# PETIT JURY VERSUS GRAND JURY INSTRUCTIONS IN NEW YORK:
## Exploring A Legal Wilderness

By: Mark M. Baker

It has long been the rule in New York, as determined in People v. Calbud, Inc.,[1] that a prosecutor need not instruct the Grand Jury on the controlling legal principles of a case with the same "precision" which is required when a trial judge instructs a petit jury. Apparently, the only limitations are, a) that the instructions to the grand jurors "may not be so misleading or incomplete as to substantially undermine the integrity of the proceedings...,"[2] and, b) where a wholly exculpating (as opposed to a merely mitigating) defense is suggested by the Grand Jury evidence, the prosecutor is required to instruct on the applicable law.[3]

It seems that the Court of Appeals has explained only what need **not** be done in the Grand Jury. Surprisingly, the Court does not appear to have articulated what **should** be done by the judge at trial. Thus, the resolution of what constitutes greater "precision" with respect to legal instructions to a petit jury has been left to the Departments of the Appellate Division. But those courts have clearly undermined the clear import of Calbud, Inc.

The purpose of this article, therefore, through the vehicle of a recent case which I have litigated, is to alert the bar to what I perceive to be this underlying gap in our criminal jurisprudence. It is my hope that, as a result, a record will be made for an appropriate case to wind

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[1] 49 N.Y.2d 389, 396, 426 N.Y.S.2d 238 (1980); see also, People v. Batashure, 75 N.Y.2d 306, 311-312, 552 N.Y.S.2d 896 (1990).

[2] People v. Caracciola, 78 N.Y.2d 1021, 576 N.Y.S.2d 74 (1991).

[3] Peopld v. Valles, 62 N.Y.2d 36, 476 N.Y.S.2d 50 (1984); People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1987).

its way to Albany, where this issue will be squarely presented and whereby adequate procedural guidelines can be delineated by the Court of Appeals.

## I. The Facts in People v. Lee [4]

The main question presented in Lee's case was whether the instructing on the bare-bones statutory elements underlying the law of Attempt,[5] where the controlling provision had been dramatically embellished over the years by layers of judicial gloss (which, in turn, is reflected in New York's criminal Pattern Jury Instructions ["CJI"] published by the Office of Court Administration), was constitutionally deficient.

On July 9, 1995, sometime around 9:00 P.M., a person wearing dark clothes was observed by a police officer in proximity to the door at 4 Spur Lane, a privately owned residence in Old Westbury, New York, Nassau County. No effort was made by the individual to enter the house, nor was anything seen in the subject's hands. The person quickly disappeared into the darkness of the night.

Approximately ten minutes later, Peter Lee was discovered on the patio of the adjoining premises at 2 Spur Lane. He was about to open a car, which the police already ascertained to have been registered to him and to have had no authorization to be on the property.

Inside Lee's knapsack, the police discovered a "fanniepack" which was in turn found to contain various tools which could be utilized to effect a forcible entry into a building. Inside a plastic bag was discovered a black sweatsuit, damp to the touch with perspiration. Upon later being questioned by Nassau County detectives, Defendant claimed that he was not about to enter any of the subject homes because the "chemistry wasn't right." When later charging on the crime

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[4] __A.D.2d__, 665 N.Y.S.2d 314 (2nd Dept. 1997).

[5] PL 110.00.

of Attempted Burglary in the Second Degree, the Court merely instructed the jury that if a person, acting with such intent to commit a crime,

> ...engages in conduct which tends to effect the commission of that crime, he has then committed and maybe [sic.] found guilty of an attempted burglary in the second degree, even though the burglary was not actually completed or accomplished.

Counsel unsuccessfully requested the Court to charge in conformity with the then existing version of the more elaborate CJI.[6]

The jury convicted Lee of Attempted Burglary in the Second Degree,[7] with respect to 4 Spur lane. As to 2 Spur Lane, Lee was only convicted of the Class B misdemeanor of Criminal Trespass in the Third Degree.[8]

On appeal, in addition to challenging the sufficiency of the evidence of Attempted Burglary, Lee claimed that the Court's instructions were legally defective in not explaining, as reflected in the CJI, the full parameters of the law of Attempt. These arguments were rejected,[9] as was an application for leave to appeal further to the Court of Appeals.

## II. The Law of Attempt

There is compelling precedent to support Lee's arguments. Since "[t]he law does not punish evil thoughts...[citation omitted], nor does it generally consider mere preparation sufficiently dangerous to require legal intervention...[citations omitted],"[10] the fact remains that "...the right to think bad thoughts undeterred or unpunished by the criminal law has been protected by the

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[6] 1 CJI, PL 110.00, pp. 46-50 (1991).

[7] PL 110.00/140.25(2).

[8] PL 140.10(a).

[9] __A.D.2d__, 665 N.Y.S.2d 314 (2nd Dept. 1997).

[10] People v. Bracey, 41 N.Y.2d 296, 300, 392 N.Y.S.2d 412 (1977), rearg denied, 41 N.Y.2d 1010, 395 N.Y.S.2d 1027 (1977).

requirement that in order to be punished as an attempt, conduct must have passed the stage of mere intent or mere preparation to commit a crime,"[11] and come "'very near to the accomplishment of the intended crime'."[12]

In Lee's case, therefore, even assuming that he was the person dressed in dark clothes who was observed at 4 Spur Lane, it was still undisputed that he never even came close to effecting an entry at that particular "dwelling,"[13] let alone came "...within dangerous proximity to the criminal end to be attained...."[14] Lee **never** touched the door; he **never** approached a window; and he **never**, in any way, sought to enter.

## III. People v. Calbud, Inc.

Evidentiary considerations aside, the overriding injustice in Lee was the inability of the jury to have had any awareness, by virtue of the trial judge's severely circumscribed instructions, of all the ramifications underlying the law of Attempt. The specific correlation of this issue to the general question of the degree of precision required with respect to instructions to all petit juries is readily apparent.

In Calbud, Inc., the Court of Appeals concluded that the judicial interpretation of the element of "community standard" in the charged obscenity crime,[15] as requiring a statewide measure of analysis by constraint of People v. Heller,[16] was not required to have been given to the

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[11] People v. Mahboubian, 74 N.Y.2d 174, 189, 544 N.Y.S.2d 769 (1989); see also, People v. Acosta, 80 N.Y.2d 665, 593 N.Y.S.2d 978 (1993).

[12] Mahboubian, supra, at 74 N.Y.2d at 190. See also, Bracey, supra, 41 N.Y.2d at 300.

[13] PL 140.00(3).

[14] Bracey, supra, 41 N.Y.2d at 300.

[15] PL 235.00 (1)

[16] 33 N.Y.2d 314, 352 N.Y.S.2d 601 (1973),

Grand Jury. The Court initially observed that "[t]he primary function of the Grand Jury in our system is to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to criminal prosecution...[citations omitted]."[17] On the other hand, a petit jury, ".... has the obligation of assessing the evidence in light of the applicable legal rules and determining whether the People have proven the guilt of the accused beyond a reasonable doubt."[18] It was held to "...be unsound to measure the adequacy of the legal instructions given to the Grand Jury by the same standards that are utilized in assessing a trial court's instructions to a petit jury..."[19]

To support this conclusion, the Court recalled that the Criminal Procedure Law, "...on the one hand, directs the court or District Attorney to give legal instructions to the Grand Jury only '[w]here necessary of appropriate'...,[20] but, on the other hand, requires a Judge presiding over a trial before a petit jury to state in detail 'the fundamental legal principles applicable to criminal cases in general' as well as 'the material legal principles applicable to the particular case' and the 'application of the law to the facts'...."[21] Hence, the Court held that "...a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law."[22] In fact, it was noted that "[i]n the ordinary case, this standard may be met by reading to the Grand Jury from

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[17] 49 N.Y.2d at 394.

[18] Id.

[19] Id.

[20] See, CPL 190.25(6).

[21] See, CPL 300.10(2)

[22] 49 N.Y.2d at 394.

the appropriate sections of the Penal Law...[citations omitted]."[23]

## IV. The Calbud Aftermath

It is apparent that the Court of Appeals has never come to grips with just what such "precision" entails. Specifically, although it has referred to the different "...standards that are utilized in assessing a trial court's instructions to a petit jury..,"[24] the Court has never explained just what constitutes such a presumably higher standard of instruction.

In this vacuum, the various Departments of the Appellate Division have subsequently held that **even petit jury instructions** which merely track or "mirror" the statutory language of an applicable offense are legally sufficient.[25] In fact, the Third Department, in People v. Crampton,[26] later relied upon by the Second Department in People v. Gorman,[27] has specifically held that the mere tracking of PL 110.00 will suffice, and that the "dangerous proximity" concept articulated in Bracey and Mahboubian need not be imparted, even to petit juries.

Inexplicably, this whole body of case law flows from the Court of Appeals' discussions of charges **to grand juries** and the requisite pleadings in indictments, rather than what is appropriate in charging petit juries. But, Calbud, Inc. implies the obvious converse, viz., that,

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[23] 49 N.Y.2d at 395, n. 1; see also, People v. Darby, 75 N.Y.2d 449, 554 N.Y.S.2d 426 (1990).

[24] 49 N.Y.2d at 395.

[25] See, e.g., People v. James K., 236 A.D.2d 825, 654 N.Y.S.2d 67, 68 (4th Dept. 1997); People v. Williams, 216 A.D.2d 211, 212 , 629 N.Y.S.2d 230(1st Dept. 1995); People v. Wilkins, 176 A.D.2d 976, 977, 575 N.Y.S.2d 580 (2d Dept. 1991); People v. Kelly, 164 A.D.2d 767, 769, 558 N.Y.S.2d 956 (1st Dept. 1990), aff'g reversal on other grounds, 76 N.Y.2d 1013, 565 N.Y.S.2d 754 (1990); People v. Felton, 141 A.D.2d 839, 840-841, 530 N.Y.S.2d 179 (2d Dept. 1988); People v. Newton, 120 A.D.2d 751, 503 N.Y.S.2d 250 (2d Dept. 1986).

[26] 107 A.D.2d 998, 484 N.Y.S.2d 721 (3rd Dept. 1985)

[27] 150 A.D.2d 797, 542 N.Y.S.2d 225 (2nd Dept. 1989).

unlike a grand jury, a petit jury should be instructed more precisely. Consequently, the Appellate Division decisions holding that **even petit jury instructions** which track or "mirror" the statutory language of an applicable offense are legally sufficient, find no support in Court of Appeals jurisprudence.

Illustratively, because Calbud, Inc., strongly implied that a petit jury would have to be instructed on the appropriate community standard set out in Heller, that should be the rule as well in a prosecution for Attempt under PL 110.00. For in the latter instance, case law, as shown, has likewise significantly expanded upon the much more limited legislative enactment. Yet, as further shown, while this general point was undoubtedly made by the Court of Appeals in Calbud, Inc., **it was only done by implication**. Hence, the ability of the intermediate appellate courts to decide cases like Crampton and Gorman has not been specifically impeded -- even though a fair reading of Calbud, Inc. could only justify such holdings with respect to **grand jury** presentations, not petit jury instructions. Remarkably, research has not uncovered a single case -- certainly none decided by the Court of Appeals -- which cites Calbud, Inc., **in connection with issues surrounding petit jury instructions**. Thus, despite its ostensible admonition regarding the need for more precision in charging trial juries, Calbud, Inc., has only been cited in grand jury matters. Further, the Calbud, Inc. rule has become indistinguishable from the rule allowing the pleading of mere statutory elements in indictments,[28] thereby undermining the need for greater precision in petit jury instructions.

## VI. Conclusion

If Calbud, Inc., is to have any meaning at all in differentiating between the degree of necessary elaboration in instructions for grand juries on the one hand, and petit juries on the other,

[28] People v. Iannone, 45 N.Y.2d 589, 412 N.Y.S.2d 110 (1978).

then, when it actually comes time to charge a petit jury, such cases as Crampton and Gorman cannot be allowed to stand. For surely, if the Heller gloss as to PL 235.00(1) would have been at least implicitly required to be charged to a **petit** jury in Calbud, Inc., then, *a fortiorari*, the Bracey/Mahboubian/Acosta elaboration upon PL 110.00 -- as reflected in the Pattern Criminal Jury Instructions -- must be given to a petit jury as well. Hopefully, the Court of Appeals will soon redress this gap in the law with respect to the degree of precision to be generally required in petit jury instructions, and review a matter where the issue will again be squarely presented, and appropriately preserved.