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### Grand Jury

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## GRAND JURY

*N.Y. CONST. art. I, § 6:*

*No person shall be held to answer for a capital or otherwise infamous crime . . . , unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel.*

*U.S. CONST. amend. V:*

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .*

## COURT OF APPEALS

People v. Boston<sup>731</sup>  
(decided April 26, 1990)

Defendant, after having served his sentence, sought vacatur of his plea to be prosecuted under a superior court information (SCI) on two charges that were added to his indictment upon his consent. The defendant claimed that his “waiver of indictment was impermissible”<sup>732</sup> under both the Criminal Procedure Law (CPL) section 195.10<sup>733</sup> and the New York State Constitution,<sup>734</sup> which allows for a waiver of a grand jury indictment upon the consent of the defendant, the court, and the People. In a unanimous decision, the court of appeals held in

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731. 75 N.Y.2d 585, 554 N.E.2d 64, 555 N.Y.S.2d 27 (1990).

732. *Id.* at 587, 554 N.E.2d at 66, 555 N.Y.S.2d at 29.

733. N.Y. CRIM. PROC. LAW § 195.10 (McKinney 1982).

734. N.Y. CONST. art. I, § 6.

favor of the defendant "as a matter of statutory interpretation."<sup>735</sup> The court found that it was contrary to the objectives of CPL 195.10 to waive a grand jury indictment and proceed with a prosecution by incorporating an SCI into an already existing indictment.

Defendant was indicted by a grand jury for attempted murder in the second degree under an intentional murder theory, as well as other charges arising out of the same incident. After arraignment, and with the consent of the parties and the court, the People filed an SCI charging defendant with second degree murder, under a depraved indifference theory.<sup>736</sup> The defendant, his attorney, the People, and the court consented to the defendant's waiver of a grand jury indictment and, instead, proceeded with an SCI prosecution. The trial court consolidated the SCI into the original indictment and the defendant was convicted on both murder counts and first degree assault. The defendant was sentenced to two concurrent, indeterminate terms of imprisonment.<sup>737</sup>

The right to an indictment by a grand jury has been recognized by state common law as a "public fundamental right."<sup>738</sup> However, a New York State constitutional provision, enacted in 1974 as an amendment to article I, section 6 of the New York State Constitution,<sup>739</sup> allows a criminal defendant being prosecuted under state law to waive his or her right to an indictment and "consent to be prosecuted on an information filed by the district attorney," and "such waiver shall be evidenced by written instrument signed by the defendant in open court in

735. *Boston*, 75 N.Y.2d at 587, 554 N.E.2d at 66, 555 N.Y.S.2d at 29.

736. *Id.* (citing N.Y. PENAL LAW § 125.25(2) (McKinney 1987 & Supp. 1990)).

737. *Id.*

738. *Id.* (citing *Simonson v. Cahn*, 27 N.Y.2d 1, 261 N.E.2d 246, 313 N.Y.S.2d 97 (1970); *People v. Miles*, 289 N.Y. 360, 45 N.E.2d 910 (1942); *People ex rel. Battista v. Christian*, 249 N.Y. 314, 164 N.E. 111 (1928)).

739. The court noted that the constitution originally "declare[d] that no person shall be held to answer for an infamous crime unless upon indictment of the Grand Jury" and that there were no exceptions. *Id.* The court emphasized the importance of narrowly construing the new provision. *Id.*

the presence of his counsel.”<sup>740</sup> Subsequently, the legislature enacted CPL section 195.10, which specifies when a defendant may be prosecuted under an SCI rather than a grand jury indictment.<sup>741</sup>

The *Boston* court found that CPL section 195.10(2)(b) was of such “critical significance,”<sup>742</sup> that waiver of the indictment must be exercised “*prior to the filing of an indictment by the grand jury.*”<sup>743</sup> The court determined that this legislation “plainly and explicitly preclude[s] waiver by SCI after an indictment is filed.”<sup>744</sup> The court reasoned that the statute was implemented as a time saving device. “The statutory procedures were thus aimed at affording a defendant the opportunity for a speedier disposition of charges as well as eliminating unnecessary Grand Jury proceedings.”<sup>745</sup> Therefore, since defendant’s waiver and plea occurred *after* his indictment, the court held that his conviction must be set aside.<sup>746</sup>

Although there is no federal constitutional provision for waiver of a grand jury indictment in favor of pleading guilty to an information, Federal Rules of Criminal Procedure section 7(b)<sup>747</sup> does provide for such an option in particular circumstances.<sup>748</sup> In

740. *Id.* at 588, 554 N.E.2d at 66, 555 N.Y.S.2d at 29 (quoting N.Y. CONST. art. I, § 6).

741. N.Y. CRIM. PROC. LAW § 195.10(1) (McKinney 1982). The statute provides that:

A defendant may waive indictment and consent to be prosecuted by superior court information when: (a) a local criminal court has held the defendant for the action of a grand jury; and (b) the defendant is not charged with a class A felony; and (c) the district attorney consents to the waiver.

*Id.*

742. *Boston*, 75 N.Y.2d at 588, 544 N.E.2d at 66, 555 N.Y.S.2d at 29.

743. *Id.* (emphasis in original) (quoting N.Y. CRIM. PROC. LAW § 195.10(2)(b) (McKinney 1982)).

744. *Id.*

745. *Id.* at 589, 554 N.E.2d at 67, 555 N.Y.S.2d at 30 (citations omitted).

746. *Id.*

747. FED. R. CRIM. P. 7(b).

748. Fed. R. CRIM. P. 7(b) provides:

Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be

1931, a federal district court established that the right to waive an indictment by a grand jury is a personal privilege and, like other personal rights or privileges, it may be waived by a defendant.<sup>749</sup> More recently, the United States Court of Appeals for the Second Circuit stated that a written waiver of indictment by a grand jury is unnecessary where a defendant affirmatively seeks the waiver and an instruction to the jury of a lesser charge.<sup>750</sup> Also, in *Ornelas v. United States*,<sup>751</sup> the United States Court of Appeals for the Eleventh Circuit acknowledged a defendant's right to plead guilty to an information if it is done in open court.<sup>752</sup> Additionally, such a waiver need not be express; it may be implied. In *Ornelas*, the defendants were in the course of their trial when they decided against risking an unfavorable jury verdict. They subsequently pleaded to an information of a lesser charge. The court held that the failure to obtain an express waiver under the circumstances was "a mere technical violation of Rule 7(b)." <sup>753</sup>

The New York Court of Appeals in *Boston*, relying primarily

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prosecuted by information if the defendant, after having been advised of the nature of the charge and rights of the defendant, waives in open court prosecution by indictment.

*Id.*

749. In *United States v. Gill*, 55 F.2d 399 (D.N.M. 1931). The district court noted that it would:

[S]ee no force in the argument that the accused may waive a trial by a jury and not waive the other constitutional privilege of having the accusation against him first passed upon and found by a grand jury. If his waiver is effective in the one instance, it must be in the other. Both provisions are provisions made for the benefit of the accused, and both are subject to that fundamental rule of law that a person may renounce a provision made for his benefit . . . .

*Id.* at 401; see also *Barkman v. Sanford*, where the court noted that "[i]t seems thoroughly established that an intelligent accused may waive any constitutional right that is in the nature of a privilege to him, or that is for his personal protection or benefit." 162 F.2d 592, 594 (5th Cir.), cert. denied, 332 U.S. 816 (1947).

750. *United States v. Ferguson*, 758 F.2d 843, 852 (2d Cir. 1985).

751. 840 F.2d 890 (11th Cir. 1988).

752. *Id.* at 892.

753. *Id.* (quoting *United States v. Travis*, 735 F.2d 1129, 1131 (9th Cir. 1984)).

upon the purpose behind the SCI provision in the CPL statute, concluded that because the statute and constitutional provisions are time saving devices and an aid in eliminating unnecessary grand jury proceedings, it was inconsistent to allow for such a waiver after grand jury proceedings have already taken place. On the federal level, although an information has not particularly been referred to as a time saving device, courts have at least recognized the constitutionality of a waiver of indictment in favor of prosecution based on an information. Thus, an information has been held to be constitutional on both the federal and state levels.

People v. Menchetti<sup>754</sup>  
(decided September 19, 1990)

Defendant challenged the validity of the superior court information,<sup>755</sup> to which he pleaded guilty, on the grounds that the information charged him with a different offense than that in the felony complaint for which he was being held for grand jury indictment. The defendant alternatively alleged that even if the information may properly charge a defendant with a lesser included offense than that in the felony complaint, the information in question is still defective because criminal possession in the fourth degree is not a lesser included offense of criminal possession in the third degree.

The court of appeals held that the superior court information (SCI) was valid because the information can charge a defendant with a lesser included offense so long as the defendant is also being charged with that lesser included offense in the felony complaint.<sup>756</sup> Moreover, the court held that criminal possession in the fourth degree is a lesser included offense of criminal possession in the third degree, because one cannot commit criminal possession in the third degree without simultaneously committing criminal possession in the fourth degree.<sup>757</sup>

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754. 76 N.Y.2d 473, 561 N.E.2d 536, 560 N.Y.S.2d 760 (1990).

755. See N.Y. CRIM. PROC. LAW § 195.10(1) (McKinney 1982).

756. *Menchetti*, 76 N.Y.2d at 478, 561 N.E.2d at 539, 560 N.Y.S.2d at 763.

757. *Id.* (citing *People v. Glover*, 57 N.Y.2d 61, 64, 439 N.E.2d 376, 377,