

PROSECUTION BY SUPERIOR COURT INFORMATION

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When lawyers think about criminal prosecutions in Superior Court (County and Supreme), the accusatory instrument that usually comes to mind is an INDICTMENT consisting of a formal accusation of a GRAND JURY charging a defendant (or defendants jointly) with a crime (PL 10.00[6]: felony or misdemeanor) or with offenses (PL 10.00[1]: conduct for which imprisonment or a fine can be imposed), at least one of which is a crime. (CPL 200.10).

Once an indictment has been filed, the parameters of permissible pleas are limited by statute (see CPL 220.10), and in jurisdictions where the District Attorney does not offer reduced pleas post indictment, the options are for the defendant to either plead guilty as charged (or at least to the highest count), and negotiate with the court for an acceptable sentence commitment, or roll the dice by going to trial.

That is one reason why a Superior Court Information (SCI) can be an attractive alternative vehicle for disposing of an accusation in Superior Court, for example, by guilty plea to a lesser charge, (preferably with a favorable sentence commitment). An SCI, which has the same force and effect as an indictment for virtually all intents and purposes, consists of a written accusation by a DISTRICT ATTORNEY filed in Superior Court per CPL Art. 195 which charges a defendant (or multiple defendants charged jointly), with the commission of a CRIME (or two or more offenses at least one of which is crime).

If a defendant is serious about pleading guilty pursuant to an SCI, he/she must do so BEFORE an indictment has been FILED in Superior Court. (See People v Boston 75 NY2d 585 [1990]; People v Mills 154 AD3d 405 [2d dep't 1989]: SCI allowed after GJ has voted but indictment has not yet been reported out to court). So, once an indictment has been filed in the matter, the SCI is no longer an option.

However, if the defendant commits a new crime post indictment and is held for the Grand Jury on charges contained in a new felony complaint, that matter could be resolved by an SCI (People v D'Amico 76 NY2d 877 [1990]). Or, if an indictment is dismissed on technical grounds with leave to re-present the case to the Grand Jury, the case could now be disposed of by plea under an SCI (See People v Lopez 4 NY3d 133 [2013]). Otherwise, if the defendant is intent on taking a plea in Superior Court, he/she should strike before the Grand Jury has spoken (and its accusation has been reported).

An SCI is not only available for guilty pleas but may be used (upon the prosecutor's consent), to take a case to trial in superior court where the defendant does not wish to wait on grand jury action in the matter. (People v D'Amico supra). Per CPL 195.10(1), a defendant may waive indictment and consent to be prosecuted by SCI when: (a) a local criminal court has HELD the defendant for action of the Grand Jury (after a preliminary hearing per CPL 180.70 or by waiver thereof by the defendant per CPL 180.30); and b) the defendant is NOT CHARGED with a CLASS A FELONY punishable by life imprisonment; and c) the district attorney CONSENTS to the waiver.

It is also worth noting that the defendant may WAIVE INDICTMENT as set forth above either: 2(a) in the LOCAL COURT when the court issues an order holding the defendant over for grand jury action (the case remains there until all such order and related documents are received in Superior court; or (b) in the appropriate superior court at any time PRIOR TO THE FILING of an indictment by the grand jury.

Other than for purposes of effectuating a favorable bargained-for plea-and-sentence disposition, it is hard to imagine why a defendant who expects to go to trial in superior court would waive prosecution by indictment and pass on the opportunity to cross examine prosecution witness upon as much Rosario material (e.g. supporting deposition, testimony at a preliminary hearing and GRAND JURY TESTIMONY) as the People can generate. When walking into a shoot-out, more ammunition is usually better than less.

In cases where a plea is the preferred objective, however, it is important to be aware of the substantive rules and procedural restrictions that regulate the use of SCI'S. Not knowing them can sometimes result in pleas that are jurisdictionally defective.

In *People v Walker* 148 AD3d 1570 (4th dep't 2017), for example, the Fourth Department vacated the defendant's guilty plea to Robbery 1st degree because the crime set forth in the SCI was alleged to have occurred on a different date (2/2/11) from that set forth in the waiver of indictment (2/2/12) which was also different from the crime date set forth in the felony complaint (1/2/11) upon which the defendant had been held for the grand jury.

The court found that the waiver of indictment was invalid because it could not be determined from the differing offense dates that the offense set forth therein was actually one for which the defendant was actually HELD FOR ACTION OF THE GRAND JURY (CPL 195.20). The court also noted that the SCI must charge the SAME CRIMINAL CONDUCT as set forth in the felony complaint, and since robbery is a single-act crime (*People v Rosas* 8 NY3d 493 [2007]), it could not be said that the crime that was alleged in the SCI to have occurred on 2/2/11 was the same one that the felony complaint alleged occurred on 1/2/11.

In the court's view, the dates set forth in the three instruments excluded any possibility that they were based on the same criminal conduct. (Citing, inter alia, *People v Colon* 39 AD3d 661 [2d dep't 2007]): the crime set forth in the SCI [Course of Sexual Conduct against a Child between 9/10/02 and 9/10/04] was clearly NOT the same offense [Criminal Sex Act between 11/1/04 and 11/24/04] contained in the felony complaint for which D was held for the Grand Jury). Nor did it qualify as a lesser included offense of the charge for which the defendant was held for grand jury action.

Clearly then, there must be legal consistency and factual continuity between and among the crime(s) set forth in a felony complaint for which the defendant is held for grand jury action, the waiver of indictment and the SCI upon which the defendant pleads guilty.

An SCI, as noted at the outset, is a written accusation filed by the DA in Superior Court pursuant to CPL 195 charging the defendant(s) with a crime(s), and it MAY INCLUDE ANY OFFENSE FOR WHICH THE DEFENDANT WAS HELD FOR ACTION OF A GRAND JURY AND ANY OFFENSE(S) PROPERLY JOINABLE THEREWITH PER CPL 200.20 AND 220.40. ALSO, AN SCI CANNOT INCLUDE AN OFFENSE THAT IS NOT NAMED IN THE WAIVER OF INDICTMENT EXECUTED PER CPL 190.20.

CPL 200.20 states that two offenses are joinable when they are based on the SAME ACT OR CRIMINAL TRANSACTION (defined in CPL 40.10[2] as conduct which establishes at least one offense and which is comprised of two or more acts that are either so CLOSELY RELATED in point of TIME and CIRCUMSTANCE OF COMMISSION as to constitute a single criminal transaction, or are so CLOSELY RELATED IN CRIMINAL PURPOSE as to constitute elements or integral parts of a SINGLE CRIMINAL VENTURE). Other bases include situations where proof of one crime constitutes material evidence of the other and vice versa, the crimes are defined by the same statutory provisions and are, therefore, similar in law, or are joinable with a third offense. (See text of CPL 200.40 regarding joinder of defendants).

The requirements of CPL 190.20 regarding waiver of indictment (enacted in 1974 to provide a limited exception to the right to prosecution by indictment), are strictly construed (but are not entirely without flexibility where the record supports a proper waiver. (See for example, *People v Wicks* 47 AD3d 585 [3d dep't 2017]: written waiver upheld where D orally waived indictment in court, and while he did not formally acknowledge his signature [that was contained on the waiver], on the record, the court's written order approving the waiver expressly stated that the defendant executed it in open court).

In the written waiver which must be executed by the defendant in open court in the presence of counsel, the defendant must acknowledge: a) the constitutional right to be prosecuted by indictment, b) his/her waiver of such right and consent to be prosecuted by SCI filed by the DA, c) that the SCI will charge the offenses named in the waiver and d) that the SCI will have the same force and effect as a grand jury Indictment. In addition to the defendant's signature, the SCI must contain the DA's written endorsement.

If the court is satisfied that the waiver complies with CPL 195.10 and 195.20, the court shall execute a written order of approval. (If this occurs in a local court, however infrequently, the local court must promptly transmit the waiver and order of approval to superior court "toute de suite" along with all other pertinent documents. The case will be deemed to remain in the local court until those papers are received in superior court.

Per CPL 195.40, when an indictment is waived in superior court, the DA must file the SCI AT THE TIME THE WAIVER IS EXECUTED. If it's waived in the local court, the DA must file the SCI in the appropriate superior court within 10 days of the execution of the lower order approving the waiver. If the DA does not do so in 10 days, a defendant who is in custody may move for and the court must release the defendant on his/her own recognizance UNLESS the delay in filing of the SCI was due to the defendant's request, action or condition, or the People show GOOD CAUSE (i.e. some compelling fact or circumstance) for not timely filing the SCI.

In *People v Menchetti* 76 NY2d 473 (1990). An Erie County case, the Court of Appeals interpreted the language of CPL 200.15 and 195.20 requiring an SCI and waiver of indictment to contain "any offense for which the defendant was held for action of the grand jury" to include a LESSER INCLUDED OFFENSE. In that case, the defendant was arraigned on a felony complaint (before a superior court judge sitting as a local criminal court) and held for the grand jury upon a charge Criminal Possession of a Weapon (CPW) in the 3d degree. He then waived indictment and plead guilty under an SCI charging him with CPW 4th degree (which he later argued was improper because it was not the offense for which he had been held for grand jury action. He also claimed that it was not a lesser included offense (LIO) of CPW 3rd degree).

The Appellate Division (AD) reversed and dismissed the SCI and waiver as jurisdictionally defective (154 AD2d 886). The Court of Appeals, in turn, reversed the AD, noting that Article 1 Section 6 of the New York State Constitution does not require that an SCI include each and every offense set forth in a felony complaint and may include a LIO of the charge for which he/she was held for grand jury action. What it CANNOT do, however, is charge a GREATER OFFENSE than that which was charged in the felony complaint upon which the defendant was held for the grand jury. (citing *People v Smith* 86 Misc 2d 1032 [Crim Ct. Nassau County 1976]. See also *People v Colon* 16 AD3d 433 [2d dep't 2005]. *People v Zanghi* 79 NY2d 815 [1991]). The Court also rejected the defendant's argument that CPW 4th degree was not a LIO of CPW 3d, noting that one can not commit the latter without, at the same time, committing the former.

The Court did not reach the defendant's argument that allowing a waiver of indictment and SCI plea charging a LIO could violate the plea restrictions of CPL 220.10 (citing *People v Heine* 110 Misc 2d 156 [Franklin County Court 1981]). In *Heine*, the defendant was held for the grand jury on a felony complaint charging Rape 1st degree (forcible sexual intercourse), but the SCI charged the defendant with Sex Abuse 1st degree (sexual touching of the intimate parts of a person for sexual gratification by forcible compulsion).

The defendant then pled guilty to Attempted Sex Abuse 1st degree which, while a LIO of a Sex Abuse 1st degree (CPL 1.20[37]), 220.20), is NOT a LIO of Rape 1st degree since it is possible to commit that crime without also committing Sex Abuse. And, since the defendant was held for grand jury action on the Rape charge and not Sex Abuse, the plea to the LIO of Attempted Sex Abuse was a jurisdictional nullity. (Counsel should note that the meaning of LIO for purposes of a guilty plea [CPL220.20] is generally more expansive than it is for a possible verdict at a trial (see CPL 1.20[37], 300.50, *People v Glover* 57 NY2d 427 [1982]).

Not all inconsistencies or variances between a felony complaint and SCI will necessarily render the latter defective. In *People v Milton* 21 NY3d 133 (2013), the Court of Appeals held that an SCI which listed the victims (bank lending institutions that were defrauded by the defendant who obtained over a million dollars worth of mortgage commitments from them on two properties that he purchased using someone else's personal information), who were not specifically named in the felony complaint, was not defective where the crime alleged in each instrument was the same and the factual recitation in the felony complaint permitted the inference that the victims were the same.

The felony complaint (charging Grand Larceny 1st degree and Scheme to Defraud) named only the victim whose identity was purloined, but it also stated that the defendant stole over one million dollars from two banks (later named in the SCI) in connection with the purchase of two specified properties. In the courts view, it was clear from reading the complaint that the victims were the banks who were duped into providing mortgages on the properties. Consequently, there was no substantive factual discrepancy between the felony complaint and the SCI.

The court also rejected the defendant's argument that the two banks named in the SCI were not the same ones referenced in the felony complaint since the allegations suggested otherwise and, in any event, it was a factual question beyond the realm of view by the Court of Appeals. (citing *People v McLean* 15 NY3d 117 [2010]).

In contrast, see *People v Siminian* 112 AD3d 974 (2d dep't 2013) where the two assault victims named in the SCI were different from those listed in the felony complaint and there were not enough facts set forth in the complaint to support the inference that the assault described in the SCI related to the same incident. The court, citing *People v Pierce* 14 NY3d 564 (2010), stated that where the defendant waives indictment and consents to plead guilty by SCI, the SCI must charge either the same crime or an LIO of that crime. Since that was not the case in *Siminian*, the SCI was invalid and defendant's guilty plea was vacated.

It is also worth noting that while an SCI may charge an offense that is properly "joinable" with the offense for which the defendant was held for the grand jury, the waiver and SCI must still contain the offense [or LIO], for which the defendant was held (*People v Zanghi* supra).

In *People v Pierce* supra, (also an Erie County case), the Court of Appeals held that the SCI (upon which the defendant pled guilty to Grand Larceny 4th degree and Criminal Possession of Stolen Property [CPSP] 3rd degree), was defective because the CPSP charge, which arose from an entirely different incident from the Larceny charge (and lacked common elements), was not a joinable offense pursuant to CPL 200.20[2][c] and 195.20.

The defendant was initially charged by felony complaint with Grand Larceny 4th degree (theft of victim's money by obtaining a bank card on false pretenses), and was later charged by separate felony complaint with CPSP 4th degree arising from an incident occurring weeks later in which he was found to be in a stolen vehicle. The defendant was held separately for grand jury action on each complaint. Thereafter, for reasons that are not entirely clear, the People filed a new felony complaint in Superior Court charging the defendant with Grand Larceny 4th degree after which the defendant waived indictment and pled guilty to that charge along with an additional charge of CPSP 3d degree (one step higher than he had been charged with in the second felony complaint filed in Buffalo City Court). The defendant was later sentenced to concurrent terms of 3 and 1/2 to 7 years on the CPSP count and 1 and 1/2 to 3 years on the larceny charge.

The AD affirmed the convictions (57 AD3d 1357 [4th dep't 2008], but the Court of Appeals reversed. The Court noted, first of all, that unlike *People v Zanghi supra* where no offense set forth in the felony complaint (or LIO), was actually contained in the SCI, here, the SCI did contain one of the very offenses (Grand Larceny 4th degree) for which the defendant was held for grand jury action.

However, the People included the CPSP 3d degree charge on a joinder theory where it involved an entirely separate crime arising from an incident occurring on an entirely different date. So, there were really no common elements, nor were they either so closely connected in point of time and circumstance of commission to constitute a single criminal incident or so closely related in criminal purpose as to constitute integral parts of a single criminal venture. (CPL 40.10[2]).

The Court, finding no commonality between the two crimes/incidents and insufficient similarity in law between them, held, therefore, that the CPSP 3d degree charge was improperly included in the SCI. (Why the People, assuming they were bent on obtaining a D felony conviction [after the defendant was held on the Class E felony CPSP charge], didn't just file a new and separate felony complaint in superior court charging CPSP 3d degree, like their decision to file a new felony complaint charging the same offense [Grand Larceny 4th degree] for which the defendant had already been held for for grand jury action], is befuddling).

Having reversed the conviction on statutory grounds, the Court declined to reach the defendant's argument that CPL 195.20 which permits a waiver of indictment and prosecution by SCI of offenses for which the defendant was not held for grand jury action (i.e. never charged in a felony complaint), based on a joinder theory is unconstitutional. (In the defendant's view, CPL 195.20 should be interpreted to preclude joinder of offenses that are higher in degree than the offense for which the defendant was held for grand jury action).

As is apparent, SCI'S, which are an often handy-dandy vehicle for resolving criminal cases in superior court by guilty plea, (much less so for purposes of trial), are not as simple as they may seem, and counsel (prosecutors and defense attorneys alike), are well advised to scrutinize them carefully to make sure that they correspond in law and in fact to the felony complaints upon which they are based and, therefore, provide a firm foundation upon which to proceed.