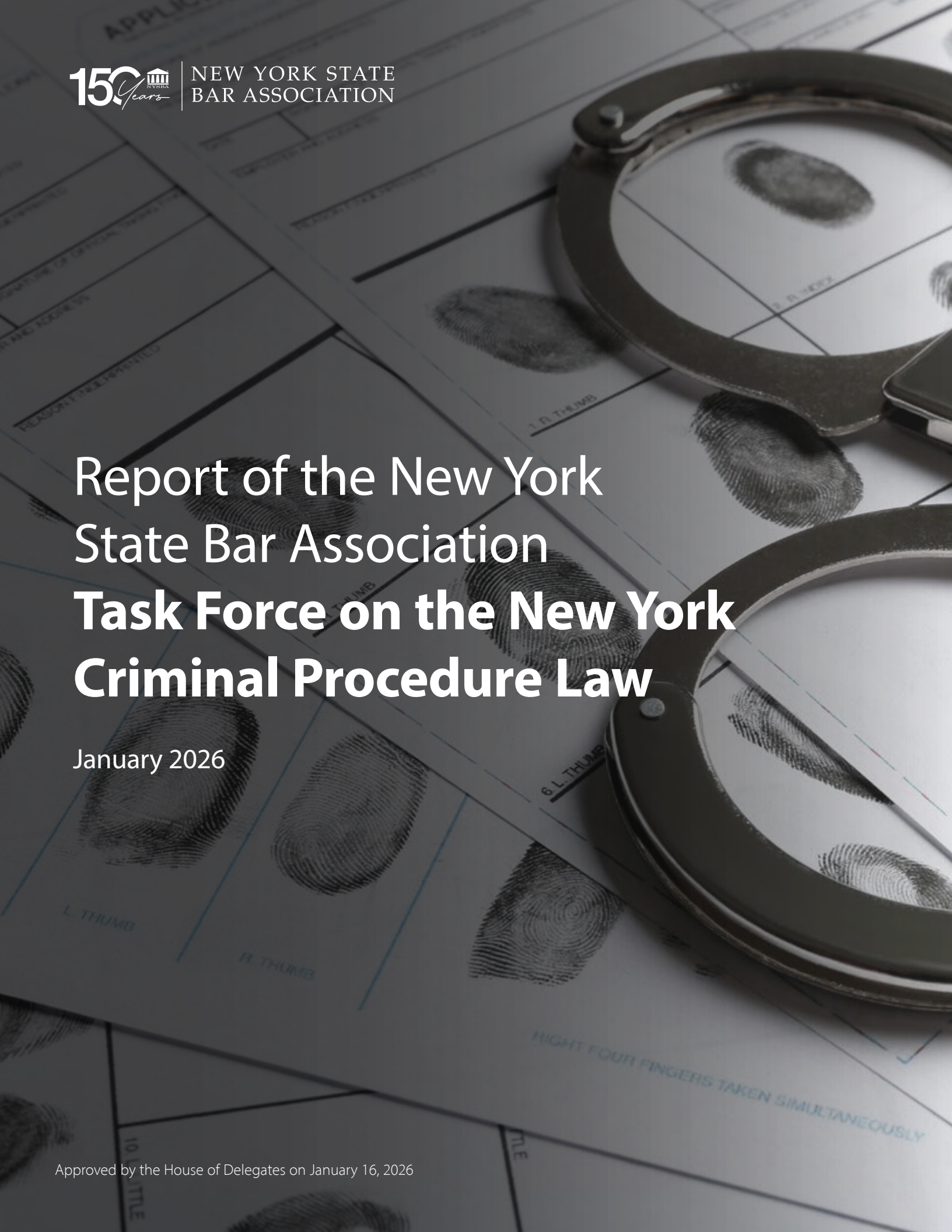
NEW YORK STATE BAR ASSOCIATION



Report of the New York State Bar Association **Task Force on the New York Criminal Procedure Law**

January 2026

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INTRODUCTION

The New York State Bar Association's Task Force on the New York Criminal Procedure Law ("Task Force") was appointed in the Summer of 2024 by President Domenick Napoletano to review whether provisions of the Criminal Procedure Law are outdated, inconsistent with practice, or in need of revision either by inclusion of governing interpretations of decisional law, by updating a provision to accord with current and sound practice, or by amending or adding provisions to allow for a better understanding and practice of the law. Most significantly, the Task Force will review the law considering what has been learned about criminal justice over the last 50 years in order to improve the fairness of the law's application, minimize wrongful convictions and provide fair avenues for their correction.

A broad range of representatives from the criminal justice system were appointed as members of the Task Force to provide a balance of perspectives on these issues. They include attorneys who practice in upstate areas of New York State as well as New York City and the greater metropolitan area. Members include criminal defense attorneys, current and former prosecutors, current and former public defenders, and current and former members of the judiciary. Several members of the Task Force are active in the NYSBA Criminal Justice Section and Committee on Mandated Representation.

Because the Task Force review of the entire CPL will be considerable, it will make periodic reports to the Executive Committee. This report provides some initial recommendations. More will follow.

Some recommendations require in-depth study and the Task Force will accordingly create subcommittees to study them in depth. The Task Force created three subcommittees to examine certain areas of the law:

- Subcommittee on whether *People v. LaFontaine* and its progeny require legislative action.

  Chaired by Hon. Barry Kamins

- Subcommittee on updating Criminal Procedure Law

  440.10 Chaired by Hon. Daniel Conviser

- Subcommittee on Oral Motions

  Chaired by Hon. Mark Dwyer

We hope that this report educates the public and provides a resource to legislators and policymakers as they seek to improve fairness in the administration of criminal justice.

EXECUTIVE SUMMARY

In accord with its Mission, the Criminal Procedure Law Task Force has made the following recommendations designed to facilitate procedures in the practice of criminal law:

- The Criminal Procedure Law (CPL) presently does not unequivocally state that the defendant is entitled to a copy of the pre-sentence report. The Task Force recommends an amendment that unequivocally authorizes the defendant to receive the report, subject to court ordered redactions of confidential information.

- Unlike other jurisdictions, New York prohibits providing a deliberating jury with a copy of the court's final instructions on the law. Ironically, New York authorizes a court to allow a jury to take notes during the court's oral presentation of its final instructions. Notes of course may be incomplete or in error. The Task Force recommends that a court, in its discretion, after providing the parties with an opportunity to be heard, be permitted to provide a deliberating jury with a written copy of the court's complete final instructions. We depend on the jury to make the right decision; we should be willing to provide them with a written copy of the law by which that decision must be made.

- In the absence of a statutory procedure to challenge the effectiveness of appellate counsel, the Court of Appeals allowed for the common law writ of error coram nobis to serve as the vehicle for the challenge. The Task Force recommends, in accord with the Court of Appeals decision, a statutory procedure to challenge the effectiveness of appellate counsel.

- Under the CPL, it is possible (and it has occurred) that New York State will have territorial jurisdiction over an offense but no county will have jurisdiction to prosecute the offense. The Task Force recommends a statutory remedy — allowing the county of Albany or a county with a "reasonable nexus" to the offender or conduct to have jurisdiction to prosecute the crime.

- The Task Force recommends that a defendant, with the permission of the court and the consent of the people, be authorized to plead guilty to a lesser included offense notwithstanding a statutory restriction on a plea to the lesser included offense when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice.

- A person charged with a felony may "consent" to be prosecuted by a Superior Court Information (SCI) in lieu of presentation of the case to the Grand Jury and the filing of an ensuing Indictment. In practice, a defendant will consent to be prosecuted by a SCI as part of a plea bargain. The Task Force recommends that the statutory

authorization for when a SCI may issue, with the consent of the defendant, be expanded principally by codifying decisions of the Court of Appeals.

- In accord with Chief Judge Wilson's recommendation expressed in one of his dissenting opinions, the Task Force recommends the enactment of a statutory standard that is better suited to determining whether there has been discrimination in the selection of a juror(s), namely: Whether, in the view of a reasonable person, the race or other cognizable class of a juror was a factor in the exercise of the peremptory challenge.

- The CPL restricts the information that may be placed on a verdict sheet that would assist a jury in distinguishing counts to when the indictment counts charge offenses set forth in the "same article of law." The Task Force recommends the repeal of that restriction, allowing the verdict sheet to contain for each count the relevant date, name of the complaining witness, the order in which the counts should be considered (as the Court of Appeals has approved), and other information that may be necessary to distinguish the counts for the assistance of the jury.

- The Task Force recommends that CPL 470.15(1) be amended to authorize an appellate court to review any question of law or issue of fact raised by the parties to the criminal court regarding that error or defect. The purpose of the amendment is to abrogate *People v. Lafontaine*, 92 NY 2d 470 (1988) and its progeny, wherein the Court of Appeals has held that CPL 470.15 (1) prevents an intermediate appellate court from affirming a judgment where the court below made the right ruling but did so for the wrong reason. Under the "*LaFontaine* rule", when a trial court does not make a ruling on an alternative legal issue and decide it adversely to the defendant-appellant, the appellate court is not authorized to affirm on that ground.

- The Task Force recommends that the definition of "incapacitated person" in CPL 730.10(1) be amended to include the Federal Constitution's Due Process requirement for a defendant to be found mentally fit to proceed.

- The Task Force recommends that the multiple felony offender statutes be amended to uniformly provide that the ten-year "look-back" period is calculated from the date of the sentence of the prior felony, not the date of the commission of the prior felony.

- The Task Force endorses pending legislation which amends CPL 190.30(8) to allow a business record to be introduced in a grand jury proceeding by an affidavit of a person who can attest to the foundation requirements; and endorses pending legislation which amends CPLR 4518 (Business Records) to include a foundation requirement for the admission of a business record which was dictated by the Court of Appeals in two cases, one decided 95 years ago and the other 70 years ago.

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- AMEND THE MULTIPLE FELONY OFFENDER STATUTES TO UNIFORMLY PROVIDE THAT THE TEN-YEAR "LOOK-BACK" PERIOD IS CALCULATED FROM THE DATE OF THE SENTENCE OF THE PRIOR FELONY, NOT THE DATE OF THE COMMISSION OF THE PRIOR FELONY

- ENDORSE PENDING LEGISLATION WHICH AMENDS CPL 190.30(8) TO ALLOW A BUSINESS RECORD TO BE INTRODUCED IN A GRAND JURY PROCEEDING BY AN AFFIDAVIT OF A PERSON WHO CAN ATTEST TO THE FOUNDATION REQUIREMENTS, AND ENDORSE PENDING LEGISLATION WHICH AMENDS CPLR 4518 (BUSINESS RECORDS) TO INCLUDE A FOUNDATION REQUIREMENT FOR THE ADMISSION OF A BUSINESS RECORD

AUTHORIZE PROVIDING A PRESENTENCE REPORT TO A DEFENDANT

Recommendation: That CPL 390.50(2)(a) be amended to unequivocally state that the defendant is entitled to a copy of a pre-sentence report, subject to court ordered redactions of confidential information.

CPL 390.50(2)(a) in part presently reads:

> "Not less than one court day prior to sentencing . . . the presentence report or memorandum shall be made available by the court for examination and for copying by the defendant's attorney, **the defendant himself, if he has no attorney,** and the prosecutor."

That language, while requiring the presentence report to be made available to the defendant's attorney, arguably does not require that the presentence report be made available to a defendant — unless the defendant is proceeding pro se.

A defendant's receipt of the presentence report should not depend on whether the defendant is proceeding with or without counsel. In the words of the Court of Appeals:

> "[F]undamental fairness and indeed the appearance of fairness may best be accomplished by disclosure of presentence reports." *People v Perry,* 36 N.Y.2d 114, 120 [1975].

It is time the arguable restriction on a defendant represented by counsel receiving a copy of a presentence report be clarified in favor of making it plain that the presentence report be made available to both defense counsel and a defendant, irrespective of whether the defendant is proceeding with or without counsel.

The statute would continue to permit a court in its discretion to "except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure of which would not be in the interest of justice."

AUTHORIZE PROVIDING A WRITTEN COPY OF A COURT'S FINAL INSTRUCTIONS ON THE LAW TO A DELIBERATING JURY

Recommendation: A court, in its discretion, after providing the parties with an opportunity to be heard, should be permitted to provide a deliberating jury with a written copy of the court's complete final instructions.

At present, a court may not provide a written copy of it final instructions to the jury, without the consent of the defendant. *People v. Johnson,* 81 N.Y.2d 980, 981-82 (1993).

CPL 310.30 allows for the giving of the text of a statute, but only [1] upon request of the deliberating jury for further instruction on the statute, and [2] with the consent of the parties. That statute reads: "With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper." Providing the statute over a defendant's objection is error "and the error cannot be deemed harmless." *People v. Sanders,* 70 N.Y.2d 837, 838 (1987).

Paradoxically, the court has the discretion to allow jurors to take notes (and perhaps a juror(s) may be able to take verbatim notes) during the oral presentation of instructions. *People v Tucker,* 77 N.Y.2d 861 (1991). If the notes are not the verbatim instruction, errors are possible.

Needless to say, final instructions, particularly involving complex statutory crimes, can be difficult for a jury to comprehend and retain in memory only from an oral presentation. It is fairly commonplace for a deliberating jury to request a repeat of some instruction(s). Mistaken notes or memory with respect to the applicable law may harm either party; that is simply not a fair way to achieve justice in a trial by jury.

To avoid undue emphasis on a portion of the court's final instructions, the court may, in its discretion, provide only a complete copy of the final instructions.

A written charge that may be submitted to a jury should initially be available to the parties; the parties should have an opportunity to be heard on whether the written charge should be provided the jury, as well as an opportunity to register any objection or submit a request for a particular jury instruction [CPL 300.10(5)].

Further, to avoid misuse of a written copy of the court's final instructions, the jury should be instructed that the written copy of the instructions are intended only as an aid in remembering the court's oral instructions; that the oral instructions given during the trial and at the end of the case are the instructions which the jurors must follow; that any perceived differences between the oral and written instructions must be reported to the court; and that if the jury perceive any ambiguity in the meaning of the instructions, or have any question on the meaning of an instruction or simply believe they need further guidance on the law, they must advise the court. *See* CJI2d [NY], General Applicability, Written Instructions to Jury.

PROVIDE A STATUTORY PROCEDURE TO CHALLENGE THE EFFECTIVENESS OF APPELLATE COUNSEL

Recommendation: Codify a motion to an intermediate appellate court to vacate an affirmance of a conviction on the grounds of ineffective appellate counsel.

In People v Bachert, 69 NY2d 593, 596 [1987], the Court declared: "The right to effective assistance of counsel on appeal is settled under both the Federal and State Constitutions." Thus, *Bachert* held that: "Until such time as a proper statutory remedy is enacted, an appellant is entitled to file a motion for a writ of error coram nobis, on the ground of ineffective assistance of appellate counsel, in the appellate tribunal which considered the primary appeal in which counsel was allegedly deficient." It is time for a "proper statutory remedy."

Thus, the recommendation is to enact a statute which includes the following principles:

1. After a determination of an appeal taken pursuant to CPL article 450, a defendant may move in the appellate court to vacate the affirmance of an appeal from a judgment on the grounds that the defendant's appellate counsel provided ineffective assistance. Upon granting the motion, the court must again determine the appeal from the judgment pursuant to the provisions of CPL article 450.

2. After an appellate court has denied a motion pursuant to subdivision (1), a successive application advancing the same grounds may be filed with the appellate court provided a judge of the court has filed a certificate granting the applicant leave to file the successive application; except if the defendant made the prior application pro se, a successive application by counsel on behalf of the defendant may be filed.

3. The appellate court may promulgate rules providing for the orderly filing, processing, and determination of an application made pursuant to this section, including, but not limited to, ordering a fact-finding hearing.

At present, CPL 450.90(1) already provides for an appeal to the Court of Appeals "from an order [of the intermediate appellate court] granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance."

The Advisory Committee on Criminal Law & Procedure to the Chief Administrative Judge has made a similar recommendation, noting:

> This measure would promote the appropriate use of ineffective assistance of counsel claims by limiting the motion to a single claim as a matter of right. Second or subsequent motions would still be permitted where the defendant first obtained leave of a judge of the intermediate appellate court on a showing of "good cause." The measure recognizes, however, the potential for injustice that could result if a defendant's initial pro se claim were denied and

if the denial were used to foreclose an attorney from subsequently raising the issue. This measure therefore allows an attorney to file an initial motion attacking the effectiveness of appellate counsel regardless of the prior pro se motions made by a defendant.

On the limitation on successive applications, the Advisory Committee explained that: "defendants routinely file successive writs attacking the effectiveness of their appellate counsel. Such successive writs rarely have merit, yet without a statute expressly limiting a defendant's successive use of the writ, a defendant may bring endless successive writs. For each of these successive writs, prosecutors are required to file reply briefs and courts are required to review the often-frivolous substantive claims. The Committee believes this is a needless waste of valuable resources."

PROVIDE A COUNTY WITH JURISDICTION TO PROSECUTE AN OFFENSE WHEN UNDER CURRENT LAW NO COUNTY HAS JURISDICTION

Recommendation: Amend CPL 20.40 to establish a basis for a county to have jurisdiction to prosecute an offense when New York State has territorial jurisdiction of the offense, but statutory law does not provide a county with jurisdiction to prosecute the offense.

In *People v. Zimmerman,* 9 N.Y.3d 421 [2007], as part of an anti-trust investigation, the Attorney General agreed to an examination, under oath, of a chief executive officer of a company in the corporate headquarters in Ohio. The officer was subsequently indicted in New York County for perjury during the examination in Ohio. The Court held that New York had territorial jurisdiction to prosecute the offense but "it is lamentable that, although defendant's acts admittedly could have caused a "concrete and identifiable" injury to New York State generally, there is not a single county in the state where this prosecution could be brought given the current statutory scheme." *Id* at 430. As the Court explained:

> "in enacting CPL 20.40 to regulate the "jurisdiction" of counties, the authors of the Criminal Procedure Law did not need to be concerned with limitations on sovereign power. More specifically, they did not need to require, as a precondition to venue, a "particular effect" upon a single "county or a political subdivision or part thereof'; nor did they need to require that the defendant intend such an effect or know that it is likely to occur. But they did impose those requirements, apparently overlooking at least two possibilities: (1) a defendant's conduct might affect, or be intended or be likely to affect, the State of New York as a whole, rather than a county or some smaller unit of government; and (2) a defendant might intend an effect within the state without knowing in which county or counties the effect will occur. In these two situations, the statute leaves a gap; the State has jurisdiction, but no county does." *Id* at 429

Thus, the recommendation is that the jurisdiction of counties to prosecute an offense per CPL 20.40 be amended to add a subdivision (5) to read:

> 5. When pursuant to subdivision (2) of CPL 20.20, New York has jurisdiction of an offense even though none of the conduct constituting the offense may have occurred within New York, and a county does not have jurisdiction of the offense pursuant to the forgoing provisions of this section [CPL 20.40], the offense may be prosecuted in the county of Albany or any county with a reasonable nexus to the offender or conduct, including but not limited to, a county in which the alleged offender may have resided at any time during the performance of the conduct or thereafter; a county wherein a related inquiry or investigation was taking place at or around the time of the performance of the conduct; or a county that borders the country or state where the conduct was performed.

The Advisory Committee on Criminal Law and Procedure has recommended similar corrective legislation:

> "In order to provide a basis for jurisdiction in an appropriate county under the situation faced by the prosecution in Zimmerman, this measure would add a new paragraph (f) to CPL 20.40(2) to allow a county to exercise jurisdiction if there is a "logical nexus" between the criminal conduct and the county. By the statute's express terms, it would only operate in cases where no other basis for a county to exercise jurisdiction can be established. Therefore, it does not extend the current reach of the remaining provisions of CPL 20.40(2), and is limited solely to closing the legislative "gap" recognized by the Court of Appeals in Zimmerman."

MODIFY LIMITATIONS ON A PLEA TO A LESSER OFFENSE

Recommendation: Authorize a defendant, other than a juvenile offender, with the permission of the court and the consent of the people, to plead guilty to a lesser included offense notwithstanding a statutory restriction on a plea to the lesser included offense when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice.

CPL 220.10 and 220.30 contain restrictions on the lesser included offense for a defendant, other than an adolescent offender. (The restrictions on juvenile offenders are geared to the offenses a juvenile offender would be criminally liable for and in turn those offenses that would require removal to Family Court.)

The restrictions originated with the Rockefeller drug laws in order to prevent having defendants plea to a lesser included offense (whether warranted or not on the facts of a given case) to avoid a particular sentence for the charged crime or the limited lesser included offense.

While a prosecutor and a court may engage in varying methods to bypass the law and its intent, a prosecutor or court, while favoring a lesser plea, may not agree that the law may be bypassed or that the recommended means is authorized by law. And neither the prosecutor or the court should be required to engage in varying strategies to bypass the restrictions that are not expressly authorized.

EXPAND THE AVAILABILITY OF A SUPERIOR COURT INFORMATION PRINCIPALLY VIA COURT OF APPEALS DECISIONS

Recommendation: Codify decisional law determinations on the availability of the Superior Court Information and expand its availability.

The State Constitution [art. 1, § 6] provides that:

> "a person held for the action of a grand jury upon a charge for [a capital or infamous], *other than one punishable by death or life imprisonment,* with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel."

CPL 195.20(1), which specifies (and limits) the offenses that may be included in a Superior Court Information, reads:

> The offenses named may include any offense for which the defendant was held for action of a grand jury *[other than one punishable by death or life imprisonment]* and any offense or offenses properly joinable therewith pursuant to sections 200.20 [what offenses may be charged; joinder of offenses and consolidation of indictments] and 200.40 [joinder of defendants and consolidation of indictments against different defendants].

Court of Appeals decisions authorizing the Superior Court Information [SCI] in circumstances not presently set forth in CPL article 195 include:

> [1] Per: *People v Menchetti,* 76 NY2d 473, 474 [1990]: "because a defendant is held for the action of a Grand Jury on both the offense charged in the felony complaint as well as its lesser included offenses, a waiver of indictment by plea to a superior court information **charging only** a lesser included offense comports with the constitutional and statutory requirements and therefore that defendant's waiver of indictment was effective."
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> [2] Per: *People v* Lopez, 4 N.Y.3d 686 [2005]: In addition to a defendant being held for the action of a grand jury pursuant to CPL article 180, after an indictment is dismissed with leave to represent, a defendant is then held for the action of a grand jury and may, in lieu of representation to the Grand Jury, consent to the filing of a SCI.
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> [3] Per: *People v D'Amico,* 76 NY2d 877 [1990]: A defendant under indictment who is charged by a new felony complaint which charges a felony connected to the same offense charged in the indictment may on the new felony charge being held for the

action of the grand jury agree to waive presentation to the grand jury and consent to a superior court information.

Unsettled is whether an offense that is of a higher grade than an offense for which the defendant was held for the action of a grand jury can be included in an SCI along with an offense for which the defendant was held for the action of the grand jury. In *People v. Zanghi,* 79 N.Y.2d 815 [1991], the Court held the SCI in that case was flawed because it included a higher-grade offense without also including an offense for which the defendant was held for the action of the grand jury. In *People v Pierce,* 14 NY3d 564, 571-72 [2010], the Court distinguished *Zanghi* by noting that the SCI in *Pierce* included both an offense the defendant was held for the action of the grand jury and an offense of a higher grade. *Pierce,* however, found it unnecessary to decide whether that distinction justified the SCI in *Pierce,* given that the SCI in that case was flawed for a different reason. The Appellate Divisions have split on whether the *Pierce* scenario is sufficient to justify a SCI. *See and compare People v Hodges,* 199 A.D.3d 1015 [2d Dept 2021] [sufficient] with *People v Coss,* 178 AD3d 25, 30 [3d Dept 2019] and *People v Perkins,* 2024 NY Slip Op 04361 [1st Dept 2024] [insufficient];

CPL article 195 should be amended to include the State Constitution provision and the Court of Appeals decisions and potentially expand its application while retaining the required consent of the parties.

Thus, the provisions which should be included in CPL art. 195 (annotated for the purposes of this memorandum) would read:

(1) A person held for the action of a grand jury upon a charge of a felony, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on a superior court information filed by the district attorney. (N.Y. S. Const. art. 6 § 1).

(2) A person is held for the action of a grand jury pursuant to CPL article 180 or when an indictment of a defendant is dismissed with leave to represent to a grand jury. *(People v* Lopez, 4 N.Y.3d 686 [2005]).

(3) The offense or offenses that may be charged in a superior court information include, but are not limited to:

(a) any offense for which the defendant was held for the action of a grand jury. *(People v Menchetti,* 76 NY2d 473, 475 [1990]).

(b) any offense which is a lesser included offense of the offense for which the defendant was held for the action of the grand jury. *(Id).*

(c) any offense or offenses properly joinable therewith pursuant to CPL sections 200.20 [joinder of offenses] and 200.40 [joinder of defendants]

(CPL 195.20 [1]).

(d) any offense connected to an offense the defendant stands indicted for. *(People v D'Amico,* 76 NY2d 877 [1990]).

(e) any offense which is of a higher grade or degree of an offense for which the defendant was held for the action of a grand jury, provided the offense for which the defendant was held for the grand jury is also charged and the two offenses are joinable pursuant to CPL 200.20. *(Cf People v Pierce,* 14 NY3d 564, 571-72 [2010]).

ENACT A STATUTORY STANDARD FOR DETERMINING DISCRIMINATION IN JURY SELECTION

Recommendation: Enact a statutory standard that is better suited to determining whether there has been discrimination in the selection of a juror(s).

The NYSBA in addressing potential racial bias in the selection of jurors has explained:

> "The burden for litigants seeking to raise a *Batson* challenge is significant, and courts are hesitant to imply racial or gender bias. Indeed, `the use of race-and gender-based stereotypes in the jury-selection process seems better organized and more' systematized than ever before.' In short, *Batson* procedures employed by New York Courts do not offer enough protection against discrimination injury selection.
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> * * *
>
> "Additional legislation or court rules could target bias in questioning by allowing parties to develop records related to racial, ethnic, and gender bias, both in the substance of questions and to whom they are addressed among the potential jurors. As such, and in order to eliminate bias injury selection, the Task Force recommends:
> - The New York State Legislators should enact legislation to expand and mandate the amount of time permitted for attorney conducted voir dire.
> - Legislation should be enacted to compliment *Batson's* prohibition on racial bias in peremptory challenges."

The NYS Justice Task Force recommended the following standard:

> Whether, in the view of a reasonable person, the race of a juror was a factor in the exercise of the peremptory challenge. If the court determines that the answer is yes, then the peremptory challenge shall be denied.

Chief Judge Wilson in a dissent in People *v Wright,* 2024 NY Slip Op 03320, 2024 WL 3029951, at *18 [2024] endorsed this recommendation:

> Two years ago, the New York State Justice Task Force (the Task Force) recommended amending Criminal Procedure Law § 270.25 by adopting a "reasonable person standard" *(see Recommendations Regarding Reforms to Jury Selection in New York,* New York State Justice Task Force at 15 [Aug 2022], http://www.nyjusticetaskforce. com/pdfs/Report-on-Recommendati ons-RegardingReforms-to-Jury-S el ecti on-in-New-York.pdf).
>
> Under that standard, at *Batson* step 3, the trial court evaluates the nonmoving party's proffered reason by asking "whether, in the view of a reasonable person, the race of a juror was a factor in the exercise of the peremptory challenge. If the court determines that the answer is yes, then the peremptory challenge shall be denied" *(id).*

> Although the Task Force's recommended "reasonable person standard" does not specifically incorporate consideration of implicit bias, because it would replace the current subjective standard with an objective one, it would represent a significant improvement over our current *Batson* test because it removes the requirement of the court's evaluation of the nonmoving party's subjective intent to discriminate. Instead, the "reasonable person standard" asks the court to consider whether, from an outside person's perspective, it appears that race played any role at all, increasing the likelihood of empaneling a "jury selected by racially neutral criteria" *(People v. Childress,* 81 N.Y.2d 263, 267, 598 N.Y. S.2d 146, 614 N.E.2d 709 [1993]).
>
> Beyond the obvious virtues of relying on a test taken from an objective perspective that will be consistent from court to court and trial to trial, and of rooting out implicit biases, not just intentional ones, the use of an objective standard removes some of the stigma attached to a lawyer's failed attempt to justify a peremptory strike, because the rejection of a strike does not ascribe discriminatory intent to the lawyer:
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> "No one wishes to accuse those with whom they regularly associate, both professionally and often personally, of moral wrongdoing. Yet virtually every *Batson* ruling potentially carries such a *stigma....Batson* violations necessarily involve findings of such socially unacceptable behavior as intentional race or sex discrimination, as well as false representations of the reasons for those unsociable acts.... [R]ulings that an attorney has purposefully discriminated by race or sex and then lied about having done so seem freighted with a dimension of personal moral delinquency" (Robin Charlow, *Batson "Blame" and Its Implications for Equal Protection Analysis,* 97 Iowa L Rev 1489, 1493 [2012]).

The recommendation is to adopt the Justice Task Force standard with the addition of the underscored words:

> Whether, in the view of a reasonable person, the race <u>or other cognizable class</u> of a juror was a factor in the exercise of the peremptory challenge. If the court determines that the answer is yes, then the peremptory challenge shall be denied.

EXPAND THE INFORMATION THAT MAY BE PLACED ON VERDICT SHEETS TO ASSIST A DELIBERATING JURY

Recommendation: Expand the information that may be provided a jury on a verdict sheet.

CPL 310.20(2) sets forth the information that may be provided a jury on a verdict sheet, as follows:

> A written list prepared by the court containing the offenses submitted to the jury by the court in its charge and the possible verdicts thereon. Whenever the court submits two or more counts charging offenses set forth in the **same article** of the law, the court may set forth the **dates, names of complainants or specific statutory language,** without defining the terms, **by which the counts may be distinguished;** provided, however, that the court shall instruct the jury in its charge that the sole purpose of the notations is to distinguish between the counts.

When the information on the verdict sheet is in violation of law, the judgment must be reversed, irrespective of whether the defendant was prejudiced. *People v Miller,* 18 NY3d 704, 706 [2012].

The specific recommendations are:

[1] delete the requirement that information may only be placed on a verdict sheet when two or more counts charge offenses in the same article. There is no justifiable rationale for allowing, for example, the date of alleged offense and name of the complaining witness for offenses in the same article and not if the offenses are in separate articles of the Penal Law.

[2] continue authorizing a court in its discretion to provide information presently included by the statute.

[3] authorize information that is presently approved by the Court of Appeals; namely, the name of offense charged, dates and names of complainants and location of the charged offense; and the order in which charges should be considered including that charges be considered in the alternative. *(See People* v Brown, 90 N.Y.2d 872, 875 [1997] [approving on the verdict sheet "identifying factual annotations, such as dates and names of the victims]; *People* v Lewis, 23 N.Y.3d 179 [2014] [allowing the offense charged, and date of allege offense, and "either the name of the store where the alleged offense occurred or the name of the bank that issued the credit card"]; *People* v Collins, 99 N.Y.2d 14 (2002) and *People* v Cole, 85 N.Y.2d 990 (1995) (authorizing the verdict sheet to state the order in which charges should be considered).

[4] authorized additional information in the court's discretion, as recommended by the Advisory Committee on Criminal Law & Procedure to the Chief Administrator Judge

[Advisory Committee] when necessary to distinguish between counts:

> Identity of property stolen or possessed.
> Value of property
> Type of controlled substance in issue
> Type of weapon in issue
> Sexual conduct in issue.

With respect to "sexual conduct," the Appellate Division in *People v Evans,* 259 AD2d 629 [2d Dept 1999], approved the "submission of an annotated verdict sheet to the jury" in a sexual abuse case "since the identifying factual annotations were provided solely for the purpose of distinguishing the various counts of sexual abuse from each other, and the defendant was not prejudiced thereby."

In support of their recommendation, the Advisory Committee explained:

> Jurors often need additional guidance to distinguish various counts listed on a verdict sheet.
>
> For instance, in larceny and similar cases, it is common to have distinct counts pertaining to different items of property that were stolen or possessed.
>
> In narcotics cases there are often multiple counts of sale or possession relating to different types of narcotics either possessed or offered for sale.
>
> In pattern burglary cases, charges often include counts whose only distinction is the location of the burgled premises, while in assault cases the only differences in counts may be the type of weapon allegedly used in each count.
>
> Finally, in sex offense cases counts may be distinguishable only by the type of sexual contact alleged.
>
> These are everyday examples and jurors are needlessly confused when attempting to deliberate on a specific count on the verdict sheet and need to match relevant facts, or lack of them, to the count under consideration.

AMEND CPL 450.15(1) TO AUTHORIZE AN APPELLATE COURT TO REVIEW ANY QUESTION OF LAW OR ISSUE OF FACT RAISED BY THE PARTIES TO THE CRIMINAL COURT REGARDING THAT ERROR OR DEFECT

Recommendation: Amend CPL 470.15(1) to authorize an appellate court to review any question of law or issue of fact raised by the parties to the criminal court regarding that error or defect

CPL 450.15(1) reads: "Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant."

The recommendation is to add at the end of that provision the words:
"or any question of law or issue of fact raised by the parties to the criminal court regarding that error or defect."

The purpose of the amendment is to abrogate *People v. LaFontaine,* 92 NY 2d 470 (1988) and its progeny, wherein the Court of Appeals has held that CPL 470.15 (1) prevents an intermediate appellate court from affirming a judgment where the court below made the right ruling but did so for the wrong reason. Under the *LaFontaine* rule", when a trial court does not make a ruling on an alternative legal issue and decide it adversely to the defendant-appellant, the appellate court is not authorized to affirm on that ground.

The Court of Appeals has repeatedly invited the legislature to amend the statute noting that it cuts against "sensible management of litigation". *People v. Concepcion,* 17 NY 3d 192 (2011).

The proposed amendment to CPL 470.15(1) eliminates the *LaFontaine* rule, promoting judicial efficiency and more prompt resolution of appeals, by authorizing an intermediate appellate court to decide an appeal based on an alternate ground for affirmance. The amendment does so by permitting the court to adjudicate not just the specific error of law or fact the appellant identifies as a basis for relief, but also any question of law or fact "regarding" the error or defect upon which the appellant relies. An alternate ground for affirmance would present a question of law or fact "regarding" the claim raised by the appellant.

However, the amendment ensures that the intermediate appellate court can review only properly preserved alternate arguments for affirmance. This is accomplished in two ways. First, the amendment permits the reviewing court to consider a "question of law." Under CPL 470.05(2), a "question of law" is presented only when the party claiming error registers an appropriate protest before the criminal court. Second, the amendment limits the alternate grounds that can be reviewed to those "raised by the parties" in criminal court. In addition, the amendment continues the ban on use of CPL 470.15(1) as a vehicle for a cross-appeal by limiting the questions of law or issues of fact the intermediate appellate court may consider to ones "regarding *that* error or defect," i.e., the asserted error or defect that the appellant is advancing as a basis for relief

There is also a significant question regarding whether CPL 470.15(1) comports with Article VI, §4(k) of the State Constitution. That provision "prohibits legislative curtailment of Appellate Division jurisdiction of appeals from final judgments." *People v. Pollenz,* 67 NY 2d 264, 268 (1986). The constitutional provision thus "fixed the floor of the jurisdiction of the Appellate Division as it existed on September 1, 1962", the provision's effective date. *People v. Farrell,* 85 NY 2d 60, 65 (1995). CPL 470.15(1) was enacted well after that date, and "the statute's subject is appellate jurisdiction." *People v. Concepcion,* 17 NY 3d 192, 201 (2011). But it appears that prior to 1962, the Appellate Division did have jurisdiction to decide a case based on alternate grounds for affirmance. *See e.g. People v. Malmud* 4 AD 2d 86, 9091 (2d Dep't 1957); see also *People v. Gillette,* 191 NY 107, 119-20 (1908).

AMEND THE DEFINITION IN CPL 730.10(1) OF "INCAPACITATED PERSON" TO INCLUDE THE FEDERAL CONSTITUTION'S DUE PROCESS REQUIREMENTS.

Recommendation: Amend the definition in CPL 730.10(1) of "incapacitated person" to include the Federal Constitution's Due Process requirements.

CPL article 730 sets forth the procedures for determining whether a defendant suffers from a mental disease or defect which renders that defendant not mentally fit to proceed.

CPL 730.10(1) specifies that a defendant who is not mentally fit to proceed as an "Incapacitated person" and defines an "incapacitated person" as "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense."

That definition does not incorporate the federal Due Process requirement for a defendant to be found mentally fit to proceed.

As explained in People v Phillips, 16 NY3d 510, 516 [2011]:

"The key inquiry in determining whether a criminal defendant is fit for trial is "whether he [or she] has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her]" (Dusky v United States, 362 US 402, 402 [1960])."

The recommendation therefore is to merge the Due Process standard with the current definition of an incapacitated person to read as follows:

An "incapacitated person" means a defendant who as a result of mental disease or defect lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding of the proceedings against him, or otherwise lacks the capacity to assist in presenting a defense.

AMEND THE MULTIPLE FELONY OFFENDER STATUTES TO UNIFORMLY PROVIDE THAT THE TEN-YEAR "LOOK-BACK" PERIOD IS CALCULATED FROM THE DATE OF THE SENTENCE OF THE PRIOR FELONY, NOT THE DATE OF THE COMMISSION OF THE PRIOR FELONY

Recommendation: Amend the multiple felony offender statutes to uniformly provide that the ten-year "look-back" period is calculated from the date of the sentence of the prior felony, not the date of the commission of the prior felony.

The multiple felony offender statutes [e.g. Penal Law § 70.04(1)(b)(iv)] required that the "sentence" on a prior felony must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted."

Although that part of the statute references starting the clock at the time of the prior sentence, it cross-references to another statute [e.g. Penal Law § 70.04(1)(b)(v)] that states: "In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded."

In *People v Hernandez,* NY3d , 2025 WL 515364 [2025], the majority found that the statutes as written required that the ten-year period calculation started on the date of the "commission" of prior crime, not the date of "sentence" of the prior conviction, and therefore, the defendant's "presentence incarceration time" for the prior crime extended the ten-year period.

The two statutes, one starting the clock at the time of "sentence" and the other at the time of the "commission" of the prior crime "seem logically deficient"' *[Hernandez* (dissent)] and should be reconciled by, in fairness, starting the clock from the time of the sentence of the prior felony, and thereby excluding from the calculation a defendant's pre-trial incarceration on the prior felony.

"This furthers the legislative goal of limiting the harsh penalties of enhanced sentencing to those defendants who cannot demonstrate the ability to live in the community without reincarceration during the ten years between the sentencing date of the prior felony and the commission of the current felony." *[Hernandez* (dissent)].

The amendment to the multiple felony offender statutes, using for example Penal Law § 70.04(1)(b), should be amended to read as follows:
(iv)Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;
(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of sentence of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.

- ENDORSE PENDING LEGISLATION WHICH AMENDS CPL 190.30(8) TO ALLOW A BUSINESS RECORD TO BE INTRODUCED IN A GRAND JURY PROCEEDING BY AN AFFIDAVIT OF A PERSON WHO CAN ATTEST TO THE FOUNDATION REQUIREMENTS, AND ENDORSE PENDING LEGISLATION WHICH AMENDS CPLR 4518 (BUSINESS RECORDS) TO INCLUDE A FOUNDATION REQUIREMENT FOR THE ADMISSION OFA BUSINESS RECORD

Recommendation: (I) Endorse pending legislation which amends CPL 190.30(8) to allow a business record to be introduced in a grand jury proceeding by an affidavit of a person who can attest to the foundation requirements; and

L Business Record in the Grand Jury

CPL 60.10 makes "the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings" (unless otherwise provide by statute or case law). CPLR 4518, the business record exception to the rule against the admission of hearsay, has therefore long applied in criminal proceedings. *See* Guide to NY Evidence rule 8.08, Business Record. At present CPL 190.30(8) limits the type of business records which may be placed in evidence in a grand jury proceeding via an affidavit of a person who can attest to the foundation requirements for the introduction of the record in evidence. Those authorized records essentially include subscriber information maintained by telephone companies and internet service providers, and financial information in the hands of certain financial institutions.

Other business records require the person attesting to the foundation to appear in person. A Manhattan prosecutor has explained that over 100 times a year that foundation witness has to be flown to New York at the prosecutor's expense. *See* Emily Saul. "New Bill Backed by Manhattan DA Would Streamline Admission of Grand Jury Business Records," NYLJ, June 5, 2025. In that article, the prosecutor "gave an example of a recent violent crime case, involving rideshare records, which he noted are now used quite frequently in violent crimes. `If I want to prove you paid Uber with a credit card, I can get that record in' [via an affidavit], he said. 'FT want the record of where your Uber went, I can't. 'We had a recent, very violent case where one of the critical pieces of evidence was a rideshare trip from point A to point B,' he explained. `The rideshare company in question fought us tooth and nail to get somebody here, even though they operate fairly close by, and insisted on us bringing somebody from very far outside the state because of this rule.'"

Legislation has been introduced in both houses of the Legislature to repeal the limitation on the introduction of business records via an affidavit of a person who can establish the foundation requirements and accordingly allow any "business record." which complies with the requirements of CPLR 4518, to be introduced via the requisite affidavit. The Task Force recommends endorsing this legislation: Assembly Bill 7896; Senate 8298.

Recommendation: (II) Endorse pending legislation which amends CPLR 4518 (Business Records) to include a foundation requirement for the admission of a business record which was dictated by the Court of Appeals in two cases, one decided 95 years ago and the other 70 years ago.

II. Business Record Foundation

At the same time, the Task Force recommends endorsing bills (Senate 7694; Assembly 8812) which amends CPLR 4518 to incorporate a foundation requirement for the admission in evidence of a business record added by the Court of Appeals 95 years ago in *Johnson v Lutz,* 253 NY 124 (1930). This bill (which passed the Senate) is recommended by the Unified Court System's Committee on Evidence. As explained in the memorandum in support of the bill:

> This measure would amend CPLR 4518(a) to incorporate an additional requirement for the introduction of a business record, namely, that the writing or record was made upon the recorder's own personal knowledge; or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately; or from information received by the recorder which is subject to an exception to the rule barring the admission of hearsay. For a hospital or medical office record, the entry must also be germane to the patient's treatment or diagnosis.
>
> This measure will codify the Court of Appeals' holdings in the 1930 case of *Johnson v Lutz* (253 NY 124) and the 1955 case of *Williams v Alexander* (309 NY 283).
>
> CPLR 4518(a) sets forth three foundation requirements for the admission of a business record in evidence as an exception the hearsay exclusionary rule. [95] years ago, the Court of Appeals in *Johnson v Lutz* found a fourth foundation element. With no mention of this element in its text, the current statute is on its face misleading. This measure would correct this omission by requiring, pursuant to Johnson, that the writing or record sought to be admitted must have been made upon the recorder's own personal knowledge or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately.
>
> In *Johnson,* the Court of Appeals (253 NY at 128) explained that the business records statute "was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto." Over the years the Court has reaffirmed that holding *(People v Patterson,* 28 NY3d 544, 550 (2016)) and noted that the added foundational requirement helps guarantee the truthfulness and reliability of third-party statements included in a business record admitted in evidence for the truth of its contents. *Matter of Leon RR,* 48 NY2d 117, 123 (1979).
>
> Similarly, [70] years ago, the Court of Appeals, in *Williams v Alexander* (309 NY 283 (1955)) added a requirement for the admission of hospital and medical records. This measure codifies that requirement by adding to the statute a stipulation that, for a hospital or medical office record to be admitted, the entry must also be germane to the patient's treatment or diagnosis. In *Williams,* the Court pointed out in that "information that the patient was struck by a motor vehicle was germane to his treatment but not the

statement that the car that struck the patient was propelled into him when it was struck by another car (Williams, 309 NY at 288). As stated by the Court: "(W)hether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment." *(Id.)* Medical testimony about whether the information is germane to treatment or diagnosis will be helpful in making the determination. . .. Guide to NY Evidence rule 8.08.

If any business record is to be permitted to be introduced in the Grand Jury via an affidavit which complies with CPLR 4518, then to avoid any misunderstanding of the foundational requirements, CPLR 4518 should also be amended to include the (95-year-old) *Johnson* and *Williams* requirement.

CONCLUSION

The New York State Bar Association Task Force on the Criminal Procedure Law has recommended a number of proposals that require our state leaders to support and enact legislation. The Task Force believes that the recommendations in this report will improve the fairness of the Criminal Procedure law's application, minimize wrongful convictions and provide fair avenues for their correction.