St. John's Law Review

Volume 62
Issue 4 *Volume 62, Summer 1988, Number 4*

Article 12

June 2012

CPL § 195.10: Criminal Defendant May Not Waive Grand Jury Indictment and Consent to Be Prosecuted by Superior Court Information After Indictment Is Filed

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terest in the continued beneficial use of such places justifies this reasonable limitation upon an individual's rights.[36]

In light of the paramount interest of public safety, it is submitted that the *Smith* court failed to balance the predicament faced by the officer with the extent of his violation of the defendant's fourth amendment rights. The court's holding, with its unnecessarily stringent requirements for the determination of the existence of an emergency, will hamper the ability of police to protect society against potentially great harm to life and property.

Simon Yeznig Balian

CPL § 195.10: Criminal defendant may not waive grand jury indictment and consent to be prosecuted by superior court information after indictment is filed

Traditionally, the New York Constitution has mandated that the prosecution of all capital or otherwise infamous crimes be initiated by grand jury indictment.[1] This right was designed to safe-

[36] *See* People v. Kuhn, 33 N.Y.2d 203, 210, 306 N.E.2d 777, 780, 351 N.Y.S.2d 649, 654 (1973). The governmental interest tends to be paramount to the individual right of privacy in these places, and often the level of exigency required will be less than in other circumstances. *See* United States v. Licata, 761 F.2d 537, 543 (9th Cir. 1985) ("[o]rdinarily, in the airport setting, exigent circumstances are apparent"). *See generally* Halbrook, *Firearms, The Fourth Amendment, and Air Carrier Security*, 52 J. AIR L. & COM. 585 (1987) (comprehensive discussion of screening practices and legislative history of government regulations). The extent of the governmental interest is succinctly illustrated in the following observation of a distinguished judge: "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness . . . . " United States v. Bell, 464 F.2d 667, 675 (2d Cir.) (Friendly, J., concurring), *cert. denied*, 409 U.S. 991 (1972).

[1] *See* N.Y. CONST. art. 1, § 6; *see also* People v. Miles, 289 N.Y. 360, 362, 45 N.E.2d 910, 911 (1942) ("fundamental principle of our government" that indictment precede prosecution for infamous crime); People *ex rel.* Battista v. Christian, 249 N.Y. 314, 317, 164 N.E. 111, 111 (1928) ("organic law decrees that no one shall be held to answer for an infamous crime until after a grand jury shall have considered the evidence against him"). Prior to the 1973 amendment, the New York Constitution had provided: "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on presentment or indictment of a grand jury." N.Y. CONST. art. 1, § 6 (1894, amended 1973).

Under the CPL an indictment is defined as "a written accusation by a grand jury, filed with a superior court, charging a person . . . with the commission of a crime." CPL § 200.10 (McKinney 1982). A grand jury hearing serves "chiefly [as] an accusatory instrument; its indictment carries no presumption of guilt, but is merely a means of informing the accused

guard the fundamental liberties of due process and equal protection of the laws, and not as a personal right waivable at the behest of the accused.[2] In 1973, however, the New York Constitution was amended[3] and enabling legislation—Criminal Procedure Law section 195.10—was subsequently enacted[4] allowing a defendant, if

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of the crime with which he is charged." Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 462 (1959).

Prior to New York's 1973 constitutional amendment, more than twenty-five jurisdictions had passed legislation providing for a waiver of indictment. *See* Simonson v. Cahn, 27 N.Y.2d 1, 4 n.1, 261 N.E.2d 246, 248 n.1, 313 N.Y.S.2d 97, 100 n.1 (1970).

[2] *See Simonson*, 27 N.Y.2d at 3-4, 261 N.E.2d at 247, 313 N.Y.S.2d at 99. The *Simonson* court stated that the public has a "right to demand that facts indicating the commission of a felony be presented to the grand jury." *Id.* at 4, 261 N.E.2d at 248, 313 N.Y.S.2d at 99; *see Christian*, 249 N.Y. at 317, 164 N.E. at 111. In *Christian*, it was stated that "[a] privilege, merely personal, may be waived; a public fundamental right, the exercise of which is requisite to jurisdiction to try, condemn and punish, is binding upon the individual and cannot be disregarded by him. The public policy of the State . . . takes precedence over his personal wish or convenience." *Id.* at 318-19, 164 N.E. at 113.

An indictment serves to protect three purposes: first, it notifies the defendant of the allegations against him so that a defense may be orchestrated; second, it provides a method of ensuring that a defendant is brought to trial for the crime for which he was indicted and not for a crime based on subsequently discovered evidence; third, it protects against further prosecution for the same offense. *See* People v. Iannone, 45 N.Y.2d 589, 594-95, 384 N.E.2d 656, 660, 412 N.Y.S.2d 110, 113-14 (1978).

Many judicial decisions have compared the right to prosecution by indictment with the right to trial by jury. *See, e.g., Simonson*, 27 N.Y.2d at 5, 261 N.E.2d at 248, 313 N.Y.S.2d at 100 ("necessity for indictment can no more be obviated than could the constitutional right to trial by jury"); *Christian*, 249 N.Y. at 319, 164 N.E. at 112 (citing N.Y. CONST. art. 1, § 2, which declares that "trial by jury . . . shall remain inviolate forever"). The right that one shall not be "held to answer for an infamous crime until after the grand jury shall have considered the evidence against him" was originally coveted as a fundamental public privilege and a necessary prerequisite to establishing jurisdiction; consequently, it was not waivable by individual defendants. *See Simonson*, 27 N.Y.2d at 3-4, 261 N.E.2d at 247-48, 313 N.Y.S.2d at 99. Attempts to preserve the sanctity of these rights stemmed from the state's "deep-rooted concern in protecting the rights of those accused of crime and of safeguarding their liberties." *Id.* at 5, 261 N.E.2d at 248, 313 N.Y.S.2d at 100.

[3] *See* N.Y. CONST. art. 1, § 6. Article 1, section 6 provides in pertinent part:

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury . . . .

Id.

[4] *See* CPL § 195.10 (McKinney 1982). Section 195.10 provides, in pertinent part:

> 1. A defendant may waive indictment and consent to be prosecuted by superior court information when:
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> (a) a local criminal court has held the defendant for the action of the grand jury; and
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> (b) the defendant is not charged with a class A felony; and
>
> (c) the district attorney consents to the waiver.

not accused of a class A felony, to waive a grand jury indictment and proceed by superior court information.[5] Recently, however, in *People v. Banville*,[6] the Appellate Division, Second Department, narrowly construed CPL section 195.10 in holding that the waiver of an indictment is unequivocally limited by specific time restraints.[7]

In *Banville*, the defendant was charged by a Suffolk County grand jury indictment with burglary in the second degree, a class C violent felony.[8] Upon advice of counsel and with the consent of the district attorney, the defendant signed a waiver of indictment

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2. A defendant may waive indictment pursuant to subdivision one in either:

. . . .

(b) the appropriate superior court, at any time *prior to the filing of an indictment by the grand jury.*

Id. (emphasis added). Section 195.10 was "designed to implement smoothly the waiver of indictment constitutional amendment." *Id.*, commentary at 380.

The New York Legislature inserted the requirement that the waiver be exercised prior to the filing of an indictment even though this was not required by the constitution. *See* CPL § 195.10. Some commentators have declared such a restriction to be necessary in order to perpetuate the legislative intent of promoting speedier trials. *See* CPL § 195.10, commentary at 380 (utilization of waiver will lead to swifter dispositions); *see also* People v. Herne, 110 Misc. 2d 152, 155, 441 N.Y.S.2d 936, 938 (Franklin County Ct. 1981) (waiver provision designed to accommodate defendant wishing to obtain quick trial and to save time and expense in unnecessary grand jury proceedings).

[5] *See* People v. Calbud, Inc., 49 N.Y.2d 389, 395 n.3, 402 N.E.2d 1140, 1144 n.3, 426 N.Y.S.2d 238, 242 n.3 (1980); *Iannone*, 45 N.Y.2d at 593 n.4, 384 N.E.2d at 659 n.4, 412 N.Y.S.2d at 113 n.4.

[6] 134 App. Div. 2d 116, 523 N.Y.S.2d 844 (2d Dep't 1988).

[7] *See id.* at 121-23, 523 N.Y.S.2d at 848; *cf. Herne*, 110 Misc. 2d at 156-57, 441 N.Y.S.2d at 939 (maintaining that recent Court of Appeals decisions require strict interpretation of CPL article 195). The *Banville* court explicitly held that according to the plain meaning of the statute, an indictment may not be waived after it has been filed by a grand jury. 134 App. Div. 2d at 123, 523 N.Y.S.2d at 849. The court found further support for its strict interpretation in the legislative intent underlying the bill. The court stated that "'"[t]he basic purpose of this bill . . . is to allow a defendant who wishes to go directly to trial without waiting for a grand jury to hand up an indictment to do so."'" *Id.* at 122, 523 N.Y.S.2d at 848-49 (quoting *Herne*, 110 Misc. 2d at 155-56, 441 N.Y.S.2d at 938 (quoting Governor's Memorandum (N.Y.S. 10414A, N.Y.A. 11610A 197th Sess.), *reprinted in* [1974] N.Y. LEGIS. ANN. 9, at 10 *and* [1974] N.Y. LAWS 2006, at 2007 (McKinney))).

[8] *See Banville*, 134 App. Div. 2d at 117, 523 N.Y.S.2d at 845. Under section 140.25 of the Penal Law, burglary in the second degree occurs when a person "knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling." N.Y. PENAL LAW § 140.25 (McKinney 1988). In *Banville*, defendant Vincent Banville, Jr. confessed to unlawfully entering the house of a friend at night and removing fifteen dollars that admittedly did not belong to him. *See* 134 App. Div. 2d at 118, 523 N.Y.S.2d at 846.

Under the plea bargaining provisions of section 220.10 of the CPL, the defendant's indictment for a class C violent felony required, at a minimum, that he plead guilty to a class D violent felony offense. CPL § 220.10(5)(d)(ii) (McKinney 1982).

form, thus agreeing to proceed by way of superior court information.[9] Pursuant to a plea bargaining agreement, the defendant entered a plea of guilty to attempted burglary in the third degree, a class E felony.[10] The trial court, satisfied that the waiver was given voluntarily and that the defendant was "cognizant of the ramifications of his guilty plea,"[11] duly accepted the admission.[12] Thereafter, the court imposed sentence and, upon the People's motion, dismissed the pending indictment.[13]

The Appellate Division, Second Department, accepted the defendant's contention that the waiver of indictment failed to comply with the statutory time restraints of the CPL and was, therefore, untimely and ineffective.[14] Writing for the court, Justice

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[9] *See Banville*, 134 App. Div. 2d at 117-18, 523 N.Y.S.2d at 845. A waiver of indictment must be evidenced by a written instrument containing a statement indicating that the defendant is aware that:

> (a) under the constitution of the state of New York he has the right to be prosecuted by indictment filed by a grand jury;
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> (b) he waives such right and consents to be prosecuted by superior court information . . . ;
>
> . . . .
>
> (d) the superior court information to be filed by the district attorney will have the same force and effect as an indictment filed by a grand jury.

CPL § 195.20 (McKinney 1982).

[10] *See Banville*, 134 App. Div. 2d at 118, 523 N.Y.S.2d at 846. The terms of the plea bargaining agreement provided that the defendant would plead guilty to attempted burglary in the third degree for which he would be sentenced to an "indeterminate term of 1½ to 3 years' imprisonment." *Id.* The plea was offered in full satisfaction of the superior court information. *Id.*; *see also* CPL § 220.10(5)(d)(ii) (McKinney 1982) (plea bargain provisions when indictment is for class C violent felony).

[11] *Banville*, 134 App. Div. 2d at 118, 523 N.Y.S.2d at 846. At trial, the judge informed the defendant of the rights he was waiving if he pleaded guilty. *Id.* The court sought to insure that "the defendant had voluntarily and intelligently relinquished his constitutional rights." *Id.*

[12] *See id.* According to CPL section 195.30, the court need only confirm that the waiver conforms to the requirements of sections 195.10 and 195.20. *See* CPL § 195.30 (McKinney 1982). In his commentaries, Judge Bellacosa notes that "the court has no discretionary authority in connection with this constitutionally granted . . . right to waive indictment," and that "the agreement of the defendant and district attorney must be honored." *See id.*, commentary at 385. Judge Bellacosa also states that such a provision appears to empower the district attorney with "unbounded discretion to approve or withhold approval of a request to waive indictment." *Id.*

[13] *See Banville*, 134 App. Div. 2d at 118, 523 N.Y.S.2d at 846. The trial court had previously inquired into the status of the grand jury indictment pending against the defendant. *Id.* The prosecutor informed the court that the defendant had executed a waiver of indictment form, which was duly accepted, and, therefore, the prosecution would move to dismiss the indictment at the time of sentencing. *Id.* Such a procedure is commonly employed by prosecutors within the Second Department. *Id.* at 117, 523 N.Y.S.2d at 845.

[14] *Id.* at 123, 523 N.Y.S.2d at 849; *see also supra* note 4 (statutory time requirements

Eiber stated that the incontrovertible language of CPL section 195.10 makes it "abundantly clear that recourse to the waiver of indictment process . . . is subject to precise time requirements."[15] The court indicated that requiring strict adherence to the statute's mandate that a waiver be exercised *prior* to the filing of the indictment was in accordance with the legislative intent behind the provision.[16] The court maintained that the legislature enacted this section to facilitate an accused's desire for a speedier adjudication[17] and to reduce the " ' "backlog of cases presently awaiting grand jury action." ' "[18] The court noted that these goals are not furthered when "the waiver occurs subsequent to the return of the indictment."[19]

The court further reasoned that failure to adhere to the statutory time restrictions would allow a prosecutor to undermine the plea bargaining limitations set forth in section 220.10 of the CPL.[20]

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set forth). The *Banville* court concluded that any attempt to waive an indictment after it has been returned by a grand jury is "untimely and hence, wholly ineffective," and "a plea of guilty to any other accusatory instrument encompassing crimes arising out of the transaction for which the defendant was originally indicted must also be deemed a nullity." 134 App. Div. 2d at 123, 523 N.Y.S.2d at 849.

The court supported its interpretation of CPL section 195.10 by citing People v. Cook, 93 App. Div. 2d 942, 463 N.Y.S.2d 59 (3d Dep't 1983). *Banville*, 134 App. Div. 2d at 123-24, 523 N.Y.S.2d at 849-50. In *Cook*, the defendant was charged by a grand jury indictment with a class E felony but waived the indictment and was prosecuted by superior court information upon pleading guilty to a lesser charge. *See* 93 App. Div. 2d at 942, 463 N.Y.S.2d at 60. The Appellate Division, however, criticized the propriety of such a measure by noting that the "adoption and use of this unusual procedure cannot be permitted to stand." *Id.*

[15] *Banville*, 134 App. Div. 2d at 121-22, 523 N.Y.S.2d at 848. According to the court, the "plain wording" of the statute demanded waiver of indictment be exercised prior to filing the instrument with the court. *Id.* at 122, 523 N.Y.S.2d at 848.

[16] *See id.*

[17] *See id.* The *Banville* court extensively cited People v. Herne, 110 Misc. 2d 152, 441 N.Y.S.2d 936 (Franklin County Ct. 1981), which contained a thorough examination of the legislative history of section 195.10. *See Herne*, 110 Misc. 2d at 154-56, 159-60, 441 N.Y.S.2d at 938-39, 940. The factual setting of *Herne* is virtually identical to that in *Banville*; the defendant in each case exercised a waiver of indictment after the grand jury filed its charges. *See id.* at 152, 441 N.Y.S.2d at 937. The *Herne* court stated that the legislative intent in enacting CPL section 195.10 was to create a more efficient means for disposing of criminal cases. *See id.* at 154-55, 441 N.Y.S.2d at 938-39. The legislation would enable a defendant who wished to circumvent the time-consuming grand jury process to waive indictment, thereby promoting the desired expediency. *Id.* at 156, 441 N.Y.S.2d at 939.

[18] *Banville*, 134 App. Div. 2d at 122, 523 N.Y.S.2d at 849 (quoting *Herne*, 110 Misc. 2d at 155, 441 N.Y.S.2d at 938-39 (quoting Governor's Memorandum (N.Y.S. 10413A, N.Y.A. 11610A 197th Sess.), *reprinted in* [1974] N.Y. LEGIS. ANN. 9, at 10 *and* [1974] N.Y. LAWS 2006, at 2007 (McKinney))); *see supra* note 7.

[19] *Id.* at 122-23, 523 N.Y.S.2d at 849.

[20] *See id.* at 124, 523 N.Y.S.2d at 850. Pursuant to the plea restrictions of section

The limitations, the court contended, would be rendered meaningless if a defendant, with consent of the prosecutor, could freely waive a grand jury indictment.[21] The court maintained that the legislature did not intend such a drastic alteration in the laws governing criminal jurisprudence; consequently, the court reversed and remitted for further proceedings on the indictment.[22]

Although the *Banville* court was justifiably concerned with expedience and convenience in the jury trial process,[23] it is suggested that the court's strict adherence to the provisions of section 195.10 unnecessarily perpetuated acceptance of an arbitrary time restraint on a potentially important procedural device. It is further suggested that the *Banville* court, in requiring compliance with specific time limitations for waiving an indictment, failed to recognize the rationale behind the legislature's promulgation of CPL section 195.10.

Judge Jasen's dissent in *Simonson v. Cahn*[24] is generally recognized as the impetus behind the enactment of section 195.10.[25] The dissent cogently argued that since the right to be prosecuted by indictment was established to protect the liberty of the accused, for the right to remain inviolate was "totally unreasonable."[26]

220.10, the defendant's indictment for a class C violent felony required that he plead guilty to no less than a class D violent felony. *See* CPL § 220.10(5)(d)(ii) (McKinney 1982). The charge of attempted burglary in the third degree, to which defendant eventually pleaded guilty, is only a class E felony and, therefore, a lesser crime than statutorily permitted. *See* N.Y. PENAL LAW § 110.05(6) (McKinney 1982).

[21] *See Banville*, 134 App. Div. 2d at 125, 523 N.Y.S.2d at 850.

[22] *Id.* at 125-26, 523 N.Y.S.2d at 851. The court in *Banville* stated that the legislature "did not intend to 'make such substantive changes in the criminal law as: providing a means by which the plea bargaining restrictions of CPL 220.10 might be avoided.' " *Id.* at 124, 523 N.Y.S.2d at 850 (quoting People v. Herne, 110 Misc. 2d 152, 156, 441 N.Y.S.2d 936, 939 (Franklin County Ct. 1981)).

[23] *See supra* notes 17-18 and accompanying text.

[24] 27 N.Y.2d 1, 6, 261 N.E.2d 246, 249, 313 N.Y.S.2d 97, 101 (1970) (Jasen, J., dissenting).

[25] *See* CPL § 195.10, commentary at 380 (McKinney 1982). Judge Jasen's dissent has been referred to as the opinion "which set the change in motion." *Id.*; *see also Banville*, 134 App. Div. 2d at 121, 523 N.Y.S.2d at 848 (constitutional amendment authorizing waiver of indictment in certain cases was in response to "cogent criticism levied by the dissenters in *Simonson*").

[26] *See Simonson*, 27 N.Y.2d at 7, 261 N.E.2d at 249-50, 313 N.Y.S.2d at 102 (Jasen, J., dissenting). Justice Jasen argued: "[A]t common law the defendant was generally not allowed to waive any right which was intended for his protection; however, at the present time, conditions which required such a rule no longer exist; therefore, there is no reason to continue such a rule." *Id.* at 8, 261 N.E.2d at 250, 313 N.Y.S.2d at 103 (Jasen, J., dissenting) (citing Patton v. United States, 281 U.S. 276, 306 (1930)).

Judge Jasen concluded that a grand jury indictment is an individual privilege similar to a trial by jury[27] and, as with other personal rights, should be waivable.[28] The *Banville* court's reliance on the capricious time limitations set forth in section 195.10 of the CPL, although consistent with prior judicial rulings, is contrary to the statute's underlying intent.[29] It is submitted that by permitting a waiver of indictment to be executed after its filing, the courts would give a defendant control over a right enacted for his own protection and would, therefore, be more in harmony with the concepts of personal rights and privileges.

It is further suggested that by abandoning the time limitations, the judiciary would reinforce the validity of the district attorney's vested discretionary authority. According to the *Banville* court, the district attorney does not possess the requisite discretionary power to "alter the decision of the Grand Jury to indict."[30] However, the court's contention ignores contemporary judicial thought, which empowers the district attorney with the discretion to alter an indictment and even to completely disregard the grand jury's findings and decide not to prosecute.[31] Several courts have

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[27] *Id.* at 6, 261 N.E.2d at 249, 313 N.Y.S.2d at 101-02 (Jasen J., dissenting); *see supra* note 2. Trial by jury has been touted as a protective device instituted to ensure that the rights of indigent persons were not unjustly manipulated. *See* Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655, 657 (1934); Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 702 (1927). However, the state's safeguards became increasingly criticized as burdensome and time-consuming. *See* Oppenheim, *supra*, at 695; *see also* Patton v. United States, 281 U.S. 276, 281 (1930) (cannot sustain idea that constitutional safeguards are necessary to protect public from defendant waiving away interest government has in his or her liberties).

[28] *See Simonson*, 27 N.Y.2d at 7, 261 N.E.2d at 249-50, 313 N.Y.S.2d at 102 (Jasen, J., dissenting). Judge Jasen claimed that "the choice of being tried by indictment or information is at all times with the accused, and only he, knowingly and intelligently, may exercise such choice." *Id.*, 261 N.E.2d at 250, 313 N.Y.S.2d at 102 (Jasen, J., dissenting). Furthermore, he reasoned that since a jury trial is waivable, then by analogy prosecution by indictment should also be waivable. *Id.* at 6, 261 N.E.2d at 249, 313 N.Y.S.2d at 101-02 (Jasen, J., dissenting).

[29] *See* People *ex rel.* Battista v. Christian, 249 N.Y. 314, 164 N.E. 111 (1928). The court in *Christian* contended that the emphasis in considering the propriety of adopting a waiver of indictment provision should not be placed on convenience or expediency, but rather, should focus on fundamental rights and liberties. *Id.* at 318, 164 N.E. at 111. Adoption of the waiver amendment did not deal with "policy, expediency or convenience as viewed by the Legislature but with public fundamental rights fixed by the Constitution." *Id.* It is suggested, therefore, that the *Banville* court's persistent reference to expediency clouded the legitimate purpose of the amendment, which was to allow defendants, with minimal intrusion, to choose the manner in which they will exercise their personal rights.

[30] *Banville*, 134 App. Div. 2d at 125, 523 N.Y.S.2d at 850.

[31] *See* N.Y. CONST. art. 13, § 13. The district attorney is empowered with broad discre-

determined that upon invalidating an untimely waiver, the proper procedure is to grant the prosecutor leave to resubmit to the grand jury.[32] It is submitted that while allowing resubmission acknowledges the validity of the district attorney's discretionary powers, a legislative amendment abandoning the time restrictions of CPL section 195.10 would better serve the overburdened criminal justice system, as well as the personal rights of defendants.

The enactment of section 195.10 of the CPL represented an attempt by the legislature to provide defendants in criminal proceedings with a louder voice in determining the course of their prosecution.[33] The *Banville* decision, however, clearly illustrates the flawed reasoning behind the implementation of the "precise time requirements"[34] found in the statute. Because the imposition of a time restraint furthers no cognizable purpose, the legislature would more efficiently serve the backlogged criminal judicial system by removing such restraints.

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tion in discharging his duty to prosecute crimes against the State. *Id.*; *see also* Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1080 (1984) (prosecutors selectively choose which cases to present to grand jury).

[32] *See, e.g.*, People v. Lee, 100 App. Div. 2d 357, 360, 474 N.Y.S.2d 308, 310 (1st Dep't 1984); People v. Sledge, 90 App. Div. 2d 588, 589, 456 N.Y.S.2d 198, 200 (3d Dep't), *leave to appeal denied*, 58 N.Y.2d 977, 447 N.E.2d 96, 460 N.Y.S.2d 1036 (1982); People v. Herne, 110 Misc. 2d 152, 161, 441 N.Y.S.2d 936, 941 (Franklin County Ct. 1981).

[33] *See Herne*, 110 Misc. 2d at 155, 441 N.Y.S.2d at 938.

[34] *See Banville*, 134 App. Div. 2d at 122, 523 N.Y.S.2d at 848.