POST-INDICTMENT PLEAS

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Most criminal cases in Superior Court are resolved by GUILTY PLEAS, either by Superior Court Information (SCI: see 10/30/20 Article on SCI Pleas) filed by the District Attorney (DA) or under one or more counts (or lesser included offenses [LIO'S]) of an INDICTMENT handed up by the Grand Jury.

Some DA'S offices become more stingy with their plea offers post-indictment ("plead guilty to the highest count to go to trial"), especially if the defense has pursued the gamut of constitutional remedies (via motions to suppress evidence and requesting hearings), and received an unfavorable outcome (i.e. suppression denied). That is why counsel and client must weigh the risks and benefits of rolling the dice or cutting their losses and taking a plea in exchange for obtaining a reduced charge and hopefully a better sentence than almost invariably follows a conviction by guilty verdict. Whether to do so by SCI or indictment is also an important consideration because the range of permissible plea dispositions becomes more limited once an indictment has been filed.

Criminal Procedure Law (CPL) 200.10 states in no uncertain terms that "THE ONLY KINDS OF PLEAS WHICH MAY BE ENTERED TO AN INDICTMENT ARE THOSE SPECIFIED IN THIS SECTION." (People v Claiborne 29 NY2d 950 [1972]). That means that a defendant can either plead guilty to one or more offenses ACTUALLY CHARGED in the indictment, or, if the DA consents (Morganthau v Gold 189 AD2d 617 [1st dep't 1993], and the court permits (People v Williams 158 AD2d 930 [4th dep't 1990]), plead guilty to a LESSER INCLUDED OFFENSE as that term is defined in both CPL 1.20(37). and CPL 220.20. (People v Johnson 89 NY2d 905 [1996]).

While a defendant has many constitutional rights, the opportunity to plead guilty to a lesser offense is not one of them. (Santobello v NY 404 US 257 [1971]. That prerogative (i.e. to offer a reduced plea or not), resides with the prosecutor (People v Farrar 52 NY2d 302 [1981]), and if he/she declines to offer a reduced plea, the defendant can then seek a favorable sentence commitment from the court which must always retain its authority to exercise discretion in arriving at a just outcome.

Of course, if a defendant decides to plead guilty to the entire indictment (generally not a good idea, especially in the absence of an attractive sentence commitment), there is little if anything that the court can do to stop it (People v White 7 AD3d 921 [3d dep't 2004]). (In those rare cases where a defendant insists on swallowing the whole enchilada with no Pepto-Bismol on the table to mitigate the aftermath, a request for a forensic exam may well be in order to make sure that the defendant truly understands the nature of the proceedings [as well as the potential consequences of his/her actions], and is able to assist in his/her own defense).

It is important to keep in mind that a felony guilty plea that strays outside the boundaries of CPL 200.10 is jurisdictionally defective (i.e. the court has no authority to accept it) (see People v Bartley 60 AD2d 283 [1st dep't 1977]), and, therefore, is subject to reversal on appeal whether or not the defendant objected to the error or moved to withdraw the plea before sentencing. In that sense, the limitations on such pleas are of constitutional dimension. (See People v Claiborne supra, People v Johnson supra. In contrast, see People v Keizer 100 NY2d 114 [2003]: constitutional restrictions that apply to felonies do not necessarily apply to misdemeanors disposed of by plea to a lesser offense (e.g. Disorderly Conduct) under a misdemeanor complaint [where the defendant waived prosecution by information]. However, a plea to another crime of equal or higher grade than that charged is not permitted).

In People v Johnson supra, the Court of Appeals vacated the defendant's guilty plea to Criminal SALE of a Controlled Substance (CSCS) 3d degree under an indictment that charged two counts of Criminal POSSESSION (3d degree and 5th degree) because Criminal Sale was NOT CHARGED in the indictment NOR DID IT QUALIFY AS A LESSER INCLUDED OFFENSE (LIO) of either possession count. The Court noted that the trial court had no authority to accept a plea to an un-indicted offense and, other than a common date and substance (cocaine), there was no factual relationship between the plea and any charged offense.

The Court pointed out that Criminal Sale is NOT, by any reckoning (i.e. under CPL 1.20[37] or CPL 220.20) a LIO of Criminal Possession. As such, the plea violated CPL 200.20(10(i) which states that "where the crime charged is CRIMINAL POSSESSION of a Controlled Substance, the LIO includes "ANY OFFENSE OF CRIMINAL POSSESSION, IN ANY DEGREE (subject to the plea restrictions of CPL 220.10 [see People v Ramirez 2011 NY Slip Op. 5088(U) [Sup. Ct. Bronx

County 5/11/11]). If the defendant had been charged with CRIMINAL SALE, on the other hand, a LIO would include any offense of CRIMINAL SALE OR POSSESSION but such was not the case in Johnson).

In People v Bartley supra, a 1977 case, the court vacated the defendant's guilty plea to Criminal Possession of a Dangerous Drug 4th degree (a Class D felony) under an indictment charging him, inter alia, with a Class A-2 felony drug sale because, under CPL 220.10(5)(a)(i), the lowest permissible plea was to a Class A felony. (It is now a Class B felony). As such, the plea was a jurisdictional nullity.

See also People v Hicks 79 AD2d 887 (4th dep't 1986): Defendant's guilty plea to Robbery 3d degree, (a Class D NON-VIOLENT FELONY), was invalid under an indictment which charged him with the Class B VIOLENT FELONY OFFENSES of Robbery 1st degree and Burglary 1st degree. As stated in CPL 220.10(5)(d)(ii), where the indictment charges a Class B or C violent felony offense as defined in PL 70.02, a plea of guilty must include at least a plea of guilty to a CLASS D VIOLENT FELONY OFFENSE. (In that case, a plea of guilty to Attempted Robbery 2d degree, a Class D violent felony offense, (PL 70.02[1][c]), would have worked).

In People v Crute 236 AD2d 208 (1st dep't 1997), the defendant was charged with Robbery 1st and 2d degree arising from the gunpoint theft from a store. After his co-defendant was found guilty by a jury of Robbery 1st degree, the defendant offered to plead guilty to a class B VF but refused to admit to having committed a robbery. Rather than look a gift-horse in the mouth, the People fashioned a plea offer to Criminal Possession of a Weapon (CPW) 1st degree, PL 265.04 (Possession of an Explosive Substance with Intent to Use Unlawfully Against Another), which the court accepted.

In vacating the judgment of conviction, the Appellate Division held that CPW was neither charged in the indictment nor did it qualify as a LIO of Robbery. Consequently, the plea was jurisdictionally invalid.

A similar conclusion was reached in People v Castillo 8 NY3d 959 (2007) where the defendant was indicted on charges of CPCS 1st degree and Robbery 1st degree (PL160.15[4] (forcible theft while displaying what appears to be a firearm) but pled guilty to the drug count and Robbery 1st degree, PL 160.15[2] (robbery while armed with a deadly weapon) which had not been charged.

The Court of Appeals held that while both theories of robbery shared the common element of forcible theft, each one encompassed a distinct additional element not contained in the other (i.e. one can display what looks like a gun without actually possessing a loaded firearm). Thus, since PL 160.15(2) was not charged in the indictment, nor did it qualify as a LIO of PL 160.15[4], (in fact was of the same degree), there was no legal basis for the guilty plea to that offense.

Citing People v Johnson supra 89 NY2d 905 (1996), the Court noted that the provisions of Article 220 are of constitutional dimension and the plea possibilities available thereunder cannot be extended to permit pleas to an uncharged crime of equal or higher degree.

So, what then are the permissible pleas as pursuant to CPL 220.10, and what qualifies as a lesser included offense under CPL 220.20?

CPL 220.10:

1. A defendant may enter a plea of not guilty as a matter of right. (If he/she does/not, the court will likely do so for him/her).

2. Except as provided in subdivision 5, the defendant may plead guilty to the entire indictment.

3. Except as per subdivision 5, where the indictment charges only one crime, the defendant, WITH PERMISSION OF THE COURT AND CONSENT OF THE PEOPLE, MAY ENTER A GUILTY PLEA TO A LESSER INCLUDED OFFENSE.

WHAT IS A LESSER INCLUDED OFFENSE (LIO) FOR PLEA PURPOSES?

CPL 1.20(37) states that "when it is impossible to commit a particular crime without (at the same time) committing, BY THE SAME CONDUCT, another offense of lesser grade/degree, the latter is, with respect to the former, a LIO. In any case (where) it is legally possible to attempt to commit a crime (PL 110.00, engaging in conduct which tends to effect the commission of a crime), an attempt to commit (that)crime constitutes a LIO with respect thereto."

For example, a defendant who intentionally causes serious injury (SPI) (e.g. permanent breathing disorder) to another person (PL 120.05[1], Assault 2d degree), e.g. by punching the victim in the nose, has, by that same act, also committed Assault 3d degree (PL 120.00[1], (intentionally causing physical injury [PL 10.00(9)],which is the foundational element of SPI (PL 10.00[10]). (In a trial context, if the injury turned out to be non-serious (e.g. non-displaced fracture of the nasal bone with no other adverse consequence), the defendant would be well within his/her rights to request a jury instruction on the LIO of Assault 3d degree).

Also, if the defendant, intending to cause physical injury to another person by means of a dangerous instrument (Assault 2d degree, PL 120.05[2]), for example, by swinging a shovel at the victim's head, (but just missing because the victim ducked at the last second), the defendant could be found guilty of Attempted Assault 2d degree because his conduct came dangerously close to the commission of the intended crime even though no actual injury resulted from it. (See People v Koufomichalis 2 AD3d 987 [3d dep't 2003], People v Mahboubian 74 NY2d 174 [1989]).

In the context of a trial, the obtain a jury instruction on a lesser included offense, the requesting party would have to show that there is a reasonable view of the evidence which would support a finding that the defendant committed the lesser offense but not the greater. (CPL 300.50[1], People v Glover 57 NY2d 61[1982]: a lower grade offense is a LIO only if it is theoretically impossible to commit the greater crime without, at the same time, committing the lesser).

So, for example, in People v Martinez 81 NY2d 810 (1993), the Court of Appeals held that it was error in this Attempted Murder case for the trial court to allow the jury to consider, in the alternative, a charge of Attempted Manslaughter 1st degree because there is no such crime. That crime requires that a defendant, intending to cause serious physical injury (SPI) to another person, causes the latter's death (an unintended consequence), while Murder requires both the intent to cause death coupled with the causation of the latter's demise. Since Attempt requires the intent to complete the intended crime (e.g. death), one can neither attempt to intend another's demise (either one does or one doesn't), nor intend to cause only SPI while at the same time attempting to cause the victim's death.

In contrast, see Peope v Robinson 143 AD2d 376 [1st dept 2002] where the defendant, charged with Attempted Murder 2d degree, raised the affirmative defense of Extreme Emotional Disturbance [EED],PL125.25[1][a]), which, in a Murder case, can serve to reduce Murder 2d degree to Manslaughter 1st degree where the defendant establishes by a preponderance of the evidence that he acted under an EED for which there was a reasonable explanation. (People v Diaz 15 NY3d 40 [2010]). In Robinson, the trial court was held to have properly permitted the jury to consider the otherwise non-existent crime of Attempted Manslaughter 1st degree.

In the context of a GUILTY PLEA, the scope of LIO'S includes not only those encompassed by CPL 1.20(37) but also those specifically enumerated in CPL 220.20(1) (People v Johnson supra).

a. Where the only culpable mental state for the crime charged is that of intent, any lesser offense consisting of reckless or criminally negligent performance of such conduct constitutes a LIO. (So, a defendant charged with intentional assault, for example, could plead guilty to reckless or negligent assault).

It is worth noting that when it comes to negotiated pleas to lesser offenses, the law does not require that the plea colloquy contain anywhere near the level of factual particularity or basis as would a plea of guilty to the highest count as charged. (See People v Claiborne supra: where a defendant pleads guilty to a lesser crime than charged, and the plea is shown to have been knowing, voluntarily and intelligently entered, a factual basis for the plea is not necessary; See also People v Cantu 202 AD3d 1033 [4th dep't 1994]).

And, in People v Daniels 237 AD2d 298 (2d dep't 1997), the court held that even though Attempted Assault 2d degree (PL120.05[3], (upon a police officer or other public servant in the performance of his/her official duty) is a legal impossibility, a defendant may plead guilty to a non-existent crime in satisfaction of an indictment for which a greater penalty may be imposed. (See also People v Mayo 77 AD3d 683 [2d dep't 2010]: While Attempted Felony Murder, is a legally and logically impossible crime to commit, a plea to it is allowed because it is in satisfaction of an indictment charging a crime carrying harsher penalties).

That does not, as noted above, however, mean that the defendant can plead guilty to an uncharged offense or to a crime of equal or higher degree to facilitate a plea disposition. Nor does it suggest that a court can ignore when the defendant, by his/her comments in a plea colloquy, negates an element (e.g. “I didn’t mean to hurt him”), or raises a defense (e.g “I had no choice but to stab him because he came at me with a broken bottle”). In such case, the court must remind the defendant of his right to have a trial where he can assert such defense and, if he/she wishes to plead guilty anyway, he/she understands that he/she is giving up the right to assert such defense.

(See People v Thomas 159 AD2d 529 [2d dep’t 1990]: Guilty plea down to Manslaughter 1st degree set aside where the defendant denied intent to cause SPI and claimed self-defense; In contrast, see Peope v Diaz 2018 NY Slip Op. 05601 [2d dep’t 8/1/18]: where, when the defendant suggested that the stabbing was an accident (“ I didn’t stab him, he [fell] to me”), the court advised the defendant of his right to assert such defense at a trial after which the defendant conferred with counsel and admitted that he stabbed the victim with the intent to cause SPI).

RETURNING TO CPL 220.20(1):

b. Where the only culpable mental state required for the crime charged is that of recklessness, (PL 15.05 [3]: conscious disregard of a substantial and unjustifiable risk of a certain result occurring), any lesser offense consisting of criminally negligent performance of the same conduct (PL15.05[4]: failure to perceive such risk), constitutes a LIO. So, a defendant charged with Reckless Manslaughter 2d degree (PL 125.15), a Class C NVF, could plead guilty to Criminally Negligent Homicide (PL 125.10).

c. Where the allegations of a count indicate that the defendant solicited another person to engage in proscribed conduct, the crime of solicitation “in any appropriate degree” is deemed to constitute a LIO. (It is important to keep in mind, though, that how low a plea offer to a LIO can go post-indictment must be determined by reference to CPL 220.10. (People v Ramirez supra 2011 NY Slip Op. 50889[u][Sup Ct. Bronx County 5/11/11]).

d. Where the allegations of a count indicate that the defendant’s participation in the crime charged consisted of a conspiratorial agreement or conduct with another to engage in the proscribed conduct, the crime of conspiracy in any appropriate degree constitutes a LIO.

e. Where the allegations of a felony count indicate that the defendant’s participation consisted of providing another person with the means or opportunity to engage in the proscribed conduct, the crime of criminal facilitation in any appropriate degree constitutes a LIO.

f. Where the crime charged is Assault or Attempted Assault in any degree, allegedly committed by intentionally causing or attempting to cause physical injury to another person by the immediate use of physical force against him/her, or where the crime charged is menacing (PL 120.15), the offense of Harassment (PL 240.25), a class B misdemeanor constitutes a LIO.

g. Where the defendant is charged with Felony Murder (PL125.25[3]), a Class A felony, the designated underlying felony or attempted felony constitutes a LIO (e.g. Defendant participates in a robbery and he or another participant causes the death of a non-participant). If the underlying felony is a robbery, burglary, kidnapping, or arson, without specification of the degree thereof, (or an attempt to commit the same), a guilty plea may be entered to the lowest degree thereof only (or as the case may be to attempted commission of such felony), UNLESS the allegations of the count CLEARLY INDICATE the existence of ALL THE ELEMENTS of a HIGHER DEGREE.

But see CPL 220.10 (5)(d)(i) which states that where the indictment charges a Class A felony offense or a Class B VF which is also an armed felony (CPL 1.20 any VF which includes as an element either: a. possession, being armed with or causing SPI by means of a deadly weapon consisting of a loaded weapon from which a shot, readily capable of causing or serious physical injury may be discharged; or b. displays what appears to be a firearm), then a guilty plea must include at least a guilty plea to a Class CVF. (Per subdivision 5[d][ii], where the indictment charges a Class B VF (e.g. Robbery 1st degree) or a Class C VF (Robbery 2d degree), a guilty must include at least a guilty plea to a Class D VF. (e.g. Attempted Robbery 2d degree but NOT Robbery 3d degree which is NOT a VF per PL 70.02 [1][c]: See People v Hicks supra).

CPL 220.20 cont'd

h. Where the crime charged is CSCS, any offense of criminal sale or possession of a controlled substance, in any degree constitutes a LIO. (But see CPL 220.10[5][a][i]: where the indictment charges a Class A felony drug offense or an attempt to comment such offense [PL 220], then any guilty plea must include a plea to at least a Class BF [whether sale or possession]. If the indictment charges a Class BF drug offense, then any guilty plea must include a plea to at least a Class DF [CPL 220.10[5][a][iii]).

i. Conversely, as noted above, where the indictment charges the defendant with criminal POSSESSION of a controlled substance, any lesser degree of CPCS qualifies as a LIO, but that does NOT include a charge involving criminal SALE thereof. (See People v Johnson supra).

j. See text for LIO of Unlawful Disposal of Hazardous Wastes.

k. See text for LIO of Unlawful Possession of Hazardous Wastes.

2. This section notes that the LIO'S designated in Section 220.20 are for purposes of a GUILTY PLEA ONLY and that one must consult CPL 1.20(37) in the context of a trial.

RETURNING TO CPL 220.10

4. Except as provided in subdivision 5, where an indictment charges TWO OR MORE OFFENSES in separate counts, the defendant may, with court permission and the DA'S consent, enter a plea of:

a. Guilty to one or more (but not all) of the offenses charged; or

b. Guilty to a LIO of any or all of the offenses charged, or

c. Guilty to any combination of offenses charged or LIO'S included within the offenses charged.

5 (a)(i): Where the indictment charges a Class A Felony drug offense, (or an attempt to commit such offense), then any guilty plea per subdivisions 3 or 4 MUST INCLUDE a guilty plea to at least a Class B Felony.

(iii): Where the indictment charges a Class B Felony drug offense, then any guilty plea per subdivisions 3 or 4 MUST INCLUDE a guilty plea to at least a Class D Felony.

(b): Where the indictment charges a Class B Felony (non-drug and non-violent), then any guilty plea must include a guilty plea to at least a FELONY.

(c): Where the indictment charges a Felony (excluding a Class A or B Felony drug offense, and a Class B or C VF) and it appears that the defendant has a PREDICATE FELONY CONVICTION (PL 70.06), then any plea of guilty must include at least a guilty plea to a FELONY.

In People v McKenzie 2020 NY Slip Op. 01966 (4th dep't 3/20/20), the defendant pled guilty to Attempted Criminal Sale of a Controlled Substance 3d degree (PL110-220.39), a Class C Drug Felony as a LIO of Criminal Sale 3d degree. Shortly after sentencing, the court realized that the defendant was a prior violent felon (rather than just a prior felon), and returned the case for further proceedings. The court then granted the People's motion (with the defendant's consent), to vacate his guilty plea after which the defendant was re-sentenced as a PVF, upon a lesser charge of Criminal Sale of a Controlled Substance 5th degree, PL 220.31, a Class D Felony. While this offense qualified as a permissible plea down from the B felony (see CPL 220.10.[5][c] supra), the problem in this case, per the Fourth Department, was that the defendant had never actually entered a guilty plea to that replacement charge (before being re-sentenced). And while a plea to a lesser charge may not require a particular factual basis (People v Claiborne supra), a plea of guilty must still be entered before sentence can be imposed. Since there was no plea actually entered, the sentence imposed was necessarily null and void. (citing People v Vanalst 148 AD3d 1658 [4th dep't 2017]).

d. Where the indictment charges either a non-drug Class A Felony or a Class BVF or CVF (See PL 70.02 referenced below), then a guilty plea MUST BE as follows:

(i): Where the indictment charges a Class A Felony or a Class BVF (which is also an ARMED FELONY), then a guilty plea must be to a CLASS CVF;

(ii): Where the indictment charges a Class BVF (which is NOT AN ARMED FELONY), then a plea of guilty must be to a CLASS DVF;

(iii): Where the indictment charges the Class DVF of Criminal Possession of a Weapon (CPW) 3rd degree (PL 265.02[4]) and the defendant has NOT been convicted of a Penal Law Class A Misdemeanor within five years of the commission of this offense, then a guilty plea must be to either the Class EVF of Attempted CPW 3d degree or to the Class A Misdemeanor CPW 4th degree per PL 265.01(1). (Obviously, the latter option would be preferred).

(iv): Where the indictment charges a Class DVF of CPW 3d degree (PL265.02[4]) and the provisions of (iii) do not apply (i.e the defendant has been convicted of a Class A Misdemeanor within the past five years of this offense), or the indictment charges the defendant with PL 265.02(5),(7) or (8), then a guilty plea must be to at least to a CLASS E VF.

(e): A defendant may not plead guilty to Murder First Degree, a Class A-1 felony (PL125.27) unless the People consent and the and the court permits it upon an agreed-upon sentence of either life imprisonment without parole or a term of imprisonment other than life without parole. (Since the death penalty is not an option in New York State, and life without parole is the worst possible sentence, it is difficult to fathom a guilty plea to this crime without preserving some possibility of parole, however remote).

(f): The provisions of this subdivision apply whether or not the defendant is thereby precluded from entering a guilty plea to any LIO.

g. Where the defendant is a JUVENILE OFFENDER (JO, (PL 30.00[1]: a 13, 14 or 15-year old charged with Murder 2d degree, including felony murder where the underlying felony is a designated felony or sexually motivated felony; or a 14 or 15-year-old charged with Kidnapping 1st degree, Arson 1st degree, Assault 1st degree, Manslaughter 1st degree, Rape 1st degree, Criminal Sex Act 1st degree, Aggravated Sexual Abuse 1st degree, Burglary 1st degree, Burglary 2d degree, Arson 2d degree, Robbery 1st degree, Possession of a Loaded Firearm on School Grounds or Attempted Murder or Attempted Kidnapping as a sexually motivated felony), the provisions of CPL 220.10 (a) through (d) set forth above DO NOT APPLY, and any plea entered per subdivisions 3 or 4 MUST BE AS FOLLOWS:

(i): If the indictment charges a 14 or 15-year-old with Murder 2d degree, any plea of guilty must be to a crime for which the defendant is criminally responsible. (See offenses set forth above).

(ii): If the indictment is for a crime other than Murder 2d degree, then any guilty plea must to a crime for which the defendant is criminally responsible. (See above offenses).

(iii): Where the indictment does NOT charge a 14-15-year-old with Murder 2d degree, the DA MAY RECOMMEND REMOVAL OF THE ACTION TO FAMILY COURT. Upon making such recommendation, the DA shall submit a SUBSCRIBED MEMORANDUM setting forth: 1. a recommendation that removal will best serve the interests of justice; 2. If a 13-year-old is indicted for Murder 2d degree or a 14-15-year-old is charged with RAPE 1st degree, CRIMINAL SEXUAL ACT 1st degree, AN ARMED FELONY, that there are one or more SPECIFIC FACTORS which REASONABLY SUPPORT SUCH RECOMMENDATION showing: (i) MITIGATING CIRCUMSTANCES THAT BEAR DIRECTLY UPON THE MANNER IN WHICH THE CRIME WAS COMMITTED, or (ii) THE DEFENDANT'S PARTICIPATION (compared to others involved), WAS RELATIVELY MINOR or (iii) THERE ARE POSSIBLE DEFICIENCIES IN THE PEOPLE'S PROOF or (iv) WHERE THE JO HAS NO PREVIOUS ADJUDICATIONS OF HAVING COMMITTED A DESIGNATED FELONY ACT (FCA 301.2), REGARDLESS OF HIS/HER AGE AT THE TIME OF COMMISSION OF THE ACT, THAT THE CRIMINAL ACT WAS NOT PART OF A PATTERN OF CRIMINAL BEHAVIOR AND, IN VIEW OF THE OFFENDER'S HISTORY, IS NOT LIKELY TO BE REPEATED.

If the court accepts the People's recommendation that the interests of justice would best be served by removal of the case to Family Court, a plea of guilty to a crime/act for which the defendant is NOT CRIMINALLY RESPONSIBLE may be entered, BUT, a 13-year-old charged with Murder 2d degree, MAY ONLY PLEAD GUILTY TO A DESIGNATED FELONY ACT (per FCA 301.2[8]).

Upon accepting any such plea, the court MUST SPECIFY on the record what portion(s) of the DA'S statement it is relying upon as the basis for an interest-of-justice removal of the case to Family Court (where the defendant will then be adjudicated as a JUVENILE DELINQUENT).

(h): Where an indictment charges Aggravated Harassment of an Employee by an INMATE (PL 240.32), then a guilty plea must be to a Class E Felony.

6. A defendant may, with court permission and consent of the People, enter a plea of NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT. (See CPL 220.15)

VIOLENT FELONIES (PL 70.02):

Since a defendant who stands indicted for a violent felony offense (VFO) may not enter a guilty plea to a non-violent felony offense (NVFO) (and thereby avoid the prospect of a determinate sentence (PL 70.02[3]), followed by post release supervision [PRS], (PL 70.45), it is well worth knowing whether a particular felony qualifies as one or the other.

a. The Class B VFO'S include: an ATTEMPT to commit the Class A-1 Felonies of Murder 2d degree (PL110- 125.25), Kidnapping 1st degree (PL110-135.25), Arson 1st degree (PL 110-150.20); Manslaughter 1st degree (PL 125.20), Aggravated Manslaughter 1st degree (PL 125.22), Rape 1st degree (PL 130.35), Criminal Sex Act 1st degree (PL130.50), Aggravated Sex Abuse 1st degree (PL 130.70), Course of Sexual Conduct Against a Child (PL 130.75), Assault 1st degree (PL 120.10), Kidnapping 2d degree (PL 135.20), Burglary 1st degree (PL 140.30), Arson 2d degree (PL 150.15), Robbery 1st degree (PL 160.15), Sex Trafficking of a Child (PL230.34-a), Sex Trafficking (PL 230.34 [5][a],[b]), Incest 1st degree (PL 225.27), CPW 1st degree (PL 265.04), Criminal Use of a Firearm 1st degree (PL 265.09), Criminal Sale of a Firearm 1st degree (PL 265.13), Aggravated Assault on a Police/Peace Officer (PL 120.11), Gang Assault 1st degree (PL 120.07), Intimidating a Victim/Witness 1st degree (PL 215.17), Hindering Prosecution of Terrorism 1st degree (PL 490.35), Criminal Possession of a Chemical Weapon / Biological Weapon 2d degree (PL490.40), and Criminal Use of a Chemical Weapon /Biological Weapon 3d degree (PL 490.47).

(b). The Class C VFO'S include an ATTEMPT to commit any of the Class B VF set forth in paragraph (a) above as well as: Aggravated Criminally Negligent Homicide (PL 125.11), Aggravated Manslaughter 2d degree (PL 125.21), Aggravated Sexual Abuse 2d degree (PL 130.67), Assault on a Peace/Police Officer, Firefighter, EMS Professional (PL 120.08), Assault on a Judge (PL 120.09), Gang Assault 2d degree (120.06), Strangulation 1st degree (PL 121.13), Burglary 2d degree (PL 140.25), Robbery 2d degree (PL 160.10), CPW 2d degree (PL 265.03), Criminal Use of a Firearm 2d degree (PL 265.08), Criminal Sale of a Firearm 2d degree (PL 265.12), Criminal Sale of a Firearm with the Aid of a Minor (PL 265.14), Aggravated CPW (PL 265.19). Soliciting/Supporting Terrorism 1st degree (PL 490.15), Hindering Prosecution of Terrorism 2d degree (PL 490.30), Criminal Possession of a Chemical Weapon / Biological Weapon 3d degree (PL 490.37).

(c). The Class D VFO'S include an ATTEMPT to commit any of the Class C VFO'S set forth in paragraph (b) above as well as: Assault 2d degree (PL 120.05), Reckless Assault of a Child (PL120.02), Menacing a Police/Peace Officer (PL 120.18), Stalking 1st degree (PL 120.60), Strangulation 2d degree (PL121.12), Rape 2d degree (PL 130.30), Criminal Sex Act 2d degree (PL 130.45), Sexual Abuse 1st degree (PL 130.65), Course of Sexual Conduct against a Child 2d degree (PL 130.80), Aggravated Sexual Abuse 3d degree (PL 130.66), Facilitating a Sex offense with a Controlled Substance (PL 130.90), Labor Trafficking (PL 135.35[3][a][b]), CPW 3d degree (PL 265.02 [5]-[10]), Criminal Sale of a Firearm 3d degree (PL 265.11), Intimidating a Victim/Witness 2d degree (PL 215.16), Soliciting/Supporting an Act of Terrorism 2d degree (PL490.10), Making a Terroristic Threat (PL 490.20), Falsely Reporting an Incident 1st degree (PL 240.60), Placing a False Bomb or Hazardous Substance 1st degree (PL 240.62), Placing a False Bomb or Hazardous Substance in a Sports Stadium/Arena, Mass Transportation Facility or Enclosed Shopping Mall (PL 240.63), Aggravated Un-Permitted Use of Indoor Pyrotechnics 1st degree (PL 405.18).

(d). The Class E VFO'S include: an ATTEMPT to commit any of the felonies of CPW 3d degree (PL 265.02 [5]-[8]) as a LIO (per CPL220.20), Persistent Sexual Abuse (PL 130.53), Aggravated Sexual Abuse 4th degree (PL 130.65-a), Falsely Reporting an Incident 2d degree (PL 240.55), Placing a False Bomb/Hazardous Substance 2d degree (PL 240.61).

It is always challenging when counsel and client are given few if any options after indictment other than to plead guilty to the entire indictment (or at least to the highest count), or proceed to trial. Absent a palatable sentence commitment, and especially if the People's proof leaves some room to maneuver, it may be preferable to just try the case and hope for an acquittal or, where appropriate, a conviction upon a lesser included offense.

The decision whether to brandish or fall on the sword, of course, belongs to the defendant, but in either case, counsel has no know the full range of available options (as to permissible pleas and their punishment possibilities), and advise the client accordingly, lest he/she be skewered for ineffective assistance of counsel.