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## Criminal Law—People's Burden of Proving Defendant Not in the Throes of an Epileptic Attack

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materiality is not required to prove second degree perjury, if she must prove lack of jurisdiction she must have notice as to the basis of the jurisdiction.

PEOPLE'S BURDEN OF PROVING DEFENDANT NOT IN THE THROES OF AN EPILEPTIC ATTACK

A majority decision of the Court of Appeals<sup>78</sup> in *People v. Higgins*<sup>79</sup> reversed a conviction for first degree murder, since the People had failed to sustain their burden of proving beyond a reasonable doubt that, at the time defendant attacked the deceased, the defendant was not in the throes of an epileptic furor attack,<sup>80</sup> hence, the verdict of the jury was against the weight of the evidence.<sup>81</sup>

The prosecution had attempted to carry its burden by focusing attention on the defendant's motive and co-ordinated movements during and immediately following his alleged seizure, contending that nineteen or more blows to the head of the decedent and successfully operating a car in an alleged post-confusional state, as well as an apparent recollection of the crime, was inconsistent with any theory of having undergone a furor seizure. But the Peoples' experts, as well as the defendant's witnesses, conceded that the post-confusional state could include automatic type behavior, and although substantial recollection does refute any possibility of a seizure,<sup>82</sup> reconstruction through deduction was possible. Thus, motive became an important consideration.

*People v. Barber* presented a defendant who had unexplainedly attacked a husband and wife, friends of long standing, then set fire to their home, killing the wife.<sup>83</sup> The court reversed the conviction for first degree murder and stated that the motive was important on the issue of insanity. Here the People unsuccessfully attempted to show that the motive was to prevent the girl from relating to mutual acquaintances defendant's amorous adventures with her, but this was more of an unfounded suggestion by the prosecution rather than an inference from evidence adduced at trial.

The apparent lack of motive may well have been the controlling factor in the courts decision, for without some purpose intended by the defendant in committing the crime the equivocal nature of the testimony regarding memory

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78. The court split, four to three, on the issue of reversing because the verdict was against the weight of the evidence. The dissenting and concurring opinions did not detail their objections, but merely concluded that the court was invading the province of the jury, and concentrated on the failure of the trial court to charge the jury on intoxication, which was not the basis for decision.

79. 5 N.Y.2d 607, 186 N.Y.S.2d 683 (1959).

80. There are four main types of epilepsy; The grand mal, where the patient is completely helpless; petit mal, prevalent in children; psychomotor, during which the patient is out of contact but has seemingly purposeful movements; thalamic, the furor seizure characterized by strange attacks of rage, often manifested by swinging and hitting.

81. *People v. Kelly*, 302 N.Y. 512, 99 N.E.2d 552 (1951).

82. The post-confusional state is the recovery period of the patient from the clonic reactions of the seizure, during which time he may perform automatically while semi-comatose.

83. 115 N.Y. 475, 22 N.E. 182 (1889).

and co-ordinated movements proves too slender a reed upon which to support a judgment sending a man to the electric chair.

POWER OF GRAND JURY TO COMPEL WITNESS TO COMPLETE QUESTIONNAIRE

In *People v. Sheriff of New York*<sup>84</sup> relator, who had waived his immunity, was ordered by the Grand Jury to complete a financial questionnaire and to return and swear that the answers therein were true. Although he was willing to give oral testimony concerning the information requested he refused to complete and submit the questionnaire. For this refusal he was held in contempt and imprisoned. In a subsequent *habeas corpus* proceeding he challenged the power of the grand jury to compel other than oral testimony where documentary evidence did not previously exist.

The grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them or furnished by legal documentary evidence.<sup>85</sup> The appellant contended that when he answered all proper questions orally and stated that he had no financial status records already in existence he satisfied the grand jury's mandate, and that to compel the questionnaire in effect required him to create evidence where none already existed.

The Court of Appeals, 4-3, held that the grand jury can compel a witness to answer and submit a written questionnaire if it is reasonably intended to expedite the proceedings.<sup>86</sup>

Since the questions could be asked orally,<sup>87</sup> there is no reason why defendant should not be compelled to record them. The court reasoned that a defendant could obviously not supply the answers from unaided memory, and therefore he could repeatedly delay the proceedings by seeking adjournments to refresh his memory. Such continuing interruptions might so seriously delay the investigation by the grand jury that the defendant would himself be perpetuating an injustice.

The dissent reasoned that Section 248 of the Code of Criminal Procedure, literally construed, disallows compelling a witness to create documentary evidence.<sup>88</sup> Since the grand jury derives its power to obtain evidence from the Legislature, broadening the method of obtaining evidence is properly a legislative function.

Although perjury convictions have been sustained on the basis of these questionnaires, their validity has never been directly challenged.<sup>89</sup> Since the

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84. 6 N.Y.2d 487, 190 N.Y. Supp. 641 (1959).

85. N.Y. CODE CRIM. PROC. § 248. An exception exists when the witness is dead, insane, or can't with due diligence be found within the state.

86. *Supra* note 84.

87. *People v. Connolly*, 253 N.Y. 300, 171 N.E. 393 (1930).

88. N.Y. CODE CRIM. PROC. § 248.

In the investigation of a charge, for the purpose of indictment, the grand jury can receive no other than: 1. Such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence; . . . ."

89. *People v. Workman*, 308 N.Y. 668, 124 N.E.2d 314 (1954); *People v. O'Brien*, 305 N.Y. 915, 114 N.E.2d 470 (1953).