USER'S NOTE

NOTE THIS FILE CONTAINS A QUICK MEMORANDUM TO SUPPORT A DEFENDANT'S RELEASE PURSUANT TO CPL 170.70 DUE TO THE FACT THAT THE MISDEMEANOR ACCUSATORY INSTRUMENT IS INSUFFICIENT.

THIS FILE ALSO CONTAINS SAMPLE SECTIONS FROM MOTIONS MADE TO DISMISS AN INFORMATION FOR INSUFFICIENCY. THEE SAMPLES HERE ARE TAKEN FROM MOTIONS REGARDING

INSUFFICIENT ALLEGATIONS OF ASSAULT LEVEL INJURIES

IN LOITERING TO USE DRUGS CHARGES, INSUFFICIENT OR CONCLUSORY ALLEGATION OF INTENT.

CASE ANALYSIS OF CRIMINAL POSSESSION OF STOLEN PROPERTY INTHE 5TH DEGREE 165.40

CASE ANALYSIS OF UNAUTHORIZED USE OF A MOTOR VEHICLE 165.05.

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MEMORANDUM FORMAT

To: The Honorable Ute Wolff Lally

Re: Memorandum of Law: Release of Incarcerated Defendant
Pursuant to CPL 170.70.
Case: Herbert Jackson 5664/88, 240.36 PL

MOTION FORMAT

CITY COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU, CITY OF LONG BEACH
_____X

PEOPLE OF THE STATE OF NEW YORK NOTICE OF MOTION

-against-

Defendant
_____X

THIS MOTION IS MADE PURSUANT TO CPL170.70 TO RELIEVE THE DEFENDANT OF UNLAWFUL IMPRISONMENT. THEREFORE, ON BEHALF OF THE DEFENDANT, WE ASK THE COURT TO MAKE AN EXPEDITED DETERMINATION ON THIS ISSUE SINCE EACH DAY INCREASES THE ILLEGAL PUNISHMENT.

SIRS:

Please take notice that upon the annexed and duly sworn to affirmation of ., and all the papers and proceedings heretofore had herein, the undersigned will move this court at a criminal term, Long Beach City Court, at 1 West Chester Street, Long Beach, NY, County of Nassau, State of New York on the 3rd day of December 1992 at 9:30 a.m. or as soon thereafter as counsel can be heard for an order granting the relief requested in this omnibus motion on behalf of the defendant, as follows:

FOR AN ORDER (RELEASE) pursuant to CPL 170.70 or 180.80 releasing the defendant on his own recognizance due to the failure of law enforcement to provide legally sufficient informations and/or reasonable cause for the arrest and detainment.

Wherefore, the defendant requests that the court grant the above relief, and

FOR SUCH OTHER, and further relief as to this Court may seem just and proper.

DATED: 11/30/92, NY

Yours,

CITY COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU, CITY OF LONG BEACH

_____X

PEOPLE OF THE STATE OF NEW YORK AFFIRMATION IN SUPPORT

-against-

Defendant

_____X

I, Robert Solomon, an attorney duly admitted to practice law in the State of New York, do hereby affirm under penalty of perjury that the facts stated herein are true, or I believe them to be true.

1. I am the attorney for the defendant herein and do make this motion on his behalf and with his approval.

2. The information herein is based upon documents and conversations which are a part of this case.

3. The defendant has been incarcerated for a period in excess of that permitted by law without the proof necessary to satisfy the standard of a felony examination.

4. As permitted by statute, I raised this 170.70 motion on the record in open court
on 11/30/92,.
for the purpose of ending what the defense believes is an unlawful incarceration pursuant to the terms of CPL 170.70, 100.15 and 100.45.

5. Wherefore, the defendant is respectfully seeking an order of release pursuant to article 170.70 of the Criminal Procedure Law releasing the defendant in his own recognizance because the district attorney's office has failed to replace the misdemeanor complaint with a misdemeanor information within the time prescribed by CPL 170.70.

6. Further, since this motion is for relief from unlawful incarceration of the defendant and is not a motion for discovery and NOT A MOTION FOR DISMISSAL, the defendant has still reserved his rights to make separate motions for dismissal and for discovery.

7. RELEASE OF INCARCERATED DEFENDANT PURSUANT TO CPL 170.70

CPL 170.70:

Upon application of a defendant against whom a misdemeanor complaint is pending in a local criminal court, and who, either

at the time of his arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff pending disposition of the action, and who has been confined in such custody for a period of more than five days, not including Sunday, without any information having been filed in replacement of such misdemeanor complaint, the criminal court MUST release the defendant on his own recognizance unless:(emphasis added)

1. The defendant has waived prosecution by information and consented to be prosecuted upon the misdemeanor complaint, pursuant to subdivision three of section 170.65; or

2. The court is satisfied that there is good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded replacement of the misdemeanor complaint by an information or a prosecutor's information within the prescribed period.

The key to applying CPL 170.70 lies in defining the terms "misdemeanor complaint", "district court information", "sufficient misdemeanor complaint" and a "sufficient district court information".

What are the requirements for establishing a misdemeanor complaint and a misdemeanor information, and what is the difference between these two instruments ? a. Both complaints and informations must satisfy the technical requirements of CPL 100.15(1 & 2) which are very clear and precise.

Furthermore, complaints and informations must satisfy CPL 100.15(3) requiring "...a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges". The requirements of CPL 100.15(3) are restated more plainly in CPL 100.40(1c) and (4b) which deals with sufficiency. In boiled down form, these provisions require that the instrument provide REASONABLE CAUSE for the arrest.

This reasonable cause for the arrest must be based on at least some evidence, observations or records of a legally admissible nature. Peo. .v Harrison, 58 Misc.2d. 636, 639; 296 N.Y.S.2d. 684, 688 (Dist. Ct. Nassau Co. 1968). An accusatory instrument which provides no evidentiary facts to support conclusory statements can be dismissed as defective. Peo. v. Penn Cent. RR. Co. 95 Misc.2d. 741, 417 N.Y.S.2d. 822.

Thus, complaints and informations must satisfy 100.15 (1 & 2) and must also contain nonconclusory, legally admissible reasonable cause for the arrest. If the accusatory instruments fails to satisfy these requirements, then the instrument is defective, no prosecution can be commenced based upon the instrument, and the instrument can be dismissed.

b. Unlike a complaint, an information must contain nonhearsay allegations of fact, establishing, if true, every element of the offense charged. CPL 100.40(1)(c). However, case law indicates that the allegations in the information may be

based on "admissible hearsay", and therefore, it may be more accurate to say that, if all allegations therein are accepted as true, an information establishes a legally admissible factual case against the defendant. Peo. v. Crisofulli, 91 Misc.2d. 424, 398 N.Y.S.2d. 120. A misdemeanor complaint is not required to contain nonhearsay allegations. Peo. v. Boyer, 105 Misc.2d. 877, 433 N.Y.S.2d. 936, rev'd 116 misc.2d. 931, 459 N.Y.S.2d. 344.

c. In the event the accusatory instrument fails to establish the elements of a misdemeanor information or of a misdemeanor complaint, the instrument can nevertheless be used to commence a local criminal court action. CPL 100.05. However, the instrument cannot be used to prosecute the defendant through final disposition or trial, CPL 100.10.4. In any event, if the instrument fails to establish an information, the provisions of CPL 170.70 may be applied to gain the defendant release on his own recognizance, assuming that the exceptions under CPL 170.70 (1 & 2) do not apply.

In effect, CPL 170.70 delineates the requirements needed by the court to establish the jurisdiction to remand the defendant. Thus, if the accusatory instrument fails to satisfy the requirements above, any detention becomes an unlawful detention by the court. Even where the defendant's prior criminal record is substantial, the court cannot remand him or set any bail other than release on one's own recognizance until jurisdiction has been given to the court.

Furthermore, the statute dictates that upon the defendant's application after the five day period, the defendant MUST be released unless one of the exceptions is met. Thus, a defendant who is not released upon a properly made 170.70 application is actually being illegally detained. The civil liability ramifications of this are matters for civil litigation and liability.

8. THE CASE AT BAR
LOITERING TO USE DRUGS 240.36 pl

In the case at bar, the complainant police officer states that the defendants "did intend to use illegal drugs within that area". The officer's allegation is completely conclusory, a matter of opinion, lacking any evidence, observation or legal records to substantiate these allegations. Peo. v. Harrison, 58 Misc.2d. 636, 639; 296 N.Y.S.2d. 684, 688. The information is defective. Furthermore, the defendant has not waived his right to prosecution by information (170.70.1) and the people have not shown good cause why the order of release should be denied (170.70.2). As such, the instrument does not constitute an information, the defendant has made no waiver of his right to be prosecuted by information, and no "good cause" has been shown to delay the defendant's release, and therefore, pursuant to CPL 170.70, the defendant must be released on his own recognizance.

With regard to specific insufficiencies in the accusatory

instruments:

The accusatory instrument provides a conclusory statement of the defendant's intent in being at the designated location. Accusatory instruments which provide no evidentiary facts to support conclusory statements can be dismissed as defective. Peo. v. Penn. Cent. R.R. Co. 95 Misc.2d. 741, 417 N.Y.S.2d. 822. In order to establish that reasonable cause exists for the arrest, the reasonable cause must be based on some evidence, observations or records of a legal nature. Peo. v. Harrison, 58 Misc.2d. 636, 639; 296 N.Y.S.2d. 684, 688.

In this case, we are presented with an accusatory instrument with an element of intent based on nothing except pure conjecture. Based on this alone, the accusatory instrument may be dismissed. Yet, if we scrutinize the instrument further, we realize that the instrument may even fail to present reasonable cause for the arrest. If this is true, then the accusatory instrument does not even satisfy the requirements to establish a misdemeanor complaint. That being the case, the people could never have answered ready on this case.

In People v. Robert J.L., 320 N.Y.S.2d. 456 (1971), Judge Marie G. Santagata presiding in this youthful offender bench trial, wherein the defendant was acquitted of the charge, held that a person is guilty 240.36 PL "only when evidence discloses pattern of behavior which transcends mere desire or intent, an overt act must be shown, that act must be of such nature and relevancy as to indisputably show the illicit purpose for the loitering and the statute cannot be made equivalent to a presumption of purpose, use or possession." No such overt act is present in this case.

9. Furthermore, pursuant to People v. Nowak, 46 AD2d 469, 363 NYS2d 142, the crime of loitering and of loitering to possess controlled substances does not apply to private homes or apartments which is where this offense took place. (Copy of case law attached).

10. The defendant has been incarcerated for a period longer than five days, not including Sundays. In fact, the defendant has been incarcerated for close to two weeks.

11. The defendant does not and has not ever consented to be prosecuted by a misdemeanor complaint.

12. Since this case has been in the district attorney's files since early November, there is no excuse for failing to convert the misdemeanor compliant into an information.

13. Wherefore the defendant should be RELEASED pursuant to CPL 170.70 pending final disposition of the case.

11/30/92

Affirmed:

ASSAULT FORMAT 120.00 PL CASE AT BAR

1. Insufficiency of the accusatory instrument:

In the case at bar, the supporting depositions of the complaining witnesses fail to allege facts sufficient to constitute assault level injury, see PL 10.00(9). The actual accusatory instruments themselves contain "to wit" clauses which actually do allege assault level injuries requiring "medical attention" or inducing "substantial pain". However, the defense finds it interesting that the police decided to allege "substantial pain"" when in fact the complainant's themselves never state anything about substantial pain anywhere in their supporting depositions. This clever artifice in drafting is nothing more than the police attempting to put words into the complainant's mouths. Nevertheless, since it is only the complainant's words that provide the "non-hearsay allegations of fact" required to create a sufficient information, the excess, fabricated, hearsay verbiage of the police is irrelevant.

The complaints taken with their supporting depositions do not allege assault level injuries as prescribed by case law. People v. Rolando, 12/17/90, App. Div 2d Dept. a bruised shoulder that was painful for a few days and a few scratches which did not cause any pain and no visit to the hospital for medical treatment held insufficient to prove "Physical Injury" under PL 10.00(9). See also Matter of Philip A., 49 NY2D 198; People v. Franklin, 149 AD2d 617. Peo v. Jiminez, 55 NY2d 895, 449 NYS2d 22, one centimeter cut insufficient to prove assault level injury; Application of Derrick M, 63 AD2d 932, 406 NYS2d 88, appellant struck respondent with a chain, respondents rib cage became black and blue but there was no bleeding held insufficient to prove assault level injury; People v. Ciccari, 90 AD2d 853, 456 NYS2d 103 complainant's subjective testimony that defendant hit her and she screamed in pain, insufficient to establish impairment of physical ability or substantial pain held insufficient to establish assault level injury; Peo v. Melcherts, 147 AD2d 594, 537 NYS2d 889, complainant's testimony of pain after defendant punched her in the stomach insufficient to establish physical injury to establish assault level injury; Peo v. Tabachnik, 131 AD2d 611, 516 NYS2d 312, complainant kicked in the thigh by defendant and complained of soreness. Thigh was black and blue. Held insufficient to establish assault level injury. Peo. v. Reed, 83 AD2d 566, 441 NYS2d, blows to side of head and nose resulting in bruises, headache, and minor pain, held insufficient to establish assault level injury; Matter of Antonio J, 129 AD2d 988, 514 NYS2d 156, victim testified he had black and blue face and sore ribs held insufficient to establish assault level injury. People v. John Jones, ___ AD2d ___ (2d dept 1986) laceration or cut held insufficient to establish assault level injury; Peo v Ruttenbur,

112 AD2d 13, 490 NYS2d 374 superficial scratches are insufficient to establish physical injury, absent details as to their extent, testimony that scratches caused "discomfort or pain" does not establish assault level injury. Peo. v. Smith, 10/21/91 complainant's testimony that he sought no medical treatment, that he had a cut on his ear, and that the blows he received from the defendant hurt, insufficient to establish physical injury.

Cases which cite assault level injury allege testimony by the complainant's that they received medical attention, broken bones, sutures, or allegations of "substantial pain" or physical impairment" did tend to establish assault level injury.

A careful reading of the complainant's supporting depositions reveals no assault level injuries and therefore the accusatory instrument has not been converted to an information.

CRIMINAL POSSESSION OF STOLEN PROPERTY
165.40 PL

People v. Gregory 147 AD2D 498 passenger in stolen automobile with screwdriver in ignition is insufficient to prove dominion and control.

UNAUTHORIZED USE OF A MOTOR VEHICLE
165.05 pl

IN RE RUBEN P 151 AD2D 487, PEO V. BUTLER 119 MISC 2D 1071, stand for the principal that mere momenta5ry presence in an automobile or in a vandalized automobile does not constitute sufficient dominion and control for unauthorized use of a motor vehicle.

OBSTRUCTING GOVERNMENTAL ADMINISTRATION AND RESISTING ARREST

5. Case law:

People v. Offen (attached) it is not a crime to refuse a police officers orders. Obstructing must be coupled with an authorized act (none underlying function being performed), a physical interference by the defendant (none alleged in the supporting depositions which actually have Mr. Ritter trying to close in on my client - a dangerous act as any lifeguard would agree, but the complainant is creating the danger, not the defendant). See also People v. Simon and People v. Ailey attached.

In light of the case law, the obstructing might not survive a pre-trial motion to dismiss, and would be hard pressed to survive a trial order of dismissal motion.

5. Reckless endangerment. I have been unable to find any case law accusing a defendant of reckless endangerment merely by his own passive conduct. My conclusion being that the defendant must actively intend to create a dangerous situation, he can't just be swimming along minding his own business until 8 life-guards tackle him. The defendant created no danger to anyone else. Mr. Ritter himself admits that the defendant was not in any danger.

HOW CAN YOU HAVE RECKLESS ENDANGERMENT IF NO ONE WAS IN DANGER AND NO ONE "INTENTIONALLY" CREATED A DANGEROUS SITUATION ?

Moreover, as I mentioned in 3 (d) above, how much danger could anyone be in if 8 lifeguards spent 30 minutes wrestling with the defendant in the water. They could have left him alone and waited for him to come in, and then give him a ticket.

In short, I hope the case law is helpful. Realistically, this case is rather stupid on both sides. Again, I think we have lifeguards on both sides, doing stupid, illogical things, which were more a product of egotistical stupidity on both sides than any criminal conduct or criminal intent.

Yours,

Attempts to cure

5. Even if the district attorney were to annex medical records to the complaint in an attempt to create an information, the medical records would still be insufficient because they are not subscribed and sworn to by the person who actually witnessed and recorded the information in those records.

Annex affirmation of service
legal back
exhibits
copies of case law or statutes