or 230.34-a of the penal law" and "a misdemeanor defined in article [130 of the penal law]" are qualifying offenses (CPL §510.10[4][e]). This chart strictly construes the above quoted language; however, some readers may interpret this language more broadly to include inchoate offenses (attempt, conspiracy, facilitation, solicitation) or other offenses that reference or include these charges. Further, while CPL §510.10(4) includes certain attempt and conspiracy offenses as qualifying offenses, some of these offenses are legally impossible offenses by definition. This chart does not determine which offenses are legally impossible.

Using this Guide: Whenever the Court is required to issue a securing order, the Court should review Part One (Remand Required) to determine whether the Court must remand the Defendant to the custody of the Sheriff.

If the Court is not required to remand the Defendant to the custody of the Sheriff, the Court should consult Parts Two and Three (Qualifying Offenses: Categories of Crimes and Qualifying Offenses: Itemized Crimes) to determine whether the Defendant is charged with one or more Qualifying Offenses.

If the **Defendant <u>is</u> charged with a Qualifying Offense**, then the Court, unless otherwise prohibited by law, may in its discretion: (1) release the Defendant pending trial on the Defendant's own recognizance; (2) release the Defendant under non-monetary conditions; (3) fix bail; (4) fix bail and non-monetary conditions or (5) commit the Defendant to the custody of the Sheriff if the Defendant is charged with a Qualifying Offense that is a felony. *CPL § 530.20(1)(b).*

If the **Defendant <u>is not</u> charged with a Qualifying Offense**, then the Court shall release the Defendant on the Defendant's

own recognizance unless the Court finds on the record or in writing that release on the Defendant's own recognizance will not reasonably assure the Defendant's return to court. If the Court makes such a finding, the Court shall release the Defendant under non-monetary conditions, selecting conditions that will reasonably assure: (1) the Defendant's return to court; and (2) the Defendant's compliance with the imposed conditions.

If none of the charged offenses satisfies Part One, Part Two, or Part Three, the Court at initial arraignment MAY NEITHER remand the Defendant NOR impose monetary bail.

Issuing Securing Orders in Town and Village Courts

Updated May 2023 – CHANGES EFFECTIVE JUNE 2, 2023

Part One – Remand Required

The Court MUST REMAND WITHOUT BAIL if arraigning the Defendant on one or more of the following:

- **An A-I or A-II Felony(s) (CPL §530.20[2][a][i])**
- **Any Felony and the Defendant has Two or More Prior Felony Convictions (CPL §530.20[2][a][ii])**
- **A Fugitive from Justice Charge (CPL §570.36)**

Part Two – Qualifying Offenses: Categories of Crimes

The Court MAY IMPOSE BAIL if:

- **Part One, above, does not apply; AND**
- **The Court is arraigning the Defendant on one or more of the following:**
  - **Any crime that causes the death of another person; (CPL §510.10[4][j])**
  - **Any felony committed while the Defendant serves a sentence of probation or while released to post-release supervision; (CPL §510.10[4][r])**
  - **Any felony that may qualify the Defendant as a Persistent Felony Offender per PL 70.10 (for Town and Village Courts this would be a felony arraignment with two (2) or more prior felony convictions requiring a REMAND, this includes out-of-state convictions that would be a felony in New York State) (CPL §510.10[4][s]); OR**
  - **Any felony or class A misdemeanor involving harm to an identifiable person or property, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law, where such charge arose from conduct occurring while the Defendant was released on his or her own recognizance, released under conditions, or had yet to be arraigned after the issuance of a desk appearance ticket for a separate felony or class A misdemeanor involving harm to an identifiable person or property, provided, however, that the Prosecutor must show reasonable cause to believe that the Defendant committed the instant crime and any underlying crime (which need not be a qualifying offense). For the purposes of this subparagraph, any of**

the underlying crimes need not be qualifying offenses as defined in this subdivision. (CPL §510.10[4][t])

For the purposes of this paragraph, "harm to an identifiable person or property" shall include but not be limited to theft of or damage to property. However, based upon review of the facts alleged in the accusatory instrument, if the court determines that such theft is negligible and does not appear to be in furtherance of other criminal activity, the principal shall be released on his or her own recognizance or under appropriate non-monetary conditions. (CPL §510.10[4][t])

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:

- **Part One on page 2 does not apply; AND**
- **The Defendant is charged with at least one of the offenses listed in the chart below.**

Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
Cor § 168-F(1)(a)*	Sex Offender Failure to Register Prior to Discharge/Release 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	E Felony
Cor § 168-F(1)(a)*	Sex Offender Failure to Register Prior to Discharge/Release Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	D Felony
Cor § 168-F(1)(b)*	Sex Offender Failure to Register at Time of Sentencing 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	E Felony
Cor § 168-F(1)(b)*	Sex Offender Failure to Register at Time of Sentencing Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	D Felony
Cor § 168-F(4)*	Sex Offender Failure to Register Any Change of Address, internet accounts with internet access providers belonging to such offender, internet identifiers that such offender uses, or his or her status of enrollment, attendance, employment or residence at any institution of higher education, within 10 days, 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	E Felony
Cor § 168-F(4)*	Sex Offender Failure to Register Any Change of Address, internet accounts with internet access providers belonging to such offender, internet identifiers that such offender uses, or his or her status of enrollment, attendance, employment or residence at any institution of higher education, within 10 days, Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	D Felony
Cor § 168-F(6)*	Non-Resident/Sex Offender Failure to Register 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	E Felony
Cor § 168-F(6)*	Non-Resident/Sex Offender Failure to Register Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	D Felony
Cor § 168-F*	Sex Offender Failure to Register 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration and** allegations of Failure to Register (NOT verification, notify, provide, or appear provisions)	YES	E Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:

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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
Cor § 168-F*	Sex Offender Failure to Register Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration and** allegations of Failure to Register (NOT verification, notify, provide, or appear provisions)	YES	D Felony
Cor § 168-G(2)*	Sex Offender on Parole/Probation Failure to Register within 10 days 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	E Felony
Cor § 168-G(2)*	Sex Offender on Parole/Probation Failure to Register within 10 days Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration**	YES	D Felony
Cor § 168-T*	Sex Offender Failure to Register 1st Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration** and allegations of Failure to Register (NOT verification, notify, provide, or appear provisions)	YES	E Felony
Cor § 168-T*	Sex Offender Failure to Register Prior Offense ***ONLY when the defendant is required to maintain Level 3 sex offender registration and** allegations of Failure to Register (NOT verification, notify, provide or appear provisions)	YES	D Felony
PL § 105.15*	Conspiracy 2nd ***ONLY** when the underlying allegation is that the defendant conspired to commit Penal Law Article 125 Class A felony (125.25, 125.25 or 125.27) [See CPL § 510.10(4)(f)]	YES	B Felony
PL § 105.17	Conspiracy 1st	NO - MUST REMAND	A-I Felony
PL § 110/120.06	Attempted Gang Assault 2nd	YES	D Violent Felony
PL § 110/120.07	Attempted Gang Assault 1st	YES	C Violent Felony
PL § 110/120.08	Attempted Assault on a Peace Officer, Police Officer, Firefighter or Emergency Medical Professional	YES	D Violent Felony
PL § 110/120.09	Attempted Assault on a Judge	YES	D Violent Felony
PL § 110/120.10	Attempted Assault 1st	YES	C Violent Felony
PL § 110/120.11	Attempted Aggravated Assault Upon a Police Officer or Peace Officer	YES	C Violent Felony
PL § 110/121.13	Attempted Strangulation 1st	YES	D Violent Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
- **The Defendant is charged with at least one of the offenses listed in the chart below.**

Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 110/121.13-a	Attempted Aggravated Strangulation	YES	D Violent Felony
PL § 110/125.11	Attempted Aggravated Criminally Negligent Homicide	YES	D Violent Felony
PL § 110/125.20	Attempted Manslaughter 1st	YES	C Violent Felony
PL § 110/125.21	Attempted Aggravated Manslaughter 2nd	YES	D Violent Felony
PL § 110/125.22	Attempted Aggravated Manslaughter 1st	YES	C Violent Felony
PL § 110/125.25	Attempted Murder 2nd	YES	B Violent Felony
PL § 110/125.25*	Attempted Murder 2nd *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 110/125.26(1)	Attempted Aggravated Murder	NO - MUST REMAND	A-I Felony
PL § 110/125.26(2)*	Attempted Aggravated Murder *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91 __AND/OR__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES *__IF__ FCOT NO - MUST REMAND	B Felony __IF__ FCOT = A-II Felony
PL § 110/125.27	Attempted Murder 1st	NO - MUST REMAND	A-I Felony
PL § 110/130.20	Attempted Sexual Misconduct	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.25	Attempted Rape 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.30	Attempted Rape 2nd	YES	E Felony
PL § 110/130.35	Attempted Rape 1st	YES	C Violent Felony
PL § 110/130.40	Attempted Criminal Sexual Act 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.45	Attempted Criminal Sexual Act 2nd	YES	D Violent Felony
PL § 110/130.50	Attempted Criminal Sexual Act 1st	YES	C Violent Felony
PL § 110/130.52	Attempted Forcible Touching	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.53	Attempted Persistent Sexual Abuse	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.60	Attempted Sexual Abuse 2nd	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.65	Attempted Sexual Abuse 1st	YES	E Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 110/130.65-a	Attempted Aggravated Sexual Abuse 4th	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.66	Attempted Aggravated Sexual Abuse 3rd	YES	E Felony
PL § 110/130.67	Attempted Aggravated Sexual Abuse 2nd	YES	D Violent Felony
PL § 110/130.70	Attempted Aggravated Sexual Abuse 1st	YES	C Violent Felony
PL § 110/130.75	Attempted Course of Sexual Conduct Against a Child 1st	YES	C Violent Felony
PL § 110/130.80	Attempted Course of Sexual Conduct Against a Child 2nd	YES	E Felony
PL § 110/130.85	Attempted Female Genital Mutilation	YES – MONETARY BAIL	Misdemeanor
PL § 110/130.90	Attempted Facilitating a Sex Offense with a Controlled Substance	YES	E Felony
PL § 110/130.95	Attempted Predatory Sexual Assault	NO - MUST REMAND	A-II Felony
PL § 110/130.96	Attempted Predatory Sexual Assault Against a Child	NO - MUST REMAND	A-II Felony
PL § 110/135.20	Attempted Kidnapping 2nd	YES	C Violent Felony
PL § 110/135.25	Attempted Kidnapping 1st	YES	B Violent Felony
PL § 110/135.25*	Attempted Kidnapping 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 110/140.25(1)	Attempted Burglary 2nd (Non-Residential)	YES	D Violent Felony
PL § 110/140.25(2)	Attempted Burglary 2nd (Residential)	YES	D Violent Felony
PL § 110/140.30	Attempted Burglary 1st	YES	C Violent Felony
PL § 110/150.15	Attempted Arson 2nd	YES	C Violent Felony
PL § 110/150.20	Attempted Arson 1st	YES	B Violent Felony
PL § 110/150.20*	Attempted Arson 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 110/160.10 (1)	Attempted Robbery 2nd (Aided by Another)	YES	D Violent Felony
PL § 110/160.10 (2) or (3)	Attempted Robbery 2nd (Not aided by Another)	YES	D Violent Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:

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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 110/160.15	Attempted Robbery 1st	YES	C Violent Felony
PL § 110/215.11	Attempted Tampering with a Witness 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 110/215.12	Attempted Tampering with a Witness 2nd	YES	E Felony
PL § 110/215.13	Attempted Tampering with a Witness 1st	YES	C Felony
PL § 110/215.15*	**Attempted Intimidating a Victim or Witness 3rd (see footnote 1)[1]**	**YES – MONETARY BAIL**	**Misdemeanor**
PL § 110/215.17	Attempted Intimidating a Victim or Witness 1st	YES	C Violent Felony
PL § 110/220.18	Attempted Criminal Possession of a Controlled Substance 2nd	NO - MUST REMAND	A-II Felony
PL § 110/220.21	Attempted Criminal Possession of a Controlled Substance 1st	NO - MUST REMAND	A-I Felony
PL § 110/220.41	Attempted Criminal Sale of a Controlled Substance 2nd	NO - MUST REMAND	A-II Felony
PL § 110/220.43	Attempted Criminal Sale of a Controlled Substance 1st	NO - MUST REMAND	A-I Felony
PL § 110/230.06	Attempted Patronizing a Person for Prostitution 1st	YES	E Felony
PL § 110/230.12	Attempted Aggravated Patronizing a Minor for Prostitution 2nd	YES	E Felony
PL § 110/230.13	Attempted Aggravated Patronizing a Minor for Prostitution 1st	YES	C Felony
PL § 110/230.34(5)(a) or (b)	Attempted Sex Trafficking	YES	C Violent Felony
PL § 110/230.34-a	Attempted Sex Trafficking of a Child	YES	C Violent Felony
PL § 110/255.25	Attempted Incest 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 110/255.26	Attempted Incest 2nd	YES	E Felony
PL § 110/255.27	Attempted Incest 1st	YES	C Violent Felony
PL § 110/265.02 (5) or (6) or (7) or (8)	Attempt to Commit Criminal Possession of a Weapon 3rd	YES	E Violent Felony
PL § 110/265.02 (9) or (10)	Attempt to Commit Criminal Possession of a Weapon 3rd ***ONLY** if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	E Violent Felony

[1] CPL 510.10(4)(b) states that "a crime involving witness intimidation under [Penal Law §215.15]"is a qualifying offense. It is unclear if "victim" intimidation was purposely excluded.

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
- **The Defendant is charged with at least one of the offenses listed in the chart below.**

Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 110/265.03	Attempted Criminal Possession of a Weapon 2nd	YES	D Violent Felony
PL § 110/265.04	Attempted Criminal Possession of a Weapon 1st	YES	C Violent Felony
PL § 110/265.08	Attempted Criminal Use of a Firearm 2nd	YES	D Violent Felony
PL § 110/265.09	Attempted Criminal Use of a Firearm 1st	YES	C Violent Felony
PL § 110/265.12	Attempted Criminal Sale of a Firearm 2nd	YES	D Violent Felony
PL § 110/265.13	Attempted Criminal Sale of a Firearm 1st	YES	C Violent Felony
PL § 110/265.14	Attempted Criminal Sale of a Firearm with the Aid of a Minor	YES	D Violent Felony
PL § 110/265.19	Attempted Aggravated Criminal Possession of a Weapon	YES	D Violent Felony
PL § 110/460.22*	Attempted Aggravated Enterprise Corruption *__ONLY__ if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 110/490.15	Attempted Soliciting or Providing Support for an Act of Terrorism 1st	YES	D Violent Felony
PL § 110/490.30	Attempted Hindering Prosecution of Terrorism 2nd	YES	D Violent Felony
PL § 110/490.35	Attempted Hindering Prosecution of Terrorism 1st	YES	C Violent Felony
PL § 110/490.37	Attempted Criminal Possession of a Chemical Weapon or Biological Weapon 3rd	YES	D Violent Felony
PL § 110/490.40	Attempted Criminal Possession of a Chemical Weapon or Biological Weapon 2nd	YES	C Violent Felony
PL § 110/490.45	Attempted Criminal Possession of a Chemical Weapon or Biological Weapon 1st	NO - MUST REMAND	A-I Felony
PL § 110/490.47	Attempted Criminal Use of a Chemical Weapon or Biological Weapon 3rd	YES	C Violent Felony
PL § 110/490.50	Attempted Criminal Use of a Chemical Weapon or Biological Weapon 2nd	NO - MUST REMAND	A-II Felony
PL § 110/490.55	Attempted Criminal Use of a Chemical Weapon or Biological Weapon 1st	NO - MUST REMAND	A-I Felony
PL § 120.00*	Assault 3rd *__ONLY__ when such crime is charged as a hate crime as defined in PL § 485.05	YES – MONETARY BAIL	Misdemeanor
PL § 120.02	Reckless Assault of a Child	YES	D Violent Felony
PL § 120.04*	Vehicular Assault 1st	YES	D Felony
PL § 120.04-a*	Aggravated Vehicular Assault	YES	C Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
- **The Defendant is charged with at least one of the offenses listed in the chart below.**

Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 120.05	Assault 2nd	YES	D Violent Felony
PL § 120.06	Gang Assault 2nd	YES	C Violent Felony
PL § 120.07	Gang Assault 1st	YES	B Violent Felony
PL § 120.07*	Gang Assault 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 120.08	Assault on a Peace Officer, Police Officer, Firefighter or Emergency Medical Professional	YES	C Violent Felony
PL § 120.09	Assault on a Judge	YES	C Violent Felony
PL § 120.10	Assault 1st	YES	B Violent Felony
PL § 120.10*	Assault 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 120.11	Aggravated Assault Upon a Police Officer or Peace Officer	YES	B Violent Felony
PL § 120.12*	Aggravated Assault Upon a Person Less than Eleven (11) years old	YES	E Felony
PL § 120.18	Menacing a Police Officer or Peace Officer	YES	D Violent Felony
PL § 120.60*	**Stalking 1st (see footnote 2) [2]**	**YES**	**D Violent Felony**
PL § 120.70(1)	Luring of a Child	YES	E Felony
PL § 120.70(1) & (2)	Luring a Child that the Underlying Offense the Actor Intended to Commit against such Child Constituted a Class A Felony	YES	C Felony
PL § 120.70(1) & (2)	Luring a Child that the Underlying Offense the Actor Intended to Commit against such Child Constituted a Class B Felony	YES	D Felony
PL § 121.11*	Criminal Obstruction of Breathing or Blood Circulation ***ONLY** if alleged to have been committed against a member of the defendant's same family or househod as defined in CPL §530.11(1)	YES – MONETARY BAIL	Misdemeanor
PL § 121.12*[3]	**Strangulation 2nd (see footnote 3)**	**YES**	**D Violent Felony**

[2] Excluding Penal Law §120.60(2), unless it is a Sexually Motivated Felony
[3] There are differing interpretations whether this charge is a qualifying offense when alleged to have been committed against a person who is not a member of the defendant's same family or household (see CPL §510.10[4][a] and [k]).

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 121.13	Strangulation 1st	YES	C Violent Felony
PL § 121.13-a	Aggravated Strangulation	YES	C Violent Felony
PL § 125.11	Aggravated Criminally Negligent Homicide	YES	C Violent Felony
PL § 125.15(1)*	Manslaughter 2nd *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91 __AND/OR__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	C Felony
PL § 125.20	Manslaughter 1st	YES	B Violent Felony
PL § 125.20*	Manslaughter 1st *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 125.21	Aggravated Manslaughter 2nd	YES	C Violent Felony
PL § 125.22	Aggravated Manslaughter 1st	YES	B Violent Felony
PL § 125.22*	Aggravated Manslaughter 1st *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 125.25	Murder 2nd	NO - MUST REMAND	A-I Felony
PL § 125.26	Aggravated Murder	NO - MUST REMAND	A-I Felony
PL § 125.27	Murder 1st	NO - MUST REMAND	A-I Felony
PL § 130.20	Sexual Misconduct	YES – MONETARY BAIL	Misdemeanor
PL § 130.25	Rape 3rd	YES	E Felony
PL § 130.30	Rape 2nd	YES	D Violent Felony
PL § 130.35	Rape 1st	YES	B Violent Felony
PL § 130.35*	Rape 1st *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 130.40	Criminal Sexual Act 3rd	YES	E Felony
PL § 130.45	Criminal Sexual Act 2nd	YES	D Violent Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 130.50	Criminal Sexual Act 1st	YES	B Violent Felony
PL § 130.50*	Criminal Sexual Act 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 130.52	Forcible Touching	YES – MONETARY BAIL	Misdemeanor
PL § 130.53	Persistent Sexual Abuse	YES	E Violent Felony
PL § 130.55	Sexual Abuse 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 130.60	Sexual Abuse 2nd	YES – MONETARY BAIL	Misdemeanor
PL § 130.65	Sexual Abuse 1st	YES	D Violent Felony
PL § 130.65-a	Aggravated Sexual Abuse 4th	YES	E Violent Felony
PL § 130.66	Aggravated Sexual Abuse 3rd	YES	D Violent Felony
PL § 130.67	Aggravated Sexual Abuse 2nd	YES	C Violent Felony
PL § 130.70	Aggravated Sexual Abuse 1st	YES	B Violent Felony
PL § 130.70*	Aggravated Sexual Abuse 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 130.75	Course of Sexual Conduct Against a Child 1st	YES	B Violent Felony
PL § 130.75*	Course of Sexual Conduct Against a Child 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 130.80	Course of Sexual Conduct Against a Child 2nd	YES	D Violent Felony
PL § 130.85	Female Genital Mutilation	YES	E Felony
PL § 130.90	Facilitating a Sex Offense with a Controlled Substance	YES	D Violent Felony
PL § 130.95	Predatory Sexual Assault	NO - MUST REMAND	A-II Felony
PL § 130.96	Predatory Sexual Assault Against a Child	NO - MUST REMAND	A-II Felony
PL § 135.10*	Unlawful Imprisonment 1st ***ONLY** if alleged to have been committed against a member of the defendant's same family or household as defined in CPL §530.11(1)	YES	E Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 135.20	Kidnapping 2nd	YES	B Violent Felony
PL § 135.20*	Kidnapping 2nd ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 135.25	Kidnapping 1st	NO - MUST REMAND	A-I Felony
PL § 135.35(3)(a) and (b)	Labor Trafficking	YES	D Violent Felony
PL § 140.20*	Burglary 3rd ***ONLY** if charged as a Sexually Motivated Felony defined in PL § 130.91	YES	D Felony
PL § 140.25(1)	Burglary 2nd (Non-Residential)	YES	C Violent Felony
PL § 140.25(2)*	Burglary 2nd (Non-Living Area of a Dwelling) ***ONLY** if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91 **AND/OR** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	C Violent Felony FCOT = B Violent Felony
PL § 140.25(2)*	Burglary 2nd (Residential - Living Area) ***ONLY** if defendant is charged with entering the living area of a dwelling	YES	C Violent Felony
PL § 140.30	Burglary 1st	YES	B Violent Felony
PL § 140.30	Burglary 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 145.20*	Criminal Tampering 1st ***ONLY** if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	C Violent Felony
PL § 150.10*	Arson 3rd ***ONLY** when such crime is charged as a hate crime as defined in PL § 485.05	YES	C Felony
PL § 150.15	Arson 2nd	YES	B Violent Felony
PL § 150.15*	Arson 2nd ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 150.20	Arson 1st	NO - MUST REMAND	A-I Felony
PL § 155.42	Grand Larceny 1st	YES	B Felony
PL § 160.05*	Robbery 3rd *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91	YES	D Felony
PL § 160.10(1)*	Robbery 2nd (Aided by another) *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91 __AND/OR__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	C Violent Felony
PL § 160.10(2) & (3)	Robbery 2nd (Not aided by another)	YES	C Violent Felony
PL § 160.15	Robbery 1st	YES	B Violent Felony
PL § 160.15*	Robbery 1st *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 190.79*	Identity Theft 2nd *__ONLY__ if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	D Violent Felony
PL § 190.80*	Identity Theft 1st *__ONLY__ if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	C Violent Felony
PL § 190.82*	Unlawful Possession of Personal Identification Information 2nd *__ONLY__ if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	D Violent Felony
PL § 190.83*	Unlawful Possession of Personal Identification Information 1st *__ONLY__ if Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	YES	C Violent Felony
PL § 205.05	Escape 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 205.10	Escape 2nd	YES	E Felony
PL § 205.15	Escape 1st	YES	D Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 215.11	Tampering with a Witness 3rd	YES	E Felony
PL § 215.12	Tampering with a Witness 2nd	YES	D Felony
PL § 215.13	Tampering with a Witness 1st	YES	B Felony
PL § 215.15*	Intimidating a Victim or Witness 3rd (see footnote 3)[4]	YES	E Felony
PL § 215.16	Intimidating a Victim or Witness 2nd	YES	D Violent Felony
PL § 215.17	Intimidating a Victim or Witness 1st	YES	B Violent Felony
PL § 215.17*	Intimidating a Victim or Witness 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 215.50(3)*	Criminal Contempt 2nd ***ONLY** when the underlying allegation is that defendant violated a duly served order of protection where the protected party is a member of defendant's same family or household under CPL § 530.11(1)	YES – MONETARY BAIL	Misdemeanor
PL § 215.51(b) or (c) or (d)*	Criminal Contempt 1st ***ONLY** when the underlying allegation is that defendant violated a duly served order of protection where the protected party is a member of defendant's same family or household under CPL § 530.11(1)	YES	E Felony
PL § 215.52*	Aggravated Criminal Contempt ***ONLY** when the underlying allegation is that defendant violated a duly served order of protection where the protected party is a member of defendant's same family or household under CPL § 530.11(1)	YES	D Felony
PL § 215.55	Bail Jumping 3rd	YES – MONETARY BAIL	Misdemeanor
PL § 215.56	Bail Jumping 2nd	YES	E Felony
PL § 215.57	Bail Jumping 1st	YES	D Felony
PL § 220.18	Criminal Possession of a Controlled Substance 2nd	NO - MUST REMAND	A-II Felony
PL § 220.21	Criminal Possession of a Controlled Substance 1st	NO - MUST REMAND	A-I Felony
PL § 220.41	Criminal Sale of a Controlled Substance 2nd	NO - MUST REMAND	A-II Felony
PL § 220.43	Criminal Sale of a Controlled Substance 1st	NO - MUST REMAND	A-I Felony
PL § 220.77	Operating as a Major Trafficker	NO - MUST REMAND	A-I Felony

[4] CPL 510.10(4)(b) states that "a crime involving witness intimidation under [Penal Law §215.15]"is a qualifying offense. It is unclear if "victim" intimidation was purposely excluded.

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 230.05	Patronizing a Person for Prostitution 2nd	YES	E Felony
PL § 230.06	Patronizing a Person for Prostitution 1st	YES	D Felony
PL § 230.11	Aggravated Patronizing a Minor for Prostitution 3rd	YES	E Felony
PL § 230.12	Aggravated Patronizing a Minor for Prostitution 2nd	YES	D Felony
PL § 230.13	Aggravated Patronizing a Minor for Prostitution 1st	YES	B Felony
PL § 230.30*	Promoting Prostitution 2nd *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91	YES	C Felony
PL § 230.32*	Promoting Prostitution 1st *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91	YES	B Felony
PL § 230.33*	Compelling Prostitution *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91	YES	B Felony
PL § 230.34	Sex Trafficking	YES	B Violent Felony
PL § 230.34*	Sex Trafficking *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 230.34-a	Sex Trafficking of a Child	YES	B Violent Felony
PL § 230.34-a*	Sex Trafficking of a Child *__AND__ Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 235.22*	Disseminating Indecent Material to Minors 1st *__ONLY__ if charged as a Sexually Motivated Felony (SMF), including SMF Attempt or Conspiracy defined in PL § 130.91	YES	D Felony
PL § 240.55	Falsely Reporting an Incident 2nd	YES	E Violent Felony
PL § 240.60	Falsely Reporting an Incident 1st	YES	D Violent Felony
PL § 240.61	Placing a False Bomb or Hazardous Substance 2nd	YES	E Violent Felony
PL § 240.62	Placing a False Bomb or Hazardous Substance 1st	YES	D Violent Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 240.63	Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall	YES	D Violent Felony
PL § 255.25	Incest 3rd	YES	E Felony
PL § 255.26	Incest 2nd	YES	D Felony
PL § 255.27	Incest 1st	YES	B Violent Felony
PL § 255.27*	Incest 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 260.10(1)*	Endangering the Welfare of a Child ***ONLY** where the defendant is required to maintain registration under Article 6-C of the Correction Law **AND** designated a level three offender pursuant to Corr. Law § 168-l (6)	YES – MONETARY BAIL	Misdemeanor
PL § 263.05	Use of a Child in a Sexual Performance	YES	C Felony
PL § 263.10	Promoting an Obscene Sexual Performance by a Child	YES	D Felony
PL § 263.15	Promoting a Sexual Performance by a Child	YES	D Felony
PL § 263.30	Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol	YES	B Felony
PL § 265.01-a	Criminal Possession of a Weapon on School Grounds	YES	E Felony
PL § 265.02(3)	Criminal Possession of a Weapon 3rd	YES	D Felony
PL § 265.02(5 - 10)	Criminal Possession of a Weapon 3rd	YES	D Violent Felony
PL § 265.03	Criminal Possession of a Weapon 2nd	YES	C Violent Felony
PL § 265.04	Criminal Possession of a Weapon 1st	YES	B Violent Felony
PL § 265.04*	Criminal Possession of a Weapon 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 265.08	Criminal Use of a Firearm 2nd	YES	C Violent Felony
PL § 265.09	Criminal Use of a Firearm 1st	YES	B Violent Felony
PL § 265.09*	Criminal Use of a Firearm 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 265.11	Criminal Sale of a Firearm 3rd	YES	D Violent Felony
PL § 265.12	Criminal Sale of a Firearm 2nd	YES	C Violent Felony
PL § 265.13	Criminal Sale of a Firearm 1st	YES	B Violent Felony
PL § 265.13*	Criminal Sale of a Firearm 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 265.14	Criminal Sale of a Firearm with the Aid of a Minor	YES	C Violent Felony
PL § 265.16	Criminal Sale of a Firearm to a Minor	YES	C Felony
PL § 265.19	Aggravated Criminal Possession of a Weapon	YES	C Violent Felony
PL § 265.50	Criminal Manufacture, Sale, or Transport of Undetectable Firearm, Rifle or Shotgun	YES	D Violent Felony
PL § 405.18	Aggravated Unpermitted Use of Indoor Pyrotechnics 1st	YES	D Violent Felony
PL § 460.20	Enterprise Corruption	YES	B Felony
PL § 460.22	Aggravated Enterprise Corruption	NO - MUST REMAND	A-I Felony
PL § 470.20	Money Laundering 1st	YES	B Felony
PL § 470.21	Money Laundering in Support of Terrorism 4th	YES	E Felony
PL § 470.22	Money Laundering in Support of Terrorism 3rd	YES	D Felony
PL § 470.23	Money Laundering in Support of Terrorism 2nd	YES	C Felony
PL § 470.24	Money Laundering in Support of Terrorism 1st	YES	B Felony
PL § 470.24*	Money Laundering in Support of Terrorism 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 490.10	Soliciting or Providing Support for an Act of Terrorism 2nd	YES	D Violent Felony
PL § 490.15	Soliciting or Providing Support for an Act of Terrorism 1st	YES	C Violent Felony
PL 490.20*[5]	**Making a Terroristic Threat (see footnote 2)**	**YES**	**D Felony**
PL § 490.27	Domestic Act of Terrorism Motivated by Hate in the Second Degree	NO – MUST REMAND	A-I Felony

[5] There are differing interpretations as to whether this charge is a qualifying offense (see CPL 510.10[4][a] and [g] and *People v. Allen* 66 Misc.3d 792 County Court, Orange County)

Part Three – Qualifying Offenses: Itemized Crimes and Offenses Requiring Remand in Town and Village Courts (listed by Section of Law)
The Court MAY IMPOSE MONETARY BAIL if:
- **Part One on page 2 does not apply; AND**
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Section of Law	Charge	Option to Set Monetary Bail or Remand?	Level of Offense
PL § 490.28	Domestic Act of Terrorism Motivated by Hate in the First Degree	NO – MUST REMAND	A-I Felony
PL § 490.30	Hindering Prosecution of Terrorism 2nd	YES	C Violent Felony
PL § 490.35	Hindering Prosecution of Terrorism 1st	YES	B Violent Felony
PL § 490.35*	Hindering Prosecution of Terrorism 1st ***AND** Felony Crime of Terrorism (FCOT), including FCOT Attempt or Conspiracy in PL § 490.25, § 490.05	NO - MUST REMAND	A-II Felony
PL § 490.37	Criminal Possession of a Chemical Weapon or Biological Weapon 3rd	YES	C Violent Felony
PL § 490.40	Criminal Possession of a Chemical Weapon or Biological Weapon 2nd	YES	B Violent Felony
PL § 490.45	Criminal Possession of a Chemical Weapon or Biological Weapon 1st	NO - MUST REMAND	A-I Felony
PL § 490.47	Criminal Use of a Chemical Weapon or Biological Weapon 3rd	YES	B Violent Felony
PL § 490.50	Criminal Use of a Chemical Weapon or Biological Weapon 2nd	NO - MUST REMAND	A-II Felony
PL § 490.55	Criminal Use of a Chemical Weapon or Biological Weapon 1st	NO - MUST REMAND	A-I Felony

Compilation of Codes, Rules and Regulations of the State of New York
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter I. Standards and Administrative Policies
Subchapter C. Rules of the Chief Administrator of the Courts
Part 126. Compensation and Expenses of Judges and Justices Temporarily Assigned to a City Court or a Justice Court (Refs & Annos)

22 NYCRR 126.3

Section 126.3. Off-hours arraignment parts

Currentness

Each judge or justice of a city, town or village court temporarily assigned to an off-hours arraignment part established by the Chief Administrator pursuant to Judiciary Law section 212(1)(w) shall receive $250 per day, or $125 per half-day, for each day or half-day period of service during which such judge or justice performs one or more judicial functions in the off-hours part. Where an assignment requires a participating judge or justice to remain available on-call for service in an off-hours arraignment part, there shall be no compensation for any day or half-day period of service that does not include at least one in-court judicial function. No State-paid judge may receive compensation under this Part for service in an off-hours arraignment part in lieu of regularly scheduled service in a State-paid court without the approval of the Chief Administrator.

Credits

Sec. filed through Court Notices in the Oct. 25, 2017 Register eff. Oct. 1, 2017.

Current with amendments included in the New York State Register, Volume XLV, Issue 28 dated July 12, 2023. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 22, § 126.3, 22 NY ADC 126.3

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 7-a. Judicial Administration (Refs & Annos)

McKinney's Judiciary Law § 212

§ 212. Functions of the chief administrator of the courts

Effective: November 8, 2021
Currentness

1. The chief administrator of the courts, on behalf of the chief judge, shall supervise the administration and operation of the unified court system. In the exercise of such responsibility, the chief administrator shall have such powers and duties as may be delegated to him by the chief judge and, in addition, the following functions, powers and duties which shall be exercised as the chief judge may provide and in accordance with such standards and administrative policies as may be promulgated pursuant to section twenty-eight of article six of the constitution:

(a) Prepare the itemized estimates of the annual financial needs of the unified court system, in accordance with section one of article seven of the constitution. Such itemized estimates, approved by the court of appeals and certified by the chief judge, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget without revision. The chief administrator shall forthwith transmit copies of such itemized estimates to the chairmen of the senate finance and judiciary committees and the assembly ways and means and judiciary committees.

(b) Establish an administrative office for the courts and appoint and remove such deputies, assistants, counsel and employees as he may deem necessary and fix their salaries within the appropriation made available therefor.

(c) Establish the hours, terms and parts of court, assign judges and justices to them, and make necessary rules therefor.

(d) Designate deputy chief administrators and administrative judges for any or all of the courts of the unified court system, except the appellate divisions and the court of appeals.

(e) Act as “chief executive officer” and exercise the functions, powers and duties of a “public employer” under the provisions of article fourteen of the civil service law.

(f) Make recommendations to the legislature and the governor for laws and programs to improve the administration of justice and the operation of the unified court system; and, with respect to any bill proposing law which is likely to have a substantial and direct effect upon the unified court system, prepare a judicial impact statement upon written request of the chairman of the standing committee of the senate or assembly to which the bill has been referred or upon his own initiative. The statement shall be submitted as soon as practicable to the chairman of the appropriate committee and contain, to the extent feasible and

relevant, the chief administrator's projections of the impact of the proposed law on the functioning of the courts and related agencies of the unified court system, including: (i) administration; (ii) caseload; (iii) personnel; (iv) procedure; (v) revenues; (vi) expenses; (vii) physical facilities; and (viii) such additional considerations as may be requested by the committee chairman, or included by the chief administrator.

(g) Receive and consider proposed amendments to the civil practice law and rules and the criminal procedure law, and conduct studies and recommend changes therein.

(h) Hold hearings and conduct investigations. The chief administrator may issue a subpoena requiring a person to attend before him and be examined under oath with reference to any aspect of the unified court system, and require the production of books or papers with reference thereto.

(i) Adopt, amend and rescind all rules and orders necessary to execute the functions of his office.

(j) Collect, compile and publish statistics and other data with respect to the unified court system and submit annually, on or before the fifteenth day of March, to the legislature and the governor a report of his activities and the state of the unified court system during the preceding year.

(k) Require all personnel of the unified court system, county clerks and law enforcement officers to furnish any information and statistical data as will enable him to execute the functions of his office.

(l) Request and receive from any court or agency of the state or any political subdivision thereof such assistance, information and data as will enable him to execute the functions of his office.

(m) Undertake research, studies and analyses of the administration and operation of the unified court system including, but not limited to, the organization, budget, jurisdiction, procedure, and administrative, clerical, fiscal and personnel practices thereof.

(n) Accept as agent of the state any grant or gift for the purpose of executing the functions of his or her office; provided, however, where a grant or gift is of money, the chief administrator shall dispose of same as provided in section eleven of the state finance law.

(o) Contract for goods and services on behalf of the unified court system.

(p) Promote cooperation and coordination between the unified court system and other agencies of the state or its political subdivisions.

(q) Create advisory committees to assist him in the execution of the functions of his office.

(r) Establish educational programs, seminars and institutes for the judicial and nonjudicial personnel of the unified court system.

(s) Delegate to any deputy, assistant, court or administrative judge, administrative functions, powers and duties possessed by him.

(t) Do all other things necessary and convenient to carry out his functions, powers and duties.

(u) Review and approve plans, specifications, designs and cost estimates for the design, acquisition, construction, reconstruction, rehabilitation, improvement, furnishing or equipping of court facilities pursuant to a capital plan approved in accordance with section sixteen hundred eighty-c of the public authorities law; provided, however, that in the event that such plans, specifications, designs or cost estimates effect a substantial change in an approved capital plan, such plans, specifications, designs or cost estimates must be approved by the court facilities capital review board in accordance with section sixteen hundred eighty-c of the public authorities law.

(v) Insure that appropriate public notice is given of the provisions of section 215.22 of the penal law.

(w) Adopt, after consultation with the office of indigent legal services, the appropriate local magistrates association, institutional providers of criminal defense services and other members of the criminal defense bar, local government officials, including the district attorney, and with the approval of the administrative board of the courts, a plan for the establishment, in accordance with paragraph (c) of this subdivision, of off-hours arraignment parts in select local criminal courts of a county to be held in such courts on a rotating basis for the conduct of arraignments and other preliminary proceedings incidental thereto, and for arrest warrant returns in criminal cases, where the use of such parts will facilitate the availability of public defenders or assigned counsel for defendants in need of legal representation at such proceedings. To the extent practicable, and notwithstanding that any such plan shall designate off-hours arraignment parts in fewer than all of the local criminal courts of a county, each plan authorized by this paragraph shall provide for the periodic assignment of all of the judges and justices of all of the local criminal courts in the affected county to the off-hours arraignment parts designated therein. The chief administrator shall give appropriate public notice of each off-hours arraignment part established hereunder and each judicial assignment made thereto.

(x) Not permit the unified court system to sell any data regarding judicial proceedings related to residential tenancy, rent or eviction to any third party. Such prohibition includes data collected, stored or utilized by any third-party vendors who have contracts with the unified court system.

(y) Collect, compile, and publish statistics and other demographic data provided in accordance with subparagraph (i) of this paragraph and submit annually, on or before the fifteenth day of March, to the legislature and the governor a report of his or her findings.

(i) The chief administrator shall annually request that each judge and justice of the state-paid courts of the unified court system disclose to the office of court administration information as to his or her race/ethnicity, sex, sexual orientation, gender identity, veteran status, and disability status. Compliance with this request by a judge or justice shall be entirely voluntary; and any information disclosed to the office of court administration may only be released publicly in the form of aggregated statistical data that does not identify a justice or judge.

(ii) The report required by this paragraph shall include separate charts showing the race/ethnicity, sex, sexual orientation, gender identity, disability status and veteran status of:

(A) all responding judges and justices of the unified court system, including sub-charts for all elected judges and justices and all appointed judges and justices by appointing authority;

(B) all responding judges of the court of appeals;

(C) all responding justices of the appellate division, including sub-charts for appellate division justices in each appellate department;

(D) all responding justices of the supreme court, including sub-charts for supreme court justices elected in each judicial district;

(E) all responding judges of the court of claims;

(F) all responding justices of the surrogate's court;

(G) all responding judges of the county courts;

(H) all responding judges of the district courts, including sub-charts for each district court;

(I) all responding judges of the family court, including sub-charts for family court judges appointed in New York city and family court judges elected outside New York city;

(J) all responding judges of the New York city civil court;

(K) all responding judges of the New York city criminal court;

(L) all responding judges of the city courts, including sub-charts for city court judges who are appointed and city court judges who are elected; and

(M) all responding judges of the New York city housing court.

(iv) The report required by this paragraph shall use the following ethnic and racial categories: American Indian or Alaska Native, Asian, Black or African-American, Hispanic or Latino, Native Hawaiian or other Pacific Islander, White, some other race, and more than one race, as those categories are defined by the United States Census Bureau for reporting purposes.

(v) The demographic data reported, disclosed, or released pursuant to this subdivision shall also indicate the percentage of respondents who declined to respond.

2. The chief administrator shall also:

(a) Designate the justices of the appellate terms of the supreme court and the places where such appellate terms shall be held, in accordance with the provisions of section eight of article six of the constitution.

(b) Promulgate rules of conduct for judges and justices of the unified court system with the approval of the court of appeals, in accordance with the provisions of section twenty of article six of the constitution.

(c) Temporarily assign judges and justices of the unified court system, in accordance with the provisions of section twenty-six of article six of the constitution.

(d) Adopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts, in accordance with the provisions of section thirty of article six of the constitution.

(e) Prepare forms and compile data on family offenses, proceedings or actions in all courts, including but not limited to the following information:

(i) the offense alleged;

(ii) the relationship of the alleged offender to the petitioner or complainant;

(iii) the court where the action or proceeding was instituted;

(iv) the disposition; and

(v) in the case of dismissal, the reasons therefor.

In executing this requirement, the chief administrator may adopt rules requiring appropriate law enforcement or criminal justice agencies to identify actions and proceedings involving family offenses and, with respect to such actions and proceedings, to report, in such form and manner as the chief administrator shall prescribe, the information specified herein.

The chief administrator of the courts shall adopt rules to facilitate record sharing and other communication among the supreme, criminal and family courts, subject to applicable provisions of the domestic relations law, criminal procedure law and the family court act pertaining to the confidentiality, expungement and sealing of records, where such courts exercise concurrent jurisdiction over family offense proceedings or proceedings involving orders of protection.

(f) Have the power to prescribe forms pursuant to section 10.40 of the criminal procedure law.

(g) Designate by rule one supreme court library within each judicial district to serve as the repository of materials transmitted by state agencies pursuant to paragraph c of subdivision four of section one hundred two of the executive law.

(h)(i) Formulate, establish and maintain a plan or plans to encourage and reward unusual and meritorious suggestions and accomplishments by state employees and suggestions of retired state employees promoting efficiency and economy in the performance of any function of the unified court system.

(ii) Make and render merit awards to or for the benefit of state employees and retired state employees nominated to receive them in accordance with such plan or plans. The chief administrator may determine the nature and extent of such merit awards, which may include but shall not be limited to certificates, medals or other appropriate insignia, or cash awards in such amounts as may be fixed by the chief administrator.

(iii) Adopt and promulgate rules and regulations governing the operation of any plan or plans established hereunder, the eligibility and qualifications of state employees and retired state employees participating therein, the character and quality of suggestions and accomplishments submitted for consideration, the method of their submission and the procedure for their review, nominations for merit awards, and the kind, character and value of such awards, and such other rules and regulations as may be deemed necessary or appropriate for the proper administration of any plan or plans established hereunder.

(i) Review the practices and procedures of the unified court system regarding fair treatment standards for crime victims and implement recommendations for change, in accordance with the provisions of article twenty-three of the executive law.

(j) Notwithstanding any provision of law, rule or regulation to the contrary, establish a system for the posting of bail and the payment of fines, mandatory surcharges, court fees, and other monies payable to a court, county clerk in his or her capacity as clerk of court, or the office of court administration, or to a sheriff upon enforcing a court order or delivering a court mandate pursuant to article eighty of the civil practice law and rules, by means of a credit card or similar device. Notwithstanding any provision of law to the contrary, the chief administrator may require a party making a payment in such manner also to pay a reasonable administrative fee. In establishing such system, the chief administrator shall seek the assistance of the state comptroller who shall assist in developing such system so as to ensure that such funds shall be returned to any jurisdiction which, by law, may be entitled to them. The chief administrator shall periodically accord the head of each police department or police force and of any state department, agency, board, commission or public authority having police officers who fix pre-arraignment bail pursuant to section 150.30 of the criminal procedure law an opportunity to have the system established pursuant to this paragraph apply to the posting of pre-arraignment bail with police officers under his or her jurisdiction.

(k) Upon application, certify former judges or justices of the unified court system and former housing judges of the civil court of the city of New York who served for at least two years in such position to solemnize marriages.

(l) Establish a panel which shall issue advisory opinions to judges and justices of the unified court system upon the request of any one judge or justice, concerning one or more issues related to ethical conduct or proper execution of judicial duties or possible conflicts between private interests and official duties.

(i) The panel shall have no executive, administrative or appointive duties except as provided otherwise in this paragraph or in rules and regulations adopted to implement this paragraph. The panel shall consist of such number of members who possess such qualifications and serve for such terms as the rules and regulations shall provide. Each member shall serve without compensation but shall be reimbursed for expenses actually and necessarily incurred in the performance of his or her official duties for the panel. Notwithstanding any inconsistent provisions of this or any other law, general, special or local, no officer or employee of the state or any public corporation, as defined in article two-A of the general construction law, shall be deemed to have forfeited

or shall forfeit his office or employment or any benefits provided under the retirement and social security law or under any public retirement system maintained by the state or any of its subdivisions by reason of his or her being a member of the panel.

(ii) The panel shall issue a written advisory opinion to the judge or justice making the request based upon the particular facts and circumstances of the case, which shall be detailed in the request and in any additional material supplied by the judge or justice at the instance of the panel. If the individual facts and circumstances provided are insufficient in detail to enable the panel to render an advisory opinion, the panel shall request supplementary information from the judge or justice to enable it to render such opinion. If such supplementary information is still insufficient or is not provided, the panel shall so state and shall not render an advisory opinion based upon what it considers to be insufficient detail.

(iii) Notwithstanding any other provisions of law, requests for advisory opinions, advisory opinions issued by the panel to an individual judge or justice of the unified court system, and the facts and circumstances upon which they are based, shall be and remain confidential between the panel and the individual judge or justice making the request; provided, however, that the panel shall publish its advisory opinion and the facts and circumstances upon which it is based with appropriate deletions of names of persons, places and things which might tend to identify either the judge or justice making the request or any other judge or justice of the unified court system; and deliberations of the panel shall be and remain totally confidential.

(iv) Actions of any judge or justice of the uniform court system taken in accordance with findings or recommendations contained in an advisory opinion issued by the panel shall be presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct.

(m) Expend funds made available in a political subdivision pursuant to section five hundred twenty-one of this chapter for the purposes of improving, furnishing or equipping jury assembly rooms, jury deliberation rooms, offices for commissioners of jurors, and such other court facilities in such political subdivision as are required to effectuate the policies of the state declared in section five hundred of this chapter; except that, in any state fiscal year, no expenditure may be made hereunder for any purpose where funds have been made available by appropriation in such fiscal year to pay the cost thereof. Nor shall this paragraph, and any expenditures made hereunder, relieve any political subdivision of its obligation under section thirty-nine of this chapter to provide goods, services and facilities suitable and sufficient for the transaction of business by courts and court-related agencies.

(n) [Expires and deemed repealed Sept. 1, 2023, pursuant to L.2010, c. 363, § 2.] Have the power to authorize a court under subdivision (b) of section forty-three hundred seventeen of the civil practice law and rules to order a reference to determine an application for an order of protection (including a temporary order of protection) that, in accordance with law, is made ex parte or where all parties besides the applicant default in appearance; provided, however, this paragraph shall only apply to applications brought in family court during the hours that the court is in session, and after five o'clock p.m. Training about domestic violence shall be required for all persons who are designated to serve as references as provided in this paragraph.

(o) Notwithstanding the provisions of paragraph (n) of this subdivision, have the power to authorize family courts in the seventh and eighth judicial districts to establish a judicial hearing officer pilot program (hereinafter referred to as “pilot program”) and, under subdivision (b) of section forty-three hundred seventeen of the civil practice law and rules, order a reference to determine an application for an order of protection or temporary order of protection, that, in accordance with law, is made ex parte or where all parties beside the applicant default in appearance; provided, however, that the chief administrator shall not exercise this power without prior consultation with the presiding justice of the fourth judicial department. Training about domestic violence shall be required for all judicial hearing officers in the pilot program.

On or before the first day of April in each year, the chief administrator of the courts shall submit a report concerning the judicial hearing officer pilot program to the governor, the temporary president of the senate, the speaker of the assembly, and the chief judge of the state. Such report shall include the number of applications for an order of protection determined by judicial hearing officers in the pilot program, the disposition of such applications, and such other data, information, and analysis as are necessary to evaluate the efficacy of the pilot program in the administration of justice in response to domestic violence.

(p) Adopt rules authorizing payment of compensation and travel expenses for judges and justices temporarily assigned to town and village courts pursuant to subdivision two of section one hundred six of the uniform justice court act.

(q) Adopt rules to require transmission, to the criminal justice information services division of the federal bureau of investigation or to the division of criminal justice services, of the name and other identifying information of each person who has a guardian appointed for him or her pursuant to any provision of state law, based on a determination that as a result of marked subnormal intelligence, mental illness, incapacity, condition or disease, he or she lacks the mental capacity to contract or manage his or her own affairs. Any such records transmitted directly to the federal bureau of investigation must also be transmitted to the division of criminal justice services, and any records received by the division of criminal justice services pursuant to this paragraph may be checked against the statewide license and record database.

(r) Ensure that cases eligible for judicial diversion pursuant to article two hundred sixteen of the criminal procedure law shall be assigned to court parts in the manner provided by the chief administrator and that, to the extent practicable, such cases are presided over by judges who, by virtue of the structure, caseload and resources of the parts and the judges' training, are in the best position to provide effective supervision over such cases, such as the drug treatment courts. In compliance with these provisions, the chief administrator shall give due weight to the need for diverted defendants to make regular court appearances, and be closely supervised by the court, for the duration of drug treatment and the pendency of the criminal charge.

(s) Establish rules for special proceedings authorized by subsection (d) of section 9-518 of the uniform commercial code. Such rules may authorize the court in which such a special proceeding is pending to order a referee to hear and determine such special proceeding.

(t) Make available translation services to all family and supreme courts to assist in the translation of orders of protection and temporary orders of protection, as provided in this paragraph, where the person protected by and/or the person subject to the order of protection has limited English proficiency or has a limited ability to read English:

(i) Translation services shall be made available to all family and supreme courts in the ten languages most frequently used in the courts of each judicial department in accordance with the schedule in subparagraph (ii) of this paragraph, and any additional languages that the chief administrator of the courts deems appropriate;

(ii)(A) In three languages from among the ten most frequently used in the courts of each judicial department, by January first, two thousand eighteen;

(B) In three additional languages from among the ten most frequently used in the courts of each judicial department, by June thirtieth, two thousand nineteen; and

(C) In four additional languages from among the ten most frequently used in the courts of each judicial department, by December thirty-first, two thousand twenty; and

(iii) Upon issuance of an order of protection or temporary order of protection, the court shall inquire of any person who is protected by it or subject to it, who has made an appearance, whether translation services are needed. The court shall advise the party or parties of the availability of such translation services;

(iv) The authority provided by this paragraph shall be in addition to, and shall not be deemed to diminish or reduce any rights of the parties under existing law.

(t-1) Issue reports concerning the availability of translation services where orders of protection and temporary orders of protection are issued; special pilot programs. (i) The chief administrator of the courts shall submit to the legislature, the governor, and the chief judge of the state the following reports:

(A) Not later than April first, two thousand nineteen, a report on the availability and use of translation services in the courts for orders of protection and temporary orders of protection, including but not limited to the languages for which written and oral translation is provided; the number of parties that received translated documents, broken down by language and judicial department; the number of parties receiving interpretation, broken down by language and judicial department; the number of people who requested a translated document and did not receive it; and the number of cases in which a court interpreter was used to communicate with either party and an order of protection or temporary order of protection was issued but in which a translated document was not provided to either party. Such report shall contain recommendations for further legislation relating to the availability of such translation services as the chief administrator of the courts shall deem appropriate; and

(B) Not later than April first, two thousand eighteen, a report evaluating the technical and operational issues involved in subjecting the following orders of protection and temporary orders of protection to the same requirements, relative to translation and interpretation of such orders, as are applicable to orders of protection and temporary orders of protection issued under section one hundred sixty-nine of the family court act: (I) orders of protection and temporary orders of protection issued under section 530.12 or 530.13 of the criminal procedure law; and (II) orders of protection and temporary orders of protection issued by a town or village justice court.

(ii) The office of court administration shall establish and oversee two pilot programs, as follows:

(A) In one town or village court within each judicial district, to develop best practices for the use of written translation and interpretation services for orders of protection and temporary orders of protection in the justice courts. Following consultation with the state magistrates association, the conference of mayors, the association of towns, the unified court system's advisory committee on language access, and such other parties as may be interested, the chief administrator shall include an analysis and evaluation of this pilot program, together with a plan for its expansion throughout the justice court system, in the report required pursuant to clause (B) of subparagraph (i) of this paragraph.

(B) In one county in the city of New York and two counties outside such city, to develop best practices for the use of written translation and interpretation services for orders of protection and temporary orders of protection issued in the state-paid criminal courts of such counties. Following consultation with the state district attorneys association, representatives of the criminal defense bar, representatives of domestic violence prevention legal services providers, the unified court system's advisory

committee on language access, and such other parties as may be interested, the chief administrator shall include an analysis and evaluation of this pilot program, together with a plan for its expansion throughout the state, in the report required pursuant to clause (B) of subparagraph (i) of this paragraph.

(u)(i)(A) Not later than February first in each calendar year, the chief administrator of the courts shall submit to the legislature, the governor and the chief judge of the state a report evaluating the state's experience with programs in the use of electronic means for the commencement of actions and proceedings and the service of papers therein as authorized by law and containing such recommendations for further legislation as he or she shall deem appropriate. In the preparation of such report, the chief administrator shall consult with each county clerk in whose county a program has been implemented in civil cases in the supreme court, the advisory committees established pursuant to subparagraphs (ii) through (vi) of this paragraph, the organized bar including but not limited to city, state, county and women's bar associations; the office of indigent legal services; institutional legal service providers; not-for-profit legal service providers; public defenders; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by any programs that have been implemented or who may be affected by the proposed recommendations for further legislation; representatives of victims' rights organizations; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator, and afford them an opportunity to submit comments with respect to such implementation for inclusion in the report and address any such comments.

Public comments shall also be sought via a prominent posting on the website of the office of court administration. All comments received from any source shall be posted for public review on the same website.

(B) The report submitted hereunder in the two thousand seventeen calendar year shall include:

(I) the evaluation specified in subparagraph (vi) of this paragraph, including the entities or individuals consulted, input received, all issues encountered or otherwise brought to the attention of the chief administrator or his or her agents, all solutions devised to address the issues, presentment of all outstanding issues, including but not limited to any issues relating to the use of electronic means for filing by unrepresented litigants, any recommendations of the advisory committee to the chief administrator, along with recommendations for legislation in relation to the use of electronic means for the origination of juvenile delinquency proceedings under article three of the family court act and abuse or neglect proceedings pursuant to article ten of the family court act in family court and the filing and service of papers in such pending proceedings.

(II) the evaluation specified in subparagraph (v) of this paragraph, including the entities or individuals consulted, the input received, all issues encountered or otherwise brought to the attention of the chief administrator or his or her agents, all solutions devised to address the issues, presentment of all outstanding issues, including but not limited to any issues relating to the use of electronic means for filing by unrepresented litigants, recommendations of the advisory committee to the chief administrator, along with recommendations for legislation in relation to the use of electronic means for the commencement of criminal actions and the filing and service of papers in pending criminal actions and proceedings.

(III) the evaluation specified in subparagraph (ii) of this paragraph, including the entities or individuals consulted, input received, all issues encountered or otherwise brought to the attention of the chief administrator or his or her agents, all solutions devised to address the issues, presentment of all outstanding issues, including but not limited to any issues relating to the use of electronic means for filing by unrepresented litigants, any recommendations of the advisory committee to the chief administrator, along with recommendations for legislation in relation to the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the supreme court.

(IV) the evaluation specified in subparagraph (iii) of this paragraph, including the entities or individuals consulted, input received, all issues encountered or otherwise brought to the attention of the chief administrator or his or her agents, all solutions devised to address the issues, presentment of all outstanding issues, including but not limited to any issues relating to the use of electronic means for filing by unrepresented litigants, any recommendations of the advisory committee to the chief administrator, along with recommendations for legislation in relation to the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the surrogate's court.

(V) the evaluation specified in subparagraph (iv) of this paragraph, including the entities or individuals consulted, input received, all issues encountered or otherwise brought to the attention of the chief administrator or his or her agents, all solutions devised to address the issues, presentment of all outstanding issues, including but not limited to any issues relating to the use of electronic means for filing by unrepresented litigants, any recommendations of the advisory committee to the chief administrator, along with recommendations for legislation in relation to the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the civil court of the city of New York.

In the report, the chief administrator also shall address issues that bear upon the need for the courts, district attorneys and others to retain papers filed with courts or served upon parties in criminal proceedings where electronic means can or have been used and make recommendations for such changes in laws requiring retention of such papers as the chief administrator may deem appropriate.

(ii) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the commencement of civil actions and proceedings and the service and filing of papers therein in the supreme court. This committee shall consist of such number of members as the chief administrator shall designate, among which there shall be representatives of the organized bar including but not limited to city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the supreme court; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator. No fewer than half of the members of this advisory committee shall be upon the recommendation of the New York state association of county clerks. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of the electronic filing program in the supreme court; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator.

(iii) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the surrogate's court. This committee shall consist of such number of members as the chief administrator shall designate among which there shall be chief clerks of surrogate's courts; representatives of the organized bar including but not limited to city, state, county and women's bar associations; institutional providers of legal services; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of electronic means for the commencement of actions and

proceedings and the service and filing of papers therein in the surrogate's court; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of the electronic filing program in the surrogate's court; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator.

(iv) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the civil court of the city of New York. This committee shall consist of such number of members as the chief administrator shall designate, among which there shall be the chief clerk of the civil court of the city of New York; representatives of the organized bar including but not limited to city, state, county and women's bar associations; attorneys who regularly appear in actions specified in subparagraph (C) of paragraph two of subdivision (b) of section twenty-one hundred eleven of the civil practice law and rules; and unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of electronic means for the commencement of actions and proceedings and the service and filing of papers therein in the civil court of the city of New York; and any other persons as deemed appropriate by the chief administrator. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of the electronic filing program in the civil court of the city of New York; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator.

(v) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the commencement of criminal actions and the filing and service of papers in pending criminal actions and proceedings, as first authorized by paragraph one of subdivision (c) of section six of chapter four hundred sixteen of the laws of two thousand nine, as amended by chapter one hundred eighty-four of the laws of two thousand twelve, is continued. The committee shall consist of such number of members as will enable the chief administrator to obtain input from those who are or would be affected by such electronic filing program, and such members shall include county clerks; chief clerks of supreme, county and other courts; district attorneys; representatives of the office of indigent legal services; not-for-profit legal service providers; public defenders; statewide and local specialty bar associations whose membership devotes a significant portion of their practice to assigned criminal cases pursuant to subparagraph (i) of paragraph (a) of subdivision three of section seven hundred twenty-two of the county law; institutional providers of criminal defense services and other members of the criminal defense bar; representatives of victims' rights organizations; unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program and other interested members of the criminal justice community. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, district attorneys, not-for-profit legal service providers, public defenders, statewide and local specialty bar associations whose membership devotes a significant portion of their practice to assigned criminal cases pursuant to subparagraph (i) of paragraph (a) of subdivision three of section seven hundred twenty-two of the county law; institutional providers of criminal defense services and other members of the

criminal defense bar, representatives of victims' rights organizations, unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program and other interested members of the criminal justice community.

(vi) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the origination of juvenile delinquency proceedings under article three of the family court act and abuse or neglect proceedings pursuant to article ten of the family court act in family court and the filing and service of papers in such pending proceedings, as first authorized by paragraph one of subdivision (d) of section six of chapter four hundred sixteen of the laws of two thousand nine, as amended by chapter one hundred eighty-four of the laws of two thousand twelve, is continued. The committee shall consist of such number of members as will enable the chief administrator to obtain input from those who are or would be affected by such electronic filing program, and such members shall include chief clerks of family courts; representatives of authorized presentment and child protective agencies; other appropriate county and city government officials; institutional providers of legal services for children and/or parents; not-for-profit legal service providers; public defenders; representatives of the office of indigent legal services; attorneys assigned pursuant to article eighteen-B of the county law; and other members of the family court bar; representatives of victims' rights organizations; unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program; and other interested members of the family practice community. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, representatives of authorized presentment and child protective agencies, other appropriate county and city government officials, institutional providers of legal services for children and/or parents, not-for-profit legal service providers, public defenders, attorneys assigned pursuant to article eighteen-B of the county law and other members of the family court bar, representatives of victims' rights organizations, unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program, and other interested members of the criminal justice community.

(u-1) Compile and publish data on misdemeanor offenses in all courts, disaggregated by county, including the following information:

(i) the aggregate number of misdemeanors charged, by indictment or the filing of a misdemeanor complaint or information;

(ii) the offense charged;

(iii) the race, ethnicity, age, and sex of the individual charged;

(iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged misdemeanor;

(v) the precinct or location where the alleged misdemeanor occurred;

(vi) the disposition, including, as the case may be, dismissal, acquittal, adjournment in contemplation of dismissal, plea, conviction, or other disposition;

(vii) in the case of dismissal, the reasons therefor; and

(viii) the sentence imposed, if any, including fines, fees, and surcharges.

(v) Have the power to establish pilot programs for the filing of petitions for temporary orders of protection by electronic means and for the issuance of such orders by audio-visual means pursuant to subdivision (b) of section one hundred fifty-three-c of the family court act. The chief administrator shall maintain an up-to-date and publicly-available listing of the sites, if any, at which such applications for ex parte temporary orders of protection may be filed, and at which electronic appearances in support of such applications may be sought, in accordance with such section one hundred fifty-three-c of the family court act. In developing such pilot program, the chief administrator shall strive for a program that is regionally diverse, and takes into consideration, among other things, the availability of public transportation, population density and the availability of facilities for conducting such program.

(v-1) Compile and publish data on violations, to the greatest extent practicable, in all courts, disaggregated by county, including the following information:

(i) the aggregate number of violations charged by the filing of an information;

(ii) the violation charged;

(iii) the race, ethnicity, age, and sex of the individual charged;

(iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged violation;

(v) the precinct or location where the alleged violation occurred;

(vi) the disposition, including, as the case may be, dismissal, acquittal, conviction, or other disposition;

(vii) in the case of dismissal, the reasons therefor; and

(viii) the sentence imposed, if any, including fines, fees, and surcharges.

(w) [As added by L.2018, c. 191, § 3. See, also, par. (w), below.] To the extent practicable, establish such number of human trafficking courts as may be necessary to fulfill the purposes of subdivision five of section 170.15 and subdivision four of section 180.20 of the criminal procedure law.

(w) [As added by L.2018, c. 291, § 1. See, also, par. (w), above.] Adopt rules and regulations standardizing use of court-appointed special advocate (CASA) programs in this state and governing the structure, administration and operation of such programs.

(w-1) The chief administrator shall include the information required by paragraphs (u-1) and (v-1) of this subdivision in the annual report submitted to the legislature and the governor pursuant to paragraph (j) of subdivision one of this section. The chief administrator shall also make the information required by paragraphs (u-1) and (v-1) of this subdivision available to the public by posting it on the website of the office of court administration and shall update such information on a monthly basis. The information shall be posted in alphanumeric form that can be digitally transmitted or processed and not in portable document format or scanned copies of original documents.

(x) Take such actions and adopt such measures as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the office of court administration, other than a search conducted solely for the internal recordkeeping or case management purposes of the judiciary or for a bona fide research purpose, contains information relating to an undisposed case. For purposes of this paragraph, "undisposed case" shall mean a criminal action or proceeding, or an arrest incident, appearing in the criminal history records of the office of court administration for which no conviction, imposition of sentence, order of removal or other final disposition, other than the issuance of an apparently unexecuted warrant, has been recorded and with respect to which no entry has been made in such records for a period of at least five years preceding the issuance of such report. Nothing contained in this paragraph shall be deemed to permit or require the release, disclosure or other dissemination by the office of court administration of criminal history record information that has been sealed in accordance with law.

(x-1) Nothing in paragraphs (u-1) and (v-1) of this subdivision shall be construed as granting authority to the chief administrator, a criminal justice or law enforcement agency, a governmental entity, or any agent or representative of the foregoing, to use, disseminate, or publish any individual's name, date of birth, NYSID, social security number, docket number, or other unique identifier in violation of the criminal procedure law, the general business law, or any other law.

(y) Take such actions and adopt such measures as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the office of court administration, other than a search conducted solely for the internal recordkeeping or case management purposes of the judiciary or for a bona fide research purpose, contains information about any action or proceeding terminated prior to November first, nineteen ninety-one in favor of the accused, as defined by section 160.50 of the criminal procedure law, or sealed in the manner provided by section 160.55 of the criminal procedure law.

(y-1) Nothing in paragraphs (u-1) and (v-1) of this subdivision shall be construed as granting authority to the chief administrator, a criminal justice or law enforcement agency, a governmental entity, a party, a judge, a prosecutor, or any agent or representative of the foregoing to introduce, use, disseminate, publish or consider any records in any judicial or administrative proceeding expunged or sealed under applicable provisions of the criminal procedure law, the family court act, or any other law.

(z) take such actions and adopt such measures as may be necessary to ensure that a certificate of disposition or a written or electronic report of a criminal history search conducted for the public by the office of court administration contains only records of convictions, if any, and information about pending cases. This limitation shall not apply to searches conducted for the internal recordkeeping or case management purposes of the judiciary, or produced to the court, the people, and defense counsel in a criminal proceeding, or for a bona fide research purpose, or, where appropriate, to the defendant or defendant's designated agent.

(z-1) In executing the requirements of paragraphs (u-1) and (v-1) of this section, the chief administrator may adopt rules consistent with the requirements of paragraphs (x-1) and (y-1) of this subdivision to secure the information specified herein from the office of the state comptroller in such form and manner as the chief administrator shall prescribe. Further, to facilitate this provision, the chief administrator shall adopt rules to facilitate record sharing, retention and other necessary communication

among the criminal courts and law enforcement agencies, subject to applicable provisions of the criminal procedure law, the family court act, and any other law pertaining to the confidentiality, expungement and sealing of records.

(aa) [As added by L.2020, c. 322, § 4. See, also, par. (aa) below.] (i) In order to maintain access to the court and open judicial proceedings for all persons in their individual capacity and to prevent interference with the needs of judicial administration, consistent with section twenty-eight of the civil rights law and section four-a of this chapter, shall promulgate rules to ensure the following:

(A) any representative of a law enforcement agency who, while acting in an official capacity, enters a New York state courthouse intending to observe an individual or take an individual into custody shall identify himself or herself to uniformed court personnel and state his or her specific law enforcement purpose and the proposed enforcement action to be taken; any such representative who has a warrant or order concerning such intended arrest shall provide a copy of such warrant or order to such court personnel;

(B) any such warrant or order concerning such intended enforcement action shall be promptly reviewed by a judge or court attorney;

(C) information about any such proposed enforcement action shall be transmitted to and reviewed by appropriate court system personnel, including the judge presiding over any case involving the subject of that enforcement action;

(D) except in extraordinary circumstances, no arrest may be made by a representative of a law enforcement agency in a courtroom absent leave of the court;

(E) no civil arrest shall be executed inside a New York state courthouse except pursuant to a judicial warrant or judicial order authorizing the arrest;

(F) an unusual occurrence report shall be filed by court system personnel for every enforcement action taken inside the courthouse, including the observation of court proceedings by a representative of a law enforcement agency acting in such person's official capacity; and

(G) copies of all judicial warrants and judicial orders authorizing an arrest and provided to court personnel pursuant to this paragraph and the rules promulgated thereunder shall be maintained by the chief administrator in a central record repository, appropriately indexed or filed alphabetically by name.

(ii) The chief administrator shall publish on the unified court system website and provide to the governor, the speaker of the assembly and the temporary president of the senate an annual report compiling statistics, aggregated by county, setting forth the date each such judicial warrant or judicial order was signed, the judge and court which issued such judicial warrant or judicial order and the location of such court as shown by such document, the date such judicial warrant or judicial order was presented to counsel for the unified court system, a description of the type of judicial warrant or judicial order and, to the extent known to court personnel, whether or not an arrest occurred with respect to such warrant and the date and specific location of such arrest.

(aa) [As added by L.2021, c. 593, § 13. See, also, par. (aa) above.] Not later than January first, two thousand twenty-two, make available Spanish translations of the additional notices in consumer credit transaction actions and proceedings required

by section 306-d and subdivision (j) of rule 3212 of the civil practice law and rules, and make available form affidavits required for a motion for default judgment in a consumer credit transaction action or proceeding required by subdivision (f) of section 3215 of the civil practice law and rules.

(bb) To the extent practicable, establish such number of veterans treatment courts as may be necessary to fulfill the purposes of subdivision five of section 170.15, subdivision four of section 180.20, section 230.11 and section 230.21 of the criminal procedure law.

(cc) [Eff. Oct. 30, 2023.] Make available form affidavits required for a motion for default judgment in an action arising from medical debt as required by subdivision (f) of section thirty-two hundred fifteen of the civil practice law and rules.

Credits

(Added L.1978, c. 156, § 7. Amended L.1982, c. 31, § 1; L.1984, c. 47, § 2; L.1984, c. 941, § 3; L.1985, c. 928, § 1; L.1986, c. 708, § 3; L.1986, c. 893, § 3; L.1987, c. 147, § 2; L.1987, c. 323, § 1; L.1987, c. 805, § 4; L.1987, c. 825, § 8; L.1988, c. 92 § 2; L.1988, c. 316, § 1; L.1989, c. 44, § 1; L.1990, c. 153, § 3; L.1992, c. 31, § 1; L.1994, c. 222, § 56; L.1995, c. 213, § 1; L.1995, c. 349, § 1; L.1999, c. 367, § 8, eff. July 27, 1999; L.2001, c. 42, § 1, eff. Nov. 1, 2001; L.2001, c. 340, § 1, eff. Sept. 1, 2001; L.2002, c. 219, § 1, eff. July 30, 2002; L.2003, c. 537, § 2, eff. Sept. 17, 2003; L.2003, c. 537, § 3; L.2005, c. 457, § 1, eff. Aug. 9, 2005; L.2005, c. 563, § 1, eff. Aug. 23, 2005; L.2007, c. 321, § 2, eff. July 18, 2007; L.2008, c. 326, § 13, eff. July 21, 2008; L.2008, c. 491, § 7, eff. Nov. 1, 2008; L.2009, c. 56, pt. AAA, § 15, eff. April 7, 2009; L.2010, c. 363, § 1, eff. Aug. 13, 2010; L.2011, c. 179, § 1, eff. July 20, 2011; L.2013, c. 1, § 18, eff. March 16, 2013; L.2013, c. 490, § 2, eff. Nov. 13, 2013; L.2015, c. 237, § 1, eff. Aug. 31, 2015; L.2015, c. 367, § 2, eff. April 1, 2016; L.2016, c. 492, § 1, eff. Feb. 26, 2017; L.2017, c. 55, pt. BB, §§ 1, 2, eff. July 19, 2017; L.2017, c. 99, §§ 1, 1-a, eff. July 19, 2017; L.2018, c. 191, § 3, eff. Aug. 15, 2018; L.2018, c. 291, § 1, eff. Oct. 1, 2018; L.2019, c. 36, pt. M, § 26, eff. June 14, 2019; L.2019, c. 55, pt. II, subpt. L, § 2, pt. II, subpt. N, § 2, eff. April 11, 2020; L.2019, c. 55, pt. II, subpt. M, § 3, eff. Oct. 9, 2019; L.2020, c. 102, § 2, eff. Dec. 12, 2020; L.2020, c. 273, § 1, eff. Nov. 11, 2020; L.2020, c. 322, § 4, eff. Dec. 15, 2020; L.2021, c. 91, § 1, eff. April 28, 2021; L.2021, c. 593, § 13, eff. Nov. 8, 2021; L.2023, c. 57, pt. Y, subpt. A, § 2, eff. Oct. 30, 2023.)

McKinney's Judiciary Law § 212, NY JUD § 212
Current through L.2023, chapters 1 to 191. Some statute sections may be more current, see credits for details.

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