MASS ARREST LAW--BASIC LAW AND TACTICS

IN PETIT MISDEMEANORS

In the District of Columbia most arrests which occur during political demonstrations are prosecuted under one of the two disorderly conduct statutes (22 D. C. Code § § 1107, 1121) by the Corporation Counsel in the District of Columbia Court. Some will be prosecuted under statutes barring of entranceways, streets, and sidewalks. The following is a brief description of the process in effect in April, 1970 for dealing with these cases and some tactical considerations for lawyers who handle them.

1. Collateral. All of the disorderly conduct and incommoding are included on a collateral schedule established by the Board of Judges of the Superior Court and by Park Regulations. The amounts of collateral are $10.00 and $25.00. When posting collateral at the precinct, an arrestee has the option of standing trial or forfeiting the amount of the collateral at that point. He should normally be advised not to enter a stationhouse forfeiture, but rather to obtain a trial date. This is because he retains the option to forfeit at two later points in time. He may therefore make a more intelligent decision after receiving counsel and being removed from the chaotic cellblock atmosphere.

2. Setting Aside Forfeiture. During mass arrests, it has been rare that attorneys were allowed to advise arrestees in the cellblocks before posting of collateral. Consequently, many forfeit without advice of counsel. This is often due to the self-serving advice of the police, sometimes sprinkled with a bit of coercion. Counsel who are later called upon to advise those who have forfeited collateral at the stationhouse should usually advise that a motion to set aside the forfeiture of collateral be filed. This is because the option to forfeit collateral remains open at two later points, and the possibility of a favorable result in the disposition conference should never be foreclosed for reasons that will soon appear.

A "motion to set aside forfeiture" may be filed on a form so denominated, obtained from the clerk's office in the Court of General Sessions. First, it must be filled out, and good reason given for the setting aside of the forfeiture (keep a copy for future use). The fact that the arrestee was not advised of any alternative to forfeiture or the consequences of his options is adequate reason. Second, the completed motion, signed by either counsel or defendant, must be signed by Assistant Corporation Counsel (acknowledging service, although a copy is not retained). Get your copy signed and dated also. Third, the original must be taken to the police liaison office where the officer's court date will be entered on the motion (and your copy). Fourth, the motion must be filed, along with a motion card, at the clerk's office (within 30 days after the forfeiture). Have your copy time-stamped. It is advisable that this be done before 10:30 A. M. so that the motion may be heard the same morning. Filing is immeasurably facilitated by going behind the counter to the motions desk, and arranging a hearing time with the motions clerk himself (presently Mr. Holmes). Sometimes the motion will be taken directly up to court at the time of filing. Failure to follow these suggestions often results in lost papers and incredible confusion. Fifth, once the motion is granted, counsel should

personally get it from the judge's clerk and deliver it to the police liaison office, and have your copy signed by an officer there "original received by_____(s) date and time." This helps to avoid the problem of the failure to notify the officer of the trial date, and a consequent delay. Sixth, appear with defendant on the trial date set, When you arrive, check with the motions clerk and ascertain whether he has docketed the case for trial. Be sure he sends the motion to D. C. Branch, Courtroom 17, rather than Traffic Court, as often occurs. You are then ready to proceed as if there had been no forfeiture. This complex process often deters lawyers from pursuing the matter. Its complexity alone argues for admission of lawyers to cellblocks, but this has been thus far an inadequate argument where the police are concerned.

3. Disposition Conferences. Whether a forfeiture is set aside or the defendant elects to stand trial at the precinct, he should nearly always participate in a disposition conference. Even though he is sure about the government's case, this discovery is often worthwhile. These conferences begin about 9:15 A. M. in Room_____the office of the corporation counsel. Counsel should arrive with his client shortly after 9:00 A. M. In the case of those who have had prior court forfeitures, a request of the judge in Courtroom 17 after 10:00 A. M. will allow a referral for a hearing with the corporation counsel. Counsel should notify the clerk who schedules conferences (who will be behind the railing up near the front counter with a clipboard) that he wishes a conference in his case. Tell the clerk this is a demonstration case and ask if Tom Johnson is holding conferences that day. If so, ask that he hold your conference. He is the most informed Assistant on demonstration law, and quite fair and reasonable. Second or third choices for conferences will depend upon the officer and the nature of the charge. Ken West and Barry are also reasonable.

The simplest dispositions occur when the officer fails to appear. If he has not arrived by 10:00 A. M., press an Assistant to "no paper" the case. While it is not counsel's duty to locate the officer, it facilitates matters to do so if he is in the building. This may be determined in the Police Liaison Office, Room_____. Another common disposition occurs where the officer who appears is a transporting officer rather than the arresting officer. Since he did not see defendant's conduct, he will be unable to testify. This happens either accidently, or due to the arresting officer's wish not to be identified.

The conference itself includes the officer(s), an Assistant Corporation Counsel, the defendant, his attorney, and any witnesses for the defendant. Tactics for the conduct of these conferences vary. Normally the officer leads off and tells his story briefly. The Assistant may have several questions for him. Counsel may then ask questions. It is suggested that full cross-examination await trial, and that only the more obvious questions be asked--for clarification of key points. This suggestion is subject to two exceptions. (1) Strong evidence given by the officer that directly contradicts that of a number of defense witnesses should usually not be questioned in the conference, unless the Assistant Corporation Counsel appears open to the suggestion of official perjury. Impeachment is more effective if foregone until trial. (2) If the judge in D. C. Court is a hanging judge, the conference result will usually be the final disposition,

since defendant should then forfeit if the case is prosecuted. Thus, the conference must be treated as a trial, and full cross-esamination undertaken.

Use of the testimony of defense witnesses including the defendant in this conference is generally dictated by the same two criteria. Additional factors arise here: (1) there may be a completely consistent story on both sides that presents a question of law alone, (2) an explanation for the officer's observations consistent with legal conduct, or (3) a situation where difference in observation between defense witnesses and the officer heavily weigh on the defense side. Reasons for not prosecuting outside the evidence should be argued by counsel after the evidence is heard. Attractive young female college students' cases present adequate non-evidentiary reasons to most assistants.

The Conference Result. The Assistant may either (a) Choose to prosecute (b) continue the matter for further investigation or (c) decide not to prosecute. In the case of a decision not to prosecute, he will make a green card and sticker, marked "no papers" and "refund collateral". The defendant must then take these to another room _____, where he will be given a case jacket and docket number. He should write down this number for his future use. He then goes to Courtroom 17, Third floor, and delivers the case jacket to the bailiff. The judge will sign the jacket, the case will be called, and the defendant told he is free to go. The bailiff will shortly deliver the case jacket to the financial officer where, upon presentation of his collateral receipt, defendant will obtain return of the collateral he posted. If he lost his receipt, he must obtain a duplicate form from the finance clerk, return to the precinct where he posted collateral and have it filled out, then return it to the finance officer. If collateral was posted by someone else, the other person must present the receipt and the case number. This may be done within two years, or by power of attorney.

Prosecution. If the disposition conference is unfavorably resolved, an information will usually be prepared and sent to Courtroom 17. The case will be called after awhile. The defendant may forfeit collateral simply by not being present, or by being present, and not answering the call. This decision should be conscious rather than inadvertent. It should depend upon (1) the evidence heard at the conference, (2) the witnesses available to the defendant, (3) the judge, and (4) the defendant's own wishes, and (5) experience in other cases. The risk of heavier fine or imprisonment must be carefully assessed.

The decision may not have to be made on the same day as the conference, however, A continuance may be requested and will usually be granted. Depending upon the judge, one may be sought until the following month when the judges rotate. A forfeiture is still available following a continuance. A continuance may often be sought and, if denied, defendant may forfeit in open court.

The Trial. Whether after continuance or on the day of the conference, a certain number of disorderly conduct cases will reach the trial stage. In spite of the possible penalty ($250 or 90 days or both), many defendants properly choose to contest the charges. The following is a summary of statutory and case law pertinent to disorderly conduct and incommoding charges. Cross-examination should be prepared, court reporter requested prior to trial. The Jencks Act applies to D. C. Court (Duncan vs. United States, 126 U. S. App. D. C. 371,373, 379 F. 2d 148 (1967). This means that the failure of

the government to produce the field arrest form, 251, or 255 or other written reports or verbatim transcriptions of their witnesses after direct examination must result in the striking of the witness' testimony. Lee vs. United States, 125 U. S. App. D. C. 126, 368 F.2d 834 (1966). For trial tactics generally see Law and Tactics in Federal Criminal Cases.

The Motion for judgement of acquittal should nearly always be made. It will often be based upon the failure of the government to prove a threat of breach of the peace. As the following material indicates, such a threat is normally essential to conviction.

The specifically itemized disorderly conduct statute is 22 D. C. Code § 1121:

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby.
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
> (2) congregates with others on a public street and refuses to move on when ordered by the police;
> (3) shouts or makes a noise either outside or inside a building during the nightime to the annoyance or disturbance of any considerable number of persons;
> (4) interferes with any person in any place by jostling against such person or unnecssarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or
> (5) causes a disturbance in any streetcar railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats or otherwise annoying passengers or employees,
>
> shall be fined not more than $250 or imprisoned not more than ninety days, or both.

Part (1) has been under attack recently on the ground of overbreadth (See e.g. Dombrowski v. Pfeister, 380 U. S. 479 (1965); Shelton v. Tucker, 364 U. S. 479 (1960); Thornhill v. Alabama, 310 U. S. 88 (1940); Stkkgold, 1968 W is L. Rev. 369) and on the ground of vagueness (see, e.g. Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). A motion to dismiss the information on these grounds should be made where part (1) is concerned, and a continuance requested for briefing.

Part (2) was upheld in Jalbert v. D. C., 221 A. 2d 94, That case was reversed in the U. S. Court of Appeals, and a very similar section was struck down in Cox v. Louisana 3794.51536. Where the intent to provoke provision is joined with the order to move on, the information should be attacked for overbreadth. Of this statute these two sub-sections are those generally used

in demonstration cases.

22 D. C. Code § 1107 reads as follows:

> (1) It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and (2) engage in loud and boisterous talking or other disorderly conduct or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street avenue, alley, road, highway, public part or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense.

The court has read into this statute a requirement that a threat of breach of the peace be alleged in the information and proved by the government. See, William v. District of Columbia, (no. 20,927 en banc). See, 58 Geo L. J. 200 and Adams v. United States, Washington L. Rep. 1585. It is also required under this section that the presence of three or more persons acting in concert for an unlawful purpose (Kiney v. District of Columbia, 130 U. S. App. D. C. 290, 400 F.2d 761 (1968).

Section 1107 really breaks down into two general charges. One is profanity and the other is incommoding a passageway. There are other code sections which ban incommoding of various places:

> § 22 3121 - obstructing public highway 9-123 (b)(6) obstruct passageway on capital grounds.
> 36CFR 50.30 - obstructing roadways or sidewalks in National Parks.
> § 19.304 of 6SA Regs - obstruction of entrances, corridors, etc. of government buildings.

Argue that there are two requisites to an incommoding conviction. First, under Adams, 97 Wash Law Rpts 1585, a threat of breach of the peace must be alleged and proven. The allegation that a breach of the peace may or might occur is inadequate as to speculative to comply with Adams or with Williams, the progentiwr of Adams and an en banc constitutional decision of the U. S. Court of Appeals. Second, under the case of Lois Lange United States divided by the U. S. Court of Appeals, D. C. Circuit on March 22, 1971 the full passageway must be blocked by the demonstrators on trial or their group to permit conviction. This opinion was followed by Judge Stewart in District of Columbia v. Dan Didawizio and Wayne Smith on April 9, 1917 in the Superior Court when a NJQ after the government case was granted on the grounds that no threat of breach of the peace was proven, and the demonstrators only blocked one-third of the sidewalk in front of the White House, though and police blocked the other two-thirds, the 90 companion cases were called on April 16. Judge Stewart is expected to sit in D. C. Branch through April and May.