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CPL § 210.20(2): Compliance with Direction of Trial Judge Does Not Excuse Defendant's Failure to Make Timely Motion to Dismiss Grounded Upon Denial of Statutory Speedy Trial Right

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Article 9, courts should cite and apply the CPLR 902 factors.[26]

Notwithstanding the plaudits of at least one segment of the New York legal community,[27] the *Brandon* court cannot be perceived as the ultimate arbiter of the rights of Article 9 litigants, especially because of the Court of Appeals' silence on the matter.[28] The *Brandon* decision should properly be read as merely one determination in a disparate litany of decisions observing the area of class certification.

Michael S. Haber

CRIMINAL PROCEDURE LAW

CPL § 210.20(2): Compliance with direction of trial judge does not excuse defendant's failure to make timely motion to dismiss grounded upon denial of statutory speedy trial right

Under section 210.20 of the Criminal Procedure Law of New York,[1] to obtain a dismissal of an indictment based upon an alleged denial of the right to a speedy trial,[2] a defendant must file a

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[26] The *Brandon* court cited CPLR 902 as the source for the trial court's decision to institute further discovery on the issue of the management of Brandon as a class action in a New York forum. *See* 106 App. Div. 2d at 166, 485 N.Y.S.2d at 58. Similarly, the court in Boulevard Gardens Tenants Action Comm., Inc. v. Boulevard Gardens Hous. Corp., 88 Misc. 2d 98, 388 N.Y.S.2d 215 (Sup. Ct. Queens County 1976), stated that a class could only be certified when the "considerations set forth in CPLR 901 and 902" are taken into account. *Id.* at 101, 388 N.Y.S.2d at 218. While these cases at least mention CPLR 902, the factors enumerated in CPLR 902 should be considered more carefully when making the class certification decision. *See* Long Island College Hosp. v. Whalen, 84 Misc. 2d 637, 638, 377 N.Y.S.2d 890, 891-92 (Sup. Ct. Albany County 1975) (plaintiffs had to comply with provisions of CPLR 902 prior to certification of class), *rev'd on other grounds*, 68 App. Div. 2d 274, 416 N.Y.S.2d 841 (3d Dep't 1979).

[27] *See* Dickerson, *Class Actions Under Article 9 of CPLR—Faith Restored*, N.Y.L.J., Feb. 8, 1985, at 1, col. 3. Dickerson hailed the *Brandon* court's statement regarding liberal construction of Article 9 as "the most exciting aspect" of the decision. *Id.* at 7, col. 2. Dickerson further stated that the "decision restores our personal faith in the utility of Article 9." *Id.* at 7, col. 2.

[28] *Id.* at 7, col. 1. Dickerson noted the "refusal" of the Court of Appeals to address questions of class certification and clarify "the substantial policy differences" between the various judicial departments. *Id.*

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[1] CPL § 210.20 (1982).

[2] *See id.* § 30.20 (1982). Unlike most other states, the right to a speedy trial in New York is not guaranteed in the state constitution, but instead is provided for by statute. *See id.*; BROWNELL, CRIM. PROC. N.Y., PT. I. 38:02, at 2-3 (3d ed. 1982). Section 30.20(1) provides

motion before commencement of the trial or the entry of a guilty plea.[3] The failure to make a timely motion[4] in writing upon reasonable notice to the People,[5] constitutes a waiver of the defendant's statutory right to request a dismissal founded upon speedy trial grounds.[6] Criminal Procedure Law section 255.20 grants a court discretion to waive the timeliness requirements for certain pre-trial

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in pertinent part that "after a criminal action is commenced the defendant is entitled to a speedy trial." CPL § 30.20(1) (1982). This speedy trial right is protected by CPL § 30.30, which provides for dismissal of charges unless the People are prepared for trial within specified time periods. *See id.* § 30.30 (McKinney 1982 & Supp. 1984-1985); *see also The Survey*, 55 ST. JOHN'S L. REV. 175, 175 & n.28 (1980) (discussing genesis and purpose of statute). In addition to the Criminal Procedure Law, New York's Civil Rights Law protects a defendant's right to a speedy trial. *See* N.Y. CIV. RIGHTS LAW § 12 (McKinney 1982) ("In all criminal prosecutions, the accused has a right to a speedy . . . trial"); *see also* People v. Gabbidon, 116 Misc. 2d 127, 131, 455 N.Y.S.2d 244, 247 (Sup. Ct. Kings County 1982) (right to speedy trial guaranteed by Federal Constitution, CPL § 30.20, and Civil Rights Law § 12).

The New York statutes are premised on the federal constitutional speedy trial right, *see The Survey*, *supra*, at 175 n.28, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." U.S. CONST. amend. VI. *But see* CPL § 30.20, commentary at 131 (McKinney 1981) (constitutional speedy trial must be differentiated from statutory speedy trial). Indeed, the right to a speedy trial has been held to be as fundamental a right as any other under the sixth amendment, *see* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967), and has been imposed on the states by the Due Process Clause of the fourteenth amendment, *see id.* at 222-26; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-12, at 568 (1978).

[3] *See* CPL § 210.20(1)(g), (2) (1982). Section 210.20 provides in pertinent part:

> 1. The superior court may, upon motion of the defendant, dismiss an indictment or any count thereof upon the ground that:
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> . . . .
>
> (g) The defendant has been denied the right to a speedy trial . . . .
>
> 2. A motion made pursuant to paragraph (g) of subdivision one must be made prior to the commencement of trial or entry of a plea of guilty.

Id; *see also* People v. Dean, 45 N.Y.2d 651, 659, 384 N.E.2d 1277, 1282, 412 N.Y.S.2d 353, 358 (1978) (motion to dismiss indictment on speedy trial grounds made after commencement of trial denied).

[4] *See supra* note 3 (timely motion is one made prior to commencement of trial or entry of guilty plea); *see also* People v. O'Brien, 56 N.Y.2d 1009, 1010, 439 N.E.2d 354, 355, 453 N.Y.S.2d 638, 639 (1982) (guilty plea constituted waiver of defendant's statutory right to speedy trial); People v. Howe, 56 N.Y.2d 622, 624, 435 N.E.2d 1092, 1092, 450 N.Y.S.2d 477, 477-78 (1982) (plea of guilty constituted forfeiture of claim to dismissal on speedy trial grounds); People v. Rodriguez, 50 N.Y.2d 553, 558, 407 N.E.2d 475, 477, 429 N.Y.S.2d 631, 633 (1980) (defense counsel's failure to renew speedy trial motion constituted waiver because it was used to secure unfair advantage).

[5] *See* CPL § 210.45(1) (McKinney 1982); People v. Jordan, 96 App. Div. 2d 1060, 1060, 466 N.Y.S.2d 486, 487 (2d Dep't 1983); People v. Collins, 98 App. Div. 2d 947, 947, 472 N.Y.S.2d 796, 797 (4th Dep't 1983); People v. Hunyadi, 96 App. Div. 2d 647, 647, 466 N.Y.S.2d 512, 513 (3d Dep't 1983); *see also* BROWNELL, *supra* note 2, at 14 (oral motion granted by lower court must be reversed).

[6] *See supra* notes 4-5.

motions "in the interest of justice, and for good cause shown."[7] Recently, however, the Court of Appeals in *People v. Lawrence*[8] held that this discretionary authority is inapplicable to a speedy trial motion, and asserted that the defendant had waived his statutory right to dismissal on speedy trial grounds even though his failure to make a timely written motion resulted from a court directive to defer the motion until after trial.[9]

The defendant in *Lawrence* was convicted of attempted murder, assault, and criminal possession of a weapon.[10] Prior to the commencement of the trial, the defendant made an oral motion or assertion that he intended to move to dismiss the indictment on the ground that his statutory right to a speedy trial had been violated.[11] The Calendar Judge, without objection from the People,[12] deferred the defendant's motion until after trial. When a written motion was finally submitted, the prosecutor objected on the ground that the motion was untimely.[13] Nevertheless, after trial, the court referred the motion for a hearing to determine the merits of the claim.[14] The judge hearing the motion held that the procedure had been proper, and ruled against the defendant on the merits.[15] The Appellate Division, Second Department, affirmed the defendant's conviction and rejected without comment the defendant's claim of a denial of a speedy trial, but remanded the case for resentencing.[16]

On appeal, the Court of Appeals affirmed the order of the Appellate Division.[17] Writing for the majority, Judge Simons[18] re-

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[7] CPL § 255.20(3) (McKinney 1982).

[8] 64 N.Y.2d 200, 474 N.E.2d 593, 485 N.Y.S.2d 233 (1984).

[9] *Id.* at 203, 474 N.E.2d at 595, 485 N.Y.S.2d at 235.

[10] *See id.* at 203-04, 474 N.E.2d at 595, 485 N.Y.S.2d at 235.

[11] *See id.* In *Lawrence*, the affidavit of the assistant district attorney acknowledged that on October 9, 1981, the defendant "indicated orally that he intended to file a speedy trial motion," and that on October 27, 1981, orally claimed before Justice Soloff that he had been denied his constitutional and statutory right to a speedy trial. *See id.* at 208, 474 N.E.2d at 598, 485 N.Y.S.2d at 238 (Meyer, J., dissenting); Respondent's Brief at 7-8 and Prosecution's Brief, appendix at 17, People v. Lawrence, 64 N.Y.2d 200, 474 N.E.2d 593, 485 N.Y.S.2d 233 (1984). Justice Soloff determined that "the defendant had preserved his right under CPL 30.30 prior to trial." *See* People v. Lawrence, Indictment number 1304/80, court order, appendix at 30 (Soloff, J., February 1982).

[12] *See* 64 N.Y.2d at 206, 474 N.E.2d at 597, 485 N.Y.S.2d at 237.

[13] *See id.* at 203, 474 N.E.2d at 598, 485 N.Y.S.2d at 238.

[14] *See id.* at 202, 474 N.E.2d at 595, 485 N.Y.S.2d at 235.

[15] *See id.*

[16] *See id.*

[17] *See id.* at 207, 474 N.E.2d at 598, 485 N.Y.S.2d at 238.

jected, *inter alia*,[19] the defendant's argument that Criminal Procedure Law section 255.20(3),[20] which grants courts discretion to entertain certain pre-trial motions any time before sentencing if good cause is shown, applies to motions to dismiss for violation of the right to a speedy trial.[21] Instead, the Court concluded that the

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[18] *Id.* at 203, 474 N.E.2d at 595, 485 N.Y.S.2d at 235. Chief Judge Cooke and Judges Jasen, Jones, and Wachtler concurred in the majority opinion of Judge Simons. Judge Meyer wrote a dissenting opinion in which Judge Kaye concurred. *Id.*

[19] *See id.* at 204-06, 474 N.E.2d at 595-97, 485 N.Y.S.2d at 235-37. In addition to its other determinations, the majority rejected the contention that the prosecution's failure to object to the Calendar Judge's deferral of the motion preserved the defendant's right to move for dismissal on speedy trial grounds. *See id.* at 206, 474 N.E.2d at 597-98, 485 N.Y.S.2d at 237-38. The Court maintained that the burden rests on the parties to secure their own rights by "asserting them at the time and in the manner that the legislature prescribes." *Id.* at 207, 474 N.E.2d at 597, 485 N.Y.S.2d at 237.

The majority stressed several reasons why speedy trial motions should be required to be made before trial: (1) all facts necessary to form a claim that the right has been denied are available to the defendant before trial; (2) unlike other motions to dismiss outlined in § 210.20(1), a motion to dismiss for the denial of a speedy trial is not based on facts that would affect the validity of the indictment or the final disposition of guilt or innocence; and (3) the motion is a "matter of legislative grace." *Id.* at 205, 474 N.E.2d at 596-97, 485 N.Y.S.2d at 236-37.

[20] *See* CPL § 255.20(3) (1982). Section 255.20 states, in pertinent part:

> 1. Except as otherwise expressly provided by law . . . all pretrial motions shall be served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment.
>
> . . . .
>
> 3. Notwithstanding the provisions of subdivisions one and two hereof, . . . the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits.

Id.

[21] *See* 64 N.Y.2d at 204-05, 474 N.E.2d at 595-96, 485 N.Y.S.2d at 235-36. The Court stressed that although CPL § 255.20 permits courts to waive time requirements for certain motions, CPL § 210.20(2) provides that "any motion *except* a motion based upon denial of the right to speedy trial should be made in the period specified in CPL § 255.20 and, . . . that a speedy trial motion 'must be made prior to the commencement of trial or entry of a plea of guilty.'" *Id.* at 204, 474 N.E.2d at 595, 485 N.Y.S.2d at 235 (quoting CPL § 210.20(2)). The Court explained that, under standard rules of statutory construction, the more "particular" provision of the statute (i.e., § 210.20(2)) must prevail over the more general provision (i.e., § 255.20(3)). *See id.* at 204, 474 N.E.2d at 596, 485 N.Y.S.2d at 236. The majority further asserted that the legislature, in amending the statute, demonstrated an intention to distinguish speedy trial motions from other types of motions. *Id.*

In the alternative, the majority argued that even if § 255.20 was applicable, the granting of additional time to make the motion would have been an abuse of discretion because such an extension was unwarranted under the facts of the case. *Id.* at 206, 474 N.E.2d at 597, 485 N.Y.S.2d at 237. The Court maintained that the defendant's counsel had no recognizable excuse for failing to make the motion before trial, and that the Calendar Judge's deferral of the motion did not constitute "good cause" warranting the extension of time to act under CPL § 255.20. *See id.*

defendant's failure to comply strictly with procedures set forth in section 210.20(2) constituted a waiver of his right to a dismissal on speedy trial grounds, despite the fact that the noncompliance occurred at the direction of the Calendar Judge.[22] Judge Simons reasoned that neither the parties nor the court may usurp the role of the legislature and restructure a statute by adopting a procedure that may be more convenient at the moment.[23]

Judge Meyer, in a vigorous dissent, criticized the majority for narrowly construing section 210.20(2) and noted that section 255.20(3) applies to *all* motions to dismiss indictments listed in section 210.20(1), thereby granting courts discretion to waive the time requirement for speedy trial motions.[24] The dissent reasoned that neither the plain meaning of the statute nor its legislative history suggest that speedy trial motions be excepted from the court's discretionary authority to consider untimely motions.[25] Therefore,

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[22] *See id.* at 203, 474 N.E.2d at 595, 485 N.Y.S.2d at 235.

[23] *See id.* at 207, 474 N.E.2d at 598, 485 N.Y.S.2d at 238; *cf.* People v. Selikoff, 35 N.Y.2d 227, 238, 318 N.E.2d 784, 791, 360 N.Y.S.2d 623, 633 (1974) (judge may not ignore provisions of law designed to insure appropriate sentencing by negotiating sentence not empowered to impose), *cert. denied*, 419 U.S. 1122 (1975); People v Lopez, 28 N.Y.2d 148, 151-52, 269 N.E.2d 28, 30, 320 N.Y.S.2d 235, 238 (1971) (judge and parties cannot restructure substantive law by negotiating sentence prohibited by statute).

[24] *See* 64 N.Y.2d at 207-08, 474 N.E.2d at 598, 485 N.Y.S.2d at 238 (Meyer, J., dissenting). In *Lawrence*, the dissent maintained that CPL § 210.20(2) provides only that the 45-day time limit of § 255.20(1) shall not apply to speedy trial motions. *Id* at 208-09, 474 N.E.2d at 599, 485 N.Y.S.2d at 239 (Meyer, J., dissenting); *see* CPL § 210.20(2) (McKinney 1982). Judge Meyer stressed that neither the second sentence of § 210.20(2) nor any part of § 255.20(1) or (3) indicated "in any way that the discretion granted by the latter two provisions was not to apply to a speedy trial motion." 64 N.Y.2d at 209, 474 N.E.2d at 599, 485 N.Y.S.2d at 239 (footnote omitted) (Meyer, J., dissenting).

[25] *See* 64 N.Y.2d at 208-10, 474 N.E.2d at 599-600, 485 N.Y.S.2d at 239-40 (Meyer, J., dissenting). In support of its argument, the dissent noted that prior to the enactment of Article 255, § 210.20 included a clause that was virtually identical to what is now § 255.20(3). *See id.* at 209-10, 474 N.E.2d at 599-600, 485 N.Y.S.2d at 239-40 (Meyer, J., dissenting). *Compare* Ch. 184, § 3, [1972] N.Y. Laws 401-02 (McKinney) (amended 1974) *with* CPL § 255.20(3) (1982). The former clause read:

> [T]he court, in the interest of justice and for good cause shown, may, in its discretion, entertain and dispose of the motion on the merits at any time before entry of a plea of guilty or commencement of trial if the motion is based upon a ground prescribed in paragraph (b) or (i) of subdivision one, or at any time before sentence if the motion is based upon any other ground.

Ch. 184, § 3, [1972] N.Y. Laws 401-02 (McKinney) (amended 1974). Since neither (b) nor (i) concerned a speedy trial motion, Judge Meyer argued that courts were given discretion to entertain speedy trial motions "at any time before sentence." *See* 64 N.Y.2d at 209-10, 474 N.E.2d at 599-600, 485 N.Y.S.2d at 239-40 (Meyer, J., dissenting). Furthermore, the dissent asserted that the clause was deleted from § 210.20(2), *see* Ch. 763, § 2, [1974] N.Y. Laws 1175 (McKinney), only because the legislature desired to consolidate the power to entertain

Judge Meyer concluded that the majority's failure to consider the merits lacked foundation.[26]

The first sentence of CPL 210.20(2) states that a motion to dismiss an indictment, except a speedy trial motion, "should be made within the *period* provided in section 255.20."[27] The period prescribed in 255.20 is "forty-five days after arraignment and before commencement of trial."[28] Thus, as the dissent correctly indicated, only the forty-five day time period of section 255.20 is expressly made inapplicable to speedy trial motions by section 210.20(2)[29] Moreover, because the forty-five day period for timeliness does not apply,[30] the remaining sentence of section 210.20(2) should be interpreted to provide merely that trial motions must be made prior to trial or entry of a guilty plea *in order to be timely*.[31] No reference was made by the legislature in section 210.20 to the discretion granted the court under 255.20(3);[32] therefore, it is submitted that the legislature did not intend to divest the court of discretion to dispose of untimely speedy trial motions.[33]

It is further submitted that the Court of Appeals unconstitu-

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untimely pretrial motions in one provision—§ 255.20(3). *See* 64 N.Y.2d at 210, 474 N.E.2d at 600, 485 N.Y.S.2d at 240 (Meyer, J., dissenting).

[26] *See* 64 N.Y.2d at 211, 471 N.E.2d at 601, 485 N.Y.S.2d at 241 (Meyer, J., dissenting). Judge Meyer noted that he would have reversed on the merits, asserting that the Calendar Judge's deferral of the motion constituted "good cause" justifying the consideration of the motion after trial. *See id.* (Meyer, J., dissenting)

[27] CPL § 210.20(2) (1982) (emphasis added).

[28] *Id.* § 255.20(1) (1982).

[29] *See* 64 N.Y.2d at 209, 474 N.E.2d at 599, 485 N.Y.S.2d at 239 (Meyer, J., dissenting) (speedy trial motion could not possibly be brought within forty-five day period).

[30] *See* CPL § 210.20, commentary at 48 (McKinney 1982).

[31] *See id.* (CPL § 210.10(2) describes when a motion to dismiss is timely) (emphasis in original).

[32] *See Lawrence*, 64 N.Y.2d at 209 n.2, 474 N.E.2d at 599 n.2, 485 N.Y.S.2d at 239 n.2 (Meyer, J., dissenting). As the dissent noted, the legislative history indicates no intention to withhold the power to consider untimely speedy trial motions from the discretionary authority of the courts under § 255.20(3). *See id.* (Meyer, J., dissenting) (citing THIRD ANN. REP. OF THE JUD. CONFERENCE ON THE CPL, *reprinted in* [1974] N.Y. Laws 1828 (McKinney); SECOND ANN. REP. OF THE JUD. CONFERENCE ON THE CPL (1972), *reprinted in* [1973] N.Y. Laws 2076-77 (McKinney)).

[33] Lower court rulings have supported the contention that the legislature did not intend to divest the courts of discretion with respect to the disposition of untimely speedy trial motions. *See, e.g.*, People v. Jordan, 96 App. Div. 2d 1060, 1061, 466 N.Y.S.2d 486, 488 (2d Dep't 1983) (court asserted that it had discretion to overlook defendant's failure to submit speedy trial motion before trial, but declined to exercise this discretion); People v. Smith, 91 App. Div. 2d 928, 929, 457 N.Y.S.2d 822, 823 (1st Dep't 1983) (trial court had discretion to accept oral speedy trial motion not made "upon reasonable notice to the people," and defer hearing until after conviction).

tionally deprived the accused of his right to a speedy trial. The Court's conclusion that the Calendar Judge's deferral of the motion constituted a waiver of the defendant's speedy trial right is contrary to the accepted principle that such a waiver must be exercised "knowingly and voluntarily."[34] It is suggested that the defendant should not be required to surrender this fundamental right because the failure to submit a timely motion occurred at the direction of the court and not by the defendant's own volition.

Carmen A. Pacheco

CPL § 700.10: 30-day limit on eavesdropping warrant begins on date of issuance

CPL 700.10 authorizes the issuance of eavesdropping warrants to certain law enforcement officers for the purpose of crime detection in New York State.[1] Consistent with federal guidelines,[2] CPL

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[34] *See* Barker v Wingo, 407 U.S. 514, 529 (1972) (prosecution has responsibility to demonstrate that claimed waiver of constitutional speedy trial right was knowingly and voluntarily made); People v Rodriguez, 50 N.Y.2d 553, 557, 407 N.E.2d 475, 477, 429 N.Y.S.2d 631, 633 (1980) (only "an intentional relinquishment or abandonment" of constitutional speedy trial right will be sufficient to constitute waiver) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); People v. White, 32 N.Y.2d 393, 399, 298 N.E.2d 659, 663, 345 N.Y.S.2d 513, 518 (1973) (waiver of constitutional speedy trial right must be both "knowingly and voluntarily" made) (citations omitted).

In *White*, while defendant's motion to dismiss for denial of a speedy trial was pending, the prosecution offered the defendant the opportunity to plead guilty to a lesser crime. *See* 32 N.Y.2d at 394, 298 N.E.2d at 660, 345 N.Y.S.2d at 514. This offer, however, was made only on the condition that the defendant accept it before his speedy trial motion was decided. *See id.* at 394-95, 298 N.E.2d at 660, 345 N.Y.S.2d at 514. Defendant subsequently pleaded guilty and was convicted. *Id.* The Court of Appeals reversed the conviction, holding that the waiver of the right to a speedy trial was coerced—contrary to the principle that a waiver must be exercised knowingly and voluntarily. *See id.* at 400-01, 298 N.E.2d at 666, 345 N.Y.S.2d at 519-20. The New York Court of Appeals has indicated that the right to a speedy trial in New York does not depend entirely on state statutes, but rests on a broader constitutional basis. *See* People v. Johnson, 38 N.Y.2d 271, 273, 275-76, 342 N.E.2d 525, 528-29, 379, 735 N.Y.S.2d 735, 737, 740 (1975); *cf.* Klopfer v. North Carolina, 386 U.S. 213, 222-26 (1967) (constitutional right to speedy trial is binding on states through fourteenth amendment). It is submitted, therefore, that in *Lawrence*, the Calendar Judge's deferral of the defendant's speedy trial motion effectively caused the defendant to waive involuntarily his right to a speedy trial, thereby raising constitutional issues that transcend the mere statutory requirements respecting speedy trial motions.

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[1] *See* CPL § 700.10(1) (McKinney 1985). CPL § 700.10(1) states

> Under circumstances prescribed in this article, a justice may issue an eaves-