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Abramovsky and Edelstein: Prosecutorial Readiness
**PROSECUTORIAL READINESS, SPEEDY TRIAL AND THE
ABSENT DEFENDANT: HAS NEW YORK'S 25-YEAR
DILEMMA FINALLY BEEN RESOLVED?**

Abraham Abramovsky* and Jonathan I. Edelstein**

INTRODUCTION

Few provisions of New York State's criminal procedure law have been as often litigated, or have been the subject of as much invective, as section 30.30 of the Criminal Procedure Law,¹ which provides that the prosecution must be ready for trial within specific time limits following the commencement of a criminal action.² Of

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** J.D., 1997, Fordham University Law School. This Article is dedicated to the memory of Albert Edelstein (1937-1996) and David T. Eames (1954-1998).

¹ N.Y. CRIM. PROC. LAW § 30.30 (McKinney 1992).

² See, e.g., *People v. Neal*, 160 Misc. 2d 173, 607 N.Y.S.2d 866 (Sup. Ct. New York County 1994). For example, Justice Rena K. Uviller of the New York County Supreme Court has described New York's readiness statute as follows: "Speedy trial motions have become a judge's, if not a litigant's, nightmare. The opaque language of N.Y. CRIM. PROC. LAW § 30.30 resists clarification by judicial interpretation. What follows is yet another attempt to understand this misbegotten statute." *Id.* at 173, 607 N.Y.S.2d at 867. See also Joseph Neff, *The Reign of the Coddled Criminal*, NEWS AND OBSERVER (RALEIGH), Mar. 31, 1996, at G3. In his article, Joseph Neff has referred to CPL § 30.30 as "a mechanistic nightmare passed in 1972 and never reviewed since." *Id.* HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (1995). In addition, New York State Supreme Court Justice Harold Rothwax has castigated CPL § 30.30 as a technical statute which has set free criminals whose guilt has been proven beyond a reasonable doubt. *Id.* at 185.

This denunciation may have been inspired by the fact that CPL § 30.30 is an entirely technical statute which is entirely unconcerned with the guilt or innocence of the defendant. However, the readiness requirement set forth in CRIM. PROC. LAW § 30.30 has an important and entirely legitimate purpose - to protect a criminal defendant from the uncertainty of an unending prosecution. The abuses which would be possible if the prosecution had an unlimited amount of time to prepare for trial are too numerous to list here;

the provisions of New York Criminal Procedure Law § 30.30, few have inspired as much confusion and critical attention, in the Legislature and the courts, as CPL § 30.30(4)(c). This statute, which addresses the exclusion of time in cases where the defendant is absent or otherwise unavailable to answer the charges against him, has been amended twice in response to judicial decisions which were seen as providing undeserved benefit to fugitive felons.³

Under section 30.30, New York prosecutors must be ready for trial within a specific time following the commencement of a criminal action, depending upon the severity of the offense charged.⁴ Failure to meet the deadlines provided by statute will result in an automatic sanction of dismissal.⁵ To mitigate this harsh penalty and allow for necessary delays, however, the statute allows a prosecutor to exclude certain periods from the time in which he must prepare his case. One of the most controversial of these exclusions is outlined in CPL § 30.30(4)(c), which pertains to cases in which the defendant has become a fugitive from justice.

Simply put, CPL § 30.30(4)(c) allows the prosecution to exclude delays stemming from the “absence” or “unavailability” of a defendant.⁶ It is the definition of “absence” or “unavailability” which has led to both confusion and controversy. According to the original version of CPL § 30.30(4)(c), a defendant was considered “absent” when his location was unknown and he was attempting to avoid prosecution or his location could not be determined through due diligence.⁷ Similarly, a defendant was deemed “unavailable”

several of the most obvious, however, include the ability to hold an indictment over the head of a defendant indefinitely, the ability to postpone trial until vital witnesses or evidence are no longer available to the defendant, and the ability to delay a criminal action in anticipation of a favorable judicial decision on a pertinent issue.

This Article considers the recent amendments to CRIM. PROC. LAW § 30.30(4)(c) in light of both of these viewpoints.

³ See *infra* notes 79-151 and accompanying text (concerning the legislative and judicial history of CRIM. PROC. LAW § 30.30(4)(c)).

⁴ N.Y. CRIM. PROC. LAW § 30.30(1). The time limits provided by the statute range from 180 days for a felony to 30 days for a petty offense. *Id.*

⁵ *Id.*

⁶ *Id.* § 30.30(4)(c).

⁷ Ch. 184, § 2, 1972 N.Y. Laws 398-401.

when his location was known, but he could not be brought to trial through the exercise of due diligence by the prosecution.⁸

The confusion surrounding this statute has centered on the circumstances under which prosecutors are required to exercise due diligence in locating a defendant, especially in cases where bench warrants have been issued. Both legislative amendments to CPL § 30.30(4)(c), as well as an inordinate number of judicial decisions, have addressed the question of how far law enforcement authorities must go in enforcing bench warrants in order to avoid the risk of dismissal.

The Legislature's most recent attempt to resolve the confusion surrounding CPL § 30.30(4)(c) occurred in 1996, when the statute was amended to provide a much wider exclusion of time - amounting almost to a blanket exclusion - in cases where bench warrants had been issued for absent defendants.⁹ Although the 1996 amendments significantly clarify the extent to which the prosecution may exclude delays stemming from the enforcement of bench warrants, several key questions remain as to prosecutors' obligations to locate absent defendants and bring them to trial.

The first of these, and perhaps the farthest-reaching in practical terms, is the issue of whether the prosecution may gain an open-ended exclusion of time simply by filing a bench warrant. In a decade-old decision which may prove prophetic, a New York trial court predicted that a blanket exclusion of time in bench warrant cases may lead to a policy of "filing and forgetting warrants" in order to avoid the readiness requirements of CPL § 30.30.¹⁰ Notwithstanding the 1996 amendments, there is some authority for the contention that law enforcement agencies may not establish a policy of issuing warrants they do not intend to enforce.¹¹

⁸ *Id.*

⁹ Ch. 631, 1996 N.Y. Laws 1327; *see also infra* notes 126-49 and accompanying text (discussing the circumstances surrounding the 1996 amendments).

¹⁰ *People v. Garrett*, 146 Misc. 2d 919, 926, 553 N.Y.S.2d 948, 952 (N.Y. Sup. Ct. Kings County 1990), *rev'd on other grounds*, 171 A.D.2d 153, 575 N.Y.S.2d 93 (2d Dep't 1991), *lv. denied*, 79 N.Y.2d 827, 588 N.E.2d 105, 580 N.Y.S.2d 207 (1991).

¹¹ *See infra* notes 262-65 and accompanying text.

In addition, while it is difficult at first glance to summon any sympathy for an absent defendant against whom a bench warrant is outstanding, a closer examination reveals that a universal exclusion may lead to injustice. While bench warrants may be issued against some defendants because they deliberately fled from prosecution, warrants are also issued against individuals who are absent simply because they have never been informed of the charges against them. Moreover, a third category of defendant may become subject to a bench warrant -- a defendant who has appeared in court but, through bureaucratic mishap, is not properly informed of the date of his next appearance.¹² Finally, a defendant may be prevented from returning to court due to circumstances beyond his control, such as accidental injury or arrest in another jurisdiction. While the second category of defendant is protected by the current version of CPL § 30.30, the two final categories are not.¹³

The second unresolved issue concerns the constitutionality of CPL § 30.30(4)(c) as a whole. In a pair of recent decisions, the Second Circuit established a constitutional obligation upon prosecutors to exercise due diligence in locating absent defendants, even in cases where the defendant has fled the jurisdiction.¹⁴ This duty, however, has not been recognized outside the Second Circuit, and has been severely limited even within the circuit; thus, a Federal constitutional challenge to CPL § 30.30(4)(c) may well be a pyrrhic victory at best for the challenger.¹⁵

Accordingly, this article will examine the open issues relating to CPL § 30.30(4)(c) in the context of the prior legislative and judicial history surrounding the right to speedy trial, both in New York and Federal jurisdictions. Part I of this article will outline the development of absent defendants' right to speedy trial¹⁶ in New

¹² See *People v. Drummond*, 215 A.D.2d 579, 629 N.Y.S.2d 55 (2d Dep't 1995).

¹³ N.Y. CRIM. PROC. LAW § 30.30(4)(c)(ii) (McKinney 1992).

¹⁴ See *infra* notes 229-49 and accompanying text (discussing *United States v. Diacolios* 837 F.2d 79, *Rayborn v. Scully*, 858 F.2d 84 and their progeny).

¹⁵ See *infra* notes 250-60 and accompanying text.

¹⁶ CRIM. PROC. LAW § 30.30 is, strictly speaking, a readiness rule rather than a speedy trial statute. See Peter Preiser, N.Y. CRIM. PROC. LAW § 30.30 practice commentary at 172 (McKinney 1992). The constitutional right to

York. Part II will analyze the framework under which absent defendants' CPL § 30.30 claims are currently adjudicated. Part III will examine the remaining issues left unresolved by the 1996 amendments to CPL § 30.30(4)(c). In conclusion, this article will attempt to suggest a proper resolution to these issues.

I. HURRY UP AND WAIT: AN INCOMPLETE HISTORY OF N.Y. CRIMINAL PROCEDURE LAW § 30.30(4)(c)

A. The Majority Rule Prior to 1968

The period from 1968 through 1972 marked a significant change in speedy trial jurisprudence, both in New York State and throughout the United States. Prior to 1968, the right to speedy trial was one of the most vaguely defined constitutional rights, both at common law and in federal and state statutes.¹⁷ This led to such inconsistencies as a pretrial delay of one year being held by one court to be *prima facie* evidence of a denial of the right to

speedy trial in New York is protected by a very broadly worded statute, CRM. PROC. LAW § 30.20, which is usually, although not always, considered in conjunction with CRM. PROC. LAW § 30.30. However, as a trial cannot occur before the prosecution is ready, violation of a readiness statute necessarily implicates the right to speedy trial. Moreover, discussions of the policy reasons behind prosecutorial readiness rules have almost invariably centered on the constitutional right to speedy trial. *See, e.g.,* United States v. Salzmann, 417 F. Supp. 1139, 1145-50 (E.D.N.Y. 1976). Accordingly, the constitutionality of CPL § 30.30 or any provision thereof must be evaluated in light of New York and Federal speedy trial jurisprudence.

¹⁷ *Salzmann*, 417 F. Supp. at 1146. The *Salzmann* court discussed the history of speedy trial jurisprudence prior to the 1970's as follows:

The Supreme Court had dealt with the Speedy Trial Clause of the Sixth Amendment only infrequently, most of the decisions having been handed down in the last two decades. Lower courts were frustrated in applying the Clause not only because of the paucity of appellate rulings but also because of the nature of the guidance.

Id.

speedy trial, while another court held that a delay of 18 years did not violate the Constitution.¹⁸

This vagueness existed, at least in part, by design, as the right to speedy trial "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused."¹⁹ In contrast with the other constitutional rights available to criminal defendants, deprivation of the right to speedy trial might actually work to the benefit of the accused.²⁰ Time is often on the side of a criminal defendant; delays, especially if prolonged, might weaken the prosecution's case as witnesses' memories dim and physical evidence is lost or misplaced.²¹ As the prosecution carries the burden of proof, the damage to the prosecution's case over time might in some instances be far more than the corresponding damage to the defense.²² Accordingly, "deprivation of the right to speedy trial does not [always] prejudice the accused's ability to defend himself."²³

For this reason, the majority of state and federal jurisdictions prior to 1968 set difficult standards for defendants seeking to assert their right to speedy trial. More than thirty states and the majority of federal appellate courts recognized the "demand rule," limiting the assertion of the right to those cases in which the defendant demanded a speedy trial.²⁴

¹⁸ See House Report on the Speedy Trial Act of 1974, H.R. REP. NO. 93-1503 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7404.

¹⁹ *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

²⁰ *Id.* at 521 (holding that "[d]elay is not an uncommon defense tactic.").

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 523-24 and cases cited therein. The majority of jurisdictions recognizing a demand rule applied the "demand-waiver" rule, under which failure to demand speedy trial operated as an absolute waiver of the right. *Id.* at 524 n.22. The First, Second, Eighth and Ninth Circuits recognized a more flexible rule in which demand was a factor which was considered in evaluating a defendant's assertion of the right to speedy trial, but allowing assertion of the right in the absence of demand in exceptional cases. *Id.* at 524 n.23; *see also* *Bandy v. United States*, 408 F.2d 518 (8th Cir. 1969); *Moser v. United States*, 381 F.2d 363 (9th Cir. 1967); *United States ex. rel. Solomon v. Mancusi*, 412 F.2d 88 (2d Cir.), *cert. denied*, 396 U.S. 936 (1969); *United States v. Butler*, 426 F.2d 1275, 1278 (1st Cir. 1970), *cert. denied*, 401 U.S. 978 (1971).

In cases involving fugitive or absent defendants, the demand rule by definition operated as a nearly absolute bar to assertion of the right to speedy trial. A fugitive defendant, who is seeking to avoid trial entirely, is unlikely to surface for the purpose of demanding an expeditious prosecution.²⁵ However, the demand rule worked not only against fugitives, but also against defendants who were unrepresented by counsel and unaware of their right to speedy trial,²⁶ or to those who were simply unaware that charges were outstanding against them and that they were being sought for prosecution.²⁷

B. The New York Rule Prior to 1970

New York State, however, went far beyond the majority in recognizing a broad equitable right to speedy trial. In 1955, New York rejected the demand rule, adopting a more liberal construction of the right to speedy trial. In *People v. Prosser*,²⁸ the New York Court of Appeals considered the case of a defendant who was rearraigned on a six-year-old indictment after an appellate court ruled that he must be released from prison because he had been improperly sentenced on a prior conviction.²⁹ After being

²⁵ See Bruce A. Green, "Hare and Hounds": *The Fugitive Defendant's Constitutional Right to Be Pursued*, 56 BROOK. L. REV. 439, 454-55 (1990). Prior to the 1960s, a defendant's flight from justice was generally construed as a waiver of speedy trial. *Id.* at 455. This rule was applied to defendants who absconded before being arrested as well as cases in which the defendant was arrested and later jumped bail or otherwise absented himself from the court's jurisdiction. *Id.*

²⁶ See, e.g., *United States v. Perez*, 398 F.2d 658 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080, (1969) (holding that the demand rule applied to defendant who was not represented by counsel and not informed by the court or the prosecution of his right to speedy trial).

²⁷ See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, SPEEDY TRIAL 17 n.17 ("ABA Standards") (Approved Draft 1968) ("[O]ne reason for [rejection of the demand-waiver rule] is that there are a number of situations, such as where the defendant is unaware of the charge . . . in which it is unfair to require a demand . . ."). *Id.*

²⁸ 309 N.Y. 353, 130 N.E.2d 891(1955).

²⁹ *Id.* at 355, 30 N.E.2d at 893.

convicted of burglary and grand larceny, the defendant was sentenced to consecutive prison terms of five to ten and five to twenty years.³⁰

The defendant appealed his conviction on the grounds that his right to speedy trial had been violated.³¹ The Fourth Department condemned the delay, but held that the defendant had waived his right to speedy trial by failing to demand dismissal pursuant to Section 668 of the New York Code of Criminal Procedure at the time of trial.³²

The Court of Appeals reversed, finding that “[i]t is the state which initiates the [criminal] action, and it is the state which must see that the defendant is arraigned.”³³ The *Prosser* court held further that the plain language of Section 668, which required the prosecution affirmatively to establish good cause for its own delay, indicated that “mere failure of the defendant to take affirmative action to prevent delay may not, without more, be construed or treated as a waiver.”³⁴ The Court of Appeals went on to cite several equitable factors in support of a more flexible rule, noting that a rigid demand rule could allow the prosecution to delay trials for periods longer than the statute of limitations³⁵ and that it would be inappropriate to require the defendant to demand a speedy trial

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Section 668 of the Code of Criminal Procedure, enacted in 1849, provided the means by which a criminal defendant in New York could enforce his right to speedy trial, stating that:

If a defendant, indicted for a crime whose trial has not been postponed upon his application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found the court may, on application of the defendant, order the indictment to be dismissed, unless good cause to the contrary is shown.

N.Y. CODE CRIM. PROC. LAW § 668 (1849), *repealed* Ch. 996, 1970 N.Y. Laws 2147-2461.

³³ *Prosser*, 309 N.Y. at 358, 130 N.E.2d at 895.

³⁴ *Id.*

³⁵ *Id.* at 359, 130 N.E.2d at 895, *citing* Report of the Commissioners on Practice and Pleading at 342 (1849).

in cases which had apparently been abandoned on the prosecution's own initiative.³⁶

Trial court decisions subsequent to *Prosser* interpreted the New York rule to require the prosecution to exercise due diligence in apprehending defendants who were unaware of the charges against them or who were living openly within the court's jurisdiction. For example, in *People v. Serio*,³⁷ the Erie County Court considered the case of a defendant indicted for grand larceny in October 1946 while serving a sentence in a California prison.³⁸ The Erie County District Attorney obtained a warrant against the defendant and forwarded it to the California prison as a detainer, but later recalled the warrant with the explanation that "the District Attorney of Erie County 'would not send for Serio as his sentence [in California] may have taught him a lesson.'"³⁹ However, the District Attorney reserved the right to enforce the warrant if the defendant returned to Buffalo.⁴⁰

The defendant, Frank Serio, did in fact return to Buffalo in 1952. For the next six years, Serio lived openly in Buffalo, was gainfully employed, was listed in the Buffalo telephone directory, and appeared in court in connection with the administration of his sister's estate.⁴¹ During that time, Serio had no trouble with the law - until the Erie County District Attorney decided without warning to bring him to trial on the 1946 indictment.

Upon the defendant's motion to dismiss, the trial court concluded that the defendant had no duty "to announce his availability for arraignment and trial to the District Attorney, or as Ogden Nash might have phrased it: 'Dear Sir: My name is Barbara North, I'll be ready for trial on the 24th.'"⁴² Citing Serio's open residence in Buffalo and the 12-year dormancy of the indictment, the County Court applied the *Prosser* rule to pre-arraignment delays and held

³⁶ *Prosser*, 309 N.Y. at 360, 130 N.E.2d at 896.

³⁷ 13 Misc. 2d 973, 181 N.Y.S.2d 340 (Erie County Ct. 1958).

³⁸ *Id.* at 974, 181 N.Y.S.2d at 340.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 975, 181 N.Y.S.2d at 342.

that the prosecution had a duty to exercise diligence in obtaining absent defendants for arraignment and trial.⁴³

The Nassau County Court's decision in *People v. Morton*,⁴⁴ and subsequent appellate litigation, demonstrate the limits of the pre-1970 New York rule. In *Morton*, the trial court dismissed a seven-year-old indictment against a defendant who had resided openly in adjoining Queens County during the period between indictment and trial.⁴⁵ Although the defendant had maintained a New York State driver's license in his own name and filed federal and state income tax returns, law enforcement authorities made no attempt to locate him by means of motor vehicle or tax records.⁴⁶ Instead, the prosecutor's efforts to bring him to trial consisted of inquiries to his brother, his previous employer and to authorities in South Carolina, where he had relatives.⁴⁷ Upon the defendant's motion to dismiss, the trial court stated that "[i]t seems inconceivable that the authorities did not make inquiry of such agencies as the taxing authorities or motor vehicle bureau in an effort to secure information as to defendant's whereabouts."⁴⁸ The defendant, who was living openly within the jurisdiction, was "not . . . a 'fugitive' who should be denied the beneficial effects of section 668 . . . solely because the indictment was returned and a superficial investigation failed to yield his whereabouts."⁴⁹ By 1966, therefore, some New York trial courts recognized a prosecutorial obligation to conduct a diligent search for absent defendants similar to the obligation, which would later be codified under CPL §30.30(4)(c).

The Court of Appeals, however, ultimately reversed the determination of the Nassau County Court in *Morton*, declining to adopt the *Prosser* rule in connection with defendants who had removed themselves from the jurisdiction of the trial court.⁵⁰ In

⁴³ *Id.*

⁴⁴ 50 Misc. 2d 890, 271 N.Y.S.2d 861 (Nassau County Ct. 1966).

⁴⁵ *Id.* at 891, 271 N.Y.S.2d at 863.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 893, 271 N.Y.S.2d at 865.

⁴⁹ *Id.*

⁵⁰ *People v. Morton*, 22 N.Y.2d 674, 238 N.E.2d 755, 291 N.Y.S.2d 367

doing so, the Court of Appeals adopted the holding of the Appellate Division dissent; namely, that the defendant waived his right to speedy trial by failing to notify the police of his whereabouts.⁵¹ Thus, although a prosecutor could not be excused for failing to locate a defendant within his jurisdiction, the Court of Appeals declined to extend this rule to require a diligent search for a defendant who resided in a county outside the jurisdiction of the court in which he was indicted. It would be several more years before the requirement of prosecutorial due diligence became firmly entrenched in New York.

C. 1968-72: *The Rise of Readiness Rules*

The 1960s saw a dramatic increase in pretrial delays in jurisdictions throughout the United States.⁵² Between 1960 and 1970, for example, the number of criminal cases filed in federal district courts increased by approximately one third, with no corresponding increase in judgeships.⁵³ In a trend mirrored in state jurisdictions, the median time interval between filing and disposition in federal criminal cases more than doubled between 1963 and 1972.⁵⁴ Accordingly, the prevailing laxity in enforcing the right to speedy trial gave way to “[e]nthusiasm for Speedy Trial Plans that would define with some precision the outer limits of permissible delay”⁵⁵

In February 1968, the House of Delegates of the American Bar Association approved a comprehensive model standard relating to speedy trial, which went far beyond the constitutional requirements of contemporary case law.⁵⁶ The ABA standards rejected the loosely defined speedy trial concept which had developed at common law, recommending instead that states establish rules

(1968).

⁵¹ *Id.*; *affirming* *People v. Morton*, 28 A.D.2d 913, 914, 282 N.Y.S.2d 960, 961 (2d Dep’t 1967) (Rabin and Nolan, JJ., dissenting).

⁵² *United States v. Salzman*, 417 F. Supp. 1139, 1145 (E.D.N.Y. 1976).

⁵³ *Id.* at 1146.

⁵⁴ *Id.* at 1145.

⁵⁵ *Id.* at 1146.

⁵⁶ *Id.* at 1147-48; *see also* Green, *supra* note 25, at 457.

mandating dismissal in cases where defendants were not brought to trial within a specified period of time.⁵⁷ These differed from prior speedy trial rules in that they were completely objective and universally applicable.

Although the ABA standards indicated that delay beyond a certain point was “inherently prejudicial,”⁵⁸ they contained certain exceptions under which justifiable delays would not be counted against the prosecution.⁵⁹ Among the exceptions addressed by the ABA standards was delay caused by an absent defendant.

The ABA standards followed the common law in recommending that a fugitive defendant - that is, one who is actively avoiding prosecution - may not complain of pretrial delay, whether or not the government has endeavored to locate him.⁶⁰ However, the ABA standards departed from the majority rule in obligating the prosecution to search for absent defendants⁶¹ who were merely unaware of the charges against them.⁶² The ABA's model rule went beyond even the developing standard of due diligence in New York, by imposing a duty upon the prosecution to pursue even those defendants who were living openly outside the jurisdiction.⁶³ In such circumstances, pretrial delay would be excused only if the

⁵⁷ *Salzmann*, 417 F. Supp. at 1148-49. The drafters of the ABA Standards refrained from selecting a specific time frame during which a defendant must be brought to trial. *Id.* at 1149.

⁵⁸ *Id.*

⁵⁹ See ABA STANDARDS, *supra* note 27.

⁶⁰ *Id.* at § 2.3(e); see also Green, *supra* note 25, at 458.

⁶¹ The obligation of the prosecution to search for an absent defendant who was unaware of the charges against him, although not recognized under the majority rule, came into increasing acceptance at common law independently of the ABA Standards following the Supreme Court's decision in *Smith v. Hooey*, 393 U.S. 374 (1969). The *Smith* decision established an obligation on prosecutors to exercise due diligence in obtaining the presence of a defendant who is incarcerated in another jurisdiction. *Id.* at 383. Following the *Smith* decision, a number of lower courts expanded the rule of due diligence to provide that “the government must try to locate defendants who are ignorant of the charges against them and who, like prisoners, are unable to appear in court of their own volition.” Green, *supra* note 25, at 460.

⁶² ABA STANDARDS, § 2.3(e).

⁶³ *Id.*

defendant's location could not be ascertained by due diligence, or if efforts to obtain the defendant's presence were resisted.⁶⁴

In the period immediately after 1968, many state jurisdictions and federal appellate courts adopted readiness statutes or rules based on the ABA standards.⁶⁵ Among these jurisdictions were New York State⁶⁶ and the United States Court of Appeals for the Second Circuit, which promulgated a comprehensive rule regarding speedy disposition of criminal cases in 1971.⁶⁷ Following the ABA recommendations, the Second Circuit established a mechanical formula under which prosecutors who were not ready for trial within six months of the commencement of a criminal action would be sanctioned by dismissal.⁶⁸ The Second Circuit rule also followed the ABA standards in tolling the six-month limitation in cases where a defendant is "absent" or "unavailable."⁶⁹ The Second Circuit defined "absence" and "unavailability" as follows:

A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence⁷⁰

Accordingly, federal prosecutors in the Second Circuit had a clear duty to conduct a diligent search for any defendant whose location

⁶⁴ *Id.* The ABA Standards were the first speedy trial standards to explicitly use the term "due diligence" in connection with the prosecution's duty to locate the absent defendant. *See id.*

⁶⁵ Green, *supra* note 25, at 457.

⁶⁶ *See infra* notes 79-82 and accompanying text (discussing the enactment of CRIM. PROC. LAW § 30.30).

⁶⁷ *Salzmann*, 417 F. Supp. at 1148.

⁶⁸ *Id.*

⁶⁹ Rules Regarding Prompt Disposition of Criminal Cases, 2D. CIR R. 5(d).

⁷⁰ *Id.*

was unknown and who was not actively attempting to avoid prosecution.⁷¹

In addition, in the landmark 1972 decision of *Barker v. Wingo*,⁷² the Supreme Court rejected the demand rule and explicitly permitted objective readiness rules of the type recommended by the ABA, although it declined to require such a mechanical rule as a matter of constitutional principle.⁷³ Under *Barker*, which is the foundation of modern speedy trial jurisprudence, the rigid demand rule was replaced by a flexible test under which the defendant's demand for speedy trial was only one of four factors to be considered in determining whether his right had been violated.⁷⁴ In addition to the timeliness of the defendant's demand, the *Barker* test mandates that courts consider the length of pretrial delay, the reason for the delay and the prejudice to the defendant.⁷⁵ The *Barker* decision placed the burden on the government to justify delays in bringing defendants to trial, specifically including negligence as a factor that should weigh against the government in determining whether the right to speedy trial had been violated.⁷⁶ Moreover, the *Barker* Court specified that the timeliness of a defendant's assertion of his right to speedy trial is affected by the reason for the delay.⁷⁷ Thus, it would seem that the *Barker* decision mandates inquiry into whether the prosecution acted

⁷¹ The United States as a whole adopted a mechanical readiness rule for all federal jurisdictions with the enactment of the Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1998). The Speedy Trial Act, however, contained a looser definition of the "absent" defendant, defining the term simply to mean any defendant whose location was unknown to the prosecution. Thus, the Speedy Trial Act stopped short of imposing an obligation to conduct a diligent search for absent defendants even where they were ignorant of the charges against them or otherwise not actively avoiding prosecution.

⁷² 407 U.S. 514 (1972).

⁷³ *Id.* at 523-26.

⁷⁴ *Id.* at 530.

⁷⁵ *Id.*

⁷⁶ *Id.* at 531. "A more neutral reason such as negligence . . . should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*

⁷⁷ *Id.*

diligently in carrying out its responsibility of informing the defendant of the charges against him and bringing him to trial.⁷⁸

D. The Enactment of CPL §30.30(4)(c)

In 1970, New York State repealed the Code of Criminal Procedure and replaced it with an entirely new Criminal Procedure Law, which had been designed by a panel of experts appointed by then-Governor Rockefeller.⁷⁹ Among the earliest amendments to the new Criminal Procedure Law, adopted in 1972, was a mechanical readiness rule modeled after the ABA's proposed speedy trial standards.⁸⁰ Like the ABA standards and the Second Circuit speedy trial rule, section 30.30 of the new Criminal Procedure Law tolled the prosecutorial readiness deadline in cases where delay was caused by a fugitive defendant.

As originally enacted, CPL § 30.30(4)(c) provided that the prosecution was entitled to exclude delays caused by the "absence"

⁷⁸ New York State defines the right to speedy trial in similar, although not identical, terms to the Supreme Court's *Barker* test. The New York test for determining whether a defendant's right to speedy trial has been violated was set down in *People v. Taranovich*, 37 N.Y.2d 442, 335 N.E.2d 303, 373 N.Y.S.2d 79 (1975). The *Taranovich* court outlined a five-factor test, including the extent of the delay, the reasons for delay, the nature of the underlying charge, whether or not there has been an extended period of pretrial incarceration, and whether the defense has been prejudiced by the delay. *Id.* at 445. The *Taranovich* test is thus more liberal than the *Barker* test in that it makes no mention at all of the defendant's responsibility to demand a speedy trial.

⁷⁹ Ch. 996, 1970 N.Y. Laws 2147-2461. The Criminal Procedure Law was based upon the work of the Temporary State Commission on Revision of the Penal Law and Criminal Code, which was appointed in 1961 by Governor Rockefeller to revamp New York's substantive and procedural criminal statutes. The adoption of the Criminal Procedure Law followed the enactment of an entirely new Penal Law in 1965, which represented the Commission's recommendations on substantive criminal legislation. Among the innovations enacted as part of the Criminal Procedure Law were a restructuring of the lower criminal court system and the adoption of a clearly defined discovery rule in criminal cases. Governor's Memorandum on Chapter 996 of the Laws of 1970, reprinted in 1970 N.Y. Laws 3140-41.

⁸⁰ Ch. 184, § 2, 1972 N.Y. Laws 398-401.

or “unavailability” of a defendant, defining those terms in language nearly identical to that used by the Second Circuit.⁸¹ The language of CPL § 30.30(4)(c) was straightforward, and its rationale was pure common sense, predicated on the notion that dismissal of charges against fugitive defendants would “breed contempt for law and the judicial process generally and especially among defendants who receive a bonanza for negligent or intentional failure to return to court.”⁸² Within a short time after its enactment, however, this statute was thrown into confusion through judicial interpretation.

In 1976, the Court of Appeals considered the case of Rita Roberta Sturgis, against whom a felony complaint had been filed in Monroe County on April 2, 1973, charging possession of a loaded firearm and escape in the second degree.⁸³ Seven months after the filing of the felony complaint, Sturgis was indicted and the case placed on the calendar of the Monroe County Court.⁸⁴ Following her arraignment, Sturgis moved to dismiss the charges against her on the grounds that the prosecution was not ready for trial within six months of the filing of the felony complaint.⁸⁵ Her motion was denied, and she was subsequently convicted of escape.⁸⁶ Following her conviction, she appealed.

For much of the period between the filing of the felony complaint and her arrest on November 26, 1973, Sturgis was certainly “absent” under the definition of CPL § 30.30(4)(c).⁸⁷ During August 1973, bench warrants were issued against her by three

⁸¹ *Id.*

⁸² Memorandum of the New York State Executive Department, *reprinted* in 1972 N.Y. Laws 3259; *see also In Re Jose R.*, 83 N.Y.2d 388, 632 N.E.2d 1260, 60 N.Y.S.2d 937 (1993).

⁸³ *People v. Sturgis*, 38 N.Y.2d 625, 627, 345 N.E.2d 331, 332, 381 N.Y.S.2d 860, 861 (1976).

⁸⁴ *Id.*

⁸⁵ *Id.* N.Y. CRIM. PROC. LAW § 30.30 (McKinney 1992) requires that the prosecution be ready for trial within 180 days of the commencement of any criminal action which contains at least one felony count. N.Y. CRIM. PROC. LAW § 30.30(1)(a) (McKinney 1992).

⁸⁶ *Sturgis*, 38 N.Y.2d at 626, 345 N.E.2d at 332, 381 N.Y.S.2d at 860.

⁸⁷ *Id.* at 628, 345 N.E.2d at 332-333, 381 N.Y.S.2d at 861. “Under the instant facts, the County Court had a right to find that, from August 18 to November 26, 1973, defendant was absent.” *Id.*

separate town courts in Monroe County for failure to appear on unrelated criminal charges.⁸⁸ In October, she was arrested under an alias in another county, and subsequently failed to appear in court there before finally being arrested in Rochester on yet another criminal charge.⁸⁹

By any fair measure, Sturgis was actively avoiding prosecution; thus, the district attorney argued that he was not required to conduct a diligent search for her or even to advance the trial process in her absence. The Court of Appeals, however, disagreed. Citing the language of CPL § 30.30(4)(c), which allowed exclusion of delays “resulting from the absence or unavailability of the defendant,” the *Sturgis* court held that absence or unavailability was insufficient by itself to justify an exclusion.⁹⁰ Rather, the court held that periods of time during which a defendant was absent or unavailable were not excludable unless the delay resulted directly from the absence or unavailability.⁹¹ Since the prosecutor could have indicted Sturgis in her absence, the Court of Appeals concluded that the seven-month delay in presenting the indictment did not result from Sturgis’ absence and that she was therefore entitled to reversal of her conviction and dismissal of the indictment against her.⁹²

A number of subsequent decisions applied *Sturgis* stringently, requiring the prosecution to carry the burden of proving that delays in readiness were caused by the defendant’s absence. For instance, in *People v. Hamilton*,⁹³ the Court of Appeals held that the prosecution had failed to adequately prove that the defendant’s absence resulted in an increased need to investigate.⁹⁴ Similarly, the court in *People v. Floyd*⁹⁵ dismissed an indictment under CPL

⁸⁸ *Id.*

⁸⁹ *Id.* at 627, 345 N.E.2d at 331, 381 N.Y.S.2d at 861.

⁹⁰ *Id.* at 628, 345 N.E.2d at 333, 381 N.Y.S.2d at 861.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 46 N.Y.2d 932, 388 N.E.2d 345, 415 N.Y.S.2d 208 (1977).

⁹⁴ *Id.* at 933, 388 N.E.2d at 345, 415 N.Y.S.2d at 209.

⁹⁵ 61 A.D.2d 844, 402 N.Y.S.2d 418 (2d Dep’t 1978).

§ 30.30(4)(c) on the grounds that the prosecution failed to offer reasons to justify its delay.⁹⁶

The Court of Appeals, however, left one possibility open as a means of excusing pretrial delays in cases where the defendant had become a fugitive. In *People v. Williams*,⁹⁷ the high court stated in dicta that district attorneys might absolve themselves of responsibility for pretrial delays in such cases by instituting a uniform policy of refusing to go forward with the prosecution of unavailable defendants.⁹⁸ If such a policy were instituted, pretrial delays in cases where defendants were absent would be attributable to the policy - and therefore to the defendant's absence.⁹⁹ Thus, the requirements of *Sturgis* would be technically satisfied.

In *People v. Bratton*,¹⁰⁰ the Second Department ruled that a Westchester County policy of not indicting unavailable defendants was "a reasonable exception to the *Sturgis* rule."¹⁰¹ Such a policy, in the court's view, "serves to enhance the capacity and the ability to efficiently prosecute those defendants who are available without infringing unreasonably on the rights of those who are not."¹⁰² Shortly after the *Bratton* decision, the Westchester County Court cited it with approval, noting that "the law abhors the doing of useless acts" and that "were the People to obtain an indictment in the defendant's absence, the trial could not proceed even in

⁹⁶ *Id.* at 844, 402 N.Y.S.2d at 418; *see also* *People v. Blackford*, 62 A.D.2d 1173, 404 N.Y.S.2d 469 (4th Dep't 1978); *People v. Stanton*, 71 A.D.2d 932, 419 N.Y.S.2d 717 (2d Dep't 1979); *People v. Thill*, 75 A.D.2d 709, 427 N.Y.S.2d 125 (4th Dep't 1980); *People v. Rice*, 87 A.D.2d 894, 449 N.Y.S.2d 522 (2d Dep't 1982).

⁹⁷ 56 N.Y.2d 824, 438 N.E.2d 104, 452 N.Y.S.2d 571 (1982).

⁹⁸ *Id.* at 826, 438 N.E.2d at 104, 452 N.Y.S.2d at 571.

⁹⁹ *See* *People v. Bratton*, 103 A.D.2d 368, 480 N.Y.S.2d 324 (2d Dept. 1983) *aff'd* 65 N.Y.2d 675, 481 N.E.2d 255, 491 N.Y.S. 2d 623 (1985).

¹⁰⁰ *Id.*

¹⁰¹ *People v. Leone*, 105 A.D.2d 757, 481 N.Y.S.2d 186 (2d Dep't 1984) (citing *Bratton*, 103 A.D.2d at 373-74, 480 N.Y.S.2d at 327). The *Bratton* court "held an extensive hearing on the policy of the Westchester County District Attorney's office regarding absent defendants" and determined that a nonindictment policy existed, although in unwritten form. *Bratton*, 103 A.D.2d at 369, 480 N.Y.S.2d at 325; *see also* *People v. Escoto*, 121 Misc. 2d 957, 964, 470 N.Y.S.2d 270, 274 (Westchester County Ct. 1983).

¹⁰² *Leone*, 105 A.D.2d at 758, 481 N.Y.S.2d at 187.

absentia.”¹⁰³ The court reasoned that the *Bratton* exclusion would prevent the conversion of CPL § 30.30(4)(c) “from . . . a shield into a sword.”¹⁰⁴

Similar policies, however, were not adopted outside Westchester County, and the Court of Appeals never specifically recognized the *Bratton* exception. In the meantime, the *Sturgis* standard continued to produce adverse results for law enforcement. In *People v. Colon*,¹⁰⁵ a 1983 decision involving a defendant who had three outstanding bench warrants for failure to answer desk appearance tickets over an 18-month period, the Court of Appeals reached a result similar to that of the *Sturgis* case. At the time of the defendant’s arrest on December 22, 1980, more than three months had elapsed since the return date on the most recently issued ticket.¹⁰⁶ At that time, the prosecution had not converted the desk appearance tickets into jurisdictionally sufficient informations and was thus not ready for trial.¹⁰⁷ Since the prosecutor could have filed sufficient informations without the defendant’s presence, the Court of Appeals found that the delays in bringing him to trial did

¹⁰³ *Escoto*, 121 Misc. 2d at 965, 470 N.Y.S.2d at 274.

¹⁰⁴ *Id.* at 964-65, 470 N.Y.S. 2d at 274. The existence of the non-indictment policy in Westchester County led to a curious motion for dismissal in the Westchester County Court some two years later. The policy of the Westchester District Attorney contained an exception under which fugitive “career criminals” would be indicted in absentia, despite the general practice of not indicting absent suspects. *People v. Lugo*, 140 A.D.2d 715, 716, 528 N.Y.S.2d 895 at 896 (2d Dep’t 1988). The defendant in *Lugo*, who was arrested following an absence of more than two years, argued that he was a career criminal and that the District Attorney’s failure to indict him was therefore not due to his absence. *Id.* The Second Department, however, held that “the enforcement of the policy exception [for career criminals] was totally discretionary” and that the defendant was thus not protected by the *Sturgis* rule. *Id.* (citing *Bratton*, 103 A.D.2d at 373-74, 480 N.Y.S. 2d at 327-28). The *Lugo* case remains as very possibly the only instance in which a criminal defendant felt it was to his best advantage to insist he was a career criminal.

¹⁰⁵ 59 N.Y.2d 921, 453 N.E.2d 548, 466 N.Y.S.2d 319 (1983).

¹⁰⁶ *Id.* Each desk appearance ticket charged the defendant with a misdemeanor, for which the prosecutorial readiness deadline in New York is 90 days. N.Y. CRIM. PROC. LAW § 30.30(1)(b) (McKinney 1992).

¹⁰⁷ *Colon*, 59 N.Y.2d 921, 453 N.E.2d 548, 466 N.Y.S.2d 319.

not result from his absence and he was therefore entitled to dismissal.¹⁰⁸

E. The 1984 Amendments and the Bench Warrant Question

The *Sturgis* and *Colon* decisions created a legal climate which was unacceptable to law enforcement. Under the Court of Appeals' interpretation of CPL § 30.30(4)(c), prosecutors were "forced to present cases to grand juries even after defendants have jumped bail" or else risk dismissal for failure to achieve readiness within the statutory time limit.¹⁰⁹ Prompted into action by the *Colon* decision, the New York State Legislature amended CPL § 30.30(4)(c) in 1984 to provide for an exclusion for "the period extending from the day the court issues a bench warrant [for the arrest of the defendant] to the day the defendant subsequently appears in the court" in cases where the defendant was absent or unavailable and had previously been released on bail or on his own recognizance.¹¹⁰ The 1984 amendment was intended to "correct [the] problem created by the Court of Appeal's decision in *People v. Sturgis*"¹¹¹ by eliminating the requirement that delays result directly from the absence or unavailability of the defendant.¹¹² In practice, however, the 1984 amendment succeeded in throwing the provisions of CPL § 30.30(4)(c) into still further confusion.

The 1984 amendment "spawned much controversy and the lower courts [were] split as to its import."¹¹³ The central issue

¹⁰⁸ *Id.*

¹⁰⁹ Governor's Bill Jacket for ch. 670, 1984 N.Y. Laws.

¹¹⁰ Ch. 670, § 1, 1984 N.Y. Laws 1995.

¹¹¹ Governor's Memorandum on Approval of ch. 670 of the Laws of 1984, reprinted in 1984 N.Y. Laws 3628-29.

¹¹² *But see* *People v. Gelfand*, 131 Misc. 2d 268, 499 N.Y.S.2d 573 (Sup. Ct. Kings County 1986), a post-1984 decision which maintained that "[t]he focus [in a CRIM. PROC. LAW § 30.30(4)(c) analysis] must be on the conduct of the prosecutor, who "should not be permitted to seize upon the circumstance of the defendant's unavailability as causation for a delay which in fact 'resulted from' its own inefficiency." *Id.* at 273, 499 N.Y.S.2d at 578 (citation omitted).

¹¹³ *People v. Garrett*, 146 Misc. 2d 919, 922, 553 N.Y.S.2d 948, 949 (Sup. Ct. Kings County 1990); *rev'd on other grounds*, 171 A.D.2d 153, 575

surrounding judicial interpretations of the 1984 amendments concerned whether the prosecution was required to exercise due diligence in locating defendants against whom bench warrants had been issued but who were not actively attempting to avoid prosecution. The majority view held that there was no separate exclusion for defendants against whom bench warrants had been issued, and that prosecutors were still required "to demonstrate the absence or unavailability of a defendant who has bench warranted in order for the time period to be excluded."¹¹⁴ Moreover, "the mere issuing of a warrant is insufficient to satisfy the People's obligation to exercise due diligence in their effort to locate the defendant."¹¹⁵ A number of trial and intermediate appellate courts, however, held that prosecutors had no further obligation to search for a defendant once a bench warrant had been issued for his arrest.¹¹⁶

In 1993, the Court of Appeals resolved this controversy in favor of the majority. In *People v. Bolden*,¹¹⁷ the court considered the case of Samuel Bolden, an accused robber who had been released on his own recognizance subsequent to arraignment and later failed to appear in court.¹¹⁸ Upon his nonappearance, a bench warrant was issued for his arrest; however, 143 days passed before he was in fact apprehended and returned to court.¹¹⁹

On appeal, Bolden contended that the prosecution was chargeable with the 143-day period between the issuance of the warrant and his

N.Y.S.2d 93 (2d Dep't); *lv. denied*, 79 N.Y.2d 827, 588 N.E.2d 105, 580 N.Y.S.2d 207 (1991).

¹¹⁴ *Id.* See also *People v. Surita*, 137 Misc. 2d 794, 520 N.Y.S.2d 1002 (N.Y.C. Crim. Ct. Bronx County 1987); *People v. Gaston*, N.Y. L.J., March 22, 1988, at 13 (Sup. Ct. New York County March 22, 1988).

¹¹⁵ *People v. Richberg*, 125 Misc. 2d 975, 481 N.Y.S.2d 237 (N.Y.C. Crim. Ct. New York County 1984); see also *People v. Woods*, 150 Misc. 2d 1070, 572 N.Y.S.2d 279 (N.Y.C. Crim. Ct. Kings County 1991).

¹¹⁶ See, e.g., *People v. Bolden*, 174 A.D.2d 111, 578 N.Y.S.2d 914 (2d Dep't 1992). *People v. Walker*, 122 A.D.2d 654, 505 N.Y.S.2d 158 (1st Dep't 1986) (dicta), *People v. Rodriguez*, 132 Misc. 2d 1044, 506 N.Y.S.2d 406 (N.Y.C. Crim. Ct. New York County 1986).

¹¹⁷ 81 N.Y.2d 146, 613 N.E.2d 145, 597 N.Y.S.2d 270 (1993).

¹¹⁸ *Id.* at 148, 613 N.E.2d at 145, 597 N.Y.S.2d at 270.

¹¹⁹ *Id.*

arrest because “during that time, the defendant’s location [at a specified address] was known to the prosecution and defendant’s presence could have been obtained had the prosecution exercised due diligence.”¹²⁰ The prosecutor did not dispute the defendant’s contentions as to his whereabouts, responding solely by arguing that, in light of the 1984 amendments, due diligence need not be shown in cases where bench warrants had been issued.¹²¹

The Court of Appeals ruled that the prosecutor’s position was “inconsistent with basic principles of statutory construction” because “where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout”¹²² The *Bolden* court concluded that applying a blanket exclusion for bench warrant cases would require concluding that “‘absent’ and ‘unavailable’ mean one thing when the period of delay in question involves an outstanding bench warrant and something else when the delay merely ‘result[ed] from’ the defendant’s absence or unavailability.”¹²³

Furthermore, the *Bolden* court held that “there was nothing in the legislative history of the 1984 amendment to suggest that the Legislature intended not to incorporate the statute’s requirement of prosecutorial ‘due diligence’ into the amendment’s new exclusion for periods . . . that are accompanied by outstanding bench warrants.”¹²⁴ The court held further that the 1984 amendments were enacted for the narrow purpose of overturning the *Sturgis* decision, and that “the specific burden that the amendment was aimed at reducing was the People’s duty to show a causative relationship between the defendant’s absence and their delay, not their wholly independent duty to show ‘due diligence’ in locating or producing the defendant.”¹²⁵ Accordingly, the District Attorney was chargeable with the entire 143-day period between the issuance of the bench warrant and *Bolden*’s arrest, which, when added to 55

¹²⁰ *Id.* at 149, 613 N.E.2d at 146, 597 N.Y.S.2d at 271.

¹²¹ *Id.*

¹²² *Id.* at 151, 613 N.E.2d at 147, 597 N.Y.S.2d at 272.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 153, 613 N.E.2d at 147, 597 N.Y.S.2d at 272.

other days of unexcused delay, exceeded the prosecution's six-month readiness deadline.¹²⁶

F. The Luperon Decision and the 1996 Amendments

After the *Bolden* decision, judicial interpretation of the 1984 amendment changed from qualitative to quantitative. Rather than focusing on whether due diligence was required after bench warrants were issued, decisions after *Bolden* centered on the degree of diligence required in enforcing the warrant. Prior to *Bolden*, at least one trial court had urged that "a reasonable period following the issuance of a bench warrant should be excluded due to the administrative delays inherent in the processing of a bench warrant."¹²⁷ However, another intermediate court rejected an exclusion for an administrative delay of six months in enforcing a bench warrant.¹²⁸

The question which remained open was whether the requirement of due diligence was satisfied "if the police acted diligently some time during . . . the period between the bench warrant and the arrest,"¹²⁹ or whether law enforcement authorities were required to

¹²⁶ *Id.* at 156, 613 N.E.2d at 150, 597 N.Y.S.2d at 275.

¹²⁷ *People v. Lewis*, 150 Misc. 2d 886, 890, 578 N.Y.S.2d 393, 395 (N.Y.C. Crim. Ct. New York County 1991).

¹²⁸ *People v. Mazyck*, 208 A.D.2d 956, 957, 618 N.Y.S.2d 406, 407 (2d Dep't 1994) (holding that "the deficiency in the warrant squad's efforts during the six month period after the defendant was indicted, was not cured by their later efforts"); *see also* *People v. Drummond*, 215 A.D.2d 579, 627 N.Y.S.2d 55 (2d Dep't 1995) (denying exclusion for 43-day administrative delay in enforcing bench warrant). The concept of "reasonable administrative delay" has also been held to allow the prosecution to exclude the time between the defendant's indictment and the time he was informed of his arraignment date. *People v. Walton*, 136 Misc. 2d 539, 518 N.Y.S.2d 930 (Sup. Ct. Queens County 1987) (delay of 41-days in informing defendant of the charges against him not inconsistent with due diligence in light of administrative procedures in Queens trial court).

¹²⁹ John D. Powell, *New York's Court of Appeals: Vito J. Titone: Stalwart or Curmudgeon?*, 59 ALB. L. REV. 1803, 1820 (1996).

act to enforce bench warrants immediately upon their issuance. The Court of Appeals decided the issue in a controversial 1995 decision, *People v. Luperon*.¹³⁰ Fernando Luperon, a tenant accused of wounding his landlord in a shooting incident, was arraigned on a felony complaint in Kings County on August 2, 1989.¹³¹ Subsequently, he failed to appear in court and a bench warrant was issued for his arrest.¹³² He was arrested on unrelated charges on October 16, 1989, at which time the existence of the outstanding bench warrant was discovered; however, as the grand jury had not yet returned an indictment on the August 2 felony complaint, he was again released on his own recognizance.¹³³ Slightly less than two months later, Luperon was indicted, but no arraignment was scheduled and no notice was sent to him or his attorney.¹³⁴ An *ex-parte* order was issued for his arrest on December 19, 1989, but he was not in fact arrested until October 1990, almost a year later.¹³⁵

On appeal, Luperon argued that the prosecutor was "inexcusably unready" for a total of 482 days, including the 290-day period between the issuance of the *ex-parte* order and his subsequent arrest.¹³⁶ The circumstances of the case were not without mitigating factors for the defendant. Although he had failed to appear in court on an earlier occasion, he had never been notified of his indictment or of a scheduled arraignment date.¹³⁷ Thus, Luperon was not deliberately avoiding prosecution during the period after his arrest and release on October 16, 1989, and the prosecution was required to exercise due diligence in locating him.

The *Luperon* case ultimately turned on the 69-day period between December 19, 1989 and February 26, 1990. During this period, no action was taken to enforce the December 19 warrant due to administrative delays in assigning it to a member of the warrant

¹³⁰ 85 N.Y.2d 71, 647 N.E.2d 1243, 623 N.Y.S.2d 735 (1995).

¹³¹ *Id.* at 74, 647 N.E.2d at 1244, 623 N.Y.S.2d at 736.

¹³² *Id.*

¹³³ *Id.* at 75, 647 N.E.2d at 1245, 623 N.Y.S.2d at 737.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 77, 647 N.E.2d at 1246, 623 N.Y.S.2d at 738.

squad.¹³⁸ The police officer who was ultimately assigned the responsibility of enforcing the warrant made repeated efforts to execute it, including inquiries at the defendant's known addresses, searches of public records and inquiries of the defendant's ex-wife and former landlady.¹³⁹

The trial court and the intermediate appellate court ruled that the prosecution had demonstrated sufficient due diligence despite the initial two-month delay in enforcing the warrant.¹⁴⁰ The Court of Appeals, however, reversed, holding that the adoption of a blanket exception for reasonable administrative delay "is inappropriate, since the 'due diligence' standard that is mandated by the statute is flexible enough to permit consideration of processing demands where warranted by the demonstrated facts."¹⁴¹ Because the prosecution had not alleged any specific facts to show that they acted diligently in processing the warrant during the period at issue, the court declined to exclude that time, noting that "this court is not privileged to defer to law enforcement's resource-allocation choices; rather it is duty-bound to determine whether the law enforcement arm of government has acted in compliance with CPL § 30.30's 'due diligence' command."¹⁴² When added to the other periods of unexcused delay, this 69-day period brought the total time chargeable to the prosecution to more than six months, necessitating dismissal of the charges against Luperon.¹⁴³

The *Luperon* decision caused great consternation among the Legislature as well as the law enforcement community. As Judge Bellacosa noted in his dissent, it was feared that "the practical consequence of this new rule is a command to . . . henceforth keep pursuing and rearresting hosts of defendants . . . no matter how many times courts set them free pending trial."¹⁴⁴ Judge Bellacosa argued that the due diligence requirement was not intended "to be

¹³⁸ *Id.* at 76, 647 N.E.2d at 1246, 623 N.Y.S.2d at 738.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 76-77, 647 N.E.2d at 1246, 623 N.Y.S.2d at 738.

¹⁴¹ *Id.* at 79, 647 N.E.2d at 1249, 623 N.Y.S.2d at 741.

¹⁴² *Id.*

¹⁴³ *Id.* at 84, 647 N.E.2d at 1250, 623 N.Y.S.2d at 742.

¹⁴⁴ *Id.* at 89, 647 N.E.2d at 1254, 623 N.Y.S.2d at 746 (Bellacosa, J., dissenting).

wielded as a sword by defendants who were granted the benefit of pretrial release, only to have them turn around and evade trial long enough to assert that their evasion morphs into dismissal of the criminal charges.”¹⁴⁵ Noting the benefits to *Luperon* - a defendant whose guilt was not in doubt, and who had disappeared on two separate occasions during the pendency of the charges against him - the dissent argued that the application of a strict due diligence rule to bench warrants was nothing more than an incentive to defendants to “stonewall and lay low for however long it takes to secure improbable dismissals for their effrontery.”¹⁴⁶

Accordingly, the Legislature amended CPL § 30.30(4)(c) for the second time in October 1996.¹⁴⁷ The 1996 amendment separated CPL § 30.30(4)(c) into two paragraphs, creating a definition of “absence” and “unavailability” for bench warrant cases separate from the paragraph dealing with due diligence.¹⁴⁸ As of October 4, 1996, there is no statutory requirement that prosecutors exercise due diligence in enforcing a bench warrant against a defendant who has previously escaped from custody or been released on bail or on his own recognizance.¹⁴⁹

¹⁴⁵ *Id.* at 92, 647 N.E. at 1255, 623 N.Y.S.2d at 747 (Bellacosa, J., dissenting).

¹⁴⁶ *Id.* (Bellacosa, J., dissenting). Judge Bellacosa argued that trial judges, especially in jurisdictions with large judicial and law-enforcement backlogs, would have to resort to trying defendants in absentia or remanding defendants routinely to pretrial custody in order to avoid widespread dismissals for failure to diligently enforce bench warrants. *Id.* (Bellacosa, J., dissenting); *see also* *People v. Richberg*, 125 Misc. 2d 975, 983-84, 481 N.Y.S.2d 237 (N.Y.C. Crim. Ct. New York County 1984) (stating that “[u]nder the current legislative scheme, a defendant clearly benefits from absenting himself from the court” and calling for legislative action to remove the due diligence requirement in cases where the defendant fails to attend a court appearance).

¹⁴⁷ Ch. 631, § 1, 1996 N.Y. Laws.

¹⁴⁸ *Id.*

¹⁴⁹ N.Y. CRIM. PROC. LAW § 30.30(4)(c)(ii) (McKinney Supp. 1996). It is noteworthy that at least one bill introduced in the Assembly in response to the *Luperon* decision created a blanket exception in bench warrant cases whether or not the defendant had previously escaped from custody or been released on bail. 1995 N.Y.A.B. 8387, § 2 (Jan. 24, 1996). Had this bill passed the Legislature, prosecutors would have been able to escape their obligation of due diligence even against defendants who had never been arrested or informed of

The older standard established by *Bolden* and *Luperon*, however, is of considerably more than historical interest, as the 1996 amendment is not retroactive.¹⁵⁰ Thus, the requirement of due diligence in bench warrant cases will exist in the New York judicial system for years to come.¹⁵¹

II. WHO IS A FUGITIVE: DEFINING ABSENCE UNDER CPL § 30.30(4)(c)

A. Avoidance of Prosecution

Despite the controversies and legislative amendments described above, the basic issues surrounding an analysis under CPL § 30.30(4)(c) have remained the same throughout the history of the statute. When confronted with an application for dismissal in a case where the defendant's location was unknown to the prosecution, a court must first determine whether the period of the defendant's absence is excludable because the defendant was actively avoiding prosecution or had failed to appear in court pursuant to a bench warrant. If none of these statutory exemptions apply, the court must then determine whether the prosecution exercised due diligence to locate the defendant.

In addition, the prosecutor has the obligation of alleging that one of these statutory conditions has been met. The defendant's initial obligation in sustaining a motion under CPL § 30.30 is satisfied simply by alleging that the required period has elapsed and the prosecution is not yet ready for trial.¹⁵² The burden "then shifts to the People to identify the exclusions on which they intend to

the charges against them through the simple expedient of obtaining a bench warrant.

¹⁵⁰ Ch. 631, § 2, 1996 N.Y. Laws 1327.

¹⁵¹ See, e.g., *People v. Sigismundi*, 89 N.Y.2d 587, 588, 679 N.E.2d 620, 621, 657 N.Y.S.2d 381, 382 (1997) (addressing a question of first impression under "the former version of CPL § 30.30.").

¹⁵² *People v. Luperon*, 85 N.Y.2d 71, 76, 647 N.E.2d 1243, 1247, 623 N.Y.S.2d 735, 739 (1995); see also *People v. Cortes*, 80 N.Y.2d 201, 604 N.E.2d 71, 590 N.Y.S.2d 9 (1992); *People v. Drummond*, 215 A.D.2d 579, 627 N.Y.S.2d 55 (2d Dep't 1995).

rely”¹⁵³ Thus, where the district attorney does not argue that the defendant was avoiding prosecution or that the prosecution exercised due diligence in locating him, dismissal may result even if the facts of the case would otherwise have entitled the prosecutor to an exclusion.¹⁵⁴

The great majority of New York court decisions have held that prosecutors are under no obligation to exercise due diligence in locating defendants who are actively avoiding prosecution.¹⁵⁵ Mere allegation that the defendant is absent, however, is not enough to satisfy the prosecutor’s obligation.¹⁵⁶ A defendant cannot be considered to have been actively avoiding prosecution without “clear indication that the defendant is knowingly seeking to avoid return to court.”¹⁵⁷ The determination of whether a defendant is knowingly avoiding return to court is a factual one to be applied on a case-by-case basis, with no single factor carrying overwhelming weight.

New York courts have applied a variety of factors in determining whether a defendant is seeking to avoid prosecution. These include fleeing the jurisdiction after arraignment, which has been held to be

¹⁵³ *Drummond*, 215 A.D.2d at 579, 627 N.Y.S.2d at 57.

¹⁵⁴ *See, e.g.*, *People v. Biaz*, 222 A.D.2d 324, 325, 635 N.Y.S.2d 616, 617 (1st Dep’t 1995) (dismissing indictment where “despite indications that defendant used several aliases and was returned to this jurisdiction from Puerto Rico, the record is devoid of any opposition to defendant’s motion.”).

¹⁵⁵ *People v. Torres*, 88 N.Y.2d 928, 931, 669 N.E.2d 1112, 1113, 646 N.Y.S.2d 790, 790 (1996); *Luperon*, 85 N.Y.2d at 80 n.3, 647 N.E.2d at 1250 n.3, 623 N.Y.S.2d 742 n.3; *but see* *People v. Lesley*, 232 A.D.2d 259, 649 N.Y.S.2d 6 (1st Dep’t 1996) (dismissing an indictment where a bench warrant had been issued, the defendant had fled the jurisdiction, and was incarcerated in Maryland under an alias, but where “the information at hand [to the New York State police] was obviously sufficient to identify this defendant despite his use of aliases.”); *see also* notes 185-93, *infra* and accompanying text (discussing the obligation of due diligence as it relates to incarcerated defendants).

¹⁵⁶ *People v. Peterson*, 115 A.D.2d 497, 498, 496 N.Y.S.2d 231, 232 (2d Dep’t 1985).

¹⁵⁷ *People v. Delacruz*, 189 A.D.2d 717, 592 N.Y.S.2d 732 (1st Dep’t 1993); *People v. Brazeau*, 162 A.D.2d 979, 980, 557 N.Y.S.2d 205 (1st Dep’t 1989), *lv. denied*, 76 N.Y.2d 891, 562 N.E.2d 878, 561 N.Y.S.2d 553 (1990).

competent evidence that the defendant intended to avoid return to court.¹⁵⁸ In fact, a defendant who leaves the jurisdiction of the trial court - or even one who remains in the jurisdiction but simply fails to appear in court on an adjourned date - is generally presumed to have been avoiding prosecution unless he can rebut that presumption by stating a valid reason for his actions.¹⁵⁹

Other factors commonly considered in determining whether a defendant is knowingly seeking to avoid return to court include use of aliases,¹⁶⁰ use of false identifying information such as addresses, dates of birth and identifying numbers,¹⁶¹ failure to report to parole

¹⁵⁸ See, e.g., *People v. Delacruz*, 189 A.D.2d 717, 592 N.Y.S.2d 732; *People v. Chisolm*, 232 A.D.2d 264, 649 N.Y.S.2d 127, (1st Dep't 1986) (fleeing the jurisdiction is competent evidence of avoidance of prosecution); *People v. Jackson*, 150 A.D.2d 609, 610, 541 N.Y.S.2d 478, 479 (2d Dep't 1989) (failing to attend a scheduled court appearance "strongly suggests an attempt to avoid prosecution.").

¹⁵⁹ See, e.g., *People v. Patterson*, 38 N.Y.2d 623, 345 N.E.2d 330, 381 N.Y.S.2d 858 (1976) ([D]efendant who failed to appear in court on adjourned date, continued to work openly in the jurisdiction and live openly at his former address, and "simply waited for the police to come and get him," was avoiding prosecution); *People v. Cohen*, 66 A.D.2d 901, 411 N.Y.S.2d 411 (2d Dep't 1978) (when defendant failed to report for narcotics rehabilitation and failed to appear for sentencing on an unrelated conviction, "[the] inference is inescapable that, in the intervening period, defendant was attempting to avoid apprehension."); *People v. Yanez*, 128 Misc. 2d 716, 717-19, 490 N.Y.S.2d 971, 972 (Sup. Ct. New York County 1985) (where defendant who jumped bail following arraignment, moved to New Jersey and resumed an open lifestyle was avoiding prosecution). But see *People v. Delaronde*, 201 A.D.2d 846, 846-47, 608 N.Y.S.2d 339 (3d Dep't 1994) (prosecutor was required to exercise due diligence in locating defendant who lived in Canada where there was "no proof that defendant was attempting to avoid apprehension.").

¹⁶⁰ *People v. Rodriguez*, 180 A.D.2d 517, 518, 580 N.Y.S.2d 24, 25 (1st Dep't 1992) (multiple aliases over seven-year absence); *People v. Jackson*, 142 A.D.2d 597, 598, 530 N.Y.S.2d 40, (2d Dep't 1988) (use of brother's name and pedigree information); *People v. Gamez*, 241 A.D.2d 693, 660 N.Y.S.2d 196 (3d Dep't 1997) (multiple aliases over eleven-year period); *People v. Green*, N.Y. L.J., Mar. 26, 1996, at 25 (Sup. Ct. Bronx County March 26, 1996) (several aliases).

¹⁶¹ *People v. Rivera*, 106 A.D.2d 278, 279, 482 N.Y.S.2d 488, 489 (1st Dep't 1984) (defendant used 14 names, 6 dates of birth, 5 different Social Security numbers, and 12 different addresses); *People v. Washington*, 233 A.D.2d 684, 650 N.Y.S.2d 334 (3d Dep't 1996) (defendant was arrested

or probation officers,¹⁶² the defendant's former criminal history,¹⁶³ the seriousness of the offense¹⁶⁴ and the defendant's admission that he was intentionally avoiding prosecution.¹⁶⁵ At least one court, however, has held that use of an alias without more is not sufficient to demonstrate that a defendant was intentionally avoiding prosecution, especially where he had never been notified of the charges at issue.¹⁶⁶

Indeed, the question of whether a defendant was aware that he was being sought for prosecution is central to determining whether he was actively avoiding apprehension.¹⁶⁷ Logic dictates that it is much less likely for a defendant to knowingly seek to avoid return to court if he has never been to court in the first place. Thus, a

several times within New York State on unrelated charges and gave a number of aliases and false dates of birth).

¹⁶² *People v. Neal*, 160 Misc. 2d 173, 180-81, 607 N.Y.S.2d 866, 871 (Sup. Ct. New York County 1994).

¹⁶³ *Green*, N.Y. L.J., Mar. 26, 1996 at 25 (defendant's prior criminal history and his use of aliases on prior occasions weigh in favor of determination that he avoided prosecution).

¹⁶⁴ *Whaley v. Rodriguez*, 840 F.2d 1046, 1048 (2d Cir. 1988).

[I]n determining whether Whaley had delayed the trial by attempting to avoid prosecution, some consideration should be given to the nature and strength of the charges against him. One who knows that, if caught, he surely will be convicted of a serious felony is more likely to attempt to avoid apprehension than one who stands only an outside chance of being found guilty of a minor misdemeanor.

Id.

¹⁶⁵ *People v. Walker*, 133 A.D.2d 2, 518 N.Y.S.2d 392 (1st Dep't 1987) (defendant admitted that he was continuously attempting to avoid execution of parole violation warrant and by inference prosecution upon the charges at issue); *People v. Johnston*, 111 A.D.2d 262, 263, 489 N.Y.S.2d 99 (2d Dep't 1985) (defendant boasted upon arrest that "[i]t took six years for them to catch me.").

¹⁶⁶ *People v. Davis*, 205 A.D.2d 697, 613 N.Y.S.2d 668 (2d Dep't 1994) (prosecution was obligated to exercise due diligence in locating a defendant arrested under an alias.); *see also* *People v. Garrett*, 146 Misc. 2d 919, 928, 553 N.Y.S.2d 948, 953 (Sup. Ct. Kings County 1990) (defendant used two aliases but the record was unclear as to whether he had been notified of the charges against him).

¹⁶⁷ *People v. Mazyck*, 208 A.D.2d 956, 618 N.Y.S.2d 406 (2d Dep't 1994).

defendant who is never in court, never arrested or charged and unaware that he had been indicted cannot be found to have been avoiding prosecution.¹⁶⁸ Similarly, a defendant who was told that he would be notified of a future court date but was never in fact notified was not avoiding prosecution.¹⁶⁹ A defendant who absconds at a late stage of the prosecution - in one case, on the eve of trial - carries a much greater presumption that his failure to appear is due to deliberate avoidance of prosecution.¹⁷⁰ Conversely, however, a defendant who learned of a bench warrant and attempted to answer it but was thwarted by administrative errors in the judicial system was held not to be avoiding prosecution, and the prosecutor was not entitled to exclude the resulting delay.¹⁷¹

B. Prosecutorial Due Diligence

If the defendant is not deliberately avoiding prosecution and no bench warrant has been issued against him or if his location is known to the prosecutor, then the prosecution is required to demonstrate due diligence in attempting to bring him to trial. Due diligence has been defined as “[s]uch a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.”¹⁷² In the context of attempting to locate a defendant whose present whereabouts are unknown, “[t]he test as to what constitutes due

¹⁶⁸ *People v. Peterson*, 115 A.D.2d 497, 496 N.Y.S.2d 231 (1st Dep’t 1985); *People v. Brooks*, 149 Misc. 2d 955, 565 N.Y.S.2d 957 (Sup. Ct. Kings County 1990).

¹⁶⁹ *People v. Drummond*, 215 A.D.2d 579, 627 N.Y.S.2d 55 (2d Dep’t 1995).

¹⁷⁰ *People v. Cropper*, 202 A.D.2d 603, 609 N.Y.S.2d 288 (2d Dep’t 1994) (defendant who failed to appear on his scheduled trial date, without more, was held to have been avoiding prosecution, and the People were thus entitled to exclude an 11-year delay).

¹⁷¹ *Brooks*, 149 Misc. 2d at 958-61, 565 N.Y.S.2d at 958-60.

¹⁷² *People v. Chi Keung Seto*, 162 Misc. 2d 255, 260, 616 N.Y.S.2d 890, 894 (Sup. Ct. New York County 1994), *quoting* BLACK’S LAW DICTIONARY 457 (6th ed. 1990).

diligence seems to be based upon a determination of whether law enforcement acted in a reasonable and expeditious manner to locate the defendant based on the information readily ascertainable to it."¹⁷³

In any event, "minimal attempts to locate a defendant and secure his presence in court will not satisfy the due diligence standard."¹⁷⁴ Thus, failure to pursue an obvious lead, such as searching for a defendant at a known address, will not satisfy the obligation of due diligence.¹⁷⁵ In order to satisfy the requirement of due diligence, the district attorney must at least "expend the minimal effort of checking the defendant's last known address, in the absence of any information that he was not there, e.g. that he fled the jurisdiction."¹⁷⁶

The generally accepted standard for the exercise of due diligence requires that the prosecution "must exhaust all reasonable leads as to the defendant's whereabouts."¹⁷⁷ However, the prosecution is not required to search indefinitely for a defendant after all reasonable investigative leads have been exhausted; thus, a search during which the police "exhausted their last investigative lead" and then put out a bulletin to other law enforcement agencies requesting

¹⁷³ *Id.*; see also *People v. Denton*, N.Y. L.J., Sept. 10, 1992 at 25 (Sup. Ct. Kings County Sept. 10, 1992).

¹⁷⁴ *People v. Marrin*, 187 A.D.2d 284, 286, 589 N.Y.S.2d 874, 876 (1st Dep't 1992); *People v. Quiles*, 176 A.D.2d 164, 165, 574 N.Y.S.2d 188, 189 (1st Dep't 1991).

¹⁷⁵ *Quiles*, 176 A.D.2d at 165, 574 N.Y.S.2d at 189.

¹⁷⁶ *People v. Davis*, 205 A.D.2d 697, 700-01, 613 N.Y.S.2d 668, 671 (2d Dep't 1991); see also *People v. Orse*, 118 A.D.2d 816, 817-18, 500 N.Y.S.2d 173, 174 (2d Dep't 1986) (mailing of two letters, a year apart, to defendant's last known address insufficient where no other efforts made to locate defendant); *People v. Franks*, 134 A.D.2d 888, 889, 521 N.Y.S.2d 605, 606 (4th Dep't 1987) (police did not satisfy due diligence requirements where they did not check government records and failed to make inquiries of California or West Virginia authorities despite having information that defendant might be in those states.); *People v. Peterson*, 115 A.D.2d 497, 498, 496 N.Y.S.2d 231, 232 (2d Dep't 1985) (finding due diligence standard not satisfied where police did not check known addresses of relatives and failed to check government records).

¹⁷⁷ *People v. Duncan*, 230 A.D.2d 750, 649 N.Y.S.2d 362 (2d Dep't 1996); *People v. Delaronde*, 201 A.D.2d 846, 608 N.Y.S.2d 338 (3d Dep't 1994).

information as to the defendant's whereabouts was held sufficient to satisfy the due diligence requirement.¹⁷⁸

In general, the obligation of due diligence is satisfied by the use of common-sense measures such as conducting a search of public records, visiting a defendant's known addresses or haunts and contacting the defendant's associates or relatives. Thus, a detective who visited the defendant's last known address, contacted the defendant's mother and visited an alternate address given by the defendant at the time of his arrest was held to have satisfied the prosecution's obligation of due diligence.¹⁷⁹ Similarly, the due diligence requirement was satisfied when a warrant squad visited the defendant's last known addresses, contacted family members and searched the records of the New York State Department of Motor Vehicles and the Human Resources Administration.¹⁸⁰ Other

¹⁷⁸ *Marrin*, 187 A.D.2d at 285, 589 N.Y.S. 2d 874 at 875 (1st Dep't 1992).

¹⁷⁹ *People v. Providence*, 216 A.D.2d 75, 628 N.Y.S.2d 64 (1st Dep't 1995).

¹⁸⁰ *People v. Maldonado*, 210 A.D.2d 259, 260, 619 N.Y.S.2d 730, 731 (2d Dep't 1994); *see also* *Whaley v. Rodriguez*, 840 F.2d 1046, 1049-53 (2d Cir. 1988) (finding visits to mother and girlfriend, inquiries at place of employment, filing of information with National Crime Information Center, and contacts with South Carolina and Georgia authorities sufficient to fulfill prosecutorial duty); *People v. Hudson*, 167 A.D.2d 950, 561 N.Y.S.2d 1014 (4th Dep't 1990) (holding that due diligence obligation satisfied when police checked defendant's place of employment and interviewed defendant's sisters and their boyfriends); *People v. Complete Allah*, 202 A.D.2d 599, 609 N.Y.S.2d 628 (2d Dep't 1994) (holding contact with relatives, visit to homeless shelter, and surveillance of areas known to be frequented by homeless people sufficient due diligence in locating homeless defendant); *People v. Cruz*, 155 A.D.2d 683, 548 N.Y.S.2d 60 (2d Dep't 1989) (holding that check of last known address, visits to possible places of employment, and checks of government records under false name known to police was sufficient); *People v. Lugo*, 140 A.D.2d 715, 715-16, 528 N.Y.S.2d 895, 896 (2d Dep't 1988) (holding that three visits to last known address, inquiries of relatives, and circulation of "wanted" posters sufficient); *People v. Hutchenson*, 136 A.D.2d 737, 738, 524 N.Y.S.2d 76, 77-78 (2d Dep't 1988) (holding that four visits to last known address, visits to relatives and former places of employment, surveillance of known haunts and checks of government records "clearly" sufficient); *People v. Macklowe*, 131 A.D.2d 785, 786, 517 N.Y.S.2d 73, 74 (2d Dep't 1987) (visiting last known address, interviews of local merchants and defendant's father sufficient); *People v. Walters*, 127

measures which seem reasonable in light of the information available to law enforcement - such as notifying customs and border patrol authorities of a defendant believed to be residing in Canada - have also been held to constitute a diligent search.¹⁸¹ Accordingly, the due diligence obligation is not an oppressive one. However, the search for a missing defendant must be conducted with dispatch, as a deficiency in prompt investigation cannot be cured by later exercise of due diligence by law enforcement authorities.¹⁸²

Once the prosecution has announced its readiness for trial, their obligation under CPL § 30.30 to exercise due diligence in locating the defendant ceases. CPL § 30.30 is not, strictly speaking, a speedy trial statute; rather, it is a prosecutorial readiness rule.¹⁸³ Accordingly, "[o]nce the People have announced their readiness for trial, there is no requirement that they exercise due diligence to locate the defendant when he has voluntarily absented himself from the proceedings, since the People did not contribute to the delays . . ."¹⁸⁴ Even after the prosecution declares its readiness for trial,

A.D. 2d 870, 511 N.Y.S.2d 957 (2d Dep't 1987) (canvassing of last known address and inquiries to building superintendent and defendant's mother sufficient); *People v. Taylor*, 127 A.D.2d 714, 714-15, 511 N.Y.S.2d 692, 692-693 (2d Dep't 1987) (visiting three most recent addresses, inquiries to neighbors, and checks of telephone company and government records sufficient); *People v. Genkin*, 131 A.D.2d 505, 506, 516 N.Y.S.2d 115, 116 (2d Dep't 1987) (inquires of associate of defendant, government and utility records, Israeli consulate and Canadian authorities sufficient); *People v. Jackson*, 150 A.D.2d 609, 610, 541 N.Y.S.2d 478, 479 (2d Dep't 1989) (visiting last known address, visits to mother and girlfriend, inquiries of parole officer, and checks of government and utility records sufficient).

¹⁸¹ *People v. Delaronde*, 201 A.D.2d 846, 847, 608 N.Y.S.2d 338, 339 (3d Dep't 1994) (State police officer assigned to enforce warrant placed defendant's name in the United States Customs computer, released defendant's photograph to customs and border patrol officials, and notified Canadian authorities as well as searching public records and defendant's known haunts in New York State).

¹⁸² *People v. Mazyck*, 208 A.D.2d 956, 957, 618 N.Y.S.2d 406, 407 (2d Dep't 1994).

¹⁸³ N.Y. CRIM. PROC. LAW § 30.30 (McKinney 1992).

¹⁸⁴ *People v. Cephas*, 207 A.D.2d 903, 904, 616 N.Y.S.2d 668, 668 (2d Dep't 1994); *see also* *People v. Coplin*, 236 A.D. 2d 552, 554, 654 N.Y.S.2d 150, 152 (2d Dep't 1997); *People v. Biaz*, 222 A.D.2d 324, 325, 635 N.Y.S.2d 616, 617 (1st Dep't 1995); *People v. Williams*, 229 A.D. 2d 603,

however, the defendant may still claim that his constitutional right to speedy trial has been violated — a separate claim which must be adjudicated under the standards set forth in CPL § 30.20 and by the Court of Appeals' decision in *People v. Taranovich*.¹⁸⁵

i. Incarcerated Defendants

The obligation of due diligence in locating a defendant incarcerated on another charge involves special constitutional implications. In *Smith v. Hooey*,¹⁸⁶ the United States Supreme Court recognized a constitutional obligation on prosecutors to secure the presence for trial of defendants incarcerated in other jurisdictions.¹⁸⁷ As an incarcerated defendant is incapable of appearing for trial on his own volition, prosecutors are obliged to take all reasonable measures to obtain his presence from the incarcerating authority.¹⁸⁸

Accordingly, New York courts have often held prosecutors to a considerably stricter standard of due diligence in obtaining incarcerated defendants than would normally be their obligation.¹⁸⁹ For example, in *People v. Lesley*,¹⁹⁰ the First Department declined to exclude a 194-day delay resulting from the defendant's incarceration in Maryland under a false name.¹⁹¹ Even though the defendant used an alias, the *Lesley* court held that the information in possession of the Maryland authorities was sufficient to identify him to the New York prosecutors.¹⁹² Similarly, in *People v. Jensen*,¹⁹³

646 N.Y.S.2d 142 (2d Dep't 1996); *People v. Cropper*, 202 A.D.2d 603, 605, 609 N.Y.S.2d 288, 290 (2d Dep't 1994).

¹⁸⁵ 37 N.Y.2d 442, 335 N.E.2d 161, 373 N.Y.S.2d 79 (1975). *See also supra* note 78 (discussing the *Taranovich* test).

¹⁸⁶ 393 U.S. 374 (1969).

¹⁸⁷ *Id.* at 383.

¹⁸⁸ *Id.*

¹⁸⁹ *See, e.g., People v. Davis*, 184 A.D.2d 575, 577, 584 N.Y.S.2d 638, 640 (2d Dep't 1992) (knowledge of whereabouts of defendant incarcerated in New York imputed to prosecutors even in absence of actual knowledge of defendant's location).

¹⁹⁰ 232 A.D. 2d 259, 649 N.Y.S.2d 6 (1st Dep't 1996).

¹⁹¹ *Id.*

¹⁹² *Id.*

a Suffolk County trial court held that the prosecution was obligated to extradite the defendant, who was incarcerated in Florida, even though he only faced misdemeanor charges in New York State.¹⁹⁴ In a recent decision, however, the New York Court of Appeals ruled that prosecutors may exclude delays resulting from the absence of an incarcerated defendant if his actions during incarceration indicate that he was actively attempting to avoid prosecution.¹⁹⁵

ii. Defendants Residing in Other Jurisdictions

At common law in England, a defendant who absented himself from the jurisdiction was a fugitive and liable to be convicted in absentia through the process of outlawry.¹⁹⁶ Although this practice has fallen into disuse, a defendant who leaves the jurisdiction after the commencement of a criminal action carries a strong presumption that he has done so in a deliberate effort to avoid prosecution.¹⁹⁷ New York courts have applied this presumption on certain occasions even to defendants who resume an open lifestyle after leaving the state.¹⁹⁸

The legal position of a defendant who leaves the jurisdiction before charges are filed, or who is unaware of the charges against him at the time he removes himself from the jurisdiction, is more ambiguous. Similarly, a defendant who resides outside New York, but commits a crime within the state, cannot be regarded as a fugitive merely because of his return to his normal place of

¹⁹³ 109 Misc. 2d 813, 441 N.Y.S. 2d 333 (Dist. Ct. Suffolk County 1981).

¹⁹⁴ *Id.* at 814, 441 N.Y.S. 2d at 442.

¹⁹⁵ *People v. Sigismundi*, 89 N.Y.2d 587, 591-93, 679 N.E.2d 620, 622, 657 N.Y.S.2d 381, 382 (1997) (declining to establish a general rule under which knowledge of an incarcerated defendant's whereabouts is always imputed to the prosecutor, and holding that use of multiple aliases and false pedigree information established that the defendant was avoiding prosecution).

¹⁹⁶ *See Green*, *supra* note 25, at 453.

¹⁹⁷ *See supra* notes 156-57 and accompanying text.

¹⁹⁸ *People v. Morton*, 22 N.Y.2d 674, 238 N.E.2d 755 (1968); *People v. Yanez*, 128 Misc. 2d 716, 717-19, 490 N.Y.S. 2d 971, 973 (Sup. Ct. New York County 1985).

residence after the commission of the offense.¹⁹⁹ In such cases, courts have generally held that the prosecutor is required to exercise due diligence in locating the defendant even outside New York State. For example, in *People v. Schiavo*,²⁰⁰ a Westchester County trial court dismissed an indictment against a defendant who was unaware of the charges against him and was living openly in Arizona under circumstances wherein law enforcement authorities could have located him with the exercise of due diligence.²⁰¹ In addition, the Fourth Department in *People v. Franks*²⁰² held that the obligation of due diligence required the prosecutor to make inquiries of authorities in California where the defendant was believed to be in that state.²⁰³

In cases where the defendant resides outside New York, however, the obligation of due diligence has been interpreted not to require New York authorities to exceed their jurisdiction. For example, a state police officer enforcing a bench warrant was not required to interview relatives of the defendant living in an Indian reservation which state police were not permitted to enter.²⁰⁴ In light of the "constraint" against the officer's authority, this conduct was held not to violate the officer's obligation to follow every reasonable investigative lead.²⁰⁵

¹⁹⁹ See *People v. Delaronde*, 201 A.D.2d 846, 847, 608 N.Y.S. 2d 338 (3d Dep't 1994). The defendant maintained addresses both in Canada and on an Indian reservation beyond the jurisdiction of the New York State police. *Id.*

²⁰⁰ 118 Misc. 2d 776, 461 N.Y.S.2d 689 (Westchester County Ct. 1983).

²⁰¹ *Id.* at 778-79, 461 N.Y.S.2d at 691. The police knew the forwarding address and telephone number in Arizona through which the defendant could have been located. *Id.*

²⁰² 134 A.D.2d 888, 521 N.Y.S.2d 605 (1987).

²⁰³ *Id.* at 889, 521 N.Y.S.2d 605; see also *People v. Wiggins*, 194 A.D.2d 840, 840-42, 603 N.Y.S.2d 81, 81-83 (3d Dep't 1993) (failure to extradite defendant in a timely manner after his arrest in Oklahoma violates obligation of due diligence).

²⁰⁴ *Delaronde*, 201 A.D.2d. at 848, 608 N.Y.S.2d at 340.

²⁰⁵ *Id.*

iii Incapacitated Defendants

On at least one occasion, law enforcement officers were held not to have violated their obligation of due diligence even when they failed to arrest a defendant who was under their control. In *People v. Chi Keung Seto*,²⁰⁶ a New York trial court considered the case of a defendant who failed to appear on charges of kidnapping, assault and possession of a weapon.²⁰⁷ Subsequent to his failure to appear, the defendant was shot and severely wounded.²⁰⁸ While comatose in the hospital, the defendant was guarded by police officers for his own safety.²⁰⁹ Ultimately, the police officers guarding the defendant learned his name, but failed to inquire into his criminal record.²¹⁰ Even though the defendant was under the control of police officers and his name was known to them, the trial court declined to dismiss the indictment against him, stating that "there was no reason for the police to treat this unknown Asian male, an alleged victim of an assault, as a suspect or a perpetrator or a possible defendant with an open warrant."²¹¹ Under the circumstances, even physical control of the defendant was not a "reasonably known lead" which law enforcement authorities could have been expected to follow.²¹²

iv. Traffic Offenses and Appearance Tickets

The right to speedy trial does not attach to actions commenced for traffic violations.²¹³ However, even for those traffic offenses classified as misdemeanors, the prosecution is not obligated to

²⁰⁶ 162 Misc. 2d 255, 616 N.Y.S. 2d 890 (Sup. Ct. New York County 1994).

²⁰⁷ *Id.* at 256, 616 N.Y.S.2d at 890-91.

²⁰⁸ *Id.* at 258, 616 N.Y.S.2d at 890-91.

²⁰⁹ *Id.* at 259, 616 N.Y.S.2d at 892-93.

²¹⁰ *Id.*

²¹¹ *Id.* at 261, 616 N.Y.S.2d at 894.

²¹² *Id.* at 262, 616 N.Y.S.2d at 894.

²¹³ *People v. Solomon*, 124 Misc. 2d 33, 475 N.Y.S.2d 749 (Dist. Ct. Nassau County 1984); *see also* N.Y. PENAL LAW § 10.00 (McKinney 1998); N.Y. VEH. & TRAF. LAW § 155 (McKinney 1996).

conduct a search for an absent defendant who has been issued a simplified traffic information in lieu of arrest.²¹⁴ In the only decision to address this question, the Nassau County District Court held that due diligence in traffic cases “would not require the prosecutor to actively seek out and secure the presence of the defendant in court.”²¹⁵ Such a requirement “would result in an impossible burden on the prosecutor in terms of the sheer volume of traffic cases” and would be inappropriate in light of the nature of the offense.²¹⁶ Accordingly, a defendant who has been issued a simplified traffic information will be considered unavailable for trial during the entire period during which he fails to respond to the appearance ticket issued to him.²¹⁷ In fact, the provisions of CPL § 30.30(4)(c) do not apply to any criminal action which is commenced with the issuance of an appearance ticket.²¹⁸ This exception, which was created by a 1982 amendment to the Criminal Procedure Law,²¹⁹ overturned prior court decisions which held that there was no blanket exclusion for desk appearance tickets charging crimes under the Penal Law.²²⁰

²¹⁴ *Solomon*, 124 Misc. 2d at 36, 475 N.Y.S.2d at 752.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *People v. Parris*, 79 N.Y.2d 69, 588 N.E.2d 65, 580 N.Y.S.2d 167 (1990). Criminal prosecutions which are initiated via appearance tickets fall under the related provisions of CRIM. PROC. LAW § 30.30(5)(b), which provides that the deadline for prosecutorial readiness does not begin to run until the defendant appears in court to answer the summons. *Id.*

²¹⁹ *Id.*

²²⁰ *See People v. Colon*, 59 N.Y.2d 921, 453 N.E.2d 548, 466 N.Y.S.2d 319 (1983) (prosecution was not ready where they had failed to convert desk appearance tickets into jurisdictionally sufficient informations).

III. PURSUING THE ABSENT SOLUTION: OPEN QUESTIONS ABOUT THE CPL § 30.30(4)(c) EXCLUSION

A. *The Constitutionality of CPL § 30.30(4)(c) After Rayborn v. Scully*

Even after two legislative amendments, open questions remain in the interpretation and enforcement of CPL § 30.30(4)(c). In perhaps the most profound of these, the efforts of the New York State Legislature to narrow the obligation of due diligence in locating missing defendants may run up against a countervailing trend in speedy trial jurisprudence. In a number of recent decisions, the Second Circuit has recognized a prosecutorial obligation to conduct a diligent search even for defendants who are in hiding or deliberately avoiding prosecution.

The question of the extent of the prosecutorial due diligence obligation was first opened in the Second Circuit in *United States v. Salzmann*,²²¹ which concerned an alleged draft evader who had moved to Israel prior to receiving his induction notice from a New York local draft board.²²² Although he informed the draft board that he did not have the financial resources to report for induction in the United States, he was nevertheless ordered to report for induction in New York on January 18, 1971.²²³ Following his failure to report, the draft board referred his case to the United States Attorney for prosecution, and he was subsequently indicted.²²⁴ The United States never attempted to obtain his extradition from Israel, and the case languished until 1975 when Judge Jack B. Weinstein of the Eastern District of New York appointed Professor Louis Lusky of Columbia University to represent him.²²⁵

²²¹ 417 F. Supp. 1139 (E.D.N.Y. 1976).

²²² *Id.* at 1143-44.

²²³ *Id.* at 1144.

²²⁴ *Id.* at 1145.

²²⁵ *Id.*

The defendant, Sidney Salzmänn, was “unavailable” rather than “absent” according to the classification outlined in CPL § 30.30(4)(c). His location was known to American law enforcement authorities, with whom he remained in communication.²²⁶ Furthermore, he was not attempting to avoid prosecution or even to avoid military service. He had moved to Israel considerably prior to receiving his induction notice, and subsequently became an Israeli citizen and served in the Israeli Defense Force.²²⁷ Accordingly, the *Salzmänn* decision did not directly address prosecutorial obligation in cases where the defendant was seeking to avoid prosecution. Nevertheless, the *Salzmänn* court concluded that “Rule 5(d) [of the Second Circuit readiness standard] is specifically addressed to those situations in which the defendant is a fugitive and places the burden of due diligence on the government nevertheless.”²²⁸ Indeed, the court found that the defendant and the government “share responsibility” for delays due to failure to prosecute a missing defendant.²²⁹

The extent of the obligation created by *Salzmänn* was an open question for twelve years after the *Salzmänn* decision. In *United States v. Diacolios*,²³⁰ the Second Circuit reiterated that prosecutors retained an obligation to exercise due diligence in locating a defendant who is “a fugitive located in a foreign country.”²³¹ The circumstances of *Diacolios*, although still involving a defendant who was “unavailable” rather than “absent,” were somewhat more ambiguous than those of *Salzmänn*. Although the defendant’s location was known to the prosecution, he had fled the jurisdiction after committing fraud and could thus be reasonably held to have been a fugitive avoiding prosecution.²³² Nevertheless, the issue of due diligence in locating “absent” defendants remained. In

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 1156.

²²⁹ *Id.* at 1165-66.

²³⁰ 837 F.2d 79 (2d Cir. 1988).

²³¹ *Id.* at 82. For a comprehensive discussion of the *Diacolios* decision, see generally Green, *supra* note 25, at pts. 4-6.

²³² See *Diacolios*, 837 F.2d at 80-81.

Rayborn v. Scully,²³³ handed down the same year as *Diacolios*, the Second Circuit resolved this question in favor of recognizing an obligation of due diligence even in locating a defendant who was in hiding, and furthermore held that this requirement was a Sixth Amendment obligation binding on state authorities.²³⁴

The *Rayborn* decision was the end result of a judicial comedy of errors lasting seven years and covering three jurisdictions. The defendant, Henry Rayborn, was accused of the 1971 shooting of Jessie Lee Starks in New York City.²³⁵ Shortly afterward, Philadelphia police notified New York authorities that they had arrested him on an unrelated charge.²³⁶ Pursuant to a warrant issued by the New York County Criminal Court, New York City detectives traveled to Philadelphia to arrest Rayborn, only to discover that he had been released.²³⁷ Following their failure to apprehend him, the New York City detectives obtained a warrant for his arrest in Philadelphia.²³⁸ On the same day, Rayborn failed to appear in court on the Philadelphia charge.²³⁹

Nothing further occurred in the *Rayborn* case until 1974, when he was arrested in Philadelphia on yet another charge.²⁴⁰ Subsequently, New York authorities obtained an extradition warrant for Rayborn; however, since they failed to do so in a timely manner, the Philadelphia court was required to release him on bail.²⁴¹ Unaware that he had been released, two New York City detectives again traveled to Philadelphia in an unsuccessful attempt to apprehend him.²⁴² Not unexpectedly, Rayborn jumped bail, and also failed to appear at a subsequent federal court date on an outstanding narcotics charge.²⁴³

²³³ 858 F.2d 84 (2d Cir. 1988).

²³⁴ *Id.* at 90-91; see also Green, *supra* note 25, at 491 n.240-41.

²³⁵ *Rayborn*, 858 F.2d at 85-86.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

In April 1976, Rayborn was finally arrested in Philadelphia and prosecuted on the charges against him in Philadelphia and in federal court.²⁴⁴ However, due to clerical errors on the part of the New York County District Attorney's office, the New York homicide charge was not prosecuted for a further two years.²⁴⁵ It was not until October 6, 1978 that he was returned to New York and subsequently convicted of second-degree murder.²⁴⁶

Even in a case such as *Rayborn*, where the defendant was in hiding and failed to appear in court on at least three separate occasions, the Second Circuit recognized an obligation on the part of prosecutors to conduct a diligent search.²⁴⁷ The effect of the *Rayborn* decision is to call into question the constitutionality of CPL § 30.30(4)(c) which contains no obligation of due diligence in searching for a fugitive defendant who is intentionally avoiding prosecution.

A constitutional challenge to CPL § 30.30(4)(c), however, would be of dubious validity. The obligation of due diligence in locating fugitive defendants has not been recognized outside the Second Circuit,²⁴⁸ and it is far from clear how the Supreme Court would rule on the validity of the statute. Moreover, CPL § 30.30 does not directly protect a defendant's right to speedy trial, but is rather a readiness rule that goes considerably beyond the constitutional standard recognized by the Supreme Court and by the New York State Court of Appeals.²⁴⁹ Nevertheless, there can be no trial - speedy or otherwise - unless the prosecution is ready. The rationale behind readiness rules is that there is a period beyond which further delay creates a presumption that the defendant's right to speedy trial has been violated.²⁵⁰ Accordingly, any tolling of the readiness deadline imposed on the prosecution would at least indirectly implicate the right to speedy trial.

²⁴⁴ *Id.* at 86-87.

²⁴⁵ *Id.* at 87.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 90-91.

²⁴⁸ Green, *supra* note 25, at 455.

²⁴⁹ See *Barker v. Wingo*, 407 U.S. 514 (1972); *People v. Taranovich*, 37 N.Y.2d 442, 335 N.E.2d 303, 373 N.Y.S.2d 79 (1975).

²⁵⁰ *United States v. Salzmman*, 417 F. Supp. 1139, 1149 (E.D.N.Y.1976).

Even a successful constitutional challenge to CPL § 30.30(4)(c), however, would likely be a pyrrhic victory for the challenger. Although the *Diacolios* and *Rayborn* courts recognized an obligation of due diligence in pursuing fugitive defendants, recent trial court decisions in the Second Circuit have recognized that prosecutorial due diligence must be determined in light of the facts of the case.²⁵¹ Law enforcement authorities “are not expected to make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension or who has fled to parts unknown.”²⁵² Nor does due diligence “require the government to pursue that which is futile.”²⁵³ In the context of the fugitive defendant, the minimal efforts undertaken by the New York authorities in apprehending Rayborn - obtaining a bench warrant in Philadelphia and acting on the Philadelphia authorities’ communications regarding his arrests - were held to satisfy the obligation of due diligence.²⁵⁴ Should a successful constitutional challenge be mounted to CPL § 30.30(4)(c), the New York Legislature or the New York courts could essentially re-establish the status quo by defining a standard of due diligence which would merely require the prosecution to ascertain that the defendant is in fact a fugitive and afterward issue appropriate bulletins to outside authorities.

Nor is it likely that a fugitive defendant could defeat the provisions of CPL § 30.30(4)(c) by bringing a habeas corpus petition in a federal court. In that situation, the prosecutor’s exercise of due diligence would be judged, not in light of the mechanical requirements of CPL § 30.30, but in light of the *Barker* test for speedy trial violation, under which the reason for the delay is only one of four factors.²⁵⁵ The prosecution’s failure to exercise

²⁵¹ See, e.g., *United States v. Solomon*, No. 95 CR. 154, 1996 U.S. Dist. LEXIS 9948 (S.D.N.Y. July 16, 1996) (“The Sixth Amendment does not fix a minimum standard of diligence for speedy trial purposes.”).

²⁵² *Rayborn*, 858 F.2d at 90.

²⁵³ *United States v. Diacolios*, 837 F.2d 79, 83 (2d Cir. 1988).

²⁵⁴ *Rayborn*, 858 F.2d at 91; see also Green, *supra* note 25, at 499-500.

²⁵⁵ *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972); see also *supra* notes 72-77 and accompanying text.

due diligence is not sufficient in itself to establish a speedy trial claim.²⁵⁶

Moreover, the third and fourth factors in the *Barker* test - the defendant's assertion of his right to speedy trial and prejudice suffered by the delay - will nearly always weigh against the fugitive.²⁵⁷ As "a defendant who is in hiding will not be in a position to seek a speedy trial,"²⁵⁸ the third factor will always weigh in the prosecutor's favor. In addition, the question of prejudice will likely be resolved in favor of the prosecution, as "a defendant who is living in hiding cannot plausibly complain about the anxiety of living under indictment . . . [and] [o]rdinarily, it would be fair to assume that the prosecution's case was impaired as much as, or more than, the [fugitive] defendant's case."²⁵⁹ Even the second *Barker* factor - the reason for delay - will be neutral rather than weighing in favor of the defendant if the defendant's fugitive status as well as lack of prosecutorial due diligence is to blame.²⁶⁰ The defendant will likely do no better under a *Taranovich* analysis in a New York State court; even though the defendant's assertion of his right to speedy trial is not a factor under *Taranovich*, the factor replacing it - length of pretrial incarceration - will necessarily weigh against a fugitive who has never been incarcerated. Thus, the constitutional obligation created by the Second Circuit in *Rayborn* provides defendants with "almost, if not quite, a right without a remedy."²⁶¹ The constitutionality of CPL § 30.30(4)(c) is sound or, at worst, easily repairable without the necessity for any change in its practical effect.

B. Mass Production of Warrants: An End Run Around the Constitution?

The open question which poses far more practical implication is that created by the elimination of any due diligence obligation in

²⁵⁶ *Rayborn*, 858 F.2d at 89.

²⁵⁷ Green, *supra* note 25, at 501-02.

²⁵⁸ *Id.* at 501.

²⁵⁹ *Id.* at 502.

²⁶⁰ *Id.* at 501.

²⁶¹ *Id.* at 502.

cases where a bench warrant has been issued. In the period before *Bolden*, at least one trial court predicted that the lack of a due diligence requirement would “encourage a practice of filing and forgetting warrants” in order to circumvent the People’s obligation under CPL § 30.30.²⁶² The *Bolden* court itself recognized that “the Legislature did not intend the bench warrants to be treated as empty paper symbols.”²⁶³

With the 1996 amendments, there is a very real possibility that such a policy might come into existence. Once a defendant has been arraigned, prosecutors will be able to eliminate any further obligation of due diligence in searching for him by the simple expedient of obtaining a bench warrant. Although the amended statute eliminates the loophole under which offenders such as Fernando Luperon obtained dismissal of the charges against them, it does not sufficiently protect defendants who fall victim to administrative errors in the judicial system or who are unable to appear in court due to circumstances beyond their control. For example, a defendant who is released and then never informed of a subsequent court date, as in *People v. Drummond*,²⁶⁴ would no longer be able to claim the benefit of the delay caused by this prosecutorial error if a bench warrant is issued for his arrest. Similarly, a defendant such as Mark Brooks, who attempted to answer an outstanding bench warrant but was told by both police and court officials that there were no outstanding charges against him,²⁶⁵ would not be protected under the 1996 amendments because he had previously been arrested and released or appeared in court.

In his dissent to *Luperon*, Judge Bellacosa acknowledged that prosecutors should not be entitled to claim the benefit of delays resulting from missing defendants if “they adopt a uniform policy of not churning their available law enforcement resources in

²⁶² *People v. Garrett*, 146 Misc. 2d 919, 926, 553 N.Y.S.2d 948, 952 (Sup. Ct. Kings County 1990), *rev’d on other grounds*, 171 A.D.2d 153, 575 N.Y.S.2d 93 (2d Dep’t 1991).

²⁶³ *People v. Bolden*, 81 N.Y.2d 146, 154, 613 N.E.2d 145, 149, 597 N.Y.S.2d 270 (1993).

²⁶⁴ 215 A.D.2d 579, 627 N.Y.S.2d 55 (2d Dep’t 1995).

²⁶⁵ *People v. Brooks*, 146 Misc. 2d 955, 565 N.Y.S.2d 957 (Sup. Ct. Kings County 1990).

chasing after . . . fugitives from justice.”²⁶⁶ Even under the 1996 amendments, a defendant should at the very least be able to claim the benefit of delays resulting from such a uniform policy of failure to enforce bench warrants. Such a policy is likely to be difficult to prove; accordingly, it may also be necessary to establish a rebuttable presumption that the prosecution did not intend to enforce a bench warrant if it is left inactive for an unreasonable period of time. In addition, the period subsequent to any administrative error which prevents the defendant from responding to a warrant or appearing in court should be chargeable to the prosecution, as a defendant in this situation is in a position analogous to one who has never been informed of the charges against him.

CONCLUSION

The 1996 amendment to CPL § 30.30(4)(c) represent the culmination of a 25-year attempt to find the proper balance of responsibilities in bringing missing defendants into court. Although the amendment was necessary in order to prevent fugitives such as Fernando Luperon from claiming the benefit of their nonappearance, it perhaps goes too far in allowing prosecutors to evade their obligation of due diligence simply by obtaining a bench warrant. Although CPL § 30.30(4)(c) most likely conforms to the constitutional requirements set down by federal and New York courts in speedy trial cases, justice demands that it be further amended or interpreted so as to protect defendants who are prevented from appearing in court through administrative errors rather than through their own deliberate action. The requirement of due diligence as defined by the New York courts is not an oppressive one, and it should continue to protect defendants who fail to appear in court through no fault of their own.

²⁶⁶ *People v. Luperon*, 85 N.Y.2d 71, 87, 647 N.E.2d 1243, 1252, 623 N.Y.S.2d 735 (1995) (Bellacosa, J., dissenting); *see also* *People v. Leone*, 105 A.D.2d 757, 758, 481 N.Y.S.2d 186, 187 (2d Dep’t 1984); *People v. Bratton*, 103 A.D.2d 368, 370, 480 N.Y.S.2d 324, 325 (2d Dep’t 1984).

