Reset Form

STATE OF NEW YORK

COUNTY OF

UCS-514 (rev. 06/02/2023)

The People of the State of New York

vs.

_____

AKA(s): _____

Address: _____

Sex: Race: DOB: _____

Securing Order

Docket/Case Number: _____

CJTN: _____

NYSID: _____

EYO: ○Yes ○No YO: ○Yes ○No

The above-named defendant is ○ **CHARGED WITH** or ○ **CONVICTED OF** the following offense(s):

Charge	Charge Weight	Charge Description	No. of Counts

The Court has considered the kind and degree of control or restriction necessary to reasonably assure the defendant's return to court and compliance with any court conditions and has selected a securing order consistent with its determination under CPL 510.10(1). If not placed on the record, the basis for court's determination and choice of securing order is as follows:

It is **ORDERED** that the defendant is *(select one)*:

○ **Released on recognizance**.

○ **Released under non-monetary conditions as follows** *(check all that apply)*:

☐ Contact with pre-trial services as follows:

☐ Placement in pre-trial supervision as follows:

☐ Placement by pre-trial supervision in mandatory programming as follows:

☐ counseling ☐ mental health treatment ☐ chemical dependence treatment ☐ violence intervention ☐ other

☐ Referral to a crisis stabilization center as follows:

☐ Removal to a hospital pursuant to section 9.43 of the mental hygiene law

☐ Travel restrictions as follows:

☐ Surrender passport

☐ Refrain from possessing a firearm, destructive device, or dangerous weapon

☐ Refrain from associating with certain persons connected with this case as follows:

☐ Make diligent efforts to maintain: ☐ employment ☐ housing ☐ enrollment in school or educational programming

☐ Obey any order of protection issued by a court of competent jurisdiction in this state, another state, or a territorial or tribal jurisdiction

☐ Obey conditions set by the court addressed to the safety of a victim of a family offense as defined in CPL §530.11

☐ Electronic monitoring under the supervision of _____ for a period of _____ days as follows:

☐ Other conditions:

○ **Committed to the custody of** _____ **and bail is fixed as follows** *(select at least 3 types, except for nominal bail)*:

- ○ [*Juvenile Offender*] to be lodged in a place certified by the Office of Children and Family Services as a juvenile detention facility for the reception of children, being a Juvenile Offender at the time the crime was allegedly committed.
- ○ [*Adolescent Offender*] to be lodged in a place certified by the Office of Children and Family Services and the State Commission on Corrections as a specialized secure juvenile detention facility for older youth, being an Adolescent Offender at the time the crime was allegedly committed.
- ☐ *(check if applicable)* Pursuant to CPL §510.10(5), although the Court would not or could not otherwise require bail or remand, the Court has set nominal bail in the form specified in CPL § 520.10(1)(a) upon the defendant's voluntary request. (***NOTE:*** *The form of bail specified in CPL § 520.10(1)(a) is <u>cash bail</u>* only.)
- ☐ $_____ Cash, or
- ☐ $_____ Credit Card or similar device, or
- ☐ $_____ Insurance Company Bail Bond, or
- ☐ $_____ Secured Appearance Bond (*Form CRC 3292*), or
- ☐ $_____ Partially Secured Appearance Bond with a _____% deposit (*Form CRC 3293*), or
- ☐ $_____ Unsecured Appearance Bond (*Form CRC 3294*), or
- ☐ $_____ Secured Surety Bond (*Form CRC 3292*), or
- ☐ $_____ Partially Secured Surety Bond with a _____% deposit (*Form CRC 3293*), or
- ☐ $_____ Unsecured Surety Bond (*Form CRC 3294*).

NOTE: A partially secured and/or unsecured surety bond must be selected.

NOTE: *Surety or appearance bonds must be submitted to the court using the applicable form as indicated above and require approval by the court before the defendant may be released from custody.*

☐ *(check if applicable)* **Nominal bail** on this matter is set at one dollar ($1) because defendant currently has other detainers/holds. Once all other detainers/holds, excluding other criminal cases secured by one dollar ($1) bail, are satisfied, the securing order on this matter **will convert to release on recognizance**, subject to any additional conditions of release indicated below, without further action by the court.

☐ Additional conditions of the defendant's release upon the posting of monetary bail are as follows *(check all that apply)*:

- ☐ Contact with pre-trial services as follows:
- ☐ Placement in pre-trial supervision as follows:
- ☐ Placement by pre-trial supervision in mandatory programming as follows:
  ☐ counseling ☐ mental health treatment ☐ chemical dependence treatment ☐ violence intervention ☐ other
- ☐ Referral to a crisis stabilization center as follows:
- ☐ Removal to a hospital pursuant to section 9.43 of the mental hygiene law
- ☐ Travel restrictions as follows:
- ☐ Surrender passport
- ☐ Refrain from possessing a firearm, destructive device, or dangerous weapon
- ☐ Refrain from associating with certain persons connected with this case as follows:
- ☐ Make diligent efforts to maintain: ☐ employment ☐ housing ☐ enrollment in school or educational programming
- ☐ Obey any order of protection issued by a court of competent jurisdiction in this state, another state, or a territorial or tribal jurisdiction
- ☐ Obey conditions set by the court addressed to the safety of a victim of a family offense as defined in CPL §530.11
- ☐ Other conditions:

○ **Committed to the custody of _____ and remanded without bail**.

- ○ [*Juvenile Offender*] to be lodged in a place certified by the Office of Children and Family Services as a juvenile detention facility for the reception of children, being a Juvenile Offender at the time the crime was allegedly committed.
- ○ [*Adolescent Offender*] to be lodged in a place certified by the Office of Children and Family Services and the State Commission on Corrections as a specialized secure juvenile detention facility for older youth, being an Adolescent Offender at the time the crime was allegedly committed.

It is further **ORDERED** that the defendant's future attendance in court is required as follows:

Court Name:	
Address:	
City, State, Zip:	
Date/Time:	_____ at _____ ○AM ○PM
Part/Room/Floor:	
Before Judge:	
For the purpose of:	

TAKE NOTICE that:

- a defendant released on recognizance, or under non-monetary conditions, or after posting bail must appear in court as directed, must not commit a crime, must obey conditions of release, if any, and shall be subject to consequences set forth on the record for violation of release conditions, including but not limited to revoking the current securing order and imposing a more restrictive securing order.
- a defendant committed to custody shall be produced by the custodial authority as directed, and upon release from custody, the custodial authority shall advise the defendant of the obligation to appear in court on the next scheduled court date as directed by the court.

Dated: _____

_____

Hon. _____

Justice/Judge

Print Form

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 120. Warrant of Arrest (Refs & Annos)

McKinney's CPL § 120.90

§ 120.90 Warrant of arrest; procedure after arrest

Effective: October 1, 2019
Currentness

1. Upon arresting a defendant for any offense pursuant to a warrant of arrest in the county in which the warrant is returnable or in any adjoining county, or upon so arresting him or her for a felony in any other county, a police officer, if he or she be one to whom the warrant is addressed, must without unnecessary delay bring the defendant before the local criminal court or youth part of the superior court in which such warrant is returnable, provided that, where a local criminal court or youth part of the superior court in the county in which the warrant is returnable hereunder is operating an off-hours arraignment part designated in accordance with paragraph (w) of subdivision one of section two hundred twelve of the judiciary law at the time of defendant's return, such police officer may bring the defendant before such local criminal court or youth part of the superior court.

2. Upon arresting a defendant for any offense pursuant to a warrant of arrest in a county adjoining the county in which the warrant is returnable, or upon so arresting him for a felony in any other county, a police officer, if he be one delegated to execute the warrant pursuant to section 120.60, must without unnecessary delay deliver the defendant or cause him to be delivered to the custody of the officer by whom he was so delegated, and the latter must then proceed as provided in subdivision one.

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

4. Upon arresting a defendant for an offense other than a felony pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or one adjoining it, a police officer, if he be one delegated to execute the warrant pursuant to section 120.60, may hold the defendant in custody in the county of arrest for a period not exceeding two hours for the purpose of delivering him to the custody of the officer by whom he was delegated to execute such warrant. If the delegating officer receives

custody of the defendant during such period, he must proceed as provided in subdivision three. Otherwise, the delegated officer must inform the defendant that he has a right to appear before a local criminal court for the purpose of being released on his own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the officer must request him to make, sign and deliver to him a written statement of such fact, and if the defendant does so, the officer must retain custody of him but must without unnecessary delay deliver him or cause him to be delivered to the custody of the delegating police officer. If the defendant does desire to avail himself of such right, or if he refuses to make and deliver the aforementioned statement, the delegated or arresting officer must without unnecessary delay bring him before a local criminal court of the county of arrest and must submit to such court a written statement reciting the material facts concerning the issuance of the warrant, the offense involved, and all other essential matters relating thereto. Upon the submission of such statement, such court must release the defendant on his own recognizance or fix bail for his appearance on a specified date in the court in which the warrant is returnable. If the defendant is in default of bail, the officer must retain custody of him but must without unnecessary delay deliver him or cause him to be delivered to the custody of the delegating officer. Upon receiving such custody, the latter must without unnecessary delay bring the defendant before the court in which the warrant is returnable.

5. Whenever a police officer is required pursuant to this section to bring an arrested defendant before a town court in which a warrant of arrest is returnable, and if such town court is not available at the time, such officer must, if a copy of the underlying accusatory instrument has been attached to the warrant pursuant to section 120.40, instead bring such defendant before any village court embraced, in whole or in part, by such town, or any local criminal court of an adjoining town or city of the same county or any village court embraced, in whole or in part, by such adjoining town. When the court in which the warrant is returnable is a village court which is not available at the time, the officer must in such circumstances bring the defendant before the town court of the town embracing such village or any other village court within such town or, if such town court or village court is not available either, before the local criminal court of any town or city of the same county which adjoins such embracing town or, before the local criminal court of any village embraced in whole or in part by such adjoining town. When the court in which the warrant is returnable is a city court which is not available at the time, the officer must in such circumstances bring the defendant before the local criminal court of any adjoining town or village embraced in whole or in part by such adjoining town of the same county.

5-a. Whenever a police officer is required, pursuant to this section, to bring an arrested defendant before a youth part of a superior court in which a warrant of arrest is returnable, and if such court is not in session, such officer must bring such defendant before the most accessible magistrate designated by the appellate division of the supreme court in the applicable department to act as a youth part.

6. Before bringing a defendant arrested pursuant to a warrant before the local criminal court or youth part of a superior court in which such warrant is returnable, a police officer must without unnecessary delay perform all fingerprinting and other preliminary police duties required in the particular case. In any case in which the defendant is not brought by a police officer before such court but, following his arrest in another county for an offense specified in subdivision one of section 160.10, is released by a local criminal court of such other county on his own recognizance or on bail for his appearance on a specified date before the local criminal court before which the warrant is returnable, the latter court must, upon arraignment of the defendant before it, direct that he be fingerprinted by the appropriate officer or agency, and that he appear at an appropriate designated time and place for such purpose.

7. Upon arresting a juvenile offender or adolescent offender, the police officer shall immediately notify the parent or other person legally responsible for his care or the person with whom he is domiciled, that the juvenile offender or adolescent offender has been arrested, and the location of the facility where he is being detained.

8. Upon arresting a defendant, other than a juvenile offender, for any offense pursuant to a warrant of arrest, a police officer shall, upon the defendant's request, permit the defendant to communicate by telephone provided by the law enforcement facility where the defendant is held to a phone number located anywhere in the United States or Puerto Rico, for the purposes of obtaining counsel and informing a relative or friend that he or she has been arrested, unless granting the call will compromise an ongoing investigation or the prosecution of the defendant.

Credits

(L.1970, c. 996, § 1. Amended L.1971, c. 762, § 1; L.1979, c. 411, § 1; L.1980, c. 843, § 12; L.1984, c. 695, § 1; L.1986, c. 5, § 1; L.1987, c. 382, § 1; L.1988, c. 324, § 2; L.1998, c. 424, § 8, eff. Jan. 1, 1999; L.2010, c. 94, § 1, eff. July 24, 2010; L.2010, c. 96, § 1, eff. July 24, 2010; L.2016, c. 492, § 3, eff. Feb. 26, 2017; L.2017, c. 59, pt. WWW, § 16.)

McKinney's CPL § 120.90, NY CRIM PRO § 120.90
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 140. Arrest Without a Warrant (Refs & Annos)

McKinney's CPL § 140.45

§ 140.45 Arrest without a warrant; dismissal of insufficient local criminal court accusatory instrument

Currentness

If a local criminal court accusatory instrument filed with a local criminal court pursuant to section 140.20, 140.25 or 140.40 is not sufficient on its face, as prescribed in section 100.40, and if the court is satisfied that on the basis of the available facts or evidence it would be impossible to draw and file an accusatory instrument which is sufficient on its face, it must dismiss such accusatory instrument and discharge the defendant.

Credits
(L.1970, c. 996, § 1. Amended L.1987, c. 549, § 8; L.1987, c. 550, § 10.)

McKinney's CPL § 140.45, NY CRIM PRO § 140.45
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 170. Proceedings upon Information, Simplified Traffic Information, Prosecutor's Information and Misdemeanor Complaint from Arraignment to Plea (Refs & Annos)

McKinney's CPL § 170.10

§ 170.10 Arraignment upon information, simplified traffic information, prosecutor's information or misdemeanor complaint; defendant's presence, defendant's rights, court's instructions and bail matters

Effective: February 26, 2017
Currentness

1. Following the filing with a local criminal court of an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the defendant must be arraigned thereon. The defendant must appear personally at such arraignment except under the following circumstances:

(a) In any case where a simplified information is filed and a procedure is provided by law which is applicable to all offenses charged in such simplified information and, if followed, would dispense with an arraignment or personal appearance of the defendant, nothing contained in this section affects the validity of such procedure or requires such personal appearance;

(b) In any case in which the defendant's appearance is required by a summons or an appearance ticket, the court in its discretion may, for good cause shown, permit the defendant to appear by counsel instead of in person.

2. Upon any arraignment at which the defendant is personally present, the court must immediately inform him, or cause him to be informed in its presence, of the charge or charges against him and must furnish him with a copy of the accusatory instrument.

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

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

(b) To communicate, free of charge, by letter or by telephone provided by the law enforcement facility where the defendant is held to a phone number located in the United States, or Puerto Rico, for the purposes of obtaining counsel and informing a relative or friend that he or she has been charged with an offense; and

(c) To have counsel assigned by the court if he is financially unable to obtain the same; except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

4. Except as provided in subdivision five, the court must inform the defendant:

(a) Of his rights as prescribed in subdivision three; and the court must not only accord him opportunity to exercise such rights but must itself take such affirmative action as is necessary to effectuate them; and

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

(c) Where the accusatory instrument is a simplified traffic information, that the defendant has a right to have a supporting deposition filed, as provided in section 100.25; and

(d) Where the accusatory instrument is a misdemeanor complaint, that the defendant may not be prosecuted thereon or required to enter a plea thereto unless he consents to the same, and that in the absence of such consent such misdemeanor complaint will for prosecution purposes have to be replaced and superseded by an information; and

(e) Where an information, a simplified information, a prosecutor's information, a misdemeanor complaint, a felony complaint or an indictment charges harassment in the second degree, as defined in section 240.26 of the penal law, if there is a judgment of conviction for such offense and such offense is determined to have been committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, the record of such conviction shall be accessible for law enforcement purposes and not sealed, as specified in paragraph (a) and subparagraph (vi) of paragraph (d) of subdivision one of section 160.55 of this title; and

5. In any case in which a defendant has appeared for arraignment in response to a summons or an appearance ticket, a printed statement upon such process of any court instruction required by the provisions of subdivision four, other than those specified in paragraphs (d) and (e) thereof, constitutes compliance with such provisions with respect to the instruction so printed.

6. If a defendant charged with a traffic infraction or infractions only desires to proceed without the aid of counsel, the court must permit him to do so. In all other cases, the court must permit the defendant to proceed without the aid of counsel if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment. Regardless of the kind or nature of the charges, a defendant who proceeds at the arraignment without counsel does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the action.

7. Upon the arraignment, the court, unless it intends to make a final disposition of the action immediately thereafter, must, as provided in subdivision one of section 530.20, issue a securing order either releasing the defendant on his own recognizance or

fixing bail for his future appearance in the action; except that where a defendant appears by counsel pursuant to paragraph (b) of subdivision one of this section, the court must release the defendant on his own recognizance.

8. Notwithstanding any other provision of law to the contrary, a local criminal court may not, at arraignment or within thirty days of arraignment on a simplified traffic information charging a violation of subdivision two, two-a, three, four or four-a of section eleven hundred ninety-two of the vehicle and traffic law and upon which a notation has been made pursuant to subdivision twelve of section eleven hundred ninety-two of the vehicle and traffic law, accept a plea of guilty to a violation of any subdivision of section eleven hundred ninety-two of the vehicle and traffic law, nor to any other traffic infraction arising out of the same incident, nor to any other traffic infraction, violation or misdemeanor where the court is aware that such offense was charged pursuant to an accident involving death or serious physical injury, except upon written consent of the district attorney.

8-a. (a) Where an information, a simplified information, a prosecutor's information, a misdemeanor complaint, a felony complaint or an indictment charges harassment in the second degree as defined in section 240.26 of the penal law, the people may serve upon the defendant and file with the court a notice alleging that such offense was committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter. Such notice must be served within fifteen days after arraignment on an information, a simplified information, a prosecutor's information, a misdemeanor complaint, a felony complaint or an indictment for such charge and before trial. Such notice must include the name of the person alleged to be a member of the same family or household as the defendant and specify the specific family or household relationship as defined in subdivision one of section 530.11 of this chapter.

(b) If a defendant, charged with harassment in the second degree as defined in section 240.26 of the penal law stipulates, or admits in the course of a plea disposition, that the person against whom the charged offense is alleged to have been committed is a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, such allegation shall be deemed established for purposes of paragraph (a) and subparagraph (vi) of paragraph (d) of subdivision one of section 160.55 of this title. If the defendant denies such allegation, the people may, by proof beyond a reasonable doubt, prove as part of their case that the alleged victim of such offense was a member of the same family or household as the defendant. In such circumstances, the trier of fact shall make its determination with respect to such allegation orally on the record or in writing.

9. Nothing contained in this section applies to the arraignment of corporate defendants, which is governed generally by the provisions of article six hundred.

10. Notwithstanding any contrary provision of this section, when an off-hours arraignment part designated in accordance with paragraph (w) of subdivision one of section two hundred twelve of the judiciary law is in operation in the county in which the court is located, the court must adjourn the proceedings before it, and direct that the proceedings be continued in such off-hours part when the defendant has appeared before the court without counsel and no counsel is otherwise available at the time of such appearance to aid the defendant, unless the defendant desires to proceed without the aid of counsel and the court is satisfied, pursuant to subdivision six of this section, that the defendant made such decision with knowledge of the significance thereof.

Credits

(L.1970, c. 996, § 1. Amended L.1972, c. 243, § 1; L.1972, c. 661, § 38; L.1972, c. 697, § 1; L.1992, c. 449, § 2; L.2006, c. 732, § 15, eff. Nov. 1, 2006; L.2009, c. 476, §§ 9, 11, eff. Oct. 16, 2009; L.2010, c. 94, § 3, eff. July 24, 2010; L.2016, c. 492, § 5, eff. Feb. 26, 2017.)

McKinney's CPL § 170.10, NY CRIM PRO § 170.10

Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Proposed Legislation

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Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 170. Proceedings upon Information, Simplified Traffic Information, Prosecutor's Information and Misdemeanor Complaint from Arraignment to Plea (Refs & Annos)

McKinney's CPL § 170.15

§ 170.15 Removal of action from one local criminal court to another

Effective: April 28, 2021
Currentness

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

1. When a defendant arrested by a police officer for an offense other than a felony, allegedly committed in a city or town, has, owing to special circumstances and pursuant to law, not been brought before the particular local criminal court which by reason of the situs of such offense has trial jurisdiction thereof, but, instead, before a local criminal court which does not have trial jurisdiction thereof, and therein stands charged with such offense by information, simplified information or misdemeanor complaint, such local criminal court must arraign him upon such accusatory instrument. If the defendant desires to enter a plea of guilty thereto immediately following such arraignment, such local criminal court must permit him to do so and must thereafter conduct the action to judgment. Otherwise, it must remit the action, together with all pertinent papers and documents, to the local criminal court which has trial jurisdiction of the action, and the latter court must then conduct such action to judgment or other final disposition.

2. When a defendant arrested by a police officer for an offense other than a felony has been brought before a superior court judge sitting as a local criminal court for arraignment upon an information, simplified information or misdemeanor complaint charging such offense, such judge must, as a local criminal court, arraign the defendant upon such accusatory instrument. Such judge must then remit the action, together with all pertinent papers and documents, to a local criminal court having trial jurisdiction thereof. The latter court must then conduct such action to judgment or other final disposition.

3. At any time within the period provided by section 255.20, where a defendant is arraigned upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint pending in a city court, town court or a village court having trial jurisdiction thereof, a judge of the county court of the county in which such city court, town court or village court is located may, upon motion of the defendant or the people, order that the action be transferred for disposition from the court in which the matter is pending to another designated local criminal court of the county, upon the ground that disposition thereof within a reasonable time in the court from which removal is sought is unlikely owing to:

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

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

4. Notwithstanding any provision of this section to the contrary, in any county outside a city having a population of one million or more, upon or after arraignment of a defendant on an information, a simplified information, a prosecutor's information or a misdemeanor complaint pending in a local criminal court, such court may, upon motion of the defendant and after giving the district attorney an opportunity to be heard, order that the action be removed from the court in which the matter is pending to another local criminal court in the same county which has been designated a court formed to address a matter of special concern based upon the status of the defendant or the victim, commonly known as a "problem solving court," including, but not limited to, drug court, domestic violence court, youth court, mental health court, and veterans court, by the chief administrator of the courts, and such problem solving court may then conduct such action to judgment or other final disposition; provided, however, that an order of removal issued under this subdivision shall not take effect until five days after the date the order is issued unless, prior to such effective date, the problem solving court notifies the court that issued the order that:

(a) it will not accept the action, in which event the order shall not take effect, or

(b) it will accept the action on a date prior to such effective date, in which event the order shall take effect upon such prior date.

Upon providing notification pursuant to paragraph (a) or (b) of this subdivision, the problem solving court shall promptly give notice to the defendant, his or her counsel and the district attorney.

5. (a) Notwithstanding any provision of this section to the contrary, in any county outside a city having a population of one million or more, upon or after arraignment of a defendant on an information, a simplified information, a prosecutor's information or a misdemeanor complaint pending in a local criminal court, such court may, upon motion of the defendant and after giving the district attorney an opportunity to be heard, order that the action be removed from the court in which the matter is pending to another local criminal court in the same county, or with consent of the district attorney and the district attorney of the adjoining county to another court in such adjoining county, that has been designated as a human trafficking court or veterans treatment court by the chief administrator of the courts, and such human trafficking court or veterans treatment court may then conduct such action to judgment or other final deposition; provided, however, that no court may order removal pursuant to this subdivision to a veterans treatment court of a family offense charge described in subdivision one of section 530.11 of this chapter where the accused and the person alleged to be the victim of such offense charged are members of the same family or household as defined in such subdivision one of section 530.11; and provided further that an order of removal issued under this subdivision shall not take effect until five days after the date the order is issued unless, prior to such effective date, the human trafficking court or veterans treatment court notifies the court that issued the order that:

i. it will not accept the action, in which event the order shall not take effect; or

ii. it will accept the action on a date prior to such effective date, in which event the order shall take effect upon such prior date.

(b) Upon providing notification pursuant to subparagraph i or ii of paragraph (a) of this subdivision, the human trafficking court or veterans treatment court shall promptly give notice to the defendant, his or her counsel, and the district attorney.

Credits

(L.1970, c. 996, § 1. Amended L.1972, c. 661, § 39; L.1974, c. 763, § 6; L.1974, c. 837, § 1; L.1984, c. 695, § 3; L.1998, c. 77, § 1, eff. June 2, 1998; L.1999, c. 565, § 1, eff. Nov. 1, 1999; L.2000, c. 67, § 1, eff. Nov. 1, 2000; L.2018, c. 191, § 1, eff. Aug. 15, 2018; L.2019, c. 634, § 1, eff. Dec. 12, 2019; L.2021, c. 91, § 2, eff. April 28, 2021.)

McKinney's CPL § 170.15, NY CRIM PRO § 170.15
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 170. Proceedings upon Information, Simplified Traffic Information, Prosecutor's Information and Misdemeanor Complaint from Arraignment to Plea (Refs & Annos)

McKinney's CPL § 170.45

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

Currentness

The procedural rules prescribed in section 210.45 with respect to the making, consideration and disposition of a motion to dismiss an indictment are also applicable to a motion to dismiss an information, a simplified traffic information, a prosecutor's information or a misdemeanor complaint.

Credits
(L.1970, c. 996, § 1.)

McKinney's CPL § 170.45, NY CRIM PRO § 170.45
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 180. Proceedings upon Felony Complaint from Arraignment Thereon Through Disposition Thereof (Refs & Annos)

McKinney's CPL § 180.10

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

Effective: February 26, 2017
Currentness

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

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

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

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

(b) To communicate, free of charge, by letter or by telephone provided by the law enforcement facility where the defendant is held to a phone number located in the United States or Puerto Rico, for the purpose of obtaining counsel and informing a relative or friend that he or she has been charged with an offense; and

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

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

5. If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant

is provided with counsel, either of his own choosing or by assignment. A defendant who proceeds at the arraignment without counsel does not waive his right to counsel, and the court must inform him that he continues to have such right as well as all the rights specified in subdivision three which are necessary to effectuate it, and that he may exercise such rights at any stage of the action.

6. Upon the arraignment, the court, unless it intends immediately thereafter to dismiss the felony complaint and terminate the action, must issue a securing order which, as provided in subdivision two of section 530.20, either releases the defendant on his own recognizance or fixes bail or commits him to the custody of the sheriff for his future appearance in such action.

7. Notwithstanding any contrary provision of this section, when an off-hours arraignment part designated in accordance with paragraph (w) of subdivision one of section two hundred twelve of the judiciary law is in operation in the county in which the court is located, the court must adjourn the proceedings before it, and direct that the proceedings be continued in such off-hours part when the defendant has appeared before the court without counsel and no counsel is otherwise available at the time of such appearance to aid the defendant.

Credits

(L.1970, c. 996, § 1. Amended L.2010, c. 94, § 4, eff. July 24, 2010; L.2016, c. 492, § 6, eff. Feb. 26, 2017.)

McKinney's CPL § 180.10, NY CRIM PRO § 180.10
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title I. Preliminary Proceedings in Superior Court
Article 210. Proceedings in Superior Court from Filing of Indictment to Plea (Refs & Annos)

McKinney's CPL § 210.45

§ 210.45 Motion to dismiss indictment; procedure

Currentness

1. A motion to dismiss an indictment pursuant to section 210.20 must be made in writing and upon reasonable notice to the people. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence supporting or tending to support the allegations of the moving papers.

2. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers, and may further submit documentary evidence refuting or tending to refute such allegations.

3. After all papers of both parties have been filed, and after all documentary evidence, if any, has been submitted, the court must consider the same for the purpose of determining whether the motion is determinable without a hearing to resolve questions of fact.

4. The court must grant the motion without conducting a hearing if:

(a) The moving papers allege a ground constituting legal basis for the motion pursuant to subdivision one of section 210.20; and

(b) Such ground, if based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and

(c) The sworn allegations of fact essential to support the motion are either conceded by the people to be true or are conclusively substantiated by unquestionable documentary proof.

5. The court may deny the motion without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion pursuant to subdivision one of section 210.20; or

(b) The motion is based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all the essential facts; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof.

6. If the court does not determine the motion pursuant to subdivision four or five, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present in person at such hearing but may waive such right.

7. Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

8. When the court dismisses the entire indictment without authorizing resubmission of the charge or charges to a grand jury, it must order that the defendant be discharged from custody if he is in the custody of the sheriff, or if he is at liberty on bail it must exonerate the bail.

9. When the court dismisses the entire indictment but authorizes resubmission of the charge or charges to a grand jury, such authorization is, for purposes of this subdivision, deemed to constitute an order holding the defendant for the action of a grand jury with respect to such charge or charges. Such order must be accompanied by a securing order either releasing the defendant on his own recognizance or fixing bail or committing him to the custody of the sheriff pending resubmission of the case to the grand jury and the grand jury's disposition thereof. Such securing order remains in effect until the first to occur of any of the following:

(a) A statement to the court by the people that they do not intend to resubmit the case to a grand jury;

(b) Arraignment of the defendant upon an indictment or prosecutor's information filed as a result of resubmission of the case to a grand jury. Upon such arraignment, the arraigning court must issue a new securing order;

(c) The filing with the court of a grand jury dismissal of the case following resubmission thereof;

(d) The expiration of a period of forty-five days from the date of issuance of the order; provided that such period may, for good cause shown, be extended by the court to a designated subsequent date if such be necessary to accord the people reasonable opportunity to resubmit the case to a grand jury.

Upon the termination of the effectiveness of the securing order pursuant to paragraph (a), (c) or (d), the court must immediately order that the defendant be discharged from custody if he is in the custody of the sheriff, or if he is at liberty on bail it must exonerate the bail. Although expiration of the period of time specified in paragraph (d) without any resubmission or grand jury

disposition of the case terminates the effectiveness of the securing order, it does not terminate the effectiveness of the order authorizing resubmission.

Credits
(L.1970, c. 996, § 1.)

McKinney's CPL § 210.45, NY CRIM PRO § 210.45
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title L. Sentence
Article 410. Sentences of Probation, Conditional Discharge and Parole Supervision [Heading Will Revert to "Sentences of Probation and of Conditional Discharge" on Sept. 1, 2025, Pursuant to L.1995, C. 3, § 74, Subd. D.] (Refs & Annos)

McKinney's CPL § 410.40

§ 410.40 Notice to appear, warrant

Effective: October 1, 2019
Currentness

1. Notice to appear. The court may at any time order that a person who is under a sentence of probation or of conditional discharge appear before it. Such order may be in the form of a written notice, specifying the time and place of appearance, mailed to or served personally upon the defendant as the court may direct. In the absence of a warrant issued pursuant to subdivision two of this section, where a probation officer has submitted a violation petition and report, the court shall promptly consider such petition and, where the court issues a notice to appear, the court shall direct that the defendant appear within ten business days of the court's order. When the order is in the form of such a notice, failure to appear as ordered without reasonable cause therefor constitutes a violation of the conditions of the sentence irrespective of whether such requirement is specified as a condition thereof.

2. Warrant. (a) Where the probation officer has requested that a probation warrant be issued, the court shall, within seventy-two hours of its receipt of the request, issue or deny the warrant or take any other lawful action including issuance of a notice to appear pursuant to subdivision one of this section. If at any time during the period of a sentence of probation or of conditional discharge the court has reasonable grounds to believe that the defendant has violated a condition of the sentence, the court may issue a warrant to a police officer or to an appropriate peace officer directing him or her to take the defendant into custody and bring the defendant before the court without unnecessary delay; provided, however, if the court in which the warrant is returnable is a superior court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer may unless otherwise specified under paragraph (b) of this subdivision, bring the defendant to the local correctional facility of the county in which such court sits, to be detained there until not later than the commencement of the next session of such court occurring on the next business day; or if the court in which the warrant is returnable is a local criminal court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer must without unnecessary delay bring the defendant before an alternate local criminal court, as provided in subdivision five of section 120.90 of this chapter. A court which issues such a warrant may attach thereto a summary of the basis for the warrant. In any case where a defendant arrested upon the warrant is brought before a local criminal court other than the court in which the warrant is returnable, such local criminal court shall consider such summary before issuing a securing order with respect to the defendant.

(b) If the court in which the warrant is returnable is a superior court, and such court is not available, and the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer, such executing officer shall, where a defendant is sixteen years of age or younger who allegedly commits an offense or a violation of his or her probation or conditional discharge imposed for an offense on or after October first, two thousand eighteen, or where a defendant is seventeen years of age or younger who allegedly commits an offense or a violation of his or her probation or conditional discharge imposed for an offense on or after October first, two thousand nineteen, bring the defendant without unnecessary delay before the youth part, provided, however that if the youth part is not in session, the defendant shall be brought before the most accessible magistrate designated by the appellate division.

Credits

(L.1970, c. 996, § 1. Amended L.1980, c. 843, § 18; L.1993, c. 161, § 1; L.1996, c. 115, § 1; L.2008, c. 652, § 4, eff. Nov. 1, 2009; L.2017, c. 59, pt. WWW, § 32.)

McKinney's CPL § 410.40, NY CRIM PRO § 410.40
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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McKinney's CPL § 510.10

§ 510.10 Securing order; when required; alternatives available; standard to be applied

Effective: June 2, 2023
Currentness

The imposition of a specific type of securing order is in some cases required by law and in other cases within the discretion of the court in accordance with the principles of, and pursuant to its authority granted under, this title.

1. When a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, such court shall impose a securing order in accordance with this title. Except as otherwise required by law, the court shall make an individualized determination as to whether the principal poses a risk of flight to avoid prosecution, consider the kind and degree of control or restriction necessary to reasonably assure the principal's return to court, and select a securing order consistent with its determination under this subdivision. The court shall explain the basis for its determination and its choice of securing order on the record or in writing. In making a determination under this subdivision, the court must consider and take into account available information about the principal, including:

(a) The principal's activities and history;

(b) If the principal is a defendant, the charges facing the principal;

(c) The principal's criminal conviction record if any;

(d) The principal's record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.1 of the family court act, or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any;

(e) The principal's previous record with respect to flight to avoid criminal prosecution;

(f) If monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond;

(g) Any violation by the principal of an order of protection issued by any court;

(h) The principal's history of use or possession of a firearm;

(i) Whether the charge is alleged to have caused serious harm to an individual or group of individuals; and

(j) If the principal is a defendant, in the case of an application for a securing order pending appeal, the merit or lack of merit of the appeal.

2. A principal is entitled to representation by counsel under this chapter in preparing an application for release, when a securing order is being considered and when a securing order is being reviewed for modification, revocation or termination. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.

3. In cases other than as described in subdivision four of this section, the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions as provided for in subdivision three-a of section 500.10 of this title that will reasonably assure the principal's return to court. The court shall explain its choice of securing order on the record or in writing.

4. Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or order non-monetary conditions in conjunction with fixing bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. A principal stands charged with a qualifying offense for the purposes of this subdivision when he or she stands charged with:

(a) a felony enumerated in section 70.02 of the penal law, other than robbery in the second degree as defined in subdivision one of section 160.10 of the penal law, provided, however, that burglary in the second degree as defined in subdivision two of section 140.25 of the penal law shall be a qualifying offense only where the defendant is charged with entering the living area of the dwelling;

(b) a crime involving witness intimidation under section 215.15 of the penal law;

(c) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law;

(d) a class A felony defined in the penal law, provided that for class A felonies under article two hundred twenty of the penal law, only class A-I felonies shall be a qualifying offense;

(e) a sex trafficking offense defined in section 230.34 or 230.34-a of the penal law, or a felony sex offense defined in section 70.80 of the penal law, or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;

(f) conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law;

(g) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; money laundering in support of terrorism in the third degree as defined in section 470.22 of the penal law; money laundering in support of terrorism in the fourth degree as defined in section 470.21 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;

(h) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this title;

(i) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law, promoting an obscene sexual performance by a child as defined in section 263.10 of the penal law or promoting a sexual performance by a child as defined in section 263.15 of the penal law;

(j) any crime that is alleged to have caused the death of another person;

(k) criminal obstruction of breathing or blood circulation as defined in section 121.11 of the penal law, strangulation in the second degree as defined in section 121.12 of the penal law or unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, and is alleged to have committed the offense against a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this title;

(l) aggravated vehicular assault as defined in section 120.04-a of the penal law or vehicular assault in the first degree as defined in section 120.04 of the penal law;

(m) assault in the third degree as defined in section 120.00 of the penal law or arson in the third degree as defined in section 150.10 of the penal law, when such crime is charged as a hate crime as defined in section 485.05 of the penal law;

(n) aggravated assault upon a person less than eleven years old as defined in section 120.12 of the penal law or criminal possession of a weapon on school grounds as defined in section 265.01-a of the penal law;

(o) grand larceny in the first degree as defined in section 155.42 of the penal law, enterprise corruption as defined in section 460.20 of the penal law, or money laundering in the first degree as defined in section 470.20 of the penal law;

(p) failure to register as a sex offender pursuant to section one hundred sixty-eight-t of the correction law or endangering the welfare of a child as defined in subdivision one of section 260.10 of the penal law, where the defendant is required to maintain registration under article six-C of the correction law and designated a level three offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law;

(q) a crime involving bail jumping under section 215.55, 215.56 or 215.57 of the penal law, or a crime involving escaping from custody under section 205.05, 205.10 or 205.15 of the penal law;

(r) any felony offense committed by the principal while serving a sentence of probation or while released to post release supervision;

(s) a felony, where the defendant qualifies for sentencing on such charge as a persistent felony offender pursuant to section 70.10 of the penal law;

(t) any felony or class A misdemeanor involving harm to an identifiable person or property, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law, where such charge arose from conduct occurring while the defendant was released on his or her own recognizance, released under conditions, or had yet to be arraigned after the issuance of a desk appearance ticket for a separate felony or class A misdemeanor involving harm to an identifiable person or property, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law, provided, however, that the prosecutor must show reasonable cause to believe that the defendant committed the instant crime and any underlying crime. For the purposes of this subparagraph, any of the underlying crimes need not be a qualifying offense as defined in this subdivision. For the purposes of this paragraph, "harm to an identifiable person or property" shall include but not be limited to theft of or damage to property. However, based upon a review of the facts alleged in the accusatory instrument, if the court determines that such theft is negligible and does not appear to be in furtherance of other criminal activity, the principal shall be released on his or her own recognizance or under appropriate non-monetary conditions; or

(u) criminal possession of a weapon in the third degree as defined in subdivision three of section 265.02 of the penal law or criminal sale of a firearm to a minor as defined in section 265.16 of the penal law.

5. Notwithstanding the provisions of subdivisions three and four of this section, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.

6. When a securing order is revoked or otherwise terminated in the course of an uncompleted action or proceeding but the principal's future court attendance still is or may be required and the principal is still under the control of a court, a new securing order must be issued. When the court revokes or otherwise terminates a securing order which committed the principal to the custody of the sheriff, the court shall give written notification to the sheriff of such revocation or termination of the securing order.

Credits

(L.1970, c. 996, § 1. Amended L.1984, c. 459, § 1; L.2019, c. 59, pt. JJJ, § 2, eff. Jan. 1, 2020; L.2020, c. 56, pt. UU, § 2, eff. July 2, 2020; L.2022, c. 56, pt. UU, subpt. B, § 2, subpt. C, § 1, eff. May 9, 2022; L.2023, c. 56, pt. VV, subpt. A, § 2, eff. June 2, 2023.)

McKinney's CPL § 510.10, NY CRIM PRO § 510.10
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 510. Recognizance, Bail and Commitment--Determination of Application for Recognizance or Bail, Issuance of Securing Orders, and Related Matters (Refs & Annos)

McKinney's CPL § 510.20

§ 510.20 Application for a change in securing order

Effective: June 2, 2023
Currentness

1. Upon any occasion when a court has issued a securing order with respect to a principal and the principal is confined in the custody of the sheriff as a result of the securing order or a previously issued securing order, the principal may make an application for recognizance, release under non-monetary conditions, bail, a reduction of bail, or imposition of non-monetary conditions in conjunction with bail or a reduction of bail.

2. (a) The principal is entitled to representation by counsel in the making and presentation of such application. If the principal is financially unable to obtain counsel, counsel shall be assigned to the principal.

(b) Upon such application, the principal must be accorded an opportunity to be heard, present evidence and to contend that an order of recognizance, release under non-monetary conditions or, where authorized, bail, a reduction of bail, or imposition of non-monetary conditions in conjunction with bail or a reduction of bail, must or should issue, that the court should release the principal on the principal's own recognizance or under non-monetary conditions rather than fix bail, or where bail has been imposed, reduce the amount of bail and impose non-monetary conditions, where authorized under this title, and that if bail is authorized and fixed it should be in a suggested amount and form.

3. When an application for a change in securing order is brought under this section and one or more of the charge or charges on which such securing order was based have been dismissed and/or reduced such that the securing order is no longer supported by the provisions of section 510.10 of this article, the court shall impose a new securing order in accordance with such section.

Credits
(L.1970, c. 996, § 1. Amended L.2019, c. 59, pt. JJJ, § 3, eff. Jan. 1, 2020; L.2023, c. 56, pt. VV, subpt. A, § 3, eff. June 2, 2023.)

McKinney's CPL § 510.20, NY CRIM PRO § 510.20
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 530. Orders of Recognizance or Bail with Respect to Defendants in Criminal Actions and Proceedings--when and by What Courts Authorized (Refs & Annos)

McKinney's CPL § 530.11

§ 530.11 Procedures for family offense matters

Effective: March 15, 2020
Currentness

1. Jurisdiction. The family court and the criminal courts shall have concurrent jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, unlawful dissemination or publication of an intimate image, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, strangulation in the first degree, strangulation in the second degree, criminal obstruction of breathing or blood circulation, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household except that if the respondent would not be criminally responsible by reason of age pursuant to section 30.00 of the penal law, then the family court shall have exclusive jurisdiction over such proceeding. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section. For purposes of this section, "disorderly conduct" includes disorderly conduct not in a public place. For purposes of this section, "members of the same family or household" with respect to a proceeding in the criminal courts shall mean the following:

(a) persons related by consanguinity or affinity;

(b) persons legally married to one another;

(c) persons formerly married to one another regardless of whether they still reside in the same household;

(d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and

(e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

2. Information to petitioner or complainant. The chief administrator of the courts shall designate the appropriate probation officers, warrant officers, sheriffs, police officers, district attorneys or any other law enforcement officials, to inform any petitioner or complainant bringing a proceeding under this section before such proceeding is commenced, of the procedures available for the institution of family offense proceedings, including but not limited to the following:

(a) That there is concurrent jurisdiction with respect to family offenses in both family court and the criminal courts;

(b) That a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end family disruption and obtain protection. That referrals for counseling, or counseling services, are available through probation for this purpose;

(c) That a proceeding in the criminal courts is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender;

(d) That a proceeding or action subject to the provisions of this section is initiated at the time of the filing of an accusatory instrument or family court petition, not at the time of arrest, or request for arrest, if any;

(e) Repealed.

(f) That an arrest may precede the commencement of a family court or a criminal court proceeding, but an arrest is not a requirement for commencing either proceeding.

(g) Repealed by L.1997, c, 186, § 7, eff. July 8, 1997.

(h) At such time as the complainant first appears before the court on a complaint or information, the court shall advise the complainant that the complainant may: continue with the proceeding in criminal court; or have the allegations contained therein heard in a family court proceeding; or proceed concurrently in both criminal and family court. Notwithstanding a complainant's election to proceed in family court, the criminal court shall not be divested of jurisdiction to hear a family offense proceeding pursuant to this section;

(i) Nothing herein shall be deemed to limit or restrict complainant's rights to proceed directly and without court referral in either a criminal or family court, or both, as provided for in section one hundred fifteen of the family court act and section 100.07 of this chapter;

(j) Repealed by L.1997, c, 186, § 9, eff. July 8, 1997.

2-a. Upon the filing of an accusatory instrument charging a crime or violation described in subdivision one of this section between members of the same family or household, as such terms are defined in this section, or as soon as the complainant first appears before the court, whichever is sooner, the court shall advise the complainant of the right to proceed in both the criminal and family courts, pursuant to section 100.07 of this chapter.

3. Official responsibility. No official or other person designated pursuant to subdivision two of this section shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.

4. When a person is arrested for an alleged family offense or an alleged violation of an order of protection or temporary order of protection or arrested pursuant to a warrant issued by the supreme or family court, and the supreme or family court, as applicable, is not in session, such person shall be brought before a local criminal court in the county of arrest or in the county in which such warrant is returnable pursuant to article one hundred twenty of this chapter. Such local criminal court may issue any order authorized under subdivision eleven of section 530.12 of this article, section one hundred fifty-four-d or one hundred fifty-five of the family court act or subdivision three-b of section two hundred forty or subdivision two-a of section two hundred fifty-two of the domestic relations law, in addition to discharging other arraignment responsibilities as set forth in this chapter. In making such order, the local criminal court shall consider de novo the recommendation and securing order, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant. Unless the petitioner or complainant requests otherwise, the court, in addition to scheduling further criminal proceedings, if any, regarding such alleged family offense or violation allegation, shall make such matter returnable in the supreme or family court, as applicable, on the next day such court is in session.

5. Filing and enforcement of out-of-state orders of protection. A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code.

(a) An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

(i) the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

(ii) the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

(iii) in the case of orders of protection or temporary orders of protection issued against both a petitioner, plaintiff or complainant and respondent or defendant, the order or portion thereof sought to be enforced was supported by: (A) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (B) a judicial finding that the requesting party is entitled to the issuance of the order which may result from a judicial finding of fact, judicial acceptance of an admission

by the party against whom the order was issued or judicial finding that the party against whom the order was issued had given knowing, intelligent and voluntary consent to its issuance.

(b) Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law; provided, however, that such filing and registry entry shall not be required for enforcement of the order.

6. Notice. Every police officer, peace officer or district attorney investigating a family offense under this article shall advise the victim of the availability of a shelter or other services in the community, and shall immediately give the victim written notice of the legal rights and remedies available to a victim of a family offense under the relevant provisions of this chapter and the family court act. Such notice shall be prepared, at minimum, in plain English, Spanish, Chinese and Russian and if necessary, shall be delivered orally, and shall include but not be limited to the information contained in the following statement:

“Are you the victim of domestic violence? If you need help now, you can call 911 for the police to come to you. You can also call a domestic violence hotline. You can have a confidential talk with an advocate at the hotline about help you can get in your community including: where you can get treatment for injuries, where you can get shelter, where you can get support, and what you can do to be safe. The New York State 24-hour Domestic & Sexual Violence Hotline number is (insert the statewide multilingual 800 number). They can give you information in many languages. If you are deaf or hard of hearing, call 711.

This is what the police can do:

They can help you and your children find a safe place such as a family or friend's house or a shelter in your community.

You can ask the officer to take you or help you and your children get to a safe place in your community.

They can help connect you to a local domestic violence program.

They can help you get to a hospital or clinic for medical care.

They can help you get your personal belongings.

They must complete a report discussing the incident. They will give you a copy of this police report before they leave the scene. It is free.

They may, and sometimes must, arrest the person who harmed you if you are the victim of a crime. The person arrested could be released at any time, so it is important to plan for your safety.

If you have been abused or threatened, this is what you can ask the police or district attorney to do:

File a criminal complaint against the person who harmed you.

Ask the criminal court to issue an order of protection for you and your child if the district attorney files a criminal case with the court.

Give you information about filing a family offense petition in your local family court.

You also have the right to ask the family court for an order of protection for you and your children.

This is what you can ask the family court to do:

To have your family offense petition filed the same day you go to court.

To have your request heard in court the same day you file or the next day court is open.

Only a judge can issue an order of protection. The judge does that as part of a criminal or family court case against the person who harmed you. An order of protection in family court or in criminal court can say:

That the other person have no contact or communication with you by mail, phone, computer or through other people.

That the other person stay away from you and your children, your home, job or school.

That the other person not assault, harass, threaten, strangle, or commit another family offense against you or your children.

That the other person turn in their firearms and firearms licenses, and not get any more firearms.

That you have temporary custody of your children.

That the other person pay temporary child support.

That the other person not harm your pets or service animals.

If the family court is closed because it is night, a weekend, or a holiday, you can go to a criminal court to ask for an order of protection.

If you do not speak English or cannot speak it well, you can ask the police, the district attorney, or the criminal or family court to get you an interpreter who speaks your language. The interpreter can help you explain what happened.

You can get the forms you need to ask for an order of protection at your local family court (insert addresses and contact information for courts). You can also get them online: www.NYCourts.gov/forms.

You do not need a lawyer to ask for an order of protection.

You have a right to get a lawyer in the family court. If the family court finds that you cannot afford to pay for a lawyer, it must get you one for free.

If you file a complaint or family court petition, you will be asked to swear to its truthfulness because it is a crime to file a legal document that you know is false."

The division of criminal justice services in consultation with the state office for the prevention of domestic violence shall prepare the form of such written notice consistent with provisions of this section and distribute copies thereof to the appropriate law enforcement officials pursuant to subdivision nine of section eight hundred forty-one of the executive law.

Additionally, copies of such notice shall be provided to the chief administrator of the courts to be distributed to victims of family offenses through the criminal court at such time as such persons first come before the court and to the state department of health

for distribution to all hospitals defined under article twenty-eight of the public health law. No cause of action for damages shall arise in favor of any person by reason of any failure to comply with the provisions of this subdivision except upon a showing of gross negligence or willful misconduct.

7. Rules of court regarding concurrent jurisdiction. The chief administrator of the courts, pursuant to paragraph (e) of subdivision two of section two hundred twelve of the judiciary law, shall promulgate rules to facilitate record sharing and other communication between the criminal and family courts, subject to applicable provisions of this chapter and the family court act pertaining to the confidentiality, expungement and sealing of records, when such courts exercise concurrent jurisdiction over family offense proceedings.

Credits

(Added L.1980, c. 530, § 15. Amended L.1981, c. 416, § 20; L.1983, c. 925, § 2; L.1984, c. 948, § 13; L.1986, c. 847, § 2; L.1990, c. 667, § 1; L.1992, c. 345, § 6; L.1994, c. 222, §§ 34 to 39; L.1994, c. 224, § 7; L.1995, c. 349, § 5; L.1995, c. 440, § 2; L.1997, c. 186, §§ 7 to 9, eff. July 8, 1997; L.1998, c. 597, § 11, eff. Dec. 22, 1998; L.1999, c. 125, §§ 1, 2, eff. June 29, 1999; L.1999, c. 635, § 3, eff. Dec. 1, 1999; L.2007, c. 541, § 2, eff. Nov. 13, 2007; L.2008, c. 326, § 11, eff. July 21, 2008; L.2009, c. 476, § 3, eff. Dec. 15, 2009; L.2010, c. 405, § 11, eff. Nov. 11, 2010; L.2013, c. 526, § 10, eff. Dec. 18, 2013; L.2018, c. 55, pt. NN, § 4, eff. Nov. 1, 2018; L.2019, c. 59, pt. JJJ, § 12, eff. Jan. 1, 2020; L.2019, c. 109, § 2, eff. Sept. 21, 2019; L.2019, c. 663, § 2, eff. March 15, 2020.)

McKinney's CPL § 530.11, NY CRIM PRO § 530.11
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Unconstitutional or Preempted Prior Version Held Unconstitutional as Applied by People v. Johnston, N.Y.City Ct., Feb. 03, 2020

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 530. Orders of Recognizance or Bail with Respect to Defendants in Criminal Actions and Proceedings--when and by What Courts Authorized (Refs & Annos)

McKinney's CPL § 530.20

§ 530.20 Securing order by local criminal court when action is pending therein

Effective: June 2, 2023
Currentness

When a criminal action is pending in a local criminal court, such court, upon application of a defendant, shall proceed as follows:

1. (a) In cases other than as described in paragraph (b) of this subdivision, the court shall release the principal pending trial on the principal's own recognizance or release the principal pending trial under non-monetary conditions, the determination for which shall be made in accordance with subdivision one of section 510.10 of this title. The court shall explain the basis for its determination and choice of securing order on the record or in writing.

(b) Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, order non-monetary conditions in conjunction with fixing bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff. The court shall explain its choice of securing order on the record or in writing. A principal stands charged with a qualifying offense when he or she stands charged with:

(i) a felony enumerated in section 70.02 of the penal law, other than robbery in the second degree as defined in subdivision one of section 160.10 of the penal law, provided, however, that burglary in the second degree as defined in subdivision two of section 140.25 of the penal law shall be a qualifying offense only where the defendant is charged with entering the living area of the dwelling;

(ii) a crime involving witness intimidation under section 215.15 of the penal law;

(iii) a crime involving witness tampering under section 215.11, 215.12 or 215.13 of the penal law;

(iv) a class A felony defined in the penal law, provided, that for class A felonies under article two hundred twenty of such law, only class A-I felonies shall be a qualifying offense;

(v) a sex trafficking offense defined in section 230.34 or 230.34-a of the penal law, or a felony sex offense defined in section 70.80 of the penal law or a crime involving incest as defined in section 255.25, 255.26 or 255.27 of such law, or a misdemeanor defined in article one hundred thirty of such law;

(vi) conspiracy in the second degree as defined in section 105.15 of the penal law, where the underlying allegation of such charge is that the defendant conspired to commit a class A felony defined in article one hundred twenty-five of the penal law;

(vii) money laundering in support of terrorism in the first degree as defined in section 470.24 of the penal law; money laundering in support of terrorism in the second degree as defined in section 470.23 of the penal law; money laundering in support of terrorism in the third degree as defined in section 470.22 of the penal law; money laundering in support of terrorism in the fourth degree as defined in section 470.21 of the penal law; or a felony crime of terrorism as defined in article four hundred ninety of the penal law, other than the crime defined in section 490.20 of such law;

(viii) criminal contempt in the second degree as defined in subdivision three of section 215.50 of the penal law, criminal contempt in the first degree as defined in subdivision (b), (c) or (d) of section 215.51 of the penal law or aggravated criminal contempt as defined in section 215.52 of the penal law, and the underlying allegation of such charge of criminal contempt in the second degree, criminal contempt in the first degree or aggravated criminal contempt is that the defendant violated a duly served order of protection where the protected party is a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article;

(ix) facilitating a sexual performance by a child with a controlled substance or alcohol as defined in section 263.30 of the penal law, use of a child in a sexual performance as defined in section 263.05 of the penal law or luring a child as defined in subdivision one of section 120.70 of the penal law, promoting an obscene sexual performance by a child as defined in section 263.10 of the penal law or promoting a sexual performance by a child as defined in section 263.15 of the penal law;

(x) any crime that is alleged to have caused the death of another person;

(xi) criminal obstruction of breathing or blood circulation as defined in section 121.11 of the penal law, strangulation in the second degree as defined in section 121.12 of the penal law or unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, and is alleged to have committed the offense against a member of the defendant's same family or household as defined in subdivision one of section 530.11 of this article;

(xii) aggravated vehicular assault as defined in section 120.04-a of the penal law or vehicular assault in the first degree as defined in section 120.04 of the penal law;

(xiii) assault in the third degree as defined in section 120.00 of the penal law or arson in the third degree as defined in section 150.10 of the penal law, when such crime is charged as a hate crime as defined in section 485.05 of the penal law;

(xiv) aggravated assault upon a person less than eleven years old as defined in section 120.12 of the penal law or criminal possession of a weapon on school grounds as defined in section 265.01-a of the penal law;

(xv) grand larceny in the first degree as defined in section 155.42 of the penal law, enterprise corruption as defined in section 460.20 of the penal law, or money laundering in the first degree as defined in section 470.20 of the penal law;

(xvi) failure to register as a sex offender pursuant to section one hundred sixty-eight-t of the correction law or endangering the welfare of a child as defined in subdivision one of section 260.10 of the penal law, where the defendant is required to maintain registration under article six-C of the correction law and designated a level three offender pursuant to subdivision six of section one hundred sixty-eight-l of the correction law;

(xvii) a crime involving bail jumping under section 215.55, 215.56 or 215.57 of the penal law, or a crime involving escaping from custody under section 205.05, 205.10 or 205.15 of the penal law;

(xviii) any felony offense committed by the principal while serving a sentence of probation or while released to post release supervision;

(xix) a felony, where the defendant qualifies for sentencing on such charge as a persistent felony offender pursuant to section 70.10 of the penal law;

(xx) any felony or class A misdemeanor involving harm to an identifiable person or property, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law where such charge arose from conduct occurring while the defendant was released on his or her own recognizance, released under conditions, or had yet to be arraigned after the issuance of a desk appearance ticket for a separate felony or class A misdemeanor involving harm to an identifiable person or property, provided, however, that the prosecutor must show reasonable cause to believe that the defendant committed the instant crime and any underlying crime. For the purposes of this subparagraph, any of the underlying crimes need not be a qualifying offense as defined in this subdivision. For the purposes of this paragraph, “harm to an identifiable person or property” shall include but not be limited to theft of or damage to property. However, based upon a review of the facts alleged in the accusatory instrument, if the court determines that such theft is negligible and does not appear to be in furtherance of other criminal activity, the principal shall be released on his or her own recognizance or under appropriate non-monetary conditions; or

(xxi) criminal possession of a weapon in the third degree as defined in subdivision three of section 265.02 of the penal law or criminal sale of a firearm to a minor as defined in section 265.16 of the penal law.

(d) [1] Notwithstanding the provisions of paragraphs (a) and (b) of this subdivision, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, a defendant may, at any time, request that the court set bail in a nominal amount requested by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court shall set such bail in such amount.

2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, and in accordance with section 510.10 of this title, order recognizance, release under non-monetary conditions, or, where authorized, fix bail, or

order non-monetary conditions in conjunction with fixing bail, or commit the defendant to the custody of the sheriff except as otherwise provided in subdivision one of this section or this subdivision:

(a) A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a class A felony, or (ii) the defendant has two previous felony convictions;

(b) No local criminal court may order recognizance, release under non-monetary conditions or bail with respect to a defendant charged with a felony unless and until:

(i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and

(ii) The court and counsel for the defendant have been furnished with a report of the division of criminal justice services concerning the defendant's criminal record, if any, or with a police department report with respect to the defendant's prior arrest and conviction record, if any. If neither report is available, the court, with the consent of the district attorney, may dispense with this requirement; provided, however, that in an emergency, including but not limited to a substantial impairment in the ability of such division or police department to timely furnish such report, such consent shall not be required if, for reasons stated on the record, the court deems it unnecessary. When the court has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

Credits

(L.1970, c. 996, § 1. Amended L.1971, c. 762, § 12; L.1972, c. 399, § 23; L.1972, c. 661, § 45; L.1975, c. 531, § 2; L.1979, c. 218, § 1; L.2019, c. 59, pt. JJJ, § 16, eff. Jan. 1, 2020; L.2020, c. 56, pt. UU, § 3, eff. July 2, 2020; L.2022, c. 56, pt. UU, subpt. C, §§ 3, 4, eff. May 9, 2022; L.2023, c. 56, pt. VV, subpt. A, § 6, eff. June 2, 2023.)

Footnotes

1 So in original; no par. (c) enacted.

McKinney's CPL § 530.20, NY CRIM PRO § 530.20
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Article 530. Orders of Recognizance or Bail with Respect to Defendants in Criminal Actions and Proceedings--when and by What Courts Authorized (Refs & Annos)

McKinney's CPL § 530.60

§ 530.60 Certain modifications of a securing order

Effective: June 2, 2023
Currentness

1. Whenever in the course of a criminal action or proceeding a defendant is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this chapter, and the court considers it necessary to review such order, whether due to a motion by the people or otherwise, the court may, and except as provided in subdivision two of section 510.50 of this title concerning a failure to appear in court, by a bench warrant if necessary, require the defendant to appear before the court. Upon such appearance, the court, for good cause shown, may revoke the order of recognizance, release under non-monetary conditions, or bail. If the defendant is entitled to recognizance, release under non-monetary conditions, or bail as a matter of right, the court must issue another such order. If the defendant is not, the court may either issue such an order or commit the defendant to the custody of the sheriff in accordance with this section.

Where the defendant is committed to the custody of the sheriff and is held on a felony complaint, a new period as provided in section 180.80 of this chapter shall commence to run from the time of the defendant's commitment under this subdivision.

2. (a) Whenever in the course of a criminal action or proceeding a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses or intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law while at liberty.

(b) Except as provided in paragraph (a) of this subdivision or any other law, whenever in the course of a criminal action or proceeding a defendant charged with the commission of an offense is at liberty as a result of a securing order issued pursuant to this article it shall be grounds for revoking such order and imposing a new securing order in accordance with paragraph (d) of this subdivision, the basis for which shall be made on the record or in writing, in such criminal action or proceeding when the court has found, by clear and convincing evidence, that the defendant:

(i) persistently and willfully failed to appear after notice of scheduled appearances in the case before the court; or

(ii) violated an order of protection in the manner prohibited by subdivision (b), (c) or (d) of section 215.51 of the penal law while at liberty; or

(iii) stands charged in such criminal action or proceeding with a misdemeanor or violation and, after being so charged, intimidated a victim or witness in violation of section 215.15, 215.16 or 215.17 of the penal law or tampered with a witness in violation of section 215.11, 215.12 or 215.13 of the penal law, law while at liberty; or

(iv) stands charged in such action or proceeding with a felony and, after being so charged, committed a felony while at liberty.

(c) Before revoking an order of recognizance, release under non-monetary conditions, or bail pursuant to this subdivision, the court must hold a hearing and shall receive any relevant, admissible evidence not legally privileged. The defendant may cross-examine witnesses and may present relevant, admissible evidence on his own behalf. Such hearing may be consolidated with, and conducted at the same time as, a felony hearing conducted pursuant to article one hundred eighty of this chapter. A transcript of testimony taken before the grand jury upon presentation of the subsequent offense shall be admissible as evidence during the hearing. The district attorney may move to introduce grand jury testimony of a witness in lieu of that witness' appearance at the hearing.

(d) Revocation of an order of recognizance, release under non-monetary conditions or bail and a new securing order fixing bail or commitment, as specified in this paragraph and pursuant to this subdivision shall be for the following periods:

(i) Under paragraph (a) of this subdivision, revocation of the order of recognizance, release under non-monetary conditions or, as the case may be, bail, and a new securing order fixing bail or committing the defendant to the custody of the sheriff shall be as follows:

(A) For a period not to exceed ninety days exclusive of any periods of adjournment requested by the defendant; or

(B) Until the charges contained within the accusatory instrument have been reduced or dismissed such that no count remains which charges the defendant with commission of a felony; or

(C) Until reduction or dismissal of the charges contained within the accusatory instrument charging the subsequent offense such that no count remains which charges the defendant with commission of a class A or violent felony offense.

Upon expiration of any of the three periods specified within this subparagraph, whichever is shortest, the court may grant or deny release upon an order of bail or recognizance in accordance with the provisions of this article. Upon conviction to an offense the provisions of article five hundred thirty of this chapter shall apply;

(ii) Under subparagraph (i) of paragraph (b) of this subdivision, revocation of a previously issued securing order shall result in the issuance of a new securing order which may, if otherwise authorized by law, permit the principal's release on recognizance or release under non-monetary conditions, but shall also render the defendant eligible for an order fixing bail, or ordering non-monetary conditions in conjunction with fixing bail, provided, however, that in accordance with the principles in this title the court must impose a new securing order in accordance with subdivision one of section 510.10 of this title, and in imposing such order, may consider the circumstances warranting such revocation. Nothing in this subparagraph shall be interpreted as

shortening the period of detention, or requiring or authorizing any less restrictive form of a securing order, which may be imposed pursuant to any other law; and

(iii) Under subparagraphs (ii), (iii), and (iv) of paragraph (b) of this subdivision, revocation of a previously issued securing order shall result in the issuance of a new securing order which may, if otherwise authorized by law, permit the principal's release on recognizance or release under non-monetary conditions, but shall also render the defendant eligible for an order fixing bail or ordering non-monetary conditions in conjunction with fixing bail. In issuing the new securing order, the court shall consider the kind and degree of control or restriction necessary to reasonably assure the principal's return to court and compliance with court conditions, and select a securing order consistent with its determination, taking into account the factors required to be considered under subdivision one of section 510.10 of this title, the circumstances warranting such revocation, and the nature and extent of the principal's noncompliance with previously ordered non-monetary conditions of the securing order subject to revocation under this subdivision. Nothing in this subparagraph shall be interpreted as shortening the period of detention, or requiring or authorizing any less restrictive form of a securing order, which may be imposed pursuant to any other law.

(e) Notwithstanding the provisions of paragraph (a) or (b) of this subdivision a defendant, against whom a felony complaint has been filed which charges the defendant with commission of a class A or violent felony offense or violation of section 215.15, 215.16 or 215.17 of the penal law committed while he was at liberty as specified therein, may be committed to the custody of the sheriff pending a revocation hearing for a period not to exceed seventy-two hours. An additional period not to exceed seventy-two hours may be granted by the court upon application of the district attorney upon a showing of good cause or where the failure to commence the hearing was due to the defendant's request or occurred with his consent. Such good cause must consist of some compelling fact or circumstance which precluded conducting the hearing within the initial prescribed period.

Credits

(L.1970, c. 996, § 1. Amended L.1981, c. 788, § 2; L.1986, c. 794, § 3; L.2011, c. 565, § 1, eff. Oct. 23, 2011; L.2019, c. 59, pt. JJJ, § 20, eff. Jan. 1, 2020; L.2023, c. 56, pt. VV, subpt. A, § 11, eff. June 2, 2023.)

McKinney's CPL § 530.60, NY CRIM PRO § 530.60
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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McKinney's CPL § 530.70

§ 530.70 Order of recognizance or bail; bench warrant

Effective: March 31, 2011
Currentness

1. A bench warrant issued by a superior court, by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state. A bench warrant issued by a city court, a town court or a village court may be executed in the county of issuance or any adjoining county; and it may be executed anywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the defendant is to be taken into custody. When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.

2. A bench warrant may be addressed to: (a) any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued; or (b) any uniformed court officer for a court in the city of New York, the county of Nassau, the county of Suffolk or the county of Westchester or for any other court that is part of the unified court system of the state for execution in the building wherein such court officer is employed or in the immediate vicinity thereof. A bench warrant must be executed in the same manner as a warrant of arrest, as provided in section 120.80, and following the arrest, such executing police officer or court officer must without unnecessary delay bring the defendant before the court in which it is returnable; provided, however, if the court in which the bench warrant is returnable is a city, town or village court, and such court is not available, and the bench warrant is addressed to a police officer, such executing police officer must without unnecessary delay bring the defendant before an alternate local criminal court, as provided in subdivision five of section 120.90; or if the court in which the bench warrant is returnable is a superior court, and such court is not available, and the bench warrant is addressed to a police officer, such executing police officer may bring the defendant to the local correctional facility of the county in which such court sits, to be detained there until not later than the commencement of the next session of such court occurring on the next business day.

2-a. A court which issues a bench warrant may attach thereto a summary of the basis for the warrant. In any case where, pursuant to subdivision two of this section, a defendant arrested upon a bench warrant is brought before a local criminal court other than the court in which the warrant is returnable, such local criminal court shall consider such summary before issuing a securing order with respect to the defendant.

3. A bench warrant may be executed by (a) any officer to whom it is addressed, or (b) any other police officer delegated to execute it under circumstances prescribed in subdivisions four and five.

4. The issuing court may authorize the delegation of such warrant. Where the issuing court has so authorized, a police officer to whom a bench warrant is addressed may delegate another police officer to whom it is not addressed to execute such warrant as his or her agent when:

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

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

5. Under circumstances specified in subdivision four, the police officer to whom the bench warrant is addressed may inform the delegated officer, by telecommunication, mail or any other means, of the issuance of the warrant, of the offense charged in the underlying accusatory instrument and of all other pertinent details, and may request him or her to act as his or her agent in arresting the defendant pursuant to such bench warrant. Upon such request, the delegated police officer is to the same extent as the delegating officer, authorized to make such arrest pursuant to the bench warrant within the geographical area of such delegated officer's employment. Upon so arresting the defendant, he or she must without unnecessary delay deliver the defendant or cause him or her to be delivered to the custody of the police officer by whom he or she was so delegated, and the latter must then without unnecessary delay bring the defendant before the court in which such bench warrant is returnable.

6. A bench warrant may be executed by an officer of the state department of corrections and community supervision or a probation officer when the person named within the warrant is under the supervision of the department of corrections and community supervision or a department of probation and the probation officer is authorized by his or her probation director, as the case may be. The warrant must be executed upon the same conditions and in the same manner as is otherwise provided for execution by a police officer.

Credits

(L.1970, c. 996, § 1. Amended L.1976, c. 265, § 1; L.1979, c. 492, § 2; L.1981, c. 456, § 2; L.1981, c. 463, § 1; L.1988, c. 565, § 2; L.1990, c. 681, §§ 2, 3; L.1991, c. 352, § 1; L.2010, c. 10, § 1, eff. May 22, 2010; L.2011, c. 62, pt. C, subpt. B, § 83, eff. March 31, 2011.)

McKinney's CPL § 530.70, NY CRIM PRO § 530.70
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title P. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants and Witnesses Under Control of Court--Recognizance, Bail and Commitment (Refs & Annos)
Article 530. Orders of Recognizance or Bail with Respect to Defendants in Criminal Actions and Proceedings--when and by What Courts Authorized (Refs & Annos)

McKinney's CPL § 530.70

§ 530.70 Order of recognizance or bail; bench warrant

Effective: March 31, 2011
Currentness

1. A bench warrant issued by a superior court, by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state. A bench warrant issued by a city court, a town court or a village court may be executed in the county of issuance or any adjoining county; and it may be executed anywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the defendant is to be taken into custody. When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.

2. A bench warrant may be addressed to: (a) any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued; or (b) any uniformed court officer for a court in the city of New York, the county of Nassau, the county of Suffolk or the county of Westchester or for any other court that is part of the unified court system of the state for execution in the building wherein such court officer is employed or in the immediate vicinity thereof. A bench warrant must be executed in the same manner as a warrant of arrest, as provided in section 120.80, and following the arrest, such executing police officer or court officer must without unnecessary delay bring the defendant before the court in which it is returnable; provided, however, if the court in which the bench warrant is returnable is a city, town or village court, and such court is not available, and the bench warrant is addressed to a police officer, such executing police officer must without unnecessary delay bring the defendant before an alternate local criminal court, as provided in subdivision five of section 120.90; or if the court in which the bench warrant is returnable is a superior court, and such court is not available, and the bench warrant is addressed to a police officer, such executing police officer may bring the defendant to the local correctional facility of the county in which such court sits, to be detained there until not later than the commencement of the next session of such court occurring on the next business day.

2-a. A court which issues a bench warrant may attach thereto a summary of the basis for the warrant. In any case where, pursuant to subdivision two of this section, a defendant arrested upon a bench warrant is brought before a local criminal court other than the court in which the warrant is returnable, such local criminal court shall consider such summary before issuing a securing order with respect to the defendant.

3. A bench warrant may be executed by (a) any officer to whom it is addressed, or (b) any other police officer delegated to execute it under circumstances prescribed in subdivisions four and five.

4. The issuing court may authorize the delegation of such warrant. Where the issuing court has so authorized, a police officer to whom a bench warrant is addressed may delegate another police officer to whom it is not addressed to execute such warrant as his or her agent when:

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

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

5. Under circumstances specified in subdivision four, the police officer to whom the bench warrant is addressed may inform the delegated officer, by telecommunication, mail or any other means, of the issuance of the warrant, of the offense charged in the underlying accusatory instrument and of all other pertinent details, and may request him or her to act as his or her agent in arresting the defendant pursuant to such bench warrant. Upon such request, the delegated police officer is to the same extent as the delegating officer, authorized to make such arrest pursuant to the bench warrant within the geographical area of such delegated officer's employment. Upon so arresting the defendant, he or she must without unnecessary delay deliver the defendant or cause him or her to be delivered to the custody of the police officer by whom he or she was so delegated, and the latter must then without unnecessary delay bring the defendant before the court in which such bench warrant is returnable.

6. A bench warrant may be executed by an officer of the state department of corrections and community supervision or a probation officer when the person named within the warrant is under the supervision of the department of corrections and community supervision or a department of probation and the probation officer is authorized by his or her probation director, as the case may be. The warrant must be executed upon the same conditions and in the same manner as is otherwise provided for execution by a police officer.

Credits

(L.1970, c. 996, § 1. Amended L.1976, c. 265, § 1; L.1979, c. 492, § 2; L.1981, c. 456, § 2; L.1981, c. 463, § 1; L.1988, c. 565, § 2; L.1990, c. 681, §§ 2, 3; L.1991, c. 352, § 1; L.2010, c. 10, § 1, eff. May 22, 2010; L.2011, c. 62, pt. C, subpt. B, § 83, eff. March 31, 2011.)

McKinney's CPL § 530.70, NY CRIM PRO § 530.70
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title Q. Procedures for Securing Attendance at Criminal Actions and Proceedings of Defendants Not Securable by Conventional Means--and Related Matters
Article 570. Securing Attendance of Defendants Who Are Outside the State but Within the United States--Rendition to Other Jurisdictions of Defendants Within the State--Uniform Criminal Extradition Act (Refs & Annos)

McKinney's CPL § 570.34

§ 570.34 Arrest of accused without warrant therefor

Currentness

The arrest of a person in this state may be lawfully made also by any police officer or a private person, without a warrant, upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year; but when so arrested the accused must be taken before a local criminal court with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and, thereafter, his answers shall be heard as if he had been arrested on a warrant.

Credits
(L.1970, c. 996, § 1.)

McKinney's CPL § 570.34, NY CRIM PRO § 570.34
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Three. Special Proceedings and Miscellaneous Procedures
Title U. Special Proceedings Which Replace, Suspend or Abate Criminal Actions
Article 730. Mental Disease or Defect Excluding Fitness to Proceed (Refs & Annos)

McKinney's CPL § 730.30

§ 730.30 Fitness to proceed; order of examination

Currentness

1. At any time after a defendant is arraigned upon an accusatory instrument other than a felony complaint and before the imposition of sentence, or at any time after a defendant is arraigned upon a felony complaint and before he is held for the action of the grand jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person.

2. When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by the defendant or by the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed; if the court is not so satisfied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director.

3. When the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity and it must conduct such hearing upon motion therefor by the defendant or by the district attorney.

4. When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.

Credits
(L.1970, c. 996, § 1. Amended L.1974, c. 629, § 7.)

McKinney's CPL § 730.30, NY CRIM PRO § 730.30
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 1. Family Court Established (Refs & Annos)
Part 5. General Powers

McKinney's Family Court Act § 153

§ 153. Subpoena, warrant and other process to compel attendance

Currentness

The family court may issue a subpoena or in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child or any other person whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary, and to admit to, fix or accept bail, or parole him pending the completion of the hearing or proceeding. The court is also authorized to issue a subpoena duces tecum in accordance with the applicable provisions of the civil practice act and, upon its effective date, in accordance with the applicable provisions of the CPLR. A judge of the family court is also authorized to hear and decide motions relating to child support subpoenas issued pursuant to section one hundred eleven-p of the social services law.

Credits
(L.1962, c. 686. Amended L.1963, c. 809, § 1; L.1997, c. 398, § 60, eff. Jan. 1, 1998.)

McKinney's Family Court Act § 153, NY FAM CT § 153
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 1. Family Court Established (Refs & Annos)
Part 5. General Powers

McKinney's Family Court Act § 155

§ 155. Arrested adult

Effective: November 13, 2013
Currentness

1. If an adult respondent is arrested under this act when the family court is not in session, he or she shall be taken to the most accessible magistrate and arraigned. The production of a warrant issued by the family court, a certificate of warrant, a copy or a certificate of the order of protection or temporary order of protection, an order of protection or temporary order of protection, or a record of such warrant or order from the statewide computer registry established pursuant to section two hundred twenty-one-a of the executive law shall be evidence of the filing of an information, petition or sworn affidavit, as provided in section one hundred fifty-four-d of this article. Upon consideration of the bail recommendation, if any, made by the family court and indicated on the warrant or certificate of warrant, the magistrate shall thereupon commit such respondent to the custody of the sheriff, as defined in subdivision thirty-five of section 1.20 of the criminal procedure law, admit to, fix or accept bail, or parole him or her for hearing before the family court, subject to the provisions of subdivision four of section 530.11 of the criminal procedure law concerning arrests upon a violation of an order of protection.

2. If no warrant, order of protection or temporary order of protection has been issued by the family court, whether or not an information or petition has been filed, and an act alleged to be a family offense as defined in section eight hundred twelve of this act is the basis of an arrest, the magistrate shall permit the filing of an information, accusatory instrument or sworn affidavit as provided for in section one hundred fifty-four-d of this article, verified in accordance with subdivision one of section 100.30 of the criminal procedure law, alleging facts in support of a petition pursuant to article eight of this act. The magistrate shall thereupon commit such respondent to the custody of the sheriff, as defined in subdivision thirty-five of section 1.20 of the criminal procedure law, admit to, fix or accept bail, or parole such respondent for hearing before the family court and/or appropriate criminal court.

3. The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.

Credits
(L.1962, c. 686. Amended L.1963, c. 809, § 2; L.1978, c. 628, § 1; L.1980, c. 530, § 1; L.1983, c. 376, § 1; L.1994, c. 222, § 55; L.1997, c. 186, § 4, eff. July 8, 1997; L.2013, c. 480, § 3, eff. Nov. 13, 2013.)

McKinney's Family Court Act § 155, NY FAM CT § 155
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Uniform Justice Court Act (Refs & Annos)
Article 2. Jurisdiction (Refs & Annos)

McKinney's Uniform Justice Court Act § 210

§ 210. Contempt

Currentness

All of the provisions of law governing civil and criminal contempts in like instances in the supreme court shall apply in this court, except that this court shall have no power to punish for contempt a judge or justice of any court.

Credits
(L.1966, c. 898.)

McKinney's Uniform Justice Court Act § 210, NY UN JUS CT § 210
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 4. Support Proceedings (Refs & Annos)
Part 3. Hearing

McKinney's Family Court Act § 431

§ 431. Preliminary procedure on warrant

Currentness

(a) When a respondent is taken into custody pursuant to a warrant issued by a family court in New York city under section four hundred twenty-eight, he shall be taken before the court issuing the warrant if the respondent is taken into custody in New York city. If the respondent is taken into custody in a county not within New York city, he shall be taken before a family judge in that county.

(b) When a respondent is taken into custody pursuant to a warrant issued by a family court in a county not within the city of New York, he shall be taken before the court issuing the warrant if the respondent is taken into custody in the county in which the court sits. If the respondent is taken into custody in a different county, he shall be brought before a family court judge in that county.

Credits
(L.1962, c. 686.)

McKinney's Family Court Act § 431, NY FAM CT § 431
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Chapter 30. Of the Consolidated Laws
Article 19. Contempts (Refs & Annos)

McKinney's Judiciary Law § 751

§ 751. Punishment for criminal contempts

Currentness

1. Except as provided in subdivisions (2), (3) and (4), punishment for a contempt, specified in section seven hundred fifty, may be by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where the punishment for contempt is based on a violation of an order of protection issued under section 530.12 or 530.13 of the criminal procedure law, imprisonment may be for a term not exceeding three months. Where a person is committed to jail, for the nonpayment of a fine, imposed under this section, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.

2. (a) Where an employee organization, as defined in section two hundred one of the civil service law, wilfully disobeys a lawful mandate of a court of record, or wilfully offers resistance to such lawful mandate, in a case involving or growing out of a strike in violation of subdivision one of section two hundred ten of the civil service law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court. In the case of a government exempt from certain provisions of article fourteen of the civil service law, pursuant to section two hundred twelve of such law, the court may, as an additional punishment for such contempt, order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of such law, for such specified period of time, as the court shall determine or, in the discretion of the court, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of section two hundred ten of the civil service law since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of section two hundred ten of the civil service law, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed pursuant to this subdivision remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, such forfeiture shall be suspended to the extent necessary for the unpaid portion of such fine to be accumulated by the public employer and transmitted to the court. In fixing the amount of the fine and/or duration of the forfeiture, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (i) the extent of the wilful defiance of or a resistance to the court's mandate (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the ability of the employee organization to pay the fine imposed; and the court may consider (i) the refusal of the employee organization or the appropriate public employer, as defined in section two hundred one of the civil service law, or the representatives thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine of the civil service law and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such

acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the ability of the employee organization to pay the fine imposed, the court shall consider both the income and the assets of such employee organization.

(b) In the event membership dues and sums equivalent to dues are collected by the public employer as provided respectively in paragraph (b) of subdivision one and subdivision three of section two hundred eight of the civil service law, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(c)(i) An employee organization appealing an adjudication and fine for criminal contempt imposed pursuant to subdivision two of this section, shall not be required to pay such fine until such appeal is finally determined.

(ii) The court to which such an appeal is taken shall, on motion of any party thereto, grant a preference in the hearing thereof.

3. (a) Where a union or hospital wilfully disobeys a lawful mandate of a court of record, or wilfully offers resistance to such lawful mandate, in a case involving or growing out of a violation of section seven hundred thirteen of the labor law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court. In fixing the amount of such fine, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (i) the extent of the wilful defiance of, or resistance to, the court's mandate (ii) the impact of the strike or lockout on the public health, safety and welfare of the community and (iii) the ability of the union or hospital to pay the fine imposed; and the court may consider (i) the refusal of the union or hospital, or the representatives thereof, to submit to or comply with, the fact-finding and arbitration procedures provided in section seven hundred sixteen of the labor law. In determining the ability of the union or hospital to pay the fine imposed, the court shall consider both the income and the assets of such union or hospital.

(b) A union or hospital appealing an adjudication and fine for criminal contempt imposed pursuant to this subdivision, shall not be required to pay such fine until such appeal is finally determined. The court to which such an appeal is taken shall, on motion of any party thereto, grant a preference in the hearing thereof.

(c) As used in this subdivision, “union” shall mean any labor organization or company union as defined in section seven hundred one of the labor law, and “hospital” shall mean any non-profit-making hospital or residential care center as defined in that section.

4. Where any person wilfully disobeys a lawful mandate of the supreme court issued pursuant to subdivision twelve of section sixty-three of the executive law, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court, but not to exceed five thousand dollars per day. In fixing the amount of the fine, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (i) the extent of the wilful defiance of or resistance to the court's mandate, (ii) the amount of gain obtained by the wilful disobedience of the mandate, and (iii) the effect upon the public of the wilful disobedience.

5. Where any member of the news media as defined in subdivision two of section two hundred eighteen of this chapter, willfully disobeys a lawful mandate of a court issued pursuant to such section, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court, but not to exceed five thousand dollars per day or imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting or both, in the discretion of the court. In fixing the amount of the fine, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited

to: (i) the extent of the willful defiance of or resistance to the court's mandate, (ii) the amount of gain obtained by the willful disobedience of the mandate, and (iii) the effect upon the public and the parties to the proceeding of the willful disobedience.

Credits

(L.1909, c. 35. Amended L.1967, c. 392, § 3; L.1969, c. 24, § 12; L.1969, c. 526, §§ 4, 5; L.1971, c. 503, § 17; L.1975, c. 440, §§ 1, 2; L.1977, c. 677, § 5; L.1980, c. 530, § 12; L.1983, c. 254, § 4; L.1985, c. 672, § 6; L.1988, c. 399, § 1; L.1992, c. 187, § 2.)

McKinney's Judiciary Law § 751, NY JUD § 751
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

McKinney's Family Court Act § 827

§ 827. Issuance of warrant; certificate of warrant

Currentness

(a) The court may issue a warrant, directing that the respondent be brought before the court, when a petition is presented to the court under section eight hundred twenty-one and it appears that

(i) the summons cannot be served; or

(ii) the respondent has failed to obey the summons; or

(iii) the respondent is likely to leave the jurisdiction; or

(iv) a summons, in the court's opinion, would be ineffectual; or

(v) the safety of the petitioner is endangered; or

(vi) the safety of a child is endangered; or

(vii) aggravating circumstances exist which require the immediate arrest of the respondent. For the purposes of this section aggravating circumstances shall mean physical injury or serious physical injury to the petitioner caused by the respondent, the use of a dangerous instrument against the petitioner by the respondent, a history of repeated violations of prior orders of protection by the respondent, prior convictions for crimes against the petitioner by the respondent or the exposure of any family or household member to physical injury by the respondent and like incidents, behaviors and occurrences which to the court constitute an immediate and ongoing danger to the petitioner, or any member of the petitioner's family or household.

(b) The petitioner may not serve a warrant upon the respondent, unless the court itself grants such permission upon the application of the petitioner. The clerk of the court may issue to the petitioner or to the representative of an incorporated charitable or philanthropic society having a legitimate interest in the family a certificate stating that a warrant for the respondent has been issued by the court. The presentation of such certificate by said petitioner or representative to any peace officer, acting pursuant to his special duties, or police officer authorizes him to arrest the respondent and take him to court.

(c) A certificate of warrant expires ninety days from the date of issue but may be renewed from time to time by the clerk of the court.

(d) Rules of court shall provide that a record of all unserved warrants be kept and that periodic reports concerning unserved warrants be made.

Credits

(L.1962, c. 686. Amended L.1980, c. 843, § 216; L.1988, c. 271, § 1; L.1994, c. 222, § 17.)

McKinney's Family Court Act § 827, NY FAM CT § 827
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by In re Milton, Cal., August 22, 2022

83 S.Ct. 792
Supreme Court of the United States

Clarence Earl GIDEON, Petitioner,
v.
Louie L. WAINWRIGHT,
Director, Division of Corrections.

No. 155.
|
Argued Jan. 15, 1963.
|
Decided March 18, 1963.

Synopsis

The petitioner brought habeas corpus proceedings against the Director of the Division of Corrections. The Florida Supreme Court, 135 So.2d 746, denied all relief, and the petitioner brought certiorari. The United States Supreme Court, Mr. Justice Black, held that the Sixth Amendment to the federal Constitution providing that in all criminal prosecutions the accused shall enjoy right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment, and that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him.

Judgment reversed and cause remanded to Florida Supreme Court for further action.

West Headnotes (4)

[1] **Federal Courts** Habeas corpus

United States Supreme Court granted certiorari to review judgment of Florida Supreme Court denying habeas corpus on ground that indigent defendant in criminal prosecution in state court has no right to have counsel appointed for him, in view of fact that problem of defendant's federal constitutional right to counsel in state court has been continuing source of controversy and litigation in both state and federal courts. U.S.C.A.Const. Amends. 6, 14.

1821 Cases that cite this headnote

[2] **Constitutional Law** Bill of Rights in general

Where provision of Bill of Rights of federal Constitution is fundamental and essential to fair trial, it is made obligatory on states by Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

947 Cases that cite this headnote

[3] **Constitutional Law** Appointment of counsel

Sixth Amendment to federal Constitution providing that in all criminal prosecutions the accused shall enjoy right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment, and indigent defendant in criminal prosecution in state court has right to have counsel appointed for him. Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, overruled. U.S.C.A.Const. Amends. 6, 14.

5393 Cases that cite this headnote

[4] **Constitutional Law** Appointment of counsel

State court's refusal to appoint counsel, upon request, for an indigent accused of non-capital felony, violated due process clause. U.S.C.A.Const. Amend. 14.

946 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

***336** Mr. Justice BLACK delivered the opinion of the Court.

[1] Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under ***337** Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:
'The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

'The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.'

Put to trial before a jury, Gideon conducted his defense about as well as could ****793** be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument 'emphasizing his innocence to the charge contained in the Information filed in this case.' The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights 'guaranteed by the Constitution and the Bill of Rights by the United States Government.' [1] Treating the petition for habeas corpus as properly before it, the State Supreme Court, 'upon consideration thereof' but without an opinion, denied all relief. Since 1942, when Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, was decided by a divided ***338** Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. [2] To give this problem another review here, we granted certiorari. 370 U.S. 908, 82 S.Ct. 1259, 8 L.Ed.2d 403. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: 'Should this Court's holding in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, be reconsidered?'

I.

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. ***339** Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:
'Asserted denial (of due process) is to be tested by an appraisal of ****794** the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.' 316 U.S., at 462, 62 S.Ct., at 1256, 86 L.Ed. 1595.

Treating due process as 'a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights,' the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of

counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

II.

The Sixth Amendment provides, 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' We have construed ***340** this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.[3] Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down 'no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.' 316 U.S., at 465, 62 S.Ct., at 1257, 86 L.Ed. 1595. In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in Betts set out and considered '(r)elevant data on the subject * * * afforded by constitutional and statutory provisions subsisting in the colonies and the states prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the states to the present date.' 316 U.S., at 465, 62 S.Ct., at 1257. On the basis of this historical data the Court concluded that 'appointment of counsel is not a fundamental right, essential to a fair trial.' 316 U.S. at 471, 62 S.Ct., at 1261. It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, 'made obligatory upon the states by the Fourteenth Amendment'. Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was 'a fundamental right, essential to a fair trial,' it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

***341** We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in ****795** Hurtado v. California, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232 (1884), the Fourteenth Amendment 'embraced' those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," even though they had been 'specifically dealt with in another part of the Federal Constitution.' 287 U.S., at 67, 53 S.Ct., at 63, 77 L.Ed. 158. In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.[4] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that ***342** private property shall not be taken for public use without just compensation,[5] the Fourth Amendment's prohibition of unreasonable searches and seizures,[6] and the Eighth's ban on cruel and unusual punishment.[7] On the other hand, this Court in Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that 'immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states' and that guarantees 'in their origin * * * effective against the federal government alone' had by prior cases 'been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption.' 302 U.S., at 324—325, 326, 58 S.Ct., at 152.

[2] **[3]** **[4]** We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined ****796** in Betts, had unequivocally declared that 'the right to the aid of ***343** counsel is of this fundamental character.' Powell v. Alabama, 287 U.S. 45, 68, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932). While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

'We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.' Grosjean v. American Press Co., 297 U.S. 233, 243—244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936).

And again in 1938 this Court said:

'(The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'' Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). To the same effect, see Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), and Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the Betts Court, when faced with the contention that 'one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state,' conceded that '(e)xpressions in the opinions of this court lend color to the argument * * *' 316 U.S., at 462—463, 62 S.Ct., at 1256, 86 L.Ed. 1595. The fact is that in deciding as it did—that 'appointment of counsel is not a fundamental right, ***344** essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the ****797** poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be ***345** heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 68—69, 53 S.Ct., at 64, 77 L.Ed. 158.

The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts

v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was 'an anachronism when handed down' and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

Mr. Justice DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.

***346** Justice Field, the first, Justice Harlan, and probably Justice Brewer, took that position in O'Neil v. Vermont, 144 U.S. 323, 362—363, 370—371, 12 S.Ct. 693, 708, 711, 36 L.Ed. 450, as did Justices Black, Douglas, Murphy and Rutledge in Adamson v. California, 332 U.S. 46, 71—72, 124, 67 S.Ct. 1672, 1683, 1686, 91 L.Ed. 1903. And see Poe v. Ullman, 367 U.S. 467, 515—522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the Slaughter-House Cases, 16 Wall. 36, 118—119, 122, 21 L.Ed. 394, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in Walker v. Sauvinet, 92 U.S. 90, 92, 23 L.Ed. 678. [1] Unfortunately it has never commanded a Court. ****798** Yet, happily, all constitutional questions are always open. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. [2] Mr. Justice Jackson shared that view. [3]

***347** But that view has not prevailed [4] and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

Mr. Justice CLARK, concurring in the result.

In Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986 (1948) this Court found no special circumstances requiring the appointment of counsel but stated that 'if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps.' Id., at 674, 68 S.Ct., at 780. Prior to that case I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment. [1] At the next Term of the Court Mr. Justice Reed revealed that the Court was divided as to noncapital cases but that 'the due process clause * * * requires counsel for all persons charged with serious crimes * * *.' Uveges v. Pennsylvania, 335 U.S. 437, 441, 69 S.Ct. 184, 186, 93 L.Ed. 127 (1948). Finally, in Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961), we said that '(w)hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.' Id., at 55, 82 S.Ct., at 159.

***348** That the Sixth Amendment requires appointment of counsel in 'all criminal prosecutions' is clear, both from the language of the Amendment and from this Court's interpretation. See ****799** Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). It is equally clear from the above cases, all decided after Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, [2] as we noted that:

'Obviously Fourteenth Amendment cases dealing with state action have no application here, but if ***349** they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here * * * would be as invalid under those cases as it would be in cases of a capital nature.' 361 U.S., at 246—247, 80 S.Ct., at 304, 4 L.Ed.2d 268.

I must conclude here, as in Kinsella, supra, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of 'liberty' just as for deprival of 'life,' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted [3] —or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

Mr. Justice HARLAN, concurring.

I agree that Betts v. Brady should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that Betts v. Brady represented 'an abrupt break with its own well-considered precedents.' Ante, p. 796. In 1932, in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, a capital case, this Court declared that under the particular facts there presented—'the ignorance and illiteracy of the defendants, their youth, ****800** the circumstances of public hostility * * * and above all that they stood in deadly peril of their lives' (287 U.S., at 71, 53 S.Ct., at 65)—the state court had a duty to assign counsel for ***350** the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an after-thought; they were repeatedly emphasized, see 287 U.S., at 52, 57—58, 71, 53 S.Ct., at 58, 59—60, 65 and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided Betts v. Brady, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, but to have imposed these requirements on the States would indeed have been 'an abrupt break' with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in Powell v. Alabama, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in Powell and in Betts, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the Betts decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. [1] Such dicta continued to appear in subsequent decisions, [2] and any lingering doubts were finally eliminated by the holding of Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114.

In noncapital cases, the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after Betts, there were cases in which the Court ***351** found special circumstances to be lacking, but usually by a sharply divided vote. [3] However, no such decision has been cited to us, and I have found none, after Quicksall v. Michigan, 339 U.S. 660, 70 S.Ct. 910, 94 L.Ed. 1188 decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the 'complexity' of the legal questions presented, although those questions were often of only routine difficulty. [4] The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the Betts v. Brady rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. [5] To continue ****801** a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be

similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

***352** In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be 'implicit in the concept of ordered liberty'[6] and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. Roth v. United States, 354 U.S. 476, 496—508, 77 S.Ct. 1304, 1315—1321, 1 L.Ed.2d 1498 (separate opinion of this writer). In what is done today I do not understand the Court to depart from the principles laid down in Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, or to embrace the concept that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

All Citations

372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733, 23 O.O.2d 258

Footnotes

1 Later in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, 'I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights.'

2 Of the many such cases to reach this Court, recent examples are Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500 (1960); Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167 (1957). Illustrative cases in the state courts are Artrip v. State, 41 Ala.App. 492, 136 So.2d 574 (Ct.App.Ala.1962); Shaffer v. Warden, 211 Md. 635, 126 A.2d 573 (1956). For examples of commentary, see Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 De Paul L.Rev. 213 (1959); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused, 30 U. of Chi.L.Rev. 1 (1962); The Right to Counsel, 45 Minn.L.Rev. 693 (1961).

3 Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

4 E.g., Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925) (speech and press); Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938) (speech and press); Staub v. City of Baxley, 355 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed.2d 302 (1958) (speech); Grosjean v. American Press Co., 297 U.S. 233, 244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936) (press); Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940) (religion); De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937) (assembly); Shelton v. Tucker, 364 U.S. 479, 486, 488, 81 S.Ct. 247, 251, 252, 5 L.Ed.2d 231 (1960) (association); Louisiana ex rel. Gremillion v.

NAACP, 366 U.S. 293, 296, 81 S.Ct. 1333, 1335, 6 L.Ed.2d 301 (1961) (association); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680 (1963) (speech, assembly, petition for redress of grievances).

5 E.g., Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 235—241, 17 S.Ct. 581, 584—586, 41 L.Ed. 979 (1897); Smyth v. Ames, 169 U.S. 466, 522—526, 18 S.Ct. 418, 424—426, 42 L.Ed. 819 (1898).

6 E.g., Wolf v. Colorado, 338 U.S. 25, 27—28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949); Elkins v. United States, 364 U.S. 206, 213, 80 S.Ct. 1437, 1441, 4 L.Ed.2d 1669 (1960); Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

7 Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962).

1 Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. See Slaughter-House Cases, supra, 16 Wall. at 118—119, 21 L.Ed. 394; O'Neil v. Vermont, supra, 144 U.S. at 363, 12 S.Ct. 708, 36 L.Ed. 450. Justices Harlan and Brewer accepted the same theory in the O'Neil case (see id., at 370—371, 12 S.Ct. at 711), though Justice Harlan indicated that all 'persons,' not merely 'citizens,' were given this protection. Ibid. In Twining v. New Jersey, 211 U.S. 78, 117, 29 S.Ct. 14, 27, 53 L.Ed. 97, Justice Harlan's position was made clear:

'In my judgment, immunity from self-incrimination is protected against hostile state action, not only by * * * (the Privileges and Immunities Clause), but (also) by * * * (the Due Process Clause).'

Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597.

2 See Roth v. United States, 354 U.S. 476, 501, 506, 77 S.Ct. 1304, 1317, 1320, 1 L.Ed.2d 1498; Smith v. California, 361 U.S. 147, 169, 80 S.Ct. 215, 227, 4 L.Ed.2d 205.

3 Beauharnais v. Illinois, 343 U.S. 250, 288, 72 S.Ct. 725, 746, 96 L.Ed. 919. Cf. the opinions of Justices Holmes and Brandeis in Gitlow v. New York, 268 U.S. 652, 672, 45 S.Ct. 625, 632, 69 L.Ed. 1138, and Whitney v. California, 274 U.S. 357, 372, 47 S.Ct. 641, 647, 71 L.Ed. 1095.

4 The cases are collected by Mr. Justice Black in Speiser v. Randall, 357 U.S. 513, 530, 78 S.Ct. 1332, 1552, 2 L.Ed.2d 1460. And see, Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274—276, 80 S.Ct. 1463, 1469—1470, 4 L.Ed.2d 1708.

1 It might, however, be said that there is such an implication in Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940), a capital case in which counsel had been appointed but in which the petitioner claimed a denial of 'effective' assistance. The Court in affirming noted that '(h)ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction.' Id., at 445, 60 S.Ct. at 322. No 'special circumstances' were recited by the Court, but in citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct.

55, 77 L.Ed. 158 (1932), as authority for its dictum it appears that the Court did not rely solely on the capital nature of the offense.

2 Portents of today's decision may be found as well in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), and Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961). In Griffin, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In Ferguson we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that '(o)ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel.' 365 U.S., at 596, 81 S.Ct., at 770.

3 See, e.g., Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188—189 (1962).

1 Avery v. Alabama, 308 U.S. 444, 445, 60 S.Ct. 321, 84 L.Ed. 377.

2 E.g., Bute v. Illinois, 333 U.S. 640, 674, 68 S.Ct. 763, 780, 92 L.Ed. 986; Uveges v. Pennsylvania, 335 U.S. 437, 441, 69 S.Ct. 184, 185, 93 L.Ed. 127.

3 E.g., Foster v. Illinois, 332 U.S. 134, 67 S.Ct. 1716, 91 L.Ed. 1955; Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986; Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683.

4 E.g., Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500; Chewning v. Cunningham, 368 U.S. 443, 82 S.Ct. 498, 7 L.Ed.2d 442.

5 See, e.g., Commonwealth ex rel. Simon v. Maroney, 405 Pa. 562, 176 A.2d 94 (1961); Shaffer v. Warden, 211 Md. 635, 126 A.2d 573 (1956); Henderson v. Bannan, 256 F.2d 363 (C.A.6th Cir. 1958).

6 Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288.

New York Official Reports

KeyCite Yellow Flag - Negative Treatment
Rejected by Flora v. Luzerne County of Com. of Pennsylvania, Pa.Cmwlth., October 14, 2014

15 N.Y.3d 8, 930 N.E.2d 217, 904
N.Y.S.2d 296, 2010 N.Y. Slip Op. 03798

**1 Kimberly Hurrell-Harring et al., on Behalf of Themselves and All Others Similarly Situated, Appellants
v
State of New York et al., Respondents.

Court of Appeals of New York
66
Argued March 23, 2010
Decided May 6, 2010

CITE TITLE AS: Hurrell-Harring v State of New York

SUMMARY

Appeal, on constitutional and other grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 16, 2009. The Appellate Division, with two Justices dissenting, (1) reversed, on the law, an order of the Supreme Court, Albany County (Eugene P. Devine, J.), which had conditionally denied a motion by defendant State of New York to dismiss the complaint by (a) requiring plaintiffs to serve and file a second amended complaint adding the counties of Onondaga, Ontario, Schuyler, Suffolk and Washington as defendants within 30 days, and (b) providing that unless the condition was complied with, defendant's motion to dismiss would be granted in its entirety; (2) granted defendant's motion; and (3) dismissed the complaint.

Hurrell-Harring v State of New York, 66 AD3d 84, modified.

HEADNOTES

Courts
Justiciable Questions
Challenge to Public Defense System—Ineffective Assistance of Counsel

(1) Plaintiffs, who were defendants in various criminal prosecutions ongoing at the time of the action's commencement and sought a declaration that the State's system of providing constitutionally mandated counsel to indigent defendants violated their rights and those of the class they sought to represent, failed to state a justiciable claim based on ineffective assistance of counsel under *Strickland v Washington* (466 US 668 [1984]). General prescriptive relief is unavailable and incompatible with the adjudication of claims alleging constitutionally ineffective assistance of counsel. Effective assistance is a judicial construct designed to do no more than protect an individual defendant's right to a fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies. The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, but rather to ensure that criminal defendants receive a fair trial.

Courts
Justiciable Questions
Challenge to Public Defense System—Denial of Assistance of Counsel

(2) Plaintiffs, who were defendants in various criminal prosecutions ongoing at the time of the action's commencement and sought a declaration that the State's system of providing constitutionally mandated counsel to indigent defendants violated their rights and those of the class they sought to represent, **9 stated a justiciable claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon v Wainwright* (372 US 335 [1963]). Ten of the 20 plaintiffs were altogether without representation at the arraignments held in their underlying criminal proceedings, and eight of those unrepresented plaintiffs were jailed after bail had been set in amounts they could not afford. The complaint additionally contained allegations sufficient to justify the inference that those deprivations of counsel at critical stages of the proceedings might be illustrative of significantly more widespread practices. In numerous cases, representational denials were allegedly premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. Similarly, the numerous allegations to the effect that counsel, although

appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, might be reasonably understood to allege nonrepresentation rather than ineffective representation. Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there was no reason why such a claim could not or should not be brought without the context of a completed prosecution. Assuming the allegations of the complaint to be true, there was considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel. The very serious dangers that the alleged denial of counsel entails outweighed the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation recognized here.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law §§ 268, 269; Am Jur 2d, Criminal Law §§ 1097, 1109, 1124.

Carmody-Wait 2d, Declaratory Judgments §§ 147:19, 147:20; Carmody-Wait 2d, Right to Counsel §§ 184:48, 184:61, 184:62.

LaFave, et al., Criminal Procedure (3d ed) § 11.7.

NY Jur 2d, Article 78 and Related Proceedings § 11; NY Jur 2d, Counties, Towns, and Municipal Corporations § 637; NY Jur 2d, Criminal Law: Procedure §§ 761, 795, 804; NY Jur 2d, Declaratory Judgments and Agreed Case §§ 21–23.

ANNOTATION REFERENCE

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal defendant. 2 ALR4th 27.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: non-justiciab! /p ineffective /2 assistance /2 counsel attorney & deficien!

***10 POINTS OF COUNSEL**

New York Civil Liberties Union Foundation, New York City (*Corey Stoughton, Arthur Eisenberg, Christopher Dunn* and *Andrew Kalloch* of counsel), and *Schulte Roth & Zabel LLP* (*Gary Stein, Daniel Greenberg, Azmina Jasani* and *Kristie M. Blase* of counsel), for appellants.

I. Plaintiffs have stated a claim for prospective relief from systemic violations of the constitutional right to counsel. (*Gideon v Wainwright,* 372 US 335; *Rothgery v Gillespie County,* 554 US 191; *Maine v Moulton,* 474 US 159; *People v Hilliard,* 73 NY2d 584; *People v Settles,* 46 NY2d 154; *People v Ross,* 67 NY2d 321; *People v Baldi,* 54 NY2d 137; *People v Cunningham,* 49 NY2d 203; *McMann v Richardson,* 397 US 759; *People v Witenski,* 15 NY2d 392.) II. The Appellate Division erred in holding that the right to counsel is enforced exclusively through individual postconviction actions seeking reversal of a conviction. (*Strickland v Washington,* 466 US 668; *Luckey v Harris,* 860 F2d 1012; *People v Donovan,* 13 NY2d 148; *N.Y. County Lawyers' Assn. v State of New York,* 192 Misc 2d 424; *Nicholson v Williams,* 203 F Supp 2d 153.) III. The Appellate Division erred in holding that plaintiffs' claims will interfere with their ongoing criminal cases such that this action must be dismissed. (*New York County Lawyers' Assn. v Pataki,* 188 Misc 2d 776; *Luckey v Harris,* 860 F2d 1012; *Matter of Oglesby v McKinney,* 7 NY3d 561; *Matter of Taylor v Sise,* 33 NY2d 357; *Matter of Veloz v Rothwax,* 65 NY2d 902; *Matter of Morgenthau v Erlbaum,* 59 NY2d 143; *Reed v Littleton,* 275 NY 150; *Strickland v Washington,* 466 US 668.) IV. Plaintiffs' claims are justiciable because they allege failure to comply with mandatory and legal constitutional standards. (*Klostermann v Cuomo,* 61 NY2d 525; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27; *Campaign for Fiscal Equity v State of New York,* 86 NY2d 307; *Campaign for Fiscal Equity v State of New York,* 100 NY2d 893; *Jiggetts v Grinker,* 75 NY2d 411; *McCain v Koch,* 70 NY2d 109; *Gideon v Wainwright,* 372 US 335; *Marbury v Madison,* 1 Cranch [5 US] 137; *King v Cuomo,* 81 NY2d 247; *New York State Bankers Assn. v Wetzler,* 81 NY2d 98.)

Andrew M. Cuomo, Attorney General, Albany (*Barbara D. Underwood, Andrea Oser, Denise A. Hartman* and *Victor Paladino* of counsel), for respondents.

I. Plaintiffs fail to state a justiciable claim. (*Gideon v Wainwright,* 372 US 335; *People v Witenski,* 15 NY2d 392; *Maine v Moulton,* 474 US 159; *People v Claudio,* 59 NY2d 556; *Strickland v Washington,* 466 US 668; ***11** *People v Baldi,* 54 NY2d 137; *People v Turner,* 5 NY3d 476; *People v Arthur,* 22 NY2d 325; *People v Settles,* 46 NY2d 154; *People v D'Alessandro,* 13 NY3d 216.) II. This action for declaratory and injunctive relief was properly dismissed because it would interfere with ongoing criminal proceedings and because adequate other remedies exist to address claims for the denial of the right to counsel. (*Matter of Rush v Mordue,* 68 NY2d 348; *Matter of State of New York v King,* 36 NY2d 59; *Matter of Lipari v Owens,* 70 NY2d 731; *Matter of Patel v Breslin,* 45 AD3d 1240; *Matter of Veloz v Rothwax,* 65 NY2d 902; *Matter of Morgenthau v Erlbaum,* 59 NY2d 143; *Matter of Oglesby v McKinney,* 7 NY3d 561; *Matter of Beneke v Town of Santa Clara,* 9 AD3d 820; *Island Swimming Sales v County of Nassau,* 88 AD2d 990; *O'Shea v Littleton,* 414 US 488.)

Kathleen B. Hogan, District Attorney, Albany (*Morrie I. Kleinbart* of counsel), for District Attorneys Association of the State of New York, amicus curiae.

There is no basis to find any violation of a counsel-related right remediable in a civil action. Finding such a violation would do incalculable damage to the ability to effectively litigate such claims in criminal proceedings. (*Matter of Stream v Beisheim,* 34 AD2d 329; *Gideon v Wainwright,* 372 US 335; *Strickland v Washington,* 466 US 668; *People v Baldi,* 54 NY2d 137; *People v Turner,* 5 NY3d 476; *People v Caban,* 5 NY3d 143; *People v Benevento,* 91 NY2d 708; *People v Claudio,* 83 NY2d 76; *Kimmelman v Morrison,* 477 US 365; *People v Wiggins,* 89 NY2d 872.)

Moskowitz, Book & Walsh, LLP, New York City (*Susan J. Walsh* of counsel), *Norman L. Reimer,* Washington, D.C., *Ivan Dominguez, Michael Getnick,* Albany, *Green & Willstatter,* White Plains (*Richard Willstatter* of counsel), *Ann Lesk,* New York City, *Bruce Green, Ellen C. Yaroshefsky, Adele Bernhard,* White Plains, *Jenny Rivera,* Flushing, and *Steve Zeidman* for National Association of Criminal Defense Lawyers and others, amici curiae.

I. The *Strickland* postconviction, remedial standard is the wrong standard in a class action claim seeking prospective relief to halt and prevent system-wide deficiencies in how the State of New York meets its constitutional obligation to provide indigent defendants effective assistance of counsel. (*Strickland v Washington,* 466 US 668; *Williams v Taylor,* 529 US 362; *Wright v West,* 505 US 277; *Kieser v People of State of N.Y.,* 56 F3d 16; *Rompilla v Beard,* 545 US 374; *Luckey v Harris,* 860 F2d 1012, *appeal after remand sub nom. Luckey v Miller,* 976 F2d 673; *United States v Cronic,* 466 US 648; ***12** *Geders v United States,* 425 US 80; *Holloway v Arkansas,* 435 US 475; *Kenny A. ex rel. Winn v Perdue,* 356 F Supp 2d 1353.) II. The Sixth Amendment right to effective assistance of counsel is broader than the right to assistance at trial and requires more than the mere appointment of counsel. (*Strickland v Washington,* 466 US 668; *Rothgery v Gillespie County,* 554 US 191; *Brewer v Williams,* 430 US 387; *Michigan v Jackson,* 475 US 625; *Higazy v Templeton,* 505 F3d 161; *Coleman v Alabama,* 399 US 1; *Kirby v Illinois,* 406 US 682; *United States v Gouveia,* 467 US 180; *Estelle v Smith,* 451 US 454; *Moore v Illinois,* 434 US 220.) III. The New York Constitution affords broader protection of the right to effective assistance of counsel and is cognizable prospectively. (*People v Elwell,* 50 NY2d 231; *People v Belton,* 55 NY2d 49; *People v P.J. Video,* 68 NY2d 296; *People v Torres,* 74 NY2d 224; *People v Dunn,* 77 NY2d 19; *People v Robinson,* 97 NY2d 341; *People ex rel. Ransom v Niagara County,* 78 NY 622; *People v Price,* 262 NY 410; *People v Settles,* 46 NY2d 154; *People v Benevento,* 91 NY2d 708.)

Willkie Farr & Gallagher LLP, New York City (*Lawrence O. Kamin, Maor A. Portnoy* and *Joseph M. Azam* of counsel), for the Fund for Modern Courts, amicus curiae.

I. Under New York's political question doctrine, the instant case is justiciable. (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo,* 64 NY2d 233; *Matter of Dairylea*

Coop. v Walkley, 38 NY2d 6; *Jones v Beame,* 45 NY2d 402; *Strickland v Washington,* 466 US 668; *New York County Lawyers' Assn. v State of New York,* 294 AD2d 69; *Jiggetts v Grinker,* 75 NY2d 411; *Matter of Anderson v Krupsak,* 40 NY2d 397; *Bruno v Codd,* 47 NY2d 582; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27; *Klostermann v Cuomo,* 61 NY2d 525.) II. The justiciability of alleged systemic deficiencies denying the constitutional right to counsel to indigent criminal defendants is further confirmed by other courts which have consistently held that this dispute is justiciable. III. Arguments that the amended complaint presents a nonjusticiable political question are flawed. (*Klostermann v Cuomo,* 61 NY2d 525; *Campaign for Fiscal Equity v State of New York,* 86 NY2d 307; *Campaign for Fiscal Equity v State of New York,* 100 NY2d 893; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27; *New York County Lawyers' Assn. v Pataki,* 188 Misc 2d 776; *Matter of Anderson v Krupsak,* 40 NY2d 397; *Marbury v Madison,* 1 Cranch [5 US] 137; *Bruno v Codd,* 47 NY2d 582.) IV. Adjudicating constitutional claims is not only within the Judiciary's purview, it is the highest calling ***13** for the courts. (*Duke Power Co. v Carolina Environmental Study Group, Inc.,* 438 US 59; *Powell v McCormack,* 395 US 486; *People v LaValle,* 3 NY3d 88; *People v Scott,* 79 NY2d 474; *Klostermann v Cuomo,* 61 NY2d 525; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27; *Campaign for Fiscal Equity v State of New York,* 100 NY2d 893; *Powell v Alabama,* 287 US 45; *New York County Lawyers' Assn. v State of New York,* 294 AD2d 69.) V. The amended complaint presents significant issues that result in serious and immediate individual, familial and societal harms. (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo,* 64 NY2d 233; *New York County Lawyers' Assn. v State of New York,* 196 Misc 2d 761; *Baba-Ali v State of New York,* 24 Misc 3d 576; *People v Claudio,* 83 NY2d 76; *United States v Cronic,* 466 US 648; *United States ex rel. Williams v Twomey,* 510 F2d 634; *Gideon v Wainwright,* 372 US 335; *Powell v Alabama,* 287 US 45; *N.Y. County Lawyers' Assn. v State of New York,* 192 Misc 2d 424; *McMann v Richardson,* 397 US 759.)

Richards Kibbe & Orbe LLP, New York City (*Lee S. Richards III, Arthur S. Greenspan* and *Eric S. Rosen* of counsel), and *Brennan Center for Justice at New York University School of Law* (*David S. Udell* and *Alicia L. Bannon* of counsel), for Michael A. Battle and others, amici curiae.

I. The deficient system for defending the indigent alleged in the complaint undercuts the work of prosecutors and damages the integrity of the criminal justice system. (*People v Pelchat,* 62 NY2d 97; *Herring v New York,* 422 US 853; *Gideon v Wainwright,* 372 US 335; *People v DiSimone,* 23 Misc 3d 402; *People v Vilardi,* 76 NY2d 67; *Georgia v McCollum,* 505 US 42; *People v Settles,* 46 NY2d 154; *People v Santorelli,* 95 NY2d 412; *People v Taveras,* 10 NY3d 227.) II. Because courts have the power and responsibility to protect the integrity of the judicial system, this Court should find plaintiffs' claims justiciable. (*Campaign for Fiscal Equity v State of New York,* 100 NY2d 893; *New York County Lawyers' Assn. v State of New York,* 294 AD2d 69; *People v Ramos,* 99 NY2d 27; *Wehringer v Brannigan,* 232 AD2d 206, 89 NY2d 980; *Matter of Maron v Silver,* 58 AD3d 102; *N.Y. County Lawyers' Assn. v State of New York,* 192 Misc 2d 424; *Bruno v Codd,* 47 NY2d 582; *Matter of McCoy v Mayor of City of N.Y.,* 73 Misc 2d 508.) III. The State of New York's remaining objections to justiciability lack merit. (*People v Baldi,* 54 NY2d 137; *People v Stultz,* 2 NY3d 277; *Matter of Swinton v Safir,* 93 NY2d 758; *People v Donovan,* 13 NY2d 148; *People v Osorio,* 75 NY2d 80; *Castillo v Henry Schein, Inc.,* 259 AD2d 651; ***14** *Andon v 302-304 Mott St. Assoc.,* 94 NY2d 740; *Kimmel v State of New York,* 302 AD2d 908; *511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144; *People v Rivera,* 71 NY2d 705.)

Davis Polk & Wardwell LLP, New York City (*Daniel F. Kolb, Daniel J. O'Neill, Jennifer Marcovitz* and *Lara Samet* of counsel), and *Legal Aid Society* (*Steven Banks* and *Janet Sabel* of counsel), for Legal Aid Society, amicus curiae.

I. The right to meaningful and effective assistance of counsel represents far more than avoidance of wrongful convictions.

(*Argersinger v Hamlin,* 407 US 25; *Gideon v Wainwright,* 372 US 335; *People v Witenski,* 15 NY2d 392; *People v Hughes,* 15 NY2d 172; *Powell v Alabama,* 287 US 45; *United States v Cronic,* 466 US 648; *McMann v Richardson,* 397 US 759; *People v Droz,* 39 NY2d 457; *People v Baldi,* 54 NY2d 137; *Strickland v Washington,* 466 US 668.) II. A judicial remedy is necessary and appropriate where ineffective assistance of counsel is systemic. (*New York County Lawyers' Assn. v State of New York,* 294 AD2d 69; *New York County Lawyers' Assn. v State of New York,* 196 Misc 2d 761; *Matter of Swinton v Safir,* 93 NY2d 758; *Klostermann v Cuomo,* 61 NY2d 525; *Bruno v Codd,* 47 NY2d 582; *Indiana Protection & Advocacy Servs. Commn. v Commissioner, Ind. Dept. of Correction,* 642 F Supp 2d 872; *Oregon Advocacy Ctr. v Mink,* 322 F3d 1101; *Marbury v Madison,* 1 Cranch [5 US] 137; *Campaign for Fiscal Equity v State of New York,* 100 NY2d 893; *Board of Educ., Levittown Union Free School Dist. v Nyquist,* 57 NY2d 27.) III. Systemic deficiencies in a system of indigent defense constrain the ability of assigned counsel to satisfy their professional obligations to clients.

Jonathan E. Gradess, Albany, and *Alfred O'Connor* for New York State Defenders Association, amicus curiae.

Ineffective assistance of counsel claims cannot be adequately resolved within the context of criminal case litigation in many counties in New York because overburdened and underfunded public defense lawyers do not file CPL article 440 motions, which are necessary for proper adjudication of these claims. (*Rothgery v Gillespie County,* 554 US 191; *Luckey v Harris,* 860 F2d 1012; *People v Linares,* 2 NY3d 507; *People v Brown,* 45 NY2d 852; *People v Rivera,* 71 NY2d 705; *People v Whitfield,* 44 AD3d 419; *People v Noll,* 24 AD3d 688.)

David Loftis, New York City, *Barry C. Scheck* and *Peter J. Neufeld* for Innocence Project, Inc., amicus curiae.

New York's system for indigent defense does not guarantee that New York's ***15** poor will receive the full scope of their right to effective assistance. Additionally, the remedy of *Strickland v Washington* (466 US 668 [1984]) is insufficient to remedy this systemic constitutional wrong. The current system for indigent defense in New York should be subject to systemic reform by the courts, both to ensure the constitutional rights of all criminal defendants and to minimize the risk that innocent defendants are convicted for crimes they did not commit. (*People v Settles,* 46 NY2d 154; *People v Claudio,* 59 NY2d 556; *People v Baldi,* 54 NY2d 137; *People v Caban,* 5 NY3d 143; *Youngblood v West Virginia,* 547 US 867; *Strickler v Greene,* 527 US 263; *People v Deskovic,* 201 AD2d 579, 83 NY2d 1003, 210 F3d 354, 531 US 1088; *People v Newton,* 150 AD2d 991, 74 NY2d 816; *Porter v Gramley,* 112 F3d 1308, *cert denied sub nom. Porter v Gilmore,* 523 US 1042.)

OPINION OF THE COURT

Chief Judge Lippman.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant "the right to . . . have the Assistance of Counsel for his defence," and since *Gideon v Wainwright* (372 US 335 [1963]) it has been established that that entitlement may not be effectively denied by the State by reason of a defendant's inability to pay for a lawyer. *Gideon* is not now controversial either as an expression of what the Constitution requires or as an exercise in elemental fair play. Serious questions have, however, arisen in this and other jurisdictions as to whether *Gideon*'s mandate is being met in practice (*see e.g.* ****2** *Lavallee v Justices in Hampden Superior Ct.*, 442 Mass 228, 812 NE2d 895 [2004]).

In New York, the Legislature has left the performance of the State's obligation under *Gideon* to the counties, where it is discharged, for the most part, with county resources and according to local rules and practices (*see* County Law arts 18-A, 18-B). Plaintiffs in this action, defendants in various criminal prosecutions ongoing at the time of the action's commencement in Washington, Onondaga, Ontario, Schuyler and Suffolk counties, contend that this arrangement, involving what is in essence a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly situated indigent defendants in the aforementioned counties of constitutionally and statutorily guaranteed representational rights. They seek a declaration that their rights and those of the class they seek to represent ***16** are being violated and an injunction to avert further abridgment of their right to counsel; they do not seek relief within the criminal cases out of which their claims arise.

This appeal results from dispositions of defendants' motion pursuant to CPLR 3211 to dismiss the action as nonjusticiable. Supreme Court denied the motion, but in the decision and order now before us (66 AD3d 84 [2009]) the sought relief was granted by the Appellate Division. That court held that there was no cognizable claim for ineffective assistance of counsel other than one seeking postconviction relief, and, relatedly, that violation of a criminal defendant's right to counsel could not be vindicated in a collateral civil proceeding, particularly where the object of the collateral action was to compel an additional allocation of public resources, which the court found to be a properly legislative prerogative. Two Justices dissented. They were of the view that violations of the right to counsel were actionable in contexts other than claims for postconviction relief, including a civil action such as that brought by plaintiffs. While recognizing that choices between competing social priorities are ordinarily for the Legislature, this did not, in the dissenters' judgment, excuse the Judiciary from its obligation to provide a remedy for violations of constitutional rights (*id.* at 95), especially when the alleged violations were "so interwoven with, and necessarily implicate[d], the proper functioning of the court system itself" (*id.* at 96).

Plaintiffs have appealed as of right from the Appellate Division's order pursuant to CPLR 5601 (a) and (b) (1). We now reinstate the action, albeit with some substantial qualifications upon its scope.

Defendants' claim that the action is not justiciable rests principally on two theories: first, that there is no cognizable claim for ineffective assistance of counsel apart from one seeking relief from a conviction, and second, that recognition of a claim for systemic relief of the sort plaintiffs seek will involve the courts in the performance of properly legislative functions, most notably determining how public resources are to be allocated.

The first of these theories is rooted in case law conditioning relief for ****3** constitutionally ineffective assistance upon findings that attorney performance, when viewed in its total, case specific aspect, has both fallen below the standard of objective reasonableness (*see* ***17** *Strickland v Washington*, 466 US 668, 687-688 [1984]), and resulted in prejudice, either with respect to the outcome of the proceeding (*id.* at 694) or, under this Court's somewhat less outcome oriented standard of "meaningful assistance," to the defendant's right to a fair trial (*People v Benevento*, 91 NY2d 708, 713-714 [1998]). Defendants reason that the prescribed, deferential (*see* *Strickland*, 466 US at 689; *Benevento*, 91 NY2d at 712) and highly context sensitive inquiry into the adequacy and particular effect of counsel's performance cannot occur until a prosecution has concluded in a conviction, and that, once there is a conviction, the appropriate avenues of relief are direct appeals and the various other established means of challenging a conviction, such as CPL article 440 motions and petitions for writs of habeas corpus or coram nobis. They urge, in essence, that the present plaintiffs can, based upon their ongoing prosecutions, possess no ripe claim of ineffective assistance and that any ineffective assistance claims that might eventually be brought by them would, given the nature of the claim, have to be individually asserted and determined; they argue that a finding of constitutionally deficient performance—one necessarily rooted in the particular circumstances of an individual case—cannot serve as a predicate for systemic relief. Indeed, they remind us that the Supreme Court in *Strickland* has noted pointedly that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system[,] . . . [but rather] to ensure that criminal defendants receive a fair trial" (466 US at 689).

(1) These arguments possess a measure of merit. A fair reading of *Strickland* and our relevant state precedents supports defendants' contention that effective assistance is a judicial construct designed to do no more than protect an individual defendant's right to a fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies. The cases in which the concept has been explicated are in this connection notable for their intentional omission of any broadly applicable defining performance standards. Indeed, *Strickland* is clear that articulation of any standard more specific than that of objective reasonableness is neither warranted by the Sixth Amendment nor compatible with its objectives:

> "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. ***18** It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process

> that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . .
>
> "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances . . . No particular set of detailed rules **4 for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause" (466 US at 688-689 [citations omitted]).

We too have for similar reasons eschewed the articulation of more specific, generally applicable performance standards for judging the effectiveness of counsel in the context of determining whether constitutionally mandated representation has been provided (*see People v Benevento*, 91 NY2d at 712; *People v Baldi*, 54 NY2d 137, 146-147 [1981]). This is not to say that performance standards are not highly relevant in assuring that constitutionally effective assistance is provided and in judging whether in a particular case an attorney's performance has been deficient, only that such standards do not and cannot usefully define the Sixth Amendment-based concept of effective assistance. While the imposition of such standards may be highly salutary, it is not under *Strickland* appropriate as an exercise in Sixth Amendment jurisprudence.

Having said this, however, we would add the very important caveat that *Strickland*'s approach is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State in a manner that would justify the presumption that the standard of objective reasonableness will ordinarily be satisfied (*see Strickland* **19 , 466 US at 687-689). The questions properly raised in this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation.

Inasmuch as general prescriptive relief is unavailable and indeed incompatible with the adjudication of claims alleging constitutionally ineffective assistance of counsel, it follows that plaintiffs' claims for prospective systemic relief cannot stand if their gravamen is only that attorneys appointed for them have not, so far, afforded them meaningful and effective representation. While it is defendants' position, and was evidently that of the Appellate Division majority, that the complaint contains only performance-based claims for ineffective assistance, our examination of the pleading leads us to a different conclusion.

According to the complaint, 10 of the 20 plaintiffs—two from Washington, two from Onondaga, two from Ontario and four from Schuyler County—were altogether without representation at the arraignments held in their underlying criminal proceedings. Eight of these unrepresented plaintiffs were jailed after bail had been set in amounts they could not afford. It is **5 alleged that the experience of these plaintiffs is illustrative of what is a fairly common practice in the aforementioned counties of arraigning defendants without counsel and leaving them, particularly when accused of relatively low level offenses, unrepresented in subsequent proceedings where pleas are taken and other critically important legal transactions take place. One of these plaintiffs remained unrepresented for some five months and it is alleged that the absence of clear and uniform guidelines reasonably related to need has commonly resulted in denials of representation to indigent defendants based on the subjective judgments of individual jurists.

In addition to the foregoing allegations of outright nonrepresentation, the complaint contains allegations to the effect that although lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients —that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable. It is repeatedly alleged that counsel missed court appearances, and that when they did *20 appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel. [1] There are also allegations that the counsel appointed for at least one of the plaintiffs was

seriously conflicted and thus unqualified to undertake the representation.

(2) The allegations of the complaint must at this stage of the litigation be deemed true and construed in plaintiffs' favor, affording them the benefit of every reasonable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the very limited object being to ascertain whether any cognizable claim for relief is made out (*id.*). If there is a discernible claim, that is where the inquiry must end; the difficulty of its proof is not the present concern. The above summarized allegations, in our view, state cognizable Sixth Amendment claims.

It is clear that a criminal defendant, regardless of wherewithal, is entitled to " 'the guiding hand of counsel at every step in the proceedings against him' " (*Gideon v Wainwright*, 372 US at 345, quoting *Powell v Alabama*, 287 US 45, 69 [1932]). The right attaches at arraignment (*see Rothgery v Gillespie County*, 554 US 191, 128 S Ct 2578 [2008]) and entails the presence of counsel at each subsequent "critical" stage of the proceedings (*Montejo v Louisiana*, 556 US —, 129 S Ct 2079 [2009]). As is here relevant, arraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited ****6** from the presently named plaintiffs,[2] a circumstance which would undoubtedly require the "critical stage" label (*see Coleman v Alabama*, 399 US 1, 9 [1970]), it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated (*see also* CPL 180.10 [6]) with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents. There is no question that "a bail hearing is a critical stage of the State's criminal process" (*Higazy v Templeton*, 505 F3d 161, 172 [2d Cir 2007] [internal quotation marks and citation omitted]).

Recognizing the crucial importance of arraignment and the extent to which a defendant's basic liberty and due process ***21** interests may then be affected, CPL 180.10 (3) expressly provides for the "right to the aid of counsel at the arraignment and at every subsequent stage of the action" and forbids a court from going forward with the proceeding without counsel for the defendant, unless the defendant has knowingly agreed to proceed in counsel's absence (CPL 180.10 [5]).[3] Contrary to defendants' suggestion and that of the dissent, nothing in the statute may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable, except at a defendant's informed option, when matters affecting the defendant's pretrial liberty or ability subsequently to defend against the charges are to be decided. Nor is there merit to defendants' suggestion that the Sixth Amendment right to counsel is not yet fully implicated (*see Rothgery*, 554 US at 209).

The cases cited by the dissent in which the allegedly consequential event at arraignment was the entry of a not guilty plea (*United States ex rel. Caccio v Fay*, 350 F2d 214, 215 [2d Cir 1965]; *United States ex rel. Combs v Denno*, 357 F2d 809, 812 [2d Cir 1966]; *United States ex rel. Hussey v Fay*, 220 F Supp 562 [SD NY 1963]; *Holland v Allard*, 2005 WL 2786909, 2005 US Dist LEXIS 46609 [ED NY 2005]) do not stand for the proposition that counsel, as a general matter, is optional at arraignment. Indeed, such a proposition would plainly be untenable since arraignments routinely, and in New York as a matter of statutory design, ****7** encompass matters affecting a defendant's liberty and ability to defend against the charges. The cited cases rather stand for the very limited proposition that where it happens that what occurs at arraignment does not affect a defendant's ultimate adjudication, a defendant is not on the ground of nonrepresentation entitled to a reversal of his or her conviction. Plaintiffs here do not seek that relief. Rather, they seek prospectively to assure the provision of what the Constitution undoubtedly guarantees—representation at all critical stages of the criminal proceedings. In New York, arraignment is, as a general matter, such a stage.

Also "critical" for Sixth Amendment purposes is the period between arraignment and trial when a case must be factually ***22** developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pretrial motions filed. Indeed, it is clear that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself" (*Maine v Moulton*, 474 US 159, 170 [1985]).

This complaint contains numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings. The complaint additionally contains allegations sufficient to justify the inference that

these deprivations may be illustrative of significantly more widespread practices; of particular note in this connection are the allegations that in numerous cases representational denials are premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.

Similarly, while variously interpretable, the numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, may be reasonably understood to allege nonrepresentation rather than ineffective representation. Actual representation assumes a certain basic representational relationship. The allegations here, however, raise serious questions as to whether any such relationship may be really said to have existed between many of the plaintiffs and their putative attorneys and cumulatively may be understood to raise the distinct possibility that merely nominal attorney-client pairings occur in the subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing of indigent defense providers. It is very basic that

> "[i]f no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.' ***23** *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940) (footnote omitted)" ****8** (*United States v Cronic*, 466 US 648, 654-655 [1984]).

While it may turn out after further factual development that what is really at issue is whether the representation afforded was effective—a subject not properly litigated in this civil action—at this juncture, construing the allegations before us as we must, in the light most favorable to plaintiffs, the complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.[4] The dissent's conclusion that these allegations assert only performance based claims, and not claims for nonrepresentation, seems to us premature. The picture which emerges from a fair and procedurally appropriate reading of the complaint is that defendants are with some regularity going unrepresented at arraignment and subsequent critical stages. As noted, half the plaintiffs claim to have been without counsel at arraignment, and nearly all claim to have been left effectively without representation for lengthy periods subsequent to arraignment. If all that were involved was a "lumping together of 20 generic ineffective assistance of counsel claims" (dissenting op at 30) we would agree with the dissent that no cognizable claim had been stated, but we do not think that this detailed, multi-tiered complaint meticulously setting forth the factual bases of the individual claims and the manner in which they are linked to and illustrative of broad systemic deficiencies is susceptible of such characterization.

Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial. Indeed, in cases of outright denial of the right to counsel prejudice is presumed. *Strickland* itself, of course, recognizes the critical distinction between a claim for ineffective assistance and one alleging simply that the right to the assistance of counsel has been denied and specifically acknowledges that the ***24** latter kind of claim may be disposed of without inquiring as to prejudice:

> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States* v. *Cronic*, [466 US] at 659, and n. 25. Prejudice in these circumstances is so likely ****9** that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent" (466 US at 692).

The allegations before us state claims falling precisely within this described category. It is true, as the dissent points out, that claims, even within this category, have been most frequently litigated postconviction, but it does not follow from this circumstance that they are not cognizable apart from the postconviction context. Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason—and certainly none is identified in the dissent—why such a claim cannot or should not be brought without the context of a completed prosecution.

Although defendants contend otherwise, we perceive no real danger that allowing these claims to proceed would impede the orderly progress of plaintiffs' underlying criminal actions. Those actions have, for the most part, been concluded, [5] and we have, in any event, removed from the action the issue of ineffective assistance, thus eliminating any possibility that the collateral adjudication of generalized claims of ineffective assistance might be used to obtain relief from individual judgments of conviction. [6] Here we emphasize that our recognition that **10 plaintiffs may have claims for constructive denial of counsel should not *25 be viewed as a back door for what would be nonjusticiable assertions of ineffective assistance seeking remedies specifically addressed to attorney performance, such as uniform hiring, training and practice standards. To the extent that a cognizable Sixth Amendment claim is stated in this collateral civil action, it is to the effect that in one or more of the five counties at issue the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of individual attorneys. While the defense of indigents in the five subject counties might perhaps be improved in many ways that the Legislature is free to explore, the much narrower focus of the constitutionally based judicial remedy here sought must be simply to assure that every indigent defendant is afforded actual assistance of counsel, as *Gideon* commands. Plainly, we do not, even while narrowing the scope of this action as we believe the law requires, deny plaintiffs a remedy for systemic violations of *Gideon*, as the dissent suggests. It is rather the dissent that would foreclose plaintiffs from any prospect of obtaining such relief. And, when all is said and done, the dissent's proposed denial is premised solely upon the availability of relief from a judgment of conviction. Neither law, nor logic, nor sound public policy dictates that one form of relief should be preclusive of the other.

As against the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation we have recognized must be weighed the very serious dangers that the alleged denial of counsel entails. " 'Of all [of] the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have' " (*United States v Cronic*, 466 US at 654, quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv L Rev 1, 8 [1956]). The failure to honor this right, then, cannot but be presumed to impair the reliability of the adversary process through which criminal justice is under our system of *26 government dispensed. This action properly understood, as it has been by distinguished members of the prosecution and defense bars alike, does not threaten but endeavors to preserve our means of criminal adjudication from the inevitably corrosive effects and unjust consequences of an unfair adversary process.

It is not clear that defendants actually contend that stated claims for the denial of assistance of counsel would be nonjusticiable; their appellate presentation, both written and oral, has been principally to the effect that the claims alleged are exclusively predicated on deficient performance, a characterization which we have rejected. Supposing, however, a persisting, relevant contention of nonjusticiability, it is clear that it would be without merit. This is obvious because the right that plaintiffs would enforce— **11 that of a poor person accused of a crime to have counsel provided for his or her defense—is the very same right that *Gideon* has already commanded the states to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide.

It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right (*see* *Marbury v Madison*, 1 Cranch [5 US] 137, 147 [1803] ["every right, when withheld, must have a remedy, and every injury its proper redress"]).

We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts (*see* *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307 [1995]; *Jiggetts v Grinker*, 75

NY2d 411 [1990]; *McCain v Koch*, 70 NY2d 109 [1987]; *Klostermann v Cuomo*, 61 NY2d 525 [1984]), and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them.

Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel in ***27** the five subject counties. The severe imbalance in the adversary process that such a state of affairs would produce cannot be doubted. Nor can it be doubted that courts would in consequence of such imbalance become breeding grounds for unreliable judgments. Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases. Wrongful convictions, however, are not the only injustices that command our present concern. As plaintiffs rightly point out, the absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. *Gideon*'s guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial.

Accordingly, the order of the Appellate Division should be modified, without costs, by reinstating the complaint in accordance with this opinion, and remitting the case to that court to consider issues raised but not determined on the appeal to that court, and, as so modified, affirmed.

****12** Pigott, J. (dissenting). There is no doubt that there are inadequacies in the delivery of indigent legal services in this state, as pointed out by the New York State Commission on the Future of Indigent Defense Services, convened by former Chief Judge Kaye. I respectfully dissent, however, because, despite this, in my view, the complaint here fails to state a claim, either under the theories proffered by plaintiffs —ineffective assistance of counsel and deprivation of the right to counsel at a critical stage (arraignment)—or under the "constructive denial" theory read into the complaint by the majority.

The majority rightly rejects plaintiffs' ineffective assistance cause of action; such claims are limited to a case-by-case analysis and cannot be redressed in a civil proceeding. Rather than dismissing that claim, however, the majority replaces it with a "constructive denial" cause of action that, in my view, is nothing more than an ineffective assistance claim under another name.

The allegations in the complaint can be broken down into two categories: (1) the deprivation of "meaningful and effective assistance of counsel," and (2) the deprivation of the right to counsel at a "critical stage" of the proceedings, i.e., the arraignment. The claims under the former category are many: lack of a sufficient opportunity to discuss the charges with their attorney ***28** or participate in their defense; lack of preparation by counsel; denial of investigative services; lack of "vertical representation;" [1] refusal of assigned counsel to return phone calls or accept collect calls; inability to leave messages on assigned counsel's answering machine due to a full voicemail box, etc.

The majority rejects plaintiffs' main claim that the complaint states a cause of action for ineffective assistance of counsel under *Strickland v Washington* (466 US 668 [1984]), [2] finding "a measure of merit" to defendants' arguments that such claims are premised on trial counsel's constitutionally deficient performance and do not form the basis for systemic relief (majority op at 17). I agree, and would affirm the Appellate Division's determination in that regard, ****13** because the *Strickland* standard is limited to whether an individual has received the effective assistance of counsel and cannot be used to attack alleged systemic failures, and the allegations of the complaint support no broader reading.

Rather than stopping at its rejection of the *Strickland* standard with respect to these allegations, however, the majority advances a third theory, and reads the complaint as stating a claim for "constructive denial" of the right to counsel, i.e., that upon having counsel appointed, plaintiffs received only "nominal" representation, such that there is a question as to whether the counties were in compliance with the constitutional mandate of *Gideon* (majority op at 22-23).

In support of this rationale, the majority relies on *United States v Cronic* (466 US 648 [1984]), which recognizes a "narrow exception" to *Strickland*'s requirement that a defendant asserting an ineffective assistance of counsel claim must demonstrate a deficient performance and prejudice (*Florida v Nixon*, 543 US 175, 190 [2004]). In other words, *Cronic*, too, is an ineffective assistance of counsel case—decided on the same day as *Strickland*—but one that allows

the courts to find a Sixth Amendment violation " 'without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial,' when 'circumstances [exist] that are so likely ***29** to prejudice the accused that the cost of litigating their effect in a particular case is unjustified' " (*Wright v Van Patten*, 552 US 120, 124 [2008] [citations omitted]).

Cronic's "narrow exception" applies to individual cases where: (1) there has been a "complete denial of counsel"; i.e., the defendant is denied counsel at a critical stage of the trial; (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; or (3) "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial" (466 US at 659-660).

Cronic's holding is instructive, if only to point out that the Supreme Court was reaching the obvious conclusion that, in *individual cases*, the absence or inadequacy of counsel must generally fall within one of those three narrow exceptions. [3] Constructive denial of counsel ****14** is a branch from the *Strickland* tree, with *Cronic* applying only when the appointed attorney's representation is so egregious that it's as if defendant had no attorney at all. Therefore, whether a defendant received ineffective assistance of counsel under *Strickland* or is entitled to a presumption of prejudice under *Cronic* is a determination that can only be made *after* the criminal proceeding has ended; neither approach lends itself to a proceeding like the one at bar where plaintiffs allege prospective violations of their Sixth Amendment rights.

The majority does not explain how it can conclude, on one hand, "that effective assistance is a judicial construct designed to do no more than protect an *individual* defendant's right to fair adjudication" and "is *not* a concept capable of expansive application to remediate systemic deficiencies" (majority op at 17 [emphasis supplied]), and on the other hand that a "constructive denial" of counsel theory could potentially apply to this class of individuals who, when they commenced the action, had not reached a resolution of their criminal cases. Courts reviewing the rare constructive denial claims have done so by looking ***30** at the particular egregious behavior of the attorney in the particular case *after* the representation has concluded (*see e.g.* *Burdine v Johnson*, 262 F3d 336 [5th Cir 2001], *cert denied sub nom.* *Cockrell v Burdine*, 535 US 1120 [2002] [defense counsel slept during capital trial]; *Restrepo v Kelly*, 178 F3d 634 [2d Cir 1999]; *Rickman v Bell*, 131 F3d 1150 [6th Cir 1997], *cert denied* 523 US 1133 [1998] [defense counsel acted as second prosecutor]; *Tippins v Walker*, 77 F3d 682, 686 [2d Cir 1996] [counsel slept through trial]; *Harding v Davis*, 878 F2d 1341 [11th Cir 1989] [constructive denial where counsel responded to defendant's displeasure of his representation by remaining silent and inactive at trial until replaced by the pro se defendant]; *Jenkins v Coombe*, 821 F2d 158, 161 [2d Cir 1987], *cert denied* 484 US 1008 [1988] [filing cursory five-page brief on appeal]).

That is not to say that a claim of constructive denial could never apply to a class where the State effectively deprives indigent defendants of their right to counsel, only that the various claims asserted by plaintiffs here do not rise to that level. Here, plaintiffs' complaint raises basic ineffective assistance of counsel claims in the nature of *Strickland* [4] (i.e., counsel was unresponsive, waived important rights, failed to appear at hearings, and was unprepared at court proceedings) and not the egregious type of conduct found in *Cronic*. Plaintiffs' mere lumping together of 20 generic ineffective assistance of counsel claims into one civil pleading does not ****15** ipso facto transform it into one alleging a systemic denial of the right to counsel.

Addressing plaintiffs' second theory—deprivation of the right to counsel at the arraignment—the majority posits that plaintiffs have stated a cognizable claim because 10 of them were arraigned without counsel, and eight of those remained in custody because they could not meet the bail that was set (majority op at 19).

It is undisputed that a criminal defendant " 'requires the guiding hand of counsel at every step in the proceedings against him' " (*Gideon v Wainwright*, 372 US 335, 345 [1963], quoting *Powell v Alabama*, 287 US 45, 69 [1932]). But the majority's bare conclusion that any arraignment conducted without the presence of counsel renders the proceedings a violation of the Sixth Amendment flies in the face of reality.

***31** The framework of CPL article 180 illustrates this point. [5] That provision presupposes that a criminal defendant, upon arraignment, may not have yet retained counsel or, due

to indigency, requires the appointment of one. CPL 180.10 mandates that, in addition to apprising him of, and furnishing him with, a copy of the charges against him (*see* CPL 180.10 [1]), the court must also inform an unrepresented defendant that he is entitled to, among other things, "an adjournment for the purpose of obtaining counsel" (CPL 180.10 [3] [a]) and the appointment of counsel by the court if "he is financially unable to obtain the same" (CPL 180.10 [3] [c]).[6] The court must also give the defendant the opportunity to avail himself of those rights ****16** and "must itself take such affirmative action as is necessary to effectuate them" (CPL 180.10 [4]). This statute is a prophylactic one whose purpose is to protect a defendant's Sixth Amendment rights because, even in a situation where a defendant chooses to go forward without counsel, "the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof" and, in a situation where it is not so satisfied, may decide not to proceed until defendant obtains or is appointed counsel (CPL 180.10 [5]).

Giving plaintiffs the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint nevertheless fails to state a cause of action for the deprivation of the right to counsel at arraignment. One reason is that there is no allegation that the failure to have counsel at one's first court appearance had an adverse effect on the criminal proceedings. The Second Circuit has rejected the assertion "that the absence of counsel upon arraignment is an inflexible, per se violation of ***32** the Sixth Amendment" (*United States ex rel. Caccio v Fay*, 350 F2d 214, 215 [2d Cir 1965]). Where a criminal defendant is arraigned without the presence of counsel and pleads not guilty—or the court enters a not guilty plea on his behalf—there is no Sixth Amendment violation (*see United States ex rel. Combs v Denno*, 357 F2d 809, 812 [2d Cir 1966]; *United States ex rel. Hussey v Fay*, 220 F Supp 562 [SD NY 1963]; *see also Holland v Allard*, 2005 WL 2786909, 2005 US Dist LEXIS 46609 [ED NY 2005]). The explanation as to why this is so is simple:

> "Under New York law, a defendant suffers no . . . prejudice [by the imposition of a not guilty plea on arraignment without benefit of counsel], for whatever counsel could have done upon arraignment on defendant's behalf, counsel were free to do thereafter. There is nothing in New York law which in any way prevents counsel's later taking advantage of every opportunity or defense which was originally available to a defendant upon his initial arraignment" (*Hussey*, 220 F Supp at 563, citing *People v Combs*, 19 AD2d 639 [2d Dept 1963]).

As pleaded, none of the 10 plaintiffs arraigned without counsel entered guilty pleas and, indeed, in compliance with the strictures of CPL 180.10, all met with counsel shortly after the arraignment. Nor is there any claim that the absence of counsel prejudiced these plaintiffs (*cf. White v Maryland*, 373 US 59 [1963] [petitioner, at initial proceeding without counsel, pleaded guilty without the knowledge that even if that plea was vacated after counsel was appointed, it was still admissible at trial, such that lack of counsel at initial proceeding ****17** required reversal of conviction]; *Hamilton v Alabama*, 368 US 52, 54 [1961] [denial of counsel at arraignment was reversible error where, under Alabama law, certain defenses had to be asserted during that proceeding or could have been "irretrievably lost"]).

The majority implies that the complaint pleads a *Gideon* violation because certain of the plaintiffs were not represented when the court arranged for the imposition of bail at the arraignment (*see* CPL 170.10 [7]; 180.10 [6]; 210.15 [6]).[7] Quite often this initial appearance inures to the benefit of defendant who may ***33** be released on his own recognizance or on manageable bail within hours of arrest. The only substantive allegations plaintiffs make relative to bail is that assigned counsel failed to advocate for lower bail at the arraignment or move for a bail reduction post-arraignment. If anything, the complaint alleges a claim for ineffective assistance of counsel under the federal or state standard, but the majority has rejected such a claim in this litigation (majority op at 17-19).

Finally, the majority notes that plaintiffs do not seek relief within the context of their own criminal cases, and therefore allowing plaintiffs to proceed on their claims "would [not] impede the orderly progress of [the] underlying criminal actions," asserting that even if plaintiffs' claims are found to be meritorious after trial they would not be entitled to a vacatur of their criminal convictions (majority op at 24 and 25 n 6). In my view, if plaintiffs are able to establish a violation of *Gideon*, they should not be foreclosed from seeking a remedy; if plaintiffs are willing to waive any remedy to which they

may be entitled, as they are doing here, then I see no reason why the courts have any business adjudicating this matter.

While the perfect system of justice is beyond human attainment, plaintiffs' frustration with the deficiencies in the present indigent defense system is understandable. Legal services for the indigent have routinely been underfunded, and appointed counsel are all too often overworked and confronted with excessive caseloads, which affects the amount of time counsel may spend with any given client. Many, if not all, of plaintiffs' grievances have been acknowledged in the Kaye Commission Report, which is implicitly addressed—as it should be—to the Legislature, the proper forum for weighing proposals to enhance indigent defense services in New York. This complaint is, at heart, an attempt to convert what are properly policy questions for the Legislature into constitutional claims for the courts.

Accordingly, I would affirm the order of the Appellate Division.

Judges Ciparick, Graffeo and Jones concur with Chief Judge Lippman; Judge Pigott dissents and votes to affirm in a separate opinion in which Judges Read and Smith concur. ****18**

Order modified, etc.

FOOTNOTES

Footnotes

1 This claim, referred to by plaintiffs as one based on “lack of consistent vertical representation,” is raised by each of the four Suffolk County plaintiffs.

2 It is, however, alleged that in the counties at issue pleas are often elicited from unrepresented defendants at arraignment.

3 It does not appear that any of the plaintiffs who were arraigned without counsel and jailed when they could not afford the bail consequently fixed agreed to proceed without a lawyer. The dissent's assertion (at 32 n 7) that plaintiffs were not “forced” to participate in bail hearings without counsel is, apart from being without any support in the record, irrelevant given the clear entitlement to counsel under the statute, and indeed the Constitution.

4 We note that *Cronic* is careful to distinguish this distinct claim from one for ineffective assistance (*Cronic*, 466 US at 654 n 11).

5 Defendants' contention that the action is, in light of this circumstance, moot overlooks the well-established exception to the mootness doctrine for recurring claims of public importance typically evading review (*see* *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

6 It follows that if plaintiffs' claims are found to be meritorious after trial, such a determination will not entitle them to vacatur of their criminal convictions. And, although the issue is not specifically raised, we note in the same connection that, in view of the circumstance that this action will not disturb the progress or outcomes of plaintiffs' criminal actions (*cf.* *Matter of Lipari v Owens*, 70 NY2d 731 [1987]; *Matter of Veloz v Rothwax*, 65 NY2d 902 [1985]), and that the action seeks relief largely unavailable in the context of the underlying individual criminal actions, the rule generally applicable to bar collateral claims for equitable intervention in

ongoing criminal prosecutions (*see e.g.* *Kelly's Rental v City of New York*, 44 NY2d 700 [1978]) would not be properly relied upon by the State here.

1 Presumably this refers to the fact that in some jurisdictions, a defendant may be represented by one lawyer in the local criminal court and have a different lawyer assigned in superior court.

2 Much of the focus of the majority is on the so-called *Strickland* standard, with respect to ineffective assistance of counsel. However, the "meaningful representation" standard obviously remains the standard to be applied in this state (*see* *People v Baldi*, 54 NY2d 137 [1981]).

3 Even the defendant in *Cronic* was not entitled to rely on any of the exceptions delineated in that opinion, notwithstanding the fact that his retained counsel withdrew shortly before the trial date and, just 25 days before trial, the court appointed a young lawyer with a real estate practice to represent defendant in a mail fraud case that had taken the Government 4½ years to investigate. Supreme Court held that any errors by counsel at trial were to be examined using the *Strickland* test.

4 Nor, in my view, are such claims any different from the generic ineffective assistance of counsel claims routinely analyzed by state courts under this State's "meaningful representation" standard as enunciated in *Baldi*.

5 CPL 180.10 addresses the procedure to be followed at a defendant's arraignment on a felony complaint and the defendant's rights in that regard. Other provisions of the Criminal Procedural Law contain similar requirements. For instance, CPL 210.15 addresses the scenario where a defendant is arraigned on an indictment; however, in the latter scenario, the court's duties and responsibilities to apprise a defendant of his rights when appearing without counsel are essentially the same. CPL 170.10 addresses arraignments relative to an information, simplified traffic information, prosecutor's information or misdemeanor complaint, and sets forth the procedures the court must follow in apprising a defendant of his right to counsel and/or assignment of counsel.

6 Indeed, the Supreme Court of the United States has favorably cited to CPL 180.10 in support of its observation that New York is one of the 43 states that "take the first step toward appointing counsel 'before, at or just after initial appearance' " (*Rothgery v Gillespie County*, 554 US 191, 204 and n 14 [2008]).

7 The majority observes that a bail hearing is a critical stage of the criminal process (majority op at 20). While that may be a correct statement of the law, it has little application to these facts, as none of these plaintiffs asserts that they were forced to participate in a bail hearing without the aid of counsel.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part Two. The Principal Proceedings
Title H. Preliminary Proceedings in Local Criminal Court
Article 120. Warrant of Arrest (Refs & Annos)

McKinney's CPL § 120.90

§ 120.90 Warrant of arrest; procedure after arrest

Effective: October 1, 2019
Currentness

1. Upon arresting a defendant for any offense pursuant to a warrant of arrest in the county in which the warrant is returnable or in any adjoining county, or upon so arresting him or her for a felony in any other county, a police officer, if he or she be one to whom the warrant is addressed, must without unnecessary delay bring the defendant before the local criminal court or youth part of the superior court in which such warrant is returnable, provided that, where a local criminal court or youth part of the superior court in the county in which the warrant is returnable hereunder is operating an off-hours arraignment part designated in accordance with paragraph (w) of subdivision one of section two hundred twelve of the judiciary law at the time of defendant's return, such police officer may bring the defendant before such local criminal court or youth part of the superior court.

2. Upon arresting a defendant for any offense pursuant to a warrant of arrest in a county adjoining the county in which the warrant is returnable, or upon so arresting him for a felony in any other county, a police officer, if he be one delegated to execute the warrant pursuant to section 120.60, must without unnecessary delay deliver the defendant or cause him to be delivered to the custody of the officer by whom he was so delegated, and the latter must then proceed as provided in subdivision one.

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

4. Upon arresting a defendant for an offense other than a felony pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or one adjoining it, a police officer, if he be one delegated to execute the warrant pursuant to section 120.60, may hold the defendant in custody in the county of arrest for a period not exceeding two hours for the purpose of delivering him to the custody of the officer by whom he was delegated to execute such warrant. If the delegating officer receives

custody of the defendant during such period, he must proceed as provided in subdivision three. Otherwise, the delegated officer must inform the defendant that he has a right to appear before a local criminal court for the purpose of being released on his own recognizance or having bail fixed. If the defendant does not desire to avail himself of such right, the officer must request him to make, sign and deliver to him a written statement of such fact, and if the defendant does so, the officer must retain custody of him but must without unnecessary delay deliver him or cause him to be delivered to the custody of the delegating police officer. If the defendant does desire to avail himself of such right, or if he refuses to make and deliver the aforementioned statement, the delegated or arresting officer must without unnecessary delay bring him before a local criminal court of the county of arrest and must submit to such court a written statement reciting the material facts concerning the issuance of the warrant, the offense involved, and all other essential matters relating thereto. Upon the submission of such statement, such court must release the defendant on his own recognizance or fix bail for his appearance on a specified date in the court in which the warrant is returnable. If the defendant is in default of bail, the officer must retain custody of him but must without unnecessary delay deliver him or cause him to be delivered to the custody of the delegating officer. Upon receiving such custody, the latter must without unnecessary delay bring the defendant before the court in which the warrant is returnable.

5. Whenever a police officer is required pursuant to this section to bring an arrested defendant before a town court in which a warrant of arrest is returnable, and if such town court is not available at the time, such officer must, if a copy of the underlying accusatory instrument has been attached to the warrant pursuant to section 120.40, instead bring such defendant before any village court embraced, in whole or in part, by such town, or any local criminal court of an adjoining town or city of the same county or any village court embraced, in whole or in part, by such adjoining town. When the court in which the warrant is returnable is a village court which is not available at the time, the officer must in such circumstances bring the defendant before the town court of the town embracing such village or any other village court within such town or, if such town court or village court is not available either, before the local criminal court of any town or city of the same county which adjoins such embracing town or, before the local criminal court of any village embraced in whole or in part by such adjoining town. When the court in which the warrant is returnable is a city court which is not available at the time, the officer must in such circumstances bring the defendant before the local criminal court of any adjoining town or village embraced in whole or in part by such adjoining town of the same county.

5-a. Whenever a police officer is required, pursuant to this section, to bring an arrested defendant before a youth part of a superior court in which a warrant of arrest is returnable, and if such court is not in session, such officer must bring such defendant before the most accessible magistrate designated by the appellate division of the supreme court in the applicable department to act as a youth part.

6. Before bringing a defendant arrested pursuant to a warrant before the local criminal court or youth part of a superior court in which such warrant is returnable, a police officer must without unnecessary delay perform all fingerprinting and other preliminary police duties required in the particular case. In any case in which the defendant is not brought by a police officer before such court but, following his arrest in another county for an offense specified in subdivision one of section 160.10, is released by a local criminal court of such other county on his own recognizance or on bail for his appearance on a specified date before the local criminal court before which the warrant is returnable, the latter court must, upon arraignment of the defendant before it, direct that he be fingerprinted by the appropriate officer or agency, and that he appear at an appropriate designated time and place for such purpose.

7. Upon arresting a juvenile offender or adolescent offender, the police officer shall immediately notify the parent or other person legally responsible for his care or the person with whom he is domiciled, that the juvenile offender or adolescent offender has been arrested, and the location of the facility where he is being detained.

8. Upon arresting a defendant, other than a juvenile offender, for any offense pursuant to a warrant of arrest, a police officer shall, upon the defendant's request, permit the defendant to communicate by telephone provided by the law enforcement facility where the defendant is held to a phone number located anywhere in the United States or Puerto Rico, for the purposes of obtaining counsel and informing a relative or friend that he or she has been arrested, unless granting the call will compromise an ongoing investigation or the prosecution of the defendant.

Credits

(L.1970, c. 996, § 1. Amended L.1971, c. 762, § 1; L.1979, c. 411, § 1; L.1980, c. 843, § 12; L.1984, c. 695, § 1; L.1986, c. 5, § 1; L.1987, c. 382, § 1; L.1988, c. 324, § 2; L.1998, c. 424, § 8, eff. Jan. 1, 1999; L.2010, c. 94, § 1, eff. July 24, 2010; L.2010, c. 96, § 1, eff. July 24, 2010; L.2016, c. 492, § 3, eff. Feb. 26, 2017; L.2017, c. 59, pt. WWW, § 16.)

McKinney's CPL § 120.90, NY CRIM PRO § 120.90
Current through L.2023, chapters 1 to 189. Some statute sections may be more current, see credits for details.

End of Document

New York Official Reports

189 N.Y.S.3d 893, 2023 N.Y. Slip Op. 23145

***1** The People of the State of New York ex rel. John Bradley, ON BEHALF OF WILLIE J. TOLBERT, Petitioner,

v.

Todd K. Baxter, MONROE COUNTY SHERIFF, Respondent.

Supreme Court, Monroe County
Index No. I2022001622
Decided on May 4, 2023

APPEARANCES OF COUNSEL

JOHN BRADLEY, ESQ.
Attorney for Willie J. Tolbert

OPINION OF THE COURT

Elena F. Cariola, J.

Petitioner commenced the instant proceeding pursuant to Article 78 in the Appellate Division, Fourth Department seeking a writ of habeas corpus on the ground that his pretrial detention for a non-qualifying felony offense was prohibited by Criminal Procedure Law (CPL) §§ 510.10 and 530.20 -- components of the 2019 amendments to the bail laws ("Bail Reform"), which, in relevant part, enumerates the offenses for which bail and remand are permissible securing orders. However, shortly after the filing of the petition, Petitioner was released from custody, and thus the petition was rendered moot. The Appellate Division, Fourth Department, duly observing the exception to the mootness doctrine and the important nature of this issue, unanimously converted this matter to a declaratory judgment action, and transferred it to Supreme Court, Monroe County for further proceedings. (*See generally People ex rel. Bradley v Baxter*, 203 AD3d 1576 [4th Dept 2022].)

The petition is unopposed inasmuch as the Attorney General for the State of New York, the District Attorney of Monroe County and the Sheriff of Monroe County have all stipulated that they do not have standing, and they further decline to oppose the merits of the instant petition by way of amicus brief. Now, upon due consideration of the arguments proffered by Petitioner, the following constitutes the Decision and Order of the Court.

BACKGROUND

The genesis of the instant petition arises from Petitioner's pretrial detention in Rochester City Court following his arraignment on a litany of non-qualifying offenses. To wit, Petitioner was arraigned on five infractions and two misdemeanor offenses under the Vehicle and Traffic Law, criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), a ***2** misdemeanor, aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]), a class E felony, and driving while intoxicated after having been previously convicted of two designated offenses (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), a class D felony. According to his DCJS report, Petitioner had four prior felony convictions, all for DWI offenses. The court, relying upon a finding that Petitioner had two or more prior felony convictions, remanded Petitioner to the custody of the Monroe County Sheriff (*see generally* CPL § 530.20 [2] [a]). The instant petition followed.

The controversy before this Court arises from the impact of Bail Reform on the existing bail laws. Prior to the enactment of Bail Reform, CPL § 530.20 (2) (a) prohibited a city, town, or village court (collectively "lower courts") from ordering recognizance or bail for a defendant charged with any felony offense if they had two or more prior felony convictions (*see generally* CPL § 530.20 [2] [a] ["a [lower] court may not order recognizance or bail when . . . the defendant has two previous felony convictions"]). This "Double Predicate Rule" eliminates a lower court's discretion relative to bail consideration for a felony offense based solely upon a defendant's criminal history to the extent it is comprised of two or more prior felony convictions. In other words, a lower criminal court may not consider the age of the prior felony convictions, their classifications, or seriousness of the offenses. Likewise, it may not consider the classification or seriousness of the felony for which a defendant stands accused. A lower court's analysis, with respect to a defendant accused of a felony who has two or more prior felony convictions, is thus limited to, and

controlled by, simply the number of an accused's prior felony convictions.

The advent of Bail Reform, which did not eradicate or modify CPL § 530.20 (2) (a), dramatically changed an arraigning court's analysis pertaining to bail determinations. Specifically, CPL § 510.10 ("Securing order; when required alternatives available; standard to be applied"), the primary source of all criminal courts' authority to impose securing order conditions, and a principal component of Bail Reform, was amended to set forth both the procedures and substantive analyses an arraigning court is required to undertake in rendering a determination for a securing order. The statute establishes a presumption in favor of release on recognizance, and it further sets forth the prerequisites which must be satisfied for bail or remand to be ordered. To be certain, a court is mandated to order the release of a principal unless and until certain conditions are established. Additionally, and of paramount importance to this Court's analysis, the statute enumerates offenses, to the exclusion of others, for which a court may impose bail or order remand -- a rule colloquially known as the "Qualifying Offense Rule." Stated another way, if an offense is not indicated within subdivision four of CPL § 510.10, a court is prohibited from ordering bail or remand.

CPL § 530.20 ("Securing order by local criminal court when action is pending therein"), which specifically governs the issuance of securing orders by local courts, was also amended by Bail Reform to include the Qualifying Offense Rule (*see generally* CPL § 530.20 [1] [b]). The Legislature, reiterating precisely the same schema as set forth in CPL § 510.10, established the presumption favoring a principal's release on recognizance, an instruction to the court to impose the "least restrictive . . . conditions that will reasonably assure a principal's return to court" and indicated a court's authority to fix bail or commit a principal pending trial "where authorized" (CPL § 530.20 [1] [a]). Furthermore, the statute explicitly authorizes remand for a qualifying offense which is also a felony (*see* CPL § 530.20 [1] [b]).

In the main, Petitioner advocates for an interpretation of the Double Predicate Rule (CPL § 530.20 [2]) which applies only in circumstances wherein a defendant is charged with a ***3** qualifying offense as defined in CPL §§ 510.10 (4) and 530.20 (1) (b). He contends that a plain reading of CPL Articles 510.10 and 530.20 and, in particular, CPL § 530.20 (2) (a), considered together, mandate a lower criminal court to issue a securing order releasing a defendant charged with a non-qualifying felony offense under non-monetary conditions irrespective of the number of prior felony convictions. Petitioner avers that remand is only available if a "qualifying offense that is also a felony" is charged (*see* CPL §§ 510.10 [4]; 530.20[1] [b]). In furtherance of his argument, Petitioner relies upon certain canons of statutory construction, arguing that the plain meaning of the bail schema and legislative intent is unambiguous in limiting a lower court's authority to set bail only when a defendant is charged with a qualifying offense. Further, Petitioner argues that the Bail Reform amendments drastically altered the application of the rules pertaining to a lower court's authority to set bail for a defendant charged with a felony who also has two or more prior felony convictions. In the alternative, Petitioner alleges that to the extent there is any statutory ambiguity with respect to the application of CPL § 530.20 (2) (a), constitutional tenets of equal protection require resolution in his favor.

Overview of Bail Reform

Bail Reform tightly controls a court's discretion and curtails its ability to set non-monetary bail for almost all misdemeanors and non-violent felonies yet, permits monetary bail for most violent felony offenses. In sum, the threshold consideration under the Qualifying Offense Rule is the instant offense for which a defendant stands accused.Specifically, CPL § 510.10 *et seq.* states,

> "[w]hen a principal, whose future court attendance at a criminal action or proceeding is or may be required, comes under the control of a court, *such court shall*, in accordance with this title, by a securing order release the principal on the principal's own recognizance, release the principal under non-monetary conditions, or, *where authorized*, fix bail or commit the principal to the custody of the sheriff. In all such cases, except where another type of securing order is shown to be required by law, *the court shall release the principal pending trial on the principal's own recognizance*, unless it is demonstrated and the court makes an individualized determination that the principal poses

> a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. (CPL § 510.10 [1] [emphasis added].)

Additionally,

> *"[i]n cases other than as described in subdivision four of this section the court shall release the principal pending trial* on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court." (CPL § 510.10 [3] [emphasis added].)

Furthermore,

> "[w]here the principal stands charged with a *qualifying offense* [enumerated below], the ***4** court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, *where the defendant is charged with a qualifying offense which is a felony*, the court may commit the principal to the custody of the sheriff." (CPL § 510.10 [4] [emphasis added].)

Likewise, the Bail Reform provisions governing criminal actions pending in local courts set forth the same framework:

> "[i]n cases other than as described in paragraph (b) of this subdivision *the court shall* release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court" (CPL § 530.20 [1] [a] [emphasis added]).

And,

> "[*w]here the principal stands charged with a qualifying offense*, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal's own recognizance or under non-monetary conditions, fix bail, or, *where the defendant is charged with a qualifying offense which is a felony*, the court may commit the principal to the custody of the sheriff" (CPL § 530.20 [1] [b] [emphasis added]).

Finally,

> "[w]hen the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order recognizance, release under non-monetary conditions, or, *where authorized*, bail or *commit the defendant to the custody of the sheriff except as otherwise provided in subdivision one of this section or this subdivision*" (CPL § 530.20 [2] [emphasis added]).

Plain Meaning of CPL Articles 510.10 & 530.20

In the instant case, the petition before the Court underscores the necessity of resolving the apparent incongruency between the Double Predicate Rule and the Qualifying Offense Rule [1] ***5** as their respective applications, considered in a vacuum, mandate opposite results. The Double Predicate Rule requires a lower court's threshold consideration to be a defendant's criminal history while the Qualifying Offense Rule requires it to be the instant offense for which a defendant stands accused. Petitioner, a principal with more than two prior felony convictions, must be remanded according to the Double Predicate Rule; however, based on the nature of the charges before the lower court, the Qualifying Offense Rule declares that bail and remand are unavailable securing orders. Simply stated, both Rules cannot be imposed simultaneously. Yet, a careful reading of the text of the bail laws in their totality permits an interpretation of CPL § 530.20 (2) (a) which reconciles what, at first blush, appears to be a cavernous divide between these competing Rules. And, for the reasons which follow, this Court finds that an analysis of the plain meaning of CPL §§ 510.10 and 530.20, examined in conjunction with additional statutory interpretation aids and policy considerations, requires a construction of CPL § 530.20 (2) (a), which limits its application to qualifying

offenses as defined in CPL §§ 530.20 (1) (b) and 510.10 (4).

"If language of a statute is plain and free from ambiguity, and expresses single definite and sensible meaning, words cannot be interpreted and courts have no authority to add to the language of law" (*see* McKinney's Cons Laws of NY Book 1 Statutes § 73, NY Annotations at 43 [2018 ed], citing *Putnam County v State*, 17 Misc 2d 541 [Ct Cl 1959]). Applying this tenet of statutory construction, the Court first turns to the plain meaning of CPL Articles 510.10 and 530.20 and finds the language, as it applies to the totality of the bail schema, to be unambiguous and the meaning therein unequivocal. The plain language of CPL §§ 510.10 (Securing Order; when required; alternatives available; standard to be applied) requires a court's analysis begin with the presumption of release on recognizance, as it commands the release of a principal pending trial, unless and until certain circumstances are established (*see* CPL § 510.10 [1] ["a court *shall* release the principal [emphasis added]; *see also* CPL §§ 510.10 [3], [4]). Additional conditions for securing orders are allowed only upon a demonstration that the principal poses a flight risk; however, the court must select the least restrictive means so as to reasonably ensure a principal's appearance -- yet another indicator of the Legislature's presumption favoring release. Furthermore, and of significant import, the Legislature has only permitted bail in circumstances wherein a principal is charged with a qualifying offense (*see* CPL § 510.10 [4] ["where the principal stands charged with a qualifying offense . . . the court ***6** may . . . fix bail . . .]) and remand where an accused charged with a qualifying offense which is a felony (*see* CPL § 510.10 [4] ["where a defendant is charged with *a qualifying offense which is a felony*"] [emphasis added]).

The statutory framework is premised upon an analysis of the offense for which a defendant stands accused and an individualized evaluation of whether they pose a risk of flight, permitting more restrictive forms of securing orders for qualifying offenses and/or those who pose a risk of flight. However, the cornerstone of the schema is the Legislature's categorical approach distinguishing the securing orders available for qualifying and non-qualifying offenses. Whether an offense is qualifying in nature, as defined by CPL § 510.10 (4), is the threshold question in securing order determinations.

CPL § 530.20 (Securing order by local criminal court when action is pending therein) is not to the contrary. Indeed, this section sets forth the same securing order analysis as its counterpart found in CPL § 510.10, beginning with the presumption of release, the requirement of an individualized assessment of a principal's risk of flight, differentiating qualifying and non-qualifying offenses, and explicitly authorizing remand for a qualifying offense which is also a felony. In sum, the plain meaning of CPL §§ 510.10 and 530.20, read individually and together, are abundantly clear that qualifying offenses as statutorily defined are the *only* offenses for which bail or remand may be ordered.

Resolving the Ambiguity of the Double Predicate Rule within the context of CPL Articles 510.10 and 530.20

With these parameters in mind, the Court now turns to the ambiguity presented within the Double Predicate Rule as it pertains to the interpretation of " felony" (*see generally* CPL § 530.20 [2] [a] ["when the defendant is charged . . . with a *felony* . . . [a lower court] may not order recognizance or bail when . . . the defendant has two or more previous felony convictions] [emphasis added]). "The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature" *Riley v County of Broome*, 95 NY2d 455, 463 [2000] [internal citations and quotations omitted]). "There is, of course, no more persuasive evidence of the purpose of a statute than [its] words. Where, however, adherence to a statute's plain meaning produces an unreasonable result, plainly at variance with the policy of the legislation as a whole, the courts will follow[ ] that purpose, rather than the literal words. Moreover, where there are ambiguities in statutory language, courts look to the purpose of the legislation as well as the statutory context to resolve those ambiguities. (*State v Kerry K.*, 157 AD3d 172, 183 [2d Dept 2017] [internal citations and quotations omitted].) "The court must interpret a statute as a symmetrical and coherent regulatory scheme, and must fit, if possible, all parts into a harmonious whole. As well, the court must construe statutes harmoniously and reconcile laws with other statutory provisions whenever possible, in order to give full effect to all the provisions of the subject legislation. In this regard, courts are obligated to avoid conflicting interpretations between statutes. Thus, when two statutes relating to the same subject appear to conflict, courts should

interpret them, if possible, in a manner that will give effect to both, taking into consideration the underlying legislative intent." (97 NY Jur 2d Statutes § 184 [citations omitted].)

As observed by the court in *People v Shafer*, 74 Misc 3d 405 (NY County Ct 2021), "the Legislature did not hold public hearings on the matter and passed . . . [Bail Reform] as part of a wide-ranging budget bill rather than as a stand-alone bill. . . [and] [c]onsequently, . . . the legislative history of its passage [renders it] . . . difficult . . . for courts to discern the intent of its ***7** drafters and to interpret its language (*Shafer*, 74 Misc 3d at 413). However, what is evident from the legislative history of Bail Reform is "that the impetus for it was the realization that so many defendants, though presumed innocent, languish in jail for long periods of time awaiting trial . . . simply because they cannot afford to post bail in any amount or in the amount required by the court, thus discriminating in favor of those who have the financial resources" (*id.* at 415). The Legislature, in its efforts to "reduce unnecessary pretrial incarceration and improve equity and fairness in the criminal justice system" (Sponsor's Mem, Senate Bill No S2101A, 2019-2020 Legislative Session)[2] therefore restricted the offenses for which bail and remand may be ordered to the more serious ones, most of which are violent in nature. This is evident by the Legislature's repeated use of "qualifying offense" and the distinctive treatment thereof as compared to non-qualifying offenses.

It is for these reasons that use of the word "felony" within CPL 530.20 (2) (a) must be interpreted to mean "a *qualifying offense* which is a felony" inasmuch as it is the only meaning which comports with the entirety of the laws governing the issuance of securing orders. Such an interpretation is consistent with the Legislature's bail framework which begins with a presumption favoring a principal's release, the instruction to impose the least restrictive means to ensure a principal's return to court, an individual assessment of a principal's risk of flight and the explicit restriction to impose bail or remand only "where authorized" (*see generally* CPL §§ 510.10 [1]; 530.20 [1]).[3] It is likewise consistent with the Legislature's authorization to commit a principal to the custody of the sheriff when charged with a "qualifying offense which is a felony" (*see generally* CPL §§ 510.10 [4]; 530.20 [1] [b]). Finally, a reading of "felony" constrained to qualifying offenses does not eradicate the Double Predicate Rule; rather, it limits its application to circumstances involving those qualifying offenses, and ultimately, such an interpretation synthesizes the entirety of the laws governing the issuance of securing orders. It is the only interpretation which allows both Rules to be given effect -- a contrary reading would effectively vitiate the Qualifying Offense Rule. Limiting the Double Predicate Rule to qualifying offenses authorizes the remand of a defendant with a significant criminal history (two or more felony convictions) who stands accused of a more serious crime (a qualifying offense) -- a rational result, and surely consistent with the Legislature's clear intent to permit bail and remand orders only for the more serious offenders and circumstances.

Furthermore, a plain reading of CPL § 530.20 (2) -- the provision setting forth available securing orders for defendants charged by way of felony complaint in a lower court -- offers ***8** additional evidence of the Legislature's intent to incorporate the Qualifying Offense Rule therein. Initially, the statute indicates that bail or remand may be ordered only "where authorized" (*see* CPL § 530.20 [2]). The significance of this language is twofold: first, it unequivocally establishes that bail and remand are available securing orders in limited, and specified, circumstances; secondly, usage of "where authorized" mirrors the language of CPL § 510.10 which sets forth the bail schema, and specifically, the Qualifying Offense Rule (*see generally* CPL § 510.10 [1] [a court may "*where authorized*, fix bail or commit the principal to the custody of the sheriff"] [emphasis added]). By impliedly referencing other statutory provisions governing the restrictions of securing orders, a statutory construction which encompasses the entirety of the bail schema is compelled -- one which harmonizes the restrictions of the Qualifying Offense Rule with the rules governing a lower court's authority to issue securing orders.

Additionally, and of significance, is the Legislature's use of restrictive language in so declaring that bail or remand may be ordered, "*except as otherwise provided in subdivision one* [setting forth the Bail Reform Schema] *or this subdivision* [in part, the Double Predicate Rule]" (*see* CPL § 510.10 [2] [emphasis added]). This phraseology evinces a clear legislative intent: the securing order authority of a lower court must comport with the Qualifying Offense Rule. Again, only one interpretation allows both rules to be given effect, and that requires the limitation of the Double Predicate Rule.

An Alternate Interpretation Results in Absurdity

Although there is an absence of proponents advancing an alternate interpretation, this Court would be remiss were it not to remark on the illogical result of reading "felony" within the Double Predicate Rule to include non-qualifying offenses (*see generally People v Pena*, 169 Misc 2d 75, 84 [Sup Ct 1996] [when statutory meaning is unclear and legislative intent is wanting, a court may be informed of the legislative intent by determining an interpretation bespeaks an absurd result in the case, and thus could not have been the intended meaning]). Consider, by way of example, the procedural undertaking following the remand of a defendant with two or more prior felony convictions who stands charged with a non-qualifying offense in lower court. Following arraignment, a prompt hearing must be scheduled in the lower court to determine the issue of whether there is sufficient evidence warranting a defendant's continued detention pending further action by a grand jury, i.e. the preliminary hearing (*see generally* CPL Art. 180). [4] A defendant, may, however, prior to the conduction of the preliminary hearing, pursue a bail application in superior court (*see generally* CPL § 530.30 [1] [a]). As it is undisputed that a defendant charged with a non-qualifying offense is entitled, as a matter of law, to release on recognizance or release with non-monetary conditions (*see generally* CPL §§ 510.10 [1] *et seq.*; 530.20 [1] *et seq.*), a superior court bail application will result in the release of the defendant and therefore vitiate the necessity of the preliminary hearing (*see generally* CPL § 180.10 [2] [invocation of preliminary hearing process for an incarcerated defendant]).

As an aside, it is worth noting that prior to Bail Reform, a superior court had unfettered discretion, within statutory confines (*see generally* CPL § 510.30 [2], *eff* through December 31, ***9** 2019), in considering a lower court's securing order and issuing its own. To be sure, a superior court, on application by a defendant, could have set bail for a remanded defendant, lessened the amount of bail set by a lower court, or released a defendant on their recognizance. Superior court, in an exercise of its scrutiny, had the ability to consider the totality of the circumstances, including, but not limited to, the crime for which a defendant stood accused and their criminal history (*see generally* CPL § 510.30, *supra*). Under the former bail schema, complete and total review of securing orders was effectively delegated to the superior courts for defendants with more significant criminal histories charged with a felony offense. However, the implementation of Bail Reform has substantially diminished the discretion once held by superior court, reducing its ability to issue only one of two non-imprisonable securing orders for non-qualifying offenses. In other words, a superior court's review of a securing order for a non-qualifying offense mandates either release or release with non-monetary conditions -- never bail or remand.

Returning to this Court's illustration, notwithstanding the disconcerting implications of incarcerating a defendant, for however brief a time, on a non-qualifying offense where release is mandatory, a remand order in lower court effectively creates an additional procedural step by requiring a defendant to pursue a bail application in superior court to obtain the relief to which they are legally entitled (*see generally* CPL § 530.30 [1] [a]). This step is duplicative inasmuch as the superior court's review of the securing order is limited to a determination of whether the charged offense is qualifying in nature -- a determination readily ascertainable in lower court. This creates an unnecessary burden on the superior courts now tasked with scheduling and hearing bail applications, prosecutors and defense counsel who must appear and make respective arguments regardless of how straightforward the analysis may be, and the Sheriff, who is charged with the custody of an accused for the period of time between remand in the lower court and release by a superior court.

This superfluous procedure resultant from a technical reading of the Double Predicate Rule, in abstract, is belied by common sense, contrary to the principles of judicial and legal economy and incongruent with the remainder of the laws governing bail and respective processes. An interpretation of "felony" to include non-qualifying offenses would, in essence, hail form over substance by compelling a procedure which would not have a noticeable degree of impact on the outcome of a securing order determination. The net impact of a superior court bail application results in a distinction without a difference; however, the distinction lies in the taxation to the legal stakeholders forced to undergo an unnecessary process -- a result certainly not intended by the Legislature.

The criminal courts of this State have long recognized the essential value of judicial economy -- streamlining the legal process and minimizing duplicate expenditure of resources, and a reading of the Double Predicate Rule limited to qualifying offenses furthers this legal maxim (*see e.g. People v Ricardo B.*, 73 NY2d 228 [1989] [dual jury trial

authorized in the interests of justice and judicial economy where proof against co-defendants was the same less the defendants' inculpatory statements]; *People v Paluska*, 112 AD2d 598 [3d Dept 1985] [Appellate Division decided merits of action improperly brought as direct appeal instead of a 440 application in the interests of judicial economy]; *People v Lubrano*, 296 AD2d 326 [1st Dept 2002] [appeal held in abeyance, in the interests of judicial economy, following developments pertaining to newly discovered evidence]; *People v Thacker*, 156 AD3d 1482 [4th Dept 2017] [Appellate Division sua sponte corrected illegal sentence pursuant to interests of judicial economy]; *People v Salaam*, 187 AD2d 363 [1st Dept 1992], *aff'd*, 83 NY2d 51 [1993] [joinder of defendants was justified by judicial economy in light of the extent and complexity of ***10** evidence]).

Further exemplifying the absurdity of an interpretation of the Double Predicate Rule which permits "felony" to encompass non-qualifying offenses is the disparate outcomes at the arraignment proceeding for precisely the same offenses in lower court as compared to superior court. Continuing with this Court's example, under this statutory reading, the defendant with two or more prior felony convictions arraigned in lower court on a felony complaint and charged with a non-qualifying offense must be remanded into the custody of the Sheriff. However, should that defendant be indicted on the same non-qualifying offense as alleged in the felony complaint, at the arraignment proceeding in superior court their release would be required by law. The inherent contradiction between the mandated remand of that defendant in lower court on a felony complaint (a charging instrument with limited evidentiary value) contrasted with their mandated release in superior court on an indictment (an instrument based upon presentment of competent evidence and a vote at a grand jury proceeding) is one that this Court cannot reconcile so as to conclude that the Legislature intended "felony" to include non-qualifying offenses.

Of additional concern, this interpretation of the Double Predicate Rule would inadvertently create a statutory exception to the Qualifying Offense Rule which does not legislatively exist, and it would undermine the legislative intent of the greater statutory schema. Had the Legislature intended for the Double Predicate Rule to function as an exception to the Qualifying Offense Rule, it could have written restrictive language into the text. However, the absence thereof operates as evidence of the Legislature's intent not to treat the Double Predicate Rule as an exception, but rather harmonize the entirety of the laws governing the issuance of securing orders.

On a final note, and in light of the foregoing, although this Court need not decide petitioner's remaining contentions pertaining to equal protection (*see generally* *New York Pub. Interest Research Group, Inc. v Carey*, 42 NY2d 527, 529-30 [1977] [a court must "not give advisory opinions" as the "giving of such opinions is not the exercise of the judicial function"]), the disparate treatment of similarly situated defendants based upon nothing more than the geographical location of the prosecuting jurisdiction must be emphasized as further evidence of the illogic of interpreting the Double Predicate Rule so as to encompass non-qualifying offenses. To illustrate this point, consider a defendant, who, if prosecuted in the New York City criminal court or in a district court, would undisputedly be entitled to recognizance or release with non-monetary conditions for a non-qualifying offense (*see generally* CPL §§ 510.10 [1], 530.20 [1] [b] [enumerated qualifying offenses]) regardless of their felonious criminal history. Contrast this result with a defendant prosecuted in a city, town or village court where the Double Predicate Rule would require a remand order for the same non-qualifying offense (*see generally* CPL § 530.20 [2] [a] [unlike city, town and village courts, New York City criminal court and district courts are not subject to the confines of the Double Predicate Rule]). Although statutorily based distinctions among local courts and their correlative procedures are not a novel concept, and prior to Bail Reform, the Double Predicate Rule resulted in similar disparities, when considered together with the other infirmities resultant from including non-qualifying offenses within the purview of the Double Predicate Rule, it stands to reason that the Legislature could not have intended such an interpretation which invokes concerns over equities, consistency and reason. It is the totality of these incongruent and irrational results which lend credence to this Court's conclusion that including non-qualifying offenses within the Double Predicate Rule was not a result intended by the Legislature.

Conclusion

Based upon the foregoing, and for all the reasons set forth above, the Double Predicate Rule must be interpreted to apply only to qualifying offenses. Nothing herein stated should be construed as a tacit endorsement or criticism of the objectives or implementation of Bail Reform, for it is the function of the

courts to simply interpret and apply the laws. To the extent a court must legislate, it must not go beyond the small gaps left by the Legislature in accordance with what appears to be the legislative purpose. (*See generally* 16 CJS Constitutional Law § 413.) Had the Legislature intended a contrary outcome, one which encompasses non-qualifying offenses within the Double Predicate Rule, the statute should have been crafted so as to avoid any ambiguity in this vein.

Accordingly, it is hereby

ORDERED that Petitioner's petition, commenced pursuant to Article 78 and converted to a declaratory judgment action by the Appellate Division, Fourth Department, is GRANTED; and it is further

ORDERED and DECLARED that CPL § 530.20 (2) (a) shall apply only to qualifying offenses as enumerated in CPL §§ 530.20 (1) (b) and 510.10 (4).

Any prayers for relief not specifically addressed herein are DENIED.

This constitutes the Decision, Order and Declaration of the Court.

Dated: May 4, 2023

_____

HON. ELENA F. CARIOLA

Supreme Court Justice

ENTER

FOOTNOTES

Footnotes

1 Although not before this Court, the instant controversy inadvertently highlights the consequences resultant from removing judicial discretion from securing order determinations. On one end of the spectrum, a lower court is required to remand a defendant with two or more prior felony convictions, no matter how far removed by the passage of time, who stands charged with a low-level, non-violent felony offense, even when all the evidence before the court supports a conclusion that they are likely to return. On the other end, a defendant charged with a non-qualifying offense, regardless of the aggravating factors, with an extended criminal history falling short of rendering them a double predicate, is required to be released notwithstanding a mountain of evidence militating against a finding that they are likely to appear for future proceedings. The result is paradoxical inasmuch as the Legislature's attempt to create equity among similarly situated defendants has resulted in, at times, outcomes which do not fully take into account all the mitigating and aggravating circumstances of a particular case and defendant.

Discretion is a critical component of the judiciary. However, it is never wholly unfettered and undirected. There are a “thousand limitations -- the product some of statute, some of precedent, some of vague tradition or of an immemorial technique -- [which] encompass and hedge [courts]” (Benjamin N. Cardozo, The Growth of the Law 60-61 [1924]). “[L]ike the hole in a doughnut, [discretion] does not exist except as an area left open by a surrounding belt of restriction (Ronald Dworkin, *Taking Rights Seriously*, 31 [1978]).

Ironically, the Double Predicate Rule and the Qualifying Offense Rule bear the same mark and invoke similar concerns as they are both rules which remove discretion from a lower court's bail determination. Although this Court need not opine in this regard, perhaps it is circumstances such as this which provide the strongest arguments for the restoration of discretion to the bench. A derivative irony is the onus placed on this Court to exercise its discretion in its analysis of the absence thereof afforded to its brethren.

2 The Court is acutely aware of the tangential relationship of Senate Bill S2101A to the 2019 Bail Reform amendments; however, in this Court's estimation, it is nevertheless insightful as to discerning the intent of the Legislature and it further provides persuasive guidance in resolving the above-discussed statutory ambiguity.

3 Recently, lawmakers have submitted several proposals to amend the current laws governing bail, including, but not limited to, the elimination of the “least restrictive means” standard, permitting courts to the option of requiring mental health and substance abuse evaluations, allowing for a combination of release conditions and permitting more options a court may exercise should a defendant violate release conditions. Assuming, arguendo, the passage of the budget bill which includes these proposed changes, the net impact is minimal in discerning the Legislature's intent. Collectively, these amendments appear to return a degree of discretion to the judiciary while upholding the statutory design of presuming release and limiting bail and remand to the more serious offenses and offenders.

4 For many town, village and justice courts with limited dockets, this often requires the addition of a calendar date and correlative expenditure of resources so as to ensure that the scheduling of a preliminary hearing comports with the time requirements explicated in CPL Article 180.

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

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

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

CITE TITLE AS: People v Jennings

SUMMARY

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

People v Jennings, 111 AD2d 678, modified.

HEADNOTES

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

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

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

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

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

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

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

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

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

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

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

Crimes
Larceny
Larcenous Intent

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

Crimes
Misapplication of Property
Risk of Loss

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Crimes
Larceny
Larcenous Intent

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

TOTAL CLIENT SERVICE LIBRARY REFERENCES

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

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

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

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

ANNOTATION REFERENCES

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

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

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

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

POINTS OF COUNSEL

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

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

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

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

Francine Seiden for Angela Fiumefreddo, respondent, appellant.

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

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

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

Kevin P. Gilleece for John Finnerty, respondent.

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

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

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

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

OPINION OF THE COURT

Titone, J.

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

I. PROCEDURAL HISTORY

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

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

II. THE THRESHOLD PROCEDURAL ISSUES

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

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

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

III. THE PROPER STANDARD FOR REVIEW

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

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

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

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

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

IV. THE REPURCHASE AGREEMENT PLAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. THE COMPENSATORY BALANCE MATTER

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

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

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

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

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

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

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

VI. ALLEGED MISAPPROPRIATION OF INSURANCE PROCEEDS

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

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

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

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

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

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

VII. THE MISSING COINS AND MONEY

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

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

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

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

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

VIII. CONCLUSION

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

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

Simons, J.

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

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

I

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

Footnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64 N.Y.2d 200, 474 N.E.2d 593, 485 N.Y.S.2d 233

The People of the State of New York, Respondent,
v.
Patrick Lawrence, Appellant.

Court of Appeals of New York
Argued November 20, 1984;
decided December 27, 1984

CITE TITLE AS: People v Lawrence

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered November 17, 1983, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Frederic S. Berman, J.), rendered in New York County upon a verdict convicting defendant of attempted murder in the second degree, criminal possession of a weapon in the second degree, and assault in the second degree. The modification consisted of reversing and vacating the sentence for attempted murder and remanding the matter for resentence on that count.

Defendant was indicted on charges arising out of a barroom incident during which defendant approached a seated patron without preface, grabbed him about the neck in a hammerlock and shot him with a revolver. When the Calendar Judge assigned this case to a trial part, counsel announced that defendant wished to move to dismiss the indictment based upon denial of his statutory right to a speedy trial (CPL 30.30, subd 1, par [a]). The Calendar Judge deferred the motion and counsel submitted a written motion after the trial. The Judge hearing the motion at that time held the procedure proper but ruled against defendant on the merits of his claim. Defendant was convicted of attempted murder in the second degree, assault in the second degree and criminal possession of a weapon in the second degree. The Appellate Division affirmed the conviction, rejecting defendant's speedy trial claim without comment, but remanded the matter for resentencing. The only issue on appeal is procedural, whether a defendant may, with the permission of the court, defer a motion to dismiss based upon speedy trial grounds until after entry of a guilty verdict.

The Court of Appeals affirmed the order of the Appellate Division, holding, in an opinion by Judge Simons, that because defendant's motion to dismiss the indictment based upon denial of his statutory right to a speedy trial was not timely and was not made in writing upon reasonable notice to the People as required by CPL 210.20 (subd 1, par [g]; subd 2) and CPL 210.45 (subd 1), defendant waived his right to a dismissal on speedy trial grounds; that neither the more general time provisions of CPL 255.20 referred to in the first sentence of ***201** CPL 210.20 (subd 2) or the definitional section of CPL 255.10 should be read to expand the particular time provision for speedy trial motions; that even if the provisions of CPL 255.20 were incorporated and a court permitted to entertain the motion for good cause at any time up to the imposition of sentence, the court abused its discretion as a matter of law in entertaining defendant's motion after trial because the record is devoid of any reason to grant defendant an extension of time to move; and that the District Attorney's failure to object to the Calendar Judge's deferral of defendant's motion to dismiss based upon speedy trial grounds until after trial did not preserve defendant's rights to make such a motion.

People v Lawrence, 97 AD2d 718, affirmed.

HEADNOTES

Crimes
Right to Speedy Trial
Motion to Dismiss Indictment on Speedy Trial Grounds--Waiver

(1) The Criminal Procedure Law provides that a motion to dismiss an indictment upon a claimed denial of the right to a speedy trial must be made prior to the commencement of trial or the entry of a plea of guilty (CPL 210.20, subd 1, par [g]; subd 2); the motion must be made in writing and upon reasonable notice to the People (CPL 210.45, subd 1). Failure to follow the statutory procedure results in a waiver of the claim. Because defendant's motion to dismiss the indictment based upon denial of his statutory right to a speedy trial (CPL 30.30, subd 1, par [a]) was not timely and was not made

in writing upon reasonable notice to the People, defendant waived his right to a dismissal on speedy trial grounds.

Crimes
Right to Speedy Trial
When Motion to Dismiss on Speedy Trial Grounds Must be Made--Particular Provision of Statute Applicable in Lieu of General Provision of Same Statute

(2) Whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular provision is inapplicable. Inasmuch as the specific language of CPL 210.20 (subd 1, par [g]; subd 2) directs that speedy trial motions must be made before commencement of trial or entry of a plea of guilty, neither the more general time provisions of CPL 255.20 referred to in the first sentence of CPL 210.20 (subd 2) or the definitional section of CPL 255.10 should be read to expand the particular time provision for speedy trial motions. Moreover, when the Legislature amended CPL 210.20 (subd 2) to remove the reference to the discretion of the court to entertain speedy trial motions after the commencement of trial, it did not add any reference to CPL 255.20 but left the statute in its present form; in the absence of any such reference, it may be assumed that the Legislature intended to distinguish speedy trial motions and that they intended that the motion should be made before trial commenced or a guilty plea was entered.

Crimes
Right to Speedy Trial
When Motion to Dismiss Indictment on Speedy Trial Grounds Must be Made-- Extension of Time for Good Cause Shown

(3) CPL 210.20 specifically directs that speedy trial motions must be made before commencement of trial or entry of a plea of guilty; neither the more ***202** general time provisions of CPL 255.20 referred to in CPL 210.20 (subd 2) or the definitional section of CPL 255.10 should be read to expand the particular time provision for speedy trial motions. However, even if the provisions of CPL 255.20 were incorporated and a court permitted to entertain the speedy trial motion for good cause at any time up to the imposition of sentence, the court abused its discretion as a matter of law in entertaining defendant's motion after trial because the record is devoid of any reason to grant defendant an extension of time to move; manifestly, the motion could have been made before the commencement of trial and nothing in the record suggests any reason why it was not or why defendant should be excused for his failure to follow the explicit language of the statute. The court's action in deferring the motion could not be characterized as "good cause" in any sense warranting an extension of counsel's time to act under the provisions of CPL 255.20.

Crimes
Right to Speedy Trial
Failure to Object to Deferral of Motion to Dismiss on Speedy Trial Grounds--Preservation of Defendant's Rights

(4) The District Attorney's failure to object to the Calendar Judge's deferral of defendant's motion to dismiss based upon speedy trial grounds until after trial did not preserve defendant's rights to make such a motion. CPL 210.20, which provides that a motion to dismiss on speedy trial grounds must be made before the commencement of trial or the entry of a guilty plea, places the initiative on the defendant to proceed as it directs and even if counsel did assert his claim orally before trial, there was no motion before the court or under consideration by it which called for opposition by the People; they objected when the written motion was submitted after the trial and that was sufficient. Neither the court nor the parties may restructure the statute to adopt a procedure that is more convenient for them at the moment by waiving its clear provisions or agreeing to preserve defendant's rights.

POINTS OF COUNSEL

Barry Stendig and *William E. Hellerstein* for appellant.
Appellant was denied his statutory right to a speedy trial under CPL 30.30 when 218 days, chargeable to the People, elapsed between his arraignment in Criminal Court and the People's readiness for trial. (People v Vega, 80 AD2d 867; People v Bermudez, 84 Misc 2d 1071; People v Key, 45 NY2d 111; People v De Rosa, 42 NY2d 872; People v Consolazio, 40 NY2d 446; People v De Jesus, 42 NY2d 519; People v Jones, 81 AD2d 22; People v Patterson, 39 NY2d 288;

People v Hamilton, 46 NY2d 932; People v Sturgis, 38 NY2d 625; People v Osgood, 52 NY2d 37.)

Robert M. Morgenthau, District Attorney (*Oscar Garcia-Rivera* and *Robert M. Pitler* of counsel), for respondent.

I. Defendant's guilt was proven beyond a reasonable doubt. II. Defendant's speedy trial rights were not violated. (People v Key, 45 NY2d 111; People v De Rosa, 42 NY2d 872; People v Rodriguez, 50 NY2d 553; People v Lopez, 28 NY2d 148; People v Selikoff, 35 NY2d 227; People v O'Brien, 56 NY2d 1009; People v Sturgis, 38 NY2d 625; People v Fuggazzatto, 62 NY2d 862; Sega v State of New York, 60 NY2d 183; People v Williams, 72 AD2d 950.) ***203**

OPINION OF THE COURT

Simons, J.

Defendant has been convicted of attempted murder in the second degree, assault in the second degree and criminal possession of a weapon in the second degree. The charges arose out of a barroom incident during which defendant approached a seated patron without preface and grabbed him about the neck in a hammerlock. As he did so, he placed a revolver against the victim's forehead and pulled the trigger. Fortunately, the victim deflected the gun while struggling to get free and the shot injured him only in one eye and one ear. Defendant fired two other shots before the gun emptied. One bullet lodged in the ceiling and the other struck the victim in the thigh.

Defendant has not challenged the finding of guilt on this appeal and the only issue before us is procedural, whether a defendant may, with the permission of the court, defer a motion to dismiss based upon speedy trial grounds until after entry of a guilty verdict. The question arises because when the Calendar Judge assigned this case to a trial part counsel announced that defendant wished to move to dismiss the indictment based upon denial of his statutory right to a speedy trial (CPL 30.30, subd 1, par [a]). The Calendar Judge deferred the motion and counsel submitted a written motion after the trial. The Judge hearing the motion at that time held the procedure proper but ruled against defendant on the merits of his claim. The Appellate Division affirmed the conviction, rejecting defendant's speedy trial claim without comment, but remanded the matter for resentencing (97 AD2d 718). Defendant has been resentenced and the order of the Appellate Division is now before us for review.

(1) The Criminal Procedure Law provides that a motion to dismiss an indictment based upon a claimed denial of the right to a speedy trial must be made prior to the commencement of trial or the entry of a plea of guilty (CPL 210.20, subd 1, par [g]; subd 2). An oral application is not sufficient (see People v Key, 45 NY2d 111, 116; People v De Rosa, 42 NY2d 872, 873). The motion must be made in writing and upon reasonable notice to the People (CPL 210.45, subd 1). Failure to follow the statutory procedure results in a waiver of the claim (People v Key, supra; People v De Rosa, supra; People v Adams, 38 NY2d 605; see, also, People v Selby, 53 AD2d 878, affd 43 NY2d 791). Concededly, defendant's pretrial motion was not in writing. Indeed, without a transcript of the proceedings before the Calendar Judge, it is not clear whether counsel made an oral motion to dismiss at that ***204** time or merely stated his intentions. Because the motion was not timely and was not made in writing upon reasonable notice to the People, defendant waived his right to a dismissal on speedy trial grounds.

Defendant raises several points in opposition to a finding of waiver. First, he contends that the provisions of CPL 255.20 (subd 3) are applicable, thereby permitting the court to waive time requirements for certain motions. CPL 210.20 (subd 2) provides, however, that any motion *except* a motion based upon denial of the right to speedy trial should be made in the period specified in CPL 255.20 and, in the second sentence which does not refer to 255.20, that a speedy trial motion "must be made prior to the commencement of trial or entry of a plea of guilty."

(2) Under standard rules of construction, whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular provision is inapplicable (People v Mobil Oil Corp., 48 NY2d 192, 200; McKinney's Cons Laws of NY, Book 1, Statutes, § 238). Inasmuch as the specific language of the statute directs that speedy trial motions must be made before commencement of trial or entry of a plea of guilty, neither the more general time provisions of 255.20 referred to in the first sentence of CPL 210.20 (subd 2) or the definitional section of CPL 255.10 should be read to expand the particular time provision for speedy trial motions.

Moreover, we find unpersuasive the contention in the dissent that the statute originally permitted the speedy trial motion to

be made after the commencement of trial, and its view that no change was intended by the amendment (see dissenting opn, pp 209-210). When the Legislature amended the first sentence of CPL 210.20 (subd 2) to remove the time requirements for CPL 210.20 motions generally, it substituted a reference to CPL 255.20 and its discretionary provisions. When it amended the subdivision to delete the third sentence to remove the reference to the discretion of the court to entertain speedy trial motions after the commencement of trial, it did not add any similar reference to CPL 255.20 but left the statute in its present form. In the absence of any such reference, it may be assumed that the Legislature intended to distinguish speedy trial motions and that they intended that the motion should be made before trial commenced or a guilty plea was entered.

There is good reason for the distinction. The Legislature's purpose in enacting CPL 255.20 was to regulate pretrial proceedings by requiring a single omnibus motion to be made ***205** promptly after arraignment and thus to avoid the proliferation experienced under prior procedure in which a defendant could bombard the courts and Judges with dilatory tactics continuing right up to the eve of trial (see 1972 Report of NY Judicial Conference Advisory Committee on the CPL, 1973 McKinney's Session Laws of NY, pp 2076-2077). A 45-day period to make the motion was deemed reasonable and CPL 255.20 offered some flexibility for motions dependent on the outcome of prior motions or necessarily delayed for other good cause. Motions to dismiss on speedy trial grounds were exempt from the provisions of CPL 255.20, however, because it would be highly unusual that the statutory period of delay could elapse within 45 days of arraignment. Thus, although subdivision 2 expressly incorporated the 45-day time period and the flexibility of CPL 255.20 into the statute for all other motions, it did not do so for speedy trial motions. They may be made at any time before commencement of trial or entry of a plea of guilty.

Moreover there are several reasons why speedy trial motions, unlike other pretrial motions, should be made before commencement of trial. First, the unexcused period of delay, six months or 90 days as the case may be, from the date of the filing of an accusatory instrument until the District Attorney announces the indictment ready for trial, are facts of record fully known or knowable to the defendant before trial and it is difficult to conceive of anything that could change to improve or alter the validity of defendant's claim after the District Attorney announces his readiness on the record. Second, most pretrial motions and many of those listed in CPL 210.20 relate to defects in the prior proceedings which may affect the validity of the indictment, bar the prosecution or, as in the case of discovery and suppression, influence the ultimate determination of guilt or innocence (CPL 210.20, subd 1; 255.10, subd 1). Thus, as in the illustrations cited by the dissent, there may be good reason to grant relief after trial has commenced, even up to the pronouncement of sentence. The issues involved in a speedy trial motion, however, do not implicate such questions and there is no reason to permit motions during or after trial to ensure that the verdict is not infirm. Third, it should be observed that a 30.30 motion is a matter of legislative grace. The statutory right to dismissal granted a defendant if the prosecutor is not ready for trial, unlike a constitutional claim for denial of a speedy trial, is based upon policy reasons and does not require consideration of prejudice to defendant (see Barker v Wingo, 407 US 514, 530; People v Taranovich, 37 NY2d 442, 445). If defendant is to avail ***206** himself of the benefits of CPL 30.30 then he should comply with the statutory requirements (see People v Sobotker, 61 NY2d 44). It makes little sense to squander the resources of the courts and the time and efforts of counsel, witnesses and jurors on a fool's errand to determine guilt when the verdict may subsequently be vacated because of prosecutorial delay.

(3) But even if we were to incorporate the provisions of CPL 255.20 and permit a court to entertain the motion for good cause at any time up to the imposition of sentence, we would necessarily find that the court abused its discretion as a matter of law in entertaining this motion (though it did not purport to exercise its discretion) because the record is devoid of any reason to grant defendant an extension of time to move. His counsel was well aware that he had grounds for the motion at least as early as October 9, 18 days before the case was sent to trial, and yet failed to submit it until after the trial. The only recognizable excuse for this failure was a one- day illness of defendant's counsel on October 22. Manifestly, the motion could have been made before the commencement of trial and nothing in the record suggests any reason why it was not or why defendant should be excused for his failure to follow the explicit language of the statute as our decisions require (see People v Key, 45 NY2d 111, supra; People v De Rosa, 42 NY2d 872, supra). Unquestionably, he had an absolute right to make the motion on October 27, as the dissent notes. He also had the responsibility to make it and the court's action

in deferring the motion could not be characterized as "good cause" in any sense warranting an extension of counsel's time to act under the provisions of CPL 255.20.

(4) Defendant next contends that his rights have been preserved because the District Attorney failed to object to the Calendar Judge's deferral of the motion until after trial on October 27. We disagree.

Generally, parties to litigation, even parties to a criminal prosecution, may adopt their own rules at trial by the simple expedient of failing to object to evidence offered or to except to instructions given the jury (see Matter of Brockway v Monroe, 59 NY2d 179, 188; Martin v City of Cohoes, 37 NY2d 162; cf. Sega v State of New York, 60 NY2d 183, 190, n 2). Thus, there are decisions which have held the People bound by their failure to object to rulings of the court although the omission resulted in the imposition of a higher standard of proof upon them (see People v Malagon, 50 NY2d 954; People v Bell, 48 NY2d 913). Similarly, there are any number of statutory pretrial rights available to a criminal defendant which may be lost by inaction ***207** (e.g., the right to a preliminary hearing [CPL 180.10]; the right in some instances to testify before the Grand Jury [CPL 190.50, subd 5]; the right to move for discovery [CPL 240.30]; etc.). The burden rests on the parties to protect their own rights by asserting them at the time and in the manner that the Legislature prescribes. Thus, we attribute no significance in this case to the District Attorney's failure to object on October 27 to the actions of the Calendar Judge. The statute places the initiative on the defendant to proceed as it directs and even if counsel did assert his claim orally before trial, there was no motion before the court or under consideration by it which called for opposition by the People. They objected when the written motion was submitted after the trial and that was sufficient. The requirements of the statute are based upon the strong public policy to further orderly trial procedures and preserve scarce trial resources. Neither the court nor the parties may restructure the statute to adopt a procedure that is more convenient for them at the moment by waiving its clear provisions (see People v Selikoff, 35 NY2d 227, 238, cert den 419 US 1122; People v Lopez, 28 NY2d 148, 152) or agreeing to preserve defendant's right (see People v O'Brien, 56 NY2d 1009; People v Di Raffaele, 55 NY2d 234)

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

Meyer, J.

(Dissenting).

Because, in my view, the majority's restrictive reading of CPL 210.20 (subd 2) is clearly inconsistent with the intent of the Legislature, I respectfully dissent.

Article 255 deals with pretrial motions. CPL 255.10 (subd 1, par [a]) defines a pretrial motion "as used in this article" as "any motion by a defendant which seeks an order of the court: (a) dismissing an indictment pursuant to article 210". CPL 210.20 (subd 1, par [g]) provides that "the superior court may, upon motion of the defendant, dismiss such indictment * * * upon the ground that: * * * (g) The defendant has been denied the right to a speedy trial".

CPL 255.20 (subd 1) directs that, "Except as otherwise expressly provided by law * * * all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment." The last clause of that sentence gives a superior court Judge the power to fix a time beyond 45 days and imposes no limitation on that power other than that defendant's ***208** application be made prior to entry of judgment (i.e., imposition of sentence [CPL 1.20, subd 15]).

In addition to the discretion thus vested in the Trial Judge with respect to a pretrial motion, the second sentence [1] of CPL 255.20 (subd 3) expressly provides that, "Any other pre-trial motion made after the forty- five day period may be summarily denied, but the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits." That provision unmistakably vests the Trial Judge with discretion "at any time before sentence, [to] entertain and dispose of the motion on the merits." Here the affidavit of the Assistant District Attorney acknowledges that defendant's counsel indicated on October 9, 1981 in the calendar part that he intended to file a 30.30 motion, and that on October 27, 1981, when the case was assigned to a trial part, "the

calendar judge indicated that any 30.30 motion should be litigated after the trial, if necessary." After trial, defendant's counsel made a written motion pursuant to CPL 30.20 and 30.30 to dismiss for lack of a speedy trial. The Calendar Judge considered the application on the merits and denied it, and the Appellate Division affirmed.

The majority now affirms, not on the merits, but on the ground that the Calendar Judge had no authority to consider the merits. It does so on the basis of CPL 210.20 (subd 2), which provides that, "A motion pursuant to this section, except a motion pursuant to paragraph (g) of subdivision one, should be made within the period provided in section 255.20. A motion made pursuant to paragraph (g) of subdivision one must be made prior to the commencement of trial or entry of a plea of guilty." It does so by reading the last sentence of that subdivision as an absolute time bar, notwithstanding that the reference to CPL 255.20 in the first sentence makes clear beyond peradventure that the Legislature was aware of both the provision for *timely* motions in CPL 255.20 (subd 1) and also of the discretion to consider *untimely* motions that is vested in the Trial Judge by ***209** both the first sentence of CPL 255.20 (subd 1) and the second sentence of CPL 255.20 (subd 3). But while the first sentence of CPL 210.20 (subd 2) expressly provides by law that a speedy trial motion need not be made within 45 days (because, of course, it cannot be), nothing in its second sentence or in the second sentence of CPL 255.20 (subd 3) or in the first sentence of CPL 255.20 (subd 1) indicates in any way[2] that the discretion granted by the latter two provisions was not to apply to a speedy trial motion. The majority's concern with which is the general and which specific is thus misguided, for that rule applies only where the two provisions are incompatible (People v McLaughlin, 93 Misc 2d 980, 985-986; see Levine v Bornstein, 4 NY2d 241; People ex rel. Knoblauch v Warden, 216 NY 154, 156-157; McKinney's Cons Laws of NY, Book 1, Statutes, §§ 97, 98, 238) and, as the foregoing discussion shows, there is no conflict between the authorization granted by CPL 255.20 (subd 3) to consider untimely motions and the reference in CPL 210.20 (subd 2) to CPL 255.20, which simply describes when a motion to dismiss on speedy trial grounds will be timely.

Indeed, the contrary is made indelibly clear when one tracks the language of CPL 210.20. Chapter 763 of the Laws of 1974 inserted article 255 into the Criminal Procedure Law. Prior to the adoption of that statute, CPL 210.20 (subd 2) contained three sentences. The first fixed the period of time for motions other than for dismissal on speedy trial grounds. The second (which read exactly as the present second sentence) provided that the latter motion "must be made prior to the commencement of trial or entry of a plea of guilty." The third, however, in language almost identical with that of the second sentence of ***210** CPL 255.20 (subd 3)[3] gave the Trial Judge discretion to entertain motions for dismissal on various grounds, including speedy trial violations, "at any time before sentence." Only because of the enactment of CPL 255.20 (subd 3) which consolidated in one provision the power to entertain all untimely "pretrial" motions was the third sentence of CPL 210.20 (subd 2) deleted, as was the analogous language in CPL 170.30 (subd 2) relating to motions to dismiss an information on grounds inclusive of denial of the right to a speedy trial, in CPL 240.30, relating to discovery, and in CPL 200.90, relating to bills of particulars.

Nor does the argument of the majority that posttrial consideration of a speedy trial motion squanders the resources of the court and involves all of the trial participants in a fool's errand withstand analysis. A motion to dismiss on the ground that prosecution is barred by the Statute of Limitations (CPL 210.20, subd 1, par [f]) or in the interest of justice (id., par [i]) is subject to the same criticism; yet there can be no question that such a motion is a pretrial motion within the meaning of the second sentence of CPL 255.20 (subd 3). It is even more of a fool's errand to permit, as CPL 210.20 (subd 1, par [b]), in combination with CPL 255.20 (subd 3), clearly does, the making after trial of a motion to dismiss on the ground that the evidence before the Grand Jury was not legally sufficient, when CPL 210.30 (subd 6) makes appeal on such a ground impossible if there was legally sufficient trial evidence, and when the Trial Judge, if he dismisses after trial for insufficiency of the evidence before the Grand Jury has the power to direct resubmission of the matter to another Grand Jury (CPL 210.20, subd 4), thereby allowing the defendant to have another trial. Of course, such a scenario is unlikely, but it is possible under the statute, and that possibility demonstrates the fallacy in the majority's interpretation of the statute.

Finally, the suggestion that the 30.30 motion is a matter of legislative grace, as to which, "unlike a constitutional

claim for denial of a speedy trial" (majority opn, p 205), defendant must comply strictly with statutory requirements, is of no greater validity. CPL 210.20 (subd 2) makes no distinction between constitutional and statutory speedy trial motions. Either both ***211** may be made, in the Trial Judge's discretion, at any time before sentence under CPL 255.20 (subd 3), or neither may be. And as is clear from the wording of the statutes in question, from the absence of any legislative history to support the thesis of the majority and from the clear refutation of that thesis by the manner in which the changes made by chapter 763 of the Laws of 1974 were made, the Legislature did not intend what the majority now reads into CPL 210.20 (subd 2).

As an alternate reason for refusing to reach the merits, the majority states that in deferring the motion the Calendar Judge did not exercise discretion and that, in any event, her entertainment of the motion was an abuse of discretion as a matter of law because defendant had not demonstrated good cause. There being no other basis for deferral of the motion until after trial and no reason to believe that the Calendar Judge deliberately violated the statute, the necessary implication is that she acted in what she thought was the discretion vested in her by CPL 255.20 (subd 3) or CPL 210.20 (subd 2), or both. Moreover, under the second sentence of CPL 210.20 (subd 2), defendant had the absolute right to make his speedy trial motion on October 27, 1981, "prior to the commencement of trial." Thus, the only possible abuse of discretion would be in the Judge's acceptance of the written speedy trial motion after trial and ruling upon it on the merits. As to that, however, defendant's counsel had good cause for the delay -- the direction of the Calendar Judge that the motion "be litigated after the trial, if necessary"! Finally, even if we accept the majority's premise that defendant's counsel was obligated to show cause on October 27, there is nothing in the record to indicate the basis for the Calendar Judge's direction to defer the motion until after trial. Whether she abused her discretion has never been raised or argued below. At the very least, therefore, we should remit for a hearing before holding that there was an abuse of discretion as a matter of law, for we have no way of knowing what basis defendant's counsel advanced for requesting deferral of the motion until after trial.

In sum, the majority's refusal to consider the merits of the speedy trial issue is without basis. Were the merits reached I would reverse, but this being a dissent, and the issue of importance to criminal procedure being the majority's truncation of the power granted the superior court Judge by the Legislature, no useful purpose would be served by articulation of my reasons on the merits. ***212**

Chief Judge Cooke and Judges Jasen, Jones and Wachtler concur with Judge Simons; Judge Meyer dissents and votes to reverse in a separate opinion in which Judge Kaye concurs. Order affirmed. ***213**

Footnotes

1 To be distinguished is the first sentence of the subdivision, which mandates that the Trial Judge consider appropriate pretrial motions if its conditions are met. Its language is: "Notwithstanding the provisions of subdivisions one and two hereof, the court must entertain and decide on its merits, at any time before the end of the trial, any appropriate pre- trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in subdivision one of this section or included within the single set of motion papers as required by subdivision two."

2 The legislative history contains no such indication either (see 1972 Report of NY Judicial Conference Advisory Committee on the CPL, reprinted in 1973 McKinney's Session Laws of NY, pp 2076-2077; 1973 Report of NY Judicial Conference Advisory Committee, reprinted in 1973 McKinney's Session Laws of NY, pp 2080-2081; 1974 Report of NY Judicial Conference Advisory Committee, reprinted in 1974 McKinney's Session Laws of NY, p 1828). Those Reports show that the Committee's proposal was made because "[t]he proliferation of such motions, the possibility that different judges may be required to decide different motions in the same

case, and the possibility that motions may be filed late for the purpose of delaying trial, all combine to create a situation needing a solution." Nothing in the Reports suggests that it was intended to except speedy trial motions from the discretion granted by CPL 255.20 (subds 1, 3), nor is there anything in the legislative history of CPL 210.20 (subd 2) to suggest that its second sentence was intended to do more than fix the time within which a speedy trial motion would be timely. Moreover, as is developed below, the form of the amendment made by chapter 763 of the Laws of 1974 to CPL 210.20 clearly demonstrates the contrary.

3 The sentence read: "A motion made thereafter may be summarily denied, but the court, in the interest of justice and for good cause shown, may, in its discretion, entertain and dispose of the motion on the merits at any time before entry of a plea of guilty or commencement of trial if the motion is based upon a ground prescribed in paragraph (b) or (i) of subdivision one, or at any time before sentence if the motion is based upon any other ground." Neither (b) nor (i) concern a speedy trial motion.

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Gardner v. United States, E.D.Mich., March 31, 2023

104 S.Ct. 2052
Supreme Court of the United States

Charles E. STRICKLAND, Superintendent, Florida State Prison, et al., Petitioners
v.
David Leroy WASHINGTON.

No. 82-1554.
|
Argued Jan. 10, 1984.
|
Decided May 14, 1984.
|
Rehearing Denied June 25, 1984.

Synopsis
See 467 U.S. 1267, 104 S.Ct. 3562.

Defendant, who received death penalty for murder conviction, filed petition for writ of habeas corpus. The United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, denied relief, and the Court of Appeals, 673 F.2d 879, affirmed in part and vacated in part. On rehearing en banc, 693 F.2d 1243, the Court of Appeals, Vance, Circuit Judge, reversed and remanded. On certiorari, the Supreme Court, Justice O'Connor, held that: (1) proper standard for attorney performance is that of reasonably effective assistance; (2) defense counsel's strategy at sentencing hearing was reasonable and, thus, defendant was not denied effective assistance of counsel; and (3) even assuming challenged conduct of counsel was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence.

Reversed.

Justice Brennan concurred in part and dissented in part and filed opinion.

Justice Marshall dissented and filed opinion.

West Headnotes (27)

[1] **Habeas Corpus** Dismissal

Rule requiring dismissal of mixed habeas corpus petitions containing exhausted and unexhausted claims, though to be strictly enforced, is not jurisdictional.

164 Cases that cite this headnote

[2] **Criminal Law** Deprivation or Allowance of Counsel

Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense. U.S.C.A. Const.Amend. 6.

336 Cases that cite this headnote

[3] **Criminal Law** Standard of Effective Assistance in General

Benchmark for judging any claim of ineffectiveness of counsel must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

7649 Cases that cite this headnote

[4] **Criminal Law** Death Penalty

A capital sentencing proceeding is sufficiently like a trial in its adversarial format and in existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial, which is to ensure that adversarial testing process works to produce a just result under standards governing decision. U.S.C.A. Const.Amend. 6.

297 Cases that cite this headnote

[5] **Criminal Law** Counsel for Accused

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components: first, defendant must show that counsel's performance was deficient, requiring showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment and, second, defendant must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

84517 Cases that cite this headnote

[6] **Criminal Law** Standard of Effective Assistance in General

Proper standard for attorney performance is that of reasonably effective assistance. U.S.C.A. Const.Amend. 6.

3109 Cases that cite this headnote

[7] **Criminal Law** Conflict of Interest

Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client duty of loyalty, a duty to avoid conflicts of interest. U.S.C.A. Const.Amend. 6.

315 Cases that cite this headnote

[8] **Criminal Law** Standard of Effective Assistance in General

Criminal Law Particular Cases and Issues

From counsel's function as assistant to defendant derive the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution. U.S.C.A. Const.Amend. 6.

209 Cases that cite this headnote

[9] **Criminal Law** Deficient representation in general

Defense counsel has duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. U.S.C.A. Const.Amend. 6.

344 Cases that cite this headnote

[10] **Criminal Law** Standard of Effective Assistance in General

Criminal Law Strategy and tactics in general

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or of the range of legitimate decisions regarding how best to represent a criminal defendant; any set of rules would interfere with constitutionally protected independence of counsel and restrict wide latitude counsel must have in making tactical decisions, and could distract counsel from the overriding mission of vigorous advocacy of defendant's cause. U.S.C.A. Const.Amend. 6.

1040 Cases that cite this headnote

[11] **Criminal Law** Conduct of trial in general

Court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under those circumstances, challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

38605 Cases that cite this headnote

[12] **Criminal Law** Presumptions and burden of proof in general

Criminal Law Determination

A convicted defendant making a claim of ineffective assistance must identify acts or omissions of counsel that are alleged not to have been result of reasonable professional judgment and, then, court must determine

whether, in light of all circumstances, identified acts or omissions were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case. U.S.C.A. Const.Amend. 6.

32370 Cases that cite this headnote

[13] **Criminal Law** Preparation for trial

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

4223 Cases that cite this headnote

[14] **Criminal Law** Determination

Criminal Law Preparation for trial

Inquiry into counsel's conversations with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. U.S.C.A. Const.Amend. 6.

213 Cases that cite this headnote

[15] **Criminal Law** Counsel for Accused

An error by counsel, even if professionally unreasonable, does not warrant setting aside judgment in a criminal proceeding if the error had no effect on the judgment. U.S.C.A. Const.Amend. 6.

2691 Cases that cite this headnote

[16] **Criminal Law** Conduct of trial in general

Actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice. U.S.C.A. Const.Amend. 6.

640 Cases that cite this headnote

[17] **Criminal Law** Conduct of trial in general

As relating to Sixth Amendment claims of ineffective assistance of counsel, prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. U.S.C.A. Const.Amend. 6.

38758 Cases that cite this headnote

[18] **Criminal Law** Conduct of trial in general

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to general requirement that defendant affirmatively prove prejudice. U.S.C.A. Const.Amend. 6.

8863 Cases that cite this headnote

[19] **Criminal Law** Prejudice in general

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

118175 Cases that cite this headnote

[20] **Criminal Law** Conduct of trial in general

In making determination whether specified errors of counsel resulted in required prejudice for a defendant to succeed on a Sixth Amendment claim, a court should presume, absent challenge to judgment on grounds of evidentiary insufficiency, that judge or jury acted according to law. U.S.C.A. Const.Amend. 6.

361 Cases that cite this headnote

[21] **Criminal Law** Death Penalty

When a defendant challenges a death sentence on ground of ineffective assistance of counsel, question is whether there is a reasonable probability that, absent the errors, sentencer, including appellate court, to extent it independently reweighs the evidence, would

have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

11263 Cases that cite this headnote

[22] **Criminal Law** Death penalty cases

In determining whether defendant was denied effective assistance of counsel in death sentence case, court must consider totality of the evidence before judge or jury. U.S.C.A. Const.Amend. 6.

1787 Cases that cite this headnote

[23] **Criminal Law** Determination

A court need not determine whether counsel's performance was deficient before examining prejudice suffered by defendant as result of alleged deficiencies. U.S.C.A. Const.Amend. 6.

31058 Cases that cite this headnote

[24] **Habeas Corpus** Adequacy and Effectiveness of Counsel

Since fundamental fairness is central concern of writ of habeas corpus, no special standards ought to apply to claims of ineffective assistance of counsel made in habeas proceedings. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

1637 Cases that cite this headnote

[25] **Criminal Law** Adequacy of Representation

Ineffectiveness of counsel is not a question of basic, primary, or historic fact but, rather, is a mixed question of law and fact. U.S.C.A. Const.Amend. 6.

161 Cases that cite this headnote

[26] **Criminal Law** Adequacy of investigation of mitigating circumstances

In capital murder case, defense counsel's strategy at sentencing hearing of not seeking out character witnesses or requesting a psychiatric examination or presentence report was reasonable and, thus, defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

1198 Cases that cite this headnote

[27] **Criminal Law** Counsel for Accused

Even assuming challenged conduct of defense counsel at sentencing hearing was unreasonable, defendant suffered insufficient prejudice to warrant setting aside his death sentence because, given overwhelming aggravating factors, there was no reasonable probability that omitted evidence would have changed conclusion that aggravating circumstances outweighed mitigating circumstances and, hence, sentence imposed. U.S.C.A. Const.Amend. 6.

7190 Cases that cite this headnote

Syllabus [a1]

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." In preparing for the sentencing hearing, defense counsel spoke with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it **2055 was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme

Court affirmed, and respondent then sought collateral relief in state court on the ground, inter alia, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals ultimately reversed, stating that the Sixth Amendment accorded criminal defendants a right ***669** to counsel rendering "reasonably effective assistance given the totality of the circumstances." After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding—such as the one provided by Florida law—that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 2063–2064.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 2064–2069.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 2064–2067.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of ****2056** the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 2067–2069.

***670** 3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d), but is a mixed question of law and fact. Pp. 2069–2070.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 2070–2071.

693 F.2d 1243 (5th Cir.1982), reversed.

Attorneys and Law Firms

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were *Jim Smith,* Attorney General, and *Calvin L. Fox,* Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was *Joseph H. Rodriguez.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *Edwin S. Kneedler;* for the State of Alabama et al. by *Mike Greely,* Attorney General of Montana, and *John H. Maynard,* Assistant Attorney General, *Charles A. Graddick,* Attorney General of Alabama, *Robert K. Corbin,* Attorney General of Arizona, *John Steven Clark,* Attorney General of Arkansas, *John Van de Kamp,* Attorney General of California, *Duane Woodard,* Attorney General of Colorado, *Austin J. McGuigan,* Chief State's Attorney of Connecticut, *Michael J. Bowers,* Attorney General of Georgia, *Tany S. Hong,* Attorney General of Hawaii, *Jim Jones,* Attorney General of Idaho, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Steven L. Beshear,* Attorney General of Kentucky, *William J. Guste, Jr.,* Attorney General of Louisiana, *James E. Tierney,* Attorney General of Maine, *Stephen H. Sachs,* Attorney General of Maryland, *Francis X. Bellotti,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi, *John D. Ashcroft,* Attorney General of Missouri, *Paul L. Douglas,* Attorney General of Nebraska, *Brian McKay,* Attorney General of Nevada, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Paul Bardacke,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Robert Wefald,* Attorney General of North Dakota, *Anthony Celebrezze, Jr.,* Attorney General of Ohio, *Michael Turpen,* Attorney General of Oklahoma, *Dave Frohnmayer,* Attorney General of Oregon, *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Dennis J. Roberts II,* Attorney General of Rhode Island, *T. Travis Medlock,* Attorney General of South Carolina, *Mark V. Meierhenry,* Attorney General of South Dakota, *William M. Leech, Jr.,* Attorney General of Tennessee, *David L. Wilkinson,* Attorney General of Utah, *John J. Easton,* Attorney General of Vermont, *Gerald L. Baliles,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, *Chauncey H. Browning,* Attorney General of West Virginia, and *Archie G. McClintock,* Attorney General of Wyoming; and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar,* and *Nicholas E. Calio.*

Richard J. Wilson, Charles S. Sims, and *Burt Neuborne* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

Opinion

***671** Justice O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10–day period in September 1976, respondent planned and committed three groups of crimes, which included ***672** three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50–53. He also stated, however, that he accepted responsibility for the crimes. E.g., id., at 54, 57. The trial judge ****2057** told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. Id., at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on ***673** the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. Id., at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See id., at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. Id., at A223–A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Id., at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227–A228, A265–A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Id., at A265–A266. Counsel also argued that respondent had no history of criminal activity and that respondent committed ***674** the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and ****2058** shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's ***675** participation in the crimes was neither minor nor the

result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." See Washington v. State, 362 So.2d 658, 663–664 (Fla.1978), (quoting trial court findings), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence ***676** of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. App. 7; see also id., at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206–A243. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. Id., at A218–A220. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. Id., at A226–A228. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. Id., at A228. Fourth, there was no error in failure to examine the medical ****2059** examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. Id., at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three ***677** reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no

substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: "[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the ... things [that respondent alleged counsel had failed to do] ***678** at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming...." App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. Washington v. State, 397 So.2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice" and, indeed, had "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief...." Id., at 287. Respondent's claims were "shown conclusively to be without merit so as to obviate the need for an evidentiary hearing." Id., at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a continuance, ****2060** as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made errors in judgment in failing to ***679** investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that "there does not appear to be a likelihood, or even a significant possibility," that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285–A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. Id., at A286–A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F.2d 879 (5th Cir.1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F.2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity rather than a matter of jurisdiction" and hence admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F.2d, at 1248, n. 7.

***680** Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Id., at 1250. The

court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. Id., at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he **2061 amount of pretrial investigation that is reasonable defies precise measurement." Id., at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. Id., at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must include " 'an independent examination of the facts, circumstances, pleadings and laws involved.' " Id., at 1253 (quoting Rummel v. Estelle, 590 F.2d 103, 104 (CA5 1979)). The scope of the duty, however, depends *681 on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. Id., at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. Id., at 1257–1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." Id., at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. Id., at 1256–1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the question of the prejudice to the *682 defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. Id., at 1258–1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." Id., at 1262. This standard, the Court of Appeals reasoned, is compatible with the "cause and prejudice" standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified showing of prejudice **2062 would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all

the evidence, harmless beyond a reasonable doubt. Id., at 1260–1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, id., at 1264–1280 (opinion of Tjoflat, J.); id., at 1280 (opinion of Clark, J.); id., at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); id., at 1288–1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, id., at 1281–1285 (opinion of Johnson, J., joined by Anderson, J.); id., at 1285–1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); id., at 1288–1291 (opinion of Hill, J.), a majority ***683** of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible "to the extent that it contains personal knowledge of historical facts or expert opinion," was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. Id., at 1262–1263; see Fayerweather v. Ritch, 195 U.S. 276, 306–307, 25 S.Ct. 58, 67–68, 49 L.Ed. 193 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. E.g., United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657. With the exception of Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. Cf. United States v. Agurs, 427 U.S. 97, 102, n. 5, 96 S.Ct. 2392, 2397, n. 5, 49 L.Ed.2d 342 (1976).

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151–152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, supra, at pp. 3a–6a; Sarno, ***684** Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A.L.R. 4th 99–157, §§ 7–10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, 7a–10a; Sarno, supra, at 83–99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S.App.D.C. 359, 371, 374–375, 624 F.2d 196, 208, 211–212 (en banc), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified ****2063** deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261–1262.

[1] For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515–520, 102 S.Ct., at 1201–04. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9

L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through ***685** the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68–69, 53 S.Ct. 63–64.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] ***686** For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); ****2064** Brooks v. Tennessee, 406 U.S. 605, 612–613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593–596, 81 S.Ct. 756, 768–770, 5 L.Ed.2d 783 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344, 100 S.Ct., at 1716. Id., at 345–350, 100 S.Ct., at 1716–1719 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

[3] The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

[4] The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see

*687 Barclay v. Florida, 463 U.S. 939, 952–954, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

[5] A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

[6] As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151–152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, 397 U.S., at 770, 771, 90 S.Ct., at 1448, 1449, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, 446 U.S., at 344, 100 S.Ct., at 1716. When a convicted defendant *688 complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies **2065 instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91, 100–101, 76 S.Ct. 158, 163–164, 100 L.Ed. 83 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

[7] **[8]** **[9]** Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68–69, 53 S.Ct., at 63–64.

[10] These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take *689 account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S.App.D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee

of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

[11] Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133–134, 102 S.Ct. 1558, 1574–1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See ***690** ****2066** Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[12] Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

[13] These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic ***691** choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

[14] The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372–373, 624 F.2d, at 209–210.

B

[15] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. ****2067** United States v. Morrison, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure ***692** that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

[16] In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046–2047, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658, 104 S.Ct., at 2046. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

[17] One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed.Rule Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, 446 U.S., at 350, 348, 100 S.Ct., at 1719, 1718 (footnote omitted).

[18] ***693** Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela–Bernal, 458 U.S. 858, 866–867, 102 S.Ct. 3440, 3446–3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are ****2068** sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. ***694** Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19–

20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

[19] Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112–113, 96 S.Ct., at 2397, 2401–2402, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela–Bernal, supra, 458 U.S., at 872–874, 102 S.Ct., at 3449–3450. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[20] In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. ***695** An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

[21] The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a ****2069** reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

[22] **[23]** In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to ***696** be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although

those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different ***697** formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

****2070** **[24]** The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See United States v. Frady, 456 U.S. 152, 162–169, 102 S.Ct. 1584, 1591–1595, 71 L.Ed.2d 816 (1982); Engle v. Isaac, 456 U.S. 107, 126–129, 102 S.Ct. 1558, 1570–1572, 71 L.Ed.2d 783 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see ***698** id., at 126, 102 S.Ct., at 1570, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

[25] Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," Townsend v. Sain, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See Cuyler v. Sullivan, 446 U.S., at 342, 100 S.Ct., at 1714. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See Pullman–Standard v. Swint, 456 U.S. 273, 291–292, 102 S.Ct. 1781, 1791–1792, 72 L.Ed.2d 66 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see supra, at 2056–2060, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the ***699** challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

[26] With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383–384, 400–401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well ****2071** known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

[27] With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the ***700** sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted supra, at 2069, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

***701** We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

Justice BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see Gregg v. Georgia, 428 U.S. 153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), I would vacate

respondent's death sentence and remand the case for further proceedings. [1]

****2072** ***702** I

This case and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657, present our first occasions to elaborate the appropriate standards for judging claims of ineffective assistance of counsel. In Cronic, the Court considers such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," at 661, 104 S.Ct., at 2048. This case, in contrast, concerns claims of ineffective assistance based on allegations of specific errors by counsel —claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding. Accordingly, a defendant making a claim of this kind must show not only that his lawyer's performance was inadequate but also that he was prejudiced thereby. See also Cronic, at 659, n. 26, 104 S.Ct., at 2047, n. 26.

I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law. Like all federal courts and most state courts that have previously addressed the matter, see ante, at 2062, the Court concludes that "the proper standard for attorney performance is that of reasonably effective assistance." Ante, at 2064. And, ***703** rejecting the strict "outcome-determinative" test employed by some courts, the Court adopts as the appropriate standard for prejudice a requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ante, at 2068. I believe these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind.

****2073** With respect to the performance standard, I agree with the Court's conclusion that a "particular set of detailed rules for counsel's conduct" would be inappropriate. Ante, at 2065. Precisely because the standard of "reasonably effective assistance" adopted today requires that counsel's performance be measured in light of the particular circumstances of the case, I do not believe our decision "will stunt the development of constitutional doctrine in this area," post, at 2076 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is largely consistent with the approach taken by the lower courts, ante, at 2069, simply indicates that those courts may continue to develop governing principles on a case-by-case basis in the common-law tradition, as they have in the past. Similarly, the prejudice standard announced today does not erect an insurmountable obstacle to meritorious claims, but rather simply requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. Ante, at 2069. [2]

***704** II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that " 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " Zant v. Stephens, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983) (quoting Gregg v. Georgia, 428 U.S., at 188–189, 96 S.Ct., at 2932–2933 (opinion of Stewart, POWELL, and STEVENS, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant

concern for procedural fairness and for the accuracy of factfinding. As Justice MARSHALL emphasized last Term: "This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), it recognized that right in capital cases, Powell v. Alabama, 287 U.S. 45, 71–72, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932). Time ***705** and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, e.g., Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)....

****2074** "Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' Ibid." Barefoot v. Estelle, 463 U.S. 880, 913–914, 103 S.Ct. 3383, 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion).

See also id., at 924, 103 S.Ct., at 3405 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S., at 112, 102 S.Ct., at 875. In fact, as Justice O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." Id., at 117, n., and 119, 102 S.Ct., at 877, n., and 878 (O'CONNOR, J., concurring).

***706** Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum.L.Rev. 1544, 1549 (1983). See, e.g., Burger v. Zant, 718 F.2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, 466 U.S. 902, 104 S.Ct. 1676, 80 L.Ed.2d 151 (1984). Accordingly, counsel's general duty to investigate, ante, at 2066, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that " 'the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " Eddings v. Oklahoma, supra, 455 U.S., at 112, 102 S.Ct., at 875 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance ***707** of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, n. 14, 25 L.Ed.2d 763 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate ****2075** assistance.[1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Ante, at 2065. Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. Ante, at 2068. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave ***708** "reasonably" and must act like "a reasonably competent attorney," ante, at 2065, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?[2] The majority offers no clues as to the proper responses to these questions.

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take ***709** account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." ****2076** Ante, at 2065. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see ante, at 2065; cf. infra, at 2077–2078, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251–1258 (CA5 1982) (en banc). For other, generally consistent efforts, see United States v. Decoster, 159 U.S.App.D.C. 326, 333–334, 487 F.2d 1197, 1203–1204 (1973), disapproved on rehearing, 199 U.S.App.D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444

U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Coles v. Peyton, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); People v. Pope, 23 Cal.3d 412, 424–425, 590 P.2d 859, 866, 152 Cal.Rptr. 732, 739 (1979); State v. Harper, 57 Wis.2d 543, 55–557, 205 N.W.2d 1, 6–9 (1973).[3] By refusing to address the merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of constitutional doctrine in this area.

***710** B

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[4] In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

****2077** ***711** Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.[5] The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

In Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. Id., at 23, n. 8, 87 S.Ct., at 827, n. 8; see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).[6] In my view, the right ***712** to effective assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.[7] I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. Ante, at 2065. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. Ibid. The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, ibid.; see ante, at 2066, 2069, and should "appl[y] a heavy measure of deference to counsel's judgments," ante, at 2066.

****2078** I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I ***713** would agree. See United States v. Cronic, 466 U.S., at 658, 104 S.Ct., at 2046. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the

majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional norms," ante, at 2065, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See ante, at 2066. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard, [8] while others have adopted various versions of ***714** the "reasonable competence" standard. [9] On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test, [10] to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant. [11]

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, ante, at 2064–2067, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, ante, at 2067–2069.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See ante, at 2069. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance ****2079** to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the majority says can relieve lower courts that hitherto ***715** have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." Ante, at 2064. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.
"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (footnote omitted). [12]

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant

whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that information and presenting it ***716** in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts, [13] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings. [14]

It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. Justice BRENNAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, "reasonableness under prevailing professional norms," in a manner that takes into account the nature of the impending penalty. Ante, at 2073–2074. Though I would prefer a more specific iteration of counsel's duties in this special context, [15] I can accept that proposal. However, when instructing lower courts regarding ****2080** the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself. [16] In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable probability" ***717** that he would have been given a life sentence if his lawyer had been competent, see ante, at 2068; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. United States v. Agurs, 427 U.S. 97, 121–122, 96 S.Ct. 2392, 2405–2406, 49 L.Ed.2d 342 (1976) (MARSHALL, J., dissenting). [17]

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us. [18] It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, non-violent man, devoted to his family, and active in the affairs of his church. See App. 338–365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

***718** Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 300–303, 334–335 (1983). The State makes a colorable—though in my view not compelling—argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions. [19] But however justifiable ****2081** such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life, see App. 383–384, 400–401.

***719** That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see ante, at 2071, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life. [20] Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges

and the Florida Supreme Court sometimes refuse to impose death sentences in cases "in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." Barclay v. Florida, 463 U.S. 939, 958, 103 S.Ct. 3418, 3431, 77 L.Ed.2d 1134 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

All Citations

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. Pulley v. Harris, 465 U.S. 37, 59, 104 S.Ct. 871, 886, 79 L.Ed.2d 29 (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see Furman v. Georgia, 408 U.S. 238, 274–277, 92 S.Ct. 2726, 2744–2746, 33 L.Ed.2d 346 (1972) (BRENNAN, J., concurring); McGautha v. California, 402 U.S. 183, 248–312, 91 S.Ct. 1454, 1487–1520, 28 L.Ed.2d 711 (1971) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See Wainwright v. Adams, 466 U.S. 964, 965, 104 S.Ct. 2183, 2184, 80 L.Ed.2d 809 (1984) (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding ... decision [to vacate stay] is itself degrading to our role as judges"); Autry v. McKaskle, 465 U.S. 1085, 104 S.Ct. 1458, 79 L.Ed.2d 906 (1984) (MARSHALL, J., dissenting) (criticizing Court for "dramatically expediting its normal deliberative processes to clear the way for an impending execution"); Stephens v. Kemp, 464 U.S. 1027, 1032, 104 S.Ct. 562, 565, 78 L.Ed.2d 370 (1983) (POWELL, J., dissenting) (contending that procedures by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to follow"); Sullivan v. Wainwright, 464 U.S. 109, 112, 104 S.Ct. 450, 465, 78 L.Ed.2d 210 (1983) (BURGER, C.J., concurring) (accusing lawyers seeking review of their client's death sentences of turning "the administration of justice into [a] sporting contest"); Autry v. Estelle, 464 U.S. 1, 6, 104 S.Ct. 20, 23, 78 L.Ed.2d 1 (1983) (STEVENS, J., dissenting) (suggesting that Court's practice in reviewing applications in death cases "injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error"). It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court.

2 Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See Cronic, 466 U.S., at 659–660, 104 S.Ct., at 2047; Javor v. United States, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

1 See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster, 93 Harv.L.Rev. 752, 756–758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U.Chi.L.Rev. 1380, 1386–1387, 1399–1401, 1408–1410 (1983).

2 Cf., e.g., Moore v. United States, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

3 For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims, see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am.Crim.L.Rev. 233, 242–248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4–1.1–4–8.6 (2d ed. 1981).

4 Cf. United States v. Ellison, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed:

[T]he evil ... is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." Holloway v. Arkansas, 435 U.S. 475, 490–491, 98 S.Ct. 1173, 1181–1182, 55 L.Ed.2d 426 (1978) (emphasis in original). When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

5 See United States v. Decoster, 199 U.S.App.D.C. 359, 454–457, 624 F.2d 196, 291–294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 311 (1979); Note, 93 Harv.L.Rev., at 767–770.

6 In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In Glasser v. United States, 315 U.S. 60, 75–76, 62 S.Ct. 457, 467–468, 86 L.Ed. 680 (1942), for example, we held:

"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As the Court today acknowledges, United States v. Cronic, 466 U.S., at 662, n. 31, 104 S.Ct., at 2048, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

7 See United States v. Yelardy, 567 F.2d 863, 865, n. 1 (CA6), cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978); Beasley v. United States, 491 F.2d 687, 696 (CA6 1974); Commonwealth v. Badger, 482 Pa. 240, 243–244, 393 A.2d 642, 644 (1978).

8 See, e.g., State v. Pacheco, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); Hoover v. State, 270 Ark. 978, 980, 606 S.W.2d 749, 751 (1980); Line v. State, 272 Ind. 353, 354–355, 397 N.E.2d 975, 976 (1979).

9 See, e.g., Trapnell v. United States, 725 F.2d 149, 155 (CA2 1983); Cooper v. Fitzharris, 586 F.2d 1325, 1328–1330 (CA9 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

10 See, e.g., United States v. Decoster, 199 U.S.App.D.C., at 370, and n. 74, 624 F.2d, at 208, and n. 74 (plurality opinion); Knight v. State, 394 So.2d 997, 1001 (Fla.1981).

11 See n. 7, supra.

12 See also Zant v. Stephens, 462 U.S. 862, 884–885, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110–112, 102 S.Ct. 869, 873–875, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

13 See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 303 (1983).

14 As Justice BRENNAN points out, ante, at 2073, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial.

15 See Part I–A, supra. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, supra, at 343–345, 360–362.

16 For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I–B, supra.

17 As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Ante, at 2068. In view of the nature of the sanction at issue, and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to "undermine confidence" in that outcome than would be true in an ordinary criminal case.

18 Adhering to my view that the death penalty is unconstitutional under all circumstances, Gregg v. Georgia, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

19 Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgement that he was responsible for his behavior. Second, the Florida Supreme Court possesses—and frequently exercises—the power to overturn death sentences it deems unwarranted by the facts of a case. See State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

20 See, e.g., Farmer & Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N–33, N–45 (1980).