Chapter 4

PREPARING FOR ARRAIGNMENT AND PRELIMINARY HEARING

Synopsis

PART D: HOLDING FELONY PRELIMINARY HEARING

PART A: PROCEDURAL CONTEXT

§ 4.01 Procedural Context—Preparing for Arraignment

An arraignment is the formal reading of charges. The purpose of the arraignment is to inform the defendant of the pending charge, advise the defendant of the right to counsel and provide the defendant with a copy of the accusatory instrument. Courts must conduct arraignments without unreasonable delay following the defendant's arrest. At the arraignment, the prosecutor provides the defendant with notices of any statements or identifications. Defense counsel should be prepared to serve a written notice of intent to testify before the grand jury. A preliminary hearing may follow an arraignment on a felony complaint if the defendant does not waive the right or if the prosecutor does not obtain an indictment within a specified time period. However, arraignments on indictments occur only after an indictment has been filed. Arraignments normally conclude with the court issuing a securing order releasing the defendant on his or her own recognizance, setting bail, or committing the defendant to the custody of the sheriff for future appearances relating to the action.

PART B: SATISFYING PURPOSE OF ARRAIGNMENT

§ 4.02 Checklist for Understanding and Fulfilling Purpose of Arraignment

Defense Tasks

- ☐ Appear at defendant's arraignment following filing of accusatory instrument. *See* § 4.03 *below.*
- ☐ Review notices of any statements, identifications, and grand jury procedures that court or prosecutor provides to defendant. *See* § 4.03 *below.*
- ☐ Advise defendant whether to enter plea at arraignment, if arraignment is on complaint. *See* § 4.04 *below.*
- ☐ Explain charges and review complaint or accusatory instrument with defendant. *See* § 4.04 *below.*
- ☐ **Search Advisor**:

  Criminal Law & Procedure > Preliminary Hearings > Initial Appearances

  Criminal Law & Procedure > Preliminary Hearings > Entry of Pleas

  Criminal Law & Procedure > Counsel > Right to Counsel > Arraignments

- ☐ **Investigate Parties on *lexis.com*®.** *See* § Intro.09 *above*.

§ 4.03 Ensuring Defendant's Rights Are Protected at Arraignment

Defense counsel's first contact with the defendant may happen at the arraignment. CPL §§ 170.10(3), 210.15(2). An arraignment occurs when a defendant against whom an accusatory instrument has been filed appears before the court in which the criminal action is pending, so that the court can acquire and exercise control over the defendant and set the course of further proceedings in the action. CPL § 1.20(9). The arraignment is designed, among other things, to ensure that the court protects the defendant's rights. In both felony and non-felony cases, the court must inform the

defendant of the charges against him or her and must furnish the defendant with a copy of the accusatory instrument.

The court must also inform the defendant of his or her right to counsel at every stage of the proceedings, and take affirmative action to effectuate the defendant's right to counsel. CPL §§ 170.10(4), 210.15(3). The court should allow the defendant a reasonable opportunity to exercise his or her right to counsel before requiring a plea to the charges.

● **Warning:** In some rural areas, courts only conduct arraignments on specific days, and if defense counsel is not at the arraignment on the designated day, the court proceeds without him or her.

Defense counsel will not suffer any procedural infirmity if he or she is absent from the arraignment on the complaint that occurs shortly after defendant's arrest. However, defense counsel must be present at the arraignment that occurs after the filing of the accusatory statement. The defendant may waive his or her right to counsel at arraignment after arrest. *See* § 4.10 *below* (differences between arraignments in rural and urban areas).

Arraignment means different things depending on whether the accusatory instrument is a complaint, an information, or an indictment. If the accusatory instrument is an indictment or information, the arraignment will include the entry of a plea of guilty or not guilty. The entry of a plea of guilty can also occur if defendant is being presented on an information. *See* § 4.09 *below* (arraignment on indictment).

● **Warning:** In New York City, a defendant usually will not get a hearing on the issue of sufficiency of the evidence to warrant the court's holding him or her for the grand jury's action. Frequently, the prosecutor will obtain an indictment first, eliminating the need for a hearing.

The felony arraignment concludes when bail is set, defendant is released on his or her own recognizance, or bail is denied. The court then sets a date for a hearing on the felony complaint, unless the defendant waives that hearing. In contrast, the arraignment on an indictment is the stage of the proceedings where the defendant first appears before a superior court to hear and respond to the charges in the indictment, and is given a copy of the indictment.

PRACTICE RESOURCES:

- *New York Criminal Practice* Ch. 9 (local criminal court arraignment).
- *Criminal Defense Techniques* § 103.04 (motions and notices at arraignment).
- 1–1*Criminal Law Advocacy* Ch. 1 (steps in criminal process).
- *Federal Criminal Practice: A Second Circuit Handbook* Ch. 1 (arraignment).
- CPL §§ 170.10–180.10 (proceedings upon information and felony complaint), CPL § 210.15 (arraignment upon indictment).
- *In re Bauer,* 3 N.Y.2d 158, 785 N.Y.S.2d 372, 818 N.E.2d 1113 (2004) (city court judge committed pattern of abuse by not only failing to advise defendants of their right to counsel at arraignment and in all stages of case, but ignoring CPL § 170.10 by telling defendants that they must engage their own attorneys, which concealed from defendants that statute requires court to assign counsel when warranted and to see that right to counsel is protected).

- *People v. Collins,* 288 A.D.2d 756, 733 N.Y.S.2d 289 (3d Dep't 2001) (defendant waived his right to counsel at arraignment by declining assistance from public defenders' office and stating that he would represent himself after court advised him of his right to counsel).

§ 4.04 Entering Plea at Arraignment

At the arraignment, defendant must enter a plea to the charges of an accusatory instrument when that instrument is an information, simplified information, or prosecutor's information. If the court dismisses the instrument or terminates or abates the criminal action pursuant to CPL §§ 170.10–170.70 or another provision of the law, the defendant is not required to enter a plea. Defendants must also appear in person and orally enter a plea to an information, except in certain traffic infractions or cases involving corporate defendants.

Exception: Under CPL § 340.20(2)(a), defense counsel may enter the defendant's plea by submitting to the court a written and subscribed statement from the defendant specifying that he or she waives the right to plead in person and authorizes defense counsel to enter a plea on his or her behalf.

If the defendant enters a plea of guilty at the arraignment, the plea constitutes conviction of the offense charged, proves every allegation in the instrument, and renders further proof unnecessary. The court sets a time for sentencing in accordance with CPL § 380.30(2)(a), although the defendant may waive this requirement. The plea may be entered at the time of arraignment or soon thereafter. A plea is not a necessary part of defendant's arraignment on a complaint, but is required at an arraignment on an information or indictment. *See* § 4.07 *below* (arraignment in misdemeanor cases). The main purpose of a felony complaint arraignment is to determine whether the defendant will be held for the action of the grand jury on the charges.

Strategic Point—Defense: Avoid having the defendant enter a plea at arraignment if the prosecutor has filed only a misdemeanor complaint. The prosecutor must gather enough evidence to convert the complaint to an information within 90 days to prevent the case from being dismissed pursuant to the speedy trial statute. If the defendant pleads guilty, the prosecutor is not required to prove its case against defendant, and the defendant faces sentence on that charge to which he has pleaded guilty. *See* §§ 4.06, 4.07 *below* (speedy trial).

PRACTICE RESOURCES:

- *New York Criminal Practice* Ch. 9 (local criminal court arraignment), Ch. 12 (superior court arraignment).
- *Federal Criminal Practice: A Second Circuit Handbook* §§ 1–1, 1–2, 1–3, 1–4, 1–5, 1–6 (arraignment).
- CPL §§ 170.10–170.70 (proceedings upon information), CPL §§ 220.10–220.70 (prosecution of indictments), CPL § 340.20 (pleas), CPL § 380.30 (pronouncing sentence).

PART C: MANAGING ARRAIGNMENT PROCEEDINGS

§ 4.05 Checklist for Managing Arraignment Proceedings

Defense Tasks

- ☐ Assure that defendant is brought to court for arraignment without unnecessary delay. *See* § 4.06 *below*.
- ☐ Ascertain whether unacceptable reason caused delay of arraignment longer than 24 hours after arrest. *See* § 4.06 *below*.
- ☐ Ensure defendant appears in person at arraignment following filing of information, simplified information, prosecutor's information, or misdemeanor complaint, unless exception exists. *See* § 4.07 *below*.
- ☐ Consider waiving defendant's right to felony preliminary hearing. *See* § 4.08 *below*.
- ☐ Review complaint and criminal record and discuss with defendant. *See* § 4.11[1] *below*.
- ☐ Elicit facts from defendant to help court determine bail. *See* § 4.11[1] *below*.
- ☐ Elicit facts from defendant to show weakness in prosecution's case. *See* § 4.11[1] *below*.
- ☐ Serve and file notice to court of defendant's intent to testify before grand jury, if applicable. *See* § 4.11[1] *below*.
- ☐ Supply written notice of defendant's intent to testify before grand jury, if applicable. *See* § 4.11[1], [2] *below*.
- ☐ Provide prosecutor with business card and telephone number for case file. *See* § 4.11[1] *below*.
- ☐ Consider plea bargain if it appears that defendant will be found guilty after trial. *See* § 4.11[1] *below*.
- ☐ Provide reasons why bail should not be set and defendant should be released on his or her own recognizance, or why low bail should be set. *See* § 4.11[2] *below*.

Prosecution Tasks

- ☐ Provide appropriate notices to defense counsel. *See* §§ 4.09, 4.10, 4.11 *below.*
- ☐ Argue for denial of bail or argue in favor of high bail amount, if appropriate. *See* § 4.11[2] *below.*
- ☐ **Search Advisor:**

  Criminal Law & Procedure > Preliminary Proceedings > Arraignments

  Criminal Law & Procedure > Preliminary Hearings > Delay in Holding Hearing

  Criminal Law & Procedure > Preliminary Hearings > Initial Appearances

  Criminal Law & Procedure > Counsel > Right to Counsel

- ☐ **Investigate Parties on *lexis.com*®.** *See* § Intro.09 *above*.

§ 4.06 Satisfying Statutory Requirements of Speedy and Public Arraignment

Arraignments must occur in open court, and the defendant usually must be present. Defense counsel may make a motion for a private arraignment by showing that the defendant would be prejudiced by a public arraignment. However, these motions are rarely granted.

Police must bring the defendant to court for arraignment without unnecessary delay after all required police procedures are performed, whether police arrest defendant with or without an arrest warrant. CPL § 140.20(1) sets no time limits within which these police procedures must take place, and courts have not defined a set time period. However, defense counsel can later protect the defendant's constitutional rights, and prevent coercions of admissions or confessions, by making a motion asserting that police unlawfully delayed defendant's speedy arraignment. The courts will review the motion to determine whether the police officers or prosecution prolonged the pre-arraignment detention beyond the time reasonably necessary to accomplish the tasks required to bring the defendant to arraignment.

Under New York law, there is a rebuttable presumption that a delay of greater than 24 hours before arraignment on the complaint is unreasonable, but the prosecution may overcome the presumption by showing an acceptable explanation for the delay. *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 568 N.Y.S.2d 575, 570 N.E.2d 223 (1991). Delay is acceptable if it results from any of the following:

1. Standard arrest processing, including fingerprinting and photographing the defendant;
2. The defendant's unexpected confession to other crimes;
3. The unavailability of a court because of the time of arrest; or
4. Other exigent circumstances sufficient to excuse a delay in arraignment.

Defense counsel may move to suppress statements made during unreasonably long pre-arraignment periods, despite any *Miranda* waiver. The court will base suppression either on right to counsel grounds that delay was calculated to prevent attachment of right to counsel or that statements were involuntary. If it appears that the defendant's arraignment was intentionally delayed beyond the time when the defendant was ready for a court appearance, the court will view the delay with suspicion.

● **Warning—Defense:** Police will argue that a delay in prompt arraignment was necessary to further interrogate the defendant, permit the defendant to negotiate for a plea bargain, or allow defendant to give videotaped confessions. However, courts have found that all of these reasons are unacceptable. *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 568 N.Y.S.2d 575, 570 N.E.2d 223 (1991).

PRACTICE RESOURCES:

- *New York Criminal Practice* Ch. 9 (local criminal court arraignment).

- *New York Criminal Practice* §§ 10.02 (speedy arraignment), 47.04 (timely arraignment and related rights enforceable through state habeas corpus).
- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment), 103.04 (motions and notices at arraignment).
- *New York Suppression Manual* §§ 10.06 (right to prompt arraignment), 31.05 (form for suppression of statement due to delay in arraignment).
- *Federal Criminal Practice: A Second Circuit Handbook* § 1–3 (speedy arraignment).
- *People v. Ramos,* 99 N.Y.2d 27, 750 N.Y.S.2d 821, 780 N.E.2d 506 (2002) (delay in arraignment for purpose of further police questioning does not establish deprivation of state constitutional right to counsel; defendant must instead advance delay in arraignment claim under CPL § 140.20(1), and claimed violation of prompt arraignment statute must be preserved for appellate review).
- *People v. Seeber,* 4 A.D.3d 620, 772 N.Y.S.2d 122 (3d Dep't 2004) (while unwarranted period of prearraignment delay can be factor in assessing whether confession was voluntary, defendant must raise claimed violation of CPL § 140.20(1) at trial level to afford prosecution opportunity to put forth other reasons for alleged delay in arraignment).

§ 4.07 Navigating Court Procedures at Arraignment in Misdemeanor Cases

[1] Distinguishing Criminal Summons from Appearance Ticket

A criminal summons may only be issued by a judge after an accusatory instrument has been filed. To be valid, the criminal summons must be both based on the accusatory instrument and be issued by a judge presiding over the court where the accusatory instrument is filed. A criminal summons lacking either of these requirements is not valid. CPL §§ 130.10, 130.20. A criminal

summons is issued by a local criminal court and its only purpose is to compel the appearance of the defendant before the issuing court for arraignment. CPL § 130.10(1).

● **Warning—Defense:** Instruct the defendant who has received a criminal summons to appear before the court at the designated time and place. CPL § 130.50. Warn the defendant that if he or she fails to appear, the court will likely issue a warrant for his or her arrest.

Unlike a criminal summons, an appearance ticket (known as Desk Appearance Ticket or DAT), does not require that a criminal action against the defendant be pending. CPL § 150.10. Additionally, a police officer or public official may issue an appearance ticket. CPL § 150.20. However, if the defendant fails to comply with the order in an appearance ticket, the court may issue a summons or warrant of arrest once an accusatory instrument has been filed. CPL § 150.60.

PRACTICE RESOURCES:

- *New York Criminal Practice* § 6.22 (summons distinguished from appearance ticket).
- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment), 103.04 (motions and notices of arraignment).
- CPL § 120.20(3) (arrest warrants), CPL §§ 130.10–130.30 (criminal summons), CPL § 170.10 *et seq.* (arraignment on non-felony complaints).

[2] Compelling Defendant's Personal Appearance at Arraignment

The defendant must appear in person at the arraignment following the filing of an information, a simplified information, a prosecutor's information, or a misdemeanor complaint with the local criminal court, except as provided in CPL § 170.10(1)(a) and

in cases where a simplified information has been filed. CPL § 170.10(1).

The defendant may be compelled to appear in court for arraignment by the following means:

1. Execution of arrest warrant (CPL § 120.20(1));
2. A summons, if the court is satisfied that the defendant will respond to it (CPL § 120.20(3)); or
3. Upon the prosecutor's direction to the defendant to appear for arraignment on a specified date (CPL §§ 120.20(3), 130.20).

Exception: Defendant may be arraigned without a court appearance in two instances:

1. When an alternative provision of the law dispenses with the need for defendant's personal appearance; or
2. When the court permits the defendant to appear by defense counsel instead of in person. CPL § 170.10(1)(a), (b). Albeit infrequently used, CPL §§ 182.10–182.40 provides for alternative methods of court appearance, including electronic appearance, that eliminate the need for the personal appearance of the defendant.

PRACTICE RESOURCES:

- *New York Criminal Practice* § 6.01 *et seq.* (warrants of arrest and summonses, local criminal courts, superior courts).
- *New York Criminal Practice* Ch. 9 (local criminal court arraignment).
- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment), 103.04 (motions and notices of arraignment).
- *Federal Criminal Practice: A Second Circuit Handbook* §§ 1–2 (pre-arraignment detention), 1–3 (speedy arraignment).

- CPL §§ 182.10–182.40 (alternate method of court appearance).
- *People v. Mensch*, 6 Misc. 3d 1012, 2002 N.Y. Misc. LEXIS 2000 (City Ct. New York 2002) (defendant must personally appear in court for arraignment; Legislature has carved out two exceptions in which court may arraign defendant charged in simplified information without court appearance).

§ 4.08 Handling Arraignment on Felony Complaints

At the defendant's arraignment on a felony complaint, the court will immediately inform the defendant or defense counsel of the charge or charges against the defendant. Defense counsel will receive from the court a copy of the felony complaint against the defendant. The court will also inform the defendant or defense counsel that the primary purpose of the felony arraignment is to determine whether the defendant is to be held for the action of a grand jury with respect to the charges. CPL § 180.10(1).

Defense counsel should expect the felony arraignment to conclude when the court issues a securing order that, as provided in CPL § 530.20(2), releases the defendant on his or her own recognizance, sets bail, or commits the defendant to the custody of the sheriff for future appearances on the action. CPL § 180.60. Afterwards, the court sets a date for a preliminary hearing on the felony complaint. At this time, defense counsel should consider waiving the defendant's right to the hearing. *See* §§ 4.13–4.16 *below* (preliminary hearings on felony complaints).

Local criminal courts generally process arraignments on felony complaints and non-felony accusatory instruments during the same court session. The CPL does not require felony complaint arraignments to be segregated from arraignments on an information, a prosecutor's information, a misdemeanor complaint, or a simplified information.

● **Warning—Defense:** Consult local court rules to

determine which court holds felony arraignments; local court procedures may vary among jurisdictions.

PRACTICE RESOURCES:

- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment).
- *New York Criminal Practice* Ch. 9 (local criminal court arraignment).
- CPL §§ 180.10–180.60 (proceedings upon felony complaint).

§ 4.09 Handling Arraignment on Indictments

The court must arraign the defendant after the grand jury has filed an indictment with a superior court. The arraignment must occur without excessive delay, although CPL does not provide an exact time frame. CPL § 210.10. *See* § 4.06 *above* (speedy and public arraignment). The court, not the prosecutor, is responsible for arraigning the defendant on an indictment. The court notifies the defendant of the arraignment date and secures the defendant's appearance to obtain jurisdiction over the defendant. *People v. Goss*, 87 N.Y.2d 792, 642 N.Y.S.2d 607, 665 N.E.2d 177 (1996). Defense counsel must explain to the defendant that he or she must appear in person at the arraignment. Be aware that any defects in the arraignment procedure in the local criminal court prior to the filing of an indictment will not affect the validity of that instrument or any subsequent proceedings.

● **Warning—Prosecution:** To determine whether a defendant can procede pro se, the prosecutor can request a sufficient inquiry into the defendant's record.

At the arraignment, the court informs the defendant or defense counsel of the charge or charges against the defendant. The prosecutor provides the defendant or defense counsel with a copy of the indictment. CPL § 210.15(1). The court informs the defendant of his or her right to an attorney and takes affirmative steps to effectuate the defendant's rights. If the defendant desires to proceed without the assistance of an attorney, the court may allow the defendant to do so if it is satisfied that the decision was made with full understanding of its significance. In some jurisdictions, the prosecutor files notice or a voluntary disclaimer form.

Unless it intends to make an immediate final disposition of the action at the arraignment, the court issues a securing order releasing the defendant on his or her own recognizance, setting bail, or committing the defendant to the custody of the sheriff or department of corrections for future appearances in the action. CPL § 210.15(6).

Defense counsel, if present at the arraignment, does not need to advise the defendant to enter a plea. However, defense counsel must advise the defendant that he or she will have to enter a plea to the indictment at a later time (statutory law does not specify when plea is to take place). CPL § 210.50. If the defendant appears at arraignment without counsel, the court will enter a plea of not guilty on behalf of the defendant.

● **Warning—Defense:** If the defendant is released under CPL § 180.80 and is later arraigned on an indictment, the court may set bail even though the defendant was previously released on his own recognizance.

PRACTICE RESOURCES:

- *New York Criminal Practice* § 12.01 *et seq.* (superior court arraignment).
- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment).
- 1–1 *Criminal Law Advocacy* Ch. 1 (steps in criminal process including arrest procedures).
- *New York Suppression Manual* § 10.06 (right to prompt arraignment).
- CPL §§ 210.10, 210.15 (arraignment on indictments).
- *People v. Providence,* 2 N.Y.3d 579, 780 N.Y.S.2d 552, 813 N.E.2d 632 (2004) (when criminal defendant waives right to counsel in favor of self-representation, searching inquiry must be conducted to ensure that defendant is aware of dangers and disadvantages of proceeding without counsel).

§ 4.10 Fulfilling Prosecutor's Responsibilities at Arraignment

[1] Proceeding With Arraignment at Large District Attorney's Office

The prosecutor will obtain from the complaint room the case file that includes several copies of the complaint and a preliminary screening sheet summarizing information elicited from the arresting police officer and witnesses. *See* Ch. 2 *above* (preparing to prosecute and complaint rooms at large district attorney's offices). The case file also includes a form listing any orders of protection or notices to be served at arraignment, for example, CPL § 190.50 (grand jury notices) or CPL § 710.30 (notices of statements or identification). All orders of protection and notices are attached to this form. If there is a family court order of protection, the file also includes a domestic incident report. *See* Ch. 7 *below* (considering grand jury issues).

At arraignment on a felony or misdemeanor complaint, the prosecutor provides the court with copies of the complaint, and

the court provides one copy to defense counsel. The prosecutor provides defense counsel with any notices, for example, a notice of the pendency of grand jury proceedings and of defendant's right to appear as a witness. The prosecutor may serve CPL § 710.30 notice (notice to defendant of intention to offer evidence) prior to the Supreme Court arraignment, and such notice is considered effective. *People v. Korang,* 160 Misc.2d 604, 610 N.Y.S.2d 730 (Sup. Ct. Queens County 1994). Depending on local practice, the prosecutor may also provide the court with a copy of any notice and any other documents provided to defense counsel at arraignment.

● **Warning—Defense:** Avoid making determinations on the strength of prosecution's case based solely on the information the prosecutor provides at arraignment. Usually, the prosecutor provides only the documents required by law, which, at best, may offer a glimpse into the prosecution's theory of the case. Defense counsel must gather all available evidence and evaluate that evidence in the context of representing the defendant's best interest. *See* §§ 1.18, 1.19 *above* (investigating client's case).

● **Warning—Prosecution:** Adhere to office policy regarding what information to provide at arraignment. Most district attorneys' offices provide only the minimum paperwork required by law.

The prosecutor should be familiar with the law surrounding notice requirements. There is no reason to provide notice of certain types of identifications, including confirmatory identifications, or statements made to individuals not acting as agents of the police. In some cases, either an untimely notice or incomplete notice will be excused or deemed harmless error.

● **Timing:** The prosecutor's failure to provide notice of confessions or identifications within 15 days of the supreme court arraignment may result in preclusion of that evidence.

PRACTICE RESOURCES:

- *New York Criminal Practice* Ch. 7 (securing attendance of defendants for arraignment and prosecution), Ch. 9 (local criminal court arraignment), Ch. 18 (motions to suppress evidence).
- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment).
- 1–1 *Criminal Law Advocacy* Ch. 1 (steps in criminal process).
- *New York Suppression Manual* §§ 10.06 (right to prompt arraignment), 31.05 (form for suppression of statement due to delay in arraignment).
- *Federal Criminal Practice: A Second Circuit Handbook* §§ 1–3 (speedy arraignment), 1–4 (pre-arraignment interviews by prosecutors).
- CPL § 710.30 (providing notice to defendant).
- *People v. Garcia-Lopez,* 308 A.D.2d 366, 764 N.Y.S.2d 264 (1st Dep't 2003) (prosecution did not have to provide notice pursuant to CPL § 710.30(1)(a) of statement defendant made in course of unrelated drug transaction; although this admission was statement of fact, defendant made it in course of commission of crime and there was no question of voluntariness).
- *People v. Thompson,* 306 A.D.2d 758, 763 N.Y.S.2d 109 (3d Dep't 2003) (because one of pretrial photo identifications that police investigator made of defendant was not confirmatory, prosecution should have provided CPL

§ 710.30 notice, but error was harmless in light of other compelling proof).

[2] Proceeding With Arraignment at Small District Attorney's Office

In counties with small district attorneys' offices, police officers not only arrest and fingerprint individuals, but also draft complaints. Police officers provide the district attorney's office with the paperwork for arraignment. The prosecutor usually conducts the arraignment on the complaint, and the court provides the defense counsel or defendant with the paperwork at the arraignment, specifically the complaint and supporting depositions.

● **Warning:** In some small counties, courts conduct arraignments on complaints in the absence of the prosecutor and defense attorney. For example, police officers arrest the defendant at 3:00 a.m., the officers call the judge, and the judge comes to the holding pen or the officers bring the defendant to a location that the judge chooses. The judge sets bail and appoints a public defender for the defendant. However, if the defendant states that he or she has an attorney, the defendant may call that attorney prior to the arraignment on the complaint. If defense counsel is willing to make an appearance, the judge and the police officers will wait for counsel's arrival.

The prosecutor and defense counsel generally are present at the arraignment on the converted accusatory statement. At this time, the prosecutor may provide defense counsel with discovery and some statutory notices. *See* Ch. 9 *below* (discovery procedures).

PRACTICE RESOURCES:

- *New York Criminal Practice* Ch. 7 (securing attendance of defendants for arraignment and prosecution), Ch. 9 (local criminal court arraignment), Ch. 18 (motions to suppress evidence).

- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment).
- 1–1 *Criminal Law Advocacy* Ch. 1 (steps in criminal process).
- *New York Suppression Manual* §§ 10.06 (right to prompt arraignment), 31.05 (form for suppression of statement due to delay in arraignment).
- *Federal Criminal Practice: A Second Circuit Handbook* §§ 1–3 (speedy arraignment), 1–4 (pre-arraignemnt interviews by prosecutors).

§ 4.11 Fulfilling Defense Counsel's Responsibilities at Arraignment

[1] Proceeding With Arraignment at Large District Attorney's Office

Defense counsel is well advised to arrive at the court when it opens to file a notice of appearance and obtain a copy of the complaint and defendant's criminal record. After reviewing these documents, defense counsel may ask for permission to speak with the defendant before the defendant is arraigned, if counsel has not had the opportunity to do so. During this short conversation, counsel should elicit information from the defendant that would be helpful on the question of bail, for example, the defendant's family background and ties to the community, including local employment and involvement in associations or local houses of worship. Counsel should also advise the defendant, especially one who has had no prior contacts with the criminal justice system, of the nature of the arraignment and courtroom decorum. *See* § 1.08 *above* (meeting with client at arraignment).

Defense counsel may try to elicit facts that will show the weakness of the prosecution's charge against the defendant. For example, if police officers made the arrest without a warrant, and there was a search, counsel may inquire about the actions of the police during this search. If it appears that the police officers seized anything in violation of the defendant's constitutional rights, this

detracts from the strength of the case because the court may ultimately suppress the incriminating evidence.

Strategic Point—Defense: Look for improper police conduct and use any instances to support the argument that the prosecution's case is weak. Ask the court to release the defendant on his or her own recognizance, instead of requesting the court to set bail. *See* Ch. 5 *below* (evaluating bail issues). *See* Ch. 12 *below* (challenging search and seizures).

Strategic Point—Defense: If defense counsel has advance notice of the arraignment, arrange for the defendant's family to be present for the arraignment. The presence of family members or other community members who support the defendant will strengthen any arguments in favor of releasing the defendant on his or her own recognizance. *See* Ch. 5 *below* (evaluating bail issues).

If the court calls the case before defense counsel has had an adequate opportunity to speak with the defendant, counsel should consider requesting a continuance. Although the court may deny the request and order defense counsel to proceed, counsel may still request additional time to confer with the defendant before proceeding.

The prosecutor will give defense counsel any applicable notices, and defense counsel should be prepared to serve the prosecutor and file with the court a notice of defendant's intent to testify before the grand jury. This notice should be in writing, as defense counsel's oral notice of defendant's desire to testify has been deemed insufficient. *See* Ch. 7 *below* (considering grand jury issues).

● **Timing:** Defense counsel should prepare a written notice of intent to testify in advance of arraignment. Defense counsel must file notice of defendant's intent to testify before the grand jury at arraignment (although counsel may decide after arraignment to waive this right) because failure to file notice with the prosecution waives defendant's right to testify.

Defense counsel should also review defendant's criminal record, known as the RAP sheet, at the arraignment. The RAP sheet at the arraignment is based on reports received from the New York state criminal records repository in Albany, but it may not be an indication of the person's complete record, including out-of-state arrests. If a defendant has an out-of-state record but no previous New York arrests, it may appear as if this is the defendant's first arrest because he or she has no RAP sheet.

● **Warning:** The criminal record system is not perfect and it may have inaccuracies. Thus, at arraignment, neither party should hastily offer or take a plea if there is a question about a prior conviction, especially if it is a felony.

If the court releases the defendant on his or her own recognizance or the defendant posts bail after arraignment, defense counsel should speak with defendant and make an appointment to meet with defendant in counsel's office within a day or two. If the defendant is unable to provide the required bail or has been held without bail, counsel should inform the defendant that counsel will visit with him or her in the detention facility in the immediate future. *See* § 1.08 *above* (meeting client at arraignment).

It is good practice for defense counsel to provide a business card or telephone number to the prosecutor for the case file. If the prosecutor does not contact defense counsel shortly after the arraignment, defense counsel should call the district attorneys' office to find out who is assigned to the case, and call that assistant

as soon as possible. During this call, defense counsel should try to get a sense of whether the assistant feels it is a strong and triable case. If appropriate, this is the time to begin to lay the groundwork for plea bargaining. Plea bargaining may be appropriate, if, after thoroughly interviewing the defendant, examining all the facts, interviewing all potential witnesses, and discussing the case with the prosecutor, it appears probable that the defendant will be found guilty after trial. *See* § 1.08 *above* (meeting client at arraignment).

● **Warning—Defense:** If defense counsel is substitute counsel who has entered a case after the arraignment, he or she needs to make sure that all notices have been served in the case.

● **Warning—Prosecution:** If substitute defense counsel is assigned, the prosecutor is not required to provide replacement counsel with notices previously served in the case.

PRACTICE RESOURCES:

- *New York Criminal Practice* § 1.02 (initial entry into action at arraignment).
- *See* §§ 8.05–8.13 *below* (plea bargaining).

[2] Proceeding With Arraignment at Small District Attorney's Office

Defense counsel should be present at the defendant's arraignment. However, because courts in small counties conduct arraignments on complaints 24 hours a day, defense counsel is often not present. Defense counsel should be present for the arraignment on the converted accusatory instrument, and advise the defendant about whether to enter a plea at arraignment. *See* § 4.04 *above* (entering plea at arraignment). *See* Ch. 8 *below* (understanding issues related to guilty pleas).

Defense counsel who was not present for arraignment on the complaint should supply written notice of defendant's intent to testify before the grand jury in the interval between the first arraignment and the arraignment on the accusatory instrument. Defense counsel must provide the court with reasons why bail should not be set in any amount and defendant should be released on his or her own recognizance, or reasons why the court should set a low bail amount. *See* § 4.11[1] *above* (review of RAP sheet at arraignment). *See* Ch. 5 *below* (evaluating bail issues). After the arraignment, defense counsel should explain the charges to the defendant and review the accusatory instrument with him or her.

PRACTICE RESOURCES:

- *New York Criminal Practice* Ch. 9 (local criminal court arraignment).
- *Criminal Defense Techniques* §§ 103.01 (practice guide for arraignment), 103.02 (checklist for arraignment), 103.03 (research guide for arraignment), 103.04 (motions and notices at arraignment).
- *People v. Madsen,* 254 A.D.2d 152, 681 N.Y.S.2d 6 (1st Dep't 1998) (court properly denied defendant's motion to dismiss indictment pursuant to CPL § 190.50(5); defendant failed to file any written notice of intention to testify before grand jury prior to filing of indictment and courts strictly enforce this requirement).
- *People v. Ward,* 234 A.D.2d 723, 651 N.Y.S.2d 649 (3d Dep't 1996) (defendant's rights were not violated when replacement counsel was not provided with prosecutor's notice that had been served on original counsel).

PART D: HOLDING FELONY PRELIMINARY HEARING

§ 4.12 Checklist for Holding Felony Preliminary Hearing

Defense Tasks

- ☐ Use felony preliminary hearing to discover prosecution's evidence against defendant. *See* § 4.13 *below*.
- ☐ Advise defendant whether to request or waive felony preliminary hearing if there is pending felony complaint. *See* § 4.14 *below*.
- ☐ Consider waiving felony preliminary hearing in various situations, for example, if prosecution witness is available for hearing but will not be available for trial, or if prosecution has strong case. *See* § 4.14 *below*.
- ☐ Participate in felony preliminary hearing and ensure that hearing is held promptly. *See* § 4.15 *below*.
- ☐ Advise defendant whether to seek exclusion of public from felony preliminary hearing. *See* § 4.16 *below*.
- ☐ Request that court release defendant if probable cause hearing has not been held within statutory time limits. *See* § 4.16 *below*.

Prosecution Tasks

- ☐ Commence felony preliminary hearing without delay. *See* § 4.13 *below*.
- ☐ Attend and participate in felony preliminary hearing if defense counsel requests one, or risk court dismissing charge against defendant. *See* § 4.15 *below*.
- ☐ **Search Advisor:**

  Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings

  Criminal Law & Procedure > Counsel > Right to Counsel > Preliminary Proceedings
- ☐ **Investigate Witnesses on *lexis.com*®.** *See* § Intro.08 *above*.

☐ **Investigate Parties on *lexis.com*®.** *See* § Intro.09 *above*.

§ 4.13 Understanding Purpose of Felony Preliminary Hearing

The purpose of a felony preliminary hearing is to ensure the defendant's right to a prompt hearing on the issue of whether there is sufficient evidence to warrant holding him or her for the action of a grand jury. CPL § 180.10. *See* § 4.16 *below* (timely hearings). The felony preliminary hearing is also referred to as a hearing upon the felony complaint and a preliminary examination. A preliminary hearing is available only in cases where there is a pending felony complaint or no grand jury action has been taken. If the prosecutor seeks an indictment within a specified time period, a hearing is not required. A preliminary hearing is also not required if the sole charge before the local criminal court is a misdemeanor or if the felony charges have been reduced to misdemeanor charges after grand jury inquiry. *See* § 4.07 *above* (arraignment in misdemeanor cases).

Defense counsel does not need to request a preliminary hearing because the defendant has a statutory right to a preliminary hearing. The prosecutor is obligated to commence and the court is obligated to conduct the preliminary hearing. The prosecutor cannot create a program of delay that would deny the defendant this statutory right. CPL § 180.60.

● **Warning—Defense:** In smaller counties that have fewer prosecutors, the district attorney's offices may prefer not to hold preliminary hearings due to limited resources. Defense attorneys should be familiar with the policies and preferences of the district attorney's office in the county where the hearing will take place. Although the defendant is entitled to assert his or her right to a preliminary hearing, the district attorney's office may factor that request into its decision to negotiate a plea offer.

While the purpose of the preliminary hearing is to determine if the defendant should be held for the action of the grand jury, this

does not require that the defendant be held in custody. The defendant may be held for the grand jury and still be placed on bail, or released on his or her own recognizance. Obtaining the defendant's release from custody is not the only purpose of the felony preliminary hearing. Although the preliminary hearing is not meant to function as a discovery tool, defense counsel may also use the felony preliminary hearing for the following purposes:

1. Exposing weaknesses in the prosecution's case and weeding out groundless charges;
2. Laying the groundwork for impeachment of prosecution witnesses at trial;
3. Encouraging plea negotiations;
4. Exploring the viability of a motion to suppress;
5. Determining appropriate bail;
6. Providing discovery of the prosecution's case; and
7. Influencing prosecutor to dismiss the charges.

● **Warning—Prosecution:** If a preliminary hearing is conducted, thoroughly prepare witnesses or inaccurate testimony may result. Practice suggests that prosecutors should prepare witnesses as if the case were going to trial because the court may allow wide latitude in questioning.

The prosecutor is compelled, in the felony preliminary hearing, to meet its burden of proving that there is reasonable cause to believe the defendant committed a felony. CPL §§ 180.60, 180.70. If the prosecutor is unable to meet its burden of proof, the court will either dismiss the felony complaint or reduce the charges to non-felony offenses. CPL §§ 180.50, 180.70. Even if the prosecutor consents to reduction to a non-felony, the court must conduct an inquiry to determine the basis for charging the defendant with a non-felony.

PRACTICE RESOURCES:

- *New York Criminal Practice* §§ 1.07 (preliminary hearing), 10.04 (nature and purpose of preliminary hearing), 10.05 (defendant's right to preliminary hearing).
- *Criminal Defense Techniques* §§ 104.01 (practice guide for preliminary hearings), 104.02 (checklist for preliminary hearings), 104.03 (research guide for preliminary hearings), 104.04 (preliminary hearing motions, state forms).
- 1–7 *Criminal Law Advocacy* Ch. 7 (preliminary hearings).
- *New York Suppression Manual* § 10.06 (right to prompt hearing on sufficiency of evidence).
- *Defense of Narcotics Cases* § 2.08 (purpose of preliminary hearing).
- CPL § 180.10 *et seq.* (felony preliminary hearings).
- *People v. Yolles,* 92 N.Y.2d 960, 683 N.Y.S.2d 160, 705 N.E.2d 1201 (1998) (if prosecutor consents to reducing charges in felony complaint to offenses other than felonies, local criminal court must first inquire into whether facts and evidence provide basis for charging non-felony offense; if court is satisfied, after inquiry, that there is reasonable cause to believe that defendant committed non-felony offense, court may order reduction).

§ 4.14 Waiving Felony Preliminary Hearing

[1] Understanding Nature and Consequences of Waiver

The defendant may waive the right to a felony preliminary hearing if the waiver is voluntarily, knowingly, and intentionally made. CPL § 180.10(2). Failure to object to defendant being held for the grand jury without a preliminary hearing does not constitute waiver of the hearing. The court is not required to accept the defendant's waiver. If defendant waives a preliminary hearing, the court must order that the defendant be held for the action of a grand jury of the appropriate superior court with respect to the charge or charges contained in the felony complaint (CPL § 180.30(1)) or the court must make an inquiry, pursuant to CPL § 180.50, to

determine whether the felony complaint should be dismissed and an information, a prosecutor's information, or a misdemeanor complaint should be filed with the court in lieu of the felony complaint.

While defense counsel may waive the preliminary hearing, the prosecutor must attend the hearing if the defendant requests one. The prosecutor's failure to attend a preliminary hearing can result in dismissal of the charges based on the fact that the prosecution did not present any evidence to the court. CPL § 180.70(4).

[2] Determining Whether Waiver Is Appropriate

[a] Exploring Availability of Prosecution Witnesses

If an important prosecution witness may be available to testify at the hearing, but may not be available to testify at trial, waiver may be appropriate. The transcribed testimony of a witness who has testified at the hearing may be read at the trial if the witness becomes unavailable. CPL § 670.10 *et seq.*

[b] Deciding Whether Defendant Will Testify Before Grand Jury

Under certain circumstances, defense counsel may waive the hearing and have the defendant testify before the grand jury. This option is desirable only if, due to the circumstances of the case, it is reasonably certain the grand jury will not indict or the charges will be reduced to misdemeanors. The defendant's grand jury testimony provides the prosecution with otherwise unavailable discovery. This testimony may also be used at trial in an attempt to impeach the defendant if the defendant chooses to testify.

[c] Evaluating Risk of Higher Bail

If the court releases the defendant on his or her own recognizance or on a low bail amount, facts revealed at the preliminary hearing may induce the court to revoke release of the defendant on his or her own recognizance or raise the amount of bail.

[d] Evaluating Risk of Excessive Adverse Publicity

If the crime is particularly heinous or of special public interest, the preliminary hearing may create extensive news coverage to the defendant's detriment.

Strategic Point—Defense: Advise the defendant to assert his or her right to a preliminary hearing if the prosecution's case has weaknesses. Holding a preliminary hearing in this situation will force the prosecutor to re-evaluate the case and perhaps decide not to proceed.

Strategic Point—Prosecution: Prosecutors in New York City regularly choose to present felony cases to a grand jury in lieu of a felony preliminary hearing to prevent unnecessary discovery to defense counsel and to avoid cross examination when there is not sufficient time to prepare.

Even if the court dismisses the charges against the defendant, the grand jury is not prevented from indicting the defendant.

PRACTICE RESOURCES:

- *New York Criminal Practice* §§ 1.06, 10.05 (waiver of preliminary hearings).
- *Criminal Defense Techniques* §§ 104.01 (practice guide for preliminary hearings), 104.02 (checklist for preliminary hearings), 104.03 (research guide for preliminary hearings), 104.04 (preliminary hearing motions, state forms).
- *New York Suppression Manual* § 10.06 (right to prompt hearing on sufficiency of evidence).
- CPL § 180.70(4) (dismissing felony complaint).
- *People v. Cleghorn,* 190 Misc.2d 421, 739 N.Y.S.2d 879 (Justice Ct. Tompkins County 2001) (prosecutor's office did

not appear at preliminary hearing requested by defendant because of its general practice not to appear at preliminary hearings of defendants who are not incarcerated; court dismissed felony complaint against defendant because prosecution had declined to participate, and thus court had received no evidence).

- *People v. Hernandez,* 259 A.D.2d 763, 688 N.Y.S.2d 170 (2d Dep't 1999) (court properly permitted prosecution to read into evidence felony hearing testimony of missing witness pursuant to CPL § 670.10; when at hearing on admissibility of testimony, two officers testified about extensive efforts made to locate witness who had escaped from police custody and remained fugitive, and court was satisfied that it was very unlikely that any additional efforts would have resulted in locating witness).

§ 4.15 Conducting Felony Preliminary Hearing

At the felony preliminary hearing, the prosecution must call and examine witnesses, offer evidence, and present a broad outline of the facts. CPL § 180.60(5). The court may narrowly limit cross-examination. Questions about the ultimate admissibility of evidence, for example, the lawfulness of a search or any confession, are not germane to the hearing. Only non-hearsay evidence or evidence allowed under hearsay exceptions is admissible at a felony preliminary hearing to demonstrate reasonable cause to support the belief that the defendant committed a felony. Reports of experts and sworn statements specified in CPL § 190.30(2) are admissible to the same extent as in a grand jury proceeding. CPL § 180.60(8).

The defendant must be present either personally or by counsel at the preliminary hearing, but may waive personal presence as long as the waiver is made knowingly, intelligently, and voluntarily. CPL § 180.60(2). *See* § 4.13 *above* (purpose of felony hearing). The defendant may, as a matter of right, testify and be cross-examined at the preliminary hearing. CPL § 180.60(6). In deciding whether the defendant should testify at the preliminary hearing, defense counsel should consider the same factors as would be considered in a grand jury proceeding. *See* Ch. 7 *below* (considering grand jury issues).

The court may allow defense counsel to call and examine other witnesses or produce other evidence on defendant's behalf. CPL § 180.60(7). However, defense counsel is not entitled to issue subpoenas in connection with a preliminary hearing.

● **Warning—Defense:** Calling witnesses at the preliminary hearing can backfire, and any witness should be interviewed and prepared before being placed on the witness stand. General practice is not to call witnesses. Instead, use the preliminary hearing to discover and memorialize the testimony of prosecution witnesses. *See* § 4.13 *above* (purpose of felony hearing).

The press and public have a First Amendment right of access to preliminary hearings. However, defense counsel may make an application to the court to exclude the public from the hearing and direct that the proceedings not be disclosed. CPL § 180.60(9). Such an application may permit defense counsel to prevent possible harm to the defendant's reputation as the result of prosecution testimony, as well as avoid unfavorable publicity that may render it difficult to obtain an unbiased jury. Defense counsel, in making an application, must detail for the court the precise harm that he or she believes would occur if the hearing were held publicly, and the reasons for this belief. If the court decides not to exclude the public, defense counsel has little recourse because any possible defects in the preliminary hearing will not affect the subsequent indictment by a grand jury. If the court agrees to the requested closure of the hearing, it must make specific findings demonstrating a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

At the conclusion of the preliminary hearing, the court must dispose of the felony complaint in certain specified ways, which will depend on whether there is reasonable cause to believe that the defendant committed a felony, non-felony, or no offense at all. CPL § 180.50. The court may order that the defendant be held for

the action of a grand jury, reduce the charge to a non-felony, dismiss the felony complaint and discharge the defendant from custody, or exonerate bail.

Separate provisions involving juvenile offenders are contained in CPL § 180.75, which is applicable in lieu of CPL §§ 180.30, 180.50, 180.70.

PRACTICE RESOURCES:

- *New York Criminal Practice* §§ 10.08 (conduct of preliminary hearings), 10.10 (preliminary hearings for juvenile offenders).
- *New York Criminal Practice* Ch. 10A (Form No. 10:3, Petition by Defendant for Order Excluding Public from Felony Hearing and Directing No Disclosure Be Made of Proceedings, Form No. 10:4, Order Excluding Public from Felony Hearing and Directing No Disclosure Be Made of Proceedings)).
- *Criminal Defense Techniques* §§ 104.01 (practice guide for preliminary hearings), 104.02 (checklist for preliminary hearings), 104.03 (research guide for preliminary hearings), 104.04 (preliminary hearing motions, state forms).
- *New York Suppression Manual* § 10.06 (right to prompt hearing on sufficiency of evidence).
- CPL § 180.60 (proceedings upon felony complaint).

§ 4.16 Holding Timely Felony Preliminary Hearing

The court should complete the preliminary hearing in one session. However, in the interest of justice, the court may adjourn a preliminary hearing for no more than one day, absent a showing of cause for further delay. CPL § 180.60. Defense counsel may request a transcript of the stenographic minutes of the hearing.

If a probable cause hearing has not commenced and the defendant has been held in custody for a period of 120 hours (five days), defense counsel may request that the court release the defendant on his or her own recognizance. If a weekend or holiday occurs during such custody, the time-period is expanded to 144 hours (six

days), unless any exception contained in CPL § 180.80 applies. The time limitations set forth in CPL § 180.80 begin to run at the time of defendant's arrest.

● **Timing:** The timing limitations for commencing a preliminary hearing differ depending on whether the complaint is for a felony or misdemeanor. The court must determine the precise characterization of the complaint because the nature of the complaint affects whether the time limitations set forth in CPL § 180.80 (felonies) or in CPL § 170.70 (misdemeanors) apply.

The court's failure to afford a timely preliminary hearing entitles a defendant to release on his or her own recognizance. It does not, however, require that the felony complaint or any ensuing indictment be dismissed or give rise to an appellate issue that would result in a new trial following conviction. Defense counsel may use a writ of habeas corpus as a remedy if the defendant has been detained in violation of CPL § 180.80.

Exception: The time limitations in CPL § 180.80 can be extended when the court finds good cause for extension. CPL § 180.80(3). Extensions are decided on a case-by-case basis.

PRACTICE RESOURCES:

- *New York Criminal Practice* §§ 1.06 (preliminary hearing), 10.04 (habeas corpus, Article 78, preliminary hearing), 10.11 (release of defendant for failure of timely disposition of preliminary hearing), 47.03 (timely arraignment, state habeas corpus).
- *New York Criminal Practice* Ch. 10A (form no. 10:5, petition for order releasing defendant from custody upon failure of timely disposition).

- *Criminal Defense Techniques* §§ 104.01 (practice guide for preliminary hearings), 104.02 (checklist for preliminary hearings), 104.03 (research guide for preliminary hearings).
- *New York Suppression Manual* Ch. 10 (procedures after arrest).
- *Defense of Narcotics Cases* § 2.08 (purpose of preliminary hearing).
- CPL § 170.70 (time limitations to commence misdemeanor preliminary hearing), CPL §§ 180.60–180.80 (time limitations to commence felony preliminary hearing).

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