2023 Annual Conference

Syracuse, New York

Accusatory Instruments, Facial Sufficiency and Dismissals in the Interest of Justice

Date: Tuesday, October 3, 2023
Instructors:
Hon. Barbara Seelbach
Wayne Witherax, Esq.
MCLE: 1.0 Ethics

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

Presenters

WAYNE WITHERWAX, ESQ. is presently in service as the Executive Assistant District Attorney for Chemung County after retiring as Principal Law Clerk to County Court Judge and Acting Supreme Court Justice Hon. Edward McLoughlin. Prior to his retirement, he also served as an adjunct professor in the Criminal Justice Department and the Paralegal Program at Marist College. Mr. Witherwax was with the Dutchess County District Attorney's office for over 13 years and served as the Justice Court Bureau Chief while there. Mr. Witherwax earned his J.D. at Albany Law School of Union University and his B.S. in Criminal Justice at the State University College at Buffalo. He is admitted to practice in New York.

BARBARA SEELBACH took the bench in 2006 and is currently employed as the Confidential Secretary to Dutchess County Supreme Court Justice Christi J. Acker. She has spent the majority of her career in personal injury claims as an adjuster and supervisor for property and casualty insurance companies. She was also employed as a senior claims negotiator for a major law firm where she successfully settled personal injury cases and represented the firm at mediation and arbitration proceedings. A graduate of the University of Arizona, she completed an internship in the House of Commons in London, England. She has also served as Secretary, Vice President and President of the Dutchess County Magistrates Association where she tackled major issues such as the prohibition of plea bargaining by the State Police. In September of 2015, she joined the ranks of the NYSMA when she was elected as a Director for the association where she has been an active member of the Training and Education Committee.

ACCUSATORY INSTRUMENTS, FACIAL SUFFICIENCY AND DISMISSAL IN THE INTEREST OF JUSTICE

PRESENTED BY:
WAYNE WITHERWAX, ESQ , ADA CHEMUNG COUNTY
BARBARA SEELBACH, CLINTON TOWN JUSTICE, NYSMA DIRECTOR

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Q: What is a T&V court's authority to act on a case?

A: JURISDICTION

What kind of jurisdiction do we have?

- TRIAL JURISDICTION over infractions, violations, misdemeanors found in PL, VTL ENCON, PARKS & REC, LOCAL ORDINANCES
- PRELIMINARY JURISDICTION over Felonies, alternate arraignments, certain Family Court matters (when Family Court is not in session)
- NO JURISDICTION over JD, JO and Adolescent Offenders (Raise the Age charged with non-VTL misdemeanors) any Felony

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Limited Jurisdiction

- You have preliminary jurisdiction over the following:
- Felonies
- Conducting an alternate arraignments
- Family court matters (when family court is not in session)

3

NO Jurisdiction?

- You have no jurisdiction over the following:
- Juvenile Delinquents (8-17 years old) *see* NY Fam. Ct. Act § 301.2(1) except for 16 and 17 yr. olds charged with misdemeanors under VTL
- Juvenile Offenders (13-15 years old) charged with a serious or violent felony under PL 10.00 (18)
- Adolescent Offenders (16-17 years old) charged with felonies (remember Raise the Age?) except 16 and 17 yr. olds charged with misdemeanors under VTL

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Q: How does a criminal case gets started?

A: With the filing of a legally sufficient accusatory instrument. Without one, the court does not have jurisdiction.

See CPL §140.45, §120.20(1), §150.50(1)

- There are 7 kinds of accusatory instruments:
- Misdemeanor complaint
- Felony complaint
- Prosecutor's information

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Q: How does a criminal case gets started? (cont)

See CPL §140.45, §120.20(1), §150.50(1)

- Misdemeanor or Violation Information
- Simplified Traffic Information
- Simplified Parks Information
- Simplified EnCon Information

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The Accusatory Instrument: What makes it legally sufficient?

See CPL§100.40

- An information, or a count thereof, is sufficient on its face when:
- **(a)** It substantially conforms to the requirements prescribed in section 100.15; and
- **(b)** The allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information; and
- **(c)** Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.

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The Accusatory Instrument: What makes it legally sufficient? (cont.)

- A prosecutor's information, or a count thereof, is sufficient on its face when it substantially conforms to the requirements prescribed in section 100.35.
- A misdemeanor complaint or a felony complaint, or a count thereof, is sufficient on its face when:(a) It substantially conforms to the requirements prescribed in section 100.15; and
- The allegations of the factual part of such accusatory instrument and/or any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of such instrument.

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The Accusatory Instrument: What makes it legally sufficient? (cont.)

- **There is no jurisdiction to act unless a legally sufficient accusatory instrument is filed with the court**
- The court has an affirmative duty to review the accusatory for legal sufficiency (CPL §140.45, CPL §120.20(1), §150.50(1)

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What to look for in an Information, misdemeanor complaint and felony complaint to establish the accusatory is legally sufficient *See* CPR §100.15

- Name of the court √
- Title of the action √
- Signature of DA (or representative) √
- Must allege the offenses/ charges: accusatory part √
- Must contain a statement of the conduct constituting the offense(s): factual part. CPL §100.35 √

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Reasonable Cause
see CPL §70.10(2)

- What is reasonable cause?
  - When evidence that appears reliable exists that discloses facts alleged and pursuades you that it is reasonably likely to support every element of the crime(s) charged
- Is there reasonable cause?
  - Do the allegations in the factual part provide reasonable cause to believe that the principal committed the offenses(s) charged in the accusatory part?

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Is there a difference between a Complaint and an Information? YES!

- A Complaint turns into an Information when non-hearsay factual allegations establish the element(s) of the offense(s) charged
- What document converts a Complaint to an Information? A Supporting Deposition

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So, what is a Supporting Deposition? (CPL§100.20)

- It is a document which is filed along with an information, a simplified information, or a misdemeanor or felony complaint that contains facts in support of the charge(s) presented

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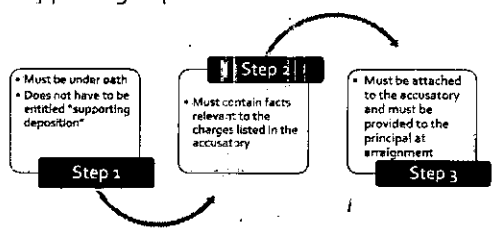
What are the requirements for a valid supporting deposition?



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So, what is the difference between a Complaint and an Information?

- A legally sufficient misdemeanor complaint can commence a case, but you only have jurisdiction to:
  - Issue an arrest warrant or criminal summons
  - Commence an arraignment
  - Assign an attorney, if needed
  - Determine release status
  - Issue an Order of Protection

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What is the difference between a Complaint and an Information?

Answer: JURISDICTION

In addition to the above powers, a legally sufficient Information gives you trial jurisdiction over the matter from arraignment to disposition.

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Complaint and Information requirements:

- Must allege facts sufficient to support each element of the charge(s)
- Must do so with non-hearsay allegations (there must be a verified statement from a witness with personal knowledge of the facts alleged)

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People v Hardy, 35NY 3d 466

- Fact pattern: On Sept. 10, 2013, the court issued a 2yr OOP against the Defendant. The order was violated in Jan. 2015 and Defendant was charged with harassment 2nd and arraigned on a misdemeanor complaint the following day. The matter was adjourned for 4 days so the People could get a sup. dep. When the court reconvened, the court proceeded to convert part of the complaint into an information and found several errors in the accusatory. The date on the DIR was incorrect – it had the wrong year listed. Defense counsel objected. The trial court noted it was a "...typographical error which the People could move to amend it at any time". Over objection, the People made an oral motion to amend the date of the incident. Def was given a 90-day jail sentence.

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People v Hardy, 35NY 3d 466

- Question: Can the court make amendments to an accusatory instrument? In this case, can the court amend a date to create a valid instrument?
- Answer: That depends! *See* CPL § 100.45 (2)
- In this case, the Court of Appeals reversed the conviction of the defendant.
- Why? The CPL only authorizes such amendments for a select subset of accusatory instruments. *See* CPL § 100.45 (2) and CPL §200.70
- The Court of Appeals ruled that in this case, the CPL doesn't permit factual amendments to Informations and mis. Complaints that are not facially sufficient

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Can the court dismiss a case in the interest of justice?

- YES. The court has discretion to dismiss a criminal action
- It allows justice to prevail over the strict letter of the law
- BUT....it should not be granted unless the facts would shock the conscience of the court
- When considering a motion to dismiss, the court must scrutinize the merits of defendant's application and weigh the interests of the defendant, the complainant and the community-at-large.
- *See* People v. Morrisey, 161 Misc. 2d 295

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Motion to Dismiss information, simplified information, prosecutor's information or misdemeanor complaint (CPL §170.30)

After arraignment, the court may, upon motion made by the Defendant, dismiss the accusatory on the ground that:

It is defective pursuant to CPL §170.35; or

The Defendant received immunity from prosecution for the charged offense

(CPL § § 50. 20 or 190.40); or

The prosecution is barred by reason of a previous prosecution CPL (§40.20); or

The prosecution is untimely CPL (§30.10); or

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Motion to Dismiss information, simplified information, prosecutor's information or misdemeanor complaint (CPL §170.30)

- Defendant was denied the right to speedy trial CPL (§30.30); or
- There exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or
- Dismissal is required in furtherance of **justice**, within the meaning of section 170.40.

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Dismissals in the Interest of Justice (CPL §170.40)

- When making the determination whether such compelling factor, consideration, or circumstances exists, the court MUST, to the extent applicable, examine and consider, individually and collectively, the following:

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Dismissals in the Interest of Justice (CPL §170.40)

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;

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Dismissals in the Interest of Justice (CPL §170.40)

- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (g) the impact of a dismissal on the safety or welfare of the community;
- (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
- (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

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Dismissals in the Interest of Justice (CPL §170.40)

- An order dismissing an accusatory instrument in the interest of justice may be issued upon:
- Motion of the People
- Motion of the Defendant
- The Court itself
- Upon the issuance of such order, the court MUST set forth its reasons for dismissal on the record

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Motion to dismiss information, simplified traffic information, prosecutor's information or misdemeanor complaint; procedure CPL § 170.45

- A motion to dismiss on the grounds of denial of speedy trial MUST be made in writing and on reasonable notice to the PPL. Oral motions on the grounds of speedy trial must be denied.

See People v. De Rosa, 84 Misc. 2d 316

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Motion to dismiss information, simplified traffic information, prosecutor's information or misdemeanor complaint; procedure CPL § 170.45

- What happens if a supporting deposition is not provided? Case can be dismissed for facial insufficiency.
- What happens if the defendant makes an oral application requesting dismissal based on the failure to supply a supporting deposition? The motion must be denied because the defendant must make the motion in writing and upon reasonable notice to the People.
- When should the motion for dismissal be made by the defendant? Before commencement of trial
- If the defendant failed to properly make the motion and was tried and found guilty, the defendant cannot raise the defect on appeal. *See* People v. Fattizzi, 98 Misc. 2d 288

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Do you have unlimited power to dismiss cases? NO

- You can be discharged from office for improperly dismissing cases without giving notice to the prosecutor.
- You cannot alter tickets/accusatories.
- you cannot dismiss tickets/accusatories of your co-judge.
- REMEMBER: Judges are sworn to uphold the law and seek the truth.
- Judicial ethics prevail!
- See In re Conti, 70 N.Y.2d 416. Justice's conduct in fixing traffic tickets demonstrated a level of dishonesty and lack of judgment that was unacceptable for a member of New York's judiciary justice's conduct in fixing traffic tickets demonstrated a level of dishonesty and lack of judgment that was unacceptable for a member of New York's judiciary

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Sample language for Order of Dismissal

Defendant moves by way of motion to dismiss the accusatory instrument filed with this Court on _____ on the ground that _____.

Based upon the available facts and evidence presented, the court finds it is impossible to draw determine that the accusatory instrument is sufficient on its face. Therefore, in consideration of the (*affidavit affirmation*) of , (*sworn to subscribed on*) , 2023, the opposing (*affidavit affirmation*) of , (*sworn to subscribed on*) , 2023, and upon inspection of the accusatory instrument to determine its sufficiency in order for jurisdiction to attach to the warrantless arrest made on , 2023, it is hereby

ORDERED that the motion to dismiss the accusatory instrument is granted, and it is further

ORDERED that the defendant be immediately discharged.

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NY Consolidated Laws Services Jud § 44

- Sanction of removal, rather than censure, was warranted where New York City Criminal Court judge willfully disregarded law in dismissing 16 criminal cases, repeatedly displayed intemperate demeanor in his dealings with persons appearing before him, abused power of his office, and exhibited bias against prosecution.
- *See* In re Duckman, 92 N.Y.2d 141, 677 N.Y.S.2d 248, 699 N.E.2d 872, 1998 N.Y. LEXIS 1831 (N.Y. 1998).

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Questions?

Please ask!

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People v. Hardy

Court of Appeals of New York

September 8, 2020, Argued ; October 15, 2020, Decided

No. 48

Reporter
35 N.Y.3d 466 *; 157 N.E.3d 117 **; 132 N.Y.S.3d 394 ***; 2020 N.Y. LEXIS 2310 ****; 2020 NY Slip Op 05803

[1] The People of the State of New York, Respondent, v Edward Hardy, Appellant.

Prior History: Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Term of the Supreme Court in the Second Judicial Department, Second, Eleventh and Thirteenth Judicial Districts, entered February 1, 2019. The Appellate Term affirmed a judgment of the Criminal Court of the City of New York, Queens County (Elisa S. Koenderman, J.), which had convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

People v Hardy, *63 Misc 3d 6, 92 NYS3d 536, 2019 N.Y. Misc. LEXIS 459 (Feb. 1, 2019)*, reversed.

Counsel: ***[****1]*** *Paul Skip Laisure, Appellate Advocates*, New York City (*Ronald Zapata* of counsel), for appellant. Because the plain language of *section 100.45 of the Criminal Procedure Law* and the legislative history demonstrate the legislature's intent to preclude factual amendment of informations and misdemeanor complaints, the prosecutor's amendment of the incident date here was impermissible and the accusatory instrument was facially insufficient. (*People v Easton, 307 NY 336*; *Town of Aurora v Village of E. Aurora, 32 NY3d 366*; *Samiento v World Yacht Inc., 10 NY3d 70*; *Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653*; *People v Teri W., 31 NY3d 124*; *People v Golo, 26 NY3d 358*; *Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577*; *People v Perez, 83 NY2d 269*; *Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs., 5 NY3d 36*; *Pajak v Pajak, 56 NY2d 394*.)

Melinda Katz, District Attorney, Kew Gardens (*Mariana Zelig, Edward D. Saslaw, Robert J. Masters, John M. Castellano* and *Joseph N. Ferdenzi* of counsel), for respondent. Criminal Court's ruling, affirmed by the Appellate Term, that the accusatory instrument was properly amended should be affirmed in this Court as well. (*People v Keizer, 100 NY2d 114*; *People v Casey, 95 NY2d 354*; *People v Smalls, 26 NY3d 1064*; *People v Dreyden, 15 NY3d 100*; *People v Iannone, 45 NY2d 589*; *People v Frederick, 45 NY2d 520*; *People v Kelly, 5 NY3d 116*; *People v Hanley, 20 NY3d 601*; *People v Becoats, 17 NY3d 643*; *People v Thomas, 53 NY2d 338*.)

Judges: WILSON, J. GARCIA, J. (dissenting). RIVERA, J. (dissenting).

Opinion by: WILSON

Opinion

[117] [*468] [***394]** Wilson, J.

The issue before us is whether the lower

courts erred in permitting amendment of a clearly erroneous fact contained in the information charging Mr. Hardy with harassment and contempt in the second degree. In *People v Easton (307 NY 336, 121 NE2d 357 [1954])*, we upheld a similar amendment. However, *Easton* was decided when the Code of Criminal **[**118]** **[***395]** Procedure governed criminal prosecutions. Following several years of study and numerous reports by the Bartlett Commission,[1] the legislature replaced the Code of Criminal Procedure with the modern Criminal Procedural **[2]** Law. Relying on *Easton*, the Appellate Term held that the factual amendment of the clearly erroneous date was permissible. We must now decide whether *Easton* remains good law following the passage of the Criminal Procedure Law. We conclude the CPL displaced *Easton* and precluded **[*469]** prosecutors from curing factual errors or deficiencies in informations and misdemeanor complaints via amendment. The CPL requires a superseding accusatory instrument supported by a sworn statement containing the correct factual allegations. Therefore, we reverse.

I.

On September 10, 2013, Criminal Court issued a two-year order of protection directing Mr. Hardy to refrain from harassing his wife and to stay away from her home. Mr. Hardy violated the order in January 2015 when he "came ringing the bell . . . yelling and screaming . . . and saying all kinds of foul language." His wife averred Mr. Hardy was "out of control" and refused to leave, in violation of the order of protection. He was arraigned the following day on a misdemeanor complaint, charging him with harassment and criminal contempt in the second degree.

After a four-day adjournment—granted so the People could obtain a supporting deposition—the parties reconvened and the court proceeded to convert part of the complaint into an information, notwithstanding the presence of several errors in the accusatory instrument. Although the first page of the attached domestic incident report listed the date (correctly) as "1/25/15," the second page mistakenly dated the statement as having been given a year prior—"1/25/14" instead of "1/25/15." In addition, the handwritten narrative on the first page of the report was **[****3]** only partially legible and partially intelligible. Germane to this appeal, the accusatory instrument incorrectly alleged that the crime occurred "on or about October 25, 2015." That date, which would not occur for another nine months, was patently incorrect. That date also fell after the expiration of the order of protection, meaning that the accusatory instrument facially failed to state facts showing a violation of the order of protection.

When defense counsel objected that the accusatory instrument included the wrong date, the court responded: "that's clearly a typographical error which the People can move to amend at any time." Over objection, the court then granted the People's oral motion to amend the date of the incident. Mr. Hardy subsequently pleaded guilty to criminal contempt, as charged in the amended accusatory instrument. He received a 90-day jail sentence.

[1] In 1961, the legislature created a temporary commission to study and eventually recommend complete revisions of both the Penal Law and the Code of Criminal Procedure. The commission, officially named the New York Temporary Commission on Revision of the Penal Law and Criminal Code, was composed of nine members, appointed in equal thirds by the Governor, the Speaker of the Assembly, and the Majority Leader of the Senate. During the course of its decade-long work, the commission became known as the "Bartlett Commission," after its Chair, Assembly Member Richard J. Bartlett, who later served as Chief Administrative Judge of the Courts of New York State and Dean of Albany Law School (*see generally* ***[****2]*** Herman Schwartz & Richard Bartlett, *Criminal Law Revision Through a Legislative Commission: The New York Experience*, 18 Buff L Rev 213 [1969]).

[119]** **[***396]** On appeal, Mr. Hardy challenged the facial sufficiency of the original accusatory instrument and argued the court impermissibly **[*470]** granted the People's motion to amend the instrument *(63 Misc 3d 6, 8, 92 NYS3d 536 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019])*. The Appellate Term, after noting that "case law has been inconsistent in this area" (*id.* at 9), ultimately upheld the amendment. The court first **[****4]** determined that

> "notwithstanding the fact that *CPL 100.45* does not authorize factual amendments of informations and complaints, the common-law rule of *Easton* still governs, and, thus, courts retain the inherent authority to permit factual amendments to these types of instruments pursuant to the guidelines set forth in *Easton*" (*id.* at 11-12).

Applying *Easton*'s rule, the Appellate Term concluded the amendment did not "surprise or prejudice" Mr. Hardy because it rectified a clear "typographical error of which defendant should have been aware" (*id.* at 13, quoting *Easton, 307 NY at 338*). A Judge of this Court granted leave to appeal (33 NY3d 976 [2019]).

II.

The People agree that the original misdemeanor complaint was facially insufficient, and that Mr. Hardy could not have been prosecuted on it.[2] Therefore, the question is whether the court had the authority to amend the date to create a valid instrument. Our decision in *Easton*, if it was not displaced by the CPL, may well have answered that **[3]** question. The facts in *Easton* are quite like the facts here. Mr. Easton was arrested on December 17, 1952, for driving while intoxicated. The arresting officer mistakenly recorded the year as 1953, unintentionally charging Mr. Easton with a violation occurring a year into **[****5]** the future (*Easton, 307 NY at 338*). The error was not discovered until the eve of trial, at which point the trial court permitted the People to amend the instrument to correct the clearly incorrect date. On appeal, we upheld the amendment, explaining that because

> "the correction of the date occasioned [Mr. Easton] no surprise or prejudice . . . what could have been effected by the preparation of a new information was properly accomplished by amendment of the one already on file. There was neither reason nor necessity for another piece of paper" (*id*).

Easton established a clear rule: factual amendments to informations were permitted provided the amendment did not surprise or prejudice the defendant. While the content of *Easton*'s rule is clear, the source of its holding is not. *Easton* is silent as to whether its rule derives from the Code of Criminal Procedure or the common law; it mentions neither explicitly.[3] In this case, the source of *Easton*'s **[**120]** **[***397]** holding does not change our analysis,[4] and the question we

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[2] Mr. Hardy waived prosecution by **[*471]** information. Although a misdemeanor complaint is subject to less stringent review than an information (*see People v Smalls, 26 NY3d 1064, 1066 [2015]*), a complaint nevertheless must state all elements of a crime (*see People v Fernandez, 20 NY3d 44, 47 [2012]*) and "provide reasonable cause to believe that the defendant committed the offense charged" (*CPL 100.40 [4] [b]*; *accord* ***People v Afilal, 26 NY3d 1050, 1052 [2015]***). Here, the erroneously charged future date rendered the instrument insufficient for failure to charge a crime under either standard.

[3] Inspection of the briefs in *Easton* reveals that neither party there presented or disputed any common-law theory for the amendment. Instead, both the People and the defense briefed the issue as one of pure statutory construction—both parties argued that sections 62 and 293 of the Code supported their position.

[4] Because the Court in *Easton* did not disclose the basis for its ruling, and because *Easton* can read as either a statutory,

must ask is whether the legislature, by enacting the CPL, displaced or left undisturbed *Easton*'s rule that factual amendments to informations are permitted as long as there is no prejudice to the defendant. **[****6]**

III.

The text, structure, and legislative history of the Criminal Procedure Law all show that the legislature replaced *Easton*'s rule with a more finely-tuned set of rules governing amendments, tailored to each of the types of accusatory instruments it had defined in the CPL. *CPL 200.70* does permit the kind of factual amendment the People sought to make here, but only **[*472]** for a select subset of accusatory instruments, and not for informations or complaints. As relevant to Mr. Hardy's case, the CPL provides, at most, that only the nonfactual, accusatory portion of an information can be amended.

[1] One of the CPL's major innovations was the creation of a new taxonomy of accusatory instruments. Where the Code had differentiated between "indictments" and "informations," the CPL divided informations into five types of local criminal court accusatory instruments: informations, simplified informations, prosecutor's informations, misdemeanor complaints and felony complaints (*CPL 100.05*). In the CPL, the legislature also adopted rules for amending accusatory instruments; those rules varied by the type of instrument. As to indictments, the CPL retained the preexisting **[****7]** Code rule that indictments could not be amended if they might prejudice the defendant. However, the new *CPL 200.70* added a limitation not present in the Code: indictments could not be amended, regardless of prejudice, if the amendment "change[d] the theory or theories of the prosecution as reflected in the evidence before the grand jury." The legislature chose to subject prosecutor's informations to the same standards governing **[4]** indictments (*CPL 100.45 [2]*). Superior court informations were treated in a similar fashion, although with an explicit difference. *Section 200.70* permitted superior court informations to be amended as to "matters of form, time, place, names of persons and the like" (*CPL 200.70 [1]*), but the legislature omitted the limitation that the amendments could not change the theory of the prosecution. Instead, the permissibility of such amendments turned on whether the defendant would be prejudiced. For complaints and informations, the legislature did not permit factual amendments for time, place, or names, as it had for prosecutor's and superior court informations. Instead, *CPL 100.45 (3)* permits the prosecutor to amend only the accusatory part of an information to add additional charges, provided those charges are supported by the original **[****8]** factual allegations.

[121]** **[***398]** The legislature's decision to exclude informations and misdemeanor complaints from the scope of *section 200.70* is supported by a strong rationale. An information or a complaint—unlike an indictment or superior court information—commences a criminal action based on the allegations of someone who is not an officer of the court, and whose testimony **[*473]** has not been vetted

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common-law, or compromise decision, it would be inappropriate to charge the legislature with specific knowledge of the source of *Easton*'s holding. Therefore, while we presume the legislature was aware of the content of *Easton*'s rule at the time the CPL was enacted, we do not presume the legislature understood *Easton* to be either a statutory or common-law decision. Furthermore, as explained below, the Bartlett Commission plainly recommended that all accusatory instruments, including complaints and informations, be amendable under specified circumstances. The legislature deliberately struck that language as to those two forms of accusatory instruments from a provision permitting amendment under what the dissent claims was the preexisting common-law rule. The legislative excision and detailed statutory scheme for amending accusatory instruments evidences the legislature's clear intent to forbid factual amendments to complaints and informations.

by a grand jury.[5] Under those circumstances, it was reasonable for the legislature to decide that no one but an affiant should be permitted to alter the factual allegations previously sworn to by an affiant.[6] Moreover, where the legislature did permit the prosecutor to move to amend informations, it expressly limited such amendments to the accusatory portion only, and further required that the amendment to the accusatory portion must be "supported by the allegations of the factual part of such information and/or any supporting depositions which may accompany it" (*CPL 100.45 [3]*). Allowing amendments to the factual part of an information would render the restriction in *CPL 100.45* meaningless.

Easton interpreted the permissibility of amendments to accusatory instruments under a substantially different statutory landscape, now defunct. **[****9]** Despite the dissimilarities between the Code and the CPL, the People urge us to affirm the continued viability of *Easton*. The text and structure of the CPL do not permit us to do so, nor does the application of our long-standing principles of statutory construction. In the CPL, **[*474]** the legislature expressly stated which amendments to complaints and informations are permissible (nonfactual amendments) and expressly authorized date, time, and place amendments for only a select subset of accusatory instruments: prosecutor's informations, indictments, and superior court informations. The People's position would have us write into the CPL an authority to make factual amendments to informations that the legislature declined in two separate places to include (*see generally* **[**122]** **[***399]** McKinney's Cons Laws of NY, Book 1, Statutes § 363, Comment and the cases cited therein ["(A) court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact. . . . (A) court cannot, by implication, read or supply in a statute a provision which **[5]** it is reasonable to suppose the Legislature intentionally omitted"]). Moreover, because we presume **[****10]** the legislature was aware of our decisional law at the time of enactment (*see Matter of Odunbaku v Odunbaku, 28 NY3d 223, 229, 43 NYS3d 799, 66 NE3d 669 [2016]*), we must give proper effect to the legislature's decision to incorporate *Easton*'s "no prejudice" rule for some, but not all, of the types of accusatory instruments it had delineated. The CPL's rule for indictments, prosecutor's informations, and superior court informations is that date, time, and place

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[5] In *People v Alejandro (70 NY2d 133, 138, 511 NE2d 71, 517 NYS2d 927 [1987])*, we explained that compared with other accusatory instruments, the "distinguishing characteristic of an information" is "its use as the sole instrument upon which the defendant could be prosecuted . . . which prompted the Legislature to write in the special restrictions applicable to informations . . . ." The legislature had a sound basis for subjecting informations to stricter pleading requirements than other instruments:

"The reason for requiring the additional showing of a prima facie case for an information lies in the unique function that an information serves under the statutory scheme established by the Criminal Procedure Law. An information is often the instrument upon which the defendant is prosecuted for a misdemeanor or a petty offense. Unlike a felony complaint (*CPL 180.10*), it is not followed by a preliminary hearing and a Grand Jury proceeding. Thus, the People need not, at any time prior to trial, present actual evidence demonstrating a prima facie case, as with an indictment following a felony complaint" (*id.* at 137-138).

And we explained that in the case of misdemeanor complaints, as with informations, "the defendant does not have the protection of a preliminary hearing and Grand Jury action as with a felony complaint" (*id.* at 138 n 2). The same considerations that motivated the legislature to tighten the pleading requirements for misdemeanor complaints and informations also apply to altering the factual allegations contained therein.

[6] The dissent's bon mot—"whether grounded in common law or common sense"—(Garcia, J., dissenting op at 482) cannot obscure the common sense underlying the legislature's decision to forbid amendments to accusatory instruments not emanating from a grand jury or an officer of the court where the change is unsupported by an affiant who can attest to the veracity of the correction.

errors may be fixed if the correction does not prejudice the defendant (*see* CPL 200.70). That is not the rule for complaints and informations.

The legislative history confirms our understanding of the plain language. The Bartlett Commission initially recommended versions of section 100.45 that would have included explicit authority for prosecutors to amend factual details in informations and misdemeanor complaints. Successive bill drafts concerning section 100.45 show that, right up until the legislative session before enactment, the Commission's proposed subdivision (2) stated: "The provisions of section 200.70 governing amendment of indictments apply to informations, prosecutor's informations and misdemeanor complaints" (Temp St Commn on Rev of Penal Law and Crim Code, 1969 Proposed NY CPL 100.45 [2] at 56). However, the legislature ultimately selected only one of those instruments—prosecutor's informations—and rejected the Commission's **[****11]** proposal to include informations and misdemeanor complaints in CPL 200.70. Particularly because the standard articulated in CPL 200.70 is *Easton*'s "no prejudice" standard, it is inconceivable that the legislature meant to apply that standard to misdemeanor **[*475]** complaints and informations by *striking* them from the sentence in the draft legislation applying that standard to other accusatory instruments.

The text, structure, and legislative history of the CPL, as well as a straightforward application of our canons of statutory construction, all demonstrate that the CPL does not permit the kinds of factual amendments once countenanced by *Easton*. The CPL does provide its own pathway for correcting factual errors in complaints and informations, through the filing of a superseding accusatory instrument (CPL 100.50), not through a prosecutor's amendment of facts averred by someone else. We recognize that the October 25, 2015 date in the accusatory instrument here cannot possibly be correct and that the correct date can be inferred from information outside the four corners of the accusatory instrument. However, in evaluating the sufficiency of an accusatory instrument we do not look beyond its four corners (including supporting **[****12]** declarations appended thereto) (*People v Thomas, 4 NY3d 143, 146, 824 NE2d 499, 791 NYS2d 68 [2005]*). It is the People's responsibility to obtain a sworn statement with the correct factual allegations and proceed on a superseding instrument.

[2] The People further contend that even if the amendment was improperly granted, Mr. Hardy forfeited his right to challenge the legality of the amendment by pleading guilty to the charges in the amended complaint. Our precedent forecloses that result. In *People v Harper*, we held that "if there is to be an amendment of an accusatory instrument within **[**123]** **[***400]** the scope of CPL 100.45 (subd 3), there must be strict compliance with the prescriptions of that section" (*37 NY2d 96, 98, 332 NE2d 336, 371 NYS2d 467 [1975]*). In *Harper*, the defendant stipulated at trial to an amendment adding two counts to the charges against him. Notwithstanding the defendant's consent to be prosecuted on the amended instrument, we held that the defendant could still challenge the validity of the amendment on appeal, explaining that a "valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (*id.* at 99). The same holds true here. Mr. Hardy was charged with violating a two-year order of protection, but the date of the alleged incident fell outside the bounds of the **[****13]** order of protection. Absent the challenged amendment, the accusatory instrument would have failed to state a crime. Because the amendment implicates a

fundamental defect and purportedly converted a facially insufficient accusatory instrument into a facially sufficient **[*476]** instrument, its legality presents a nonwaivable jurisdictional issue (*see People v Correa, 15 NY3d 213, 222, 933 NE2d 705, 907 NYS2d 106 [2010]*; *People v Scott, 3 NY2d 148, 152, 143 NE2d 901, 164 NYS2d 707 [1957]* ["(O)bjections to the jurisdiction of the court are not waived (by a guilty plea), nor is the objection that the information does not state a crime" (emphasis omitted)]; *People v Van Every, 222 NY 74, 77, 118 NE 244, 36 NY Cr 158 [1917]*).[7]

[6] IV.

The trial court granted the People's motion to amend the information because the amendment pertained only to "a matter as to date, time or place." As described above, the CPL authorizes such amendments for a select subset of accusatory instruments (*see CPL 200.70*, *100.45 [2]*). That subset does not include misdemeanor complaints or informations, for which the CPL licenses amendments to the nonfactual portion of the accusatory instrument only (*see id.* § *100.45 [3]*). Because the court lacked the authority to permit the amendment, the accusatory instrument—which failed to allege a crime occurring within the bounds of the two-year order of protection—was jurisdictionally defective **[****14]** (*see Alejandro, 70 NY2d at 138*). Accordingly, the order of Appellate Term should be reversed and the accusatory instrument dismissed.

Dissent by: GARCIA; RIVERA

Dissent

GARCIA, J. (dissenting):

Defendant waived prosecution by information, pleaded guilty to a jurisdictionally-sufficient misdemeanor complaint, and then appealed, challenging the procedure used by the court to amend a typographical error in the accusatory instrument. A plea, as we have made clear time and again, "generally marks the end of a criminal case, not a gateway to further litigation" (*People v Hansen, 95 NY2d 227, 230, 738 NE2d 773, 715 NYS2d 369 [**124] [***401] [2000]*). Not so in this case. Instead, the majority holding elevates the correction of a typographical error to the level of a **[*477]** jurisdictional defect, a status formerly reserved for errors "implicating the integrity of the process," not applicable to "less fundamental flaws, such as evidentiary or technical matters" (*People v Hightower, 18 NY3d 249, 254, 961 NE2d 1111, 938 NYS2d 500 [2011]*). In doing so, we reject not only our holding in *People v Easton*, but the wisdom of its warning that to sustain a "reversal of the conviction and hold impermissible an amendment made solely to correct an obvious typographical error in the information" would be to "exalt form over substance" and "enthrone technicality purely for its own sake" (*307 NY 336, 338, 121 NE2d 357 [1954]*). Accordingly, I dissent.

I.

Some clarification **[****15]** is necessary with respect to the facts. On January 25, 2015, defendant entered the complainant's residence

[7] The dissent stretches *Easton* far beyond its holding, contending that *Easton* "stands for the unquestionable proposition that correcting a mere typographical error in the date of the crime—even one that as here would have made the crime impossible to commit as charged—does not render a facially-sufficient accusatory instrument jurisdictionally defective" (Garcia, J., dissenting op at 482). *Easton* said ~~nothing about whether an illegal amendment constitutes a~~ nonwaivable jurisdictional defect because Mr. Easton preserved his challenge to the amendment and proceeded to trial. We concluded that under the law as it existed at that time, the amendment was permitted, and so we affirmed his conviction. Because the legislature, when replacing the Code with the CPL, contemplated permitting factual amendments to misdemeanor complaints but chose otherwise, we now reach a different result.

in violation of an order of protection. A police officer responded and observed the defendant inside the home. Defendant was charged with criminal contempt and harassment in a misdemeanor complaint that incorrectly listed the date of the charged offenses as "October 25, 2015"—a date nine months in the future—rather than "January 25, 2015." At arraignment the following day, the judge issued a full order of protection in favor of the **[7]** complaining witness and adjourned the matter to provide the People with the opportunity to produce a supporting deposition sufficient to convert the misdemeanor complaint to an information. [8]

When the proceedings reconvened five days later, the People presented two additional documents to the court. The first was an unsworn domestic incident report that contained a narrative by a police officer and reflected the correct date of the incident. The second document was a short affirmation by the complaining witness, dated "1/25/14," describing the incident but without indicating the date it occurred. The court found that the complainant's sworn **[****16]** statement along with the original misdemeanor complaint would together satisfy the requirements of an information charging criminal contempt. It was in the context of converting the complaint to an information that defense counsel pointed out that the accusatory instrument **[*478]** listed the incorrect date of the incident. The court responded that the date was "clearly a typographical error which the People can move to amend at any time." Over defense counsel's objection, the court granted the People's motion to amend the complaint to "January 25, 2015" on the grounds that the amendment was "to date, time or place." [9]

At this point in the proceeding, the Judge had concluded that the two documents—the original sworn statement of **[**125]** **[***402]** the arresting officer and the complainant's sworn statement—together constituted an information charging criminal contempt. Rather than have the People proceed by information, however, defense counsel, referencing an offer by the People of a six-month sentence, asked "would the Court be willing to offer anything less?"

The People responded:

> "[T]he Defendant and Complainant have a long domestic violence history, seven cases since 2005. In 2013 the Defendant pled to two **[****17]** counts of criminal contempt in the Second Degree taking sixty days. He has been rejected from [treatment] programs on the last case. He has been offered programs in the past and conditional pleas on the other case which he has failed to complete."

The court made a more favorable offer: "All right, so, I do see that he last got sixty days for violating an Order of Protection against this Complainant in 2013. So, I would give him ninety days for this contempt, which is half of what the People are offering."

Counsel immediately accepted the offer: "Your Honor, we do have a disposition." At the same proceeding, defendant waived prosecution by information, pleaded guilty to the criminal contempt charge in the misdemeanor complaint, and was sentenced according to

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[8] Without a waiver by defendant, a misdemeanor complaint must be converted to an information for the People to proceed with the prosecution (*CPL 170.65 [1], [3]*; *see People v Kalin, 12 NY3d 225, 228, 906 NE2d 381, 878 NYS2d 653 [2009]*). A supporting deposition can be used to cure a facially insufficient accusatory instrument (*see CPL 100.15 [3]*; *100.45 [3]*), but one is not otherwise required (*see Kalin, 12 NY3d at 228*; *CPL 100.40 [4] [b]*).

[9] The fact that defendant objected here does not affect the outcome. If the process for correcting the typographical error is not a jurisdictional defect, the claim—whether preserved or not—would be forfeited by a guilty plea. If it is a jurisdictional defect, as the majority now holds, the defendant need not object and dismissal on appeal will nevertheless result.

the bargain struck with the court. There is no issue as to the voluntariness of his plea. Nevertheless, defendant appealed, arguing that the court improperly granted the People's motion to amend the date, and that the unamended accusatory instrument was facially insufficient. Appellate Term **[*479]** rejected that argument and affirmed, relying primarily on this Court's decision in *Easton (63 Misc 3d 6, 11-13, 92 NYS3d 536 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019])*.

The majority **[****18]** reverses, holding that the Criminal Procedure Law "displaced *Easton* and precluded prosecutors from curing factual errors or deficiencies in informations and misdemeanor complaints via amendment" (majority op at 468-469). According to the majority, "[b]ecause the amendment implicates a fundamental defect and purportedly converted a facially insufficient accusatory instrument into a facially sufficient instrument, its legality presents a nonwaivable jurisdictional issue" (majority op at 475-476). The majority holding expands our narrow range of **[8]** fundamental jurisdictional defects so far as to now include the correction of a typographical error in the date of a misdemeanor complaint.

II.

A guilty plea generally "marks the end of a criminal case," encompassing "a waiver of specific rights attached to trial . . . [and] a forfeiture of the right to revive certain claims made prior to the plea" (*Hansen, 95 NY2d at 230*). A valid and sufficient accusatory instrument is a jurisdictional prerequisite and a defendant does not forfeit the right to challenge jurisdictional sufficiency by pleading guilty (*see People v Dreyden, [**126] 15 NY3d 100, 103, 931 NE2d 526, 905 NYS2d 542 [2010]*). The distinction between jurisdictional and nonjurisdictional defects "is between defects implicating the integrity of the **[****19]** process . . . and less fundamental flaws, such as evidentiary or technical matters" (*id.*; *Hightower, 18 NY3d at 254*). As this Court has made clear, "[t]he test is, simply, whether the accusatory instrument failed to supply defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy" (*Dreyden, [***403] 15 NY3d at 103*).

In the past, we have found jurisdictional defects of a magnitude to survive a defendant's guilty plea when the factual allegations failed to demonstrate reasonable cause to believe that the defendant committed the crime charged (*see e.g. People v Dumas, 68 NY2d 729, 731, 497 NE2d 686, 506 NYS2d 319 [1986]* [conclusory statements in misdemeanor complaint lacked evidentiary character to support sale of marijuana]; *Dreyden, 15 NY3d at 103* [officer did not give any support in misdemeanor complaint to conclude that defendant possessed a gravity knife]), and when the facts recited in the accusatory instrument or supporting deposition **[*480]** did not state a crime (*see e.g. People v Case, 42 NY2d 98, 100, 365 NE2d 872, 396 NYS2d 841 [1977]* [sum of facts in misdemeanor information failed to establish element of physical force]; *Hightower, 18 NY3d at 254-255* [factual portion of misdemeanor information contained no basis for possessory element of petit larceny]).

Nothing remotely near the level of those jurisdictional errors occurred here. First, it is important to make clear **[****20]** that defendant pleaded guilty to the jurisdictionally-sufficient, amended, misdemeanor complaint. Although a misdemeanor complaint may be filed in order to obtain jurisdiction over a defendant, that instrument may not serve as the basis for a prosecution without an express waiver (*see Kalin, 12 NY3d at 228*). In order to go forward with the prosecution, the People must—as they were in the process of doing here—convert the misdemeanor complaint to

an information (*see* CPL 100.10 [4]; 170.65 [1]). "To meet the jurisdictional standard for facial sufficiency, a misdemeanor complaint need only set forth facts that establish reasonable cause to believe that the defendant committed the charged offense" (*People v Smalls, 26 NY3d 1064, 1066, 23 NYS3d 134, 44 NE3d 209 [2015]* [internal quotation marks omitted]). By contrast, an information must also set forth "nonhearsay allegations which, if true, establish every element of the offense charged and the defendant's commission thereof" (*Kalin, 12 NY3d at 228-229*; *see* majority op at 473 n 5 [quoting *People v Alejandro (70 NY2d 133, 138, 511 NE2d 71, 517 NYS2d 927 [1987])* for the proposition that the "distinguishing characteristic of an information" is "its use as the sole instrument upon which the defendant could be prosecuted . . . which prompted the Legislature to write in the special restrictions applicable to informations"]). As we have repeatedly stressed, "an information **[****21]** must satisfy significantly more stringent facial sufficiency requirements than those applicable to a complaint" (*Smalls, 26 NY3d at 1067*). Where, as here, a defendant waives prosecution by information, "he or she declines the protection of [*CPL 100.40 (1)*], and the accusatory instrument must only satisfy the reasonable cause requirement" (*People v Dumay, 23 NY3d 518, 522, 992 NYS2d 672, 16 NE3d 1150 [2014]*). Therefore, the sufficiency of the accusatory instrument defendant pleaded guilty to is measured by the reasonable cause standard of a misdemeanor complaint (*see id.*; *CPL 170.65 [3]*).

At the time defendant waived prosecution by information and entered a plea to the charge, the misdemeanor complaint was facially sufficient. The typographical error as to the month the crime occurred had been fixed and the correct date now **[***404]** appeared. **[*481]** With that correction, the accusatory **[**127]** instrument set forth facts that established reasonable cause to believe defendant committed the charged offense and provided the defendant with the required notice of the crime (*see Dreyden, 15 NY3d at 103*).

In an effort to characterize defendant's claim as one asserting a jurisdictional defect not forfeited by his guilty plea, the majority looks behind the facial sufficiency of the misdemeanor complaint at the time of the plea and examines the process for amending **[****22]** the typographical error in the date (*see* majority op at 468-469). But that amendment process—an alleged statutory violation—was not a fundamental jurisdictional error, and any challenge to it was forfeited by the guilty plea (*see People v Konieczny, 2 NY3d 569, 575, 813 NE2d 626, 780 NYS2d 546 [2004]*).

Defendant and the majority rely on this Court's decision in *People v Harper (37 NY2d 96, 332 NE2d 336, 371 NYS2d 467 [1975])* as support for the conclusion that a jurisdictional defect may be brought on by an ineffective amendment. However, in *Harper*, the information was amended during trial to add two counts of menacing involving victims not covered in the original **[9]** menacing count (*id.* at 98-99). Defendant was convicted of the two added counts and acquitted of all remaining counts (*id.* at 99). Adding counts based on different facts after trial commences raises double jeopardy and notice issues not remotely relevant here. For this reason, in *Harper* the Court began its analysis by noting that "[i]n the present case there was a trial rather than the entry of a plea" (*id.*). The rule in *Harper* does not apply where, rather than adding new charges during trial, the court permitted the People to correct a typographical error in a misdemeanor complaint prior to a guilty plea. [10]

[10] The majority's citation to two cases involving classic

The People argue that any flaw in the amendment process should **[****23]** be considered a technical defect, relying on our decision in *Easton*, which involved facts more analogous to the present **[*482]** case. In *Easton*, the arresting officer filed a misdemeanor information charging the defendant with driving while intoxicated on a date one year after defendant was arrested (*307 NY at 338*). On the eve of trial, the court permitted a factual amendment to cure the typographical error over defendant's objection that the information was "defective as a matter of law" (*id.*). Defendant was convicted and he appealed. County Court reversed the conviction, holding that the Code of Criminal Procedure in effect at the time did not permit the amendment and the typographical error in the date made the information "void and fatally defective" *(127 NYS2d 163, 164 [Broome County Ct 1954])*. The court held that "[t]he rules of procedure in criminal cases cannot be treated with the same elasticity as the rules of pleading in **[***405]** civil actions" because "[t]he principle of **[**128]** adherence to our established rules of criminal procedure greatly outweighs the importance of any individual case" (*id. at 165-166*).

This Court reversed and reinstated the conviction, explaining that although a conviction could not be upheld if it was obtained "without jurisdiction, even though **[****24]** the record evidence stamps defendant plainly guilty," amending the typographical error in the date did not rise to that level (*Easton, 307 NY at 338*). Because the officer could easily have sworn out a new information with the correct date, "[t]here was neither reason nor necessity for another piece of paper" (*id.*). We upheld the conviction, despite an amendment made to the information, on the eve of trial, over defendant's objection, and in apparent contravention to the language of the criminal procedure code.

At a minimum, *Easton* stands for the unquestionable proposition that correcting a mere typographical error in the date of the crime—even one that as here would have made the crime impossible to commit as charged—does not render a facially-sufficient accusatory instrument jurisdictionally defective. [11] . Therefore, defendant's claim that the statutory amendment process was not followed in this case was forfeited by his guilty plea. We should continue to apply *Easton*'s rule, whether grounded in common law or common sense, and affirm the order of the Appellate Term.

[*483] Rivera, J. (dissenting). I am in full agreement with the majority's conclusion that defendant's challenge to the validity of the **[****25]** amendment to the accusatory instrument presents a nonwaivable jurisdictional issue reviewable by us on this appeal (majority op at 475-476). However, I would affirm for the reasons explained by the Appellate Term (*see* ***People v Hardy***, *63 Misc 3d 6, 92 NYS3d 536 [App Term, 2d Dept, 2d,*

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examples of jurisdictional defects, *People v Scott (3 NY2d 148, 152, 143 NE2d 901, 164 NYS2d 707 [1957]* [complete absence of a verified information]) and *People v Correa (15 NY3d 213, 222, 933 NE2d 705, 907 NYS2d 106 [2010]* [allegation that the court lacked subject matter jurisdiction to try the case]) serves only to place in stark contrast the technical defect at issue here (majority op at 476). Reliance on *People v Van Every (222 NY 74, 118 NE 244, 36 NY Cr 158 [1917]*; *see* majority op at 476) is more surprising still given this Court's statement in *Easton* that *Van Every*, cited by County Court as the controlling authority in reversing defendant's conviction (*127 NYS2d 163, 164* [Broome County Ct 1954]), was "entirely inapposite, and defendant's reliance upon [it is] misplaced" (*307 NY at 338*).

[11] This Court did not dispute County Court's holding regarding the applicability of the criminal procedure rules, holding only that "[d]ecisions" dealing with amending indictments should not be relied upon in this context (*Easton, 307 NY at 338-339*). Accordingly, given County Court's holding, *Easton* may be read as providing a common-law basis for amending a misdemeanor information to correct a typographical error in the date *despite* any criminal procedure rule to the contrary.

11th & 13th Jud Dists 2019]).

Judges Stein, Fahey and Feinman concur; Judge Garcia dissents and votes to affirm in an opinion in which Chief Judge DiFiore concurs; Judge Rivera dissents and votes to affirm in a separate dissenting opinion.

Order reversed and accusatory instrument dismissed.

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People v. Morrisey

Criminal Court of the City of New York, New York County

March 15, 1994, Decided

Docket Nos. 93N055650, 93N055651

Reporter
161 Misc. 2d 295 *; 614 N.Y.S.2d 686 **; 1994 N.Y. Misc. LEXIS 228 ***

The People of the State of New York, Plaintiff, v. Paul Morrisey and Ruby McDaniel, Defendants.

Notice: **[***1]** EDITED FOR PUBLICATION

Subsequent History: As Amended July 8, 1994.

Counsel: *Robert J. Barsch,* New York City, for defendants. *Robert M. Morgenthau, District Attorney* of New York County, New York City *(David A. Stampley* of counsel), for plaintiff.

Judges: NEWMAN

Opinion by: Barbara F. Newman, J.

Opinion

[*297] **[**687]** Barbara F. Newman, J.

The defendants are charged with disruption, or disturbance of a religious service (*Penal Law § 240.21*). Defendant Morrisey is also charged with attempted assault in the third degree (*Penal Law §§ 110.00, 120.00 [1]*) and harassment in the second degree (*Penal Law § 240.26 [1]*). On November 30, 1993, the court issued an abbreviated decision denying the defendants' motion to dismiss pursuant to CPL articles 170 and 210, granting the defendants' requests for discovery, granting the People's cross motion for reciprocal discovery and referring the issue of the defendants' prior convictions or prior bad acts to the Trial Court. This decision will constitute the full decision concerning the defendants' motion to dismiss pursuant to CPL articles 170 and 210.

Penal Law § 240.21 states:

"Disruption, or disturbance of religious service.

[*2]** "A person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof."

The accusatory instrument provides, in relevant part:

"Deponent states that, at approximately 1715 hours, inside the above location, when a regularly scheduled service was to have begun, the defendants and other unapprehended individuals, scattered throughout the congregation, including in the altar area, loudly chanted, and in doing so, prevented the **[*298]** scheduled service from beginning. Deponent observed the two defendants, along with approximately eight other unapprehended individuals, performing these actions on the sanctuary platform **[**688]** around the altar and behind the cross, alternately walking and kneeling as they chanted. Deponent states that defendants' actions caused the service to be delayed approximately one-half hour.

"Deponent states that, at approximately 1740 hours, as he and deacon Felipe Sin

approached the altar, defendants blocked deponent and Mr. Sin from proceeding to the altar **[***3]** by standing at the altar, in the way. Defendants continued to chant, with defendant Morrisey leading and defendant McDaniel and other unapprehended individuals responding.

"Deponent states that, as he stood to conduct the opening rite of the service, defendant Morrisey stood in front of deponent, the defendant facing the congregation and with his back to deponent.

"Deponent states that, after the choir and congregation sang a hymn, he observed an unapprehended person seize the microphone in front of the choir.

"Deponent states that, as deponent observed Cathy Brown read the first reading, deponent observed two unapprehended individuals stand approximately one foot from Ms. Brown, on either side of her, shouting at her.

"Deponent states that, at the same time, defendant McDaniel approached informant and from approximately three feet away, shouted, in substance: 'You shouldn't be here. You are not fit to be a priest. You should be ashamed of yourself. You're not fit or worthy to sell shoes.'

"Deponent then observed defendant Morrisey attempt to seize a microphone from the lectern.

"Deponent states that, as he stood, prior to the reading of the Gospel, defendant Morrisey **[***4]** approached deponent and, from behind, pulled deponent with defendant Morrisey's arm around deponent's neck. Deponent further observed defendant Morrisey reach with defendant's other hand and seize the small, clip-on microphone which deponent held for the Gospel reader. Deponent states that, as the defendant pulled the microphone away, a wire on the microphone lodged in deponent's finger and then hooked into his hand, causing physical injury in the form of lacerations which required cleaning and tetanus shots at St. Luke's Roosevelt Hospital, and which caused deponent pain.

[*299] "Deponent states that defendants' actions constituted unreasonable noise of a sort that prevented the worshippers at the scheduled service from conducting the service and which caused deponent annoyance and alarm."

The defendants have moved for the dismissal of the accusatory instrument on several grounds. The court will address each argument individually.

CONSTITUTIONALITY OF PENAL LAW § *240.21*

The defendants argue that the charge of disruption, or disturbance of religious service is unconstitutional on the grounds that it violates the Due Process, Free Exercise of Religion and *Establishment **[***5]** Clauses of the United States Constitution.*

At the outset, the court notes that it is an elementary rule of judicial review of the constitutionality of any statute that: "[i]f there is any doubt as to the constitutionality of a statute the Legislature's expressed will should be upheld; and mere doubt does not afford a sufficient ground for a judicial declaration of invalidity. As otherwise expressed, if there is a reasonable doubt as to its validity an act must be upheld, and it will be stricken down only when unconstitutionality is shown beyond a reasonable doubt." (McKinney's Cons Laws of NY, Book 1, Statutes § 150, at 311.) Thus, the defendant has a heavy burden to meet in order to overcome this presumption of constitutionality. (*Matter of Quinton A., 49 NY2d 328* [1980]; *People v Pagnotta, 25 NY2d 333, 337* [1969].)

In support of their argument, the defendants rely on the arguments advanced in *People v Steele (70 Misc 2d 351* [Crim Ct, NY County 1972]). In *People v Steele,* the court dismissed the complaints against eight defendants who were charged with *Penal Law § 240.21* when they allegedly lay in **[**689]** the center aisle of St. Patrick's Cathedral **[***6]** during a Mass. The defendants, whose group consisted of seven nuns and one Catholic lay teacher, argued that their actions were allowed under church doctrine, as stated in the Constitution on the Sacred Liturgy, which encourages worshippers " 'to take part by means of acclamation, responses, psalmody, antiphons and songs, as well as by actions, gestures and bodily attitudes.' " *(Supra, at 354.)* In reaching its decision the *Steele* court relied on *Presbyterian Church v Hull Church (393 US 440* [1969]), and declined to engage in the process of interpreting and weighing church doctrine. *(People v Steele, at 354-355.)* Accordingly, the **[*300]** complaints were dismissed against all of the defendants on these alternate grounds.

The court in *Steele (supra)* declined to declare *Penal Law § 240.21* unconstitutional and the court did not reach any of the constitutional arguments presented by the defendants in that case. However, the defendants in the instant matter renew these constitutional arguments before this court.

The defendants contend that *Penal Law § 240.21* violates the Establishment Clause by designating this statute as a class A misdemeanor while the **[***7]** disruption of a nonreligious assembly is designated in the Penal Law as a violation. *(See, Penal Law § 240.20.)* The People argue that the purpose of *Penal Law § 240.21* is not to establish any right; its purpose is to protect the rights of those individuals who choose to exercise their fundamental right of freedom of religion.

The court agrees with the People. As the People have correctly noted, the Legislature may designate an offense a class A misdemeanor when the proscribed conduct interferes with a fundamental right. *(See, e.g., Penal Law § 240.30 [3]; Civil Rights Law § 40-c [2];* § 40-d.)

In support of their argument, the People cite to *Riley v District of Columbia (283 A2d 819* [DC Ct App 1971]). The defendants in *Riley* also argued that a statute, similar to *Penal Law § 240.21,* violated the Establishment Clause. The court in *Riley* upheld the constitutionality of District of Columbia Code Annotated § 22-1114, which states:

"Disturbing religious congregation:

"It shall not be lawful for any person or persons to molest or disturb any congregation engaged in any religious exercise or proceedings in any church or place of worship **[***8]** in the District of Columbia; and it shall be lawful for any of the authorities of said churches to arrest or cause to be arrested any person or persons so offending, and take him, her, or them to the nearest police station, to be there held for trial; and any person or persons violating the provisions of this section shall forfeit and pay a fine of not more than $ 100 for every such offense."

The court in *Riley (supra)* rejected the defendants' argument that the statute violated the Establishment Clause and conversely found that the statute expressed "a legitimate governmental interest in protecting freedom of worship as well as the maintenance of peace and good order." *(Supra, at 825.)*

This court concurs with the People's argument and is persuaded **[*301]** by the rationale of the court's finding in *Riley v District of Columbia (283 A2d 819, 825* [DC Ct App 1971], *supra).*

The defendants further argue that as applied *Penal Law § 240.21* is an unconstitutional infringement of their First Amendment right to freedom of religion. The defendants argue that they were in the process of reciting the rosary at the time of their arrest. Therefore, the defendants argue, **[***9]** this court must find that the recitation of the rosary is prima facie an "unreasonable noise or disturbance" proscribed by *Penal Law § 240.21* in order to find that the statute is constitutional.

In response to this argument, the People contend that the statute does not impose criminal liability on an individual for his or her religious beliefs and that to do so would in fact be prohibited by the Free Exercise of Religion Clause. Rather, the People state that the statute "is directed at preventing acts which intentionally or recklessly inhibit or interfere with the progress of a religious service." *(People v King, 148 Misc 2d 859, 861* [Crim Ct, NY County 1990].)

[690]** The court finds the defendants' argument to be without merit. The Supreme Court has explicitly held that an individual may not exercise his or her own constitutional rights and in this process infringe on the constitutional rights of others. Further, the Court has held that an individual may not exercise claimed First Amendment rights at any place or at any time. *(Adderley v Florida, 385 US 39* [1966], *reh denied 385 US 1020* [1967]; *Cox v Louisiana, 379 US 536* [1965].)

The First **[***10]** Amendment does not guarantee an absolute right to express in "any place, at any time, and in any way." *(Olivieri v Ward, 801 F2d 602, 605* [2d Cir 1986], citing *Heffron v International Socy. for Krishna Consciousness, 452 US 640, 647* [1981]; *Adderley v Florida, 385 US 39, 47- 48* [1966], *supra; People v Hollman, 68 NY2d 202* [1986]; *People v Bakolas, 59 NY2d 51* [1983].) In *People v Hollman (supra)*, the New York Court of Appeals framed the State's ability to regulate expression as follows: "[C]onduct may be regulated, or even prohibited, 'if [the regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest' " (citations omitted). (*68 NY2d, at 207*.)

[*302] The defendants are charged with engaging in conduct which interfered with the religious service being conducted at St. Paul the Apostle Church. It is acknowledged by the defendants that their actions **[***11]** were intended as "an attempt to prevent the sacrilege of a Mass". Clearly, the defendants' conduct, if as alleged, infringed on the rights of those persons in attendance who were exercising their freedom of religion and who were participating in a Mass. The court finds that conduct proscribed by the challenged statute is not intended to punish the exercise of religion but it is rather intended to protect the rights of persons to exercise their own religious beliefs without impermissible interference.

Additionally, in response to the defendants' argument, the court notes that the factual allegations in the accusatory instrument describe conduct by the defendants significantly beyond the mere recitation of the rosary. The complaint alleges considerable disruptive conduct by the defendants, including that the defendants blocked the way of the priest and the deacon at the beginning of the service, keeping them from proceeding to the altar; defendant McDaniel shouted several things that did not constitute a prayer of any type at the priest; defendant Morrisey attempted to seize a microphone from the lectern; defendant Morrisey, with his arm

around the neck of the priest, pulled at **[***12]** the priest as defendant Morrisey attempted to grab the microphone from the priest. Clearly, the conduct which is alleged to have been committed by the defendants exceeded the recitation of the rosary. "Prohibiting a 'disturbance' is directed at preventing acts which intentionally or recklessly inhibit or interfere with the progress of a religious service." (*People v King, supra, at 861*, citing *People v Malone, 156 App Div 10* [2d Dept 1913]; *State v McNair, 178 Neb 763* [1965].) *Penal Law § 240.21* prohibits conduct intended to cause annoyance or alarm at a religious service. As noted *supra*, the conduct alleged herein goes far beyond the recitation of a prayer.

After consideration of the applicable principles of law and pertinent case law, this court finds that *Penal Law § 240.21* does not violate the defendants' freedom of religion.

The defendants also argue that *Penal Law § 240.21* is facially overbroad and cite to *People v Steele (70 Misc 2d 351, supra)*, in support of this argument. However, *People v Steele (supra)* did not rule on the issue of the overbreadth of *Penal Law § 240.21*. The decision in *Steele* simply suggests that an argument **[***13]** can be made that the statute is overbroad and **[*303]** thereby void. In support of this position the *Steele* decision **[**691]** cites to the Practice Commentary by Denzer and McQuillan (McKinney's Cons Laws of NY, Book 39, *Penal Law § 240.21*, at 158 [1967]). The Honorable Richard Denzer, counsel to the Temporary Commission on Revision of the Penal Law and Criminal Code, wrote to the Honorable Robert R. Douglas concerning the proposed *Penal Law § 240.21* in a letter dated April 11, 1967, contained in the Bill Jacket to *Penal Law § 240.21* (L 1967, ch 614). The letter states, "[t]he proposed section ... provides that a person is guilty of 'aggravated disorderly conduct' if he 'makes [sic] ... disturbance' while within 100 feet of a 'lawfully assembled religious service.' There is no requirement that the offender's conduct in fact disturb the service, or that his conduct be coupled with an intent to disturb the service, or that it recklessly create a risk thereof." The drafters of the Penal Law clearly were mindful of these comments in the wording of the statute. As noted in *People v King*, "the crime of disruption or disturbance of a religious service and the offense **[***14]** of disorderly conduct by disturbing a lawful assembly, provide that a person is guilty when, acting with the necessary intent he or she makes unreasonable noise or disturbance." *(Supra, at 861.)* Therefore, it is clear that the statute is not meant to proscribe the conduct of an individual who is standing fewer than 100 feet from a religious service and whose conduct is not coupled with the requisite intent to disturb the service or recklessly creating a risk thereof. As stated previously, the State has a justifiable interest in protecting the rights of those who wish to exercise their freedom of religion over the interest of those individuals who intend to infringe these First Amendment rights. *(People v Hollman, supra.)*

The right to freedom of speech is not absolute. *(Chaplinsky v New Hampshire, 315 US 568* [1942].) Certain forms of speech may be regulated if the regulating statute is formulated properly. As stated in *Chaplinsky (supra, at 571-572)*: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, **[***15]** the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit

that **[*304]** may be derived from them is clearly outweighed by the social interest in order and morality." A statute may be held unconstitutional if it is overbroad. *(Broadrick v Oklahoma, 413 US 601* [1973].) The Supreme Court defined the concept of overbreadth in *Grayned v City of Rockford (408 US 104* [1972]). "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct ... The crucial question ... is whether the ordinance sweeps within its prohibitions what may not be punished [constitutionally]." *(Supra, at 114- 115.)*

The People argue that the defendants lack standing to raise an overbreadth claim because their conduct allegedly occurred inside the church and "falls squarely within the 'hard core' of the statute's proscriptions." *(Broadrick v Oklahoma, [***16] 413 US 601, 608* [1973], *supra.)*

The court finds that the defendants do have standing to challenge the statute. In *Gooding v Wilson (405 US 518* [1972]) the Supreme Court held a person has standing to make an overbreadth challenge "even though it might be constitutionally permissible to regulate that person's conduct under a more narrowly drawn and specified statute." *(Holton v State, 602 P2d 1228, 1233*, citing *Gooding v Wilson, supra, at 520-521*.) One commentator states: "[The] result [of a successful overbreadth challenge] may be understood as an exception to the rule that individuals are not ordinarily permitted to litigate the rights of third parties, since an individual whose conduct may not itself be protected by the First Amendment is awarded a judicial victory on the claim of a law's potential **[**692]** unconstitutional applications to the conduct of persons not before the court." (Tribe, American Constitutional Law 711-712 [1978] [footnotes omitted].)

Under the overbreadth doctrine, a person may be permitted to litigate the rights of third parties, even though that individual's alleged actions do not necessarily fall under the scope of **[***17]** these arguments. Accordingly, the defendants do have standing to raise an overbreadth argument in relation to *Penal Law § 240.21*.

The court is unaware of any reported decisions in this State which analyze *Penal Law § 240.21* in relation to an overbreadth challenge; courts in other States have analyzed comparable statutes proscribing the disturbance of a lawful meeting. *(See, Riley v District of Columbia, 283 A2d 819, supra.)* The Supreme Court of California upheld the constitutionality **[*305]** of a statute proscribing the willful disturbance of a lawful meeting. *(In re Kay, 1 Cal 3d 930, 464 P2d 142* [Sup Ct 1970].) In so holding the court stated: "The Constitution does not require that any person, however lofty his motives, be permitted to obstruct the ... continuation of a meeting without regard to the implicit customs and usage or explicit rules governing its conduct ... The constitutional guarantees of the free exercise of religious opinion, and of the rights of the People peaceably to assemble and petition for a redress of grievances, would be worth little if outsiders could disrupt and prevent such a meeting in disregard of the customs and rules applicable **[***18]** to it." *(In re Kay, 1 Cal 3d, at 938, 464 P2d, at 147* [citations omitted].)

The facts in *Kay (supra)* are distinguishable from the defendants' alleged actions herein. The petitioners in *Kay* began clapping and shouting during the latter portion of a speech being delivered by a Congressman. The petitioners had been advised by the police that they would be allowed to protest the speech on the condition that it was done in a nonviolent manner. During the speech, the Congressman also assured the petitioners that

they possessed the constitutional right to protest. Another important distinguishing fact in *Kay* is that it was not alleged that the petitioners' protests affected the program and the Congressman completed his speech. In contrast, the defendants herein did not have the implicit or explicit authority or permission from the complainants or the church officials to enter into a protest in any manner whatsoever. Furthermore, herein the defendants' conduct allegedly "prevented the scheduled service from beginning", "caused the service to be delayed approximately one-half hour", and "prevented the worshippers at the scheduled service from conducting the service" **[***19]** (Crim Ct misdemeanor information). The defendants allegedly chanted during the service and physically approached the priest and others participating in the Mass. Although it may be argued that protest was the motive behind the defendants' alleged actions, the manner of their actions make a prima facie case that the defendants intended to prevent those with whom they disagreed from conducting a religious service.

Similarly, in *Riley v District of Columbia (supra),* the court upheld the constitutionality of a comparable statute. The court stated "to justify the imposition of criminal sanctions for disturbing a religious meeting a person must have *intentionally committed an act or acts* which are found to have substantially **[*306]** disrupted the service. A conviction cannot be had for conduct which is orderly and within the known customs and usages governing the religious exercise[s] or proceedings in the church." *(Supra, at 823* [emphasis supplied].)

This court must decide whether the language of the challenged statute, given its normal meaning, is so broad that its sanctions might apply to conduct that is constitutionally protected. This court finds that *Penal* **[***20]** *Law § 240.21* is not overly broad. While the statute prohibits conduct committed at a religious service or within 100 feet of a religious service, the statute proscribes these actions only when they are coupled with the requisite culpable intent necessary under the statute. *(See, People v King, 148 Misc 2d 859, supra.)*

The defendants urge this court to follow the holding of *People v Steele (70 Misc 2d 351, supra),* and dismiss the accusatory instrument on an alternative **[**693]** ground. The defendants argue that the resolution of these issues presented in this criminal action would require this court to "engage in the forbidden process of interpreting and weighing church doctrine." *(Presbyterian Church v Hull Church, 393 US 440, 451* [1969], *supra.)*

The defendants argue that the Mass at St. Paul the Apostle Church was to be celebrated in honor of lesbian and gay pride. The defendants further argue that a Mass is "a sacrifice of God to God on behalf of mankind." In conclusion, the defendants state that a Mass celebrated for these reasons would be in the name of sin and evil, therefore making the Mass a sacrilege. The defendants further argue that **[***21]** all Catholics are under an obligation to prevent such a sacrilege from occurring within the church. This court declines to engage in the process of interpreting and weighing church doctrine and therefore declines to decide whether church doctrine condones or permits the defendants' conduct.

The court having denied the defense motions to dismiss a trier of fact must determine if the defendants' actions constituted conduct proscribed by *Penal Law § 240.21*.

MOTION TO DISMISS IN INTEREST OF JUSTICE

A motion to dismiss in the interest of justice enables the court as a matter of discretion to dismiss a criminal action in the furtherance of justice and fairness. *(People v Clayton, 41*

AD2d 204 [2d Dept 1973].)

The purpose of a motion to dismiss in the interest of justice **[*307]** is to allow justice to prevail over the strict letter of the law so as to prevent a miscarriage of justice. *(People v Andrew, 78 AD2d 683* [2d Dept 1980]; *People v Stern, 83 Misc 2d 935* [Crim Ct, NY County 1975].) The motion should not be granted unless the facts and circumstances are such that to deny relief would shock the conscience of the court. *(See, People v Rickert, [***22] 58 NY2d 122* [1983].) In entertaining such a motion, the court must scrutinize the merits of the defendant's application and weigh the respective interests of the defendant, the complainant and the community-at-large. *(People v Belkota, 50 AD2d 118* [4th Dept 1975]; *People v Clayton, 41 AD2d 204* [2d Dept 1973], *supra; People v Garcia, 126 Misc 2d 579* [Sup Ct, NY County 1984].)

In deciding a motion to dismiss in the interest of justice, the court must to the extent applicable examine and consider individually and collectively the following factors: (1) seriousness of the offense; (2) harm caused by the offense; (3) evidence of guilt, whether admissible at trial or not; (4) history and character of the defendant; (5) any exceptionally serious misconduct of law enforcement personnel; (6) purpose and effect of imposing sentence on defendant; (7) impact of dismissal on community safety; (8) impact of dismissal on public confidence in the system; (9) the victim's attitude toward the motion; and (10) any other relevant factors which demonstrate that a conviction would serve no useful purpose.

The burden of setting forth factors sufficiently compelling to justify **[***23]** dismissal under *CPL 170.40* rests squarely upon the defendant. Where the defendant does not meet this burden, the court may summarily deny the motion. *(People v Schlessel, 104 AD2d 501* [2d Dept 1984].)

The defendants argue that their actions were peaceful and a sincere attempt to prevent a sacrilege. Additionally, it is argued that defendant McDaniel is a 71-year-old woman who is charged with the minor act of shouting at Father Harris. It must be noted that although the defense characterizes the defendant McDaniel's conduct as minor, the Legislature chose to classify disturbances to religious services as a class A misdemeanor, intending to safeguard the rights of all individuals to exercise their constitutional rights. Further, the actual **[*308]** harm that results from the defendants' alleged actions is both **[**694]** tangible and intangible: tangible harm results from the halting or interruption of church services; the consequent harm, the disturbance of peaceful exercise of freedom of religion, is a serious disturbance of the rights of worshippers. The court does not view such actions, if committed, as trivial.

The court has evaluated the merits of the defendants' **[***24]** argument, as well as the applicable factors enumerated in *CPL 170.40*. Taken collectively, the grounds that are relevant in the consideration of the defendants' motion prove to be insufficient and do not rise to the level required for the granting of a motion to dismiss in the interest of justice. (*CPL 170.40*; *see also, People v Clayton, supra.)*

In sum, the court concludes that the defendants have failed to sustain the burden of showing factors which would compel the dismissal of the accusatory instrument in the interest of justice. A balance of the equities simply does not render unjust the continuation of this prosecution. Accordingly, the defendants' motion to dismiss is denied.

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People v. De Rosa

Supreme Court of New York, Appellate Term, Second Department

October 17, 1975

No Number in Original

Reporter
84 Misc. 2d 316 *; 375 N.Y.S.2d 777 **; 1975 N.Y. Misc. LEXIS 3133 ***

The People of the State of New York, Appellant, v. Frank De Rosa, Respondent

Prior History: **[***1]** Appeal from an order of the District Court of Nassau County (Paul S. Lawrence, J.), entered December 11, 1974, dismissing the information against respondent.

Counsel: *Denis Dillon, District Attorney (Frank A. Doddato* of counsel), for appellant.

Dillworth, Hoesch & Mercurio (Pat R. Mercurio of counsel), for respondent.

Judges: Gagliardi and Glickman, JJ., concur in memorandum; Hogan, P. J., dissents in separate memorandum.

Opinion

[*316] **[**778]** Memorandum. Order dismissing information reversed on the law and facts, information reinstated and matter remanded for trial.

A motion by a defendant to **[***3]** dismiss an information upon the grounds of denial of a speedy trial and in the interests of justice (*CPL 170.30*, *subd 1*, pars [e], [g]) must be made in writing and upon reasonable notice to the People (*CPL 170.45*, *210.45*; see, also, *People v Trottie, 47 AD2d 751*; cf. *People v Wingard, 33 NY2d 192*, where the dismissal was on the court's own motion). Hence, the oral motion of the defendant herein to dismiss the information on the day of trial was improperly made and should have been denied. However, we have considered the application on its merits and conclude that it should **[*317]** have been denied in any event. The failure of defendant, who was represented by counsel, to object in any way to the date set by the court for trial, should under the circumstances disclosed be deemed consent thereto. Consequently, the period of time between the arraignment and the originally scheduled trial date should be excluded from the computation of time within which the People had to be ready for trial (*CPL 30.30*, *subd 1*, par [c]; subd 4, par [b]). Nor does the record disclose any basis for a dismissal in the interests of justice (*CPL 170.40*).

Dissent by: HOGAN

Dissent

Hogan, P. J. **[***4]** (dissenting). I dissent and vote to affirm the order dismissing the information.

The record shows that at all times defendant was ready and willing to proceed to trial. The three and one-half month delay was the result of the People's inaction. The minutes of July 3 illustrate the defendant's insistence on early trial:

"The Court: R.O.C. September 3, 1974, 9:30 for conference.

"Mr. Mercurio: I'd rather not have a conference

on this. I'd rather go right to trial on this.

"The Court: It might do some good to have a conference. Whatever Judge you are going to come in front of is going to try to conference it anyway. Maybe the charge will be dismissed in the conference.

"Mr. Mercurio: Your Honor, I'd rather go right to trial.

[779]** "The Court: Part I, September 3, 1974. Defendant waives conference".

The People's assertion that this decision to waive a conference and to seek a trial on September 3 is a continuance to be attributed to defendant is ludicrous. The defendant could do no more than that which he did.

From the minutes of October 24, one again discerns that the reason the September 3 trial date was aborted was the lack of preparation on the part of the People:

[*5]** "Mr. Mercurio: On September 3rd at the call of the calendar before Judge Diamond the people said they were not ready and I agreed to an adjournment and I asked them to pick the date because my client works for Dime Savings Bank, Your Honor. And I even had to call them personally to get them to release him again today. And the People said they would be ready for sure on October 24th. And that's the way I accepted it and that's the way I went about it".

[*318] On October 24 the People again were not ready when the court convened in the morning, offering the unavailability of witnesses as an excuse:

"Mr. Doddato: It was the People's understanding that this case would go to a jury and on that understanding we set it down for today. We felt we would have time to get our witnesses in this afternoon. I was informed this morning this case would go non-jury. It's one of the reasons the People are not ready at this time.

"Mr. Mercurio: Your Honor, this is the first I know of this, your Honor.

"The Court: Motion denied. Defendant's motion is granted. Case dismissed".

Defendant's culpability in this delay is once again nonexistent.

Furthermore, the People's insistence that **[***6]** the period from September 3 to October 24 should be excluded from the operation of the ready rule because of "exceptional circumstances" under *CPL 30.30* (subd 4, par [g]) is without merit. The gathering of witnesses and obtaining of accident reports is routine and certainly not deserving of such preferential treatment. In this case the People have not been prepared to proceed in a relatively simple and uncomplicated trial.

Finally, the Court of Appeals in *People v Wingard (33 NY2d 192, 195)* has recently held that a Judge may, on his own motion, dismiss informations "in the interest of justice," thus abrogating formal notice requirements. In the instant case the motion to dismiss was made by defense counsel in open court, which permitted full argument by the People. The court in *People v Wingard (supra)*, exercised its discretion in dismissing the case when **[**780]** neither the corporation counsel nor the arresting officers appeared in court for trial eight days after arraignment on an information. The instant case presents a far more heinous delay, and, accordingly, I would affirm the judgment of the trial court **[***7]** to dismiss the information.

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People v. Fattizzi

Supreme Court of New York, Appellate Term, Second Department

June 5, 1978

No Number in Original

Reporter
98 Misc. 2d 288 *; 413 N.Y.S.2d 804 **; 1978 N.Y. Misc. LEXIS 2875 ***

The People of the State of New York, Respondent, v. Frank Fattizzi, Appellant

Prior History: [***1] Appeal from a judgment of the District Court of Nassau County, First District (Julius Schwartz, J.), rendered November 14, 1977 after a nonjury trial, which convicted defendant of speeding. People v Fattizzi, 98 Misc 2d .

Core Terms

deposition, traffic, judgment of conviction, criminal conviction, motion to dismiss, written motion, simplified, accusatory instrument, element of a crime, rules of procedure, timely motion, go to trial, guilty plea, Criminal Procedure Law, adjournment, infraction, notice

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

HN1 **Accusatory Instruments, Informations**

A valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

HN2 **Accusatory Instruments, Informations**

Where a defendant fails to make a timely written motion to dismiss an information and is thereafter tried and found guilty upon proof which establishes all the elements of the crime, he may not raise the defect on an appeal from the judgment of conviction.

Headnotes/Summary

Headnotes

Crimes -- Traffic Information -- Supporting Deposition

1. While the failure to serve a supporting deposition renders a simplified traffic information insufficient on its face (*CPL 100.40*, *subd 2*) and subject to a motion to dismiss (*CPL 170.30*, *subd 1*, par [a]; 170.35, subd 1, par [a]), such a motion must be in writing and upon reasonable notice to the People (*CPL 170.45*) and should generally be made before commencement of trial and in no event can the court entertain the motion after sentence has been imposed. (*CPL 255.20*,

subds 1, 3.)

Crimes -- Traffic Information -- Waiver of Defect

2. Although a valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution, where a defendant fails to make a timely written motion to dismiss a simplified traffic information and is thereafter tried and found guilty upon proof which establishes all the elements of the crime, he may not raise the **[***2]** defect of the People's failure to serve a supporting deposition (CPL 100.40, subd 2) on an appeal from the judgment of conviction since defendant waived the defect by failing to have timely moved to dismiss the accusatory instrument in accordance with the procedural rules contained in the CPL; to hold otherwise would render the statutory provisions as to the time and manner of raising the defects completely meaningless.

Counsel: *Jack B. Solerwitz* and *Leonard B. Isaacs* for appellant.

Denis Dillon, District Attorney (Herbert H. Esrick and *Frederick J. Annibale, Jr.*, of counsel), for respondent.

Judges: Concur: Glickman, P. J., Gagliardi and Silberman, JJ.

Opinion

[*289] OPINION OF THE COURT

[805]** Memorandum.

Judgment of conviction affirmed.

Defendant, charged with the traffic infraction of speeding (Vehicle and Traffic Law, § 1180, subd [d]), made a timely request for a supporting deposition. The deposition was not served and at trial defendant orally moved to dismiss based upon such failure. The motion was denied, the matter proceeded to trial and defendant was convicted of the charge. On this appeal, defendant contends that the information is defective **[***3]** and his motion should have been granted.

[806]** The failure to serve a supporting deposition renders a simplified traffic information insufficient on its face (CPL 100.40, subd 2) and subject to a motion to dismiss (CPL 170.30, subd 1, par [a]; 170.35, subd 1, par [a]). However, such a motion must be in writing and upon reasonable notice to the People (CPL 170.45, 210.45; cf. People v De Rosa, 42 NY2d 872). Moreover, the motion should generally be made before commencement of trial, but in no event can the court entertain the motion after sentence has been imposed (CPL 255.20, subds 1, 3).

The question which arises is whether the failure to make a timely motion in writing precludes the issue of a defective information from being raised on appeal; especially in view of the language of the Court of Appeals in People v Case (42 NY2d 98) and People v Harper (37 NY2d 96) to the effect that ***HN1***[↑] a valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution.

It is our opinion that ***HN2***[↑] where a defendant fails to make a timely written motion to dismiss an information and is thereafter tried and found guilty upon proof which **[***4]** establishes all the elements of the crime, he may not raise the defect on an appeal from the judgment of conviction (People v Willett, 213 NY 368, 375; People v Grimsley, 60 AD2d 980; People v Key, 87 Misc 2d 262; *People v Palotta*, NYLJ, Dec. 16, 1977, p 12, col 6; *People v Eric K.*, NYLJ, Dec. 4, 1975, p 11, col 3; *People v Friday*, NYLJ, April 21, 1975, p 16,

col 4; cf. *People v Strassner, 299 NY 325, 328)*. To hold otherwise would render **[*290]** the statutory provisions as to the time and manner of raising the defect completely meaningless.

A different result is reached where the information does not allege all the elements of the crime and defendant pleads guilty rather than electing to go to trial. A plea of guilty admits only those facts contained in the factual part of the information *(People v Williams, 135 Misc 564, 566)*. Thus, the judgment of conviction may be attacked upon the ground that defendant has not been convicted of a crime, even though no motion was made to dismiss the information (e.g. *People v Case, supra)*. To the same effect would be a situation where defendant goes to trial under such an information and the People establish **[***5]** only those elements alleged therein. Here, too, the failure to make a timely motion to dismiss the information would not preclude defendant from alleging on appeal that he has not been convicted of a crime. Additionally, we note that a defendant may, for the first time on appeal, argue that he was convicted of a crime never charged in the accusatory part of the information (e.g., *People v Harper, supra)*.

This, then, leads us to the simplified information here involved, which we note was sufficient to adequately provide defendant with notice of the nature of the charge (see *People v Boback, 23 NY2d 189*). While defendant could have moved to dismiss the accusatory instrument by following the procedural rules contained in the Criminal Procedure Law, his failure to do so should be deemed a waiver of the defect (see *People v Key, supra; People v Palotta, supra)*, inasmuch as compliance with the statute is required unless an oral motion is consented to by the People (see *People v Ray, 58 AD2d 588*). We are aware of the difficulty involved since the supporting deposition may be timely served until the day preceding the trial date (see *People v De Feo, 77 Misc 2d 523, 524)*. **[***6]** However, the written motion may be served on the day of trial and an adjournment of the trial requested. We note that the adjournment of the trial will not enlarge the time to serve the deposition.

We are also mindful of the fact that requiring a written motion may be onerous **[**807]** where all that is involved is a minor traffic infraction. Nevertheless, since the Criminal Procedure Law specifically provides that the procedural rules apply to a simplified traffic information (*CPL 170.30*, *170.45*), any relief **[*291]** from the burden is a matter for the Legislature and not this court.

We have considered the remaining contentions urged by defendant upon this appeal and find them to be without merit.

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In re Conti

Court of Appeals of New York

October 6, 1987, Argued ; October 22, 1987, Decided

No Number in Original

Reporter
70 N.Y.2d 416 *; 516 N.E.2d 1207 **; 522 N.Y.S.2d 93 ***; 1987 N.Y. LEXIS 18976 ****

In the Matter of Ernest J. Conti, a Justice of the Amsterdam Town Court, Petitioner. State Commission on Judicial Conduct, Respondent

Prior History: **[****1]** Proceeding pursuant to *NY Constitution, article VI, § 22* and *Judiciary Law § 44* to review a determination of respondent State Commission on Judicial Conduct, dated March 23, 1987, that petitioner should be removed from the office of Justice of the Amsterdam Town Court, Montgomery County.

Disposition: Determined sanction accepted, without costs, and Ernest J. Conti is removed from his office of Justice of the Amsterdam Town Court, effective immediately.

Counsel: *Robert J. Krzys* for petitioner. I. The findings of fact upon which the Commission founds its decision and recommendation is totally unsupported by the evidence, and the result arrived at constitutes an abuse of discretion on the part of the Commission. *(People v Fagg, 86 Misc 2d 1046.)* II. Serious errors were committed in the receipt of evidence which prejudiced the ability of respondent to adequately defend himself against the charge. III. The sanction of removal of a Judge from office is extreme and should only be imposed in the event of egregious circumstances. *(Matter of Aldrich v State Commn. on Judicial Conduct, 58 NY2d [****3] 279; Matter of McGee v State Commn. on Judicial Conduct, 59 NY2d 870; Matter of Sardino v State Commn. on Judicial Conduct, 58 NY2d 286; Matter of Kuehnel v State Commn. on Judicial Conduct, 49 NY2d 465; Matter of Kelso, 61 NY2d 82; Matter of Bulger v State Commn. on Judicial Conduct, 48 NY2d 32; Matter of Dixon v State Commn. on Judicial Conduct, 47 NY2d 523.)*

Gerald Stern, Jean M. Savanyu and *Henry S. Stewart* for respondent. I. Petitioner's conduct violated established ethical standards, is properly subject to discipline, and demonstrates lack of fitness for judicial office. *(Matter of Bulger v State Commn. on Judicial Conduct, 48 NY2d 32; Matter of Byrne*, 47 NY2d [b]; *Matter of Dixon v State Commn. on Judicial Conduct, 47 NY2d 523; Matter of Edwards, 67 NY2d 153; People v Douglass, 60 NY2d 194; Matter of Reedy, 64 NY2d 299.)* II. Petitioner's arguments that he was unfairly deprived of an opportunity to present his evidence and that the Commission conspired in the fabrication of a witness' testimony are totally without merit.

Judges: Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa **[****4]** concur in Per Curiam opinion.

Opinion by: PER CURIAM

Opinion

[*417] [1207] [***93] OPINION OF THE COURT**

Petitioner was charged with misconduct in

connection with the disposition of two speeding tickets. Additionally, he was charged with having improperly dismissed, or adjourned in contemplation of dismissal, some 31 cases without having given notice to the prosecutor as required by ***CPL 170.45***, *170.55* and *210.45*. Following a hearing in which petitioner and a number of other witnesses gave testimony, the Judicial Conduct Commission sustained the charges and found that the proven acts of misconduct had been exacerbated by petitioner's patently false explanations for his actions. Noting that **[*418]** "[such] deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth", the Commission determined that petitioner should be removed from judicial office. We agree that petitioner's conduct demonstrated a level of dishonesty and lack of judgment that is unacceptable for a member of our State's judiciary. Consequently, we accept the determined sanction of removal.

Initially, we reject petitioner's contention that the ticket-fixing **[****5]** charges were not convincingly established by the hearing evidence. With regard to the speeding ticket issued to John Reedy, the son of a former Town Justice with whom petitioner was acquainted, the testimony of petitioner's co-Justice, as well as that of the issuing officer and the court clerk, lead inexorably to the inference that petitioner, or someone acting at his direction, had altered the simplified traffic information by crossing out the speeding charge and substituting an "unsafe tire" charge. Petitioner then dismissed the ticket himself, without notice to **[***94]** the prosecution, even though the case was not properly before him because the ticket was not returnable on a day when petitioner was presiding. In view of the impressive **[**1208]** evidence against him, we find incredible petitioner's claims that the ticket had been delivered to his house by the issuing officer after the cross-outs and alterations had already been made and that he had innocently dismissed the "unsafe tire" charge -- the only count in the accusatory instrument -- after being assured by the defendant Reedy that the condition had been repaired.

Similarly lacking in candor is petitioner's explanation **[****6]** of his dismissal, again without notice to the prosecution, of a speeding ticket issued to a local attorney, who was petitioner's friend and was then representing petitioner on two personal matters. Petitioner testified that he perceived no impropriety in his handling the matter despite his relationship with the attorney, because the officer who issued the ticket had told him that the ticket would have to be dismissed as a result of a radar failure. However, the officer testified, quite credibly, that there was no radar failure on the day the attorney's ticket was issued and that he had not contacted petitioner at any time to suggest dismissal of the ticket.

We have previously held that ticket-fixing is such a serious impropriety that even a single isolated incident can serve as a basis for removal (*Matter of Reedy, 64 NY2d 299*), although there is no per se rule requiring removal in every case *(see, **[*419]** Matter of Edwards, 67 NY2d 153, 155)*. Here, as the credible evidence shows, petitioner not only "fixed" speeding tickets on two separate occasions, but he also compounded his offense by his dishonesty in altering one of the tickets and then telling a patently false **[****7]** story when called upon to explain his conduct to the Commission. As yet a further aggravating circumstance, petitioner demonstrated an unacceptable degree of insensitivity to the demands of judicial ethics when he asserted his view that he could properly adjudicate his personal attorney's traffic violation case because a dismissal of the charges was anticipated. Indeed, even if it

were true that the speeding ticket issued to petitioner's attorney had to be dismissed because of a problem with the radar, petitioner's decision to handle the matter himself evidenced a serious lack of judgment, since it led to both an appearance of impropriety and the potential for a conflict of interest.

Accordingly, the determined sanction of removal is accepted, without costs.

End of Document

In re Duckman

Court of Appeals of New York

April 28, 1998, Argued ; July 7, 1998, Decided

No. 66

Reporter

92 N.Y.2d 141 *; 699 N.E.2d 872 **; 677 N.Y.S.2d 248 ***; 1998 N.Y. LEXIS 1831 ****

In the Matter of Lorin M. Duckman, a Judge of the Criminal Court of the City of New York, Kings County, Petitioner. State Commission on Judicial Conduct, Respondent.

Prior History: [**1]** Proceeding, pursuant to *NY Constitution, article VI, § 22* and *Judiciary Law § 44*, to review a determination of respondent State Commission on Judicial Conduct, dated October 24, 1997, that petitioner should be removed from the office of Judge of the Criminal Court of the City of New York, Kings County.

Counsel: *Ronald G. Russo,* New York City, and *Richard W. Levitt* for petitioner. The Referee failed to make findings sufficient to sustain the sanction of removal; the evidence, under any objective analysis, supports no sanction greater than censure. (*Matter of Quinn v State Commn. on Judicial Conduct, 54 NY2d 386*; *Victor Catering Co. v Nasca, 8 AD2d 5*; *Matter of VonderHeide, 72 NY2d 658*; *Matter of Reeves, 63 NY2d 105*; *Matter of Waltemade,* 37 NY2d [a]; *Matter of Roberts, 91 NY2d 93*; *Matter of McGee v State Commn. on Judicial Conduct, 59 NY2d 870*; *Matter of Cunningham, 57 NY2d 270*; *Matter of Kiley, 74 NY2d 364*; *Matter of Shilling, 51 NY2d 397*.)

Gerald Stern, New **[****2]** York City, *Robert H. Tembeckjian* and *Jean M. Savanyu* for respondent. I. Petitioner engaged in egregious misconduct in that he intentionally violated provisions of the Criminal Procedure Law, conveyed the appearance that he lacked impartiality, and repeatedly made highly improper statements. (*People v Douglass, 60 NY2d 194*; *Matter of David PP., 211 AD2d 995*; *Pennsylvania v Mimms, 434 US 106*; *People v Robinson, 74 NY2d 773*.) II. Petitioner should be removed from office. (*Matter of Shilling, 51 NY2d 397*; *Matter of Aldrich v State Commn. on Judicial Conduct, 58 NY2d 279*; *Matter of Sims, 61 NY2d 349*; *Matter of Sardino v State Commn. on Judicial Conduct, 58 NY2d 286*; *Matter of Reeves, 63 NY2d 105*; *Matter of Droege, 129 App Div 866, 197 NY 44*; *Matter of Capshaw, 258 App Div 470, 1053*; *Matter of McGee v State Commn. on Judicial Conduct, 59 NY2d 870*.) III. The dissenting opinions do not provide a basis to impose a lesser sanction than removal from office. (*Matter of LaBelle, 79 NY2d 350*; **[****3]** *Matter of Sardino v State Commn. on Judicial Conduct, 58 NY2d 286*; *Matter of Sims, 61 NY2d 349*; *Matter of VonderHeide, 72 NY2d 658*.) IV. Petitioner's brief repeatedly misconstrues the record and fails to provide a basis to impose a lesser sanction than removal.

Russell M. Gioiella, New York City and *Thomas H. Burt* for New York Criminal Bar Association, *amicus curiae.* I. A political system founded on the rule of law requires an independent judiciary. *(Matter of "John", 61 Misc 2d 347*; *United States v Will, 449 US 200*; *Young v United States ex rel. Vuitton et Fils, 481 US 787*; *Supreme Ct. v Consumers Union, 462 US 1137*; *Stump v Sparkman, 435 US 349*; *Welch v State of New York, 203 AD2d 80*;

Mullen v State of New York, 122 AD2d 300, 68 NY2d 609, 480 US 938; *Arteaga v State of New York, 72 NY2d 212*; *Matter of Catanise v Town of Fayette, 148 AD2d 210*.) II. The scope of the Commission's investigation and the Commission's findings and recommended sanction create the appearance **[****4]** of political influence. III. The removal of Judge Duckman will have a chilling effect on judicial independence.

Scott H. Greenfield, New York City, for New York State Association of Criminal Defense Lawyers, *amicus curiae*. I. The maintenance of charges for political reasons is contrary to sound public policy. II. The sanction of removal is inappropriate and unduly harsh under the facts and circumstances.

Judges: Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley concur in Per Curiam opinion; Judge Titone dissents and votes to reject the determined sanction in a separate opinion; Judge Bellacosa dissents and votes to reject the determined sanction in another dissenting opinion.

Opinion

[*143] [872] [***248]** PER CURIAM.

The State Commission on Judicial Conduct has determined that petitioner, since April 1991 a Judge of the Criminal Court of the City of New York (Bronx County, 1991-1994; Kings County, 1994-1996), engaged in various acts of misconduct demonstrating a pattern of injudicious behavior that renders him **[**873] [***249]** unfit to continue in office. Given petitioner's acknowledgment before us of many of the alleged acts of wrongdoing, **[****5]** the central issue on his appeal to this Court is one of appropriate sanction: should he be removed from office or censured? Like the Commission, we conclude that removal is the appropriate sanction.

I.

In a Formal Written Complaint dated June 5, 1996, the Commission charged that petitioner had willfully disregarded the law, displayed intemperate demeanor, abused the power of his office and exhibited bias against the prosecution. With 363 specifications, the Complaint made two formal charges. Charge I asserted that between October 1991 and February 1996 petitioner

"in the exercise of his judicial duties, willfully disregarded provisions of law that resulted in the improper dismissal of criminal charges, delivered *ad hominem* criticisms and injudicious lectures to assistant district attorneys that unfairly attributed to them improper and harsh values and judgments in their role as prosecutors and made intemperate, derisive and otherwise inappropriate comments to **[*144]** assistant district attorneys. ... [B]y reason of the foregoing, [petitioner] abused the power of his office, displayed evident bias against the prosecution, and acted in a manner inconsistent with **[****6]** and prejudicial to the fair and proper administration of justice."

Charge II alleged that between May 1992 and December 1995, petitioner engaged in certain specific acts of "intemperate and injudicious conduct." Petitioner denied all wrongdoing.

On November 6, 1996, Matthew J. Jasen, appointed by the Commission as Referee, commenced hearings that continued over a period of 20 days. The evidence included the testimony of 67 witnesses (29 for petitioner, 38 for the Commission), consuming more than 4,000 transcript pages, and 200 exhibits. In addition, the record before us includes a "Book of Letters," 112 letters largely from practitioners who appeared before petitioner--

both as prosecutors and as defense counsel--attesting to his personal and professional qualities.

On May 28, 1997, the Referee filed his Report, a 157-page document summarizing in detail the evidence with respect to each alleged act of misconduct, annotated to the record (for the most part transcripts of court proceedings conducted by petitioner, and petitioner's own testimony).

In his "Findings of Fact" the Referee found that petitioner had committed all but one of the acts of misconduct charged (he sustained **[****7]** all but five specifications; two were withdrawn by the Commission). As "Conclusions of Law" the Referee determined that petitioner had violated the State Constitution, as well as specified provisions of the Code and Rules of Judicial Conduct. He further rejected the notion that it is common practice for Judges of the Criminal Court to engage in the misconduct found, and even if it were, each Judge individually "must abide by the ethical standards required of judges in the unified court system, and neither calendar congestion nor a judge's frustration excuses or mitigates the pattern of misconduct reflected in these findings of fact and conclusions of law." Finally, the Referee concluded that petitioner's "expressed belief in the propriety of his undisputed conduct, as set forth in the findings as to Charge [II], demonstrates a failure to recognize that such conduct was improper, and a failure to appreciate the proper roles of a Judge and a prosecutor in the criminal justice system."

[*145] Commission counsel then moved to confirm the Report and for a determination that petitioner be removed from office. Petitioner opposed the motion.

Petitioner waived confidentiality **[****8]** and on September 11, 1997, the Commission heard oral argument in a public session, at which both petitioner and his counsel appeared. Thereafter, the Commission considered the record of the proceeding and made findings of fact, concluding that petitioner violated several provisions of Canons 1, 2A and 3 of the Code of Judicial Conduct as well as the Rules Governing Judicial Conduct. Charges I and II were sustained insofar as they were consistent with the Commission's findings **[**874]** **[***250]** (several additional specifications of the Commission's complaint were not sustained), petitioner's misconduct was deemed established, and the Commission held that petitioner should be removed from office. A 50-page Appendix to the Commission's Determination describes each of the specifications of misconduct found by the Commission.

All 11 members agreed that petitioner had engaged in serious misconduct by his knowing disregard of the law and by his intemperate, disparaging name-calling of young prosecutors and insensitive remarks. The Commission, however, issued five separate opinions, and it split seven-to-four on the issue of sanction. While the seven members agreed unanimously **[****9]** on the wrongdoing warranting removal, three would have gone further in their findings--two members underscoring petitioner's "consistent and outrageous disregard of the law," and a third underscoring "the gravity of the misconduct found with respect to Charge II" and the fact that petitioner "repeatedly made inappropriate comments concerning gender and race which are antithetical to the role of a judge." Of the four Commission members who voted for censure rather than removal, one expressed the view that "a jurist who has sat on over 50,000 cases should not be removed for misconduct in only 19 cases." The other three, while agreeing that petitioner had committed serious judicial misconduct, asserted that, given all of the facts and circumstances, the appropriate sanction was censure.

After careful review of the evidence, we conclude that the Commission's determination sustaining the charges is supported by a preponderance of the evidence and that the sanction of removal is warranted (*NY Const, art VI, § 22*; *Judiciary Law § 44*).

[*146] II.

In our view, the credible evidence--indicating wrongdoing both in connection with case **[****10]** dispositions and in court proceedings generally--was sufficient to support the Commission's findings of misconduct. Given the voluminous record, as well as the extensive factual digests already set forth both in the Commission's Determination and in the Referee's Report, [1] we will not particularize all of the individual incidents but instead will more broadly indicate the categories of misconduct into which they fall.

Misconduct in Connection with Case Dispositions: Largely consisting of transcripts of court proceedings before petitioner, the evidence establishes that petitioner willfully disregarded the law in disposing of the criminal charges in 16 cases: 13 **[****11]** dismissals for facial insufficiency, one purportedly in the interests of justice, and two adjournments in contemplation of dismissal (ACDs). Cases were dismissed without notice or an opportunity for the prosecution to be heard, without allowing an opportunity to redraft charges, without requiring written motions, and in the case of ACDs, without the consent of the prosecutor. What is significant for present purposes is both that petitioner dismissed these cases in knowing disregard of requirements of the law (*see, e.g.*, *CPL 140.45*, *170.30*, *170.35*, *170.40*, *170.45*, *170.55*, *210.45*), and the abusive, intemperate behavior he manifested in dismissing those cases, at times not permitting the attorney to make a record of an objection either to the disposition or in response to the accusations.

In the overwhelming number of these cases it is clear that petitioner dismissed accusatory instruments for facial insufficiency because the prosecutor refused to agree to petitioner's requests for an ACD or to offer a plea to a violation. In others, petitioner simply believed that the cases should not be prosecuted. Petitioner explained to the Commission that "there **[****12]** were times where [he] did things in the interests of justice, using the guise of facial insufficiency" to dispose of a case when he "thought it was right to do it." In his words:

"Sometimes in an effort to do justice, I used the vehicle of dismissals for facial insufficiency without **[*147]** making defense attorneys **[**875]** **[***251]** put their motions in writing, without giving the people an opportunity to amend or redraft, and sometimes without giving the people an opportunity to be heard fully."

Illustratively, in one case where defendant was charged with menacing in the third degree for pointing what appeared to be a gun at children, at arraignment petitioner told the prosecutor "it's an ACD or it's dismissed." Petitioner refused to allow the prosecutor to present his argument as to why the accusatory instrument was in fact facially sufficient, denied his request that the dismissal motion be in writing and, after warning him not to "just come up with some nonsense and tell me you want the opportunity to redraft," petitioner denied the prosecutor's request to rewrite the accusatory instrument. Petitioner also

[1] While petitioner attacks the Referee's Report as insufficient because it does not make explicit credibility findings, we note that the facts supporting the determination were largely established by documentary evidence, such as court transcripts of proceedings (which required no credibility determination) and petitioner's own testimony.

cautioned the prosecutor that he should "ACD and maintain **[****13]** the peace." When the prosecutor refused, petitioner dismissed the charge on concededly improper grounds. The prosecutor's reply, "Over the People's objection," evoked the following diatribe:

"THE COURT: Please don't say that. It's not over your objection. My objection is that you can't stand here and act like a lawyer. How are you going to proceed in this case? It's not over your objection. You are supposed to come into court--don't smile, put that down and look at me--I said to look at me, Mr. Petrillo. I am going to tell you what offends me. I tell you fifty times, it's not over your objection, you are given an opportunity to be heard. When you can't make out the charges, the charges are dismissed. These are people's lives. Based on that nonsense, you had a person go to jail. What am I supposed to say to you, about the lack of respect that I have for you prosecuting a person, when you don't have a case? You don't have an objection. You are just mouthing some words that somebody told you, for no reason, and insulting me, and I am insulted and I don't want to hear it again.

"MR. PETRILLO: I did not intend to insult--

"THE COURT: Did I ask you to talk; did I? You **[****14]** told me it was over your objection, and I am telling you what my objection is and I speak last. He does it all the time, and you do it all the time and lawyers **[*148]** don't do that. They stand up here and do what they are supposed to do. You can't come up here, with a facially insufficient complaint, and say 'we are moving to dismiss or we are ACD'ing it.' It's too bad we don't have more who do. The case is over. I am not listening to you. Move away. Next case. Don't do it again. If you smile, you are going to find out what power I really have. Do you understand that? Do you understand that; yes or no?

"MR. PETRILLO: Yes, I do."

A transcript from another case reflects a similar colloquy between petitioner and two prosecutors:

"THE COURT: You want to ACD? Dismiss or ACD. That is your choice.

"MR. SACK: Judge I am not prepared to do either right now.

"THE COURT: You have a reason for that? Is there something I said--that was wrong?

"MR. SACK: Judge, I am reviewing the write-up.

"THE COURT: I think I gave you five minutes to look at it and--Ms. Rice, you have a problem? Stand up. I didn't ask you to talk.

"MS. RICE: Do I have a problem, your Honor?

[**15]** "THE COURT: I didn't ask you to talk. Then leave the courtroom and solve your problem.

"MS. RICE: You want me to leave now?

"THE COURT: Don't you shirk and give me weird looks, okay.

"MS. RICE: I apologize, your Honor, if I gave--

"THE COURT: Here we go again. You want to dismiss or ACD the cases, Mr. Sack?

"MR. SACK: Judge, I see that a count is not charged. I therefore, with the Court's permission, move to add that.to the Complaint at this time--

"THE COURT: Your application is denied. You charged him with this. ACD or dismiss. **[**876]** **[***252]** If you want to re-arrest **[*149]** him or go, go to their houses and charge them with the Administrative Code violation. Are you ready to do it?

"MR. SACK: With all due respect, your Honor, the factual allegations in the complaint do make out--

"THE COURT: Didn't I just dismiss your application? You want me to--you want to say it five more times? When I ask you and I rule that is it. Go on to the next point.

"MR. SACK: My next point, Judge, is to ask for bail.

"THE COURT: Charges dismissed. Good day."

Apart from knowingly disregarding procedural requirements of the law to reach his desired result, **[****16]** petitioner on his own dismissed a drunk driving prosecution, over the prosecutor's objection, where he thought a conviction would be unlikely, [2] and assumed facts where his own life experience suggested police misconduct. Court transcripts, for example, show petitioner in one case surmising that "defendant had taken a beating for causing two police officers to chase him for three blocks." There having been no prior mention of a beating in the transcript, during the hearing before the Referee petitioner explained that his belief was based on the fact that defendant "looked rather disheveled."

[**17]** Again, in another proceeding, petitioner speculated on the record: "Somebody in a car with a gun, police officer goes to the car and they don't move--the cops then try to do something to get them out ... [w]hat they did to get them out of the car, whether they were abused, grabbed, hit, berated." And in yet another, where defendant was charged with obstructing governmental administration and disorderly conduct based on allegations that he had interfered with his brother's arrest, court transcripts indicate that petitioner insisted that the prosecutor agree to an ACD. When the prosecutor refused, petitioner asked defense counsel for a motion and dismissed **[*150]** the charges. In response to questioning before the Commission, petitioner admitted that he did not give proper notice before dismissing the charges, but it was his opinion that defendant only pushed the officer to protect his brother from injury. He knew his view was the correct one because he had "talk[ed] to a lot of people" and had heard from defense counsel "what was going on here." Petitioner explained: "I read things into cases and I'm not wrong about these things."

In yet another matter, the accusatory **[****18]** instrument charged defendant with assault in the third degree and harassment based on allegations that defendant "struck [the victim] with closed fist in the face, causing swelling and bruising to the face and to suffer substantial pain and to be alarmed." Petitioner argued that the prosecutor did not allege facts to make out an assault and described the alleged punch in the face as a "push": a "push is not an assault ... It's harassment." After defendant pleaded guilty to harassment, petitioner asked defense counsel whether he wanted to move to dismiss the assault charge. Although the prosecutor argued that the victim "received swelling and bruising to the face" and suffered pain, petitioner rejected the prosecutor's argument as a "conclusion," and dismissed the misdemeanor assault for facial insufficiency.

In addition, petitioner knowingly disregarded statutory requirements in dismissing charges

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[2] Defendant had slurred speech, red eyes and a blood alcohol content of .08%. Petitioner admitted before the Referee that he knew that a .07% blood alcohol content constitutes prima facie evidence of driving while impaired (*see*, *Vehicle and Traffic Law § 1195*), but maintained that "it's not illegal to drink and drive." Explaining further, petitioner testified that there needs to be a "reasonable relationship between the drinking and the driving to show that the alcohol ... somehow affected the individual's ability to operate the motor vehicle. ... Absent some proof that the drinking affected the driving you can't get a conviction." Petitioner therefore dismissed the case.

in the interest of justice, and twice imposed an ACD without the consent of prosecutors, berating them in the process. For example, the dismissal in the interest of justice involved a charge of theft of services for allegedly entering the New York City subway, in the Bronx, without **[****19]** paying a fare; defendant at the time had a similar charge **[**877]** **[***253]** pending against him in New York County, and four prior class A misdemeanor convictions. When the prosecutor refused petitioner's request for a plea to disorderly conduct, with time served, petitioner lectured her about the need for jobs and health care, said she was not "doing justice" and was being "unreasonable" and dismissed the case, in knowing disregard of the requirements of a written motion for such relief and reasons for such dismissal set forth on the record (*see*, CPL 210.45, 170.40, 170.45).

Misconduct in Court Proceedings Generally: The 16 cited instances of knowing disregard of the law are not the only credible evidence supporting the charges. Well beyond those proceedings, the Commission documented instances of petitioner's inappropriate behavior in his dealings with persons appearing before him, demonstrating impatience and intolerance, **[*151]** even at times ordering prosecutors who disagreed with him out of the courtroom.

Petitioner, for example, subjected prosecutors to harsh, personal criticisms when they would not accept his view as to the **[****20]** "worth" of a case. Petitioner admitted to the Commission that he chastised prosecutors for their bail recommendations because he did not want to be criticized for setting low bail. As one prosecutor reported in testimony before the Referee, after his bail recommendation petitioner accused him of "making him look bad in front of the audience." Petitioner asked another prosecutor if her bail recommendations were the "result of [her] middle-class background"; another was criticized as "too lofty" to appear in his court; another as having "no guts." Petitioner's lectures about the unfair actions of "your society" or "your government" at times elicited laughter or applause in the courtroom.

Petitioner conceded that on several occasions he made derisive remarks in open court referring to prosecutors' allegiance to their office policies, calling them "good little soldiers," "good little soldier boys," "mannequins" and "puppets," or commenting that they were "earning another stripe on the arm" or "notch on the belt" every time they put someone in jail. In open court, he called them nicknames, such as "Princess" or "Princess Nancy," "Mr. Nuisance," and "Marshal Dillon" or "the Marshal. **[****21]** " As lawyers testified, they felt belittled, degraded and demeaned by petitioner's open-court sarcasm and ridicule. [3]

In the case of one prosecutor who is visually impaired, petitioner heatedly accused him of having broken his lectern by leaning **[****22]** on it. Petitioner, who was admittedly "distraught," "upset," "shocked" and "dismayed" by the damage to the lectern, told the prosecutor that he would "teach" him "how to properly stand up in court." Petitioner concedes that his law clerk "calmed [him] down" by assuring him that the lectern could

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[3] The former Chief of the Bronx Criminal Courts Bureau, Chief Assistant District Attorney in the Bronx, First Deputy Bureau Chief of the Criminal Courts Bureau in the Bronx and Bureau Chief of the Criminal Court in Brooklyn all testified that, based on complaints by others and, in some cases, direct observation, they repeatedly spoke with petitioner about the need to moderate his courtroom behavior. Petitioner acknowledges conversations with them, and admits to knowing that prosecutors from time to time ordered transcripts after his outbursts. Petitioner denies, however, having prior notice of the alleged wrongdoing. If in fact none of these indicators was sufficiently pointed to reach petitioner, that would underscore the problem that typified his misconduct.

be fixed. A year later, when petitioner ran into the **[*152]** prosecutor after business hours at a restaurant bar near the courthouse, he said in a manner that was "not kidding" or "jovial"--"he's the one who broke my lectern."

Petitioner told one female prosecutor that she was "too sexy" to wear flat shoes and that she had "nice legs" (petitioner denied the first comment but acknowledged the second); he admittedly told another that she looked better in shorter skirts. In a case involving two African-American women, court transcripts reveal that petitioner, attempting to explain to a prosecutor why his disposition of the case--an ACD--was appropriate, stated: "At the risk of sounding racist and sexist, [the case] is really just two women, and you know sometimes certain things are just cultural." While petitioner strongly denies any racist or sexist bias, he admits making "isolated **[****23]** statements" which he characterizes **[**878]** **[***254]** as "aberrational in character," reflecting a familiarity not appropriate to his position. [4]

Incidents such as these, plainly inappropriate behavior for any Judge, are multiplied throughout the evidence and persuade us that the charges have been sustained.

III.

Having concluded from the proven facts that petitioner willfully disregarded the law, abused the power of his office and engaged in injudicious behavior, we reach the crux of the present appeal: whether removal or public censure is appropriate (*see, NY Const, art VI, § 22 [d]*). We agree with the Commission that petitioner should be removed.

"[T]he purpose of judicial disciplinary **[****24]** proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents' " (*Matter of Reeves, 63 NY2d 105, 111*, quoting *Matter of Waltemade*, 37 NY2d [a], *[llll]*). The actual levels of discipline to be imposed by the Court for judicial misconduct are, in the end, "institutional and collective judgment calls" (*Matter of Roberts, 91 NY2d 93, 97*). They rest on our assessment of the individual facts of each case, as measured against the Code and Rules of Judicial Conduct and the prior precedents of this Court.

[*153] Not surprisingly, in the intensely fact-specific inquiry before us the parties differ in their view of the more analogous precedent. Petitioner urges us to look to *Matter of LaBelle (79 NY2d 350)*, where the Court concluded that the Commission had overstated both the number and the nature of petitioner's transgressions regarding commitments without bail and then rejected the determined sanction of removal in favor of censure. The Commission, in contrast, considers more pertinent *Matter of Sardino v State Commn. on Judicial Conduct (58 NY2d 286, 292)*, **[****25]** where the Court upheld a determination that the individual under review had " 'so distorted his role as a judge as to render him unfit to remain in judicial office'."

While finding no four-square precedent--each judicial misconduct appeal truly stands on its own facts--we note that several of petitioner's arguments are analogous to arguments made by the Judge, and ultimately rejected by this Court, in *Sardino* (*see also, Matter of Reeves, 63 NY2d at 110-111, supra*). We underscore, however, that this case is neither *Sardino* nor *LaBelle*.

Like petitioner here, Judge Sardino argued that he in fact felt no bias, nor was he motivated by animosity or self-interest. As this

[4] While these comments may not be indicative of a racist or sexist bias harbored by petitioner, they are highly inappropriate and completely antithetical to the role of a Judge. Indeed, even isolated instances of such inappropriate behavior cast doubt on a Judge's ability to be impartial and fair-minded.

Court observed, however, the perception of impartiality is as important as actual impartiality: Judges must conduct themselves "in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property" (*Matter of Sardino v State Commn. on Judicial Conduct, 58 NY2d at 290-291, supra; see also,* Code of Judicial Conduct Canon 2 [A]; *22 NYCRR 100.2* **[****26]** [a "judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities"]; *22 NYCRR 100.2 [A]* [a "judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"]).

Similarly, petitioner in *Sardino* argued unsuccessfully that the number of abuses--62 over a two-year period--should not be viewed in isolation from his seven-year career on the Bench. As the Court noted, the number of abuses was not insignificant and, if viewed in the context of Sardino's entire career, would at best "establish that his behavior was erratic, which itself is inconsistent **[***255]** **[**879]** with a Judge's role" (*58 NY2d at 291, supra*). Here, too, petitioner urges that we credit his otherwise unblemished performance in a high-stress, high-volume court. The Court, however, has resisted any numerical yardstick for determining **[*154]** unfitness (*see, Matter of Hamel, 88 NY2d 317*; *Matter of Esworthy, 77 NY2d 280*; *Matter of VonderHeide, 72 NY2d 658*; *Matter of Sims, 61 NY2d 349*). Rather, it must be **[****27]** the nature of the proven wrongdoing as well as the numbers that determine the appropriate sanction.

Moreover, in *Sardino,* as we do here, the Court questioned the veracity of the argument that many other Judges engaged in similar misconduct and concluded that, in any event, such evidence would be irrelevant. "Each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense" (*Matter of Sardino v State Commn. on Judicial Conduct, 58 NY2d at 291, supra; see also,* Code of Judicial Conduct Canons 1, 3 [A] [1]; *22 NYCRR 100.1* [a "judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved"]; *22 NYCRR 100.3 [B] [1]*). Nor are Judges, in the interest of alleviating regrettable court congestion--or indeed, even in the interest of empathy for defendants--free to ignore the law in order to weed out cases they personally feel are unworthy **[****28]** of prosecution or clogging the system.

Petitioner's contention that his harsh treatment of young prosecutors was simply a consequence of his efforts to educate them to be more just is similarly unavailing. As the Commission noted: "[t]eaching need not involve angry screaming and humiliating invective and is not effective when the lesson is that a judge may abandon the law and abuse judicial authority."

Of significant concern as well--and particularly relevant to the question of appropriate sanction--is petitioner's refusal, throughout the Commission's initial investigation and the proceeding before the Referee, to acknowledge the impropriety of his behavior in wrongfully dismissing cases (*see, Matter of Aldrich v State Commn. on Judicial Conduct, 58 NY2d 279, 283*; *Matter of Sims, 61 NY2d 349, 356*; *Matter of Shilling, 51 NY2d 397*). As petitioner made clear in his testimony, he believes dispositions made in contravention of CPL requirements are permissible if they serve his definition of justice or conserve court resources by removing unworthy cases from

an overburdened calendar. Testifying before the Referee, petitioner explained: **[****29]** "I think about what cases should be in this system **[*155]** and which cases shouldn't be in the system, and I think judges get to make that decision, and ... if somebody comes and brings it to your attention and complains or asks you to do something, you can do something about it."

When petitioner was questioned before the Commission and the Referee about his handling of a number of cases, he was reluctant to acknowledge that the CPL required him to allow prosecutors to amend facially insufficient accusatory instruments. Even more troubling, however, are the numerous instances when petitioner testified that he had not abided by the CPL's amendment and notice requirements in disposing of a case, but still maintained that he had not been wrong in doing so. For example, petitioner explained before the Referee that although he "may have been wrong in reaching the decision [to dismiss in *People v Shaw*]," he believed that he "still did the right thing." Similarly, when petitioner was questioned during the hearing about *People v Zhao*--a case which he later acknowledged he "should not have dismissed"--petitioner refused to admit that he had not acted in accordance with the **[****30]** law in disposing of the matter. Instead, petitioner insisted that his "legal ruling **[**880]** **[***256]** was correct." In *People v Samuels*, although he admitted to dismissing the charges "for the wrong reason," petitioner again refused to acknowledge before the Referee that he had not handled the matter in accordance with the law. [5]

[**31]** Additionally, with regard to several instances of clearly intemperate behavior, petitioner refused to admit that his comments were inappropriate. For example, petitioner testified during the hearing that he does not consider his asking a prosecutor whether he got his law license "on the back of an orange Xjuice carton" to have been insulting. Moreover, despite **[*156]** considerable evidence to the contrary, petitioner maintained that his courtroom "was always run with courtesy."

In making the difficult choice between censure--returning petitioner to the Bench--and removal, we find these examples particularly pertinent when combined with the numerous instances when Bureau Chiefs or Chief Assistant District Attorneys of Bronx and Kings Counties spoke with petitioner about his loss of temper and demeaning treatment of prosecutors who appeared before him. Petitioner sometimes acknowledged the inappropriateness of what he had done and said he would try to calm down, yet the misconduct continued. This evidence--not mentioned by the Commission's dissenters--suggests that the confirmed findings of improper conduct are not isolated, acontextual, subjective instances, and it supports **[****32]** the inference that petitioner lacks the insight and self-control to make fundamental changes

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[5] *Samuels* provides another example of petitioner's contradictory positions when testifying about his misconduct during the proceedings leading up to this appeal. When questioned about *Samuels* during the Commission's initial investigation, petitioner defended his actions in dismissing the case and was reluctant to admit that his intemperate treatment of prosecutors in that matter was inappropriate. During the hearing before the Referee, petitioner testified that his conduct was "a terrible example of [his] judicial demeanor and behavior" and that he was "embarrassed that [he] was the judge that sat on [the] case." Petitioner also testified that he "dismissed the charges for the wrong reason" and "didn't handle [the case] properly." In his Post-Hearing Memorandum, which was submitted to the Referee, petitioner stated that he had "properly dismissed the complaint" and had acted "within the proper ambit of his powers and duties." In his brief to this Court, petitioner referred to *Samuels* as "an example of a dismissal, with its attendant conduct, which [petitioner] agrees was terribly mishandled by him."

in his attitude or judicial temperament. [6]

The foregoing leads us to conclude that the Commission has not, as in *LaBelle,* overstated the seriousness of petitioner's wrongdoing. Rather, the substantial record of petitioner's intentional disregard of the requirements of the law in order to achieve a personal sense of justice in particular cases before him, coupled with the substantial record of improper courtroom conduct and unresponsiveness to concerns flagged for him, persuade us that removal is the appropriate sanction.

Finally, we note several weighty concerns voiced by petitioner, by the dissenters and **[****33]** by *amici* relating to the origin of the Commission's investigation. The investigation was triggered not by appeals or complaints of wronged litigants or lawyers, but by a firestorm of public criticism generated by a separate tragedy, as to which, in the end, petitioner's rulings were found to be a proper exercise of judicial discretion, not a basis for discipline. As petitioner points out, but for that tragedy--as to which he has been fully exonerated--likely no charges would have been lodged against him. There is, moreover, the deeply troubling suggestion--not established on this record--that prosecutors kept a "dossier" on petitioner, microscopically tracking him.

These concerns, which we share, center on a threat to the independence of the judiciary, a cornerstone of our democracy, **[*157]** posed by unwarranted criticism or the targeting of Judges. Judges must remain free to render unpopular decisions that they believe are required by law. Valid and vital though these concerns surely are, the difficult issue that confronts us in this matter is how to sanction the serious misconduct--now fully documented **[**881]** **[***257]** before us--that the firestorm has exposed. **[****34]** Plainly, wrongdoing in connection with initiating an investigation could not insulate an unfit Judge; any such wrongdoing must be otherwise redressed. We are satisfied that in this particular case removal, rather than censure, does not imperil the independence of the judiciary. Indeed, on the merits of this case, the judiciary, the Bar, and the public are better served when an established course of misconduct is appropriately redressed and an unfit incumbent is removed from the Bench. [7]

[**35]** Accordingly, the determined sanction of removal should be accepted, without costs.

Dissent by: TITONE; BELLACOSA

Dissent

Titone, J. (Dissenting). By accepting without qualification the harsh sanction of removal for Judge Duckman's indiscretions, the majority has sent a message that the State's judicial disciplinary procedures are susceptible to manipulation by public officials and that Judges whose rulings displease those public officials may find themselves singled out for exceptional, and possibly ruinous, scrutiny. Because the outcome in this case strikes at the heart of the notion of judicial independence

[6] Plainly the objective here is not to require contrition, bended knee or forfeiture of spine in return for the privilege of continued service as a member of the judiciary (*see,* Bellacosa, J., dissenting opn, at 169), but rather to attempt to assess petitioner's fitness based on his prior conduct.

[7] This matter does not involve "second-guessing" the adjudicative work of Judges, nor does it open a new avenue for Commission intrusion into that work (*see,* Bellacosa, J., dissenting opn, at 164, 168). *Matter of Greenfield (76 NY2d 293)* involved a different issue--the time limits within which Judges should dispose of pending matters, an issue properly left in the first instance for the Judges themselves and secondarily for court administrators. Here the issue is not whether petitioner's decisions were right or wrong on the merits, but rather repeated, knowing disregard of the law to reach a result and courtroom conduct proscribed by the rules governing judicial behavior.

which is so critical to our tripartite system of government, I feel compelled to express my dissenting views.

The instant disciplinary proceeding did not begin in a vacuum, and its outcome cannot be assessed without reference to the political maelstrom that generated it. It is clear from the public record that petitioner was targeted for investigation and formal discipline because of the publicity he received in connection with a routine bail decision he made in a misdemeanor prosecution involving one Benito Oliver. Some three weeks after his release **[****36]** on bail, Oliver located his former girlfriend, **[*158]** Galina Komar, shooting her and then himself. The following day, the incident was reported by the New York City tabloids in sensational headlines which implied that petitioner was somehow to blame for the tragic incident. One tabloid blared a headline indicating that petitioner had said "[e]ven I beat my wife"--a remark that he never actually made.

The lurid newspaper coverage was followed only a few days later by a letter from the State Senate Majority Leader to the State Commission on Judicial Conduct demanding that petitioner's fitness be investigated immediately. At the same time, Governor Pataki initiated his own "investigation" of petitioner. These actions by two of the State's most powerful elected officials were part of a larger political climate in which Judges were increasingly being scapegoated. Beginning around the time of the Komar killing and continuing throughout the spring and fall of 1996, journalists specializing in sensational reportage and politicians anxious to capitalize on public fear combined to lay the blame for urban crime at the feet of "criminal coddling" Judges (*see generally,* Goshko, **[****37]** *Accusations of Coddling Criminals Aimed at Two Judges in New York,* Wash Post, Mar. 14, 1996, at A3; Olch, *Soft on Crime? Not the New York Court of Appeals,* NYLJ, May 6, 1996, at 1, col 1; Reske, *ABA Commission Defines Areas of Judicial Independence,* 82 [Dec. 1996] ABA J, 99; Reske, *Pointed Resignation Judge Blasts Politicization of Judiciary,* 82 [July 1996] ABA J, 40; Seymour, Jr., *Defending the Judiciary--An Open Letter to the Bar,* 38 [No. 2] NY St Bar Assn--St Bar News, at 1, col 2 [Mar./Apr. 1996]; Spencer, *Protection Order Abuse Elevated to Felony,* NYLJ, Aug. 9, 1996, at 1, col 3).

As the onslaught from the media continued, the Governor's office sent representatives to the Kings and Bronx County District Attorneys offices, apparently to obtain additional **[**882]** **[***258]** negative background material on Judge Duckman. These representatives were given access to one or more files containing transcripts of proceedings before Judge Duckman, which appear to have been ordered and preserved for some unspecified future use. Notably, some of these transcripts involving dismissed criminal charges were shown to the Governor's investigators without **[****38]** regard to the confidentiality rules that apply to sealed records (*see,* CPL 160.50). Having collected a list of complaints from trial assistants about petitioner's handling of their cases and his mistreatment of individual prosecutors, the investigators compiled a nine-page report that **[*159]** was ultimately forwarded to the Judicial Conduct Commission. [1]

On February 28, just two weeks after the Komar killing, the Governor made a highly publicized demand that the Judge who released the killer be suspended and that formal disciplinary proceedings against him be commenced. This demand was accompanied by an ultimatum, announced at a gubernatorial

[1] The Commission subsequently obtained a judicial order directing these records be unsealed so that they could be used in evidence at the judicial conduct proceeding against Judge Duckman.

press conference, that the Commission must either remove petitioner from office within 60 days or the Governor would initiate impeachment proceedings **[****39]** before the State Senate (*see, NY Const, art VI, § 23 [b]*).

On April 22nd, just a few days shy of the Governor's deadline, the Commission acted by announcing the filing of formal charges against petitioner. None of the charges were based on petitioner's bail decision in the *Oliver* case. Instead, the charges in question were cobbled together from a handful of incidents selectively drawn from tens of thousands of cases petitioner handled during his five-year tenure on the criminal Bench.

The majority's opinion details the evidence that led to the Commission's determination that petitioner should be removed, and there is no need to repeat the substance of that evidence here. Suffice it to say that, despite the fact that some 10,000 pages of transcripts were subpoenaed and scoured for petitioner's misdeeds, there were no clear "smoking guns"; there was only a list of petty offenses involving petitioner's "bullying" of prosecutors, his intemperate behavior and his improper dispositions of criminal charges in some 16 cases. The latter "misconduct" was evidently motivated by petitioner's view, expressed repeatedly on the record, that the particular prosecutions did not serve **[****40]** the interests of justice. Significantly, none of the 16 dismissed prosecutions in issue was deemed sufficiently important or meritorious to warrant an appeal, and none of the 19 incidents of intemperance were deemed sufficiently serious to warrant a disciplinary complaint.

What emerges from this sequence of events is a very disturbing picture. Given the timing of the investigation and the severity of the sanction imposed, the conclusion is inescapable that the Judicial Conduct Commission bowed to the Governor's political threats and allowed itself to be used to advance the **[*160]** agenda of the Judge baiters who were feeding off the media frenzy.

No one--including petitioner--disputes that some of the specific behavior revealed by the evidence before the Commission constitutes impropriety and may even be worthy of some sanction. The argument here is not that petitioner's performance has been beyond reproach, but rather that he has been subjected to an extraordinary degree of microscopic scrutiny under circumstances that cannot help but serve as an object lesson to other Judges faced with the possibility of making an unpopular decision. While the existence of intemperate **[****41]** conduct by other judicial officers does not justify any of petitioner's excesses, it is also true that few Judges who, like petitioner, have handled tens of thousands of cases--and sometimes as many as 100 to 200 a day--could withstand the kind of intense spotlight that has been aimed at petitioner's record.

The implication of the present disciplinary proceeding is that Judges whose rulings displease the political powers that be may be subjected to a modern-day witch hunt in which their records are combed for indiscretions, their peccadillos strung together to make out a "substantial record" of misconduct **[**883]** **[***259]** and their judicial "sins" punished with the ultimate sanction of removal from office. Indeed, in this case, the inference that petitioner has been removed at least in part because of his interest in protecting individual defendants' rights is reinforced by the Commission's emphasis on his purportedly antiprosecution bias and his statements criticizing the District Attorneys' policies. It is clearly contrary to the goal of judicial independence to suggest that a Judge may be singled out for discipline because of his or her expressed views on questions

affecting **[****42]** the criminal justice system. [2]

Our system of laws and the public's confidence in **[****43]** the judiciary rest in large measure on the notion that our Judges are **[*161]** free to rule on the issues before them without fear of retaliatory removal. Without that freedom, there is no assurance that the choices Judges make in situations often involving unpopular alternatives have the necessary level of integrity. There are few among us who have the courage and fortitude to take judicial stands at the risk of public humiliation and loss of office. It is for that reason that our State Constitution mandates lengthy terms of office for Judges and permits removal of Judges only after impeachment by the Legislature or for grave cause after a fair adjudicative process administered by the State Commission on Judicial Conduct (*NY Const, art VI, §§ 22, 23*; *see, Matter of Cunningham, 57 NY2d 270, 275*; *Matter of Steinberg, 51 NY2d 74, 81*).

The perception arising from this case that the Commission is itself susceptible to political influences cannot help but undermine the confidence of the State's Judges in these constitutional protections and chill the free exercise of their judicial discretion. A precedent has now been set in which politicians and **[****44]** local prosecutors have demanded the removal of a widely respected sitting Judge for what they perceived as "criminal coddling" and have *succeeded* in that demand. Now that the Commission has demonstrated its willingness to be hospitable to such machinations, it seems likely, indeed inevitable, that Judges will be intimidated and will frequently be tempted to err on the side of the prosecution in debatable situations rather than risking Judge Duckman's fate. Nothing could be more inimical to the health of our State's system for administering criminal justice.

The record here unquestionably reveals that Judge Duckman was occasionally guilty of intemperate conduct and that he knowingly misused his authority to terminate 16 prosecutions in order to achieve what he believed to be the ends of justice. Accordingly, since these matters were brought to the attention of the disciplinary authorities, some form of sanction should now be imposed. It seems to me, however, that Judge Duckman's record of service as a whole does not indicate any unfitness for judicial office. To the contrary, the hearing testimony and the flood of letters that were made available to the Commission indicates **[****45]** that overall he has been an intelligent, hard-working, knowledgeable and compassionate jurist. Furthermore, to the extent that he demonstrated intolerance or intemperance, he did not do so out of malevolent or venal **[*162]** motives; [3] rather, his actions were clearly motivated by compassion (*see, Matter of LaBelle, 79 NY2d 350*). **[**884]** **[***260]** Finally, Judge Duckman has apologized for his excesses and has indicated that they will not occur again. Thus, there is no need to invoke the extreme sanction of removal; the lesser sanction of censure will suffice. Since the use

[2] While actual bias or even the appearance of bias is unacceptable in a Judge (*see, Matter of Sardino v State Commn. on Judicial Conduct, 58 NY2d 286, 290-291*; *Matter of Spector v State Commn. on Judicial Conduct, 47 NY2d 462, 466*), it is commonplace for Judges to express their own viewpoints during the course of the proceedings before them. For example, sentencing minutes often contain statements by Judges about the evils of crime and the impact that criminal conduct has on society. Similarly, in pretrial proceedings, Judges frequently interject their own concerns about such policy questions as "overcharging" and prosecutorial delays in processing cases. Although it would clearly be improper for a Judge to bend or stretch the law to advance his or her views on such subjects, it would unrealistic--and probably even undesirable--to require total neutrality in judicial decision-making.

[3] Although Judge Duckman was charged with having made offensive racist and sexist remarks, the majority has wisely eschewed reliance on that aspect of the charges, since it is apparent from the record that Judge Duckman is not a person who harbors such biases.

of the removal power here not only deprives the public of a conscientious and hard-working Judge but also signals an unhealthy tolerance on the part of this Court for the heavy-handed tactics of would-be "Judge bashers," I dissent from the Court's acceptance of the Commission's imposed sanction.Dissenting opinion per Bellacosa, J.

[**46]** Bellacosa, J. (Dissenting). I, too, respectfully disagree in this separate dissenting opinion with the Per Curiam determination to remove this Judge from his judicial office. From my personal examination of this entire record, the evidence of sustainable misconduct does not rise to the extreme level of egregiousness, demanded by this Court's precedents, for that ultimate sanction to be imposed. Moreover, the precedential implications of this removal decision are daunting and disturbing (a) insofar as the future scope and operations of the Commission are concerned, and (b) for the future discharge of adjudicative responsibilities, especially by trial level judicial officers who have to maintain actual and perceptual independence from all outside influences.

This Court has consistently and appropriately set the bar of removal very high: it is "an extreme sanction [that] should be imposed only in the event of truly egregious circumstances" (*Matter of Cunningham, 57 NY2d 270, 275*; *compare, Matter of Roberts, 91 NY2d 93, with Matter of Skinner, 91 NY2d 142, 144*; *see also, Matter of Kiley, 74 NY2d 364, 369-370*; **[****47]** *Matter of Steinberg, 51 NY2d 74, 83)*. Our precedents ordain that "removal should not be ordered for conduct that amounts simply to poor judgment, or *even extremely poor judgment*" (*Matter of Cunningham, supra, 57 NY2d, at 275* [emphasis added]).

The heavily relied-on set of specifications in the instant case boils down to the overarching charge that Judge Duckman improperly handled 16 criminal proceedings: 13 dismissals for facial legal insufficiency, one dismissal in the interests of justice, and two adjournments in contemplation of dismissal. **[*163]** The accusations are that the Judge knowingly and wrongly dismissed these cases, without notice or an opportunity for the prosecution to be heard, without allowing a chance to redraft charges, without requiring written motions, and in the case of ACDs, without the consent of the prosecutor.

These extrapolated rulings were statutorily unauthorized and irregular devices; they constitute improper means to reach debatably correct ends. While they should not be countenanced, they do not equal disciplinary misconduct at the egregious level for removal from office. They absolutely do not represent **[****48]** a pattern of conduct in any realistic context and appraisal of the full record of this Judge's career. Rather, they are qualitatively and quantitatively exceptional, measured by a fair and proportional analysis of the full gamut and docket of any Judge, serving, as this Judge did, in such high volume and high intensity assignments, locales and courts. Thus, these few, never-appealed and disciplinarily resurrected remnants of cases are not so out-of-line as to justify removal of this Judge from his judicial office.

While I agree generally that this Court should resist "any numerical yardstick for determining unfitness" (Per Curiam opn, at 153-154), our precedents provide some measuring guideposts of the over-all judgmental quality and quantity necessary to elevate misconduct to a level of gravity that is required to impose the final and lifetime sanction of removal (*compare, Matter of LaBelle, 79 NY2d 350* [rejecting removal where the Judge failed to set bail without legal justification in approximately 24 cases], *with Matter of*

Sardino, 58 NY2d 286, 289-290 [upholding removal where the Judge (1) "consistently failed (in 62 cases) to inform the **[****49]** accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they were entitled **[**885]** **[***261]** to assigned counsel," (2) "regularly abused his authority with respect to setting bail," and (3) "often assumed an adversarial role at arraignments by questioning defendants"]; *compare also, Matter of Skinner, 91 NY2d 142, supra* [rejecting removal and imposing censure], *with Matter of Roberts, 91 NY2d 93, supra* [accepting removal]).

The record evidence in the instant case comes nowhere near the "distortion of the judicial function" that is reflected in *Matter of Sardino* (*supra*). This is especially so when weighed and evaluated within the precedential and judgmental universe of the multitude of other cited cases. To be sure, each disciplinary case with its sanction assessment is unique and different. Yet, the instant case fits closest to *Matter of LaBelle* (*supra*), where **[*164]** the majority of this Court rejected the removal recommendation and imposed a serious, public censure. I consider of very high concern and weight, therefore, that the breakthrough **[****50]** precedent established by this case will seriously and widely expand the reasonably balanced guidance that the governing principles have ordained--up to now that is. And let no one make any mistake as to the grave, plenary responsibility invested exclusively in this Court by the State Constitution: the Commission cannot remove a Judge; only this Court can, absent impeachment.

This case also presents an additionally disturbing and distinct precedential concern in this allocation of power--i.e., that the Commission could infer that it has a new obligation and intrusive authorization to poke into the adjudicative work of Judges, legitimatized by this Court's ultimate precedential acceptance of a determined sanction recommended by the Commission majority, insofar as it rests on these quintessentially decisional matters of dismissed cases (*compare, Matter of Greenfield, 76 NY2d 293*).

In *Greenfield,* this Court rejected the Commission's sanction, even of censure, where the record disclosed "serious administrative failings in petitioner's handling of the cases in issue, but no persistent or deliberate neglect of his judicial duties rising to the level of misconduct" **[****51]** (*id., at 295*). Although a Judge's failure to promptly dispose of pending matters is generally subject to administrative correction, the Commission pushed the envelope to urge "that at some point a Judge's failure to dispose of pending matters must be viewed as misconduct within its jurisdiction" (*id., at 297*). This Court emphatically rejected the Commission's misguided incursion, concluding that it "would overlap the jurisdiction clearly granted to those administering the courts" and "would permit the Commission to intervene in the administrative process whenever it believes that a Judge has failed to dispose of pending matters within unspecified time limits in an unspecified number of cases and on a case-by-case basis" (*id., at 297*). The instant case represents a far deeper incursion, insofar as the 16 now-disciplinarily challenged rulings are concerned, because the overlap and intervention drive into the very heart of the adjudicative administration and delivery of justice by a Trial Judge.

Furthermore, I am unable to accept that removal here may be justified under an exacerbation theory, related to a series of "instances of **[****52]** petitioner's inappropriate behavior in his dealings **[*165]** with persons appearing before him, demonstrating impatience and intolerance, even at times

ordering prosecutors who disagreed with him out of the courtroom" (Per Curiam opn, at 150-151). These unfit-to-serve characterizations are associated with and derived from a collection of misdeeds mixed with indecorous and indiscrete comments, admonitions, sarcasm and wisecracks. The utterances made in the rough-and-tumble world of the New York City arraignment and criminal courts are sharply contested, acontextual, selective and subjective. They also do not satisfy, on proportional record analysis, the substantive gravity needed for removal from judicial office (*compare, Matter of Agresta, 64 NY2d 327* [upholding censure]).

[886] [***262]** My reading of this record supports a contrary, or at least reasonably competing, point of view that the substance and credibility concerning many of the specifications of misconduct range from questionable-to-weak, and are subject to significant conflicting evidence favorable to the Judge's conduct and over-all performance of his judicial duties. The record fairly **[****53]** and fully appraised, provides reasonable-to-strong mitigating and countervailing evidence, in substantive detail and in credibility, which contradicts the negative debasings of the Judge's character and the unfounded projection of his permanent unfitness for judicial office.

For example, various witnesses called by the Judge, and even by the Commission, portray the Judge as an unbiased and knowledgeable Judge. A good deal of criticism has been heaped on him for bias against some prosecutors whom he apparently found deficient in performance; indeed, none of them filed any contemporaneous complaints or appeals against him anywhere until he became publicly vilified. They did, however, keep negative material in personal files over the years that was retrieved and projectiled into his disciplinary proceeding.

Thus, I consider it fair to select some particular competing evidence that I find particularly relevant and cogent on the sanction weighing issue. Barry Kamins, a former prosecutor, Chair of the Grievance Committee for the Second and Eleventh Judicial Districts, past president of the Brooklyn Bar Association, and recent cochair of that Association's Judiciary Committee, testified **[****54]** that he had observed Judge Duckman in court several hundred times over the years and that the Judge "is more knowledgeable about criminal law, in my opinion, than any other judge in the Criminal Court in Kings County" (Transcript, vol XVI, at 3324). He also testified that he never heard the Judge "shout or yell," but at most "heard him speak **[*166]** in a frustrating tone, which is not novel" (*id.*, at 3331). He testified that the Judge "holds both sides accountable" and that there is no "double standard" (*id.*, at 3333).

Former Judge and Acting Justice Alain Bourgeois, now a practicing attorney, also testified:

"From what I observed, he dealt with [issues] effectively, and although he was demanding of respective counsel, although he obviously held them to a high standard, I believed that he held them to an appropriate standard and an equivalent standard. I think the frustration that one feels sitting in the Criminal Court is difficult to contain; I didn't see it spill over in any way in Judge Duckman's handling of cases that I observed." (Transcript, vol XVI, at 3354.)

Juda Epstein, a former prosecutor who appeared before the Judge regularly, testified that the **[****55]** Judge "was absolutely down the line fair," that he did not treat the prosecution more harshly or differently from the way he treated the defense (Transcript, vol XVIII, at 3759, 3796). In fact, he testified that in one case, the defense attorney complained that the Judge was "too pro prosecutorial" (*id.*,

at 3796).

Gerald Allen, former Kings County prosecutor and former Deputy Bureau Chief of the Criminal Courts Bureau, called by the Commission, testified on cross-examination that the Judge was "definitely ... the best trial judge in the building" (Transcript, vol VII, at 1388), and that he exhibited "almost exclusively good behavior" (*id.,* at 1389).

These necessarily selective appraisals illustratively and strongly negate the mischaracterization of this Judge by the majority at the Commission on Judicial Conduct level (7 of 11 Commissioners). No matter how many favorable letters are assembled, however, they cannot make the case one way or the other on the appropriate sanction; no more, I respectfully submit, than the necessarily incomplete materials the Commission majority and this Court's Per Curiam opinion focus and rely on, and adopt. The whole record must be evaluated.

[**56]** It is, nevertheless, quite significant to me that more than 100 attorneys wrote to the Commission in early 1996 to protest the publicized ultimatums for the removal of Judge Duckman--concerning a media-intensified ruling that proved *not* to be misconduct. This varied array of personal letters and direct appraisals are part of the whole record. They depict an individual **[*167] [**887] [***263]** significantly different from and somewhat better than the "mean-spirited" and "bullying" Judge, sobriqueted by the Commission as some caricaturized martinet (*see,* Commission majority opn, at 7). The characterizations seem to me neither accurate, nor fair.

At least for some balance, it should be observed that the numerous evidentiary letters in the "Book of Letters" are neither from partisans, nor are they of merely character reference quality. They are from ordinary lawyers, court employees and others representing a wide cross section of people and professionals who worked in and around and observed Judge Duckman in the performance of his judicial duties over long and different periods of time. Surely, their real evidence is worthy of some consideration and greater **[****57]** weight than this material garnered from the Hearing Referee or the Commission itself--which apparently was naught.

These letters also provide and constitute empirical and directly relevant evidence presented as part of the defense case before the Commission on the sanction weighing issue. The credibility and lack-of-outcome interest of these many letter writers (thus enjoying some reasonable and creditable professional objectivity) are very illuminating for those who would look to the whole picture with its varying hues and textures. They are appropriate to weigh on the sanction mitigation aspects of this particular case, as this Court is exclusively obligated to do.

In sum, removing this Judge on this record represents a disproportionate redress, when examined in the dispassionate reflection of the less-than-egregious level of cobbled misconduct. This is especially so in the balance wheel of these overwhelmingly favorable, on-the-firing-line source appraisals of the Judge's adjudicative work and good character.

The genesis, breadth and nature of the exceedingly pervasive investigation of this Judge by the Commission staff are at least also contextually noteworthy. In my **[****58]** view, these features raise legitimate concerns and reflect an acutely unfair methodology with questionable motivation for the Commission's course of action. The diverse perceptions and evaluations, even among the Commission members, provide an eye opening window into understanding the skewed and distorted

process that propelled itself ultimately into this divided Commission recommendation. Seven members voted to recommend the most severe sanction, and they were even divided as to some specifications; four **[*168]** of the 11 Commissioners voted for censure only for differing reasons.

The dissenters at the Commission tendered an array of particulars for this Court to consider in mitigation of the sanction recommendation. They summarized their reasons for public censure as the sufficient level of redress, for example, as follows: (1) none of the acts committed resulted in a deprivation of liberty; (2) none of the acts was motivated by self-interest; (3) all of the improper dismissals involved misdemeanors; (4) on no occasion did prosecutors find Judge Duckman's knowingly erroneous dismissals of cases serious enough to warrant complaints to his judicial administrative superiors **[****59]** or even appeals by them as "aggrieved" litigant parties (though they instead chose to stockpile grievances in personal files for future retrieval to be used in collaboration with a drumbeat to remove a Judge for an unpopular decision); and (5) the instances of misconduct are few compared to the tens of thousands of cases Judge Duckman handled in his five-year career.

My judgment coincides with that of the dissenting Commissioners: the ultimate sanction here is disproportionate to the nature, number and gravity of the proven and acknowledged judicial misdeeds, misspeaks and mishaps. Under the applicable preponderance of the evidence standard, the case for the removal penalty falls short of the extreme egregiousness necessary. Since this Court is the only and exclusive guardian of a neutral and independent adjudication of these matters, it should reject the recommended sanction. Up to now I have concentrated essentially on the individual justice aspects of this Court's responsibility to accord to Judge Duckman all his rights of fair procedure and full review since we are his only court of review.

[*264]** **[**888]** Now I turn to the twin tower of this Court's role--precedential **[****60]** responsibility. Removal here will have an inescapably adverse impact in that quintessential universe, as it affects the vital and vibrant independence of the judicial function and branch of government. The conduct of Judges and the culture of the operation and decision-making in trial courts will be necessarily and materially altered and affected by today's decision. Many of the effects will be hidden from view, buried in the hearts and psyches of Judges as they think, work and worry their way through a myriad of dockets and rulings, peering or at least seeming to peer over their shoulders at severely scrutinizing critics, disappointed lawyers, disgruntled litigants and the second-guessing Commission itself. Other consequences **[*169]** include emboldening critics towards even more deconstructive attacks on Judges and their rulings at every turn, twitch and utterance. These combined visible and invisible consequences cannot help but threaten the independence and damage the integrity of the jewel of this State's judicial process--actually and perceptually. Fortunately, the judiciary and judicial process are strong and will survive, and so I agree with the Per Curiam opinion's **[****61]** observation that this case and circumstance do not create a state of peril. Yet, this does not bode well for the deliberative administration of justice.

Lastly, to the extent made relevant on the sanction determination, this Judge acknowledged on the record the inappropriateness of many of his actions (*compare,* Transcript, at 33, 53, 59, 66-68, 80, 81, 86, 97-98, *with* Per Curiam opn, at 155-156). In fact, in my view, the over-all tenor of

the Judge's testimony and positions before the Hearing Officer, the Commission and this Court, was apologetic and contrite.

Moreover, this Court's guiding precepts do not demand that Judges who are fighting for their professional lives and reputations must throw in the towel as part of their "defense" (*compare, Matter of Kiley 74 NY2d 364, 371, supra* [removal rejected and censure imposed] [adding this Court's wise caution against using "lack of candor" (something I would deem worse than asserted "lack of contrition") as an aggravating circumstance to pump up a more serious sanction]). Thus, Judges should not have to "kneel penitently in the snows of Canossa" before the Commission; Judge Duckman is not Emperor **[****62]** Henry IV and the Commission is not Pope Gregory VII.

It should suffice that accused Judges should tell the truth, be candid and acknowledge wrongdoing that they are truly guilty of and to the extent necessary and consistent with maintaining a defense against wrongful criticisms and charges. Indeed, even an appropriate measure of remorse and resolve to conform to acceptable judicial behavior and norms are prudent and useful. On the other hand, Judges surely are not obligated to plead guilty, no matter what is thrown at them, nor are they expected to rely merely on the "mercy" of the Commission.

I vote for censure only, because I am unconvinced and unable to pronounce that this Judge is incorrigibly and irredeemably unfit to serve as a Judge ever again.

Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley concur in Per Curiam opinion; Judge Titone dissents and votes to reject the determined sanction in a separate **[*170]** opinion; Judge Bellacosa dissents and votes to reject the determined sanction in another dissenting opinion.

Determined sanction accepted, without costs, and Lorin M. Duckman is removed from his office of Judge of the Criminal Court of the City **[****63]** of New York, Kings County.

End of Document

People v. Rose

City Court of New York, Rochester

December 9, 2005, Decided

05-03527

Reporter
11 Misc. 3d 200 *; 805 N.Y.S.2d 506 **; 2005 N.Y. Misc. LEXIS 2773 ***; 2005 NY Slip Op 25526 ****; 234 N.Y.L.J. 116

[**1]** The People of the State of New York, Plaintiff, v Kelly Rose and Kevin Puckhaber, Defendants.

Counsel: *Mark F. Cianca* for Kelly Rose, defendant. *Mark Young* for Kevin Puckhaber, defendant. *Michael C. Green*, District Attorney (*Tara Johnson* of counsel), for plaintiff.

Judges: Thomas Rainbow Morse, JCC.

Opinion by: Thomas Rainbow Morse

Opinion

[*200] **[**507]** Thomas Rainbow Morse, J.

[*201] The defendants have moved for dismissal of their driving while intoxicated (DWI) charges because the State Police issued computer generated simplified informations (hereinafter referred to as e-tickets) rather than the multicopy handwritten simplified traffic informations used for decades across New York State (hereinafter referred to as UTTs). Since there are no reported cases regarding the validity of prosecutions based on e-tickets, these two cases were consolidated for purposes of a hearing at which the People presented testimony from the state troopers who arrested the defendants and from Lieutenant Leonard Casper, the officer in charge of technology for the New York State Police. [1] As such, he was responsible for coordinating **[***2]** the development of the software and protocols for the use of e-tickets by law enforcement in New York. While rigorous cross-examination of Lieutenant Casper by both defense counsel highlighted several serious areas of concern which might merit further consideration by the law enforcement community and the Legislature, the court finds that the e-tickets filed with this court together with hand signed supporting depositions provide a valid jurisdictional basis upon which these DWI cases may be prosecuted.

Simplified Traffic Informations and Supporting Depositions

The DWI charges in these cases were commenced by filing simplified traffic informations and supporting depositions rather than misdemeanor informations. Under our law as it applies in this **[***3]** case, such a simplified information is

> "a written accusation by a police officer ... filed with a local criminal court, which charges a person with the commission of one or more traffic infractions and/or misdemeanors relating to traffic, and which, being in a brief or simplified form **[****2]** prescribed by the

[1] Although rarely used, the Criminal Procedure Law does provide for the possibility of a factual hearing where the insufficiency of a local court accusatory instrument is alleged. CPL 170.45, 210.45 (6).

commissioner of motor vehicles, designates the offense or offenses charged but contains no factual allegations of an evidentiary nature supporting such charge or charges. It serves as a basis for commencement of a criminal action for such traffic offenses, alternative to the charging thereof by a regular information, and, under circumstances prescribed in section 100.25, it **[**508]** may serve, either in **[*202]** whole or in part, as a basis for prosecution of such charges." [2]

As noted by the Court of Appeals, "[t]he simplified information is a statutory creation designed to provide an uncomplicated form for handling the large volume of traffic infractions and petty offenses for which it is principally used. It need not provide on its face reasonable cause to believe defendant has committed the offense." [3] When standing alone, it "must be substantially in the form prescribed by the **[***4]** commissioner of motor vehicles." [4] Two factors distinguish a simplified information from other local court accusatory instruments. First, although it contains specific information regarding the offense, it does not contain "factual allegations of an evidentiary nature." Secondly, unlike informations, misdemeanor and felony complaints, a simplified information is not a "verified written accusation." [5]

[*5]** If requested, sworn facts will be provided in a supporting deposition from the arresting officer which must "contain[] allegations of fact, based either upon personal knowledge or upon information and belief, providing reasonable cause to believe that the defendant committed the offense or offenses charged." [6] Importantly, this deposition must be "subscribed and verified." [7] The facts, however, need not be handwritten. Our highest court has sanctioned the use of "fill in the blank" supporting depositions in DWI cases noting that "the factual statements in the deposition are communicated by check marks made in boxes next to the applicable conditions and observations signifying the complainant's allegations as to the existence of those conditions **[****3]** and the truth of those observations." [8]

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[2] CPL 100.10 (2) (a); see also **CPL 1.20 (2), (5)**; 150.50 (1).

[3] People v Nuccio, 78 NY2d 102, 104, 575 NE2d 111, 571 NYS2d 693 (1991) (citations omitted).

[4] CPL 100.25 (1); see also People v Nuccio, at 104.

[5] CPL 100.10 (3), (4), (5) see also CPL 100.30 (1). Prior to the enactment of the Criminal Procedure Law, the Court of Appeals held that allowing prosecution for a misdemeanor DWI based on a "mere unverified summons" denied a defendant "an essential guarantee ... of a fundamental right, namely, that he be not punished for a crime without a formal and sufficient accusation." People v Scott, 3 NY2d 148, 153, 143 NE2d 901, 164 NYS2d 707 (1957). In this court's view, however, the precedential value of this holding was vitiated by the CPL's new statutory framework which provides a right to a verified supporting deposition.

[6] CPL 100.25 (2); see also CPL 150.10 (2).

[7] CPL 100.20.

[8] People v Hohmeyer, 70 NY2d 41, 43, 510 NE2d 317, 517 NYS2d 448 (1987). A valid accusatory instrument is a nonwaivable jurisdictional prerequisite to a valid local court prosecution and that issue may be raised at any time during the proceeding including being raised for the first time on appeal. People v Peacock, 68 NY2d 675, 496 NE2d 683, 505 NYS2d 594 (1986); People v Alejandro, 70 NY2d 133, 511 NE2d 71, 517 NYS2d 927 (1987). The supporting deposition is akin to the factual portion of other local court accusatory instruments. However, as "long as the factual allegations of an [accusatory instrument] give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense, they should be given a fair and not overly restrictive or technical reading." People v Konieczny, 2 NY3d 569, 575, 813 NE2d 626, 780 NYS2d 546 (2004) (citation omitted); see also People v Casey, 95 NY2d 354, 360, 740 NE2d 233, 717 NYS2d 88 (2000); People v Allen, 92 NY2d 378, 385, 703 NE2d 1229, 681 NYS2d 216 (1998) compare People v Thomas, 4 NY3d 143, 146, 824 NE2d 499, 791 NYS2d 68 (2005) and People v Inserra, 4 NY3d 30, 32, 823 NE2d 437, 790 NYS2d 72 (2004).

[*6]** **[*203]** Troopers Loewke and Blum hand signed similar "fill in the blank" verified depositions **[**509]** in the cases before this court. As observed by the Court of Appeals, "[a] verification attesting to the truth of the contents of a document on penalty of perjury is of the same effect as a testimonial oath, which at once alerts a witness to the moral duty to testify truthfully and establishes a legal basis for a perjury prosecution." [9] The failure to properly verify a supporting deposition may result in a jurisdictionally defective accusatory instrument which is subject to dismissal. [10]

[*7]** It is within this legislative and common-law context that, as the millennium approached, several segments of state government began thinking about the opportunities presented by maturing computer technologies. The New York State Police and Department of Motor Vehicles started studying e-tickets and the efficiencies of data entry, transfer and retrieval which they presented. [11]

[*204] E-Tickets and the Electronic Signatures and Records Act

[**4]** The advent of the *Electronic Signatures and Records Act (ESRA)*, [12] recognized that we had entered a new era in the public **[***8]** and private sectors "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities," [13] and the rules accompanying the legislation were intended "to be flexible enough to embrace future technologies that comply with ESRA" [14] **[***9]** by giving "governmental entities the greatest latitude to determine the most effective protocols for producing, receiving, accepting, acquiring, recording, filing, transmitting, forwarding and storing electronic signatures and electronic records within the confines of existing statutory and regulatory requirements regarding privacy, confidentiality and records retention." [15] The electronic records encompassed by the statute include "information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by **[**510]** human sensory capabilities." [16]

State law predated federal legislation in this area [17] and in 2002, the New York definition of "electronic signature" was circumscribed to

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[9] *Matter of Neftali D., 85 NY2d 631, 635-636, 651 NE2d 869, 628 NYS2d 1 (1995)* (citations omitted).

[10] *Matter of Neftali D. at 636* *compare* ***People v Holmes, 93 NY2d 889, 890-891, 711 NE2d 965, 689 NYS2d 687 (1999)*** (in verifying an accusation the complainant must appreciate the significance of that act) *with Matter of Shirley v Schulman, 78 NY2d 915, 917, 577 NE2d 1048, 573 NYS2d 456 (1991)* ("[i]nasmuch as neither the notice of violation nor the complaint violation was verified pursuant to *CPL 100.30*, they were not valid as accusatory instruments"). In a case prosecuted by simplified information, if a supporting deposition is requested in a timely fashion, the failure to provide one within the established time frame "renders the simplified information insufficient on its face." *CPL 100.40 (2)*.

[11] According to Lieutenant Casper's testimony before this court, the New York State Police recognized in early 2000 that with over 3.9 million handwritten uniform traffic tickets having been issued the year before, advances in computer technology could offer some real benefits to law enforcement, the Department of Motor Vehicles and the courts. Transcript of proceedings on June 25, 2005 at 22-23.

[12] This part of the State Technology Law became effective on March 27, 2000.

[13] *State Technology Law § 302 (1)*.

[14] ***9 NYCRR 540.1 (c)***

[15] ***9 NYCRR 540.1 (f)***. The statutory business record exception, *CPLR 4518*, was amended to incorporate ESRA's provisions and ESRA incorporates its provisions by reference into our rules of evidence under the CPLR. *State Technology Law § 306*.

[16] *State Technology Law § 302 (2)*.

[17] Electronic Signatures in Global and National Commerce Act (*15 USC § 7001 et seq.*).

provide symmetry with federal law. [18] Since then, an electronic signature has meant "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." [19] The statutory framework and legislative history of ESRA illustrate that its main focus is on **[*205]** commercial and public record applications rather than law enforcement use. Nonetheless, based on the testimony presented before this court, it would appear that the decision **[****5]** to substitute e-tickets for the **[***10]** often illegible multiple copy uniform traffic tickets was an appropriate and logical extension within the purview of ESRA.

Accordingly, the court finds no difficulty in accepting the statutory propositions **[***11]** that "[t]he use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand," [20] and that "[a]n electronic record shall have the same force and effect as those records not produced by electronic means." [21] What troubles the court is that with regard to accusatory instruments certain additional statutory safeguards and procedural protocols may be in order.

Development and Processing of E-Tickets Following ESRA

During the hearing, it became clear that in early 2001, the New York State Police, the Department of Motor Vehicles (DMV), the Division of Criminal Justice Services (DCJS), the Office of Court Administration (OCA), the State Magistrate's and Court Clerk's Associations among others became involved in a project to explore the possibility of using e-tickets to replace handwritten uniform traffic tickets. [22] After reviewing **[***12]** the concerns and needs of all affected parties, the State Police chose Traffic and Criminal Software (TRACX) to be used for the project and a pilot program was initiated in Warren County in November 2001. [23] Following a successful refinement process there, the program was made available statewide. TRACX was used by the State Police in both of the cases before this court. [24]

Under the TRACX system, the police car must be equipped with a computer terminal, a printer and a bar code scanner **[*206]** which also functions as a digital imager. [25] **[**511]** When issuing a ticket under the Vehicle and Traffic Law, a trooper clicks on the computer screen icon to enter the program and types in his or her user name and personal **[***13]** password. The computer then brings up the appropriate template which is immediately populated with information unique to that trooper including the trooper's electronic signature which he or she had previously scanned into the computer. [26] At that point, the

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[18] Laws of 2002 (ch 314, § 1).

[19] *State Technology Law § 302 (3)*. Before the change, such an electronic signature also included an

"identifier, including without limitation a digital signature, which is unique to the person using it, capable of verification, under the sole control of the person using it, attached to or associated with data in such a manner that authenticates the attachment of the signature to particular data and the integrity of the datatransmitted, and intended by the party using it to have the same force and effect as the use of a signature affixed by hand."

This portion of the law was deleted from *State Techonology Law § 102 (3)*, the predecessor statute to *section 302 (3)* in 2002 (L 2002, ch 314, § 2).

[20] *State Technology Law § 304 (2)*.

[21] *State Technology Law § 305 (3)*.

[22] Transcript at 22-24, 73.

[23] Transcript at 20.

[24] It appears TRACX, which was originally developed in Iowa with federal support, is now in use in 24 states and two Canadian provinces and is utilized by 156 law enforcement agencies here in New York State. Transcript at 20, 23, 31.

[25] Transcript at 31.

[26] Transcript at 33.

e-ticket is blank in many respects and does not contain any information relating specifically to the individual being ticketed. [27] Using the bar codes on the **[****6]** defendant's license and registration, the officer scans them electronically, inserting on the ticket information relating to the driver and the car stopped. [28] After the template is populated with that data, the trooper manually inserts information regarding the type of arrest, location of the offense, section of law violated (including miles per hour if appropriate), court data and future date of the defendant's appearance to answer the ticket. [29] Once all the data has been entered, the trooper checks a button to validate the ticket, a process which alerts the trooper to any misentries and provides an opportunity for the trooper to correct any errors. [30] After any corrections have been made, the trooper clicks on the validate button. According to the testimony at the hearing, validating **[***14]** the ticket is not the same as electronically signing it. Once the ticket has been validated, a copy is printed out for the driver. It is only when the ticket is printed that the information is "locked" in the computer and cannot be altered by the trooper or his or her supervisors. [31] **[***15]** If multiple tickets are issued to the driver, the trooper has the option to click on the button marked "replicate" and a copy of the ticket appears already populated with trooper, driver, car, location and court information to which the trooper can then add the specific section of the Vehicle and Traffic Law allegedly violated. [32] After the trooper's tour of duty, all simplified informations issued are downloaded into the computer at the state police substation and **[*207]** through a series of network connections are distributed to OCA and DMV among others. [33]

Through cross-examination at the hearing it became apparent that e-tickets differ in a number of important respects from UTTs. [34] First, with e-tickets there is only one document: the simplified traffic information. Everyone receives a duplicate original of the e-ticket with the arresting officer's electronic signature affixed. Second, **[**512]** the e-ticket is printed in one color. Third, it is one-sided. While in the court's view, it would be advisable **[***16]** for the Commissioner of Motor **[****7]** Vehicles to more specifically delineate regulations regarding the form of electronic tickets as has been done with UTTs, [35] the e-tickets still "conform substantially to a paper ticket" [36] and are not a basis for dismissal since on its face the e-ticket "substantially conforms to the requirement therefor prescribed by" the Criminal Procedure Law, Vehicle and Traffic Law and the Commissioner's regulations. [37]

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[27] Transcript at 39-43.

[28] Transcript at 32-33. Absent those documents, the trooper enters the information manually.

[29] Transcript at 44-46.

[30] Transcript at 47-49, 77.

[31] Transcript at 87. The TRACX administrator is the only person able to alter information at that point. *Id.*

[32] Transcript at 82.

[33] Two flow charts were entered into evidence showing the electronic trail of a simplified information. The New York State Police (NYSP) substation computer transmits the informations and depositions entered by each trooper to a NYSP secure network. From their central computer it is then made available to the New York Statewide Police Information Network (NYSPIN), a secure network. From the NYSPIN it is transferred to a secure state repository or gateway server. From there it is made available to OCA and DMV secure networks, DCJS and the Department of Transportation database. The OCA network then makes the simplified informations and supporting depositions available to the courts.

[34] *See generally* 15 NYCRR part 91--Uniform Traffic Ticket.

[35] *See* Vehicle and Traffic Law §§ 207, 215.

[36] 15 NYCRR 91.21 (c).

[37] CPL 100.40 (2).

The fourth difference, however, is more problematic: the e-ticket is "signed" before any information regarding the traffic stop is placed on the ticket. Thus, the arresting officer is signing an essentially blank document. If a simplified information was required by **[***17]** law to be verified, this distinction alone would be fatal to an e-ticket since the signature affirms only what appears before it in the document. [38] In the case of e-tickets, the arresting officer would be affirming nothing specifically relating to the motorist, the vehicle or the offense allegedly committed since none of that information is entered on the e-ticket until after it is electronically signed. Since the Commissioner's rules **[*208]** indicate that an arresting officer's signature on a UTT "constitutes the affirmation of the information under penalty of perjury," [39] the absence of such a provision in the rules relating to e-tickets is troubling to the court. What rescues the prosecution in these cases is the fact that the "fill in the blank" supporting depositions were not generated electronically but were hand signed by the troopers. [40]

While the simplified informations charging these defendants with DWI are sufficient, it is respectfully suggested that the Legislature and the Commissioner of Motor Vehicles work with dispatch to address some of the concerns raised by this opinion. While the bill recently passed by our State Senate may be a first step in this process, [41] **[***18]** our common-law traditions dictate that further steps should be taken.

Recommendations For Regulatory and Legislative Action Regarding E-Tickets

Since the Criminal Procedure Law and Vehicle and Traffic Law defer in great measure to the Motor Vehicle Commissioner's rule-making authority, the most expedient changes may be **[****8]** **[***19]** accomplished by amending the rules relating to e-tickets. [42] Specifically, the rules should describe in detail the form of the ticket to make it clear that it is one-sided and in one color. The rules should set forth a type size and location on the e-ticket for notice with regard to how one may appear and answer a ticket as well as sanctions **[**513]** which may be imposed for failure to appear. [43] **[***20]** More importantly, the rules should require that the last act by an officer issuing an e-ticket should be to click on an "I affirm" button on the computer which is preceded on the screen by a form notice which mirrors that on the simplified information that indicates it is "affirmed under penalty of perjury." As Lieutenant Casper candidly admitted at the hearing, there is no **[*209]** reason why the software can't be reprogrammed to accomplish such an affirmation. [44]

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[38] *Compare* People v Smith, 258 AD2d 245, 250, 697 NYS2d 783 (4th Dept 1999) (preprinted seal and signature on blank DMV abstracts provide insufficient authentication), *lv denied* ***94 NY2d 829, 724 NE2d 392, 702 NYS2d 600 (1999)***.

[39] *15 NYCRR 91.18 see also 15 NYCRR 91.11 (a)*.

[40] Lieutenant Casper testified that the only computer generated depositions with electronic signatures used by the State Police at that time were filed in speeding cases. Since depositions filed in conjunction with simplified informations must by law be verified, such electronically presigned depositions may be jurisdictionally invalid.

[41] 2005 NY Senate Bill S 4022.

[42] *15 NYCRR 91.21*.

[43] The notice regarding failure to appear would seem to be especially important to prosecutors in light of recent rulings regarding proving knowledge of license suspension in aggravated unlicensed operation cases. *See* People v Pacer, 21 AD3d 192, 796 NYS2d 787 (4th Dept 2005).

[44] The Lieutenant was asked:

"Is there any reason that you know, given your background in technology, why you couldn't create the program that says 'okay, we validated everything first round, everything is correct, now, Trooper, either you're going to sign it or decide that you're not going to sign the ticket.' Any reason you couldn't do it at that point?"

While such rule changes may be sufficient where prosecutions are based on simplified informations alone, they may not go far enough in those cases where a supporting deposition is prepared to accompany the e-ticket. In those cases, the court respectfully suggests that the Legislature needs to make a number of amendments to the Criminal Procedure Law and Vehicle and Traffic Law. First, since the more restrictive definition of "electronic signature" was deleted from ESRA solely because of compatibility concerns in commercial applications, that or similar language should be incorporated into a Criminal Procedure Law definition of "electronic signature" to appear in *section 1.20*. [45] That **[***21]** definition would then define such a signature not only for e-ticket supporting depositions, but could also be used in conjunction with other accusatory instruments and papers filed with the criminal courts. The CPL article defining verification should be amended to refer to the new protections in *CPL 1.20* for electronic signatures and then explicitly state that a verifying signature can be signed electronically as long as those safeguards are in place.

Obviously, the most important facet of an electronic signature used in our criminal courts must be the insistence that the electronic signature can be affixed only by a knowing and purposeful act by the person intending to sign the document. That could be accomplished by clicking on a form notice indicating the signer's acknowledgment that "false statements made therein are punishable as a class A misdemeanor pursuant to *section 210.45 of the penal law*." [46] **[****9]** **[***22]** Such an act would be similar to what computer users do when they install a new program on their computers and agree to the terms of the software developer in order to activate the program. Or, the individual could sign a pressure sensitive screen after viewing the document and reading a verification notice or being sworn by a court, notary or **[*210]** desk sergeant. [47] That process would be similar to that undertaken by customers who pay with a credit or debit card at some retail outlets. It would appear that in the latter cases, the person before whom the individual swore to tell the truth would also have to electronically sign the document. It would seem prudent to also add to *articles 100*, **[**514]** *150* and *170 of the Criminal Procedure Law* as well as *section 207 of the Vehicle and Traffic Law* which presently does not reference either simplified informations or e-tickets--rather by its terms it covers issuance of a "uniform traffic summons and complaint."

[*23]** Conclusion

Until the suggested changes to the TRACX protocol regarding the timing of electronic signatures being affixed to supporting depositions are made, prosecutions by electronic ticket using only such signatures on supporting depositions may be seriously flawed. At the very least, in cases such as these wherein a conviction becomes a predicate for a felony prosecution with its attendant potential for civil disabilities (such as the loss of the right to vote), general orders for troopers and arresting officers should require them to send a hard copy of the supporting deposition to the court with a second handwritten signature affixed following the perjury notice and just before or after the electronic signature. While our laws should be flexible enough to account for technological innovations which foster greater accountability, increased information availability and fiscal responsibility, our common-law traditions

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He replied, "No sir. No reason at all." Transcript at 54.

[45] See the language quoted in n 19, *supra* at 204.

[46] *See* CPL 100.30 (1) (d).

[47] *See* CPL 100.30 (1) (a), (b), (c), (e).

dictate that a defendant's due process rights deserve at least an equal footing.

Because the supporting depositions filed with the court in each of these cases bear original signatures, the motions to dismiss the DWI charges are denied. [48]

[*24]** [Portions of opinion omitted for purposes of publication.]

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[48] The motions filed and the court's oral decision encompassed a number of issues; this written decision, however, addresses only the sufficiency of the e-tickets charging DWI.