AN INCOMPLETE MOTION OUTLINE[1]

The attached forms and the motions referred to are available on disk or via E-mail (requests to dmthompson@etksdefense.com) in WordPerfect, Word, or PDF format.

SUGGESTED READING

22 NYCRR § 1200.33(a)(2)[2]
Code of Criminal Procedure, bill jackets, legislative histories of statutes
John Lilburne: Democracy's Pillar of Fire, Wolfram; Syracuse L.Rev., vol. 3, no. 2 (1952)
In Spite of Innocence, Bedeau, Radlet, Putnam; Northeastern University Press (1992)
The Whole Motion Catalog, Mahoney; NYSACDL
Handling a Criminal Case in New York, Muldoon; West Group
People v. Gray, 86 N.Y.2d 10, 629 N.Y.S.2d 173[3]

MOTION STRATEGY

ALLEGATIONS BY DEFENDANT

Defendant's affidavit may be used to impeach, allegations may constitute admissions[4]

Affidavit of counsel may generally not be introduced in People's direct case,[5] but may be used to impeach defendant[6]

No factual allegations needed for *Huntley/Wade* hearings,[7] still needed for PC hearing[8]

PRECLUSION VS. SUPPRESSION

Motion for suppression waives motion for preclusion of same statements[9]

May move to suppress one statement while moving to preclude another; see citations under "Motion to Preclude" below

STICK WITH IT

Abandonment or failure to renew waives objection to issue[10]

UPDATE MOTIONS (AT LEAST) ONCE/YEAR

At least correct the typo.s

PRE-INDICTMENT "MOTIONS"

JUDICIAL SUBPOENAS[11]

The local practice; *People v. Doe*, 170 Misc.2d 454, 649 N.Y.S.2d 326

The real rule: notice to subpoenaed party, opposing party by motion or order to show cause (see attached form). Cases where the real rule applies:

Mental health records[12] (MHL § 33.13)
DSS/other sealed records, City schools, OEC (delivery only)
Media: don't need judicial subpoena, but they are objectors

EXPERT SERVICES FOR INDIGENTS[13]

The real rule (see motion attached) vs. local practice (order for signature) again

POLICE OFFICER PERSONNEL FILES

Requires "clear showing of facts" demonstrating relevance of the records requested (e.g. prior unprovoked violent behavior). Ex.: May not be used to show propensity for violent behavior; to establish unreliability of claim that officer merely responded to defendant's use of force.

Professional Standards Section files include:

PSS Career History (or Personal History Index): all prior complaints and dispositions
Investigative Summary (for each complaint investigated), includes:
- entire CR (if related to a criminal investigation)
- witness statements (including statements of police officer witnesses)
- officer's Daily Activity Summary, officer notes
- transcript and/or videotape of hearing on complaint
- statement by investigator or superior officer re: departmental action resulting from complaint, and reasons for such action

Civil Rights Law § 50-a (applies to both criminal and civil proceedings; *Gannett Co., Inc. v. James*, 108 Misc.2d 862, 438 N.Y.S.2d 901, *aff'd.*, 86 A.D.2d 744, 447 N.Y.S.2d 781, *appeal denied*, 56 N.Y.2d 502, 450 N.Y.S.2d 1023):

1. All personnel records . . . under the control of any police agency or department . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer except as may be mandated by lawful court order.

2. Prior to issuing such court order the judge must review all such requests and give all interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.

3. If, after such hearing, the judge concludes there is a sufficient basis he shall sign an order requiring that the personnel records requested be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the record found to be relevant and material available to the persons so requesting . . .

Disclosure: requires "clear showing of facts" demonstrating relevance of the records requested (*see, People v. Gissendanner*, 48 N.Y.2d 543, 550, 423 N.Y.S.2d 893 [unreliability of the witness's testimony, an issue which is never collateral]; *People v. Morales*, 97 Misc.2d 733, 412 N.Y.S.2d 310; *People v. Francis*, 149 Misc.2d 693, 566 N.Y.S.2d 486; *compare Tarran v. State of New York*, 140 A.D.2d 429, 432, 528 N.Y.S.2d 131), including "some factual predicate" warranting intrusion into the officer's personnel records. Generally no disclosure of "unfounded" or uncorroborated complaints which were "unfounded"; only "founded" or "not founded" but corroborated complaints.[14]

Factual predicate: No "fishing expeditions" (*Zarn v. City of New York*, 198 A.D.2d 220, 603 N.Y.S.2d 503); good faith basis that relevant info. will be found (*compare, Rodriguez v. City of New York*, 222 A.D.2d 317, 635 N.Y.S.2d 590). Ex.: instances of prior unprovoked violent behavior in case where allegations are use of excessive force (*Unger v. Cohen*, 125 F.R.D. 67 [S.D.N.Y.]; *see also, Guzman v. City of New York*, 91 Misc.2d 270, 397 N.Y.S.2d 870; *People v. Zanders*, 95 Misc.2d 82, 407 N.Y.S.2d 410; *cf., People v. Lugo*, 93 Misc.2d 195, 402 N.Y.S.2d 759). Records can't be used to show propensity for violent behavior (*see, People v. Hudy*, 73 N.Y.2d 40, 538 N.Y.S.2d 197; *People v. Pavao*, 59 N.Y.2d 282, 464 N.Y.S.2d 458), just to show unreliability of claim that officer merely responded to defendant's use of force (*compare, People v. Gissendanner, supra*). Ex.: complaint filed by civilian vs. officer re: excessive use of force, dereliction of duty, etc. relating to officer's performance in *this* matter.

Sample entries: reporting for work intoxicated, making a false statement under oath, sodomizing a female hooker, running over a homicide victim, destruction of department property, official misconduct, avoidable MVA, discrediting the department, etc., etc.

Dispositions: none, no disposition needed, founded, reprimand, suspension, memorandum, exonerated, unprovable, unfounded, not sustained.

Procedure: In camera inspection followed by disclosure of any relevant portions of record (*Thomas v. New York City Transit Police Dept.*, 91 A.D.2d 898, 457 N.Y.S.2d 518; *People v. Herrera*, 131 Misc.2d 96, 499 N.Y.S.2d 311, *aff'd.*, 135 A.D.2d 830, 522 N.Y.S.2d 934).

Standard: "unfounded" or "unprovable" and uncorroborated complaints not disclosed; only "founded" or "unprovable" but corroborated complaints disclosed (*People v. Francis*, 149 Misc.2d 693, 566 N.Y.S.2d 486; *see also, Wunsch v. City of Rochester*, 108 Misc.2d 854, 438 N.Y.S.2d 896; *People v. Morales*, 97 Misc.2d 733, 412 N.Y.S.2d 310)

Argument: Trial court's discretion to limit impeachment of People's witnesses by defendant is circumscribed by defendant's constitutional rights to present a defense and confront his accusers (*People v. Hudy*, 73 N.Y.2d 40, 57, 538 N.Y.S.2d 197; *see also, Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297; *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019; *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; *People v. Gissendanner*, 48 N.Y.2d 543, 546, 423 N.Y.S.2d 893). Defendant's right to impeachment material may outweigh a witness' right to privacy through sealing of records (*People v. Rodriguez*, 152 Misc.2d 328, 576 N.Y.S.2d 488; *see also, People v. Rahming*, 26 N.Y.2d 411, 311 N.Y.S.2d 292; *People v. Vidal*, 26 N.Y.2d 249, 309 N.Y.S.2d 336; *People v. Arrellano*, 150 Misc.2d 574, 569 N.Y.S.2d 574; *People v. Scott*, 134 Misc.2d 224, 510 N.Y.S.2d 413). Law enforcement not barred from using information which should have been sealed when investigating and charging defendant (*People v. Gilbert*, 136 A.D.2d 562, 523 N.Y.S.2d 557; *People v. Dozier*, 131 A.D.2d 587, 516 N.Y.S.2d 295; *People v. London*, 124 A.D.2d 254, 508 N.Y.S.2d 262, *lv. den.* 68 N.Y.2d 1001, 510 N.Y.S.2d 1034); justice requires that defendant not be precluded from using the same type of evidence in his defense as law enforcement may use to try to convict him (*see, People v. Vargas*, 88 N.Y.2d 363, 645 N.Y.S.2d 759). Determination of witness's employer that allegations against officer/employee are "unfounded" (often without formal hearing or opportunity for complainant to be heard) is not determinative when considering whether defendant should be permitted to utilize allegations to assail witness's credibility in *criminal* action -- "unfounded" doesn't mean it's *not* a prior bad act/doesn't eliminate good faith basis to ask.

SUPPRESSION[15]

Illegally seized evidence admissible at GJ if unchallenged;[16] a no 20/20 hindsight rule[17]

Challenge to denial = Article 78 petition; standard for imposition of writ of mandamus is a clear legal right to relief[18] so, pre-indictment suppression is *permissive*, not mandated[19]

CONDITIONAL EXAMINATION[20]

FREEDOM OF INFORMATION LAW (FOIL) REQUESTS

CROSS-MOTION OPPOSING PEOPLE'S ORDER TO SHOW CAUSE (see attached form)

POST-INDICTMENT MOTIONS

DISMISSAL; DENIAL OF DEFENDANT'S RIGHT TO TESTIFY[21]

Waived if not made within 5 days of arraignment,[22] unless:

Defendant incapacitated at the time of grand jury presentation;[23]

Incapacity may result from ineffective counsel - failure to advise defendant of grand jury proceeding or preserve defendant's right to testify[24]

Motion must then be made within 5 days of appearance of (effective) counsel[25]

CPL ARTICLE 255 MOTIONS

"Pre-trial motions" are defined by CPL § 255.10(1) as any motion seeking: dismissal or reduction of accusatory instrument ([1][a] and [b]); discovery ([1][c]); bill of particulars ([1][d]); suppression ([1][f]); severance ([1][g]); or removal([1][e])[26]

45 day motion filing deadline (CPL § 255.20[1]) applicable to these "pre-trial motions" (see CPL § 255.10); not to other motions made prior to trial[27]

• DISMISSAL OF INFORMATION

Where sworn allegations are conceded, motion must be summarily granted[28]
Facial sufficiency[29]
Amendment of factual defects not permitted[30]
Availability of superseding informations (or not)[31]

• DISMISSAL OF INDICTMENT[32]

INTRODUCTION OF CODEFENDANT'S STATEMENT

Improper to rely on statement of codefendant as proof that of defendant committed any crime,[33] but preservation of this error is difficult.[34] It's *not* a violation of defendant's right to confrontation (since there is no such right at GJ),[35] doesn't impair integrity of GJ proceedings,[36] DA not required to instruct GJ re: weight to be given accomplice "testimony"[37](but a statement isn't testimony, is it?); legal insufficiency of GJ evidence not reviewable on appeal of conviction supported by legally sufficient evidence[38]

INTRODUCTION OF OTHER INADMISSIBLE HEARSAY

Statements of property owners that exceed statutory exception[39]

PROSECUTOR'S ACTIONS

DA need not search out or even present all known exculpatory evidence, only requirement is that presentation not be affirmatively misleading[40]

Complete defense must be presented[41]

Brady material that would materially influence grand jury must be presented[42]

Reliance on evidence known to be false requires dismissal[43]

DA testifying, vouching for witnesses[44]

Actual prejudice need not be shown - "possibility of prejudice" only[45]

RELIANCE BY GJ ON DEMONSTRABLY UNRELIABLE EVIDENCE[46]

PRESENCE OF UNAUTHORIZED INDIVIDUALS

Witness present during other witness's testimony requires dismissal[47]

FAILURE TO DENOTE SUBSECTION OF STATUTE

Results in lack of notice of charge to be defended against/frustration of effective appellate review[48]

Correction is not a "mere ministerial amendment"[49]

USE OF ANATOMICALLY CORRECT DOLLS[50]

MISAPPLICATION OF AUTOMOBILE/WEAPON PRESUMPTION

Merely reading statutory language (Penal Law § 265.15[3]) not sufficient to alert grand jury that presumption is permissive[51]

LOADED WEAPON

Requires that the weapon be loaded and readily capable of firing a shot[52]

Not enough to demonstrate that weapon possessed is capable of firing a shot; it must be shown that the weapon was capable of discharging the ammunition with which it was loaded;[53] was this one so tested?

WEAPON IN HOME OR BUSINESS

An absolute defense to CPW 3rd (Penal Law § 265.02[4]); it must be instructed

DA instructed that exception didn't apply; improperly precluding grand jury from deciding an issue of fact.

POSSESSION OF STOLEN PROPERTY

Possession presumption is permissive, rebuttable, and must be charged as such[54]

MARIJUANA

Presumption re: possession of controlled substance is inapplicable[55]
Proper calculation of weight excludes dirt and stalks[56]
Plants are not a "preparation, compound, mixture, or substance"[57]

IDENTICAL COUNTS

Failure of indictment to substantially conform to CPL Article 200[58]

DUPLICITOUS COUNTS

Each count may charge one offense only[59]
Duplicity frustrates effective appellate review[60]

INTERSTATE AGREEMENT ON DETAINERS[61]

Note: this *is not* a "ready for trial" statute, it's an "actual trial" statute

A defendant returned to this state at the People's request and not brought to trial within 120 days is entitled to dismissal[62]

Defendant returned to this State at his request, no trial within 180 days - dismissal[63]

Failure to advise defendant of rights under the IAD violates CPL § 580.20 Art.III (c).

SPEEDY TRIAL - STATUTORY[64]

Burdens of proof: defendant need only make a prima facie demonstration that the applicable time period for prosecution has been exceeded; burden then shifts to the People to demonstrate the existence of excludable time by preponderance of evidence[65]

Where defendant includes sworn allegations establishing unexcused delay in excess of statutory maximum, motion must be granted unless the People controvert the factual basis for the motion[66]

Common response: "exceptional circumstances" = excludable time[67]

Post-indictment, post-readiness delay inconsistent with continued readiness is chargeable to the People[68]

SPEEDY TRIAL - CONSTITUTIONAL[69]

Claim of "ongoing investigation" not sufficient;[70] some "significant, substantial activity" required[71]

Unreasonable delay determined on case by case basis, not fixed by days or months[72]

Factors considered[73]

No actual prejudice need be shown[74]

DOUBLE JEOPARDY

Two standards: constitutional[75] and statutory[76]

Constitutional double jeopardy standards not necessarily violated by successive state and federal prosecutions based on the same criminal transaction[77] or conduct;[78] however such successive prosecutions are statutorily barred[79]

Guilty plea = previous prosecution[80]

Offenses joinable in a single accusatory instrument[81] (proof of one offense admissible as evidence in chief at trial of the other; example: theft and forgery facilitating the theft) generally not separately prosecutable[82]

Separate prosecutions allowed for different harms to the same victim or the same harm to different victims[83]

COLLATERAL ESTOPPEL

Parties to the present proceeding are same parties that were involved in the previous proceeding, or are so closely related that they may be deemed the same for collateral estoppel purposes[84]

Note: same issue, different burdens of proof (i.e., Family Court, criminal court); subsequent prosecution not barred[85]

FURTHERANCE OF JUSTICE[86]

Statutory factors (CPL § 210.40[1]):

a. Seriousness and circumstances of the offense;
b. Extent of harm caused by the offense;
c. Evidence of guilt;
d. History, character, and condition of the defendant;
e. Misconduct of law enforcement officers;
f. Purpose and effect of imposing a sentence authorized for the offense;
g. Impact of dismissal on public's confidence in the criminal justice system;
h. Impact of dismissal on the safety and welfare of the community;
i. Attitude of the complainant or victim with respect to the offense;
j. Any other fact indicating that conviction would serve no useful purpose.

MISCELLANEOUS

Selective prosecution[87]

Statute defining offense charged is unconstitutional or otherwise invalid

The defendant has received immunity from prosecution[88]

Court lacks jurisdiction of the offenses charged[89]

• SEVERANCE; A COUNT OF THE INDICTMENT

Mandatory severance; counts improperly joined[90]

Discretionary severance; even where counts properly joined, severance appropriate where there is a substantial likelihood that jury would be unable to separately consider the proof as to each crime charged[91]

Example: D charged w/CPCS and UPM in vehicle; D's possession of controlled substance may be presumed where D is occupant of a vehicle in which controlled substance discovered (Penal Law § 220.25[1]); "automobile presumption" not

applicable to marijuana; instruction relieves People of proving that unlawful possession of marijuana was "knowing"; places D in a worse position than Ds charged w/UPM only, or possession of marijuana joined with any charge other than possession of a controlled substance in a car.

Example: CPW/CPSP in a vehicle; "automobile/weapon" presumption applied to stolen property found in vehicle eliminates element of knowing possession of stolen property; legislature did not intend for the "automobile presumption" to apply to criminal possession of stolen weapons (see, Penal Law § 165.55).

Similarity of crimes charged and methods used to commit those crimes - inference of propensity outweighs proof[92]

• SEVERANCE; SEPARATE TRIAL FROM CODEFENDANT

"Severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt"[93]

Statements of the defendants (attach them) are "mirror opposites"; jury could not credit both versions; in order to believe one defense it would necessarily have to disbelieve the other[94]

Codefendant's counsel, acting consistently with his client's defense and attempting to minimize the culpability codefendant may act as a second prosecutor with respect to the defendant[95]

Redaction of the statements

Impractical (three defendants - codefendant's statement: "[redacted] went into 7-11 with a gun"; defendant charged alone with Criminal Use of a Firearm)
Denial of defendant's right to confront the codefendant would be severely curtailed by his inability to bring out those inconsistent portions of the codefendant's statement which had previously been redacted

Sandoval ruling doesn't prohibit codefendant's counsel from asking about matters which DA could not;[96] however court may, in its discretion, limit the questioning of defendant by codefendant[97]

Discretion not exercised, codefendant not limited; severance in the interests of justice[98] based on denial of due process and equal protection (defendant

placed in a worse position than persons charged with the same crime with no codefendant)

Discretion exercised, defendant limited; conflict between defendant's right to confrontation and codefendant's right to a fair trial (again denial of equal protection and due process)

Remedy in either case is timely motion for severance.[99] Where severance granted; next motion: sufficient time between trials to obtain transcripts[100]

• SUPPRESSION OF EVIDENCE

MOTION TO SUPPRESS FRUITS OF UNLAWFUL STOP AND ARREST[101]

Challenge to reliability and sufficiency of information transmitted to arresting officer by fellow officer[102]

Not essential for People to call the sending officer[103] to establish reasonable cause to arrest[104]

Defendant's inability to make specific factual allegations relating to probable cause may be excused by People's failure to supply discovery; hearing should be granted or decision reserved until discovery supplied[105]

Defendant should request permission to file a supplemental motion[106]

MOTION TO PRECLUDE STATEMENTS

No good cause for late service[107]

Description in 710.30 notice insufficient to alert defendant to what evidence People seek to introduce[108]

Notice must contain the sum and substance of any oral statement which the People seek to admit, as well as the person to whom it was made[109]

Fact that notice makes defendant aware of some, but not all statements does not mitigate the prejudice to the defendant[110]

Inadequate notice may not be cured by discovery,[111] only appropriate remedy is preclusion;[112] prejudice plays no part in analysis[113]

Motion to preclude may operate separately from, and without relation to, any motion to suppress other written statements by the defendant[114]

MOTION TO SUPPRESS STATEMENTS

Limit to CPL § 710.30 notice (so as not to confuse with preclusion)

MOTION TO SUPPRESS TANGIBLE EVIDENCE

Relating to warrantless seizure, without consent[115]

Seizure pursuant to a warrant; challenges:

> Affidavits or sworn testimony on which the warrant was issued contains material and false allegations, made knowingly and in reckless disregard for the truth;[116] warrant (1) was issued without probable cause; (2) fails to describe the place to be searched with sufficient particularity; (3) fails to describe the things to be seized with sufficient particularity; (4) is overly broad in the property which it authorized seizure of; (5) was executed beyond its authorized scope; (6) was seized was executed at night without lawful authorization; (7) was executed without giving proper notice of the executing officers' purpose and authority and in the absence of any "no knock" authorization; (8) fails to contain a direction that the warrant be returned to the court without regard to whether any property is seized as a result of the search pursuant to CPL § 690.45(8); (9) was invalid, in that the issuing magistrate lacked jurisdiction to issue such warrant (magistrate not physically within the town of his jurisdiction at the time he signed the warrant);[117] (10) officers executing warrant failed to make proper, timely return of the warrant; officer failed to truthfully report that informant existed or in accurately reported the information he allegedly received from informant.[118]

MOTION TO SUPPRESS IDENTIFICATION EVIDENCE[119]

MOTION TO SUPPRESS WIRETAP EVIDENCE[120]

• DISCOVERY AND INSPECTION

Request for 911 tapes in omnibus motion filed 40 days after crime; People's failure to preserve tape requires reversal[121]

Any statement by any codefendant, coconspirator, or witness, whether or not the prosecutor intends to introduce the same at trial as well as any notes concerning such statements made by any law enforcement officers[122]

Work notes or rough drafts of any composite photographs or drawings, as well as any notes containing any information obtained from the person providing the information from which the composite was constructed;

All information provided media to personnel, either orally or in writing, in preparation for the "Crime Stoppers" broadcast relating to this case, all information received by police following any "Crime Stoppers" broadcast relating to this case, including but not limited to any audio tapes, notes, or documentation of any type recording or summarizing the substance of any communications from persons familiar with, or alleging to be familiar with, the events surrounding the alleged assault in this matter, a list of the television channel(s) broadcasting the "Crime Stoppers" re-enactment of the incident in this matter as well as the dates and times of such broadcasts, and a copy of the video recording of the "Crime Stoppers" re-enactment of the incident in this case

Any portion of any police department manual, directive, or policy statement governing the police conduct of this investigation in any respect

The name and field of expertise of each person that the People intend to call at trial as an expert witness, as well as the field and subject matter of the expert's expected testimony, a copy of the resume or curriculum vitae of the expert, for each scientific examination or test performed, the name, author, and chapter of any reference manual or authoritative text referred to or relied upon, and if this expert has previously testified for the People the date, case name, court, indictment or docket number of the case in which the expert testified, as well as copies of any transcripts of that testimony.

All documents concerning any toxicological analysis associated with the post-mortem examination, including all records or notes relating to the preparation and calibration of any analytical instruments used; the preparation, synthesis, or analysis of any solutions, reagents or other chemicals utilized in the toxicological analysis; the preparation, synthesis, or analysis of any chemical substances used as a standard, control, or reference solution in the toxicological analysis; the steps followed in performing any toxicological analysis; the number of times each analysis was performed and the results observed or recorded for each; the output, in whatever form, of any instruments used to perform or assist in each analysis; any mathematical computations utilized.

BRADY MATERIAL[123]

Defined: *see, Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 and *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1. Some sample requests:

Any record of previous arrests or convictions or any other evidence or information demonstrating participation in dangerous, vicious, immoral or criminal behavior on the part of the victim, and/or any persons intended to be called as witnesses by the prosecutor,

including but not limited to "rap sheets", military records, police personnel records, or other memoranda (*see, United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481);

Names and addresses of any witnesses interviewed by law enforcement officials that the People do not intend to call at trial, including the transcript of any testimony given by any such witness before the grand jury;

Any evidence, testimony, transcript, statement or information indicating that any prospective prosecution witness on any occasion gave false, misleading or contradictory information regarding the underlying circumstances of this case or any related matters, to persons involved in law enforcement or to their agents or informers;

Any evidence, testimony, transcript, statement or information indicating that any prospective prosecution witnesses have given statements which are or may be contradictory to each other;

Any information indicating or documenting that any prospective prosecution witness has or had a history of mental or emotional disturbance;

Specifically, defendant believes that the alleged victim has suffered from and continues to suffer from psychological and/or behavior disorders for which he has received and continues to receive treatment, that those disorders render the victim unable or unwilling to distinguish truth from untruth, and that the allegations made against the defendant in this case are solely the result of the victim's fabrication as a direct result of his psychological disorders.

(2) Defendant requests that the prosecution be required to disclose to the defense all of the victim's Monroe County Department of Social Services records as well as all other records or reports pertaining to any mental health programs, counseling, treatments, or evaluations, which are, or with reasonable diligence could be in the possession of the People.

(3) In the alternative, defendant requests that the People provide to the defense a complete history of the victim's contacts with MCDSS as well as any other psychological care providers so that defendant may subpoena to the Court for examination all records which may be relevant to the victim's inability or unwillingness to distinguish fact from fiction.

(4) Further, upon information and belief, the victim has exhibited a history of sexually inappropriate behavior, he engaged in such behavior on the date of the alleged offense in this case, and he fabricated these charges following the defendant's threat to report his sexually inappropriate behavior, as a means of avoiding or discrediting any report to the Department of Social Services or police authorities relating to his unlawful behavior.

(5) The People may argue that such information would pertain merely to the weight and credibility of the victim's testimony, however clearly, under *Brady*, it is more. The information sought is information which would support the position that the defendant never committed the acts alleged.

FAILURE TO COMPLY BY PEOPLE

CPL § 240.35; refusal ". . . shall be made in a writing, which . . . shall be served on the demanding party and a copy shall be filed with the court".

CPL § 240.70; provides that court may impose sanctions for failure to comply with CPL Article 240 (*see e.g., People v. Vasquez*, 143 A.D.2d 161, 532 N.Y.S.2d 8; *People v. Sacco*, 141 Misc.2d 98, 532 N.Y.S.2d 705).

Sanctions; preclude prosecution from opposing hearings requested (*see, People v. Mendoza*, 82 N.Y.2d 415, 604 N.Y.S.2d 922 [may be used as a sword, not just a shield]); time period beginning 15 days after defendant's demand was served and ending when the People provide the defendant with discovery demanded chargeable to the People for CPL § 30.30 or § 30.20 (CPL § 240.80; *People v. McKenna*, 76 N.Y.2d 59, 556 N.Y.S.2d 514).

OTHER NON-CPL § 255 MOTIONS

• APPOINTMENT OF A SPECIAL PROSECUTOR

When "it is obvious that the lawyer ought to be called as a witness on behalf of the client"[124]

Where DA's office has acquired confidential information from the defendant as a result of an ADA's ongoing attorney-client relationship with the defendant[125]

• BILL OF PARTICULARS[126]

Goal: narrow scope of proof at trial

Response: "it's evidentiary"; if it wasn't (to some degree), you wouldn't ask for it

Example: OGA:

Whether it is alleged that the accused obstructed governmental administration by means of "intimidation", "physical force", "interference", or by means of "an independently unlawful act" and

if it is alleged that the accused used "intimidation", describe the actions of the accused constituting such "intimidation";

if it is alleged that the accused used "physical force", describe the actions of the accused constituting such "physical force";

if it is alleged that the accused used "interference", describe the actions of the accused constituting such "interference";

if it is alleged that the accused committed an "independently unlawful act", describe the actions of the accused constituting such "unlawful act" and the section or sections of the Penal Law which the accused allegedly violated by such actions;

Whether it is alleged that the accused obstructed the "administration of law" or "other governmental function" or whether the accused "prevented" or "attempted to prevent" a public servant from performing an official function and

if it is alleged that the accused obstructed the "administration of law" identify the law which the accused allegedly obstructed the administration of and describe the conduct of the accused constituting such obstruction;
if it is alleged that the accused obstructed some "other governmental function" describe the governmental function which the accused allegedly obstructed and the conduct of the accused constituting such obstruction;

if it is alleged that the accused "prevented" or "attempted to prevent" a public servant from performing an official function, identify the public servant (or public servants) allegedly obstructed by the actions of the accused, the official function which the accused allegedly obstructed, the actions of the accused constituting such obstruction, the authority permitting the public servant to perform the official function allegedly obstructed, and the section of the law authorizing the performance of such function by a public servant;

• ***SANDOVAL***[127]

• **LEAVE TO FILE SUBSEQUENT MOTIONS**[128]**/JOIN IN CODEFENDANT'S MOTIONS**

• **MOTION TO STRIKE ALIAS**

• **MOTION FOR COMPENSATION IN EXCESS OF STATUTORY RATE** (see attached)

• **MOTIONS IN LIMINE** (see attached form)

POST-TRIAL MOTIONS

• CPL ARTICLE 330.30 MOTIONS

• CPL ARTICLE 440 MOTIONS[129]

Post-trial, post-sentence (may also be post-appeal); i.e., DNA testing motion[130]

Most common CPL § 440.10 grounds for relief:

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment on the ground that: . . .

> (b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf or a court or a prosecutor; or
>
> (c) Material evidence adduced at a trial resulting in the judgment was false as was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or
>
> (f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or
>
> (g) New evidence has been discovered since the entry of judgment . . . which is of such character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant; or
>
> (h) the judgment was obtained in violation of a right of the defendant under the constitution of this state or the United States.

Court *may* (read "probably will") deny motion without a hearing where:

> Essential facts are unsupported by either sworn allegations or unrefuted documentary proof[131]
>
> Allegations of fact essential to the motion are conclusively refuted by unquestionable documentary proof[132]

Conceded or uncontradicted allegations establish circumstances contrary to defendant's claims[133]

Essential allegation of fact is (1) contradicted by a court record or other official document or, (2) is made solely by the defendant and unsupported by any other affidavit or evidence and, (3) under all the circumstances of the case, there is no reasonable possibility that defendant's allegations are true[134]

Safety-valve: vacatur of conviction is authorized in court's discretion even where court may otherwise deny a § 440.10 motion, in the interest of justice for good cause shown, where motion is otherwise meritorious[135]

Court *must* deny a § 440.10 motion when the issue raised:

(1) was raised and decided on direct appeal, or
(2) may still be raised and decided on direct appeal, or
(3) even though sufficient facts were present in the record for such issue to be raised and decided on direct appeal, it was not, due to defendant's failure to raise the issue on appeal or take an appeal[136]

Most common: newly-discovered evidence - evidence unavailable to defendant prior to the entry of judgment and that unquestionably would have had direct bearing on the issues decided by the jury at trial. Judgment of conviction may be vacated where:

(1) evidence could not have been produced at trial even with due diligence;
(2) motion made with due diligence after discovery of the new evidence; and
(3) new evidence is of such character as to create a probability that had it been received at trial, verdict would have been more favorable to the defendant[137]

OTHER STUFF

• **ARTICLE 78 PROCEEDINGS** (CPLR § 7804, 506)

• **DECLARATORY JUDGEMENT ACTIONS** (CPLR Article 30)

• **HABEAS CORPUS** (CPLR Article 70)

• **APPLICATION FOR MATERIAL WITNESS ORDER** (see attached)

ENDNOTES

1. This outline includes only pre-trial motions, does not include all of those, and does not include all arguments applicable to the motions that are included. It's also limited by the author's imagination; as my mother-in-law is fond of saying to my wife: "You could do better."

2. "In the representation of a client a lawyer shall not: . . . knowingly advance a claim or defense that is unwarranted under existing law, *except* that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, *or reversal* of existing law" (emphasis added).

3. The single most cited case by the Appellate Division, Fourth Department in criminal cases; along the same lines, *see, People v. Qualls*, 55 N.Y.2d 733, 447 N.Y.S.2d 149 ("bolstering" objection where evidence was hearsay failed to preserve error on appeal].

4. *Reed v. McCord*, 160 N.Y. 330, 341, 54 N.E. 737.

5. *People v. Longdue*, 168 A.D.2d 948, 566 N.Y.S.2d 562.

6. *See, People v. Cassas*, 84 N.Y.2d 718, 622 N.Y.S.2d 228; *People v. Jones*, 190 A.D.2d 31, 596 N.Y.S.2d 811; *People v. Rivera*, 58 A.D.2d 147, 149, 396 N.Y.S.2d 26, *aff'd.*, 45 N.Y.2d 989, 413 N.Y.S.2d 146; *People v. Pennachio*, 167 Misc.2d 114, 637 N.Y.S.2d 633.

7. *People v. Dixon*, 85 N.Y.2d 218, 222, 623 N.Y.S.2d 813.

8. *People v. Mendoza*, 82 N.Y.2d 415, 604 N.Y.S.2d 922.

9. *People v. Kirkland*, 89 N.Y.2d 903, 653 N.Y.S.2d 256; *People v. Merrill*, 87 N.Y.2d 948, 641 N.Y.S.2d 587.

10. *People v. Stabley*, 192 A.D.2d 1056, 596 N.Y.S.2d 247, *lv. denied*, 81 N.Y.2d 1080, 601 N.Y.S.2d 601; *People v. Brimage*, 214 A.D.2d 454, 631 N.Y.S.2d 2, *lv. denied*, 86 N.Y.2d 732, 631 N.Y.S.2d 613.

11. See, CPLR §§ 2302, 2307.

12. *Schartzer v. Israles*, 1996 WL 710563 [Cal App 2d Dist. 12/11/96] (attorney sued by victim after obtaining victim's mental health records by subpoena duces tecum).

13. County Law 722-c; *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53; *People v. Jones*, 210 A.D.2d 904, 620 N.Y.S.2d 656, *aff'd.*, 85 N.Y.2d 998, 630 N.Y.S.2d 961 (failure to grant application for expert services was reversible error).

14. *See, People v. Francis*, 149 Misc.2d 693, 566 N.Y.S.2d 486; *see also, Wunsch v. City of Rochester*, 108 Misc.2d 854, 438 N.Y.S.2d 896; *People v. Morales*, 97 Misc.2d 733, 412 N.Y.S.2d 310.

15. CPL § 710.50(1)(a); *see also, People v. Ferradino*, 69 Misc.2d 508, 330 N.Y.S.2d 114; *compare, People v. Estensen*, 101 A.D.2d 687, 476 N.Y.S.2d 39.

16. *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561; *People v. McGrath*, 46 N.Y.2d 12, 22, 412 N.Y.S.2d 801; *Matter of Grand Jury Proceedings [People v. Doe]*, 89 A.D.2d 605, 452 N.Y.S.2d 643; *see also People v. Davis*, 190 A.D.2d 987, 593 N.Y.S.2d 713.

17. See, CPL § 710.50 and CPL § 60.45 ("Evidence of a written or oral confession, admission, or other statement made by a defendant . . . may not be received against him *in a criminal proceeding* if such statement was involuntarily made . . ."); clearly, presentation of a case to a grand jury is a "criminal proceeding".

18. *Matter of Burse v. Bristol*, 203 A.D.2d 962, 612 N.Y.S.2d 990; *see also, Matter of Scherbyn v. Wayne-Finger Lakes Board of Cooperative Educational Services*, 77 N.Y.2d 753, 570 N.Y.S.2d 474; *Matter of Legal Aid Society of Sullivan County v. Scheinmann*, 53 N.Y.2d 12, 16-17, 439 N.Y.S.2d 882.

19. CPL § 710.50; *Matter of Burse v. Bristol*, 203 A.D.2d 962, 612 N.Y.S.2d 990.

20. CPL Article 660.

21. CPL § 190.50(5).

22. CPL § 190.50(5)(c); *see also, People v. Jones*, 187 A.D.2d 750, 589 N.Y.S.2d 937, *lv. denied*, 81 N.Y.2d 790, 594 N.Y.S.2d 737.

23. *People v. Bakulas*, 95 A.D.2d 813, 463 N.Y.S.2d 534.

24. *See, People v. Jiminez*, 180 A.D.2d 757, 580 N.Y.S.2d 393; *People v. Stevens*, 151 A.D.2d 704, 542 N.Y.S.2d 754 (five day time period for motion to dismiss held inappropriate where defendant unrepresented); *see also, People v. Hooker*, 113 Misc.2d 159, 448 N.Y.S.2d 363.

25. *People v. Prest*, 105 A.D.2d 1078, 482 N.Y.S.2d 172 (". . . the circumstances here militate against a strict application of the five day requirement [CPL 190.50, sub. 5, par. {c}] . . . Assigned counsel promptly moved within five days of his appointment to dismiss the indictment on the ground that defendant had improperly been denied her right to testify before the Grand Jury").

26. The statute requires a motion for removal be made within 45 days of arraignment or attorney appearance, however case law holds that the motion is premature if made before voir dire (*People v. Oakes*, 130 A.D.2d 980, 516 N.Y.S.2d 1000; *People v. Morin*, 56 A.D.2d 715, 392 N.Y.S.2d 731).

27. See, Statutes § 240: "The maxim *expressio unis est exclusio alterius* is applied in the construction of the statues, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded".

28. *People v. Gruden*, 42 N.Y.2d 214, 397 N.Y.S.2d 704; *People v. Smith*, 81 A.D.2d 965, 439 N.Y.S.2d 749.

29. CPL § 170.35(1)(a); CPL § 100.15; CPL § 100.40; *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927; *see also People v. McNamara*, 78 N.Y.2d 626, 578 N.Y.S.2d 476.

30. CPL § 100.45(3); *People v. Harper*, 37 N.Y.2d 96, 371 N.Y.S.2d 467; *People v. Hairston*, 122 A.D.2d 340, 504 N.Y.S.2d 310; *People v. Law*, 106 Misc.2d 351, 431 N.Y.S.2d 648; *People v. Diggs*, 72 Misc.2d 898, 339 N.Y.S.2d 712; *People v. Moore*, 58 Misc.2d 122, 294 N.Y.S.2d 897.

31. CPL § 100.50 (a superseding information may be substituted for an information, a prosecutor's information, or a misdemeanor complaint; it *does not* provide for superseding a simplified information with a "long form" information); *see also, People v. Gerloff*, 145 Misc.2d 683, 547 N.Y.S.2d 544; *People v. Origlia*, 138 Misc.2d 286, 524 N.Y.S.2d 163; *People v. Baron*, 107 Misc.2d 59, 438 N.Y.S.2d 425 and Statues § 240, *supra*.

32. Note that in conjunction with a motion to dismiss the indictment, CPL § 210.30(3) permits the disclosure of grand jury minutes to defense counsel; a motion granted about as frequently as a motion for change of facts or a motion to strike opposing counsel.

33. CPL Article 60; CPL § 190.30[1]; *People v. Jackson*, 148 Misc.2d 886, 561 N.Y.S.2d 398; *People v. Sanchez*, 125 Misc.2d 394, 479 N.Y.S.2d 602; *compare, People v. Cunningham*, 88 Misc.2d 1065, 390 N.Y.S.2d 547 *see also, People v. Mitchell*, 82 N.Y.2d 509, 605 N.Y.S.2d 655). This error may not be ignored, even if defendant's constitutional rights were not violated by the presentation of such evidence (*People v. Percy*, 74 Misc.2d 522, 345 N.Y.S.2d 276, *aff'd.*, 45 A.D.2d 284, 358 N.Y.S.2d 434, *aff'd.*, 38 N.Y.2d 806, 382 N.Y.S.2d 39, *motion denied and granted*, 36 N.Y.2d 756, 368 N.Y.S.2d 831, *motion denied*, 37 N.Y.2d 922, 378 N.Y.S.2d 390).

34. *People v. Stone*, 225 A.D.2d 1067, 639 N.Y.S.2d 603.

35. *See, Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476; *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162; *People v. Scalise*, 70 A.D.2d 346, 421 N.Y.S.2d 637; *People v. Eaddy*, 142 Misc.2d 341, 537 N.Y.S.2d 465.

36. CPL §§ 210.20(1)(c), 210.35; *People v. Rocco*, 229 A.D.2d 599, 646 N.Y.S.2d 518; *People v. Diaz*, 209 A.D.2d 1, 624 N.Y.S.2d 113; *People v. Steans*, 187 A.D.2d 741, 590 N.Y.S.2d 534; *see also, People v. Huston*, 88 N.Y.2d 400, 646 N.Y.S.2d 69 (impairment of integrity of GJ proceeding is a "very precise and very high test").

37. CPL § 190.30(7); *People v. Lowery*, 151 A.D.2d 1026, 542 N.Y.S.2d 88; *People v. Bomberry*, 112 A.D.2d 18, 490 N.Y.S.2d 382.

38. *People v. Babchak*, 25 N.Y.2d 981, 305 N.Y.S.2d 503; *see also, People v. Morin*, 192 A.D.2d 791, 596 N.Y.S.2d 509; *People v. Ganett*, 68 A.D.2d 81, 84, 416 N.Y.S.2d 914, *aff'd.*, 51 N.Y.2d 991, 435 N.Y.S.2d 976.

39. CPL § 190.30(3); *see, People v. Percy*, 74 Misc.2d 522, 345 N.Y.S.2d 276, *aff'd.*, 45 A.D.2d 284, 358 N.Y.S.2d 434, *aff'd.*, 38 N.Y.2d 806, 382 N.Y.S.2d 39.

40. CPL § 210.35(5); *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626; *People v. Lancaster*, 69 N.Y.2d 20, 27, 511 N.Y.S.2d 559; *People v. Valles*, 62 N.Y.2d 36, 38, 476 N.Y.S.2d 50; *Matter of Morgenthau v. Altman*, 58 N.Y.2d 1057, 462 N.Y.S.2d 629; *People v. Manfro*, 150 Misc.2d 1080, 571 N.Y.S.2d 986.

41. *People v. Karp*, 76 N.Y.2d 1006, 565 N.Y.S.2d 751; *People v. Lancaster, supra*; *People v. Valles, supra.*

42. *People v. Scott*, 150 Misc.2d 297, 568 N.Y.S.2d 857; *People v. Monroe*, 125 Misc.2d 550, 558-559, 480 N.Y.S.2d 259. "It is not a question of whether the result 'would' be different but whether such evidence could 'possibly cause the Grand Jury to change its findings'" (*People v. Filis*, 87 Misc.2d 1057, 1059, 386 N.Y.S.2d 988; *see also, People v. Abbetiello*, 129 Misc.2d 831, 494 N.Y.S.2d 625 [indictment dismissed where prosecutor withheld from grand jury statement which exonerated defendant]).

43. *People v. Robertson*, 12 N.Y.2d 355, 239 N.Y.S.2d 673; *People v. Savvides*, 1 N.Y.2d 554, 154 N.Y.S.2d 185.

44. *People v. Huston*, 88 N.Y.2d 400, 646 N.Y.S.2d 69; *People v. Batashure*, 75 N.Y.2d 306, 552 N.Y.S.2d 896.

45. *See, People v. Sayavong*, 83 N.Y.2d 702, 613 N.Y.S.2d 343; *People v. Wilkins*, 68 N.Y.2d 269, 508 N.Y.S.2d 893.

46. *See, People v. Swamp*, 84 N.Y.2d 725, 622 N.Y.S.2d 472 (lack of laboratory drug analysis); *People v. Zelaya*, 232 A.D.2d 261, 648 N.Y.S.2d 93 (erroneous calculation of distance from school re: Penal Law § 220.44 [drug sale on school grounds]).

47. *People v. Sayavong*, 83 N.Y.2d 702, 613 N.Y.S.2d 343.

48. *People v. Keindl*, 68 N.Y.2d 410, 416, 509 N.Y.S.2d 790; *People v. Morris*, 61 N.Y.2d 290, 293, 473 N.Y.S.2d 769; *People v. Iannone*, 45 N.Y.2d 589, 594, 412 N.Y.S.2d 110; *People v. Bogdanoff*, 254 N.Y. 16, 23, 171 N.E. 890.

49. *See, e.g. People v. Del Pilar*, 177 A.D.2d 642, 643, 576 N.Y.S.2d 346; *People v. Johnson*, 163 A.D.2d 613, 559 N.Y.S.2d 41; *People v. Casdia*, 163 A.D.2d 604, 558 N.Y.S.2d 976, *aff'd*, 78 N.Y.2d 1024, 576 N.Y.S.2d 75.

50. CPL 60.44 (requires exercise of court's discretion).

51. *See, e.g. People v. Williams,* 136 A.D.2d 132, 526 N.Y.S.2d 581.

52. Penal Law §§ 10.00(12), 265.00(15).

53. *See, People v. Shaffer*, 66 N.Y.2d 663, 495 N.Y.S.2d 965; *People v. Llewelyn*, 136 Misc.2d 525, 518 N.Y.S.2d 881.

54. Penal Law § 165.55(1); *see, People v. Barrie*, 74 A.D.2d 576, 424 N.Y.S.2d 477; *People v. Felcone*, 43 A.D.2d 976, 352 N.Y.S.2d 499; *see also, People v. Williams*, 136 A.D.2d 132, 526 N.Y.S.2d 581; *People v. Bradley*, 99 A.D.2d 513, 471 N.Y.S.2d 145; *People v. Bacote*, 143 Misc.2d 535, 541 N.Y.S.2d 305; *People v. Kennedy*, 127 Misc.2d 712, 487 N.Y.S.2d 667 (failure to properly instruct the grand jury may not be viewed as a mere irregularity or harmless procedural defect).

55. Penal Law § 220.25(1).

56. Mature stalks not includable (Public Health Law § 3302[20]).

57. Penal Law § 221.25; *compare People v. Nelson*, 144 A.D.2d 714, 535 N.Y.S.2d 132.

58. *See*, CPL § 200.50: "[a]n indictment must contain: (3) A separate accusation or count addressed to each offense charged".

59. CPL § 200.30(1); *see People v. Corrado*, 161 A.D.2d 658, 556 N.Y.S.2d 95.

60. *See, e.g., People v. Keindl*, 68 N.Y.2d 410, 418, 509 N.Y.S.2d 790; *see also, People v. James*, 98 A.D.2d 863, 471 N.Y.S.2d 158; *People v. Klipfel*, 160 N.Y. 371, 54 N.E. 78.

61. See, generally, *New York v. Hill*, ___ U.S. ___, 120 S.Ct. 659, 145 L.Ed.2d 560.

62. CPL § 580.20 Article IV (c); however, demonstration of good cause for delay may avoid dismissal.

63. CPL § 580.20 Article III (a).

64. See generally, CPL § 30.30.

65. *See, People v. Berkowitz*, 50 N.Y.2d 333, 428 N.Y.S.2d 927; *People v. Young*, 155 Misc.2d 878, 590 N.Y.S.2d 1006; *see also People v. Cortes*, 80 N.Y.2d 201, 590 N.Y.S.2d 9; *People v. Russo*, 99 A.D.2d 498, 470 N.Y.S.2d 447; *People v. Daniel P.*, 94 A.D.2d 83, 463 N.Y.S.2d 838.

66. See, CPL §210.45(4); *People v. Santos*, 68 N.Y.2d 859, 508 N.Y.S.2d 411; *People v. Smith*, 81 A.D.2d 965, 439 N.Y.S.2d 749; *see also, People v. Gruden*, 42 N.Y.2d 214, 397 N.Y.S.2d 704.

67. *See, e.g., People v. Goodman*, 41 N.Y.2d 888, 393 N.Y.S.2d 985; *People v. Warren*, 85 A.D.2d 747, 445 N.Y.S.2d 797; *People v. Sturgis*, 38 N.Y.2d 625, 381 N.Y.S.2d 860; *compare, People v. Zirpola*, 57 N.Y.2d 706, 454 N.Y.S.2d 702; *People v. Washington*, 43 N.Y.2d 772, 401 N.Y.S.2d 1007.

68. *See, People v. Auslander*, 168 A.D.2d 759, 563 N.Y.S.2d 912; *People v. Marsh*, 127 A.D.2d 945, 946-947, 512 N.Y.S.2d 545.

69. CPL § 30.20; Civil Rights Law § 12; Sixth Amendment, United States Constitution.

70. *People v. Washington*, 43 N.Y.2d 772, 401 N.Y.S.2d 1007; *People v. Townsend*, 38 A.D.2d 569, 328 N.Y.S.2d 333.

71. *People v. Bryant*, 79 A.D.2d 867, 434 N.Y.S.2d 558; *People v. Marshall*, 72 A.D.2d 799, 421 N.Y.S.2d 630.

72. *People v. Watts*, 57 N.Y.2d 299, 456 N.Y.S.2d 677; *People v. Perez*, 42 N.Y.2d 971, 398 N.Y.S.2d 269; *People v. Prosser*, 309 N.Y. 353, 357, 130 N.E.2d 891; *see also, Barker v. Wingo*, 407 U.S. 514, 521, 92 S.Ct. 2182, 33 L.Ed.2d 101.

73. *People v. Taranovich*, 37 N.Y.2d 442, 373 N.Y.S.2d 79; *see also, People v. Pasquino*, 100 Misc.2d 1034, 420 N.Y.S.2d 658.

74. *People v. Singer*, 44 N.Y.2d 241, 405 N.Y.S.2d 17.

75. *See, Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548; *People v. Rivera*, 60 N.Y.2d 110, 468 N.Y.S.2d 601.

76. CPL § 40.40 provides, in relevant part, that:

1. Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, pursuant to paragraph (a) of subdivision two of section 200.20, such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article.

2. When (a) one of two or more joinable offenses of the kind specified in subdivision one is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred.

77. Defined in CPL § 40.10(2) as ". . . conduct which establishes at least one offense, and which is comprised of two or more of a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture".

78. *See, Bartkus v. Illinois*, 359 U.S. 121, 136-138, 79 S.Ct. 676, 3 L.Ed.2d 684; *People v. Abbamonte*, 43 N.Y.2d 74, 400 N.Y.S.2d 766; *Matter of Abraham v. Justices of N.Y. Supreme Court of Bronx County*, 37 N.Y.2d 560, 376 N.Y.S.2d 79.

79. CPL § 40.40; *People v. Abbamonte, supra*.

80. CPL § 40.30 (1)(a); *Troy v. Jones*, 61 A.D.2d 802, 402 N.Y.S.2d 26.

81. See, CPL § 200.20(2)(b); *People v. Bongarzone*, 69 N.Y.2d 892, 895, 515 N.Y.S.2d 227; *People v. Johnson*, 51 A.D.2d 851, 380 N.Y.S.2d 775.

82. CPL §§ 40.20, 40.40; Practice Commentary, Peter Preiser, CPL § 40.40, McKinney's Cons. Laws of New York, Book 11A, p. 374; *cf. People v. Durant*, 88 Misc.2d 731, 389 N.Y.S.2d 533.

83. *See, United States v. Diaz*, 223 U.S. 442 (different harms, same victim); *People v. Rivera*, 60 N.Y.2d 110, 115, 468 N.Y.S.2d 601 (same); *Matter of Kaplan v. Ritter*, 71 N.Y.2d 222, 525 N.Y.S.2d 1 (same harm, different victims); *see also*, Practice Commentaries, Peter Preiser, CPL § 40.20, McKinney's Cons. Laws of New York, Book 11A, pp. 308-309.

84. *See, People v. Berkowitz*, 50 N.Y.2d 333, 344, 428 N.Y.S.2d 927; *People ex rel. Dowdy v. Smith*, 48 N.Y.2d 477, 482, 423 N.Y.S.2d 862; *Matter of McGrath v. Gold*, 36 N.Y.2d 406, 411, 369 N.Y.S.2d 62; *People v. Lo Cicero*, 14 N.Y.2d 374, 380, 251 N.Y.S.2d 953; *compare, Brown v. City of New York*, 60 N.Y.2d 897, 898, 470 N.Y.S.2d 573 (District Attorney and New York City Corporation Counsel separate entities for collateral estoppel purposes); *Nelson v. Dufficy*, 104 A.D.2d 234, 482 N.Y.S.2d 511 (same); *see also, People v. Bosilkofski*, 134 A.D.2d 869, 521 N.Y.S.2d 601.

85. *People v. Roselle*, 84 N.Y.2d 350, 618 N.Y.S.2d 753; *compare People v. Bosilkofski*, 134 A.D.2d 869, 521 N.Y.S.2d 601 (criminal allegations of incest included conduct and dates not contained in Family Court abuse petition).

86. See, CPL § 210.40; *see People v. Clayton*, 41 A.D.2d 204, 342 N.Y.S.2d 106.

87. Fourteenth Amendment, United States Constitution; *Yick Wo v. Hopkins*, 118 U.S. 356, 373-373, 6 S.Ct. 1054, 30 L.Ed. 220; *People v. Goodman*, 31 N.Y.2d 262, 269, 338 N.Y.S.2d 97; *People v. Carter*, 86 A.D.2d 451, 450 N.Y.S.2d 203.

88. CPL § 50.20 or CPL § 190.40.

89. See, CPL § 20.20. The People must prove proper territorial jurisdiction beyond a reasonable doubt; venue (CPL § 20.40) need only be proven by a preponderance of the evidence (*People v. McLaughlin*, 80 N.Y.2d 466, 469, 591 N.Y.S.2d 966). Territorial jurisdiction is a "jurisprudential fundamental" (*People v. McLaughlin, supra*), however proper venue may be waived (*see, People v. Lowen*, 100 A.D.2d 518, 519, 473 N.Y.S.2d 22).

90. CPL § 200.20(2) provides, in relevant part, that two offenses are joinable in a single indictment when:

> (a) They are based on the same act or criminal transaction . . .;
>
> (b) Even though based upon different criminal transactions . . . proof of the first offense would be material and admissible upon a trial of the second (*see People v. Bongarzone*, 69 N.Y.2d 892, 895, 515 N.Y.S.2d 227; *People v. Johnson*, 51 A.D.2d 851, 380 N.Y.S.2d 775; *People v. Lanzot*, 67 A.D.2d 864, 413 N.Y.S.2d 399) . . . ;
>
> (c) Even though based upon different criminal transactions . . . such offenses are defined by the same or similar statutory provisions . . . ;
>
> (d) Though not directly joinable with each other . . . each is joinable with a third offense contained in the indictment . . .

91. CPL § 200.20(3)(a); *People v. Lewis*, 66 A.D.2d 702, 411 N.Y.S.2d 249.

92. *See, e.g., People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422; *People v. Stanley*, 81 A.D.2d 842, 438 N.Y.S.2d 848; *People v. Forrest*, 50 A.D.2d 260, 377 N.Y.S.2d 492.

93. *People v. Mahboubian*, 74 N.Y.2d 174, 184, 544 N.Y.S.2d 769; *see also, People v. Cardwell*, 78 N.Y.2d 996, 997-998, 575 N.Y.S.2d 267.

94. *See, United States v. Romanello,* 726 F.2d 173; *Rhone v. United States*, 365 F.2d 980; *People v. Mahboubian*, 74 N.Y.2d at p. 184.

95. *See, People v. Cardwell, supra,* at note 81.

96. *People v. McGee*, 68 N.Y.2d 328, 508 N.Y.S.2d 927.

97. *People v. Williams*, 142 A.D.2d 310, 536 N.Y.S.2d 814.

98. CPL § 200.40(1).

99. *See, People v. McGee* and *People v. Williams, supra*.

100. *People v. Sanders*, 31 N.Y.2d 463, 341 N.Y.S.2d 305 [twenty day rule]; *see also, People v. Goins*, 75 N.Y.2d 989, 540 N.Y.S.2d 994; *People v. Jaglom*, 17 N.Y.2d 162, 164, 269 N.Y.S.2d 405; *People v. Riley*, 101 A.D.2d 710, 475 N.Y.S.2d 691; *People v. Staeikin*, 163 Misc.2d 517, 620 N.Y.S.2d 903.

101. CPL § 710.20.

102. *See. People v. Petralia*, 62 N.Y.2d 47, 476 N.Y.S.2d 56; *People v. Dodt*, 61 N.Y.2d 408, 474 N.Y.S.2d 441; *People v. Havelka*, 45 N.Y.2d 636, 412 N.Y.S.2d 345; *People v. Lypka*, 36 N.Y.2d 210, 366 N.Y.S.2d 622.

103. *People v. Parris*, 83 N.Y.2d 342, 610 N.Y.S.2d 464; *see also, People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 643 N.Y.S.2d 502.

104. CPL § 140.10.

105. *See, People v. Mendoza*, 82 N.Y.2d 415, 604 N.Y.S.2d 922.

106. *See, People v. Bonilla*, 82 N.Y.2d 825, 604 N.Y.S.2d 937; *see also, People v. Schoendorf*, 196 A.D.2d 600, 601 N.Y.S.2d 859.

107. *See, People v. O'Doherty*, 70 N.Y.2d 479, 522 N.Y.S.2d 498; *People v. Briggs*, 28 N.Y.2d 319, 379 N.Y.S.2d 799; *People v. St. Martine*, 160 A.D.2d 35, 559 N.Y.S.2d 697; *see also People v. Cooper*, 78 N.Y.2d 476, 577 N.Y.S.2d 202; *People v. Bennett*, 56 N.Y.2d 837, 453 N.Y.S.2d 164.

108. *People v. Lopez*, 84 N.Y.2d 425, 618 N.Y.S.2d 879; *People v. Palermo*, 169 A.D.2d 787, 566 N.Y.S.2d 519; *see also People v. Matter of Albert B.*, 79 A.D.2d 251, 256, 436 N.Y.S.2d 653; *People v. Ocasio*, 183 A.D.2d 921, 584 N.Y.S.2d 156 *lv. dismissed*, 80 N.Y.2d 932, 589 N.Y.S.2d 859.

109. *People v. Laporte*, 184 A.D.2d 803, 804-805, 584 N.Y.S.2d 662, *lv. denied* 80 N.Y.2d 905, 588 N.Y.S.2d 831; *People v. Holmes*, 170 A.D.2d 534, 535, 566 N.Y.S.2d 93, *lv. denied* 77 N.Y.2d 961, 570 N.Y.S.2d 495.

110. *People v. Phillips*, 183 A.D.2d 856, 584 N.Y.S.2d 83; *People v. Ludolph*, 63 A.D.2d 77, 407 N.Y.S.2d 85.

111. *People v. Lopez*, 84 N.Y.2d 425, 618 N.Y.S.2d 879.

112. *People v. O'Doherty*, 70 N.Y.2d 479, 522 N.Y.S.2d 498; *People v. Boughton*, 70 N.Y.2d 854, 523 N.Y.S.2d 454; *People v. McMullin*, 70 N.Y.2d 855, 523 N.Y.S.2d 455.

113. *People v. Lopez, supra*.

114. *See, People v. Laing*, 79 N.Y.2d 166, 171, 581 N.Y.S.2d 149; *People v. Taylor*, 65 N.Y.2d 1, 489 N.Y.S.2d 152.

115. *See, Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081.

116. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667; *People v. Alfinito*, 16 N.Y.2d 181, 264 N.Y.S.2d 243; *People v. Ippolito*, 226 A.D.2d 285, 641 N.Y.S.2d 633; *People v.*

Seybold, 216 A.D.2d 935, 629 N.Y.S.2d 561.

117. See, e.g., UJCA § 106; *Cf., People v. Schoonmaker*, 65 Misc.2d 393, 317 N.Y.S.2d 696); *People v. Shepard*, 68 N.Y.2d 841, 843, 508 N.Y.S.2d 173; *People v. Hickey*, 40 N.Y.2d 761, 390 N.Y.S.2d 42; *compare People v. Fishman*, 40 N.Y.2d 858, 387 N.Y.S.2d 1003; *see also People v. Dyla*, 142 A.D.2d 423, 536 N.Y.S.2d 799.

118. *People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582.

119. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; *see also Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; *see also, People v. Duuvon*, 77 N.Y.2d 541, 545, 569 N.Y.S.2d 346; *People v. Riley*, 70 N.Y.2d 523, 529, 522 N.Y.S.2d 842.

120. For an excellent review of state wiretap procedural requirements see *People v. Fonville*, 247 A.D.2d 115, 681 N.Y.S.2d 420.

121. *People v. Huynh*, 232 A.D.2d 655, 649 N.Y.S.2d 160; *see also, People v. Joseph*, 86 N.Y.2d 565, 635 N.Y.S.2d 123; *People v. Anderson*, 222 A.D.2d 442, 634 N.Y.S.2d 715 (failure to preserve witness's description of perpetrator is prejudicial *per se*). Routine destruction of 911 tapes is not *Rosario* violation absent a timely demand for production (*People v. Morris*, 231 A.D.2d 911, 647 N.Y.S.2d 893; *People v. Thomas*, 226 A.D.2d 1071, 642 N.Y.S.2d 749; *see also, People v. Gierszewski*, 226 A.D.2d 1099, 641 N.Y.S.2d 766; *People v. Hyde*, 172 A.D.2d 305, 568 N.Y.S.2d 388, *lv. denied*, 78 N.Y.2d 1077, 577 N.Y.S.2d 240). The question remaining is "what is a timely demand"? The Fourth Department seems to imply, in *People v. Morris*, that a request for such material as late as at a pre-trial hearing (pursuant to CPL § 240.44) is "timely". Note that failure to request sanctions for destruction of 911 tapes effectively waives any objection to such destruction (*People v. Thomas, supra*).

122. *See, Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305.

123. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342; *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

124. Disciplinary Rule 5-102(A).

125. New York State Bar Association Committee on Professional Ethics, Opinion 605, November 17, 1989; see also, DR 4-101 (. . . "a lawyer shall not knowingly . . . use a confidence or secret of a client to the disadvantage of the client . . ."); DR 5-108 (". . . a lawyer who has represented the former client in a matter shall not: [1] Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . ."); DR 9-101(B).

126. CPL §§ 200.95, 100.45(4).

127. *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849.

128. CPL Article 255.

129. Some sections permit civil recovery vs. state if conviction vacated; others don't (see, Court of Claims Act 8-b).

130. CPL § 440.30(1-a)

131. CPL § 440.10(4)(a), (b)

132. CPL § 440.10(4)(c)

133. CPL §§ 440.10(2), 440.20(2), 440.30(2)

134. CPL § 440.10(4)(d)

135. CPL § 440.10(3)(c)

136. CPL §§ 440.10(2), 440.20(2)

137. CPL § 440.10(1)(g)