CRIMINAL PROCEDURE LAW SECTION 30.30 (1) MANUAL

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- **IN GENERAL:** Criminal Procedure Law § 30.30, also known as "statutory speedy trial," requires the prosecution establish its readiness for trial on an "offense" within a specific codified time period after the commencement of a criminal action (which occurs, generally, by the filing of the initial accusatory). If the prosecution is not ready for trial within the time required, the defendant may be entitled to dismissal of the accusatory instrument, pursuant to CPL 30.30 (1), or release pending trial, pursuant to CPL 30.30 (2). The statute excludes certain designated periods from the time calculation.

    - **Rights Afforded**

        - This statute does not afford the defendant the right to a "speedy trial." That right is provided by CPL 30.20, the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section Six (the due process clause) of the New York State Constitution. (*See United States v Tigano,* 880 F3d 602 [2d Cir 2018]; *People v Wiggins,* -- NY3d --, 2018 Slip Op 01111; *People v Singer*, 44 NY2d 241 [1978]); *People v Portorreal*, 28 Misc 3d 388 [Crim Ct, Queens County 2010]).

        - The statute does not require the People to speedily *commence* a criminal action (i.e., file an accusatory) after the commission of a crime (*People v Faulkner,* 36 AD3d 1009 [3d Dept 2007]).

        - A defendant's rights under this statute are not dependent in any way on whether he or she is ready for trial (*People v Hall,* 213 AD2d 558 [2d Dept 1995]).

    - **Interpreting** CPL 30.30

        - In determining whether a defendant's 30.30 rights have been violated, one must look to the statute and case law interpreting the applicable statutory provisions (*see e.g. People v Parris*, 79 NY2d 69 [1992]; *People v Sturgis*, 38 NY2d 625 [1976]).

- **Scope**

  - **Offense Requirement**: An accusatory is subject to dismissal pursuant to CPL 30.30 (1) only if it charges an "offense" that is a violation, misdemeanor, or felony. The Penal Law defines an "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of [New York], or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same" (Penal Law § 10.00 [1]). The Penal Law defines a violation as an "offense *other than a traffic infraction*, for which a term of imprisonment in excess of fifteen days cannot be imposed" or "the only sentence provided therein is a fine" (Penal Law §§ 10.00 [3], 55.10 [3] [a] [emphasis added]). A traffic infraction is defined by Penal Law § 10.00 (2) and Vehicle and Traffic Law § 155.

    - A violation of a town ordinance may be an "offense" such that a charged violation of the ordinance is subject to 30.30 dismissal (*People v Lewin*, 8 Misc 3d 99 [App Term 2005]). A strict reading of relevant statutory provisions gives support to the conclusion that a violation of a town ordinance is subject to 30.30's provisions, even when the violation of the town ordinance is punishable only by a fine. Penal Law § 10.00 (1) defines an offense in part as a "conduct for which a sentence to a . . . fine is provided by any . . . ordinance of a political subdivision of this state . . . ." Moreover, Penal Law § 55.10 (3) defines a violation to include an offense not defined by the Penal Law for which "the only sentence provided therein is a fine." Trial level courts writing on the issue are split as to whether a violation of a town ordinance for which no imprisonment may be imposed may be subject to 30.30 dismissal (*see People v Kleber*, 168 Misc 2d 824 [Muttontown Justice Court 1996] [concluding that ordinances imposing only a fine are not subject to CPL 30.30 dismissal]; *People v Vancol*, 166 Misc 2d 93 [Westbury Justice Court 1995] [determining that all

ordinances are subject to CPL 30.30]; *People v Olsen*, 37 Misc 3d 862 [Massapequa Park Justice Ct. 2012] [observing, in footnote, analytical error in *Kleber* decision]).

- Since a traffic infraction is not a violation, an accusatory charging only a traffic infraction is not subject to 30.30 dismissal (*People v Pilewski*, 173 Misc 2d 800 [Just Ct 1997]). However, it has been held that a traffic infraction will be subject to dismissal where the People dismiss a misdemeanor charge and proceed against the defendant on a traffic infraction for the sole purpose of circumventing the defendant's 30.30 rights (*People v Faison*, 171 Misc 2d 68 [Crim Ct 1996]).

- **Homicide Exception**: Pursuant to 30.30 (3) (a), 30.30 is not applicable where the defendant is charged with murder in the first degree (Penal Law § 125.27), murder in the second degree (Penal Law § 125.25), aggravated murder (Penal Law § 125.26), manslaughter in the first degree (Penal Law § 125.20), manslaughter in the second degree (Penal Law § 125.15), or criminally negligent homicide (Penal Law § 125.10). Noteworthy is that if the defendant is not charged with any of these particular homicide offenses and is instead charged with aggravated manslaughter in the first or second degree (Penal Law §§ 125.22, 125.21), aggravated criminally negligent homicide, (Penal Law §125.11), or any vehicular manslaughter offense (Penal Law §§ 125.12, 125.13, 125.14), the accusatory remains subject to dismissal pursuant to CPL 30.30 (1).

  - This exception applies even if a non-homicide charge is joined, and there is no requirement that such charge be severed solely for the purposes of applying 30.30 rules (*People v Ortiz*, 209 AD2d 332 [1st Dept. 1994]).

  - It has been held that this exception applies to non-homicide charges severed from homicide charges on the theory that "there can be only one criminal action for each set of criminal charges brought against a particular defendant" (*People v Steele*, 165 Misc 2d 283 [Sup Ct

1995]; *see also People v Lomax*, 50 NY2d 351 [1980]).

- The homicide exception does not apply to the mere attempt to commit any of the enumerated homicides (*see People v Ricart*, 153 AD3d 421 [1st Dept 2017]; *People v Smith*, 155 AD3d 977 [2d Dept 2017]).

- Courts have not yet resolved whether 30.30 (3) (a) is applicable to non- homicide charges in a criminal action in which the defendant initially faced both homicide and non-homicide charges and the homicide charge is later dismissed outright or reduced to a non-homicide charge. However, courts have held that in the 30.30 context, there can be just one criminal action for each set of charges brought against a defendant and that, generally, the applicable time period within which the People must be ready is governed by the highest level offense ever charged in the criminal action. (*Lomax*, 50 NY2d 351; *Cooper*, 98 NY2d 541; *People v Tychanski*, 78 NY2d 909 [1991]).

➢ TIME PERIODS

- **In General:** With limited statutory exception, the time period within which the prosecution must be ready for trial is determined by the highest level offense ever charged against the defendant in the criminal action (*see Cooper*, 98 NY2d 541; *People v Tychanski*, 78 NY2d 909 [1991]).

  - When the highest level offense ever charged is a felony, the People must establish their readiness within six months (not necessarily 180 days) of the commencement of the criminal action. When it is an "A" misdemeanor, the People must demonstrate that they are ready within 90 days. With respect to criminal prosecutions in which the highest offense ever charged is a "B" misdemeanor, the People must establish their readiness within 60 days. And when the highest offense ever charged is just a violation, the People must demonstrate their readiness for

trial within 30 days. (CPL 30.30 [1] [a], [b], [c]).

- **Determining time period**

  - **The day the criminal action commenced**: To determine the date by which the People must be ready when the time period is being measured by days (where the highest level offense charged is a misdemeanor or violation), the day on which the action commenced is to be excluded from the time calculation (*People v Stirrup*, 91 NY2d 434, 438 n 2 [1998]; *People v Page*, 240 AD2d 765 [2d Dept 1997]). For example, in a case in which the criminal action commenced on January 1st with the filing of a complaint charging only disorderly conduct, the first day counted in the calculation is January 2nd and the People must be ready by the 30th day, which is January 31st. However, where the time period is to be measured in terms of months (when the highest level offense charged is a felony), the day the criminal action commenced is not excluded from the calculation. For example, where the criminal action commenced with the filing of a felony complaint on July 19th, the People must be ready by January 19th (*see People v Goss*, 87 NY2d 792, 793-794 [1996]).

  - **Expiration date falling on a non-business day:** The Third Department has extended the People's time to establish their readiness to the next business day where the expiration date falls on the weekend or a holiday (*see People v Mandela*, 142 AD3d 81[3d Dept 2016]; *see also People v Powell*, 179 Misc 2d 1047 [App Term 1999]).

  - **Six month time period measured in calendar months:** Where six months is the applicable time period (where the highest level offense charged is a felony), the period is computed in terms of calendar months and, thus, the applicable felony time period may be longer than 180 days (*People v Delacruz*, 241 AD2d 328 [1st Dept 1997]).

- **Multi-Count accusatory instruments:** With respect to multi-count accusatory instruments, the controlling time period is the one applying to the top count (*People v Cooper*, 98 NY2d 541, 543 [2002]).

- **Multiple accusatory instruments:** Where the criminal action results in multiple accusatory instruments, the *general* rule is that the applicable time period is the one that applies to the highest level offense ever charged (*People v Tychanski*, 78 NY2d 909 [1991]). Exceptions to this general rule exist under CPL 30.30 (5) (c), (d), and (e).

- **Reduced charges**: Although there are statutory exceptions (see below), generally speaking, the most serious charge ever brought against the defendant determines which time period applies, regardless of whether that charge is ultimately reduced (*Cooper*, 98 NY2d 541; *People v Tychanski*, 78 NY2d 909 [1991]; *People v Cooper*, 90 NY2d 292 [1997]).

  - **Examples:** Where an A misdemeanor is reduced to a B misdemeanor, the 90 day period applies (*Cooper*, 98 NY2d 541). Where a felony complaint is later superseded by a misdemeanor *indictment*, the six month period applies (*People v. Tychanski*, 78 NY2d 909 [1991]).

  - **Statutory Exceptions:** When (1) a felony complaint has been replaced by, or converted to, a misdemeanor complaint or misdemeanor information (and not a misdemeanor indictment) or (2) a superior court has, upon the defendant's motion, reduced a felony count of the indictment to a misdemeanor or petty offense on legal insufficiency grounds and as a result, a reduced indictment or prosecutor's information has been filed, the applicable time period is the one applying to the highest level offense charged in the new accusatory (CPL 30.30 [5] [c], [e]). *However*, where the felony complaint has been replaced by a misdemeanor or petty offense instrument, the time period applicable to the new accusatory instrument *does not* apply if "the aggregate of such period and the period of time, excluding periods provided in [30.30 (4)], already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months." In such an instance, the original time period applies: the People must

establish their readiness within six months of the filing of the felony complaint. (*See* CPL 30.30 [5] [c].) And where a court has reduced a felony count of an indictment and, as a result, a reduced indictment or prosecutor's information is filed, the period applicable to the new accusatory does not apply if the period of time between the filing of the indictment and the filing of the new accusatory (less any excludable time), plus the period applicable to the highest level offense charged in the new accusatory, exceeds six months. If that period does exceed six months, then the time period applicable remains six months and the criminal action will be deemed to have commenced by the filing of the felony complaint (CPL 30.30 [5] [e]).

- **Increased charges**: Where the original charge is subsequently elevated to a more serious charge, the applicable time period is the one applying to the more serious charge (*Cooper*, 90 NY2d 292).

➢ COMMENCING THE 30.30 CLOCK

- **Commencement of criminal action**: The time period starts when the criminal action has commenced. Usually, the criminal action is commenced with the filing of the *very first* accusatory instrument (*People v Stiles*, 70 NY2d 765 [1987]; *People v Sinistaj*, 67 NY2d 236 [1986]; *People v Brown*, 23 AD3d 703 [3d Dept 2005]; *People v Dearstyne*, 215 AD2d 864 [3d Dept 1995]; *see* CPL 1.20 [17] [defining commencement of the criminal action as the filing of the first accusatory]).

  - **Dismissal of original charges**: This rule governs, even if the original charges are dismissed (*People v Osgood*, 52 NY2d 37 [1980]).

  - **Superseding accusatory**: This rule applies, even if the original accusatory is "superseded" by a new accusatory (*People v Sanasie*, 238 AD2d 186 [1st Dept 1997]).

  - **Different charges**: This rule applies even if the new charges replacing the old charges allege a different crime, so long as the new accusatory directly derives from the initial accusatory. Once a criminal action commences, the action includes the

filling of any new accusatory instrument directly deriving from the initial one. (CPL 1.20 [16]; *People v Farkas*, 16 NY3d 190 [2011]; *see People v Chetrick*, 255 AD2d 392 [2d Dept 1998] [acts "so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident"]; *see also People v Nelson*, 68 AD3d 1252 [3d Dept 2009] ["To the extent that 'the felony complaint and subsequently filed indictment allege[d] separate and distinct criminal transactions, the speedy trial time clock commence[d] to run upon the filing of the indictment with respect to the new charges'"]; *People v Bigwarfe*, 128 AD3d 1170 [3d Dept 2015] [counts two and three of the superseding indictment should not be dismissed as they allege a separate and distinct drug transaction from the one alleged in the felony complaint; count one, however, was required to be dismissed as it did directly derive from the felony complaint]).

- **Jurisdictionally defective accusatory**: This rule governs even if the first accusatory is jurisdictionally defective (*People v Reyes*, 24 Misc 3d 51 [App Term 2009]).

- **Sealed indictment**: The filing of a sealed indictment, as the first accusatory, commences the criminal action.

- **Proving when an accusatory was filed:** The time stated on arrest warrant indicating when the original complaint was filed is generally sufficient proof of when the original complaint was filed (*People v Bonner*, 244 AD2d 347 [2d Dept 1997]).

- **An indictment deriving from multiple felony complaints, filed on different days and involving separate incidents:** Where different counts of an indictment derive from different felony complaints filed on separate days and involving distinct incidents, there will be multiple criminal actions having distinct time periods. Counts deriving from such separate felony complaints must be analyzed separately, possibly resulting in the dismissal of some but not all counts of an indictment (*People v Sant*, 120 AD3d 517 [2d Dept 2014]).

o **Statutory exceptions to the first accusatory instrument rule:**

- **Appearance ticket**: If the defendant has been issued an appearance ticket, the criminal action is said to commence when the defendant first appears in court, not when the accusatory instrument is filed (CPL 30.30 [5] [b]; *People v Parris*, 79 NY2d 69 [1992]).

    - **Incarceration**: The date that the defendant first appears in court controls, regardless of whether the defendant is detained on an unrelated charge and was consequently unable to appear in court on the date specified on the appearance ticket or whether the prosecution failed to exercise due diligence to locate the incarcerated defendant (*People v Parris*, 79 NY2d 69 [1992]).

    - **No accusatory filed**: The date the defendant first appears in court controls, even if no accusatory instrument is filed at the time of the defendant's first court appearance (*Stirrup*, 91 NY2d 434).

    - **No judge**: The date the defendant first appears in court is determinative regardless of whether he actually appears before a judge (*Stirrup*, 91 NY2d 434).

    - **Appearance ticket issued by judge in lieu of a bench warrant**: Where a judge directs that an "appearance ticket" be issued upon a defendant's failure to appear in court, in lieu of a bench warrant, the notice to appear should not be deemed an appearance ticket for 30.30 purposes, as an appearance ticket is defined by the CPL as a notice to appear issued by a law *enforcement officer*, not a judge, and *before*, not after, the accusatory has been filed (CPL 1.20 [26], 150.10). Thus, where the judge directs that an appearance ticket be filed to secure the defendant's presence upon his failure to appear in court as previously scheduled, the criminal action will be deemed to have commenced with the filing of the initial accusatory, not upon the defendant's appearance on the judicially directed "appearance ticket."

- **Summons by District Attorney directing defendant to appear for arraignment pursuant to CPL 120.20 (3) or CPL 210.10 (3):** To be excluded from the 30.30 calculation, however, is the period "prior to the defendant's actual appearance for arraignment in a situation in which the defendant has been directed to appear by the *district attorney*" by way of summons in lieu of an arrest warrant (CPL 30.30 [4] [i]).

- **Simplified traffic informations**: It has been held that a simplified traffic information does not commence a criminal action for 30.30 purposes. The underlying rationale is that since 30.30 is not applicable to traffic violations, an information charging only traffic infractions cannot be said to commence a criminal action that later charges the defendant, by way of a subsequent information, with a misdemeanor or felony (*People v May*, 29 Misc 3d 1 [App Term 2010]).

- **Felony complaint converted to an information, prosecutor's information, or misdemeanor complaint:** The criminal action (or the 30.30 clock) commences with the filing of the new accusatory, with the applicable time period being that which applies to the most serious offense charged in the new accusatory, provided that the new time period – taking into account any excludable time -- does not give the People more time than they would have had if no new accusatory had been filed (CPL 30.30 [5] [c]).

  - **Misdemeanor indictments:** Where a felony complaint is later superseded by a misdemeanor *indictment*, the original six month period, commencing with the filing of the complaint, applies (*People v Tychanski*, 78 NY2d 909 [1991]).

- **Felony indictment reduced to a misdemeanor or petty offense, resulting in a reduced indictment or misdemeanor information being filed**: A criminal action commences with the filing of the new accusatory, with the applicable time being that applying to the most serious offense charged in the new

accusatory, unless the period of time between the filing of the indictment and the filing of the new accusatory (less any excludable time [*see* 30.30 (4)]), plus the period applicable to the highest level offense charged in the new accusatory, exceeds six months. If that period does exceed six months, then the criminal action will be deemed to have commenced as if the new accusatory had not been filed (typically with the filing of the first accusatory) and the period applicable is that which applies to the indicted (felony) charges, i.e., six months (CPL 30.30 [5] [e]).

- **Withdrawn guilty pleas**: Clock commences when the guilty plea is withdrawn (CPL 30.30 [5] [a]).

- **Withdrawn pleas of not guilty by reason of insanity**: Time period commences upon withdrawal of plea of not responsible by reason of mental disease or defect (*People v Davis*, 195 A.D.2d 1 [1st Dept 1994]).

- **New trial ordered**: When a new trial has been ordered, the time period begins when the order has become final (CPL 30.30 [5] [a]; *People v Wilson*, 86 NY2d 753 [1995]; *People v Wells*, 24 NY3d 971 [2014]).

    - **Motion for reargument:** Where the prosecution has moved for reargument of an appeal it has lost, the order of the appellate court directing a new trial becomes final when the appellate court has denied the prosecution's motion (*People v Blancero*, 289 AD2d 501 [2d Dept 2001]).

    - **Pre-order delay**: Periods of delay occurring prior to the new trial order are not part of the computations (*People v Wilson*, 269 AD2d 180 [1st Dept 2000]).

➢ ESTABLISHING READINESS

- **Announcement of readiness**: The prosecution is deemed ready for trial only if it has announced it is ready – either in open court with counsel present or by written notice to defense counsel and the court clerk (*People v Kendzia*, 64 NY2d 331, 337 [1985]).

    - **Timing of the written notice (i.e., off-calendar statement of readiness [aka *Kendzia* letter]):** To be effective, the written statement of readiness must be filed with the court clerk within the statutory period and served on the defendant promptly thereafter. It has been held that the prosecution is not required to have served the statement of readiness within the statutory period so long as service takes place "promptly" after a timely filing of the statement of readiness. (*See People v Freeman*, 38 AD3d 1253 [4th Dept 2007].)

    - **Off-the-record assertions:** Off-the-record assertions of readiness are insufficient (*People v Kendzia*, 64 NY2d 331, 337 [1985]).

    - **Recorded:** In-court assertions of readiness must be recorded by either the court reporter or the court clerk (*Kendzia*, 64 NY2d at 337).

    - **Present readiness**: Statement must be of present readiness, not future readiness. A prosecutor's assertion, "I'll be ready next Monday," for example, is invalid. (*Kendzia*, 64 NY2d at 337 [1985].)

    - **Responding papers**: It is insufficient for the prosecution to assert for the first time in an affirmation in opposition to a 30.30 motion that it was ready for trial on an earlier date (*People v Hamilton*, 46 NY2d 932 [1979]).

    - **Proper service**: Service of statement of readiness on defendant's former counsel is ineffective (*People v Chu Zhu*, 171 Misc 2d 298 [Sup Ct 1997], *revd on other grounds*, 245 AD2d 296 [2d Dept 1997]).

    - **Court congestion**: Delays caused by pre-readiness court

congestion do not excuse the prosecution from timely declaring its readiness for trial (*People v Chavis*, 91 NY2d 500 [1998]).

- **Defendant's presence in court**: The defendant need not be present for the statement of readiness to be effective (*People v Carter*, 91 NY2d 795 [1998]).

- **New accusatory:** Where a new accusatory has been filed, following the dismissal of the original accusatory, the prosecution is required to announce its readiness upon the filing of the new accusatory, irrespective of whether it announced its readiness with respect to the original accusatory (*People v Cortes*, 80 NY2d 201, 214-215 [1992]).

- **Actual readiness:** The prosecution must be actually ready for trial for its announcement of readiness to be effective. However, unless shown otherwise, the prosecution's statement of readiness will sufficiently demonstrate its readiness (*People v McCorkle*, 265 AD2d 736 [3d Dept 1999]). The People's announcement of readiness will be presumed to be accurate and truthful (*People v Brown*, 28 NY3d 392, 399-400 [2016]; *People v Bonilla*, 94 AD3d 633, 633 [2012]).

  - **Readiness defined:** The People will be deemed ready where they have done all that is required of them to bring the case to a point where it can be tried *immediately* (*People v England*, 84 NY2d 1 [1994]; *People v Austin*, 115 AD3d 1063 [3d Dept 2014]; *People v Robinson*, 171 AD2d 475, 477 [1st Dept. 1991]; *People v Kendzia*, 64 NY2d 331, 337 [1985]). The People will be ready for trial if the case cannot go to trial due to no fault of their own (*People v Goss*, 87 NY2d 792 [1996]).

- **Pre-arraignment:** The People can be ready for trial prior to the defendant's arraignment on the indictment, as arraigning the defendant is the court's function (*England*, 84 NY2d 1; *People v Price*, 234 AD2d 973 [4th Dept 1997]). However, where the People have secured an indictment so late in the statutory period that it is impossible to arraign the defendant within the period, the People's statement of readiness prior to indictment is but illusory (*People v Goss*, 87 NY2d 792 [1996]).

- **Two day rule:** Defendant can be arraigned within the prescribed period only if the indictment was filed at least two days before expiration of the period (CPL 210.10 [2]). Therefore, for the People's pre-arraignment announcement of readiness to be effective, the People must have indicted the defendant at least two days before the time period has expired (*Carter*, 91 NY2d 795]; *People v Freeman*, 38 AD3d 1253 [4th Dept 2007]; *People v Gause*, 286 AD2d 557 [3d Dept 2001]).

- **Subsequent statement of not ready**: After the People have announced ready, their subsequent statement that they are not ready for trial does not necessarily mean that they were not previously ready for trial, as they had claimed. Indeed, a statement of readiness is presumed to be accurate and truthful (s*ee People v Bonilla*, 94 AD3d 633, 633 [1st Dept 2012]). Generally, it can be said that the People were not previously ready only if it is shown that their announcement of readiness was made in bad faith or did not reflect an actual present state of readiness (*People v Santana*, 233 AD2d 344 [2d Dept 1996]; *People v South*, 29 Misc 3d 92 [App Term 2010]).

- **Off-calendar declaration of readiness and a statement of unreadiness at next court appearance:** Such an off-calendar declaration of readiness is to be "presumed truthful and accurate," though such a presumption "can be rebutted by a defendant's demonstration that the People were not, in fact ready at the time the statement was filed." (*People v Brown*, 28 NY3d 392, 399-400 [2016]).

  - **People's burden**: "If the People announce that they are not ready after having filed an off-calendar statement of readiness, and the defendant challenges such statement — at a calendar call, in a CPL 30.30 motion, or both — the People must establish a valid reason for their change in readiness status to ensure that a sufficient record is made for the court to determine whether the delay is excludable." (*Brown*, 28 NY3d at 399-400.)

  - **Defendant's burden:** "The defendant bears the ultimate burden of demonstrating, based on the People's proffered

reasons and other relevant circumstances, that the prior statement of readiness was illusory."

- **Subsequent unavailability of evidence:** If, after the People have announced their readiness, the People request an adjournment to obtain additional evidence, the People's announcement of readiness may be considered illusory unless the People can show that, at the time of their announcement of readiness, the evidence was available or their case did not rest on the availability of the additional evidence (*see People v Sibblies*, 22 NY3d 1174, 1181 [2014] [Graffeo, J., concurring]; *People v Bonilla*, 94 AD3d 633, 633 [1st Dept 2012]).

- **Impediments to readiness:**

  - **Indictment not yet filed:** The People are not ready for trial when the indictment has been voted by the grand jury but has not yet been filed with the clerk of the court (*People v Williams*, 32 AD3d 403 [2d Dept 2006]; *People v Gause*, 286 AD2d 557 [3d Dept 2001]).

  - **Failure to provide grand jury minutes for inspection:** The People can't be ready for trial where they have failed to provide grand jury minutes necessary to resolve a motion to dismiss (*People v McKenna*, 76 NY2d 59 [1990]; *People v Harris*, 82 NY2d 409 [1993]; *see also People v Miller*, 290 AD2d 814 [3d Dept 2002] [the time chargeable to prosecution, attributable to post-readiness delay in producing grand jury minutes, commences with date defendant moved for inspection of grand jury minutes]).

  - **Failure to produce an incarcerated defendant:** The prosecution is not ready for trial when it has failed to produce a defendant incarcerated in another county or state (*England*, 84 NY2d at 4).

  - **Failure to announce readiness on a new accusatory:** The

People are not ready for trial until they have re-announced their readiness upon the filing of a new accusatory (*Cortes*, 80 NY2d 214-215).

- **Failure to file a valid accusatory:** The prosecution cannot be ready if the accusatory is invalid, for the defendant may not be tried on an invalid accusatory (*People v Weaver*, 34 AD3d 1047, 1049 [3d Dept 2006]; *People v McCummings*, 203 AD2d 656 [3d Dept 1994]; *see also People v Friedman*, 48 Misc 3d 817 [Crim Ct, Bronx County 2015] [People not ready because information failed to state non-hearsay allegations establishing each element]; *People v Walsh*, 17 Misc 3d 480 [Crim Ct 2007] [People not ready because the absence of the docket number on the complainant's corroborating affidavit converting the misdemeanor complaint to a misdemeanor information; the failure to include the docket number is a facial, as opposed to a latent, defect]). That being so, the People cannot be ready for trial until the misdemeanor complaint has been properly converted to an information, unless prosecution by information has been waived (*People v Gomez*, 30 Misc 3d 643, 651 [Sup Ct 2010]; *People v Gannaway*, 188 Misc 2d 224 [Crim Ct 2000] [field tests conducted were insufficient to convert complaint into a prosecutable information and thus the People were not read for trial]; *see also People v Weaver*, 34 AD3d 1047 [3d Dept 2006] [it has been held that the People cannot be ready where they have converted some but not all of the charges of a misdemeanor complaint into a misdemeanor information; *People v Peluso*, 192 Misc 2d 33 [Crim Ct 2002] [same]).

    - **Jurisdictionally defective accusatory:** A defendant does not waive his or her right to be prosecuted by jurisdictionally valid accusatory (i.e. one that alleges each element of the offense charged [s*ee People v Casey*, 95 NY2d 354, 366 (2000)]) simply by failing to move to dismiss the accusatory on the ground that the accusatory is jurisdictionally defective (*see People v Hatton*, 26 NY3d 364, *revg* 42 Misc 3d 141 [A] [Sup Ct, App Term 2014]). This means that the People cannot be ready on a jurisdictionally defective accusatory regardless of

whether a motion to dismiss on defectiveness grounds has been made.

- **Accusatory with non-jurisdictional defect:** What about where the defendant is being prosecuted by a local court accusatory that is defective, but not jurisdictionally so – for example, where the accusatory rests on hearsay allegations? A trial level court has ruled that the People's announcement of readiness on an accusatory having a non-jurisdictional defect (one resting upon hearsay allegations) can be effective where the defendant failed to move to dismiss the information as defective, reasoning that by failing to make the motion to dismiss, the defendant thereby "waived" his right to be prosecuted by information supported by non-hearsay allegations (*see People v Davis*, 46 Misc 3d 289 [County Court, Ontario County 2014]; *see also People v Wilson*, 27 Misc 3d 1049 [Crim Ct 2010] [defendant cannot lie in wait, first raising a challenge to the accusatory instrument in the 30.30 motion, after the time period has expired]). The soundness of the ruling is subject to debate, however. It relies upon *People v Casey* (95 NY2d 354 [2000]) to support the notion that a defendant's failure to move to dismiss the accusatory serves as a waiver of the right to be prosecuted by information supported by non-hearsay allegations. *Casey*, however, held only that by failing to move to dismiss the accusatory, the defendant "waived" *appellate review* of his complaint that accusatory rested upon hearsay allegations; in other words, the defendant failed to preserve the issue for appellate review. *Casey* does not appear to have held that the defendant literally waived (or knowingly relinquished) his right to be prosecuted by an information resting on non-hearsay allegations.

- **Failure to announce readiness after a new trial has been ordered:** When a new trial has been ordered, the People cannot be ready until they have re-announced their readiness (*People v Wilson*, 86 NY2d 753 [1995]; *People v Dushain*, 247 AD2d 234 [1st Dept 1998]).

- **Unawareness of key witness's whereabouts:** the People are not ready for trial when they are unaware of the whereabouts of an essential witness and would be unable to locate and produce the witness on short notice (*People v Robinson*, 171 AD2d 475 [1st Dept 1991]).

- **Non-impediments to readiness:**

  - **People's inability to make out a prima facie case on some – but not all – counts:** The People can be ready for trial if they can make out a prima facie case on one or some, but not all, of the charged offenses (*see e.g. People v Sibblie*s, 98 AD3d 458 [1st Dept 2012]; *People v Bargerstock*, 192 AD2d 1058 [4th Dept 1993] and *People v Hunter*, 23 AD3d 767 [3d Dept 2005] [People ready despite unavailability of lab results of rape kit]; *People v Cole*, 24 AD3d 1021 [3d Dept 2005] [People ready for trial despite their motion for a buccal swab of defendant for DNA analysis]; *People v Carey*, 241 AD2d 748 [3d Dept 1997] [People ready despite the unavailability of drug lab results]; *People v Terry*, 225 AD2d 306 [1st Dept 1996] [People can be ready for trial when unavailable evidence is necessary proof for some but not all charged offenses]; *but see People v Mahmood*, 10 Misc 3d 198 [Crim Ct 2005] [criminal charge subject to dismissal where the People not ready on the criminal charge but ready on traffic infractions charged in the same accusatory]).

  - **Court congestion:** The People can be ready for trial if their only impediment to proceeding to trial is court congestion (*People v Smith*, 82 NY2d 676 [1993]; *People v Figueroa*, 15 AD3d 914 [4th Dept 2005]).

  - **Unawareness of witness's current location:** It has been held that the People can be ready for trial even though the prosecutor is unaware that his key witness has changed jobs, so long as the People could readily learn of the witness's whereabouts and secured his attendance at trial within a few days; the People are not required to contact their witnesses on each adjourned date

or be able to produce their witnesses at a moment's notice (*Dushain*, 247 AD2d 234).

- **Discovery violations:** The People can be ready for trial despite their failure to comply with their discovery obligations where the discovery violation can be remedied without dismissing the charges (*People v Griffin*, 111 AD3d 1355, 1356 [4th Dept 2013] [failure to provide bill of particulars did not render People unready for trial]; *People v Cajigas*, 224 AD2d 370 [1st Dept 1996]).

- **Failure to move to consolidate indictments:** the People can be ready for trial notwithstanding that they haven't yet moved to consolidate indictments (*People v Newman*, 37 AD3d 621 [2d Dept 2007]).

- **Amendment of indictment:** The fact that the People have moved to amend the indictment does not render the prior announcement of readiness illusory (*People v Niver*, 41 AD3d 961 [3d Dept 2007]).

- **The superseding of a valid indictment:** The mere fact that an indictment has been superseded does not mean that the original indictment was invalid and that the People were not ready for trial until the filing of the new indictment (*People v Stone*, 265 AD2d 891 [4th Dept 1999]).

➢ EXCLUDABLE TIME

- **Summary:** Certain periods - identified by statute (CPL 30.30 [4]) - are excluded from the time calculation. Only those periods falling within the specified exclusions qualify. Any period during which the 30.30 clock is ticking will be considered in determining excludable time. Therefore, where the action commences with the filing of an accusatory that is subsequently replaced by a new accusatory, the period to be considered for exclusion begins with the filing of the original accusatory, so long as the new accusatory directly derives from the initial one. This is true even if the new accusatory alleges

different charges (*People v Farkas*, 16 NY3d 190 [2011]; *People v Flowers*, 240 AD2d 894 [3d Dept 1997]).

- **Delay "resulting from" requirement:** Many – but not all – of the excludable time provisions will permit exclusion of periods of delay only when the delay at issue "results from" a particular circumstance (e.g. an adjournment requested or consented to by the defendant, the defendant's absence or unavailability, the detention of the defendant in another jurisdiction, or "exceptional circumstances"). Those excludable time provisions do not allow for exclusion of time where the particular circumstance at issue (e.g. the defendant's absence or unavailability) does not cause the People's lack of readiness (*see People v Sturgis*, 38 NY2d 625 [1976] [partially abrogated by legislative amendment]; *People v Callender*, 101 Misc 2d 958, 960 [Crim Ct, New York County 1979] ["The *Sturgis* case therefore stands for the proposition that, in order for time to be excludable as resulting from the defendant's conduct, such conduct must have contributed to the failure of the People to answer that they were ready for trial. For example, where the People's delay in preparedness is due only to the defectiveness of an accusatory (and is no fault of the defendant), exclusion of periods of delay should not be permitted under any of the excludable time provisions requiring that the delay in readiness "result from" a particular circumstance. It should be noted that there are a number of excludable time provisions that permit exclusion of periods due to a particular circumstance without regard to whether the particular circumstances caused the delay at issue (*see* 30.30 [4] [c] [ii], [d], [h], [i], [j]; *see also People v Bolden*, 81 NY2d 146, 151-152 [1993] [partially abrogated by legislative amendment]; *People v Kanter*, 173 AD2d 560, 561 [2d Dept 1991] [some periods during which a jurisdictionally defective accusatory is in place may be excludable]; *People v Flowers*, 240 AD3d 894 [3d Dept 1997] [same]).

    - **Requested or consented to adjournments exception:** The Court of Appeals has held that where the defendant has requested or consented to an adjournment, the defendant waives chargeability of the delay, regardless of whether the adjournment causes the People's delay in readiness – that the 4 (b) excludable time provision rests generally on theories of estoppel or waiver (*People v Worely*, 66 NY2d 523 [1985]; *see*

also People v Kopciowski, 68 NY2d 615, 617 [1986] [Where adjournments are allowed at defendant's request, those periods of delay are expressly waived in calculating the People's trial readiness, without the need for the People to trace their lack of readiness to defendant's actions]).

- **"Other proceedings":** Periods of "reasonable" delay "resulting" from "other proceedings" concerning the defendant, including pretrial motions, are excludable (30.30 [4] [a]). It should be noted that the People may be able to exclude a time period during which "other proceedings" are pending, even if the "other proceedings" did not necessarily prevent the People from becoming ready, if it can be shown that the People might have been wasting time or resources by getting ready for trial while the "other proceeding" was pending (*People v Dean*, 45 NY2d 651, 658 [1978]).

  - **Trial on another case:** Reasonable delay resulting from trial of defendant on another indictment is excludable (*People v Oliveri*, 68 AD3d 422 [1st Dept 2009]; *People v Hardy*, 199 AD2d 49 [1st Dept 1993]).

  - **Pretrial motions**: The People are entitled to exclude from the time calculation *reasonable* delay associated with the filing of pretrial motions. In some instances, the People are entitled to exclude delay caused by the defendant's mere expressed intention to file a motion (*People v Brown*, 99 NY2d 488 [2003]). The time excluded is "the period during which such matters are under consideration"; however, only delay that is reasonable may be excluded (30.30 [4] [a]; *People v Inswood*, 180 AD2d 649 [2d Dept 1992]).

    - **Motions to terminate prosecution pursuant to CPL 180.85:** The period during which such motions are pending is *not* excludable (*see* CPL 180.85 [6]).

    - **Grand jury minutes**: The People may exclude a reasonable period necessary to obtain and inspect grand jury minutes (*People v Beasley*, 69 AD3d 741 [2d Dept

2010], *affd on other grounds*, 16 NY3d 289 [2011]; *People v Del Valle*, 234 AD2d 634 [3d Dept 1997]).

- **Unreasonable delay not excludable:** It has been held that a four month delay in providing grand jury minutes is not reasonable and thus not entirely excludable (*People v Johnson*, 42 AD3d 753 [3d Dept 2007]).

- **Motions to dismiss/reduce**: The period from defendant's filing of omnibus motion seeking dismissal of indictment until date of dismissal is excludable except to the extent that resolution of the motion unreasonably delayed (*People v Roebuck*, 279 AD2d 350 [1st Dept 2001]).

- **30 day period following indictment dismissal:** 30 days following the issuance of an order dismissing an indictment or reducing a count of the indictment are excludable since the effect of the order is stayed for 30 days following the entry of that order (*see* CPL 210.20 [6]).

- **Discovery**: Reasonable period of time needed to accommodate defense counsel's request for production of discovery, such as a recording of a telephone call to 911, is excludable (*People v McCray*, 238 AD2d 442 [2d Dept 1997]).

- **Suppression Motions**: Reasonable delay resulting from defendant's motion to suppress is excludable as delay resulting from "other proceedings" (*People v Hernandez*, 268 AD2d 344 [4th Dept 2000]). Nevertheless, it can be argued that a motion to suppress will not *result* in *reasonable* delay, and thus the period during which the motion is under consideration is not excludable, where the motion to suppress does not prevent the People from both preparing for the suppression motion and getting ready for trial or where, in light of the nature of the

evidence sought to be suppressed, it would not be a waste of the People's time to simultaneously prepare for the suppression motion and get ready for trial.

- **People's motions:** Excludable time includes period of reasonable delay resulting from the People's pretrial motions (*People v Sivano*,174 Misc 2d 427 [App Term 1997]; *People v Kelly*, 33 AD3d 461 [1st Dept. 2006] [period during which People's motion to consolidate is pending held to be excludable]).

- **Codefendant's motions**: Periods of delay resulting from motions made by codefendant may be excludable (*People v Durette*, 222 AD2d 692 [2d Dept 1995]).

- **Defendant's motions in unrelated case**: Delay due to defendant's motion in unrelated case against defendant, or, in some instances, mere announced intention to file motion, may be excludable (*People v Brown*, 99 NY2d 488 [2003]).

- **Additional time necessary to prepare as a result of the decision on the motion:** Such period may also be excludable (*People v Davis*, 80 AD3d 494 [1st Dept 2011] [additional time needed to prepare as the result of the granting of a consolidation motion]).

- **Reasonableness requirement:** The People cannot exclude delay caused by their "abject dilatoriness" in responding to the defendant's motion and in preparing for hearing (*People v Reid*, 245 AD2d 44 [1st Dept 1997]).

    - **Examples**

- People's delay of over a year in making motion to reargue suppression motion unreasonable and not excludable (*People v Ireland*, 217 AD2d 971 [4th Dept 1995]).

- Approximately half of the two month delay resulting from the People's preparation for a suppression hearing was held to be unreasonable. (*People v David*, 253 AD2d 642 [1st Dept 1998]).

- Only 35 of 54 days of delay associated with the defendant's pretrial motions were excludable since the 14 of the days it took the People to respond to pretrial motions was reasonable and only 21 of the days it took the court to decide the motion was reasonable delay (*People v Gonzalez*, 266 AD2d 562 [2d Dept 1999]).

- **Appeals:** Reasonable delay associated with appeals, whether it is the defendant's or the People's, is excludable under CPL 30.30 (4) (a).

  - **Period to be excluded:** Period between People's filing notice of appeal from an order dismissing indictment and appellate ruling reinstating that indictment is excludable, but the period between dismissal and the filing of the People's notice of appeal is not necessarily excludable (*People v Holmes*, 206 AD2d 542 [2d Dept 1994]; *People v Vukel*, 263 AD2d 416 [1st Dept 1999]).

  - **Reasonableness of the delay:** The People may not exclude the entire period of delay due to their appeal if they are dilatory in perfecting the appeal (*People v Muir*, 33 AD3d 1058 [3d Dept 2006]; *People v Womak*, 263 AD2d 409 [1st Dept 1999]). It has been held that the People's delay in perfecting their appeal to await a decision of the Court of Appeals that would resolve the

issue on appeal is excludable as "reasonable delay" in the perfection of an appeal (*People v Barry*, 292 AD2d 281 [1st Dept 2002]). However, delay of a prosecution during which an appeal is pending in an unrelated criminal prosecution that may resolve a dispositive legal issue in the prosecution is excludable as an "exceptional circumstance" (*see* CPL 30.30 [4] [g]; *People v Price*, 14 NY3d 61 [2010]).

- **The period following an order granting a new trial has become final will not automatically be excludable:** Pursuant to CPL 30.30 (5) (a), a new criminal action will be said to have commenced when the intermediate appellate court's order granting a new trial has become final, typically when a judge of the Court of Appeals has denied the People leave to appeal (*see People v Wells*, 24 NY3d 971 [2014]). The period immediately following the commencement of this new criminal action will not be automatically excluded as a period of delay associated with the defendant's appeal. It will only be excluded if the People establish, on the record, justification for the post-appeal delay. (*Wells*, 24 NY3d 971.)

- **Psychiatric evaluation of defendant:** The period of delay resulting from the prosecution's psychiatric evaluation of a defendant raising an insanity defense is excludable as delay resulting from "other proceedings" (*People v Jackson*, 267 AD2d183 [1st Dept 1999]).

- **Defendant's testimony before grand jur**y: Reasonable delay resulting from need to accommodate defendant's request to testify before grand jury is excludable (*People v Casey*, 61 AD3d 1011 [3d Dept 2009]; *People v Merck*, 63 AD3d 1374 [3d Dept 2009]).

o **Defense requested or consented to continuances (30.30 [4] [b]):** This provision renders excludable delay *resulting* from a continuance granted by the court at the request, or with the consent, of the defendant or his counsel. The provision permits exclusion only if the court has granted the continuance "satisfied that the postponement is

in the interest of justice, taking into account the public interest in the prompt dispositions of criminal charges."

- **Court ordered:** Adjournments are excludable only if court ordered (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]). Thus, the period under which plea negotiations are ongoing is not excludable under this subdivision unless the court has ordered the case continued for that purpose (*People v Dickinson*, 18 NY3d 835 [2011]).

- **Interests of Justice**: Adjournments are excludable only if ordered in the interests of justice. (*People v Rivas*, 78 AD3d 739 [2d Dept 2010] [holding that an adjournment was not excludable for 30.30 purposes, though court ordered and expressly consented to by the defendant, because, as the trial court found, the adjournment had not been ordered to further the interests of justice]).

- **Consent or request**: Adjournments are excludable only if consented to or requested by the defendant or counsel (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]; *see also People v Coxon*, 242 AD2d 962 [4th Dept 1997] [adjournment not excludable where defendant initially requested adjournment for mental health evaluation; trial court stated that it would grant adjournment only on condition that defendant waive presentment before grand jury; defendant was unwilling to waive that right; and court adjourned the matter without setting another appearance date]).

    - **Clearly expressed:** The defendant will be deemed to have consented to or requested the adjournment only if the request or consent was "clearly expressed by the defendant or defense counsel" (*People v Liotta*, 79 NY2d 841 [1992]; *People v Collins*, 82 NY2d 177 [1993]). It is not enough for the People to make the unsubstantiated claim that the adjournment was "agreed" or understood" (*People v Smith*, 110 AD3d 1141, 1143 [3d Dept 2013]).

- **Failure to object**: The defendant's failure to object to adjournment does not equate to consent (*People v Liotta*, 79 NY2d 841 [1992]; *People v Collins*, 82 NY2d 177 [1993]).

- **Assertions approving the particular adjourn date:** Defense counsel's statement to the court that a particularly adjournment date was "fine" does not constitute consent to the adjournment (*People v Barden*, 27 NY3d 550 [2016]; *People v Brown*, 69 AD3d 871 [2d Dept 2010]; *People v Nunez*, 47 AD3d 545 [1st Dept 2008]; *cf. New York v Hill*, 528 US 110 [2000]).

- **On the record:** Defendant's request for or consent to the adjournment, and the basis for the adjournment, must be on the record (*People v Liotta*, 79 NY2d 841 [1992]; *People v Bissereth*, 194 AD3d 317, 319 [1st Dept 1993]). The onus is upon the People to ensure that the record reflects that the defendant requested or consented to the adjournment on the record (*People v Robinson*, 67 AD3d 1042 [3d Dept 2009]).

- **Defense request for adjournments beyond that initially requested by the People:** Where the People initially request an adjournment to a specific date, and defense counsel does not expressly consent to that adjournment but, because of counsel's unavailability on that date, requests a later date, the period between the adjourn date requested by the People and the date requested by defense counsel will be excludable *if defense counsel does more than state that he or she is unavailable and instead requests additional time and explains why additional time is needed* (*Barden*, 27 NY3d at 554-555).

- **Adjourn dates set beyond the date requested by either the People or the defense:** Where the court sets the next court date beyond the adjournment date requested by either the People or the defendant, the period beyond the date requested will not be excludable unless defense counsel has clearly expressed consent to the entire adjourned period. Defense counsel's

ambiguous statement in response to the adjourn date set by the court – "that's fine" – will not be sufficient to charge the defendant with that additional period. (*Barden,* 27 NY3d at 555-556).

- **Dismissed case**: Defendant is without power to consent to an adjournment of a case that has been terminated by an order of dismissal (*People v Ruparelia*, 187 Misc 2d 704 [Poughkeepsie City Ct 2001]).

- **Defendant-requested delay of indictment**: It has been held that where defense counsel's request to delay filing of indictment directly affected the People's readiness, the period is excludable as an adjournment requested by defendant (*People v Greene*, 223 AD2d 474 [1st Dept 1996]). That holding cannot be reconciled with the plain language of the statute, stating that only delay resulting from a continuance "granted by the court" is excludable (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]; *see also Dickinson*, 18 NY3d 835).

- **Co-defendant's request**: Adjournment requested by co-defendant is excludable where the defendant and co-defendant are tried jointly (*People v Almonte*, 267AD2d 466 [2d Dept 1999]).

- **Defendant who is without counsel:** "A defendant who is without counsel must not be deemed to have consented to a continuance unless he has been advised by the court of his [30.30] rights . . . and the effect of his consent."

- **Resulting delay requirement:** While this statutory provision entitles the People to exclusion of a period only to the extent that the continuance "*resulted*" in *"delay*," the People will not be expected to show that the continuance actually prevented them from being ready for trial. The Court of Appeals has held that where the defendant has requested or consented to an adjournment, the defendant waives chargeability of the delay, regardless of whether there is a causal link between the adjournment and the People's lack of readiness – that the 4 (b)

excludable time provision rests generally on theories of estoppel or waiver (*People v Worely*, 66 NY2d 523 [1985]; *see also People v Kopciowski,* 68 NY2d 615, 617 [1986] ["Where adjournments are allowed at defendant's request, those periods of delay are expressly waived in calculating the People's trial readiness, without the need for the People to trace their lack of readiness to defendant's actions"]).

- **Delay due to the defendant's failure to appear (30.30[4] [c]):** The clock will stop ticking during the period of delay resulting from the defendant's failure to appear if it is shown that the defendant was "unavailable" or "absent."

  - **Unavailability:** A defendant is considered unavailable whenever his location is known and his presence cannot be secured even with due diligence.

  - **Absent**: "Absent" means that the People are *unaware* of the defendant's location and the defendant is attempting to avoid apprehension or prosecution or that the People are unaware of the defendant's location and his location cannot be determined with due diligence (CPL 30.30 [4] [c] [i]).

    - **Proof that the defendant was avoiding apprehension or prosecution**: The defendant's use of a different name in a subsequent arrest or flight to another jurisdiction may evince an intent to "avoid apprehension" (*People v Motz*, 256 AD2d 46 [1st Dept 1998]; *People v Williams*, 78 AD3d 160 [1st Dept 2010]; *People v Button*, 276 AD2d 229 [4th Dept 2000]).

    - **Incarceration**: A defendant may be "absent" due to his *unknown* incarceration, if the People have exercised due diligence to locate him or if the defendant, while incarcerated on the other matter, continues to avoid prosecution (CPL 30.30 [4] [c] [i]). However, a defendant is not "absent" if the People are aware of the defendant's incarceration or could have been made aware had they exercised due diligence (*People v Lesley*, 232 AD2d 259 [1st Dept 1996]).

- Where the defendant is incarcerated under a false name but the People have enough information to locate him despite his use of an alias, the defendant will not be considered absent, assuming that the defendant, by giving the false name, was not attempting to avoid apprehension or prosecution (*People v Lesley*, 232 AD2d 259 [1st Dept 1996]).

- **Due diligence**: Due diligence means to exhaust all reasonable investigative leads (*People v Petrianni*, 24 AD3d 1224 [4th Dept 2005]; *People v Grey*, 259 AD2d 246 [3d Dept 1999]; *People v Walter*, 8 AD3d 1109 [4th Dept 2004]; *see also People v Devino*, 110 AD3d 1146, 1149 [3d Dept 2013] [police obligated to diligently utilize "available law enforcement resources" and cannot exclude the delay time by relying on implicit "resource-allocation choices"]).

  - **When applicable:** The due diligence question comes into play when the People seek to exclude delay resulting from the defendant's absence or unavailability. If the People have timely established their readiness for trial within the statutory period, and do not seek to have a period excluded because of the defendant's absence or unavailability, it does not matter whether the People have exercised due diligence to locate or produce the defendant (*Carter*, 91 NY2d at 799).

- **Examples of due diligence:**

  - authorities sent letters to defendant's last known address, repeatedly sought assistance of out-of-state authorities to locate the defendant in that state, and frequently sought information from New York and out-of-state DMV (*People v Petrianni*, 24 AD3d 1224 [4th Dept 2005]);

- authorities tried to locate defendant, who was known to spend time in both Canada and Plattsburgh, by placing defendant's name in customs' computer (and thereby notified all points of entry); distributed defendant's photo to custom officials, border patrol, Plattsburgh police department, and Canadian authorities; obtained the help of elite squads of police to help locate defendant in Plattsburgh; looked for defendant in motels, malls, and bars known to be frequented by defendant; contacted defendant's relatives in the Plattsburgh area; and used a ruse to lure defendant into a bingo hall (*People v Delarounde*, 201 AD2d 846 [3d Dept 1994]);

- authorities made visits to defendant's last known address, contacting defendant's relatives and neighbors, and thoroughly investigated all leads (*People v Garrett*, 171 AD2d 153 [1st Dept 1991]);

- authorities repeatedly visited defendant's last known address, leaving cards with family members when informed that defendant was living on the street, and circulated wanted posters (*People v Lugo*, 140 AD2d 715 [2d Dept 1988]); and

- law enforcement went to defendant's last known home address repeatedly, twice visited defendant's aunt, looked for the defendant at locations he frequented, contacted defendant's last known employer, and checked with the DMV and social services (*People v Hutchenson*, 136 AD2d 737 [2d Dept 1988]).

- **Examples of due diligence lacking:**

    - authorities failed to check with the Department of Probation though the defendant was on probation (*People v Hill*, 71 AD3d 692 [2d Dept 2010]);

    - authorities failed to look for defendant at his mother's home, where he was known to spend nights (*In re Yusef B.*, 268 AD2d 429 [2d Dept 2000]);

    - law enforcement failed to locate the defendant who was incarcerated in a state facility under same name and NYSID number (*People v Ramos*, 230 AD2d 630 [1st Dept 1996]);

    - the government made sporadic computer checks while failing to check defendant's last known address (*People v Davis*, 205 AD2d 697 [2d Dept 1994]); and

    - the State Police confined their efforts to locate the defendant to within the assignment zone of their investigating unit and made unspecified efforts to locate the defendant through governmental agencies, including support collection (*People v Devino*, 110 AD3d at 1149).

- **Automatic exclusion provision**: Regardless of whether diligent efforts have been used to locate the defendant or whether the defendant's absence the has caused the delay at issue, the defendant's absence will be excludable where the defendant has either escaped from custody or has failed to appear after being released on bail or his own recognizance, *provided* that the defendant is not held in custody on another matter and a bench warrant has been issued. The time excluded is the entire period between the day the bench warrant is issued and the day the defendant appears in court (CPL 30.30 [4] [c] [ii]; (*People v Wells*, 16 AD3d 174 [1st Dept 2005]).

- **In custody on another matter**: Pursuant to the plain and unambiguous language of this provision, there is no automatic exclusion during any period in which the defendant is being held in custody on another matter. However, that period will be excludable if the People can show that they exercised due diligence to secure the incarcerated defendant's presence (*People v Bussey*, 81 AD3d 1276 [4th Dept 2011]; *People v Newborn*, 42 AD3d 506 [2d Dept 2007]; *People v Mane*, 36 AD3d 1079 [3d Dept 2007]; *see also* CPL 30.30 [4] [e] [excludable time includes "the period of delay resulting from detention of the defendant in another jurisdiction provided the district attorney is aware of such detention and has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial"]).

    - Some courts have held otherwise and have interpreted the "in custody on another matter" proviso more narrowly. They have interpreted it to allow automatic exclusion of the period during which the defendant was incarcerated on another matter so long as the defendant was *not in custody at the time he first failed to appear and a bench warrant was issued*. If the defendant was not in custody at the time the bench warrant was issued and was later taken into custody on another matter, the entire period between the issuance of the bench warrant and the defendant's eventual appearance in court is to be excluded, even the time during which the defendant is in custody on the other matter (*see People v Mapp*, 308 AD2d 463 [2d Dept 2003]; *People v Howard*, 182 Misc 2d 549, 551-553 [Sup Ct, New York County 1999]; *People v Penil*, 18 Misc 3d 355 [Sup Ct, Bronx County 2007]).

        - It has been further held, however, that when authorities (either the police or he District Attorney) learn of the defendant's

subsequent incarceration, the automatic exclusion provision no longer applies (and due diligence to secure the defendant's presence must be shown to establish the defendant's unavailability), whether or not the defendant was incarcerated at the time he first failed to appear and the bench warrant was issued (*see Mapp,* 308 AD2d at 464).

- **Delay resulting from defendant's incarceration in another jurisdiction:** Also excludable is the period of delay resulting from the defendant's detention in another jurisdiction, provided the People are aware of the defendant's detention and the People have been "diligent" and have "made reasonable efforts to obtain the presence of the defendant for trial" (CPL 30.30 [4] [e]). Such period of time may also be excludable due to the defendant's "unavailability" (CPL 30.30 [4] [c] [i]).

  - **Diligent and reasonable efforts requirement:** The mere filing of detainer does not satisfy due diligence requirement (*People v Billups*, 105 AD2d 795 [2d Dept 1984]). However, the due diligence requirement does not mandate that the People seek the defendant's presence where the use of the available procedures would be futile. It has been held that the due diligence requirement is satisfied in a case in which the defendant is held in federal custody in another state, though the People failed to secure defendant's presence through the use of a writ of habeas corpus, where the federal government would not relinquish custody of the defendant until the defendant was sentenced (*People v Mungro*, 74 AD3d 1902 [4th Dept 2010], *affd* 17 NY3d 785 [2011]).

    - **Defendant held on pending charges in another jurisdiction:** It has been held that the People are not expected to request that the defendant be released to New York while charges are still pending in the other jurisdiction. It is enough that the People are in regular

contact with the other jurisdiction while the charges are still pending there. (*People v Durham,* 148 AD3d 1293 [3d Dept 2017]).

- **Federal custody:** Delay associated with the defendant incarceration in a federal prison is excludable where it is shown that the defendant cannot be produced even with due diligence (*People v Clark*, 66 AD3d 1415 [4th Dept 2009]).

  - **Due diligence requirement:** Adjournments caused by the People's repeated failure to exercise due diligence in attempting to produce defendant from federal custody are not excludable where they failed to pursue statutorily prescribed methods for securing the defendant's presence (*People v Scott,* 242 AD2d 478 [1st Dept 1997]).

  - **Writ of habeas corpus ad prosequendum:** The People will not be said to have acted diligently and have used reasonable effort to secure a defendant in federal custody where they have not sought his production by way of a writ of habeas corpus ad prosequendum, pursuant to CPL 580.30 (*People v Scott*, 242 AD2d 478 [1st Dept 1997]), unless they show that use of that procedure would have been futile due to the federal government's unwillingness to allow defendant's production (*People v Gonzalez*, 235 AD2d 366 [1st Dept 1997]).

- **Plea bargaining:** The period of delay resulting from plea bargaining is *not* excludable on that basis alone (*Dickinson*, 18 NY3d 835). That period may be excludable, however, if the defendant expressly waived his 30.30 rights ; mere silence in the face of an adjournment request for purposes of plea negotiations is not sufficient to waive 30.30 time (18 NY3d at 836; *Leubner*, 143 AD3d at 1245; *People v Waldron*, 6 NY3d 463 [2006]). A plea bargaining period may also be excludable if the defendant requested or consented to a court-ordered adjournment during that period (*People v Wiggins*, 197 AD2d 802 [3d Dept 1993]).

- **Exceptional Circumstances (30.30 [4] [g])**: Delay caused by "exceptional circumstances" will be excluded.

    - **Unavailability of a witness:** Delay due to the unavailability of a witness will be excludable; however, it is so only if the People can show that they have exercised due diligence in securing the witness (*People v Douglas,* 47 Misc 3d 1218 [Crim Ct, Bronx County 2015]; *People v Zimny*, 188 Misc 2d 600 (Sup Ct 2001]).

        - **Disappearance of witness**: delay due to the prosecution's inability to locate a witness is excludable as an exceptional circumstance if the prosecution has exercised due diligence to locate the witness (*People v Thomas,* 210 AD2d 736 [3d Dept 1994]; *see e.g. People v Figar*o, 245 AD2d 300 [2d Dept 1997] [period of delay due to the complainant's disappearance was not excludable, where the People, in an attempt to locate the complainant, made a single visit to the complainant's home and only a "few" phone calls]).

        - **Witness's departure to another country**: Delay associated with a witness's departure to another country will be excludable if the People have demonstrated due diligence to secure the witness' attendance – that is to say, "vigorous activity to make the witness available" (*People v Belgrave*, 226 AD2d 550 [2d Dept 1996]; *see e.g. People v Hashim,* 48 Misc 3d 532 [Crim Ct, Bronx County 2015] [People failed to show that due diligence was exercised where the "complainant made no plans to come back to the United States until the People gave him a 'firm' trial date"; the People did not show they were unable, despite their best efforts, to schedule trial before the witness's departure or to secure his return; and on "more than one occasion . . . the People could have told the witness either not to leave or to return to the United States in anticipation of one of the trial dates"]).

        - **Deployment of witness in overseas military service**: Unavailability of key witness due to his military

deployment is excludable, so says *People v Williams* (293 AD2d 557 [2d Dept 2002]).

- **Injury or illness of prosecution witness**: The injury or illness of a prosecution witness, rendering the witness unavailable, is an exceptional circumstance (*People v Stanley*, 275 AD2d 423 [2d Dept 2000]; *People v Moore*, 234 AD2d 567 [2d Dept 1996]; *People v Ali*, 209 AD2d 227 [1st Dept 1994]; *People v Pharr*, 204 AD2d 126 [1st Dept 1994]; *see also People v. Womak*, 229 AD2d 304 [1st Dept 1996] *affd* 90 NY2d 974 [1997] [period during which arresting officer was unavailable due to maternity leave is excludable delay]; *People v McLeod*, 281 AD2d 325 [1st Dept 2001] [large and cumbersome cast in which officer's right arm was encased constituted a sufficiently restricting injury to qualify officer as medically unable to testify]; *People v Sinjaj*, 291 AD2d 513 [2d Dept 2002] [witness unavailable due to emotional trauma brought on by the crime is an exceptional circumstance]).

    - **People's burden**: "Although the prosecutor's representation is typically sufficient to establish the witness's unavailability due to medical reasons, due diligence is not satisfied when the People merely state a naked (albeit valid) reason for the unavailability or rely on hearsay information from family members that the witness is unavailable" (*People v Douglas*, 47 Misc 3d 1218 [Crim Ct, Bronx County 2015]).

- **Police witness's unavailability due to participation in mandatory training:** Period during which the police witness is participating in a mandatory training program only if the People have demonstrated due diligence to make the witness available. Thus, in *People v Friday* (-- AD3d --, 1018 NY Slip Op 02367 [3d Dept 2018]), it was held that such a period could not be excluded as the People made no effort to learn whether the witness could switch to another training program that did not conflict with the trial.

- **Defendant's mental incompetency**: Delay caused by defendant's commitment after being declared incompetent to stand trial is excludable, as stemming from an exceptional circumstance; the People have no obligation to monitor competency status (*People v Lebron*, 88 NY2d 891 [1996]).

- **Special Prosecutor**: The appointment of a special prosecutor is an exceptional circumstance such that the associated delay is excludable (*People Crandall*, 199 AD2d 867 [3d Dept 1993]; *People v Morgan*, 273 AD2d 323 [2d Dept 2000]).

- **Obtaining evidence from defendant**: Delay associated with obtaining blood and saliva samples from defendant, performing DNA tests, and obtaining results has been held to be excludable as stemming from an exceptional circumstance (*People v Williams*, 244 AD2d 587 [2d Dept 1997]).

- **Delay associated with obtaining DNA results:** Delay associated with obtaining DNA results is not necessarily excludable as an exceptional circumstance. The People may exclude the period only if they meet their burden of showing that the evidence was unavailable during that period despite their exercise of due diligence. (*see People v Clarke*, 28 NY3d 48 [2016] [no reasonable excuse for the People's delay in seeking court order for defendant's DNA exemplar]; *People v Gonzalez*, 136 AD3d 581 [1st Dept 2016] [People failed to demonstrate due diligence in obtaining DNA results]; *People v Wearen*, 98 AD3d 535 [2d Dept 2012] [same]).

    - **Example**: "People's inaction in obtaining defendant's DNA exemplar, the 161-day period of delay to test the DNA and to produce the DNA report was not excludable from speedy trial computation as an exceptional circumstance" (*Clarke*, 28 NY3d at 52).

- **People's unawareness of charges:** The delay between the date a complaint is filed and the date the People first receive notice of the filing has been held to be excludable where the court clerk or police delay giving the People notice of the filing

(*People v La Bounty*, 104 AD2d 202 [4th Dept 1984]; *People v Smietana*, 98 NY2d 336 [2002] [the delay between the date the filing of the misdemeanor information by police and the defendant's arraignment on that information is excludable under the "exceptional circumstances" provision, where the police prepared the information without knowledge or involvement of prosecutor, and police did not inform the prosecutor of the charges until the arraignment date]; *see also* CPL 110.20 [requiring that a copy of the accusatory instrument filed in local court be promptly transmitted to the District Attorney]).

- **Failure of local criminal court to transmit divesture documents not an exceptional circumstance:** The time during which the local criminal court failed to transmit the order, felony complaint and other documents pursuant to CPL 180.30 (1) to County Court is not excludable time under the exceptional circumstances provision as it does not prevent the People from presenting their case to the grand jury (*People v Amrhein*, 128 AD3d 1412 [4th Dept 2015]).

- **Adjournments to await appellate decision resolving dispositive legal issue:** Such delay has been held not to be occasioned by an exceptional circumstance (*People v Price*, 14 NY3d 61 [2010]).

- **Disaster:** Delay resulting from a natural disaster has been found to be an exceptional circumstance (*People v Sheehan*, 39 Misc 3d 695 [Crim Ct, New York County 2013] [Hurricane Sandy]).

- **No counsel:** The period defendant is without counsel through no fault of the court, except where the defendant proceeds pro se, is excludable (30.30 [4] [f]; *People v Sydlar*, 106 AD3d 1368, 1369 [3d Dept 2013]).

- **Definition of "without counsel" includes not having counsel present:** The phrase "without counsel" has been given a broader definition than "not having" counsel. It includes not having counsel present at the court proceeding (*People v DeLaRrosa*, 236 AD2d 280, 281 [1st Dept 1997]; *People v Bahadur*, 41 AD3d 239 [1st Dept 2007]*; People v Lassiter*, 240 AD2d 293 [1st Dept 1997]; *People v Corporan*, 221 AD2d 168 [1st Dept 1995]).

    - However, it has been held that the defendant is not without counsel where counsel's absence is the People's fault, for example, where counsel does not appear because the People failed to comply with their obligation to produce incarcerated defendant (*People v Brewer*, 63 AD3d 402 [1st Dept 2009]).

- **Codefendant:** Period during which codefendant is without counsel is excludable (*People v Rouse*, 12 NY3d 728 [2009])

- **Newly assigned counsel**: A defendant is not "without counsel" within the meaning of the statute when he is recently assigned counsel, even though the lawyer knows nothing about case (*People v Rouse*, 12 NY3d 728 [2009]).

- **No showing of delay required:** All periods during which the defendant is without counsel through no fault of the court must be excluded, regardless of whether the defendant's lack of representation actually impeded the People's progress in case (*People v Aubin*, 245 AD2d 805 [3d Dept 1997]*; see e.g. People v Rickar*d, 71 AD3d 1420 [4th Dept 2010] [court excluded period between defendant's arraignment (when court faxed to the Public Defender an assignment order) and the Public Defender's first appearance in court (when the Public Defender advised the District Attorney that the defendant was waiving his preliminary hearing)]).

- **Assigned Counsel Program's failure**: Assigned Counsel Program's failure to provide counsel to the defendant may be deemed the fault of the court, depending upon the relationship

and connection between the court and the program (*Cortes*, 80 NY2d at 209).

- **Summons by District Attorney directing defendant to appear for arraignment pursuant to CPL 120.20 (3) or CPL 210.10 (3):** To be excluded from the 30.30 calculation is the period "prior to the defendant's actual appearance for arraignment in a situation in which the defendant has been directed to appear by the district attorney" by way of summons in lieu of an arrest warrant (CPL 30.30 [4] [i]).

- **Waiver**: That period may also be excluded if defendant or his counsel waived any objection to the delay, either by letter or an in-court declaration (*People v Waldron*, 6 NY3d 463 [2006]*; People v Jenkins*, 302 AD2d 978 [4th Dept 2003]; *People v Dougal*, 266 AD2d 574 [3d Dept 1999]).

  - **Clarity requirement:** The waiver will be effective only if it is unambiguous; waiver will not be inferred from silence (*Dickinson*, 18 NY3d 835]; *People v Leubner*, 143 AD3d 1244, 1245 [4th Dept 2016]). The Court of Appeals has repeatedly advised that prosecutors obtain unambiguous written waivers (*Dickinson*, 18 NY3d at 836).

  - **Rescinding the waiver:** It has been held that defendant's expressed revocation of a plea offer, by itself, does not rescind 30.30 waiver where the waiver agreement expressly requires that any revocation of the waiver be done in writing (*People v Hammond*, 35 AD3d 905 [3d Dept 2006]).

  - **Counsel's waiver:** Counsel can effectively waive his client's 30.30 rights (*People v Moore*, 32 AD3d 1354 [4th Dept 2006]).

- **Executive Order:** A period may be excluded where there is in effect governor's executive order directing that time be tolled due to a disaster or other emergency (*People v Sheehan*, 39 Misc 3d 695 [Crim Ct, New York County 2013] [Hurricane Sandy]).

➢ POST-READINESS DELAY

- **Defined**: Dismissal may be warranted even where the People have established their readiness within the statutory period if the People subsequently become unready and the aggregate of the pre-readiness and post-readiness delay exceeds the prescribed period (*People v McKenna*, 76 NY2d 59 [1990]; *People v Anderson*, 66 NY2d 529 [1985]).

    - **The People must have caused the delay:** The People will be charged with post-readiness delay only to the extent that they were responsible for the delay (*Dushain*, 247 AD2d 234; *Cortes*, 80 NY2d 201).

    - **Test**: The test is whether the People are no longer in fact ready for trial – i.e., whether the People have not done everything required of them to bring the case to a point that it can be tried (*People v England*, 84 NY2d 1 [1994]; *People v Robinson*, 171 AD2d 475, 477 [1st Dept 1991]; *People v Kendzia*, 64 NY2d 331, 337 [1985]).

- **Adjournments:** Where the People request an adjournment, the entire adjourned period constitutes post-readiness delay unless the People re-announce their readiness during the adjourned period or the People had requested an adjournment for a date certain and the adjournment exceeded the period requested (*People v Betancourt*, 217 AD2d 462 [1st Dept 1995]; *Barden;* 27 NY3d at 554-556).

    - **Re-announcement of readiness:** The prosecution may re-announce its readiness during the adjourned period by filing a notice of readiness and thereby avoid being charged with the entire adjourned period (*Stirrup*, 91 NY2d 434).

    - **Adjourned period beyond what is requested by the People:** Where the court has granted the People's request for an adjournment, but sets the next court date beyond the adjourned period requested by the People due to court congestion, the People will be considered unready only for the adjourned period they requested (*People v Alverez*, 117 AD3d 411 [1st Dept 2014]; *Barden*, 27 NY3d at 554-555).).

- **People's burden:** The People bear the burden of showing that they had requested a shorter adjournment than that ordered by the court (*People v Miller*, 113 AD3d 885, 887 [3d Dept 2014]).

- **Chargeable post-readiness delay:**

  - **Failure to produce incarcerated defendant**: Post-readiness delay exists where the People have failed to produce the defendant incarcerated in the same jurisdiction (*People v Anderson*, 66 NY2d 529 [1985]). However, that period may be excludable due to the defendant's unavailability if the defendant is not produced despite the People's diligent efforts to obtain the defendant's presence (*People v Newborn*, 42 AD3d 506 [2d Dept 2007]).

  - **Inability to produce the complainant:** Post-readiness delay exists if the People are unable to secure the attendance of the complainant (*People v Cole*, 73 NY2d 957 [1989]).

  - **Failure to provide grand jury minutes**: Post-readiness delay will be charged to the People where they fail to provide grand jury minutes needed for a decision on a motion to dismiss (*People v McKenna*, 76 NY2d 59 [1990]; *People v Johnson*, 42 AD3d 753 [3d Dept 2007]).

  - **Delay caused by *court* stenographer not under the People's control:** Delay caused by *court* stenographer's failure to timely provide relevant minutes is not chargeable to the People (*People v Lacey*, 260 AD2d 309 [1st Dept 1999]).

  - **Failure to provide copy of search warrant**: Post-readiness delay will be charged to the People where they fail to provide a copy of search warrant, rendering it impossible for the defendant to move against the search warrant (*People v Daley*, 265 AD2d 566 [2d Dept 1999]).

- **Post-readiness delay not chargeable to the People**

- **A *non-incarcerated* defendant's failure to appear**: Delay due to the defendant's failure to appear, regardless of whether due diligence is exercised to locate him, is not chargeable to the People (*People v Myers*, 171 AD2d 148 [2d Dept 1991]; *People v Carter*, 91 NY2d 795).

- **Court congestion delay:** Post-readiness delay due to court congestion is not chargeable to the People, as the People are not the cause of such delay (*Cortes*, 80 NY2d 201).

- **Applicability of CPL 30.30 (4)'s excludable time provisions:** The People's post-readiness delay will not necessarily be "charged" to the People, as periods of post-readiness delay, just like pre-readiness delay, are subject to the excludable time provisions of CPL 30.30 (4) (*People v Kemp*, 251 AD2d 1072 [4th Dept 1998]).

- **Exceptional fact or circumstance:** the court is not required to dismiss an indictment due to post-readiness delay (although it may) where the post-readiness delay is occasioned by "some exceptional fact or circumstance, including, but not limited to, the sudden unavailability of evidence material to the People's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period." CPL 30.30 (3) (b). Note, there is an incongruence between this subdivision, which, through its use of the permissive term "may," seems to allow a court to dismiss an indictment due to post-readiness delay occasioned by an exceptional fact or circumstance and CPL 30.30 (4) (g), which requires exclusion of delay resulting from an exceptional fact or circumstance.

    - **Unavailability of prosecutor**: An adjournment requested by the prosecutor due to his own personal unavailability for trial is chargeable to the People where the People fail to show that it would not have been onerous to reassign the case to another prosecutor (*People v DiMeglio*, 294 AD2d 239 [1st Dept 2002]).

➢ PRETRIAL RELEASE

- **In general**: The defendant is entitled to be released on "just and reasonable bail" or his own recognizance if the prosecution fails to become ready within certain time periods (CPL 30.30[2]). "Just and reasonable bail" is bail within reach of the defendant (*People ex rel. Chakwin on Behalf of Ford v Warden, New York City Correctional Facility, Rikers Is.*, 63 NY2d 120 [1984]).

- **Commencement of time period:** time clock generally commences from date defendant is committed to custody of sheriff (CPL 30.30 [2]), though statutory exceptions do exist (CPL 30.30 [5]).

- **Time periods:** The applicable time periods, set forth under subdivision two, are shorter than those that apply under the motion to dismiss provisions of CPL 30.30 [1]).

- **Excludable time:** The excludable time provisions of 30.30 (4) apply to a CPL 30.30 (2) motion for pretrial release.

➢ PROCEDURE

- **Defendant's burden**

  - **Written motion to dismiss before trial**: To invoke her 30.30 rights, the defendant must make a written motion to dismiss, pursuant to CPL 170.30 (1) (e) or 210.20 (1) (g), before trial commences (*People v Woody*, 24 AD3d 1300 [4th Dept 2005]; *People v Lawrence*, 64 NY2d 200 [1984]).

    - **Waiver of objection to oral motion:** People waive writing requirement by failing to object at the time of oral motion (*People v Brye*, 233 AD2d 775 [3d Dept 1996]).

  - **Timing of motion:** At least with respect to prosecutions in which the highest level offense charged is either a felony or misdemeanor (where the applicable time period is six months, ninety days, or sixty days), CPL 255.20's general requirement that pretrial motions be made within forty-five days after

arraignment does not apply to CPL 30.30 motions. This is so because the time period within which the People must be ready extends beyond the forty-five day period.

- **Content of papers**: Motion papers must contain "sworn allegations that there has been unexcused delay in excess of the statutory maximum" (*People v Beasley*, 16 NY3d 289, 292 [2011]; *People v Santos*, 68 NY2d 859 [1986]).

  - **Facial sufficiency:** Papers submitted must on their face indicate entitlement to dismissal (*People v Lusby*, 245 AD2d 1110 [4th Dept 1997]).

  - **Allegation of lack of readiness:** If the People failed to announce their readiness within the designated period, the defendant must allege that fact in his motion papers (*People v Jackson*, 259 AD2d 376 [1st Dept 1999]). If the People announced their readiness, but were not actually ready, the defendant must alleged in his motion papers the specific time periods during which the People were not in fact ready and the particular reason the People were not ready during the alleged periods (*id.*).

  - **Disputing excludable time:** The defendant's initial burden does not require him to allege that certain periods are not excludable (*People v Beasley*, 16 NY3d at 292). It is the People's burden to identify the excludable time (*People v* Beasley, 16 NY3d at 292-293; *People v Luperon*, 85 NY2d 71, 81-82 [1995]). Only if the People raise excludable time does the defendant have the obligation to refute that the period is excludable (*People v Beasley*, 16 NY3d at 292 – 293; *Luperon*, 85 NY2d at 81 - 82).

    - **The failure to dispute alleged excludable time:** Defendant's motion papers must dispute excludable time alleged in People's responding papers; otherwise the defendant will be deemed to have conceded that the periods are excludable (*see*

People v Notholt, 242 AD2d 251 [1st Dept 1997] [period during which, according to People's papers, defendant requested and consented to adjournment, is excludable, despite the failure of prosecutor to supply minutes in support of contention, where the defendant did not deny the People's contentions]). Therefore, if the alleged excludable time is not disputed in the defendant's initial papers, it will be necessary for the defendant to dispute the allegations with supplemental sworn allegations (*People v Beasley*, 16 NY3d at 292-293; *People v Daniels*, 36 AD3d 502 [1st Dept 2007]).

- **Notice:** Papers must give the People reasonable notice of motion as required by CPL 210.45 (1) (*People v Woody*, 24 AD3d 1300 [4th Dept 2005]; *People v Mathias*, 227 AD2d 907 [4th Dept 1996]; *see People v Baxter*, 216 AD2d 931 [4th Dept 1995] [motion to dismiss indictment served and made returnable on first day of trial does not to provide People with reasonable notice]).

- **Prosecution's Burden**

  - **Demonstrating excludable time:** Once the defendant has alleged an unexcused delay greater than the statutory maximum, the prosecution must demonstrate that there is sufficient excludable time (*People v Berkowitz*, 50 NY2d 333 [1980]). It is incumbent upon the People to "*submit*" "*papers*" setting forth the "particular dates they claim should be excluded and the *factual* and statutory basis for each exclusion" (*Santos*, 68 NY2d at 861[emphasis added]). A determination on whether the People met that burden must rest solely on the motion papers, and accompanying documentary evidence, and the evidence presented at hearing on the motion, if one is held; a determination -- whether by the trial court or the reviewing appellate court -- must not be based upon documentary evidence, including the minutes of the proceeding, which were not included as part of the motion papers or introduced at the

hearing (CPL 30.30 [1]; CPL 210.20 [1] [g]; CPL 210.45 [1], [2], [3], [4], [5], [6]; *see also People v Contrearas*, 227 AD2d 907 [4th Dept 1996] [it is documentary proof "submitted" to the lower court that is to be considered in determining whether a period is to be excluded for 30.30 purposes]).

- **People's failure to meet their burden**: Where the prosecution fails to meet this burden, the defendant's motion to dismiss must be granted summarily, i.e., without a hearing (*Santos*, 68 NY2d 859).

  - **Concession of allegations**: The prosecution will be deemed to have conceded what it does not deny in its answering affirmation (*People v Berkowitz*, 50 NY2d 333 [1980]).

- **Hearing:** Where the motion papers raise a factual dispute (for example, as to when the accusatory was filed, whether the People announced ready within the designated period, whether the People were in fact ready within the prescribed period, or whether a certain period is excludable) a hearing is necessary so long as the dispute is dispositive of the motion (*People v Sydlar*, 106 AD3d 1368, 1370 [3d Dept 2013]; *People v Smith*, 245 AD2d 534 [2d Dept 1997]; *see also People v Allard*, 113 AD3d 624, 626-627 [2d Dept 2014] [People can defeat a 30.30 claim without a hearing when they can demonstrate with "unquestionable documentary proof" that the claim has no merit]).

  - **Defendant's burden:** The defendant has the burden of proving that the People failed to establish their readiness within the designated period, if that issue is in dispute (*People v Beasley*, 16 NY3d at 292). Thus, the defendant will be required to prove by a preponderance of the evidence when criminal action commenced, the People's failure to announce their readiness within the designated time period, and the illusory nature of the People's announcement of readiness, to the extent the issues are in dispute (*see People v Brown*, 114 AD2d 418 [2d Dept 1985]; *People v O'Neal*, 99 AD2d 844, 845 [2d Dept 1984]).

  - **People's burden:** The People bear the burden of proving that

certain periods are excludable (*People v Figaro*, 245 AD2d 300 [2d Dept 1997]; *see People v Martinez*, 268 AD2d 354 [1st Dept 2000] [the prosecution must prove that a witness was indeed "unavailable" for trial, such that the delay occasioned by his unavailability is excludable as an exceptional circumstance]; *People v Valentine*, 187 Misc 2d 582 [Sup Ct 2001] [where motion papers create a factual dispute over whether the defendant had consented to an adjournment, it is incumbent upon the prosecution to submit relevant supporting documentation from its records and court records]).

- **Pro Se motions**: Since a defendant has no Federal or State constitutional right to hybrid representation, a trial court is not required to entertain a pro se 30.30 motion when the defendant is represented by counsel. Whether to entertain such a motion rests within the sound discretion of the court (*People v Rodriguez*, 95 NY2d 497 [2000]).

- **Forfeiture**: A defendant forfeits his 30.30 rights by pleading guilty, even if the court has advised him that his 30.30 rights will be reviewable (*People v Attanasio*, 240 AD2d 877 [3d Dept 1997]).

  - **Voluntariness of guilty plea:** Incorrect advice that the 30.30 claim is reviewable despite the guilty plea may render the guilty plea involuntary (*People v Thomas*, 53 NY2d 338, 344 [1981]).

  - **Ineffective Assistance of Counsel:** A guilty plea will not preclude the defendant from claiming that his counsel's failure to make a meritorious CPL 30.30 motion deprived him effective assistance (*People v Devino*, 110 AD3d 1146).

- **Preservation**: A defendant, on appeal, may raise only those 30.30 contentions that he argued in the lower court in his or her initial motion papers, reply papers, or at the hearing *or* those which the lower court addressed in its decision (*People v Allard*, 28 NY3d 41, 46-47 [2016]; *People v Goode*, 87 NY2d 1045 [1996]). The appellate court will only exclude those periods that the defendant, in the lower court, argued with specificity were not excludable. For example, if a defendant argued that from January to July is not excludable because the People's delay in responding to the omnibus motion was "unreasonable," the appellate

court will consider only whether that entire period was not excludable. It will not consider, for example, the alternative argument that the shorter period from May to July was not excludable as being unreasonable delay (*Beasley*, 16 NY3d 289). If the People contend in their answering papers that a specific period is excludable, the defendant will have preserved his or her argument that the period is not excludable only to the extent that the People's particular arguments were addressed in the defendant's original motion or reply papers (*People v Allard*, 28 NY3d at 46-47; *People v Henderson*, 120 AD3d 1258 [2d Dept 2014]; *People v Brown*, 122 AD3d 461, 462 [1st Dept 2014]).

- **Decision required:** The defendant's 30.30 claim will be preserved only if the court expressly decides the 30.30 motion (CPL 470.05 [2]; *People v Green*, 19 AD3d 1075 [4th Dept 2005]).

- **Reviewable grounds for affirmance:** An appellate court may affirm a CPL 30.30 ruling only on those grounds that were the basis for the trial court's determination (*People v Concepcion*, 17 NY3d 192 [2011]).

- **Ineffective Assistance of Counsel:** Where defense counsel has failed to make a meritorious 30.30 motion for dismissal, the defendant will be denied effective assistance of counsel (*People v Devino*, 110 AD3d 114; *People v Sweet*, 79 AD3d 1772 [4th Dept 2010]; *People v Manning*, 52 AD3d 1295 [4th Dept 2008]; *People v Grey*, 257 AD2d 685 [3d Dept 1999]; *People v Miller*, 142 AD2d 970 [4th Dept 1988]).

  - **Merit Requirement:** It has been held that there will be no IAC claim where the record is unclear that the 30.30 claim that counsel failed to pursue actually had merit (*see People v Lucieer*, 107 AD3d 1611 [4th Dept 2013]; *People v Brunner*, 16 NY3d 820 [2011] [counsel's failure to make a 30.30 motion did not deny defendant effective assistance counsel where there was negative precedent and applicability of exclusions was debatable]; *but see People v Clermont*, 22 NY3d at 934 [court found counsel ineffective for not vigorously pursuing suppression claim, noting that it was not necessary for the court to resolve whether the motion to suppress actually had merit; it was enough that substantial arguments for and against suppression could be made

and the question, which involved "complex *DeBour* jurisprudence," was a close one]).