



NEW YORK LAWYERS'
PRACTICAL SKILLS SERIES

Criminal Law and Practice

2021–2022

Jay Shapiro, Esq.



New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207 or publications@nysba.org.

Copyright 2021
New York State Bar Association
All rights reserved
ISBN: 978-1-57969-041-0
Product Number: 406422

CONTENTS

I.	Introduction	1
II.	Attorney Entry	1
III.	Arraignment/Pretrial Release	2
	A. Complaint or Information.....	3
	B. Accused's Criminal Record.....	5
	C. Criminal Justice Agency Sheet.....	5
	D. Pretrial Release.....	6
	E. Plea Negotiations at Arraignment	7
	F. Notices	7
IV.	Preliminary Proceedings.....	9
	A. Misdemeanors.....	9
	B. Felonies.....	9
	1. Preliminary Hearing	10
	2. Superior Court Information	11
	3. Grand Jury Action	11
V.	Pleas and Plea Bargaining	14
	A. Generally	14
	B. Plea Bargaining Considerations	15
	1. Misdemeanors.....	15
	2. Felonies.....	16
	3. Plea Allocutions.....	17
	C. <i>Alford</i> Plea/Mental Disease or Defect/ACD.....	19
	D. Motion to Withdraw the Plea	20
VI.	Pretrial Motions and Discovery	20
	A. Misdemeanors.....	21
	B. Felonies.....	22
	C. Motion to Dismiss in Furtherance of Justice	23
	D. Discovery Under CPL Article 245	24
	1. Automatic Discovery	25
	2. Timing of Discovery	27
	3. Compliance with Discovery Obligations.....	28
	4. Protective Orders	29
	5. Failure to Comply with Discovery	30
	6. Bill of Particulars	30
	E. Motion for a Separate Trial or Joinder of Accuseds.....	31
	F. Motion to Sever Counts.....	32
	G. Consolidation of Indictments/Informations.....	32
	H. Speedy Trial.....	32
	1. Constitutional Right.....	33
	2. Statutory Right.....	33
	3. Filing the Motion	34
	4. Excludable Periods	35
	5. Conversion.....	36
	6. Pre-Indictment Delay.....	36
	7. Post-Indictment Delay	36

VII.	Motion to Suppress Statements	37
A.	Involuntary Statements	38
B.	Constitutional Violations.....	38
C.	Pre-Arrest Silence.....	38
1.	Fifth Amendment Rights	39
a.	Custody	39
b.	Interrogation.....	39
2.	Illegal Detention	41
3.	Right to Counsel	42
a.	Initiation of Proceedings.....	42
b.	Request for Counsel.....	43
c.	Representation by Counsel on an Unrelated Pending Charge	43
d.	Notification by Counsel	44
4.	Voluntariness	44
D.	Use of Suppressed Statements.....	44
E.	Exceptions	45
1.	Spontaneous Declaration Exception	45
2.	Emergency Exception.....	45
3.	Waiver.....	45
VIII.	Motion to Suppress Evidence of an Identification	46
A.	Notice	46
B.	The Hearing.....	47
C.	Identification Procedures.....	48
1.	Lineups	48
2.	Show-ups	48
3.	Photo Identifications.....	49
4.	Confirmatory Identification Procedures	50
D.	Bolstering	50
E.	Right to Counsel	50
IX.	Motion to Suppress Physical Evidence	51
A.	Motion	51
B.	Standing	52
C.	Search and Seizure	53
D.	Street Encounters.....	54
1.	Approach to Request Information	54
2.	Common Law Right to Inquire.....	54
3.	Stop	54
4.	The Frisk.....	55
5.	Arrest	56
E.	Exceptions to the Warrant Requirement.....	57
1.	Abandonment.....	57
2.	Automobile Exception	57
3.	Search Incident to Arrest	58
4.	Consent Searches	59
5.	Exigent Circumstances	60
6.	Emergency Exception	60

7. Plain View	60
8. Securing Premises.....	61
9. Administrative Searches	61
F. Search Warrants.....	61
1. Property Subject to Seizure	62
2. Premises to Be Searched.....	62
3. Persons to Be Searched.....	62
4. Statutory Requirements	63
5. Disclosure of the Confidential Informant's Identity.....	64
6. Disclosure of Search Warrant Affidavit	65
G. <i>Mapp</i> Hearing	66
1. "Fruit of the Poisonous Tree" Doctrine	67
2. Independent Source and Inevitable Discovery	68
3. Challenging a Search Warrant.....	68
X. Pretrial Issues.....	68
A. Accused's Presence	68
B. Competence of Accused.....	69
C. <i>Sandoval</i> Hearing	70
D. Uncharged Crimes	72
XI. Trial	74
A. Order of Trial.....	74
B. Jury Selection	75
1. Challenges for Cause	76
2. Peremptory Challenges.....	77
3. <i>Batson</i>	77
C. Nonjury Trial	78
D. Closing the Courtroom	78
E. Opening Statement	79
F. Presentation of Evidence	79
1. Constructive Possession	80
2. Drug Factory Presumption.....	81
3. Conspiracy Cases.....	82
G. Defenses	82
1. In General	82
2. Infancy	84
3. Justification.....	85
4. Duress	86
5. Entrapment.....	86
6. Renunciation	87
7. Mental Disease or Defect.....	88
8. Temporary and Lawful Possession.....	88
H. Motion to Dismiss	88
I. Summation.....	89
J. Requests to Charge and the Court's Instructions	89
K. Jury Deliberations.....	90
L. Verdict	90

M.	Mistrial	91
XII.	Sentencing	91
	A. General Considerations	92
	B. Interview Procedure.....	92
	C. Presentence Report	93
	1. Face Sheet.....	93
	2. Criminal Record.....	93
	a. Prior Record.....	93
	b. Instant Offense.....	93
	3. Social Circumstances.....	94
	a. General Considerations.....	94
	b. Family	94
	c. Residence	94
	d. Education	94
	e. Employment.....	94
	f. Drugs/Alcohol.....	95
	g. Other Relevant Social Data.....	95
	h. Mental Health	95
	i. Evaluation	95
	4. Department Recommendation	95
	D. Preparation of Accused's Presentence Memorandum.....	95
	E. Appendices	96
	F. Submission of Presentence Memorandum	96
	G. Presentence Conference.....	96
	H. Felony Sentencing	96
	1. Predicate and Persistent Felon	97
	2. Hate Crimes	98
	3. Other Felony Sentences	99
	a. Indeterminate Sentence.....	99
	b. Determinate Sentence and Post-Release Supervision.....	99
	c. Parole Supervision	99
	d. Other Possible Sentences	100
	4. Sentencing Chart Synopsis	100
	a. Nonpredicate Felons	100
	b. Predicate Felons	103
	c. Persistent Violent Felons	104
	d. Nonviolent Persistent Felony Offenders	104
	I. Sealing of Certain Convictions.....	104
	J. Certificate of Relief From Disabilities	104
	K. Juvenile Offenders and Youthful Offenders.....	105
XIII.	The Sex Offender Registration Act	105
	A. Statute	105
	1. Definition.....	105
	2. Incarcerated Offenders.....	106
	3. Nonincarcerated Offenders	106
	4. The Right to Counsel	107

5. Registration and Dissemination.....	107
B. Case Law	108
1. Federal	108
2. State	108
Appendix Working With the New Bail Statutes/Bail Reform Chart.....	111
Criminal Law—Forms Index	115
Table of Authorities	139
About the Authors.....	161

LAWRENCE N. GRAY, ESQ.

Lawrence Gray served as a former Special Assistant Attorney General in the appellate section of the Attorney General's Medicaid Fraud Control Unit. He was previously a Special Assistant Attorney General in the Office of the Special State Prosecutor for the Investigation of the New York City Criminal Justice System; prior to that he was an Assistant Attorney General in the Bureau of Real Estate, Securities Fraud and Theatrical Syndications. He began his career as an Assistant District Attorney in Bronx County. Mr. Gray was a 1969 graduate of St. John's University School of Law, where he was an associate editor of the *St. John's Law Review*. His other publications include *Criminal and Civil Contempt*, Second Edition (NYSBA, 2012); *Evidentiary Privileges—Grand Jury, Criminal and Civil Trials*, Fifth Edition (NYSBA, 2012); *Contempt and the Courtroom* (NYSBA, 1996); *Criminal Discovery: A Statutory and Appellate Court Analysis* (NYSBA 2012); *A Practice Commentary to Judiciary Law Article 19*, 1 Cardozo Public Law, Policy & Ethics Journal 61 (2003); *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's Law Review 337 (1998); and *Judiciary and Penal Law Contempt in New York: A Critical Analysis*, Brooklyn Law School Journal of Law and Policy, Vol. III, No. 1 (1994). He was Editor-in-Chief of NYSBA's *New York Criminal Practice, Fourth Edition*, and its Supplements.

JAY SHAPIRO, ESQ.

Jay Shapiro is a partner in the Commercial Litigation Department in the New York office of White and Williams LLP. He has 40 years' experience as a litigator in criminal and civil practice. A prosecutor for two decades who focused on white collar crimes, he now represents clients in complex civil litigation and investigations, including corporate internal investigations and criminal and regulatory enforcement. He also represents insurance companies in their affirmative efforts to combat insurance fraud. He has represented broker-dealers and financial professionals in FINRA arbitrations and has represented financial services businesses in connection with government inquiries.

Mr. Shapiro began his legal career in the Bronx County District Attorney's Office as a prosecutor for eight years and later spent 12 years with the King's County District Attorney's Office, becoming the Deputy District Attorney in charge of the Rackets Division, before going into private practice. As a prosecutor, Mr. Shapiro was one of the first participants in the federal Electronic Crimes Task Force, which launched some of the earliest investigations into cybercrimes. He now advises clients on the investigation of data breaches, computer trespass and best policies concerning employee utilization of personal electronic devices for business purposes.

Mr. Shapiro has tried more than 35 cases in state and federal courts in New York and has also appeared before courts in California, Florida, New Jersey, Pennsylvania, and Washington. He has represented clients in relation to investigations conducted by federal and state authorities, including the Department of Justice, the Securities and Exchange Commission, the Internal Revenue Service, the Food and Drug Administration, state prosecutors, and numerous city and state regulatory agencies.

Mr. Shapiro is the author of a number of treatises relating to criminal practice and constitutional rights. He is a member of the Executive Committee of the Criminal Justice Section of the New York State Bar Association and the editor of the Section's newsletter. He has been recognized for his work with the New York City Police and Fire Departments. Mr. Shapiro is a member of the Society of Benchers of Case Western Reserve University School of Law.