PRETRIAL MOTIONS

CRIMINAL CASES

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C.P.L. § 225.20- OMNIBUS MOTION

All pretrial motions made in the form of an omnibus motion must be filed within 45 days of the arraignment, the initial appearance of counsel for the previously unrepresented accused or from the service of any notice under C.P.L § 700.70 or 710.30. Any and every form of pretrial relief should be included in the omnibus motion. Typically this document includes:

i. A motion to compel discovery. See, CPL § 240.20, 240.40

ii. A motion to compel a bill of particulars. See, CPL § 200.95

iii. A motion for a separate trial. See, CPL § 200.40

iv. A motion for severance of offenses. See, CPL § 200.20

v. A motion to suppress statements, identification testimony and or physical evidence.

A. C.P.L. § 170.30 PRETRIAL DISMISSAL MOTIONS- MISDEMEANORS

A motion to dismiss a prosecutor's information or misdemeanor complaint can be made on the following grounds:

i. The instrument is defective within the meaning of CPL § 170.35

ii. The accused has received immunity. See, CPL 50.20

iii. The prosecution is barred by reason of a previous prosecution. CPL § 40.20

iv. The prosecution is untimely. See CPL § 30.10; 30.20; or 30.30

v. The accused has been denied his or her right to a speedy trial. See, CPL § 100.10 (1)

vi. Some legal or other jurisdictional impediment to the prosecution exists.

vii. In the furtherance of justice, dismissal is required. See, CPL § 170.40

B. CPL § 170.40, 210.40 MOTION TO DISMISS IN FURTHERANCE OF JUSTICE

This motion to dismiss should be considered where the accused firmly believes that "justice" demands dismissal. Normally, a litigant would consult the prosecutor and inform him/her of the decision to file the motion. Moreover, it may be good practice to pursue all possible avenues of disposition prior to filing this motion. If this motion is not filed within the 45 day period required for omnibus motions, for good cause shown it may be filed after conviction but before sentence. See, People v. Clayton, 41 A.D.2d 204, People v. Rickerts, 58 N.Y.2d 122.

Note that *Motions for Dismissal In Interests of Justice* are addressed to the sound discretion of the Court and Court must make a "sensitive balancing" of the individual and state interests in assessing its reason for dismissal. *See People v. Doe,* 602 N.Y.S.2d 507 (N.Y.C. Crim. Ct. 1993).

The factors to be considered by the court for motions set forth for misdemeanors pursuant to CPL § 170.40 or for felonies pursuant to CPL § 210.40:

i. the seriousness and circumstances of the offense;

ii. the extent of harm caused by the offense;

iii. the evidence of guilt, whether admissible or inadmissible at trial;

iv. the history, character and condition of the accused;

v. any exceptionally serious misconduct of law enforcement personnel in the investigation and prosecution of the accused;

vi. the purpose and effect of imposing sentence;

vii. the impact of dismissal on the confidence of the public in the criminal justice system;

viii. the impact of dismissal on the safety or welfare of the community;

ix. where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and

x. any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

NOTE: **When filing a "pre-pleading memorandum" on behalf of your client, CPL Sections 170.40 and 210.40 may be used as a guide to organize the structure of said memorandum.**

C. C.P.L. § 200.20 CONSOLIDATION OF INDICTMENTS INFORMATIONS

When two or more indictments against the same codefendants charge offenses that are joinable under CPL § 200.20(2), the court may, upon application of either party, order that such indictments be consolidated for trial purposes. CPL § 200.20(4), see CPL § 200.45(1)(misdemeanors).

A motion to consolidate rests in the trial court's discretion. Where the two offenses are based upon the same act or transaction the court must order consolidation unless good cause is shown for not consolidating.

D. C.P.L. § 200.95 BILL OF PARTICULARS

This is a motion by the defense to the prosecutor demanding a written statement by reciting the substance of the accused's conduct encompassed by the charge and whether the People intend to prove that the accused acted as principal or accomplice or both. The prosecutor is not required to include in the bill of particulars matters of evidence relating to how the People intend to prove the elements of the offense charged or how the People intend to prove any item of factual information included in the bill of particulars. THIS IS SIMPLY INTENDED TO CLARIFY THE INDICTMENT NOT DISCOVERY DEVICE.

Pursuant CPL §200.95 the request for a bill of particulars is filed without leave of the court within 30 days of arraignment; within 15 days of service, the prosecutor must reply.

NOTE: Normally, the prosecutor conforms to this request by simply referring to the previously filed complaint if said complaint contains skeletal factual allegations, providing date/time and location of the incident and whether the defendant acted alone or with others.

NOTE: The Prosecutor is generally allowed to amend it's "bill of particulars" as long as it does not change the theory of the case and/or prejudice the defendant. ***See People v. Wright, 785 N.Y.S.2d 809 (3d Dept. 2004); People v. West 708 N.Y.S.2d 478 (3d Dept. 2000); People v. Jarvis, 626 N.Y.S.2d 832 (2d Dept. 1995).***

E. C.P.L. § 210.20 PRETRIAL DISMISSAL MOTIONS-FELONIES

A motion to dismiss an indictment or a count thereof can be made on the following grounds:

i. **The indictment or count is defective pursuant to CPL § 210.25 because it does not substantially conform to CPL article 200 or because on its face the court is without jurisdiction or the statute defining the offense is unconstitutional.**

ii. **The evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser-included offense. See, CPL § 210.30, CPL § 300.50.**

iii. **The grand jury proceeding was defective within the meaning of CPL § 210.45 because it was illegally constituted or fewer than 16 grand jurors were present or fewer than 12 voted or the defendant was deprived of his or her right to appear or the integrity of the proceeding was impaired thereby prejudicing the defendant.**

iv. **The accused has immunity with respect to the offense charged. See, CPL § 50.20, 190.40**

v. **The prosecution is barred by reason of a previous prosecution. See, CPL CPL § 40.20.**

vi. **The prosecution is barred by the statute of limitations. See, CPL § 30.10**

vii. **The accused has been denied the right to a speedy trial (this motion may be filed at any time prior to the commencement of trial). See, CPL § 30.30**

viii. **Dismissal is required in the interest of justice. See, CPL § 210.40**

F. C.P.L. § 240.20(1)(a)-(k) DEFENSE DEMAND TO PRODUCE

This is written notice served by and on a party in a criminal action, without leave of court. See, CPL§ 240.10. The prosecution is entitled to reciprocal discovery on demand. See, CPL § 240.30. This section requires the prosecutor to make available to defense counsel the following items:

i. **Written, recorded or oral statements of an accused or co-accused, other than those statements made in the course of the criminal transaction, or made to public law enforcement officials or to others acting on behalf of public law enforcement officials.**

ii. **A transcript of the accused's or co-accused's grand jury testimony.**

iii. **Any written report concerning physical or mental examination, or scientific test or experiment.**

iv. **Any photograph or drawing relating to the criminal action or proceeding.**

v. **Any photograph or photocopy or reproduction made pursuant to PL § 450.10 prior to the release of the property, whether or not the People intend to introduce that property or the photograph at trial.**

vi. **Any property obtained from the accused or co-accused to be tried jointly.**

vii. **Any tapes that the prosecutor intends to introduce at trial.**

viii. **Anything required to be disclosed by the U.S. or N.Y. Constitutions (<u>Brady</u> material, etc.).**

ix. **The approximate date, time and place of the offense and of the accused's arrest.**

x. **The time and manner of required notice for illegal computer prosecutions. See, PL § 156.05, 156.10.**

xi. **Calibration for other testing of instruments in vehicle and traffic prosecutions.**

G. <u>C.P.L. § 240.30 DISCOVERY DEMAND BY PROSECUTOR</u>

i. **Upon demand by the prosecutor, a defendant shall disclose and make available for inspection and/or copy any written report or document concerning a medical or scientific test that was made by or at the direction of the defendant IF the defendant intends to introduce the report or document at trial or if the defendant has filed notice of intent to proffer psychiatric evidence and such report relates thereto AND**

any photograph, drawing, tape or electronic recording which the defendant intends to introduce at trial.

NOTE: This only applies to items within the defendant's possession and the defendant must make a good faith effort to make it available when it is not in his/her possession.

H. <u>C.P.L. § 240.40 DISCOVERY UPON COURT ORDER</u>

In addition to the demand to produce filed by the accused, the court may order the People to reply to an accused's discovery request upon a showing by the accused that the information or property is material to the preparation of the defense and that the request is reasonable. CPL § 240.40.

Upon the motion of the prosecutor, the court may, among other things, require the accused to:

i. appear in a lineup;

ii. speak for identification purposes;

iii. submit to fingerprint analysis;

iv. pose for photographs not involving reenactment of an event;

v. reasonably provide for the taking of his blood, hair, or other materials;

vi. provide handwriting exemplars; and

vii. submit to reasonable medical inspection. See, CPL § 240.40(2).

Upon motion of either party, the court may issue a protective order limiting discovery pursuant to CPL § 240.50. Pursuant to CPL § 240.60 both defense counsel and the prosecutor have a continuing duty to disclose.

I. C.P.L. § 240.45 – ROSARIO MATERIAL

At trial, the district attorney is obliged to turn over recorded statements of the People's witnesses to the defense. The recorded statements are commonly referred to as "Rosario material." People v. Rosario, 213 N.Y.S.2d 448, cert. denied, 368 U.S. 866 (1961).

***Rosario* is now codified under C.P.L. Section 240.45 which requires that after the jury has been sworn and prior to the prosecutor's opening statement or in a bench trial before the submission of evidence, the prosecutor must make available any written or recorded statement by a person it intends to call as a witness at trial and which relates to the subject matter of the witness testimony.**

Under this rule the district attorney must turn over prior recorded statements that are in the possession of either the district attorney or a law enforcement agency or any other entity that is under the "control" of the district attorney. The Court of Appeals has restricted the definition of entities under the "control" of the district attorney, so that production of prior recorded statements held, for example, by the Department of Motor Vehicles need not be obtained by the district attorney and turned over to the accused. People v. Flynn, 581 N.Y.S.2d 160 (1992). Similarly, a medical examiner's notes are not discoverable as Rosario material. People v. Washington, 630 N.Y.S.2d 693 (1995). The Court of Appeals ruled that the medical examiner's office is not a law enforcement agency and its records are not under the control of the district attorney; nor are witness statements made during an

accused's prison disciplinary proceeding deemed Rosario material. People v. Howard, 641 N.Y.S.2d 222 (1996).

However, Rosario material can consist of police complaint forms and police officer memo books (People v. Ranghelle, 69 N.Y.2d 56 (1986)), previously recorded statements of the prosecution's witnesses (People v. D'Amico, 538 N.Y.S.2d 965 (4th Dep't 1989)), notes made by the trial assistant and police forms prepared while interviewing the prosecution witness (People v. Jones, 523 N.Y.S.2d 53 (1987)).

Formerly, where the prosecution failed to disclose Rosario material even though it was in their possession, this failure to disclose was per se reversible error that required a new trial. People v. Jones, 523 N.Y.S.2d 53 (1987). This was known as the Ranghelle rule, after the Court of Appeals case that established the rule. People v. Ranghelle, 69 N.Y.2d 56 (1986).

After February 1, 2001, the prosecution's failure to turn over Rosario material no longer will lead to per se reversal. Peter Preiser, McKinney's Practice Commentary, CPL § 240.75 (2002). Reversal now will occur only if counsel shows "a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding." CPL § 240.75.

J. C.P.L. § 200.40 MOTION FOR A SEPARATE TRIAL OR JOINDER OF ACCUSED

The accused or the People may move within the 45-day motion period that one accused be tried separately from another, upon a showing of good cause. CPL § 200.40. Good cause for a severance exists where the court finds that an accused or the People will be unduly prejudiced by a joint trial. One defendant's defense may be antagonistic to his codefendant's defense.

CPL § 200.40 provides that two or more accused may be jointly charged in a single accusatory instrument if inter alia:

i. all such accused are jointly charged with every offense alleged;

ii. all offenses are based upon a common scheme or plan, and

iii. all offenses are based on the criminal transaction

iv. proof of one court would be admissible as proof of another;

v. the offenses are defined by the same or similar statutory provisions.

The decision on joinder or severance rests within the sound discretion of the court. Where it appears the accused genuinely would be prejudiced by a co-accused's antagonistic defense, severance should be granted. Where the accused moved for a

severance based on his or her desire to call the co-accused as a witness, there must be a showing of intention and a need to do so. See, People v. Owens, 291 N.Y.S.2d 313 (1968).

K. CONSOLIDATION AND SEVERANCE OF CODEFENDANTS

Generally, two codefendants charged with the same crime will be tried together, unless their defenses are antagonistic. People v. Mahboubian, 544 N.Y.S.2d 769 (1989).

L. SPEEDY TRIAL (keep track of the chargeable time in your case)

The accused has both a constitutional and statutory right to a speedy trial. The constitutional right to a speedy trial is codified in CPL § 30.20 and supplemented in CPL § 30.30.

NOTE: My general rule of thumb related to "speedy trial" is simply: WHO IS RESPONSIBLE FOR THE ADJOURNMENT/DELAY? WHO CAUSED THE ADJUOURNMENT?

- **If the prosecutor is responsible for the adjournment, then normally the time is chargeable or included in speedy trial computation**
- **If the defendant, the Court or nobody is responsible for the adjournment then the time is normally excludable from speedy trial computation.**

NOTE: Always remember, the transcript normally controls who is responsible for the adjournment, so on every instance it is important for the litigants to make the record as clear (or strategically unclear) as possible relating to the cause and purpose of the adjournment.

1. Constitutional Right

Under the constitutional right to a speedy trial (CPL § 30.20) section, the court must consider a number of factors in determining whether a delay has deprived an accused of his right. The court must consider the extent of the delay, the reason for the delay, the prejudice to the accused, the nature of the underlying charge and whether the accused is incarcerated. At a hearing on this issue the accused has the burden of proof by a preponderance of the evidence.

2. Statutory Right

Under the statutory right to a speedy trial, the People must convey their readiness for trial within the periods set forth in CPL § 30.30(1):

a. Six months from commencement of the criminal action where the highest charge is a felony. Six months means calendar months with excludable periods noted below.

b. Ninety days from commencement of the criminal action where the highest charge is a class A misdemeanor.

c. Sixty days from commencement of the criminal action where the highest charge is a class B misdemeanor.

d. Thirty days from the commencement of the criminal action where the accused is charged with a violation.

In announcing their readiness, the People must communicate their present readiness to defense counsel. Communication of readiness requires either a statement of readiness in open court or written notice of readiness to the court and defense counsel. Where the statement is made in court and defense counsel is not present, the prosecutor must notify defense counsel in writing of his or her readiness. People v. Kendzia, 486 N.Y.S.2d 888 (1985). A statement that a prosecutor will be ready on a future date is insufficient notice. The announcement of readiness cannot be made in superior court until after the case appears on the superior court calendar for arraignment. Therefore, the district attorney cannot announce "ready" if the case has been voted by the grand jury but has not yet appeared on the calendar for arraignment on the indictment.

The issue of whether post-readiness could be charged against the People was addressed in People v. Anderson, 498 N.Y.S.2d 119 (1985). Under Anderson, the time period charged to the People after they have answered ready for trial is added to the time period charged to them prior to their readiness.

3. Filing the Motion

A motion to dismiss on speedy trial grounds must be in writing, pursuant to CPL § 210.45 and filed before the trial is commenced or a plea of guilty is entered.[1] An accused meets his or her burden of going forward under CPL § 30.30 by showing that the People did not answer ready within the applicable time period. The People then have the burden to show that certain time periods are excludable from the calculation.

[1] **Note that on very few occasions, an oral motion will be granted when it can be clearly shown that the statutory period has clearly elapsed. In this instance, defense counsel should make the oral motion, indicate how the 30.30 clock has clearly expired and then strategically consent to "stay sealing for 30 days".**

NOTE: It is a good practice to include the transcripts of the court dates that support your position related to the dismissal. Failure to do so may result in significant delay of the decision of your motion AND/OR failure of your motion.

4. Excludable Time Periods

Pursuant to CPL § 30.30(4), in computing the time within which the People must be ready for trial, the following periods must generally be excluded with limited exceptions:

a. Delay resulting from pretrial motions, appeals, trial of the accused on the other charges, periods where the accused is incompetent to stand trial and the period during which the court is deciding these issues.

b. Adjournments granted on consent of or at the request of the accused. Defense counsel's mere failure to object to the adjournment does not constitute consent.

c. The period of delay resulting from the accused's absence or unavailability where his or her presence cannot be known or secured by due diligence.

d. The period of delay when the accused has either escaped from custody or has failed to appear when required after having been released from jail provided the accused is not in jail on another matter.

e. Delay resulting from joinder of the accused with a co-accused where there is no good cause for a severance.

f. Delay resulting from detention of the accused in another jurisdiction.

g. Where the accused is without counsel.

h. Delays occasioned by exceptional circumstances.

i. The period during which an action has been adjourned in contemplation of dismissal.

j. The period prior to the accused's actual appearance for arraignment, in a situation in which the accused has been directed to appear by the district attorney, pursuant to CPL § 120.20(3) or 210.10(3).

k. The period during which a family offense is before a family court until an accusatory instrument or indictment is filed against the accused alleging a crime constituting a family offense. CPL § 530.11.

5. Misdemeanor Conversion

An accused in a misdemeanor criminal case is entitled to be prosecuted by an Information. People v. Weinberg, 358 N.Y.S.2d 357 (1974). The People cannot be ready for trial unless the complaint has been so converted to an Information. People v. Colon, 466 N.Y.S.2d 319 (1983). Prior to conversion, any adjournments consented to or requested by counsel will be excluded from speedy trial calculations. People v. Worley, 498 N.Y.S.2d 116 (1985). Where one count of the instrument has been converted and the other has not, courts have ruled that each count stands separately under CPL § 30.30. People v. Jackson, 480 N.Y.S.2d 281 (Crim. Ct., Kings Co. 1984).

6. Pre Indictment Delay

While a felony case is pending in criminal court, the entire period is charged to the People, unless the indictment was impeded or prevented by the accused's actions. See, People v. Thill, 427 N.Y.S.2d 125 (4th Dep't 1980), rev'd, 438 N.Y.S.2d 297 (1981).

When the accused is absent or unavailable and the People have adopted a policy of non-indictment, any pre-indictment delay is deemed to result from the accused's actions. People v. Bratton, 491 N.Y.S.2d 623 (1985).

NOTE: If the defendant consents to any Pre Indictment Delay, said time is not includable pursuant to 30.30

7. Post Indictment Delay

The period from the return of the indictment up to the arraignment is generally not excludable. People v. Correa, 569 N.Y.S.2d 601 (1991). Defense counsel's failure to object to an adjournment does not constitute consent to the adjournment. People v. Liotta, 580 N.Y.S.2d 184 (1992).

8. Illusory Adjournments

A statement of readiness on a facially insufficient instrument is illusory and can not serve to toll a statutory speedy trial period. *People v. Reyes, 24 Misc 3d 51 (App Term 2d Dept 2009); People v. Armenta, 27 Misc 3d 1218 (Crim Ct. Kings County 2010)*.

Additionally, where the People file an off-calendar certificate of readiness and subsequently declare at the next court appearance that they are not ready, the defendant can challenge the propriety of the declaration AND the People must demonstrate that some exceptional fact or circumstance arose after the declaration of readiness so as to render then presently not ready for trial or the time between the filing of the off-calendar certificate and the following appearance will be charged to the People.

- **Basically, if the People file a Statement of Readiness and are not ready on the next court date without a very good reason (or at least a judicially acceptable reason), the People may (or should) be charged for the entire adjournment period.**
- ***People v. Sibblies 22 NY3d 1174 (2014)*. People's off calendar statement of readiness was illusory when they were subsequently not ready.**
- ***See also, People v. Guirola, 2016 NY Slip Opinion 26049 (2nd Dept.)***

M. MOTIONS TO SUPPRESS EVIDENCE: CPL Section 710

NOTE: AS A GENERAL RULE, THESE MOTIONS MUST BE IN WRITING

Motions to suppress (with suppression hearings) can serve several purposes:

- **Obtain *Rosario* material that you may not otherwise receive prior to hearings and trial;**
- **Cross examine witnesses prior to trial;**
- **Obtain impeachment material prior to trial;**
- **Provide the accused the opportunity to actually hear some of the evidence prior to trial;**
- **Prosecution: obtain legal authority to enter certain evidence into trial.**

When litigating motions to suppress, the litigant should break down the facts into component parts. The litigants should identify and focus on the goal of the particular hearing.

If you're a prosecutor, you should be focusing on establishing the legality of the obtained evidence in the most efficient, succinct method possible in order to not provide the defense more information than necessary before trial.

If you are a defense attorney, you should be focusing on establishing the illegality of the obtained evidence, seeking to obtain impeachment material, establishing a record for appeal and fishing as much as possible.

1. MOTION TO SUPPRESS STATEMENTS

When drafting a motion, sworn allegations of fact are not required.

When the People intend to offer at a trial evidence of a statement made by the accused to a public servant, they must serve notice of their intention within 15 days of the accused's arraignment. CPL § 710.30. A failure to serve timely notice requires preclusion of the statements unless the People show good cause for such failure. People v. O'Doherty, 522 N.Y.S.2d 498 (1987). The appropriate application for lack of timely CPL § 710.30 notice is a motion to preclude. People v. Bernier, 541 N.Y.S.2d 760 (1989). The People may not appeal a preclusion order granted under CPL § 710.20. People v. Laing, 581 N.Y.S.2d 149 (1992). A suppression motion on the merits can cure the untimely §710.30 notice. CPL § 710.30(3).

When notice has been served, the accused may move for suppression—a Huntley hearing— in his or her omnibus motion. People v. Huntley, 255 N.Y.S.2d 838 (1965). In a Huntley hearing, the People have the burden of proving the voluntariness of the statement beyond a reasonable doubt. A statement will be suppressed if it was taken in violation of the accused's constitutional or *Miranda* Rights.

> **NOTE: There is considerable recent litigation related to whether an accused can be lied to during interrogation. Please make a note of that as well during any interviews of your client or law enforcement witness.**

Notice under CPL §710.30 need not be given to the accused regarding the accused's answers to routine pedigree booking questions. People v. Rodney, 624 N.Y.S.2d 95 (1995). However, the People must give notice and a hearing held, even if it is alleged that the statement was spontaneous. People v. Chase, 626 N.Y.S.2d 721 (1995).

NOTE: If after reviewing the discovery and interviewing the client, the litigant believes that law enforcement secured a statement (confession or otherwise) from the accused, the litigant should decide if that statement was obtained via some form of law enforcement misconduct: coercion, *Miranda* violation, duress, severe treachery, unlawful threats, etc:

- **Was there custody AND was there questioning**
- **Where was the custody and questioning**
- **How long was the questioning**
- **Why did he answer the questions**
- **What type of questions were asked**
- **Age and education of the accused**
- **When was *Miranda* warnings read? How many times?**
- **Responses to *Miranda* warnings**
- **When, where and who wrote the statement**
- **How many times was the statement written**

NOTE: Litigating statement hearings often times involve strategic maneuvering. For example, a prosecutor may not want to use a particular statement because it

may open the door for the defense. On the other hand, a defendant may not contest the legality of a statement if the statement by the accused helps establish a defense.

2. MOTION TO SUPPRESS EVIDENCE OF AN IDENTIFICATION

When drafting a motion, sworn allegations of fact are not required.

Eyewitness identification may be fallible for three reasons: poor encoding in the memory at the time of initial perception, subsequent faulty memory and suggestive police identification procedures. See "Visual Expert Human Factors," available at http://www.visualexpert.com. The first two factors are explored at trial. Subject to the discretion of the court, the defense may do this by introducing expert testimony as to why eyewitnesses' testimony may be unreliable. See, People v. Lee, 726 N.Y.S.2d 361 (2001). The third, suggestive police identification procedures, on the other hand is subject to exploration at a pre-trial hearing. This hearing is brought on by a motion. United States v. Wade, 388 U.S. 218 (1967).

As such, if after speaking to their client and reviewing the discovery, a litigant believes that there was some police arranged identification procedure of any kind, the litigant should file a motion to suppress that police arranged procedure.

Such procedures include:

- **Show up: where the police bring the accused to where the victim is located and the victim identifies the accused;**
- **Line up: where the accused is placed in a room with other people and the victim is asked to identify the person who allegedly committed the crime;**
- **Photo array: where the victim is asked to view a group of photos and to identify the person who allegedly committed the crime; and**
- **Single photo ID: where the victim is shown one photo and selects the accused.**

Each procedure should be factually analyzed (with follow up) from start to finish by defense and prosecutor:

- **where did identification take place;**
- **time identification took place;**
- **delay between identification and incident;**
- **how many times the identification took place;**
- **who else was present when identification took place;**
- **what type of lineup conducted: double blind, blind etc.;**
- **how long after alleged crime did identification take place;**
- **age, height, weight, race, ethnicity of fillers;**
- **age, height, weight, race of description of suspect;**
- **where did fillers or photo(s) come from;**
- **questions asked of the identifier prior to identification;**

- **does identifier know accused;**
- **had identifier seen accused before incident; etc.**

3. MOTION TO SUPPRESS PHYSICAL EVIDENCE

When drafting a motion, sworn allegations of fact ARE REQUIRED.

Any evidence recovered by law enforcement to be used against the accused may be subject to a "motion to suppress" if there is a belief that the evidence was obtained illegally.

Warrantless Searches (those searches that occur without an actual search warrant) depend on whether there was a legal basis for the search other than an actual search warrant. Other legal basis may include: consent, exigent circumstances, search incident to lawful arrest, probable cause, plain view, furtive movements etc…

Note, however, the accused must have "standing" to suppress evidence seized. If the accused does not have "standing" then he has no right to suppress the evidence. Presence in the area where an item was seized does not automatically grant an accused standing. However, discarding an item does not automatically mean the accused does not have standing.

Moreover, in order to file a "motion to suppress physical evidence" the accused must articulate specific facts that grant him standing AND why the challenged evidence must be suppressed or hearing granted. Failure to do so will normally result in the Court denying any application for a hearing to determine the admissibility of seized evidence.

Rules governing warrantless arrests are set forth in CPL article 140. This article covers arrest by police officers, peace officers and citizens.

Pursuant to CPL § 140.50, a police officer may stop a person when he or she reasonably suspects that such person is committing, has committed or is about to commit a felony or a misdemeanor, and may demand the person's name and address, and an explanation of his or her conduct. When stopping a person under such circumstances, the police officer may search such a person for a deadly weapon or instrument when the officer reasonably suspects he or she is in danger of physical injury. People v. Torres, 74 N.Y.S.2d 796 (1989).

MOTIONS IN LIMINE

WHAT IS A MOTION IN LIMINE:

A PRETRIAL OR TRIAL MOTION THAT ATTEMPTS TO PREVENT OR ALLOW THE ADMISSION OF CERTAIN EVIDENCE BEFORE THE JURY.

PURPOSE OF A MOTION IN LIMINE:

TO OBTAIN A RULING FROM THE COURT TO PREVENT OR ALLOW THE FACT FINDER TO HEAR CERTAIN

- You want to avoid the scenario where you are on trial and assume certain evidence will (or won't) be admitted and then the opposite occurs.

WHEN IS A MOTION IN LIMINE FILED:

PRIOR TO TRIAL

WHEN YOU THINK OF AN ISSUE DURING TRIAL RELATING TO EVIDENCE NOT YET INTRODUCED

KNOW YOUR JUDGE:

YOU SHOULD KNOW YOUR JUDGE BEFORE YOU FILE MOTIONS IN LIMINE

- Knowing your adversary is equally valuable

JUDGE MAY HAVE RULED ON THIS ISSUE IN THE PAST

THOROUGHLY RESEARCH ISSUE BEFORE FILING MOTION:

BURDENS OF PROOF FOR YOUR ISSUE

CASES THAT SUPPORT OR HURT YOUR ISSUE

ANALOGIES AND DISTINGUISHING CASES

STATUTES THAT APPLY

HAVE AN OBJECTIVE FOR YOUR MOTION:

- This requires complete knowledge of your case and your adversary's case in order to anticipate what's going to happen at the trial. Without this knowledge you cannot make or anticipate an effective *motion in limine.*

PRECLUDE CERTAIN EVIDENCE

ADMIT CERTAIN EVIDENCE

PRESERVE RECORD

DISCOVERY MECHANISM

- Better be done for a lawful reason and secondarily as a **PRETEXT** of discovery.

EXAMPLES:

What do you want the jury/judge to know (or not know) about your (or your adversary's) case/witness

What do you know your adversary has but you do not believe is legally admissible (and why)?

What do you want (or don't want) the jury to know about your (or your adversary's) witness?

- Prior Crimes;
- Prior Misconduct;
- Prior Statements;
- Social Media Entries;
- Bank Account Info;
- Tax info;
- Income info;
- Sexual Proclivities;
- Lack of Sexual Proclivities;
- Dating habits;
- TV or Movies Watched;
- Evidence that will connect your dots (hard one);
- Photographs; etc.

HAVE A REMEDY AND HAVE SOME LEGAL, POLICY OR COMMON SENSE SUPPORT FOR YOUR REMEDY:

WHAT EXACTLY DO YOU WANT AND WHY IS IT APPROPRIATE?

DOES YOUR MOTION "SPEAK FOR ITSELF":

DO YOU NEED TO ORALLY SUPPORT IT

CAN A DECISION BE MADE BASED UPON YOUR MOTION

DOES YOUR MOTION PASS THE "LAUGH TEST":

IF YOU OR YOUR COLLEAGUE LAUGH (OR SLIGHTLY SMIRK) AT YOUR ISSUE, DON'T FILE IT. THE JUDGE WILL LAUGH TOO AND YOU WILL LOSE CREDIBILITY FOR LATER ARGUMENTS.

IF YOUR MOTION IN LIMINE IS DENIED:

KEEP IT IN YOUR BACK POCKET

WAIT FOR YOUR ADVERSARY TO OPEN THE DOOR DURING TRIAL