March 14, 2007

Dear Panelist,

This letter covers the following topics:

- Justice Delayed – Illusory Statements of Readiness
- Fictional Gunshot Residue
- Upcoming CLE Program
- Spanish Class For Lawyers
- Long Form Vouchers
- New Additions to Experts' Panel

Justice Delayed
Illusory Statements of Readiness

It seems as if the assistant district attorneys in Nassau County are very busy these days. I received calls from three panelists in the last 10 days who told me that although their cases were months old, the prosecutor had still not talked to the complaining witness. In one of those cases, the prosecutor offered a plea to a violation, which would have given the incarcerated defendant time served. If, on the other hand, the defendant wanted a trial (which he did) the prosecutor said: "I'll drag this case out", thus threatening to have the defendant languish in jail. There's something wrong with this picture.

Fortunately, CPL § 30.30 exists and I suggest you consider making increased use of it in your defense of local criminal cases. Defendants who are presumed innocent shouldn't be forced to do jail time because they can't afford bail in cases where the prosecution doesn't have the time or inclination to go to trial expeditiously. All of which brings us to the subject of statements of readiness by our local assistant district attorneys.

Under the speedy trial provisions of § 30.30, delays are not chargeable to the People when they declare that they are ready for trial. The law is clear, however, that such statements must be real and not illusory. As set forth in **People v. Kendzia**[1]**.**

> "Ready for trial" in CPL 30.30 (1) encompasses two necessary elements. First, there must be a communication of readiness by the People which appears on the trial court's record. This requires either a statement of readiness by the prosecutor in open court, transcribed by a stenographer, or recorded by the clerk or a written notice of readiness sent by the prosecutor to both defense counsel and the appropriate court clerk, to be placed in the original record… As the prosecutor must make an affirmative representation of readiness (see, People v Santiago, 96 A.D. 2d 720, 465 N.Y.S.2d 364), he may not simply rely on the case being placed on a trial calendar
>
> The second requirement under the statute…is that the prosecutor must make his statement of readiness **when the People are in fact ready to proceed. The statute contemplates an indication of present readiness, not a prediction or expectation of future readiness.**
> (emphasis supplied)

Courts have held in a number of cases that simple statements of readiness may not suffice. The People's inability to produce the complainant may render such statement illusory[2]. If the People announce that they are ready before the defendant is arraigned on the indictment and there is insufficient time to arraign the defendant within the allowable time period, such statement is illusory[3]. An announcement of readiness before an indictment is handed up is illusory[4]. Announcements of readiness where drug tests are unavailable have been held to be illusory[5]. Announcing readiness for a pre-trial hearing has been held not to constitute readiness for trial.[6] Failure to convert misdemeanor complaints to informations in the required time period required dismissal on speedy trial grounds even though defendant was in warrant status, because defendant's absence did not prevent the People from converting the accusatory instruments in a timely manner.[7]

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[1] 64 NY2d 331, 486 NYS 2d 888 (1985)
[2] People v Cole 73 NY 2d 957, 540 NYS 2d 984 (1989)
[3] People v England 84 NY 2d 1, 613 NYS 2d 854 (1994)
[4] People v. Delgado 209 AD 2d 218, 618 NYS 2d 311 (1st Dept. 1994)
[5] People v. Blunt 189 Misc 2d 471 732 NYS 2d 852 (2001)
People v Hyndman 194 Misc 2d 335, 753 NYS 2d 811 (2002)
People v Volkes 1 Misc 3d 823, 771 NYS 2d 797 (2003)
cf. People v Fox 2 Misc 3d 950, 771 NYS 2d 850 (2004)
[6] People v. Chavis 91 NY 2d 500, 673 NYS 2d 29 (1998)
[7] People v. Colon 56 NY 2d 921, 66 NYS 2d 319 (1983) See also People v. Sturgis 38NY 2d 625, 381 NYS 2d 860 (1976)

Suppose an assistant district attorney files a certificate of readiness for trial and thereafter answers "Not ready". Suppose this happens repeatedly. Such a scenario recently played out in First District Court in Hempstead in the case of **People v. Perkins**, where Judge Norman St. George found that the Nassau County District Attorney's Office's repeated certificates of readiness were illusory. The motion by defense attorney Tim Aldridge to dismiss the case on speedy trial grounds was granted, and it's a tribute to Tim that he pushed for this result. A copy of the decision is enclosed. Take time to read it. It's an eye opener.

So what does all this mean? It means that **Nassau prosecutors' statements of readiness may sometimes be illusory,** and that if you have speedy trial issues in Nassau County you should consider asking for speedy trial relief. If the prosecution has indicated that they are ready for trial by filing an off calendar certificate of readiness, and you believe they are not ready, you should ask that the case be advanced for trial. We have been assured that such requests will be honored, and if they are not, I would appreciate it if you would let me know. In any event, if you are planning to seek speedy trial relief, you should object on the record to all adjournments that are not at your request. Good Luck.

Fictional Gunshot Residue

One of our Major Felony Panelists, Bill Shanahan, recently defended a case where, on the eve of trial, the assistant district attorney served him with a report from the Forensic Evidence Bureau of the Nassau County Police Department indicating that the defendant's hands had been tested and that elements had been found that were "consistent with Gunshot Residue (GSR)". "The finding of these particles", the report went on, "indicates that the sampled person: discharged a firearm, was in close proximity to a discharged firearm, or recently handled a discharged firearm". Since the report was brand new, the Judge gave Bill two days to get an expert and be ready for trial.

Bill first went to his client and recommended that, given the gunshot residue evidence, he consider pleading guilty. The defendant declined.

Bill then immersed himself in the books and hired an expert. Bill learned that the report submitted by the People was inaccurate. He learned that gunshot residue consists of three elements (lead, antimony, and barium), which combine to form one particle as a result of a gun being fired. In his case, the People had no such combination of elements. In fact they didn't even have two elements combined. They had one particle of lead, one particle of antimony and no particle of barium. Bill learned that according to FBI protocols, three elements must be present, at least two of which are found in combination, in order to reach a GSR finding. Bill also learned that the elements of lead and antimony found on his client's hands could have come from any number of things other than a recently discharged firearm.

When Bill confronted the assistant district attorney with this, the assistant told Bill that he spoke to his source at the lab, who said that if the defense hired an expert, they would get blown out of the water and therefore they weren't going to use the test or the results at trial

It is frightening to think what might have happened if Bill had not diligently pursued this matter and put it to rest. This case should serve as an alert to Nassau criminal defense attorneys that **not all prosecution proof may be what it first appears to be.** My thanks to Bill Shanahan for his fine work and for bringing this matter to our attention.

Upcoming CLE Program

On Wednesday, March 28, from 5:30 to 8:30 PM we will present a program entitled "Collateral Consequences of Criminal Convictions". This 3 credit program is **free to all 18B Panelists**. A brochure is enclosed. If you wish to attend, please complete it and return it to the Nassau Academy of Law at the Bar Association.

Spanish Class for Lawyers

Jose Salas, one of the Spanish interpreters on our Experts' Panel, will be giving a 3-hour class in "Basic Spanish" at the Bar Association, from 5:30 to 8:30 PM on April 19th. This is not a CLE program and no CLE credits will be awarded, but it is **free to all 18B Panelists**. It is my understanding that those who attend this program will be eligible to attend subsequent classes on "Conversational Spanish for Attorneys". If you want to attend the basic class, fill out the enclosed form and fax it back to me at 873.8032 as soon as possible.

Long Form Vouchers

I want to thank 95% of our Panelists for always doing the right thing when they submit vouchers. To the other 5%, please note and comply with the following rules.

If you want to print out long form vouchers from our website (whether criminal vouchers or Family Court vouchers), be sure to first **put legal size paper in your printer, and if necessary, change your printer setting to legal size paper. (**This usually involves hitting "print", then "properties", "paper", "legal" and "OK".)

We can no longer accept long form vouchers on letter-sized paper. We can no longer accept vouchers that are illegible. Please note also that when you submit the County of Nassau claim voucher (the short form) insert your tax I.D. number at number 4. Please remember that you must submit two copies of each voucher. If you do not comply with the above, we will have to return your vouchers to you.

New Additions to Experts' Panel

The following have been added to our Expert's Panel:

Forensic Psychiatry

Allen Reichman, M.D.
190 Willis Ave. Suite 114
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Interpreters – Chinese - Mandarin

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Chinese – Mandarin, Cantonese and Hakka

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Interpreters – Spanish

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Investigators

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Medicine

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My thanks to you all for your continued advocacy on behalf of your 18B clients.

Very truly yours,

Patrick L. McCloskey