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New York Criminal Law Newsletter

A publication of the Criminal Justice Section
of the New York State Bar Association

Inside

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THE NEW YORK BAR FOUNDATION

Advancing Justice and
Fostering the Rule of Law

Table of Contents

Message from the Chair

"Reform" means the improvement or amendment of what is wrong, corrupt, unsatisfactory, etc. It does not require a revolution in which a radical change is necessary to overhaul the entire system. The Criminal Justice Section works to reform certain areas of the criminal law that need some fine tuning, or at most redressing serious wrongs without altering the fundamentals of our system. It is with this tempered approach that our Section seeks to improve justice for all citizens of this State.

Serving as defense counsel for the indigent, I came face to face with hundreds (if not thousands) of New York's poor citizens facing the regrettable choice of pleading guilty to crimes they did not commit for the lack of $500 bail because another night behind bars would mean losing jobs, homes, and custody of their children. In my view, the bail system needs to be improved to educate lawyers, judges, and court personnel about alternative forms of bail and to only impose cash bail in the most serious of cases. Would the loss of $500 cash bail seriously be incentive enough for an accused to be in court if they were inclined to flee the jurisdiction? Surely, our system can be improved to address this incongruity. Since January 2018, the Criminal Justice Section has made bail reform a priority because the poor, unconvicted of any crimes, are needlessly filling our jails. New York is in a unique position this legislative term to make serious and meaningful progress in making changes to a system that unwittingly discriminates against the poor.

Diversity of views is a key aspect of the Criminal Justice Section's makeup and a critical component of our success on controversial issues. As defense counsel, prosecutors, police officers, and judges we do not always see eye-to-eye on the necessary changes that will improve the administration of justice. A prime example is Discovery reform. The mission of this section is "to anticipate, recognize, and address such [criminal] issues…as properly come before or should come before the New York State Bar Association." See Section's Mission Statement.

Discovery reform is coming to New York State. We need to recognize the importance of our role in the discussion and address the issue at a legislative level. How we accomplish this task and to what extent is often debated amongst the leadership. The New York State Bar Association is made up of an ever more diverse group of practitioners. Civil lawyers and citizens alike are baffled by the secretive methods of criminal prosecutions. No depositions of key witnesses? Limited access to evidence? Investigative notes and prior statements withheld until the 11th hour? The stakes are not merely financial as they are in civil cases. In my view, the blindfold should be lifted and the Criminal Justice Section, together with Bar leadership, must move this new legislature to take appropriate corrective action without unduly jeopardizing the safety of those a part of the process.

The Bar Association has also established a Wrongful Convictions Taskforce to examine previous reforms such as video recording of confessions. In 2001, I presented the Appellate Division, Third Department with the issue of suppressing a youth's confession for failure to electronically record the interrogation process that led to a written statement obtained by law enforcement. The court stated that "there is no authority in this State which supports defendant's argument that failure to electronically record his statement requires that it be suppressed." *People v. Ferguson*, 285 A.D. 2d 901 (2001). Although I believed then (as I do now) that Due Process required suppression of the unrecorded confession in serious felony cases, the courts are reluctant to change without statutory authority. It took over 15 years for the legislature to catch up with the times for electronic recording of custodial interrogations. The same is true for Discovery reform. Although Due Process seems to mandate open discovery for those facing incarceration, it will not come to pass without legislative authority. Critics justly point out the dangers to witnesses for the truly unscrupulous defendants. In my view, sufficient safeguards can be enacted to cure the objection. The Criminal Justice Section will be active; we will be thoughtful; and we will be relevant to the discussion as we approach the next legislation session.

Diversity of views is a key aspect of the Criminal Justice Section's makeup and a critical component of our success on controversial issues.

In 2012, our executive committee worked tirelessly with our Sealing Committee to enact sealing legislation for former offenders. This, too, is now law in New York. Fast forward to 2018 and the *New York Times* reports that the federal government is seeking to overhaul the criminal justice system and the nation's sentencing rules. Reform at the federal level should also include sealing of convictions in New York's federal court system. The Criminal Justice Section continues to make this a legislative priority for our citizens previously convicted in federal court.

All in all, I believe the Criminal Justice Section continues to rise to the occasion of reform. It need not be revolutionary. Simple improvements will suffice. I look forward to continuing as your Chair until June 2019. Thank you.

Tucker C. Stanclift

Message from the Editor

Justice. It's the principle that is at the foundation of our Section. Justice is also the theme of a number of the articles in this issue, from the Message from our Chair to the article on the question of summons or arrest by Alexandra Ferlise.

Justice is also at the forefront of the article by Mark Cohen concerning a critical bail issue in federal practice. Without a doubt, the legislation establishing a Commission on Prosecutorial Conduct discussed in the article by David Cohn is focused on justice. One of the keys to justice is confidence in the investigation and prosecution of crimes.

Of course, we as a Section strive for justice. The goal of the prosecutor is to seek justice, and to do so fairly. The goal of all attorneys is to strive to work towards improving the system of justice.

At the Annual Meeting, there will be a full program that focuses on issues of fairness in the Criminal Justice system. The more we learn about impediments to justice, the more effective we can be in overcoming those challenges.

Finally, one of the highlights of this issue is Judge Kamins' review of recently passed legislation. The laws discussed in that article are critical to the implementation of—-what else—justice!

And following my message is a letter from Paul Schectman thanking Spiros for his years of contributions to the *Newsletter*.

Jay Shapiro

Letter Thanking Spiros

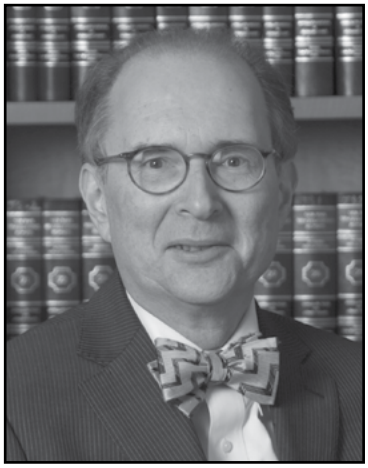
The September 2018 issue of the *New York Criminal Law Newsletter* contained Spiros Tsimbinos' farewell article on the United States Supreme Court. "I think it is a good time to conclude my service on the *Newsletter*," Spiros wrote. All of us owe Spiros a debt of gratitude. In the last 15 years, the Supreme Court, on more than one occasion, has gotten it wrong; Spiros never has.

Paul Schectman
Partner, Bracewell

An Annual Review of Criminal Justice Legislation in New York

Commission on Prosecutorial Conduct, New Crimes, Expanded Penalties

By Barry Kamins



Forty-four years after New York State established a commission to oversee judges – and remove those found unfit for the bench – the state may soon establish a commission to oversee prosecutors, with the power to remove those deemed unfit for office.

A full discussion of this law is contained in the article by David Cohn that appears on page 9.

This article contains an annual review of new legislation amending the Penal Law, Criminal Procedure Law and other related statutes. The discussion that follows will primarily highlight key provisions of the new laws and as such the reader should review the legislation for specific details. In some instances, where indicated, legislation enacted by both houses is awaiting Governor Andrew M. Cuomo's signature and, of course, the reader must check to determine whether a bill is ultimately signed or vetoed by the governor.

Bills Addressing Criminal Justice Issues

Aside from the legislation enacting the Commission, the legislature enacted a number of individual bills addressing criminal justice issues. Each year, the legislature enacts new crimes, amends the definition of existing crimes and increases the penalties of others – and this year was no exception.

In an effort to toughen human trafficking laws, the legislature enacted a new crime, Sex Trafficking of a Child, a class B felony.[1]

Although New York has enacted significant sex trafficking laws since 2007, the legislature has now taken steps to strengthen the law relating to victims of trafficking who are under the age of 18. Under the new law, a person is guilty of sex trafficking of a child when he or she, being 21 years old or more, intentionally advances or profits from the prostitution of a child less than 18 years old. Significantly, the prosecutor need no longer prove that the trafficker used force, fraud or coercion to commit the crime.

Knowledge by the defendant of the age of the child is not an element of the offense and it is not a defense that the defendant did not know the age of the child or believed such age to be greater than 18. The law also creates an affirmative defense to the new crime where such person's participation in the offense was a result of having been a victim of sex trafficking under New York or federal law. Thus, a sex trafficking victim will not be punished if he or she has been compelled by his or her trafficker to assume a role, such as answering phone calls, relaying messages or looking after younger sex trafficking victims, that he or she would not have assumed had he or she not been a sex trafficking victim.

A second new crime will protect individuals who hire caregivers for one's children. The new crime – Misrepresentation by, or on behalf of, a Caregiver for a Child or Children – will make it illegal to make a false written statement that misrepresents an applicant's background for employment as a caregiver.[2] The legislation defines "caregiver" as someone who provides 15 or more hours of care per week. It should be noted that the new crime is an unclassified misdemeanor, providing for a term of imprisonment of up to six months in jail.

Under a new law, police officers can now be prosecuted for having sex with persons in their custody. Under the amendment, when a person is under arrest, in detention or otherwise in actual custody, that person is legally incapable of giving consent to sexual activity with a police officer.[3]

Merchants in barber shops, hair salons and beauty shops will benefit from an amendment to the Theft of Services law. The law currently protects certain business, e.g., restaurants, cable services, companies, hotels, electric

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A version of this article appeared in the Nov/December 2018 issue of the NYSBA *Journal*.

companies, etc., but a person who leaves a barbershop or beauty salon without paying cannot be prosecuted for theft of services. Under the new law, that has now changed.[4]

The legislature has also responded to the dangers of hazing rituals at college fraternities in which serious injuries and deaths have occurred. Under an amendment to the hazing statutes, physical conduct and physical activities are prohibited during a person's initiation into these types of organizations.[5]

Finally, the crime of Coercion has been restructured. Currently, the crime is delineated as an A misdemeanor (2nd Degree) and D felony (1st Degree). Under the new legislation, the crime is delineated as an A misdemeanor (3rd Degree), E felony (2nd Degree) and D felony (1st Degree). A person is guilty of the new crime of Coercion in the Second Degree when he or she commits the crime of Coercion in the Third Degree and compels or induces a person to engage in sexual intercourse, oral sexual conduct or anal sexual conduct.[6]

A number of procedural changes were enacted in the last legislative session. In 2013, New York State implemented the Human Trafficking Intervention Court (HTIC) establishing 11 courts throughout the state – one for each of the five counties in New York City and six others around the state. Unlike drug courts, however, which were created to act as focal points for the drug caseloads for their respective counties, four of the six HTIC courts outside of New York City lack jurisdiction to hear cases that originate outside of the local criminal courts where they are physically situated.

In order to expand the jurisdiction of these courts – in Westchester, Erie, Monroe and Onondaga counties – new legislation permits the removal of prostitution cases pending in the local criminal court to another local criminal court in the same county or, with the consent of the prosecutor, to a human trafficking court in an adjourning county.[7]

Another amendment will permit town and village justices to preside over their courts outside their respective towns and villages for the limited purpose of presiding over an off-hours arraignment part established in another municipality located in the same county.[8]New legislation will affect the recovery of funds by a prosecutor prior to the filing of an accusatory instrument in a criminal case. The new law applies only to the five District Attorneys in New York City where a "pre-criminal proceeding settlement" has been reached.[9] After any injured parties have been appropriately compensated, the prosecutor will be able to retain a certain percentage of the funds in recognition that such monies were recovered as a result of the investigation undertaken by that office.

The new law creates a formula for the percentage of funds that can be retained by the prosecutor, beginning with 10 percent of the first $25 million and up to 1 percent in excess of $100 million. Monies retained by a prosecutor pursuant to this law must be used to enhance law enforcement efforts within New York State.

Victims of crimes will benefit from several new laws. For example, victims of sexual assaults will now be provided a copy of a Victim's Bill of Rights before the victim can be interviewed by the police or prosecution or given a physical examination.[10] These rights include the right to have a rape crisis representative present during the interview, the right to be notified by the prosecutor about the progress of the case and the right to decide whether to report the offense to the police.

"A new crime will make it illegal to make a false written statement that misrepresents an applicant's background for employment as a caregiver."

In addition, sexual assault evidence kits must now be maintained for 20 years. Where the evidence is privileged, the custodian of the evidence cannot release the evidence to law enforcement without written consent from the victim.[11]

Other laws expand the reporting of certain crimes. Under current law, an incident of child abuse at a public school must be reported by school employees to school administrators who must, in turn, notify the child's parents. That requirement has now been expanded to private schools.[12] In addition, when a prosecution for a sex offense has commenced against a school employee (private or public), the prosecutor must notify the school superintendent or administrator; there is no requirement that the crime must have occurred in the school.[13]

Victims of domestic violence will benefit from a new law that expands the number of misdemeanors that, upon conviction, disqualify a defendant from possessing a firearm, rifle or shotgun.[14] Under this amendment, the number of disqualifying offenses has increased from four to 13, although one offense, forcible touching (P.L. §130.52), is no longer a disqualifying offense. In addition, the statute utilizes a broader definition of "members of the same family or household" in order to disqualify a defendant from possessing a firearm after being convicted.

The statute also requires a court to ask a defendant who has been convicted of a felony or "serious offense"

if he or she owns or possesses any firearms, rifles or shotguns and to order the immediate surrender of such weapons. Finally, upon issuing an Order of Protection or Temporary Order of Protection, a court is now authorized to order the surrender of firearms, rifles, or shotguns.

Battered women and children can now be reimbursed for shelter costs and crime scene cleanup costs.[15] In addition, victims of sex offenses will now be able to file a claim with the Crime Victim Board by filing official documents other than police reports; this will apply to victims of offenses under Article 130 and other specified crimes. This amendment reflects the understanding that many sex crime victims may not be emotionally ready to go to the police to report crimes of this nature.[16]

Victims of human trafficking will benefit from two other new laws. First, survivors of these crimes will be provided short-term and long-term safe house residential facilities, operated by not-for-profit agencies. A victim can be placed in these facilities even if he or she is involved in a proceeding which has not reached final disposition or is not even involved in a pending proceeding.[17] Second, hotels and motels will now be required to display informational cards, in plain view, describing services for human trafficking victims.[18]

Finally, a new law ensures that victims of crimes are reimbursed for appropriate burial expenses. The Office of Victim Services will now be permitted to make an award not exceeding $6,000 for the burial expenses of a victim who has died as a direct result of a crime. Should it be determined later that the victim contributed to the infliction of his or her injury, the award cannot be reduced by more than 50 percent.[19]

A new law will affect prisoners who have been denied parole because they have not completed a mandated program through no fault of their own. Such prisoners will be placed in the required program as soon as practicable.[20]

Other legislative changes have been enacted in miscellaneous statutes. For example, under state law a municipality may currently impose the following forms of punishment: a fine, forfeiture or a civil penalty. A new law adds community services as a permissible form of punishment.[21]

In addition, a new law allows for the use of medical marijuana as an alternative to opioids for pain management. A physician can now certify that a patient is eligible for medical marijuana if he or she suffers from "pain that degrades health and functional capability."[22]

Finally, the City Council has enacted two local laws that will impact significantly on the criminal justice community. First, inmates within New York City correctional facilities will be able to use telephone service without any cost.[23]

Second, under a new law, known as the Right to Know Act, police officers who engage in a variety of law enforcement activities must now identify themselves by providing pre-printed business cards with specific information (name, rank, shield number) and provide an explanation for such law enforcement activity. This will not be required when an officer is making an arrest, issuing a summons, or engaging in undercover activity or activity that subjects him or her to danger or a risk of physical injury.[24]

Endnotes

1. 2018 N.Y. Laws, Ch. 189 (adding Penal Law § 230.34-a), eff. November 14, 2018.
2. 2018 N.Y. Laws, Ch. 195 (adding Penal Law § 260.35), eff. October 15, 2018.
3. 2018 N.Y. Laws, Ch. 55 (adding Penal Law § 130.05(3)(j)), eff. June 11, 2018.
4. 2018 N.Y. Laws, Ch. 275 (adding Penal Law § 165.15(12)), eff. December 24, 2018.
5. 2018 N.Y. Laws, Ch. 188 (amending Penal Law § 120.16 and 120.17), eff. August 15, 2018.
6. 2018 N.Y. Laws, Ch. 55 (adding Penal Law § 135.61), eff. November 1, 2018.
7. 2018 N.Y. Laws, Ch. 191 (adding Penal Law § 170.15(5)), eff. August 16, 2018.
8. 2018 N.Y. Laws, Ch. 231 (adding Uniform Justice Court Act 106(11)), eff. August 24, 2018).
9. 2018 N.Y. Laws, Ch. 55 (adding Article 95), eff. April 12, 2018.
10. S. 8977, awaiting the governor's signature.
11. 2018 N.Y. Laws, Ch. 57 (adding Public Health Law 2805-i), eff. April 12, 2018.
12. S. 7372, awaiting the governor's signature.
13. 2018 N.Y. Laws, Ch. 233 (amending Education Law 1126), eff. August 24, 2018.
14. 2018 N. Y. Laws, Ch. 295 (amending Executive Law 631), eff. October 31, 2018.
15. 2018 N.Y. Laws, Ch. 204 (amending Executive Law 631(12)), eff. February 18, 2019.
16. 2018 N.Y. Laws, Ch. 295 (amending Executive Law 631), eff. October 31, 2018.
17. 2018 N.Y. Laws, Ch. 238 (adding Social Services Law 438-aa(c) and (d)), eff. November 21, 2018.
18. 2018 N.Y. Laws, Ch. 190 (adding General Business Law 206-f), eff. October 14, 2018.
19. S 7992, awaiting the governor's signature.
20. 2018 N.Y. Laws, Ch. 26 (amending Executive Law 259-1), eff. December 18, 2018.
21. 2018 N.Y. Laws, Ch. 216 (amending Municipal Home Rule Law (10)(4)(b)), eff. August 24, 2018.
22. 2018 N.Y. Laws, Ch. 273 (Public Health Law 3360(7)(a)), eff. September 24, 2018.
23. Local Law Int. 144 (adding Administrative Code 9-154), eff. May 4, 2019.
24. Local Law No. 54 (adding Administrative Code 14-174), eff. October 19, 2018.

District Attorneys Challenge Constitutionality of New Law Establishing Commission on Prosecutorial Conduct

By David M. Cohn

On August 21, 2018, Governor Cuomo signed legislation creating a State Commission on Prosecutorial Conduct, the first such commission in the nation. The new law, which takes effect on January 1, 2019, empowers the newly formed Commission to review complaints about the conduct of any District Attorney or Assistant District Attorney in a criminal case. Specifically, the Commission is authorized to examine, among other things, whether a prosecutor's conduct violated the dictates of applicable statutes, case law, or rules of professional conduct.[1] A complaint may arise from an allegation made by a third party or from an investigation initiated by the Commission itself.[2]

A. The Commission and Its Powers: A Brief Overview

The Commission shall have 11 members, including three judges, four prosecutors, and four defense attorneys. The Governor selects two members: one prosecutor and one public defender. The Senate majority leader and Assembly speaker select two members each, while the Senate and Assembly minority leaders select one member each. The appointees selected by the Legislature must include an equal number of prosecutors and defense attorneys. The Chief Judge of the Court of Appeals selects the final three members: one Justice of the Appellate Division and two Judges of courts other than the Court of Appeals or the Appellate Division.[3] The Commission, in turn, appoints an administrator, who must be a member of the New York bar with at least five years of experience, and who may not be "a prosecutor or retired prosecutor."[4] The administrator may hire deputies, assistants, attorneys, investigators, and other officers or employees.[5]

The Commission is authorized to conduct hearings and investigations, to take testimony under oath, to subpoena witnesses, records, and documents, and to confer immunity. The Commission, however, should exercise its powers in a way that will not interfere with an active investigation or prosecution.[6] The Commission may require a prosecutor who is the subject of a complaint to appear before it on three days' notice.[7]

After completing its investigation of a prosecutor's conduct, the Commission may recommend that a sanction be imposed. Specifically, the Commission may recommend that a prosecutor be admonished or censured, or it may recommend to the Governor that a prosecutor be removed from office. The grounds for a sanction may include (but are not limited to) the prosecutor's violation of a statute, case law, or rule of professional conduct, "persistent failure " to perform his or her duties, "habitual intemperance," or conduct "prejudicial to the administration of justice."[8] Additionally, the Commission may recommend that a prosecutor be "retired for mental or physical disability preventing the proper performance of his or her prosecutorial duties."[9] The Commission's findings and conclusions, along with the record of its proceedings, shall be made public.[10]

The prosecutor may either accept the commission's findings or seek review by the Court of Appeals.[11] If the prosecutor requests review, the Court of Appeals examines the record and reviews the Commission's factual findings and conclusions of law.[12] If the Commission recommended removal or retirement, the Court of Appeals may suspend the prosecutor while review is pending.[13] Upon review, the Court may either accept the recommended sanction, impose a different sanction, or conclude that no sanction is warranted.[14] If the Court determines that removal or retirement is warranted, the record is transmitted to the Governor, who ultimately decides whether the prosecutor should be removed or retired.[15]

B. The Attorney General's Opinion

Before the bill was signed into law, the Attorney General's Office opined, in a memorandum by General Counsel Leslie Dubeck, that the proposed law might be unconstitutional. In that regard, the Dubeck memo noted that the bill gives the Commission "expansive" authority to "engage in general supervision of the performance of District Attorneys and their staff" with "no standard by which" prosecutors' "decisions will be evaluated."[16] The Dubeck memo added that the Commission has authority to scrutinize active investigations and prosecutions, which could "purposefully or not, influence prosecutors' decision-making in an open case."[17] Further, the Dubeck memo observed that the Commission could compel production of records and testimony that would intrude into "a District Attorney's deliberative process."[18]

Thus, the Dubeck memo noted the bill likely violates the New York Constitution by infringing on the "prosecutorial independence of the State's District Attorneys," who are "constitutional officers."[19] The memo explained that the Constitution gives elected District Attorneys the "exclusive, nontransferable" power to decide whether and how to prosecute a criminal case.[20]

In addition, the Dubeck memo observed that the bill vested an executive function—oversight of prosecutors—in a "hybrid" body appointed by executive, legislative,

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and judicial actors, a majority of whose members would be appointed by the legislature. According to the memo, this arrangement violates the separation of powers.[21] The memo maintained that the Commission would constitute a new "civil department" that the Legislature was not authorized to create.[22]

Finally, the Dubeck memo offered that the bill unduly expanded the role of the judiciary by assigning "non-judicial tasks" to judges.[23] For instance, the memo noted that although the powers of the Court of Appeals and of the Chief Judge are "strictly defined by the Constitution," the bill assigned them new, unauthorized tasks.[24] Moreover, the Dubeck memo observed that sitting judges may not be assigned the executive tasks of investigating a prosecutor's conduct and recommending a prosecutor's removal.[25] Likewise, the memo argued that the Chief Judge may not be assigned the executive power of appointing members to a commission that will, in turn, exercise executive power.[26] The memo discussed that the tasks assigned to judges by the new law were likely "incongruous with their judicial functions."[27] Thus, despite the "laudable goal" of the legislation, the Dubeck memo concluded that it suffered from "numerous constitutional defects."[28]

In response to the Dubeck memo, the Governor and the legislature agreed to enact a chapter amendment in January 2019. The proposed amendment would, among other things, ensure that a majority of the commissioners are appointed by the executive branch, require the Chief Judge to appoint retired judges, instead of active judges, to the Commission, give the Appellate Division (instead of the Court of Appeals) the power to review the Commission's findings, and give prosecutors extra protection from interference with active investigations.[29] The full details of the agreement, however, are not available, and there is no precise timetable for when the changes will be enacted.

C. The District Attorneys' Lawsuit

On October 17, 2018, a group of prosecutors filed suit in Albany County Supreme Court, on behalf of all of the state's District Attorneys and Assistant District Attorneys, asking that the legislation be declared unconstitutional. The lawsuit reiterates the arguments in the Dubeck memo and expands upon them. In that regard, the suit alleges that the legislation is inconsistent with the constitutional design, since it permits the Commission to influence prosecutorial decisions "through disciplinary proceedings and the threat of such proceedings" and allows the Commission to "grant immunity to those who prosecutors might otherwise prosecute."[30] The suit asserts, too, that the Commission should not be permitted to obtain confidential materials such as attorney work product and sealed Grand Jury materials, adding that disclosure would threaten the safety of "witnesses, cooperators, undercover officers, and victims."[31]

In addition, like the Dubeck memo, the lawsuit contends that non-judicial duties may not be assigned to judges. In fact, the suit observes, it would be unethical, under the Code of Judicial Conduct, for a sitting judge to serve on the Commission.[32] The suit notes, too, that the Commission, unlike the Commission on Judicial Conduct, does not "fill[] a void," because "prosecutors are already subject to disciplinary proceedings for misconduct."[33] In fact, the suit points out that the Appellate Division, which has exclusive jurisdiction over matters of attorney discipline, may sanction prosecutors for breaches of the rules of professional conduct.[34]

Next, the suit alleges that the new law violates the due process rights of prosecutors by failing to "identify any standards" by which the Commission is to decide whether to open an investigate and "whether or how to impose disciplinary sanctions."[35] By contrast, the lawsuit notes, the Appellate Division has adopted detailed, uniform rules that govern disciplinary actions against attorneys.[36]

Finally, the lawsuit alleges that, even though the legislature and the Governor have promised to make amendments to the bill, the proposed amendments would cure only two of the constitutional infirmities—the conflict posed by having active judges serve on the Commission and the "improper expansion of the Court of Appeals' jurisdiction."[37] The remaining constitutional defects would remain unresolved.[38] Thus, the lawsuit seeks a declaratory judgment that the legislation is unconstitutional, and an immediate, preliminary injunction barring the law from taking effect.[39]

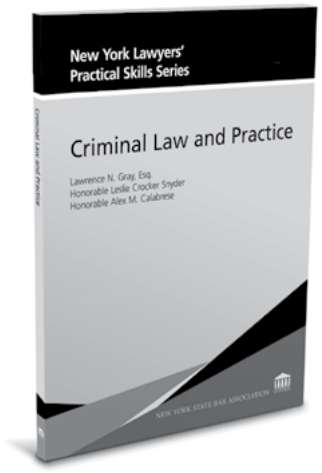
The prosecutors' request for a preliminary injunction is currently pending as of the day this issue went to print. The judge overseeing the litigation has proposed that the parties enter a stipulation, delaying the formation of the Commission until after the legislature has passed the promised chapter amendment.[40]

Endnotes

1. S.B. 2412-D §§ 499-a, 499-b(2).
2. S.B. 2412-D § 499-f(1)-(2).
3. S.B. 2412-D § 499-c(1).
4. S.B. 2412-D §§ 499-b(2), 499-c(7).
5. S.B. 2412-D § 499-c(7).
6. S.B. 2412-D § 499-d(1)-(2).
7. S.B. 2412-D § 499-f(3).
8. S.B. 2412-D §§ 499-f(1), (7).
9. S.B. 2412-D § 499-f(1).
10. S.B. 2412-D § 499-f(7).
11. S.B. 2412-D § 499-f(7).
12. S.B. 2412-D § 499-f(8).
13. S.B. 2412-D § 499-f(9)(a).
14. S.B. 2412-D § 499-f(8).
15. *Id.*

16. Dubeck memo at 2.
17. *Id.*
18. *Id.* at 3.
19. *Id.* at 4.
20. *Id.* at 4-5.
21. *See id.* at 3, 5-7.
22. *Id.* at 7-8.
23. *Id.* at 3, 8.
24. *Id.* at 3, 9.
25. *Id.* at 9-10.
26. *Id.* at 10.
27. *Id.*
28. *Id.* at 11.
29. *Cuomo, Lawmakers Agree on Changes to Prosecutorial Misconduct ommission Bill,* New York Law Journal, August 20, 2018.
30. *Soares, et. al. v. New York*, Complaint ¶ 35.
31. *Id.* at ¶ 37(b).
32. *See id.* at ¶¶ 47-52 and n. 3.
33. *Soares, et. al. v. New York*, Complaint ¶ 26.
34. *Id.* at ¶¶ 53-58.
35. *Id.* at ¶ 59.
36. *Id.* at ¶ 60.
37. *Id.* at ¶ 70.
38. *Id.*
39. *Id.* at ¶¶ 71-79.
40. *NY Prosecutorial Conduct Watchdog Could Be Placed on Hold Under Stipulation,* New York Law Journal, December 3, 2018.

Criminal Law and Practice



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Summons or Arrest? The Arbitrary Enforcement of Low-Level Offenses in New York City

By Alexandra R. Ferlise

Introduction

Enforcement of low-level offenses in New York City is arbitrary and inconsistent. To illustrate: Vendors A and B fail to display the proper license and are approached by police officers. Neither vendor has an open warrant, prior arrests for similar conduct, or meaningful contact with the criminal justice system. Vendor A is arrested, held for over 30 hours, and arraigned in general Criminal Court. After a trial delayed by 19 months, Vendor A is found guilty of an unclassified misdemeanor and sentenced to time served, plus mandatory surcharges. Instead of getting arrested, Vendor B is issued a criminal summons, pleads guilty to a violation at first appearance and is sentenced to pay only a $50 fine. Why was enforcement so different? Short answer: There is no answer.

In New York City, there are a few options for how to deal with low-level offenses (defined here as offenses designated a B misdemeanor, unclassified misdemeanor, or penal law violation), but there is a lack of clear guidance on which method suits a given situation. After observing a violation, an officer can effectuate an arrest, eventuating in either a desk appearance ticket (DAT) or formal arraignment, or the officer may issue a criminal or civil summons. There is official guidance as to whether to issue a civil versus criminal summons, but none as to whether to issue a summons versus making an arrest. Because there is no administrative guidance as to which method is preferred, enforcement depends entirely on the sole, unfettered, unguided discretion of the individual officer.

The Criminal Court of the City of New York is a court of the New York State Unified Court System in New York City that handles misdemeanors and lesser offenses. The Summons Part (SAP) is a division of Criminal Court that deals with even lesser Penal Law offenses (usually unclassified misdemeanors and violations) and violations of varied city ordinances and regulations. The part is staffed by attorneys from the Assigned Counsel Plan, and cases are adjudicated by a Judicial Hearing Officer (JHO), who are usually retired judges able to hear cases up to a B misdemeanor.[1]

SAP has recently been the subject of successful criminal justice reform, namely the City's Criminal Justice Reform Act (CJRA) effective June, 2017. The CJRA has resulted in a reduction in the issuance of criminal, as opposed to civil, summonses. Working off of this momentum, it would be appropriate to further define what the criminal summons court is, and consider what the part is poised to be—a viable alternative to costly arrest for low level offenses. Establishing clear guidelines that emphasize issuing a summons over effectuating an arrest would reduce the population of local jails and detention centers, conserve judicial and prosecutorial resources, and mitigate the negative collateral consequences that accompany contact with the criminal justice system. Overall, defendants are still held accountable for crimes or violations, without the systemic costs and collateral consequences that can stem from an arrest.

For minor crimes and violations, costly and time-consuming arrest procedures should not be the primary method of enforcement. Instead, we should use the established summons system to clear general Criminal Court of petty offenses, and create continuity in low level offense adjudication.

Current Summons Procedure and SAP's Shrinking Caseload

Though not explicitly indicated, article 150 of the Criminal Procedure Law seems to cover the issuance of Criminal Court summonses *and* DATs under the general term of "appearance ticket."[2] Sections 150.10 through 150.75 outline the legislature's expectation of appearance ticket procedure but, likely due to the general nature of the article, there is no language expressing a preference for a particular type of appearance ticket over another. Therefore, article 150, coupled with the allowance for JHOs to adjudicate up to B level misdemeanors, indicates legislative intent to allow broader summons-able charges than the NYPD patrol guide specifically authorizes.[3]

Procedure no. 209-01 of the NYPD patrol guide states that NYPD officers may issue a summons instead of arresting a violator (over 16 years old) for any misdemeanor or violation listed in various codes and regulations, including the New York City Administrative Code and the Vehicle and Traffic Law, as well as Penal Law violations (with some exceptions).[4] Though Penal Law misdemeanors are not explicitly eligible offenses under the patrol guide, Criminal Procedure Law § 150.20 specifically allows for appearance tickets for charges other than A, B, C, and D felonies, with some exceptions.[5] Further, JHOs may

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adjudicate up to a B misdemeanor, and unclassified misdemeanors such as aggravated unlicensed operation of a motor vehicle in the third degree and reckless driving are regularly adjudicated in SAP. In fact, reckless driving was SAP's ninth most frequent charge in 2017.[6]

NYPD summons procedures do not include a listing of factors that would make issuing a summons unavailable, or outline circumstances under which a summons should be issued rather than an arrest made. The procedures that are detailed cut against an individual officer's discretion to issue summons on her own. Effective May 31, 2018, procedures 209-38 and 209-39 cover conditions for issuing Criminal Court summons regarding criminal possession of marijuana in the fifth degree, and some vehicle and traffic law charges respectively. Neither grants complete discretion to the initial officer involved, but tasks the desk officer with the final decision of whether to issue a summons. Stripping the authority to issue a summons from officers on the street suggests to officers that they should not be issuing any summons at all.

Procedural confusion may be a factor in SAP's diminishing caseload. Summons filings have decreased significantly in the past few years, remarkably more than the general downward trend in criminal filings systemwide.[7] In fact, for the first time, DAT and general arraignments in 2017 outnumbered summons filings by just about 60,000 cases. Though no one cause is known, various factors have likely contributed to the steep decline. First could be the results of the *Stinson* lawsuit. Filed in 2010, the suit alleged the police were issuing summonses without any probable cause, resulting in the city's 2016 settlement, in which it agreed to pay over $75 million to affected parties.[8] While summons filings have decreased since 2006, after 2010 the rate becomes increasingly steep, indicating a possible aversion to summonses post-filing of the suit.

Another factor is the CJRA, which is a set of legislative and policy changes enacted by the New York City Council and signed into law by Mayor Bill de Blasio, that shifted certain behaviors from the criminal to the civil/administrative law courts (specifically the Office of Administrative Trials and Hearings (OATH)). By creating a "presumption that civil summonses should be issued for eligible charges," charges including public urination, littering, open container, spitting, and excessive noise (the "five behaviors") as well as some offenses of the parks regulations that once packed SAP, are now almost entirely dealt with in the civil system.[9] Notably, officers had already been authorized to send these offenses to OATH before the CJRA was enacted; however, it was only after the CJRA provided officers with specific guidance (under procedure no. 209-03) and a clear preference for a civil summons that the practice became widespread.

Reports also indicate that officers have stepped away from the practice of issuing summons, favoring warnings instead.[10] Looking at the demographics of SAP, the question then becomes who gets a warning and why. In the second quarter of 2018, a whopping 91 percent of criminal summons defendants were people of color, compared to 85 percent of civil summons defendants, signifying possible implicit bias.

Regardless of the exact reason, the New York City Summons Parts are down from over 600,000 cases a year to under 200,000 cases per year, and the New York and Kings County SAP courtrooms at One Centre Street have been combined for most of 2018. Therefore, SAP has recently obtained the capacity to adjudicate more cases without being overburdened.

Differences in DAT and Summons Procedure

Once arrested, defendants may be issued a DAT or proceed to general Criminal Court arraignment. Either way, they are processed, their data is stored in arrest records, and they are held in a precinct for hours until DAT eligibility is determined by a desk officer. As with a summons, if issued a DAT, a defendant is not held in jail or detention until arraignment. Instead, they appear on their own on a date set at the time the DAT is issued, and a warrant is ordered in the event of a no-show.

The NYPD patrol guide also gives specific guidance for DAT eligibility. Procedure number 208-27 includes eligible charges (misdemeanors, violations, and certain class "E" felonies), and a list of specific situations in which a DAT cannot be issued. There are no similarly instructive guidelines for the issuance of summonses on a general level.

Arrest and processing alone can cost the city hundreds or even thousands of dollars per defendant.[11] This estimate *doesn't* take into account all of the costs of the officer's lost time on patrol, the defendant's loss of wages or missed school, or the costs associated with prosecutors' offices, indigent defense providers, or the courts. For seemingly little added benefit, issuing a DAT carries costs significantly higher than issuing a summons.

Why Venue Matters

The difference in venue—that is, SAP versus the general Criminal Court parts—has several significant implications. Both venues will issue a warrant if a defendant fails to appear, but unlike general criminal dispositions, SAP does not issue warrants if a defendant fails to pay fines. Instead, a civil judgment is automatically entered against the defendant's credit. There are no additional mandatory surcharges in SAP, other than cases stemming from the Environmental Protection Agency, and for some Vehicle and Traffic Law cases. There is no prosecutor present, and plea negotiations often center on fines and ACDs, rather than dispositions involving jail time. Therefore, defendants are still held accountable for their actions, but they are not subject to the more traumatic and costly procedures related to arrest, processing, and jail time.

Adjudicating cases in SAP has advantages for both the defendant and city (such as expediency and systemic/personal costs), but there is resistance to its use. Some public defenders would rather their clients appear in general Criminal Court, believing a sentence of time served is better for indigent clients unable to pay fines. They also value the due process of general Criminal Court over the "chaos" they had personally experienced in SAP.

It should be noted that defendants are not forced to proceed in SAP even if they are issued a summons. Should they refuse to consent to the jurisdiction of the JHO, their cases will be transferred to general Criminal Court. Therefore, defendants and their attorneys can decide whether they want to proceed in general Criminal Court.

Still, the public defenders' concerns are valid. Due process rights are not as consistently observed in SAP as in general Criminal Court. For example, some JHOs will refuse to rule on facial sufficiency arguments, stating that that is a matter for trial. Further, the sufficiency of a plea allocution depends heavily on the JHO. Therefore, depending on the day, a defendant may or may not be apprised of the rights they waive by pleading guilty, and may not even be informed of the charge they are pleading guilty to. The Appellate Term, First Department commonly dismisses accusatory instruments on appeal based on blatant due process violations.[12]

Equally disconcerting is the part's lack of substantive oversight. The Appellate Term, First Department, will generally assign counsel to people on appeal from SAP convictions, as mandated by statutory and state constitutional law.[13] However, the Appellate Term, Second Department, rarely grants appellate counsel or poor person relief to defendants convicted in SAP, regardless of their inability to pay for a lawyer. Research has not produced a single decision assigning appellate counsel to a Kings County SAP defendant. Therefore, appeals from Kings County (and thus appellate oversight) are few and far between.

The summons court need not be scorned by public defenders and prosecutors, and these issues could be addressed by the judicial system. They are easily addressed, and regardless of any plan to expand SAP's use, should be rectified through consistent access to appellate review, and periodic trainings for court staff, defense attorneys, and officers issuing summonses.[14]

Criteria Considered in Decision to Arrest Over Summons Is Unknown

In the moment they witness a low-level offense, officers have two choices; arrest or issue a summons, (whether or not to issue a DAT or proceed with arraignment is decided post-arrest by the desk officer). It is unclear how this decision is made, or exactly what factors are considered.

When asked, neither defense attorneys, prosecutors, nor police officers could specify exactly why an arrest would occur rather than issuing a summons. There was, however, plenty of speculation. A prosecutor posited that it was likely based on whether a defendant had a warrant or a history of warrants, a sentiment echoed by officers standing nearby (despite that, in the case of DATs versus summonses, a mere history of warrants should not be definitive given that the defendant is released either way). Another was similarly unsure of the exact reason, but knew that recidivism would result in an arrest over a summons, and added that recidivism did not necessarily mean a history of arrests for similar conduct, but *any* notation in an officer's system.

"The summons court need not be scorned by public defenders and prosecutors, and these issues could be addressed by the judicial system. They are easily addressed, and regardless of any plan to expand SAP's use, should be rectified through consistent access to appellate review, and periodic trainings for court staff, defense attorneys, and officers issuing summonses."

The majority of responses noted that the decision of whether to arrest or issue a summons is left to the discretion of officers, with no official reasoning known. Technically, official reasoning is not strictly necessary because an officer can legally arrest an individual for any crime they witness, even if jail time is not an authorized sentence. The Supreme Court solidified this sentiment in *Atwater v. Lago Vista*, in which it noted "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[15] However, this ability does not preclude local governments from expressing a preference against effectuating an arrest in certain circumstances. Rather than asking police to memorize "frequently complex penalty schemes," or impede on an officer's discretion, providing guidance would simply guide an officer's decision making.[16] Further, it would provide transparency to an officer's decision to effectuate an arrest or issue a summons.

As it currently stands, one can only speculate as to what officers are considering when they decide to arrest an individual for summons-able conduct. It could be that officers prefer arrest and DAT procedures over confusing summons practice, or generally disfavor the summons system (another possible reaction to the *Stinson* suit). It may also be that data collection from processing is prioritized over adding to the SAP caseload. There are also more nefarious explanations, such as the officer's desire to boost personal or precinct arrest numbers for quotas, or using lengthy DAT procedures to rack up overtime.

One defense attorney that appears in SAP frequently guessed an arrest may occur for a summons-able offense to justify an otherwise illegal stop or search. Finally, some believed there was an element of implicit bias at play, using summonses as a substitute for stop-and-frisk policing that targeted communities of color. While more research is needed, it is a valid concern across the city, and DAT arrest demographics indicate possible racial bias. Without more transparency, speculation will remain.

Under the CJRA, officers must state a reason for giving out a criminal summons over a civil summons. Criminal summonses for the five behaviors are issued over civil summons only if (1) the individual has an open warrant, (2) the individual has three or more unanswered civil summonses in the past eight years, (3) the individual has two or more felony arrests in the past two years, (4) the individual is on parole or probation, (5) the officer has a legitimate law enforcement reason, or (6) multiple offenses are charged, at least one of which must be adjudicated in criminal court.[17] Though broad, these criteria give the police clear administrative guidance on whether to issue a civil versus a criminal summons. These measures are not applied to the arrest-versus-summons determination, but could easily be adjusted and adopted through another piece of CJRA legislation.

Benefits of Preferring Summons, and Charges That Should Be Considered Summons-Preferred

As with the CJRA, the way to create uniform enforcement of low-level offenses is through clear legislative and administrative guidelines. Simply establishing set criteria where issuing a criminal summons would be preferred over a DAT or full arrest, while still allowing law enforcement discretion to arrest with aggravating circumstances, would have the following benefits:

- Keep low-level offenders out of jail or holding cells;
- Ease Criminal Court caseloads, particularly in arraignment and AP parts, allowing judges to focus on eliminating the backlog of cases clogging New York City courts;
- Preserve prosecutorial resources by eliminating many low-level violations and misdemeanors from their trial caseload altogether (as there is no prosecutor present in the Summons Court);
- Reduce the caseloads of institutional providers (as the summons part is staffed by 18-B attorneys and cases are often disposed of at first appearance);
- Reduce the negative impact that the criminal justice system can have in a person's life. Arrests and taking days off to attend court dates may inevitably lead to the loss of employment and the disruption of New York families.
- Reduce the costs of enforcing the law by eliminating the need to spend thousands of dollars arresting, processing, holding, and arraigning New Yorkers for low-level offenses.

The Annual Report for the Criminal Court of the City of New York shows that some of the most frequently arraigned DAT charges are also common charges adjudicated in SAP.[18] The first most frequently arraigned DAT charge city-wide in 2017 was criminal possession of marijuana in the fifth degree, followed by aggravated unlicensed operation of a motor vehicle in the third degree. Criminal trespass in the third degree and unlicensed general vending are further down the list at number 10 and 11 respectively. Without any piece of legislation or regulation, these four charges could be adjudicated in SAP, and general Criminal Court could clear a large swath of cases from its docket.

Marijuana offenses present their own issues. Kings and New York Counties have stopped prosecution of low level marijuana cases and have dismissed warrants related to those offenses.[18] Reports from CourtWatch, however, noted that "people continued to be arbitrarily prosecuted for marijuana-related charges."[19] Their frequency in Criminal Court is both disconcerting and unnecessary where a summons could have easily been issued pursuant to NYPD procedure number 209-38. Take, for instance, the case CourtWatch noted, in which a young adult was arraigned in Manhattan Criminal Court for marijuana possession and unlicensed driving, two charges eligible for adjudication in the summons part. Despite the Manhattan DA's insistence that they are not prosecuting such cases, they refused to dismiss the marijuana charge and requested a sentence of probation with a $500 fine.[20]

Then, there are the charges that could have been brought via summons, but were instead brought via DAT or arrest on a charge that cannot be adjudicated by a JHO. By overcharging turnstile jumping as theft of services, and possession of a pocket knife on the subway as criminal possession of a weapon in the fourth degree, both A misdemeanors, the general Criminal Court is clogged with petty cases that could have been handled by summons for fare evasion under N.Y.C.R.R. § 1151.1 or a public safety violation of AC § 10-133, respectively. Establishing clear summons criteria may also mitigate overcharging.

The charges discussed here are fairly common, but there are a number of other B misdemeanors and violations that can be adjudicated in SAP, including criminal sale of marijuana in the fifth degree, possession of graffiti instruments, and reckless endangerment of property, among others. For these crimes, non-recidivist offenders (and by recidivist, meaning *convicted* recidivists) should not be arrested unnecessarily, absent aggravating circumstances. Such circumstances could be an element of violence, open warrant, significant history of similar conduct, or failure to provide accurate identifying information.

Conclusion

More guidance to the officer will assure uniform and consistent enforcement of low level offenses. Whether to issue a summons or make an arrest should be up to the discretion of the individual officer, but that discretion should be guided. Policies should be adopted to establish when a criminal summons would be the preferred method of enforcing low level offenses.

Endnotes

1. *See* CPL § 350.20.
2. *See* CPL § 150.10 ("A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title.).
3. It should be noted that a summons *could* be issued for an A misdemeanor, and SAP has been sent A misdemeanors. When this happens, the JHO simply transfers the case to general Criminal Court and issues a new date to the defendant.
4. Other explicitly listed codes for which a summons can be issued include and misdemeanor or violation in the Agriculture and Market Laws, General Business Law, Labor Law, Multiple Dwelling Law, Workers' Compensation Law, New York State Tax Law (art 21, Section 289), Alcoholic Beverage Control law, Navigation Law, New York City Charter, New York City Administrative Code, New York City Health Code, New York City Traffic Regulations, and New York Code of Regulations. *See* Conditions of Service Procedure No. 209-01, New York City Police Department Patrol Guide.
5. *See* CPL § 150.20.
6. *See* Lisa Lindsay, *Criminal Court of the City of New York Annual Report 2017*, Oct. 2018, at 35, www.nycourts.gov/COURTS/nyc/criminal/2017-Annual-Report.pdf (last visited November 19, 2018). (hereafter "Annual Report").
7. As an example, from 2016 to 2017, misdemeanor filings decreased by 25,056. DAT and online arraignments decreased by 28,046. Summons filings decreased by 102,456.
8. *Stinson v. City of New York*, No. 10 Civ. 4228(RWS), (S.D.N.Y. July 19, 2012).
9. NYPD patrol guide, procedure no. 209-03; *see also*, Mulligan, K., Cuevas, C., Grimsley, E., Chauhan, P. (2018, September), *The Criminal Justice Reform Act Evaluation: Post-Implementation Changes in Summons Issuance and Outcomes*. New York: New York. (hereafter "CJRA Evaluation").
10. J. David Goodman, *Fewer Criminal Tickets for Petty Crimes, Like Public Urination*, N.Y. Times, October 20, 2017 at A19.
11. *See generally* Harry G. Levine; Loren Siegel, *$75 Million a Year: The Cost of New York City's Marijuana Possession Arrests*, The Drug Policy Alliance, http://www.drugpolicy.org/resource/75-million-year-cost-new-york-citys-marijuana-possession-arrests (last visited November 20, 2018).
12. *See People v. Richardson*, 43 Misc.3d 126(a) (App Term, 1st Dep't 2014); *People v. Gertner*, 49 Misc.3d 141(A) (App Term 1st Dep't 2015); *People v. Jonas*, 42 Misc.3d 135(A) (App. Term 1st Dep't 2014); *People v. Kravchenko*, 48 Misc.3d 143(A) (App. Term 1st Dep't 2015); *People v. Meehan*, 41 Misc.3d 127(A) (App. Term 1st. Dep't 2013); *People v. Potts*, 43 Misc.3d 141(A) (App. Term 1st Dep't 2014); *People v. Cantrell*, 44 Misc.3d 131(A) (App. Term 1st Dep't 2014); *People v. Jones*, 59 Misc.3d 139(A) (App. Term 1st Dep't 2018); *People v. Gonzales*, 59 Misc.3d 139(A) (App. Term 1st Dep't 2018).
13. Pursuant to the New York Constitution, criminal defendants have a right to appeal a criminal conviction to the intermediate appellate court. N.Y. Const. art. 6 § 4. The nature of the conviction makes no difference in this right, nor is it waived by a guilty plea. *See also, People v. Callahan*, 80 N.Y.2d 273, 284 (1992); *People v. Pollenz*, 67 N.Y.2d 264, 269 (1986). Because New York grants defendants the right to appeal, it is compelled to ensure the defendants receive the effective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. 387 (1985) (where state offers statutory first appeal as of right to a criminal defendant, federal due process requires that he be afforded effective assistance of counsel).
14. When the CJRA moved many SAP cases to the civil summons court, judges there were given trainings, most notably implicit bias trainings.
15. *See Atwater v. Lago Vista*, 532 U.S. 318 (2001).
16. *Id.*
17. *See* CJRA Evaluation at 7. However, city data evaluating the reasons criminal summonses were issued over civil summonses list only four reasons, including: (1) the defendant is an OATH recidivist (2) the defendant has an open warrant or investigation card, (3) a "law enforcement reason" or (4) the offense was not CJRA eligible or multiple offenses were charged at once.
18. *See* Annual Report at 31.
19. Mara Silvers, *Thousands of Manhattan Residents Have Marijuana Warrants Dropped*, Gothamist, September 12, 2018, http://gothamist.com/2018/09/12/marijuana_manhattan_vance.php (last visited November 14, 2018).
20. CourtWatch NYC, *Broken Promises: A CWNYC Response to Drug Policing and Prosecution in New York City* // October 2018 https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5bda55bb21c67c69e6b50409/1541035453806/CWNYC+Drug+Zine+FOR+WEB.pdf (last visited November 19, 2018).

INSIGHT: Congress Should Amend 18 USC § 3143

By Mark I. Cohen

With the enactment of the Mandatory Detention for Offenders Convicted of Serious Crimes Act, the 101st Congressional session (1989-1990) amended the Bail Reform Act to require the detention, pending sentence or appeal, of any person found guilty of a crime of violence, an offense for which the maximum sentence is life imprisonment or death, or a drug offense for which a maximum term of imprisonment of 10 years or more is prescribed, unless there is a substantial likelihood of acquittal or a new trial or the government is not recommending imprisonment and the person is not likely to flee or pose a danger to the community. Pub. L. 101647. Since the U.S. Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, U.S. district court judges have had greater flexibility when sentencing persons convicted of federal criminal offenses. Judges are no longer required to impose a sentence within the range set forth in the U.S. Sentencing Guidelines (USSG). Instead, those ranges are now considered recommendations which must be considered when imposing sentence. Judicial sentencing discretion is still strictly curtailed, however, by U.S. Code (USC) statutes which impose mandatory terms of incarceration in certain circumstances.

This article addresses one exceptionally unjust result of the USC statutory framework: the intersection of 18 USC § 3553(a) and 18 USC § 3143(a)(2) requires that defendants convicted of narcotics and violent offenses must be incarcerated between conviction and sentencing, even if they had been deemed suitable to be at liberty while the prosecution was pending and even if they might not be sentenced to a term of incarceration. In this article, I will discuss how this result is created, describe two hypothetical examples of how it may occur, and provide a simple solution to this curtailed judicial discretion, which restores to sentencing district court judges the power and discretion to release some currently ineligible defendants awaiting imposition of sentence but only if there are indicia that the public and the integrity of the criminal justice system would be protected.

Section 3143

18 USC § 3143(a)(2) delineates the eligibility of a post-conviction/pre-sentence defendant to remain at liberty, either on bail or recognizance, pending sentencing. Specifically,18 USC § 3143(a)(2) provides that:

> The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of § 3142 and is awaiting imposition or execution of sentence be detained unless– (A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and (B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

This statute operates in a particularly restrictive manner once a guilty plea is accepted by a U.S. district court judge or a guilty verdict is returned by a trial jury in cases involving certain narcotics offenses (21 USC § § 841(a) and (b)(1)(A), (b)(1)(B) and (b)(1)(C)) and crimes of violence (18 USC § 16). While mandatory detention is arguably appropriate in a majority of these cases, some offenders are found to have only limited participation in an offense and are therefore eligible for non-custodial sentences. As a result, they are in the unfortunate, and perhaps prejudicial, position of being incarcerated for the time between conviction and sentence, no matter how compliant they have been with the conditions of the terms of their release pending prosecution and no matter how likely it is that they will not be sentenced to a term of incarceration. This anomaly became more evident to criminal defense practitioners after the ruling in *Booker*, *supra*, in which the Supreme Court held that the mandatory application of the USSG was unconstitutional.

Before the decisions rendered in *Booker*, 18 USC § 3553(b)(1) required a court to sentence defendants within the delineated USSG ranges of various types of sentences, unless a rare downward or upward departure was available and appropriate. *United States v. Crosby*, 397 F. 3rd 103, 111 (2d Cir. 2005). In *Gall v. United States*, 552 U.S. 38, 49-50 (2007), the U.S. Supreme Court held that after correctly calculating the applicable range, a "district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested

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by a party'' and ''[i]f he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'' *Gall* at pp. 49-50.

Since *Booker*, *Crosby*, *Gall*, et al., a sentencing court is required to consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, provide the defendant with needed training or treatment; the kinds of sentences available; the sentencing ranges established by the USSG for the crime(s) of conviction; pertinent policy statements of the USSG Commission; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims (18 USC § 3553 (a) and (b)).

For more than a decade, federal courts have considered all of the 18 USC § 3553(a) factors, including the USSG, in order to arrive at a sentence. See *Crosby*, 397 F. 3rd at 113; USSG § § 1B1.1(c). Before *Booker*, *Crosby* and *Gall*, in high-quantity narcotics cases charged under a statute which included a mandatory minimum term of imprisonment, certain Criminal History Category I offenders were entitled to apply for relief from a sentence at or above the mandatory minimum by making a proffer to the government. This form of relief, known as a ''safety valve,'' enables certain offenders to receive a USSG sentence below the mandatory term of incarceration, if credited by the government. Since *Booker*, *Crosby* and *Gall*, eligible offenders enjoy an additional benefit that permits them to seek a nonincarceratory sentence variance for low-level participation in trafficking crimes. Similarly, in certain violent offense cases, though no safety valve consideration exists, e.g. 18 USC § 1951, Hobbs Act Robbery, a defendant whose role in the offense was limited, minor or minimal can receive a variance from a USSG range of incarceration to a non-incarceratory sentence.

Pre-Sentencing Problems Created By the Bail Statute

In the vast majority of cases, 18 USC § 3143(2) empowers only the government to prevent the mandatory detention of a person convicted of a crime delineated in 18 USC § 3142(f)(1)(A-C) while that person is awaiting sentencing. Such a person may remain at liberty only if ''there is a substantial likelihood that a motion for an acquittal or new trial will be granted'' or ''an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person'' and if the presiding judge determines ''by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.'' Sentencing judges are permitted to allow an individual awaiting sentence to remain at liberty on bail or on their own recognizance while pending sentencing only if the crime of conviction is not delineated in 18 USC § 3142(f)(1)(A-C) and if the defendant is not a flight risk or a danger to the community. Setting aside those circumstances relating to a motion for an acquittal or a new trial because convictions after trial represent a very small minority of cases, the requirement of a recommendation from the government is problematic for defendants in many jurisdictions.

In the U.S. Attorney's Office for the Southern District of New York, for example, local defense practitioners know that office policy prohibits prosecutors from making specific sentencing recommendations. Typically, the government will make only a general recommendation that the court impose a sentence within the USSG range or, at best, not object to a variance therefrom or concede that a variance would be appropriate. Thus, at least by custom and practice, defendants in this jurisdiction (and many others) cannot avoid mandatory presentence detention, sometimes for months, while the pre-sentencing process proceeds toward the sentencing date.

"In the vast majority of cases, 18 USC § 3143(2) empowers only the government to prevent the mandatory detention of a person convicted of a crime delineated in 18 USC § 3142(f)(1)(A-C) while that person is awaiting sentencing."

Consider the following hypothetical illustrations of individuals convicted by guilty pleas to a narcotics conspiracy and a Hobbs Act Robbery conspiracy, respectively.

Narcotics Conspiracy

Ms. X is a 50-year-old naturalized U.S. citizen. She has lived at the same residence in New York City for more than 20 years and has been employed and filing tax returns for the same length of time. She is also a single mother of three teenaged children, whom she solely supports. She has no prior criminal record.

Mr. Y is a family friend from Ms. X's native country. Unbeknownst to Ms. X, Mr. Y has recently established a thriving narcotics trafficking business by sending narcotics from his location overseas to the United States. Mr. Y contacted Ms. X after obtaining her telephone number from a mutual acquaintance. Although he was initially merely social, over the course of the next year, Mr. Y applied significant pressure on Ms. X to become involved in his narcotics trafficking activities, which she resisted. Finally, she relented and agreed to participate in a single narcotics transaction. Mr. Y notified Ms. X that he was sending an unknown individual, Mr. Z, to meet with and leave narcotics with Ms. X. She was not informed of the type of drug or the quantity she would receive, she had no pecuniary interest in the transaction, she had no idea how much compensation she would earn for accepting the package and delivering it to Mr. Y, and she had no understanding of the size or scope of Mr. Y's narcotics business overseas or in the United States. Ms. X's activity was limited to a series of telephone calls with unknown individuals at the explicit direction of Mr. Y over the course of a couple of days to arrange receipt of the narcotics package from Mr. Z. The scope of her agreement was to accept the package, which she knew only would contain an unknown quantity of narcotics of an unknown type, from Mr. Z and to deliver it to Mr. Y.

Federal agents arrested Ms. X when she accepted the package from Mr. Z. The package was revealed to contain just under a kilogram of heroin although Ms. X did not know the quantity and type until she was so advised by law enforcement officials. She immediately confessed to her involvement in the crime in a post-arrest, post-*Miranda* statement. Ms. X was presented for arraignment on a complaint before a U.S. magistrate judge in the Southern District of New York. She was charged with a narcotics offense for which, if convicted, she would receive a mandatory minimum sentence of five years incarceration (21 USC § § 841(a), 841(b)(1)(B)) and was released from custody on a personal recognizance bond the same day. For many months after her release on bail, Ms. X was supervised by the U.S. Pre-Trial Services Agency (Pre-Trial Services). She was in full compliance with all of the conditions set by the court and the Pre-Trial Services officer who supervised her pre-conviction bail status.

Pursuant to 18 USC § 3553(f)(1-5) and USSG § 5C1.2(a)(1-5), Ms. X applied for and attended a "safety valve" proffer session with her attorney, the prosecutor, and the federal agent who arrested her in order to seek relief from the mandatory five-year minimum term of incarceration. During the proffer, Ms. X fully accepted responsibility for her conduct and demonstrated true remorse.

The prosecution notified the defense of its intention to credit Ms. X's safety valve proffer and recommend to the sentencing court that she be sentenced without regard to the statutory five-year minimum term of incarceration. Moreover, during plea negotiations, the prosecutor agreed to designate Ms. X a "minimal participant" pursuant to USSG § 3B1.2(a), the lowest level participant in the case. The calculation of her Offense Level pursuant to the USSG was driven by the quantity of the heroin in the package (between 700-999 grams), over which she had no control (USSG § 2D1.1(6)). Her Offense Level was reduced because of her minimal participation (USSG § 3B1.2(a)), safety valve eligibility (USSG § 2D1.1(17)), and acceptance of responsibility (USSG § 3E1.1). The combination of Ms. X's adjusted Offense Level and the fact that she had no other criminal history resulted in a USSG recommendation of 30-37 months of incarceration.

Based upon Ms. X's personal history and characteristics and her minimal role in the offense, she appears to be a good candidate for a non-incarceratory sentence. However, despite the equities in her favor and her strict compliance with the requirements of Pre-Trial Services, 18 USC § 3143(a)(2) and § 3142(f)(1)(A-C) require Ms. X to be incarcerated upon the district court judge's acceptance of her guilty plea pursuant to Fed. R. Crim. P. 11(b). Because Ms. X has accepted responsibility for her commission of the offense, thereby demonstrating remorse for her conduct, preserving government and judicial resources and earning a reduction of her USSG Offense Level, she cannot, of course, make a motion for acquittal or a new trial. 18 USC § 3143(a)(2)(A)(i). Similarly, if her case were pending in a jurisdiction such as the Southern District of New York, the government's office policy would prohibit the prosecutor from making a recommendation, at any time, to the judge that she not receive a sentence of imprisonment. 18 USC § 3143(a)(2)(A)(ii). Therefore, no matter how clear and convincing the judicial officer may find that she is "not likely to flee or pose a danger to any other person of the community," (18 USC § 3143(a)(2)(B)) and no matter how likely the possibility that she will receive a sentence of imprisonment, she must be jailed until her sentencing hearing, leaving her three children to be cared for by family members and hoping that she will be have a job to return to in order to support them when she is released from custody.

Hobbs Act Robbery

In 2009, co-conspirators B and C planned to intercept an individual inside the lobby of an apartment building and rob him, at gunpoint, of narcotics trafficking proceeds. The defendant, Mr. A, did not participate in planning the robbery. He did not know of its object until after the plan was made and never knew the intended victim. Mr. A joined the conspiracy to act as an unarmed lookout while sitting in his motor vehicle outside the planned robbery location. He was unaware of the amount of compensation he would receive for his assistance.

On the day of the robbery, after receiving instructions from his co-conspirators, Mr. A drove alone to the location and parked across the street from the building. He did not meet them at the location. During the robbery, Mr. A remained alone in his vehicle, unarmed and in cellphone contact with B and C. He was unable to see the events occurring inside the building and merely watched the building entrance to warn his coconspirators of potential police activity nearby. His compensation for his participation in the robbery was $2,000.00 of the $30,000.00 stolen by his coconspirators. Mr. A was not arrested and charged with the offense until nearly five years after the robbery occurred. He had lived a law-abiding life in the area under his true name for the entire post-robbery period.

Mr. A had no prior or subsequent criminal record. He was a naturalized U.S. citizen in his late 20's at the time of his arrest. He is the father of four children, one of whom suffers from a mental disability. At the time of his arrest, and for a number of years prior, he was supporting his family with full-time, lawful employment. The magistrate judge presiding over his initial appearance released Mr. A on a bond despite the violent nature of the crime. During the course of his supervision by Pre-Trial Services, Mr. A was in compliance with his release conditions and continued to work to support his family.

Mr. A pleaded guilty to a violation of 18 USC § 1951, Hobbs Act Robbery. His USSG Offense Level (USSG § 2B3.1(a)) was adjusted upward as a result of factors over which he had no control: his co-conspirator's use of a firearm (USSG § 2B3.1(b)(2)(C)) and the amount of money stolen (USSG § 2B3.1(b)(7)(B)). After receiving a reduction for his acceptance of responsibility (USSG § 3E1.1(a) and (b)), and considering his criminal history, the USSG recommended a range of imprisonment of 46-57 months.

Mr. A demonstrated an admirable level of acceptance of responsibility and contrition for his participation in the crime. By all accounts, in the nearly five years since the robbery, he had matured and moved on. He had resisted further illegal conduct, remaining arrest-free. When he was interviewed by the U.S. Probation Department during its pre-sentence investigation, he demonstrated remorse and regret for his participation in the single robbery.

Based upon Mr. A's personal history and characteristics, the limited nature of his participation as an aider and abettor in the crime and his years of selfrehabilitation, the defense would likely request a nonincarceratory sentence. Pursuant to 18 USC § 3143(a)(2), despite the equities in Mr. A's case, he would be in the same position as Ms. X in the previous example. The law requires that he be remanded into custody until his sentencing date. He must leave his common-law wife with the entire burden to care for their four children, without his emotional and financial support, for the time between his guilty plea and sentencing hearing, even if he is ultimately not sentenced to a term of incarceration.

Potential Remedies

Why not allow judicial officers the discretion to permit a low-level participant guilty of an offense described in 18 USC § 3142(f)(1)(A-C) to be released on bail or recognizance upon a finding that a defendant is not a flight risk or a danger to others or to the community? As with the same decision to be made at other stages of the prosecution, and to the extent that the statute may imply that the government has greater knowledge of the facts and circumstances of the case than the defendant, the government would have the opportunity to make any relevant arguments before the court against continued release, including that the guilty plea or conviction after trial represents a changed circumstance in favor of incarcerating the defendant pending sentence. Defense counsel would presumably focus on the defendant's personal background, including work and education history and his/her role in the offense as well as the defendant's behavior while on bail or recognizance pending prosecution and compliance with the terms of Pre-Trial Services supervision.

District court judges have enjoyed greater sentencing discretion since *Booker* and its progeny. Judges are no longer strictly controlled by mandatory sentencing guidelines which are often driven by factors outside the control of low-level offenders (e.g. quantity or type of narcotics, presence of a weapon or amount of money stolen in the commission of a robbery). Judicial officers are empowered to rule that imprisonment is not necessary under the circumstances of a particular case. Therefore, it is illogical that they are obligated to incarcerate a defendant for the period of time between conviction and sentence who was released on bail or recognizance for the duration of the prosecution and who will not receive a sentence of imprisonment.

Experience in the Southern District of New York demonstrates that a procedural loophole exists that enables some offenders implicated by 18 USC § § 3142(f)(1)(A-C) to remain at liberty until sentencing. Defendants whose cases are assigned to a district judge whose practice is to refer guilty pleas to a magistrate judge have been permitted to remain at liberty until their sentencing date. 28 USC § 636(b)(3) permits a magistrate judge delegated by a district judge in a felony prosecution to administer—but not accept—a Fed. R. Crim. P. 11 guilty plea allocution, provided that a defendant consents to this delegation. (*See U.S. v. Williams*, 23 F.3d 629 (2nd Cir. 1994) and Article III of the U.S. Constitution). Thus, the time between a magistrate judge's hearing of the guilty plea and the time of the district judge's acceptance of it operates as an unofficial reprieve for those whose cases would otherwise fall within the mandatory detention

dictates of 18 USC § 3143(a)(2). To the extent that defense counsel can use that time to perform the work that is typically conducted between conviction and sentence, i.e. preparation of a sentencing memorandum, work with the Department of Probation toward completion of its investigation and preparation of its report, this will minimize the number of occurrences of low-level defendants' mandatory incarceration pursuant to 18 USC § 3143(a)(2).

Unfortunately, those defendants whose cases have been assigned to district judges who hear and immediately accept their own guilty pleas are destined to be incarcerated immediately despite their eligibility for no sentence of imprisonment, and even the likelihood that such a sentence will be imposed. Some practitioners have become adept at working to steer their client's cases toward guilty plea hearings by magistrate judges when the assigned district judge has no strict policy of hearing his/her own guilty pleas.

Another possible unofficial reprieve from presentence incarceration from post-conviction/presentence incarceration might be to request that a district court judge not immediately accept the client's guilty plea, thereby avoiding an immediate conviction (see Fed. R. Crim. P. 11(b)(3)) and the mandatory detention provision. This would require district judges to engage in the unseemly task of circumventing 18 USC § 3143(a)(2). One final possibility is to hope that the U.S. Attorney's Office would start to make sentencing recommendations in this limited number of cases.

In the hypothetical cases of Ms. X and Mr. A, absent the employment of a "loophole," both would have been required to argue for non-incarceratory sentences while in custody. Experienced defense attorneys believe it is arguably more of a challenge to convince a district court judge to sentence someone returned to custody to a period of time-served than to do the same for a similarly-situated defendant who has avoided mandatory pre-sentence detention to receive a nonincarceratory sentence. Based upon the sentencing judge's discretion found in 18 USC § 3553(a), equity dictates that the sentencing judge should enjoy the same discretion to act when determining someone's post-conviction bail status as their ultimate sentence, regardless of whether they have committed a 18 USC § 3142(f)(1)(A-C) offense.

Conclusion

I urge Congressional action to ameliorate this anomaly in the statutory scheme at the intersection of 18 USC § 3553(a) and 18 USC § 3143(a)(2) that has become more evident during the post-*Booker* sentencing era.

In my view, the solution is simple in both its principle and its implementation. Power and discretion should be restored to the district court judges who can hear the arguments of the government and the defense as to the particular defendant they will shortly sentence and make an informed and specific decision regarding whether that individual, under the specific circumstances which exist, should either be freed or remain free pending sentence. The amendment of 18 USC § 3143(a)(2)(A)(ii) to change the final word "and" to "or" and the amendment of 18 USC § 3143(a)(2)(B) to simply use the same language to create a new subsection 18 USC § 3143(a)(2)(A)(iii) would accomplish this goal. The new statute would require judicial officers to detain defendants pending sentence unless "there is a substantial likelihood that a motion for acquittal or new trial will be granted" *or* the Government "has recommended that no sentence of imprisonment be imposed on the person" *or* there is "clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community."

In the limited number of cases in which defendants have committed admitted serious crimes under unambiguously mitigating circumstances, I submit that their freedom between guilty plea and sentence should not be forced to rely upon upon the happenstance of the procedures of the district judge to whom their prosecution is assigned or the policies of the U.S. Attorney's Office in the jurisdiction of which they committed the crime. Instead, as with all other stages of the proceeding, and more consistently with the principles of the criminal justice system, every defendant's liberty should depend upon an assessment of the risk that the defendant will inflict harm on the public or will not return to court.

Stated more simply, every defendant's liberty must depend upon due process.

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