
COURT OF APPEALS

STATE OF NEW YORK

APL-2015-00171

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

JAMES BROWN,

Defendant-Appellant

BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY

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This Amicus Curiae brief is submitted in support of Point I of the brief of appellant James Brown, which contends that the lower court erred under CPL §30.30 in not requiring the prosecution to explain why it was not ready in court after having previously filed an "off-calendar" statement of readiness.

INTEREST OF THE AMICUS CURIAE

The Legal Aid Society ("Legal Aid") is the oldest and largest provider in the nation of legal services to indigent clients. Its Criminal Defense Practice handles more than 230,000 criminal matters for clients annually, representing the majority of criminal defendants in New York City.

The effective working of New York's "speedy-trial" statute, CPL §30.30, is a matter of great concern to the thousands of criminal defendants whose cases proceed beyond arraignment. Functioning properly, the statute is supposed to facilitate the prompt adjudication of criminal cases. But if frustrated by repeated prosecutorial unreadiness for trial, the statute's purpose can be defeated by chronic

delays that prolong the life of cases and force defendants to endure repeated unproductive court appearances or protracted pre-trial confinement in jail.

A prime cause of chronic delay is prosecutors' abuse of "ready" declarations, which essentially stop the "speedy-trial clock" and enable long periods of inaction to escape the consequences provided by the law. The case under review, People v. Brown, sets a dangerous precedent because it would allow an "off-calendar" statement of readiness, which is then followed by non-readiness when the case is actually in court, to go essentially unchallenged. Invoking presumptions automatically relieving the prosecution of any duty to explain its non-readiness, often after having claimed to be "ready," the appellate panel instead put the burden on the defense to prove that the prosecution's purported readiness had been invalid. This reversal of the burden of proof contradicted this Court's ruling in People v. Sibblies, which had placed the burden on the prosecution to satisfactorily explain its new posture of non-readiness.

Amicus Legal Aid urges that this Court make clear that, when the prosecution says it is not ready for trial on a case in which it had previously claimed to be ready, it has the burden to explain what changed circumstances account for its non-readiness. The standard that it must meet to sustain the validity

of its earlier claim of readiness is to show that exceptional circumstances arose that prevented it from going forward with the trial.

Clarifying the burden and standard in this manner is consistent with this Court's rulings on CPL §30.30 and effectuates the purpose of this vitally important law, the practice under which has dramatically deviated from the course intended by the Legislature.

BACKGROUND

The "Off-Calendar" Statement of "Readiness"

The "off-calendar" statement of "readiness" for trial is a device by which the prosecution stops the running of the CPL §30.30 clock. It does so on a day on which the case has not been scheduled for trial. Ordinarily, the scheduled date for trial had been previously set to occur weeks, or months, in the future.

This device, although often employed, is an anomaly. The prosecution suddenly declares itself "ready" for a trial on a day that the case cannot be tried

because neither the defendant nor defense counsel is in court, and the case is not on the court's calendar for any purpose.

The incongruous nature of the claim of "ready" is not so much its filing, which is a method to signal readiness allowed by People v. Kendzia, 64 NY2d 331 (1985), but its attendant circumstances. Very often, on the previous trial date, when the requisite parties were present in court, the prosecution had admitted that it was "not ready" and sought an adjournment. The "off-calendar" declaration of "readiness" then is filed, usually early in the adjournment period, stopping the clock for the rest of the period.

This familiar sequence was followed in the Brown case. As usual, no move by the prosecution to advance the case was made along with the off-calendar filing. The prosecution was then "not ready" at the next court appearance.

In People v. Stirrup, 91 NY2d 434 (1998) this Court sanctioned a limited use of the off-calendar statement of readiness. It allowed a notice of readiness served off-calendar to stop the running of the speedy-trial clock for the ensuing 48-day period. The opinion stressed that "a mere empty assertion of readiness" would not suffice; only "actual readiness" would. Id. at 440.

Three crucial facts limited the reach of the Stirrup ruling. First, the ready statement under review was the sole off-calendar claim of readiness made in the case. Second, the defense did not challenge, but virtually conceded, the actual readiness of the prosecution. Third, the prosecution actually was ready at the end of the adjournment period. Id.

The Proliferation of Off-Calendar Filings after Stirrup

Despite the limiting facts of the Stirrup decision, lower court rulings in its wake allowed a radical expansion of the use of the off-calendar statement of readiness. One way was to extend its clock-stopping function even where the prosecution was not ready at the next court appearance, unlike in Stirrup. Such decisions also made plural the number of occasions on which the prosecution could claim readiness off-calendar; Stirrup had allowed only a single such occurrence.

People v. Douglas, 264 AD2d 671, 671-72 (1st Dept. 1999) exemplified this multiplication. It said that "the certificates of readiness the People filed subsequent to answering not ready on August 2, 1994, January 25, 1995, and February 8,

1995," served "to toll the 'speedy-trial clock' from running for the remainder" of the adjournment periods (citing Stirrup).

The Douglas opinion also erected a "good faith" presumption in favor of any certificate of readiness, despite the People's subsequent unreadiness at the next calendar call. It cited People v. Acosta, 249 AD2d 161 (1st Dept. 1998) in support of this proposition, although that decision never mentioned "good faith." The Douglas opinion did not cite People v. Anderson, 66 NY2d 529 (1985), in which this Court had squarely rejected the use of "good faith" as an element in judging the validity of a statement of readiness.

Notwithstanding this Court's ruling in Anderson, subsequent lower court cases explicitly applied a "good faith" standard in upholding statements of readiness despite "the People's unreadiness at the subsequent calendar calls." People v. Camillo, 279 AD2d 326 (1st Dept. 2001) (citing Douglas, Stirrup, and Acosta). See also People v. Bosse, 17 Misc.3d 1122 (Crim. Ct. Kings Co. 2007) (seven "not ready" admissions by prosecutor after prior declarations of "readiness;" six "good faith" mentions by judge).

People v. Huger, 22 Misc.3d 1137 (Sup. Ct. Queens Co. 2009), involved 11 instances of non-readiness after a claim of readiness early in the case. The court pointed out that the "announcements that the People are 'not ready' on consecutive court appearances is bound to raise doubts as to the People's true state of readiness." Nevertheless, citing Camillo, it asserted that it had no basis to question prior claims of readiness in the case. Slip op. at 6-7.

The frequent use of the "off-calendar" statement of readiness after Stirrup resulted in substantial swaths of real-time delay that were not being charged to the prosecution. Once the readiness certificate was filed, the case was considered to be in a "post-readiness" posture, in which lengthy delays were excluded from CPL §30.30 calculation. See People v. Brothers, 50 NY2d 413, 417 (1980).

People v. Stewart, 21 Misc.3d 1109 (Crim. Ct. NY Co. 2008) illustrates how this worked. The opinion stated: "On March 10 the People were not ready, and the case was adjourned to June 9 for trial. On March 11, the People served and filed a certificate of readiness. Thus, 1 day is chargeable to the People (see People v. Stirrup, 91 NY2d 434, 440 [1998])." 21 Misc.3d 1109, slip op. at 4.

The prosecution's prompt filing of the off-calendar statement of readiness, one day after stating in court that it was "not ready," enabled the three-month adjournment that followed to be excluded from speedy-trial calculations. The judge's perfunctory citation of Stirrup reflected an assumption that this Court's decision compelled such a result. Completing this very representative scenario was the prosecution's unreadiness on the June 9 adjourned date. Id.

Similar facts produced the same result in People v. Farrell, 21 Misc.3d 579 (Sup. Ct. Bronx Co. 2008). In the morning of February 11, the prosecution said it was "not ready;" in the afternoon, after the defendant and counsel had left the courthouse, it filed a certificate of readiness. The ensuing 77-day adjournment period was excluded from speedy-trial calculations. The court said it was "legally unable," under Stirrup, to charge the People with the entire 77-day period. The prosecution was then "not ready" on the next three court dates following the adjournment. Slip op. at 10.

These lower court cases illustrate how Stirrup, which dealt with a single unchallenged statement of readiness, had been distended to countenance prosecutorial gamesmanship and to immunize long periods of the resulting delay from CPL §30.30 consequences.

Chronic Unreadiness and Delay

The proliferation of "off-calendar" statements of readiness, followed by in-court admissions of non-readiness, has had a ruinous effect on the administration of justice. The delay in the resolution of criminal cases, a serious affliction before Stirrup, markedly worsened in subsequent years.

The mean duration of a criminal case before occurrence of a trial became longer and longer. The age of a case at trial before a jury in New York City Criminal Court in 2003, for example, was 298 days. By 2014, it had become 570 days, almost 20 months. See 2014 Annual Report of Criminal Court of the City of New York, p. 50. It bears emphasis that the 570-day figure represents an average. That prolonged duration should be viewed in light of the statutory limit of 90 days for an A misdemeanor prescribed in CPL §30.30(1)(b).

It should also be viewed in the light of the practice of some prosecutorial offices in New York City of routinely declaring "ready for trial" at the arraignment of a misdemeanor. See *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 Colum. J.L. & Soc. Probs. 223, 249-51 (Winter 2015) (discussing the practice).

Adjournment periods often last for months in Criminal Court. With the entire life of the case thus maneuvered into a "post-readiness" posture, little time is charged to the prosecution.

Such a stratagem does not just stop the speedy-trial clock; it disables the clock.

Even when an accused is not incarcerated before trial, prosecutions that last for years subject individuals to the aggravation and expense of multiple court appearances at which nothing happens. A day in court may entail missed school or work, or burdensome child-care arrangements. A common motivation among defendants eventually pleading guilty is simply to put an end to the onerous court appearances. The prosecution can thus attain a conviction simply by prolonging the ordeal, without ever producing any evidence to a trier of fact.

More troubling still is the plight of those accused individuals forced to await their trial while incarcerated. In New York City, thousands of such pre-trial detainees are held at Rikers Island.

The recent case of Kalief Browder is an illustration of how abuse of the "ready rule" can subject an accused to years of incarceration before trial. (A detailed account of Mr. Browder's case is presented in Jennifer Gonnerman, *Before the Law*, The New Yorker, Oct. 5, 2014, pp. 26-32.)

Shortly before his 17th birthday in May 2010, Browder was charged with robbing a backpack; the complainant accused him two weeks after the alleged incident. Unable to make the bail of \$3,000, Browder was remanded to Rikers Island. He spent the next three years there. A substantial portion of his jail time was spent in solitary confinement. He maintained his innocence throughout, even rejecting the prosecution's offer of "time served" if he pled guilty. Three years after his arrest, in May 2013, he was released. The charges were dropped.

Apart from the indictment obtained 73 days after Browder's arrest, there was no discernable activity by the prosecution to bring the case to trial. There were, however, 31 appearances in court on the case. And a notice of readiness was filed "off-calendar" by the prosecution shortly after indictment.

Portions of the court file reproduced in the article reveal a familiar "post-readiness" pattern:

June 23, 2011: People not ready, request 1 week.
August 24, 2011: People not ready, request 1 day.
November 4, 2011: People not ready, prosecutor on trial, request 2 weeks.
December 2, 2011: Prosecutor on trial, request January 3.

This was a representative six-month period in Browder's three-year confinement. The actual adjournment periods that resulted were six weeks or more, purportedly due to "court congestion." The article explains how the speedy-trial clock was largely neutralized:

As long as a prosecutor has filed a Notice of Readiness, however, delays caused by court congestion don't count toward the number of days that are officially held to have elapsed. Every time a prosecutor stood before a judge in Browder's case, requested a one-week adjournment and got six weeks instead, this counted as only one week against the six-week deadline. Meanwhile, Browder remained in Rikers, where six weeks still felt like six weeks -- and often much longer.

Id. at 28.

The latter six months of 2012 showed the same pattern.

June 29, 2012: People not ready, request one week.
September 28, 2012: People not ready, request two weeks.
November 2, 2012: People not ready, request one week.
December 14, 2012: People not ready, request one week.

"By the end of 2012," the author noted, "Browder had been in jail for nine hundred and sixty-one days and had stood before eight different judges." None apparently ever questioned the validity of the "readiness" that preceded the years-long string of "People not ready" admissions and requested adjournments.

Id. at 30.

The ordeal of Kalief Browder exemplifies the disabling of our speedy-trial law. His experience of long-term pre-trial confinement is hardly unique to his case. As of April 2015 there were 400 people who had been held in Rikers Island for over two years awaiting their trials. More than 1,500 pre-trial detainees had been incarcerated more than a year. See Michael Schwirtz and Michael Winerip, *New Plan to Shrink Rikers Island Population: Tackle Court Delays*, New York Times, Apr. 14, 2015.

CPL §30.30 (2)(a) entitles a person accused of a felony to release within 90 days if the prosecution is not ready by then. The years of actual confinement endured by many is testament to how far the reality of CPL §30.30 practice has migrated from the original purpose of the Legislature to expedite the trial process.

As the New York Times stated in an editorial decrying the bail system:

By the thousands, they sit in dangerous prisons like the Rikers Island complex for months, sometimes years, because they cannot afford bail as low as \$1,000. After months of delay, many simply give up, plead guilty, and accept what is often a rotten deal that sends them back into society with a criminal record.

"Pretrial detention can tear apart the very fabric of people's lives," [Judge Lippman has said.] They lose their jobs, their housing. They can lose their place in school or their health in these rough and unsafe prisons.

Editorial, *Bail Reform for Indigent Suspects*, Oct. 3, 2015, A22.

These deleterious real-life consequences of confinement are magnified when the period lasts for years, not just months, due to the manipulation of abstractions like "presumption" and "ready" and "court congestion" to the detriment of those awaiting their trials.

The Sibblies Correction

In People v. Sibblies, 20 NY3d 1174 (2014), this Court for the first time addressed the off-calendar statement of readiness that is followed by a statement of non-readiness at the next appearance. The question to be determined was what

effect this non-readiness, coupled with a request for an adjournment, had on the validity of the prosecution's prior claim of readiness.

The facts in Sibblies involved an assault upon an officer. The prosecution had filed a certificate of readiness off-calendar on February 22, 2007. At the next court appearance on March 29, it said that it was not ready because it was still seeking the officer's medical records, and requested an adjournment.

The trial court held that the readiness statement was not rendered illusory by the subsequent unreadiness. The Appellate Division upheld this ruling. People v. Sibblies, 98 AD3d 458 (1st Dept. 2012). Its opinion accepted the prosecution's argument on the appeal that its statement of readiness had been made "in good faith," and that it could have tried the case without the medical records. Id. at 459-60.

This Court unanimously reversed, with two concurring opinions, each with three votes. Both opinions stated that a statement of non-readiness after an earlier claim of readiness required an explanation by the prosecution to show that the earlier claim of readiness was not rendered invalid by the subsequent unreadiness. The Lippman concurring opinion would require the People to "demonstrate that

some exceptional fact or circumstance arose after their declaration of readiness as to render them presently not ready for trial." 22 NY3d at 1178 (Lippman, J., concurring). The Graffeo concurrence likewise required an explanation for the change from ready to not ready. Id. at 1181 (Graffeo, J., concurring) ("Significantly, the prosecutor gave no explanation for the change in circumstances between the initial statement of readiness and the subsequent admission that the People were not ready to proceed without the medical records.") In each opinion, the earlier claim of readiness was judged to be invalid.

Except for the difference over whether the prosecution must demonstrate "exceptional circumstances" or make some other showing, the Court was effectively unanimous on critical issues in judging the validity of a claim of trial readiness that is followed by an admission of non-readiness at a subsequent proceeding.

First, a single such episode triggers the requirement of some on-the-record justification or suitable explanation by the prosecution. No "presumption" obviates this obligation.

Second, the purported "good faith" of the prosecution is not relevant to the court's determination whether the prosecution had demonstrated that its actual readiness had been altered by changed circumstances necessitating an adjournment.

None of the judges joining in the Graffeo concurrence expressed disagreement with the policy or analysis contained in the Lippman concurrence. Rather, those judges chose to decide the case before them "on a narrower basis." Id. at 1181.

The Brown Regression

In the case under review, People v. Brown, 126 AD3d 516 (1st Dept. 2015), the Appellate Division upheld the validity of a statement of readiness filed off-calendar on July 17, 2007 that was followed by non-readiness on the next court date on August 8, 2007. The 22-day period was thus excluded from CPL §30.30 calculations.

Noting the two opinions that make up People v. Sibblies, the panel said that it would apply "the narrower approach of Judge Graffeo." Id. at 517. Despite

quoting the crucial "no explanation" basis of that opinion in finding the earlier readiness statement in Sibblies to be invalid, the Appellate Division in Brown did not apply that standard to the prosecution, which had given no explanation for its subsequent non-readiness nor detailed any "change in circumstances" causing that situation. Id.

The Brown opinion, rather, placed the burden on the defense to "submit evidence" to rebut the "presumption" of truth and accuracy of the statement of readiness. It stated that the subsequent non-readiness "in itself" was insufficient to rebut the presumption. Id. at 518-19. The appellate opinion, with no reference to the particulars of the prosecution's case, expressed its "inference" that the prosecution had decided to proceed with a minimal prima facie case. The prosecution was not required "to explain the change in circumstances." Judge Graffeo's concurrence in Sibblies had deemed such an omission to be "significant[]." 22 NY2d at 1181.

ARGUMENT

POINT I

THE PROSECUTION MUST HAVE THE BURDEN TO SHOW THAT CHANGED CIRCUMSTANCES CAUSED ITS NON-READINESS AFTER HAVING CLAIMED TO BE READY.

The record in the Brown case is conspicuously bare of facts revealing why the prosecution, which had made an off-calendar "ready" declaration on July 17, 2007, yet was "not ready" on the scheduled trial date of August 8, 2007. The prosecution offered no explanation on the record, and the lower court made no inquiry.

This Court's ruling in People v. Sibblies underlined the need for such an explanation. Yet the Appellate Division's decision in Brown assumed that none was required. This posture recalls the pre-Sibblies approach by which some lower-court decisions had allowed long-term stoppage of the "speedy-trial clock" by a pattern of ready/not ready maneuvering by prosecutors, with no explanations given or demanded, and no consequences under CPL §30.30. (See cases at 5-8.)

The Court Below Misapplied the Presumption of Readiness

In the pre-Sibblies period, the creation of a meaningful record explaining a ready/not ready pattern was often blocked by the invocation of presumptions. These presumptions were not drawn from this Court's decisions, but were unilaterally erected by lower courts.

One such presumption awarded to the prosecution was the "good faith" of any certificate of readiness. See, e.g., People v. Douglas, 264 AD2d 671, 671-72 (1st Dept. 1999) ("good faith" presumed, despite repeated subsequent unreadiness); People v. Camillo, 279 AD2d 326 (1st Dept. 2001) (same).

None of the lower courts' decisions relying on a presumption of "good faith" cited this Court's ruling in People v. Anderson, 66 NY2d 529 (1995), in which it had squarely rejected that analysis. Anderson was a grouping of five cases presenting readiness issues. In two of them, Anderson and Salsedo, this Court took pains to explain that the lower courts' reliance on the "good faith" of the prosecution was an erroneous basis for judging the validity of a statement of readiness. Id. at 538-39. "[P]ostreadiness delay is not excused because inadvertent," the opinion said, "no matter how pure the intention." Id. at 535-36.

An analysis focusing on "good faith," whether presumed or not, focuses on the subjective state of mind of an individual prosecutor. This is simply not a feature of proper CPL §30.30 analysis; the statute refers to "the People" throughout. The subjective "good faith" of a corporate entity is an analytic incongruity, too elusive to prove or disprove. In any case, the Sibblies Court explicitly assumed the good faith of the prosecution, but based its ruling on objective evidence. 22 NY3d at 1179 (Lippman, J., concurring).

The Brown opinion did not explicitly cite the words "good faith," but its reasoning evoked such a "state of mind" analysis. It based its affirmance partly on an "inference" that "the People made an initial strategic decision to proceed, if necessary, with a minimal prima facie case." 126 AD3d at 519. The prosecution's off-calendar statement of readiness, of course, contained no such qualification. The appellate court's "inference" was a speculation that substituted for the fact-based analysis that should have been made in the trial court.

The other form of presumption is that a statement of readiness is "truthful and accurate." See, e.g., People v. Acosta, 249 AD2d 161, 161-62 (1st Dept. 1998). This presumption can be warranted, depending on the circumstances. A

proper application would be when the prosecution has stated readiness and maintained that readiness, as in Stirrup. In the absence of a fact or occurrence that is inconsistent with actual readiness, the presumption of truth and accuracy can serve as the equivalent of proof of readiness.

The presumption cannot continue to operate, however, when facts may call into question the reality of a claim of readiness. Such an occurrence inconsistent with readiness would be the prosecution's admission of non-readiness at a subsequent proceeding and request for an adjournment. People v. Sibblies recognized the distinction: "Stirrup, however, appeared to address the situation where the People declare readiness off-calendar and remain ready at the next appearance, not where, as here, the People declare readiness off-calendar only to declare themselves unready at the next appearance." 22 NY3d at 1177. (Lippman, J., concurring) The Graffeo concurrence did not dispute that such a ready/not ready sequence called for an explanation by the prosecution of what circumstances had changed. Id. at 1181.

The Brown opinion erred in invoking the presumption of truth and accuracy in a context where, under Sibblies, it should not apply, namely, "where the People declare readiness off-calendar only to declare themselves unready at the next

appearance." Id. at 1177. In this situation, reliance on the presumption mistakenly dispenses with the required prosecutorial explanation and judicial scrutiny.

The Burden to Explain Must Be on the Prosecution

Besides employing the presumption to lift the burden that this Court had placed on the prosecution, the Brown opinion shifted the burden to the defense to submit "proof" that the People's off-calendar statement was inaccurate. But the defense is rarely in a position to prove the true state of the prosecution's readiness at a particular point in time, especially when it had been asserted "off-calendar." The details proving or disproving readiness or non-readiness are generally in the hands of the prosecution.

Moreover, relieving the prosecution of its duty to explain impedes the creation of the record that is essential for judicial review. As this Court has emphasized, "it is the People's burden to ensure, in the first instance, that the record of the proceedings at which the adjournment was actually granted is sufficiently clear to enable the court considering the subsequent CPL 30.30 motion to make an informed decision as to whether the People should be charged." People v. Cortes, 80 NY2d 201, 215-16 (1992) (citations omitted).

This existing rule covers the "People not ready" appearance, at which an adjournment is usually sought by the prosecution. To avoid being charged for the adjournment, the prosecution must make a record of what necessitated it. The obligation is serious. Its failure to do so in Cortes, for example, resulted in its being charged the subsequent 44-day period.

There is plainly an overlap, on the one hand, of the record that must be made regarding the prospective adjournment, and, on the other hand, the record that is relevant to the post-Sibblies determination: whether the reasons necessitating the adjournment call into question the validity of a prior statement of readiness. It would make no sense to excuse the prosecution from its longstanding duty as to the former because the record would shed light on the second issue as well.

It is the prosecution that has access to the pertinent facts. It can put on the record whether its inability to proceed is due to an unavailable witness, to tests not performed, to documents not obtained, or to the absence of an individual prosecutor. A record left bare by the prosecution serves no legitimate interest.

The facts of Sibblies accentuate the point. The prosecution stated on the record that it was not ready because of its need for medical records. This fact -- inconsistent with actual readiness -- was the basis for this Court's ruling that the previous claim of readiness was illusory. But before the prosecution's in-court admission, the defense had been in no position to know which documents the prosecution considered essential and had not yet obtained.

Similarly, in People v. Bonilla, 94 AD3d 633 (1st Dept. 2012) the prosecution cited a "need for further investigation" in requesting an adjournment after having claimed to be ready for trial. The Appellate Division concluded this reason for unreadiness "rendered the initial statement of readiness illusory," in the words of Judge Graffeo's concurrence, which approvingly cited the decision. 22 NY3d at 1181.

Yet the defense would have had no way of knowing on its own whether the state of the prosecution's investigation was complete or not. In Bonilla and Sibblies, the prosecutors admitted the reasons for their unreadiness on the apparent supposition that the earlier claims of readiness were unaffected by the revelations.

A rule placing the burden on the defense would be an incentive for prosecutors to be less forthcoming when stating "not ready." Courts and defendants would be deprived of the information necessary to determine whether speedy-trial rights were violated by premature declarations of readiness.

POINT II

THE STANDARD THE PROSECUTION MUST SATISFY TO MEET ITS BURDEN IS TO SHOW THAT EXCEPTIONAL CIRCUMSTANCES CAUSED ITS NON-READINESS.

In the wake of the Court's separate opinions in Sibblies, lower courts have applied different standards in judging the validity of an off-calendar readiness statement that is followed by non-readiness in court. Some have applied the exceptional circumstance test laid out in the Lippman concurrence. See, e.g., People v. Ramos, 45 Misc.3d 1219, Slip. op. at 3 (Crim. Ct. Queens Co. 2014) ("the People have failed to demonstrate that an exceptional fact or circumstance arose after their declarations of readiness, so as to render them not ready for trial on the next court date (Sibblies at 1178).").

Other courts have cited the Graffeo concurrence in requiring an explanation from the prosecution where it "filed a statement of readiness off-calendar and on

the subsequent date [was] not ready." See People v. Monegro, 49 Misc.3d 1202, Slip op. at 3 (Sup. Ct. Bronx Co. 2015). See also People v. Kelly, 44 Misc.3d 1211, Slip op. at 3 (Crim. Ct. Kings Co. 2014) (readiness illusory absent justification for the subsequent unreadiness); People v. Johnson, 44 Misc.3d 469, 473-4 (Crim. Ct. Queens Co. 2014) (earlier statements of readiness deemed invalid due to subsequent unexplained non-readiness).

On the other hand, People v. Brown has interpreted the Graffeo concurrence to leave the wall of pre-Sibblies presumptions intact and to place a burden of proof on the defense. See also People v. Farrell, 47 Misc.3d 524, Slip op. at 9 (Crim. Ct. Queens Co. 2015) (requiring "proof" from defense that statement of readiness was not in "good faith").

This Court can bring uniformity to this currently inconsistent application of standards with a ruling that the prosecution must show that exceptional circumstances were responsible for its non-readiness after having previously claimed to be ready. This standard has already been laid out in the Lippman concurrence in Sibblies. It is drawn from the text of the statute and best effectuates its purpose.

The three judges joining that opinion stated:

We would hold that, if challenged, the People must demonstrate that some exceptional fact or circumstance arose after their declaration of readiness so as to render them presently not ready for trial. The requirement for an exceptional fact or circumstance should be the same as that contained in CPL §30.30(3)(b)...

If the People cannot demonstrate an exceptional fact or circumstance, then the People should be considered not to have been ready when they filed the off-calendar certificate, and the time between the filing and the following appearance cannot be excluded and should be charged to them.

This rule flows from the purpose of the statute. It is intended to expedite, not delay the defendant's ability to seek resolution of a case. Indeed, allowing, without scrutiny, declarations of readiness off-calendar and subsequent declarations of unreadiness at the next court appearance creates the possibility that this scenario could be reenacted ad seriatim. But CPL 30.30 is not a mechanism for filibustering trials.

22 NY3d at 1178. The reenactment of the ready/not ready scenario, unfortunately, is more than a possibility, as the recent history of speedy-trial practice shows. The phenomenon of "readiness in the air without readiness on the ground" identified in Judge Lippman's concurrence has become a chronic impediment to the expeditious functioning of CPL §30.30 that the Legislature intended. Id.

As this Court has stressed, "the dominant legislative intent informing CPL 30.30 [was] to discourage prosecutorial inaction." People v. Price, 14 NY3d 61, 64 (2010) (citations omitted). The ready/not ready syndrome, without judicial scrutiny, subverts that purpose. It has allowed prosecutorial inaction, masked by "off-calendar" filings that assert ostensible readiness, to give many cases the appearance of movement toward trial, while they are in fact immobilized in a "speedy-trial" system that has been turned against itself.

The exceptional circumstances standard is especially suitable for ensuring that a declaration of readiness reflects actual readiness. CPL §30.30(3)(b) enables the prosecution to escape being charged for delay when it can show that its unreadiness is due to an exceptional circumstance such as "the sudden unavailability of evidence," despite the exercise of "due diligence."

This standard affords latitude to the prosecution to avoid being disadvantaged by unforeseeable problems in the preparation of its case. It also provides that a sufficient record be made for court review, with a specific uniform standard for all courts to apply. The exceptional circumstances standard also has the advantage of a well-developed body of caselaw that can guide prosecutors and

judges in fulfilling their responsibilities. See, e.g., People v. Price, 14 NY3d at 64; People v. Harris, 49 Misc.3d 1206 (Crim. Ct. NY Co. 2015) (citing cases).

Most important, the standard will enable CPL §30.30 to accomplish its intended purpose to expedite cases to trial rather than to frustrate their progress. When the prosecution declines to proceed on a date that it has led the parties to believe it would be ready for trial, lawyers, judges, witnesses, members of the public, and especially accused individuals experience different levels of disruption and imposition. A change of posture with such ramifications should not be undertaken casually, or as a tactic to stop the speedy-trial clock from running as it should.

The prosecution could not have kept an accused person like Kalief Browder in jail for three years if it had had to demonstrate that the reasons for its inactivity met the exceptional circumstances test. In case after case, the prospect of making that showing to a court will spur prosecutors to treat the "ready for trial" declaration with the seriousness it deserves. And courts, applying a uniform standard, will be able to judge whether a prosecution's diversion from that commitment had been warranted by the circumstances put forth on the record.

CONCLUSION

For the foregoing reasons, this Court should clarify that, to preserve its "ready" status under CPL §30.30, a prosecution that changes its posture from ready for trial to not ready has the burden to show that an exceptional fact or circumstance arose after the ready declaration to render it not ready for trial.

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Respectfully submitted,

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