When a Client Lies

Preparing for the Grand Jury and Preliminary Hearings

Making the Most of Your Suppression Hearings

Speakers:
Jill Paperno, Esq., ***Assistant Monroe County Public Defender***
Erik Teifke, Esq., ***Assistant Monroe County Public Defender***

Sponsored by the:
Oneida County Bar Association
In Cooperation with:
New York State Defenders Association, Inc.
Oneida County Public Defender, Criminal Division
Oneida County Supplemental Assigned Counsel Program

Chair: Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

Saturday, March 7, 2015
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive
Utica, New York
ACC Room 116
(Alumni College Center)

MCLE Credits: 2 Skills and 1 Ethics

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The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association in cooperation with the Criminal Division of the Oneida County Public Defender's Office, the Oneida County Supplemental Assigned Counsel Program and the New York State Defenders Association, Inc. as a regional effort to provide low and reduced cost training programs for public defenders and assigned counsel. A major part of the Series is the annual Criminal Law Academy that is presented in the Fall. The Criminal Law Academy was designed to provide fundamental knowledge of the practice of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. The faculty is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The two full-day course provides continuing legal education credits in skills, professional practice and ethics.

Again this year, under a grant from the New York State Office of Indigent Legal Services, the Oneida County Supplemental Assigned Counsel Program is sponsoring an Assigned Counsel School in conjunction with the Criminal and Civil Divisions of the Oneida County Public Defenders' offices. There will be two, full day sessions this spring – one on criminal trial practice and one on family law. All programs will be held on Fridays at Mohawk Valley Community College, IT Building, Room 225 from 9 a.m. – 4 p.m. The fee for ***each session*** is nominal. To register, contact Kimberly Flint at the Oneida County Supplemental Assigned Counsel Office, 800 Park Avenue, Utica, NY 13501, Telephone: 315-793-6042, Fax 315-797-3047, email kflint@ocgov.net.

Friday, May 29th:	"Family Court: Article 101"
Friday, April 24th:	"Criminal Trial Practice" with Prof. Todd Berger, Syracuse Law; Prof. John Blume, Cornell Law; Ray Kelly and Rob Wells.

The Oneida County Bar Association also offers a number of Saturday morning 3-hour Criminal Track programs focusing on various aspects of criminal defense. Past seminars included computer forensics, trial practice, appeals from local criminal court, immigration consequences of criminal convictions, alternative sentencing, motion practice, competency and the affirmative defense of not responsible by reason of mental disease or defect. These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A $25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. All programs are posted on the Oneida County Public Defender, Criminal Division's website at *http://www.ocgov.net/oneida/pdcriminal/training* and the Oneida County Bar Association's website at *www.oneidacountybar.org*. Also, the Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website.

COMING UP: IMMIGRATION UPDATE with the Immigration Defense Project, NYC. Saturday, April 11th.

The Oneida County Bar Association offers a wide range of CLE programs throughout the year. A full calendar of programs is available at their website. The New York State Defenders Association, Inc. is also a valuable resource for criminal law practitioners through their website http://www.nysda.org/. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year. Our special thanks to Mohawk Valley Community College who continue to offer their first class facilities for our use. Welcome to today's program. I hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

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9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive, ACC Room 116
Utica, New York

8:30 a.m. – 9:00 a.m.	**REGISTRATION**
9:00 a.m. – 9:50 a.m.	**When a Client Lies,** ***Jill Paperno, Esq.***
9:50 a.m. – 10:30 a.m.	**Preparing for the Grand Jury and Preliminary Hearings** ***Jill Paperno, Esq. and Erik Teifke, Esq.***
10:30 a.m. – 10:45 a.m.	**BREAK**
10:45 a.m. – 12:00 p.m.	**Making the Most of Your Suppression Hearings** ***Jill Paperno, Esq. and Erik Teifke, Esq.***

MCLE Credits: 2 Skills and 1 Ethics

Speakers

Jill Paperno, Esq. is the second assistant public defender in the Monroe County Public Defender's Office. Jill graduated from the State University of New York at Albany in 1981, and Buffalo Law School in 1984. She has worked for the Monroe County Public Defender's Office since 1987. She trained and supervised attorneys in the City Court and Parole sections of the office for ten years as the City Court Supervisor, and since 2009 has supervised felony staff as the Second Assistant Public Defender. She has represented defendants in numerous felony jury trials, including homicides and sex offenses. Ms. Paperno assisted in developing the training program for Monroe County Public Defender's Office staff attorneys, and has presented CLEs on a variety of topics over the years. In 2010 she was awarded the Jeffrey A. Jacobs Memorial Award for outstanding trial work. In 2011 she was named a Rochester Daily Record Leader in Law and awarded the Rochester Daily Record Nathaniel Award. Jill contributed a chapter on handling sex offenses in Strategies for Handling Sex Crimes. She is a frequent blogger at http://newyorkcriminaldefense.blogspot.com. Her book, Representing the Accused: A Practical Guide to Criminal Defense, was published in July of 2012 by West Publishing.

Erik Teifke, Esq. serves as a Special Assistant Public Defender in Monroe County where he has worked since 1995. Erik supervises the non-violent felony staff, and handles violent felony and major drug cases. He has tried numerous violent felonies, including homicides. He is a frequent lecturer at in-house CLEs presented to junior and senior staff at the Monroe County Public Defender Office and has lectured at programs presented by the NYSACDL and NYSDA. Erik previously held the position of Director of the Syracuse University School of Law's Criminal Defense Clinic and is currently an adjunct Professor at Monroe Community College.

When a Client Lies

Jill Paperno, Esq.
Assistant Monroe County Public Defender

Here Is Your Ethics Credit

(When a client expresses an intention to, or does, lie in court)

The Rules

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200 – RULES OF PROFESSIONAL CONDUCT

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

1.2(d)

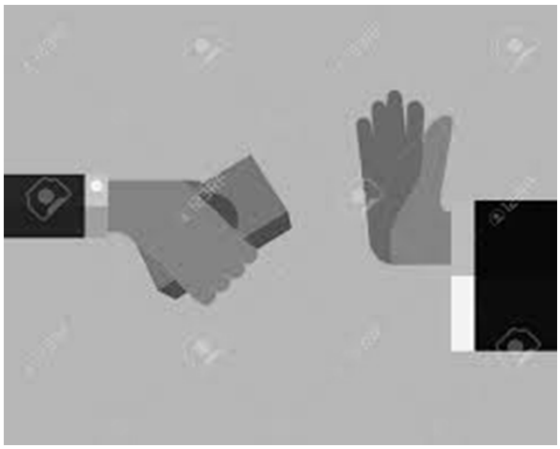
1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

1.0(i)

- 1.0(i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

1.2(f)

- 1.2 (f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.



1.6(a)

- 1.6 Confidentiality of Information
- (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

1.6(b)

- (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:…
- (2) to prevent the client from committing a crime;…
- (6) when permitted or required under these Rules or to comply with other law or court order.

1.8(b)

- 1.8 (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

1.16(c)

1.16 (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;…

(10) the client knowingly and freely assents to termination of the employment;…

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

3.3

RULE 3.3.
Conduct Before a Tribunal
A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
CAN YOU SUM ON FALSE TESTIMONY?

3.4

RULE 3.4.
Fairness to Opposing Party and Counsel
A lawyer shall not:
(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;…
(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
(4) knowingly use perjured testimony or false evidence;
(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or
(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

4.1

RULE 4.1.

Truthfulness In Statements To Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person

8.4

Misconduct

RULE 8.4.

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;…

The Three Questions

In 1966 Monroe Freedman wrote "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions"

1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he will commit perjury?
3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

Question 2 – Freedman argues:

- Attorney functions in an adversary system based on premise most effective means of determining truth is to present finder of fact clash between proponents of conflicting views
- Essential that adversary have "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights…"
- Defendant presumed innocent – Plea of not guilty does not necessarily mean "not guilty in fact" (By allowing all a plea of not guilty our system sanctions the possible lie.)

Freedman, cont'd

- "Criminal defense lawyers do not win their cases by arguing reasonable doubt" (I disagree)
- "Effective trial advocacy requires that the attorney's every word, action and attitude be consistent with the conclusion that his client is innocent."
- "As every trial lawyer knows, the jury is certain that the defense attorney knows whether his client is guilty."

Freedman cont'd

- "There is, of course, a simple way to evade the dilemma raised by the not guilty plea. Some attorney rationalize the problem by insisting that a lawyer never knows for sure whether his client is guilty."

Freedman cont'd

- "It is also argued that a defense attorney can remain selectively ignorant. He can insist in his first interview with his client that, if his client is guilty, he simply does not want to know. It is inconceivable, however, that an attorney could give adequate counsel under such circumstances."

Freedman cont'd

- "The problem is compounded by the practice of plea bargaining. It is considered improper for a defendant to plead guilty to a lesser offense unless he is in fact guilty."
- If the attorney prepares the client for a plea, and the plea fails, the attorney now knows the client is guilty as you prepare for trial.

Freedman cont'd

- "If one recognizes that professional responsibility requires that an advocate have full knoweldge of every pertinent fact, it follows that he must seek the truth from his client, not shun it. This means that he will have to dig and pry and cajole, and even then, he will not be successful unless he can convince the client that full and confidential disclosure to his lawyer will never result in prejudice to the client by any word or action of the lawyer."

Freedman cont'd

- "This is, perhaps, particularly true in the case of the indigent defendant, who meets his lawyer for the first time in the cell block or the rotunda. He did not choose the lawyer, nor does he know him."

Question 2 – The Perjurious Client

- Withdrawal from case – The client will go to the next law office and know that confidentiality is not what was represented.
- Indigent client has no choice unless the attorney advises the judge, who may hear the case.
- The new attorney will not be aware of perjury and unable to try to dissuade.

Freedman – Another possible solution

- Approach the bench and ask to be relieved, causing a mistrial. But lawyer's ethical problem has not been solved, just transferred to the judge.
- Client may have basis for appeal

Freedman – another unsatisfactory solution

- Let the client take the stand without the attorney's participation and omit reference ot the client's testimony in closing argument. This would be as damaging as to fail to argue the case to the jury.

Freedman's conclusion (not the Court of Appeals)

- The obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury. Canons do not proscribe this – recognizes only two exceptions to the obligation of confidentiality – lawyer accused by a client, and announced intention of a client to commit a crime.

Rule 1.6(b)

- Lawyer *may* disclose under certain circumstances, but broad catchall:
- "(6) when permitted or required under these Rules or to comply with other law or court order."

Back to Freedman

- "Of course, before the client testifies perjuriously, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality. In addition, the client should be impressed with the fact that his untruthful alibi is tactically dangerous. There is always a strong possibility that the prosecutor will expose the perjury on cross-examination. However, for the reasons already given, the final decision must necessarily be the client's."

People v. DePallo 96 NY2d 437:

DePallo had made several incriminating statements linking him to the brutal murder of a 71-year-old man. At trial, defense counsel noted at a sidebar that he had told defendant he did not have to testify and should not testify. Defendant confirmed that he had been so advised but insisted on testifying. Counsel elicited his testimony in narrative form. He testified that he had been at home throughout the evening of the murder. During the prosecutor's cross examination, defense counsel made several objections.

DePallo cont'd

After both sides had rested, defense counsel met with the court in chambers, without the presence of the prosecutor or the defendant, "…I told the defendant I cannot participate in any kind of perjury, and you really shouldn't perjure yourself…He never told me what he was going to say, but I knew it was not going to be the truth…"

People v. DePallo 96 NY2d 437:

"The United States Supreme Court has noted that counsel must first attempt to persuade the client not to pursue the unlawful course of conduct. If unsuccessful, withdrawal from representation may be an appropriate response, but when confronted with the problem during trial, as here, an 'attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response' (id., at 170).

People v. Andrades, 4 NY3d 355 (2005):

When the judge was factfinder:

(A)n attorney faced with a client who intends to commit perjury has the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action (cites omitted). Should the client insist on perjuring himself, counsel may seek to withdraw from the case. If counsel's request is denied, defense counsel, bound to honor defendant's right to testify on his own behalf, should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form. However, in accordance with DR 7-102 (a) (4), counsel may not use the perjured testimony in making argument to the court.

How low can you go?

People v. Berroa, 99 NY2d 134

- Attorney gives stipulation at trial that alibi witnesses never mentioned defendant out of town at time of offense
- Whether a conflict of interest operates on the defense is a mixed question of law and fact (cites omitted) Here, however, there is no support in the record to conclude anything but that, as a matter of law, the conflict created by the adverse stipulation bore "a substantial relation to 'the conduct of the defense'" (cites omitted).

People v. Lewis, 2 N.Y.3d 224

- Attorney testifies against defendant at *Sirois* hearing when called by prosecutor
- "If, as we all agree, the attorney's testimony had at least some significance, it was enough to rupture the attorney-client relationship not only for the *Sirois* hearing but for the balance of the trial itself. Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Questions

Can you tell if a client is lying?

Do you have to engage in a narrative approach?

Do you have to disclose to the judge?

Do you use the testimony in summation? What if only part is a lie?

What happens if you are called to testify as a witness against your client?

WHEN A CLIENT LIES
Jill Paperno March 7, 2015

Lying My Head Off
Cate Marvin, 1969

Here's my head, in a dank corner of the yard.
I lied it off and so off it rolled.
It wasn't unbelieving that caused it
to drop off my neck and loll down a slope.
Perhaps it had a mind of its own, wanted
to leave me for a little while…

Excerpts From Relevant NY Rules of Professional Conduct

1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

1.0(i) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

1.2 (f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

1.6 Confidentiality of Information
(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
(1) the client gives informed consent, as defined in Rule 1.0(j);
(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
(3) the disclosure is permitted by paragraph (b).
"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer **may** reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law or court order.

1.8 (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

1.16 (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;
(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
(10) the client knowingly and freely assents to termination of the employment;
(11) withdrawal is permitted under Rule 1.13(c) or other law;
(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

RULE 3.3.
Conduct Before a Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

RULE 3.4.
Fairness to Opposing Party and Counsel
A lawyer shall not:
(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;
(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
(4) knowingly use perjured testimony or false evidence;
(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or
(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

RULE 4.1.
Truthfulness In Statements To Others
In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

Misconduct
RULE 8.4.
A lawyer or law firm shall not:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability:
(1) to influence improperly or upon irrelevant grounds
any tribunal, legislative body or public official; or
(2) to achieve results using means that violate these Rules or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

Excerpt from the 1966 article “Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions” by Monroe H. Freedman, Maurice A. Deane School of Law at Hofstra University

…The second question is generally considered to be the hardest of all: Is it proper to put a witness on the stand when you know he will commit perjury? Assume, for example, that the witness in question is the accused himself, and that he has admitted to you, in response to your assurances of confidentiality, that he is guilty. However, he insists upon taking the stand to protest his innocence. There is a clear consensus among prosecutors and defense attorneys that the likelihood of conviction is increased enormously when the defendant does not take the stand. Consequently, the attorney who prevents his client from testifying only because the client has confided his guilt to him is violating that confidence by acting upon the information in a way that will seriously prejudice his client's interests.

Perhaps the most common method for avoiding the ethical problem just posed is for the lawyer to withdraw from the case, at least if there is sufficient time before trial for the client to retain another attorney.' The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of his guilt from his new attorney. On ethical grounds, the practice of withdrawing from a case under such circumstances is indefensible, since the identical perjured testimony will ultimately be presented. More important, perhaps, is the practical consideration that the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but he loses it in the very act of evading the ethical problem.

The problem is all the more difficult when the client is indigent. He cannot retain other counsel, and in many jurisdictions, including the District of Columbia, it is impossible for appointed counsel to withdraw from a case except for extraordinary reasons. Thus, appointed counsel, unless he lies to the judge, can successfully withdraw only by revealing to the judge that the attorney has received knowledge of his client's guilt. Such a revelation in itself would seem to be a sufficiently serious violation of the obligation of confidentiality to merit severe condemnation. In fact, however, the situation is far worse, since it is entirely possible that the same judge who permits the attorney to withdraw will subsequently hear the case and sentence the defendant. When he does so, of course, he will have had personal knowledge of the defendant's guilt before the trial began. Moreover, this will be knowledge of which the newly appointed counsel for the defendant will probably be ignorant.

The difficulty is further aggravated when the client informs the lawyer for the first time during trial that he intends to take the stand and commit perjury. The perjury in question may not necessarily be a protestation of innocence by a guilty man. Referring to questions the earlier hypothetical of the defendant wrongly accused of a robbery at 16th and P, the only perjury may be his denial of the truthful, but highly damaging, testimony of the corroborating witness who placed him one block away from the intersection five minutes prior to the crime. Of course, if he tells the truth and thus verifies the corroborating witness, the jury will be far more inclined to accept the inaccurate testimony of the principal witness, who specifically identified him as the criminal.

If a lawyer has discovered his client's intent to perjure himself, one possible solution to this problem is for the lawyer to approach the bench, explain his ethical difficulty to the judge, and ask to be relieved, thereby causing a mistrial. This request is certain to be denied, if only because it would empower the defendant to cause a series of mistrials in the same fashion. At this point, some feel that the lawyer has avoided the ethical problem and can put the defendant on the stand. However, one objection to this solution, apart from the violation of confidentiality, is that the lawyer's ethical problem has not been solved, but has only been transferred to the judge. Moreover, the client in such a case might well have grounds for appeal on the basis of deprivation of due process and denial of the right to counsel, since he will have been tried before, and sentenced by, a judge who has been informed of the client's guilt by his own attorney.

A solution even less satisfactory than informing the judge of the defendant's guilt would be to let the client take the stand without the attorney's participation and to omit reference to the client's testimony in closing argument. The latter solution, of course, would be as damaging as to fail entirely to argue the case to the jury, and failing to argue the case is "as improper as though the attorney had told the jury that his client had uttered a falsehood in making the statement." Therefore, the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury. Canon 37 does not proscribe this conclusion; the canon recognizes only two exceptions to the obligation of confidentiality. The first relates to the lawyer who is accused by his client and may disclose the truth to defend himself. The other exception relates to the "announced intention of a client to commit a crime." On the basis of the ethical and practical considerations discussed above, the Canon's exception to the obligation of confidentiality cannot logically be understood to include the crime of perjury committed during the specific case in which the lawyer is serving. Moreover, even when the intention is to commit a crime in the future, Canon 37 does not require disclosure, but only permits it. Furthermore, Canon 15, which does proscribe "violation of law" by the attorney for his client, does not apply to the lawyer who unwillingly puts a perjurious client on the stand after having made every effort to dissuade him from committing perjury. Such an act by the attorney cannot properly be found to be subornation-corrupt inducement-of perjury. Canon 29 requires counsel to inform the prosecuting authorities of perjury committed in a case in which he has been involved, but this can only refer to perjury by opposing witnesses. For an attorney to disclose his client's perjury "would involve a direct violation of Canon 37." Despite Canon 29, therefore, the attorney should not reveal his client's perjury "to the court or to the authorities."

Of course, before the client testifies perjuriously, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality. In addition, the client should be impressed with the fact that his untruthful alibi is tactically dangerous. There is always a strong possibility that the prosecutor will expose the perjury on cross-examination. However, for the reasons already given, the final decision must necessarily be the client's. The lawyer's best course thereafter would be to avoid any further professional relationship with a client whom he knew to have perjured himself…

http://www.newyorklegalethics.com

Counsel May Notify Judge of Expected Client Perjury
May 1, 2005 • Archive—NYPRR

By Lazar Emanuel

In *People v. DePallo*, 96 NY2d 437 (2001), the Court of Appeals defined the responsibility of criminal defense counsel who suspects that his client will offer perjured testimony in a jury trial. In that case, defendant DePallo had made several incriminating statements linking him to the brutal murder of a 71-year-old man. At trial, defense counsel noted at a sidebar that he had told defendant he did not have to testify and should not testify. Defendant confirmed that he had been so advised but insisted on testifying. Counsel elicited his testimony in narrative form. He testified that he had been at home throughout the evening of the murder. During the prosecutor's cross examination, defense counsel made several objections.

After both sides had rested, defense counsel met with the court in chambers, without the presence of the prosecutor or the defendant, "…I told the defendant I cannot participate in any kind of perjury, and you really shouldn't perjure yourself…He never told me what he was going to say, but I knew it was not going to be the truth…"

During summation, defense counsel did not refer to defendant's testimony. The jury convicted defendant of second-degree murder, robbery and burglary. Defendant argued on appeal that counsel should not have disclosed his perjury to the court and that the meeting in chambers was a material stage of trial which required his presence. The Appellate Division rejected both arguments and the Court of Appeals affirmed.

When Court Sits as Fact Finder

Since 2001, the *DePallo* decision has served as a guide to defense counsel in their management of perjured testimony in a jury trial. But the decision "…left open the question of the propriety of a similar disclosure under circumstances where the court sits as the fact finder."

That question has now been answered by the Court of Appeals in *People v. Andrades*, N.Y., No. 28 (March 29, 2005). In an opinion by Judge George Bundy Smith, the court said: "…counsel's ethical obligations do not change simply because a judge rather than a jury is sitting as the fact finder."

Defendant Andrades was arrested and charged with murder and manslaughter. After he was given his Miranda rights, defendant admitted in written and videotaped statements that he had participated in the killing of a former girlfriend. He then moved to suppress his confession and the court conducted a Huntley

hearing (a hearing in which the defendant asks to suppress statements made to the police or to prosecutors on the grounds that he was not read his Miranda rights or that his statement was induced by threats or coercion.)

Before the hearing, defense counsel asked to be relieved and told the court, "[T]here is an ethical conflict with my continuing to represent [defendant] and I can't go any further than that." The court asked counsel to state the nature of his conflict, but counsel refused to elaborate. "The court then presumed that counsel's ethical dilemma concerned defendant's right to testify." The court denied counsel's application to withdraw. After the prosecution had completed its Huntley testimony, defense counsel advised the court that defendant intended to testify. Outside defendant's presence, counsel stated:

As part and parcel of my request to be relieved in this matter, I think I should tell the court and place on the record that I did tell [defendant] and advise [defendant] that he should not testify at the hearing and as a result of the problem I'm having, the ethical problem I'm having. What I'm going to do is just basically direct his attention to date, time and location of the statement and let him run with the ball.

Satisfied that counsel, anticipating that defendant "could possibly…commit perjury on the witness stand," had complied with his ethical obligations under the disciplinary rules, the court "concluded that counsel could still afford defendant the effective assistance of counsel." Defendant then offered his Huntley testimony "largely in narrative form," with questioning by the court and counsel. Defense counsel offered no closing arguments. At the close of the Huntley hearing, the court denied defendant's motion to suppress. In a written opinion the court said that it "did not find the defendant's testimony credible or worthy of belief."

At the subsequent trial, defendant was convicted of second-degree murder. The Appellate Division affirmed. The judges found that counsel had properly disclosed his ethical dilemma when he instructed the defendant to testify in narrative form, and that defendant had not been denied a fair hearing or the effective assistance of counsel. The court also held that the colloquy between counsel and the court concerning counsel's ethical dilemma did not constitute a material stage of the trial requiring defendant's presence.

In a decision by Judge George Bundy Smith, the Court of Appeals affirmed the conviction. The court said:

> In *DePallo*, we recognized that a defense attorney's duty to zealously represent a client must be circumscribed by his or her duty as an officer of the court to serve the truth seeking function of the justice system [96 NY2d at 441].

> Moreover, as perjury is a criminal offense, defense counsel has a duty to refrain from participating in the client's commission of it. Thus, we stated that while counsel must pursue all reasonable means to reach the objectives of the client, counsel must not in any way assist a client in presenting false evidence to the court [Id.; *Nix v Whiteside*, 475 U.S. 157, 166 (1986).]

Court Relies on DR 7-102 (A)

The court relied on DR 7-102 (A) of the New York Code, which reads, in part, as follows:

In the representation of a client, a lawyer shall not:

3. Conceal, or knowingly fail to disclose that which the lawyer is required by law to reveal.

4. Knowingly used perjured testimony or false evidence.

5. Knowingly make a false statement of law or fact.

6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.

8. Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

The court issued a clear and definitive guide for New York lawyers who suspect client perjury:

In light of the ethical obligations of an attorney in this state, and in accordance with U.S. Supreme Court jurisprudence, an attorney faced with a client who intends to commit perjury has the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action. [See *Nix v Whiteside*, 475 U.S. at 170; *People v DePallo*, 96 NY2d at 441.] Should the client insist on perjuring himself, counsel may seek to withdraw from the case. If counsel's request is denied, defense counsel, bound to honor defendant's right to testify on his own behalf, should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form. However, in accordance with DR 7-102 (A)(4), counsel may not use the perjured testimony in making argument to the court.

Defendant argued that counsel should not have disclosed his ethical dilemma to the court because the disclosure inevitably led the court, sitting as fact finder, to infer that defendant intended to commit perjury. He also argued that counsel should not have told the court that he intended to question defendant in the narrative before he actually did so.

Defendant's position was that counsel should have said nothing to the court and allowed him to testify in the narrative without comment. "If counsel's suspicions…ripened into reality, counsel could simply refrain from using the perjured testimony in his closing argument." The court disagreed:

As an initial matter, we note that at no time did counsel ever disclose to the court that defendant intended to commit perjury or otherwise disclose any client secrets. Rather the court inferred defendant's perjurious intent based upon the nature of counsel's application. However, counsel could have properly made such a disclosure since a client's intent to commit a crime is not a protected confidence or secret. [See *Nix v Whiteside*, 475 U.S. at 174; *People v DePallo*, 96 NY2d at 442; DR 4-101(c)(3).] Moreover, counsel's ethical obligations do not change simply because a judge rather than a jury is sitting as the fact finder. Moreover, as a practical matter, defendant's suggestion would solve nothing because counsel would likely find it difficult to allow defendant to testify in the narrative without prior explanation…Even if counsel were permitted to present defendant's testimony in narrative form without objection, the very fact of defendant testifying in such a manner would signify to the court that counsel believes that his client is perjuring himself.

The Court also rejected defendant's argument that the colloquy between defense counsel and the court was a material stage of the trial requiring defendant's presence.

> As we stated in *DePallo* [96 NY2d at 443] and in People v. Keen [94 NY2d 533, 539 (2000)], a colloquy of this nature involves procedural matters at which a defendant can offer no meaningful input. Therefore, defendant has no right to be present.

In a footnote, the court also expressly rejected the approach adopted by the Ninth Circuit in *Lowery v Cardwell*, 575 Fd 727 (1978). In that case, defendant's attorney was surprised when defendant committed perjury at a bench trial. After an unsuccessful attempt to withdraw, counsel made no reference to defendant's testimony during his closing arguments. The Ninth Circuit found that counsel's actions gave the court the impression that counsel believed his client had lied and denied defendant a fair trial. It suggested that counsel should have made a record for his own protection instead. The Court of Appeals in *Andrades* said this suggestion would be incompatible with counsel's obligation as an officer of the court to reveal a fraud perpetrated by the client upon the court.

Lazar Emanuel is the publisher of NYPRR. In 2004, he received the State Bar's Sheldon D. Levy award for Outstanding Contribution to Understanding and Advancement in the Field of Professional Ethics.

From *People v. DePallo* 96 NY2d 437:

> Notwithstanding these ethical concerns, a defendant's right to testify at trial does not include a right to commit perjury (see, *United States v Dunnigan*, 507 US 87, 96; Harris v New York, 401 US 222, 225), and the Sixth Amendment right to the assistance of counsel does not compel counsel to assist or participate in the presentation of perjured testimony (see, *Nix v Whiteside*, 475 US 157, 173). In light of these limitations, an attorney's duty to zealously represent a client is circumscribed by an "equally solemn duty to comply with the law and standards of professional conduct * * * * to prevent and disclose frauds upon the court" (id., at 168-169). The United States Supreme Court has noted that counsel must first attempt to persuade the client not to pursue the unlawful course of conduct. If unsuccessful, withdrawal from representation may be an appropriate response, but when confronted with the problem during trial, as here, an "attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response" (id., at 170).
>
> This approach is consistent with the ethical obligations of attorneys under New York's Code of Professional Responsibility. DR 7-102 (codified at 22 NYCRR 1200.33) expressly prohibits an attorney, under penalty of sanctions, from knowingly using perjured testimony or false evidence (DR 7- 102[A][4]); knowingly making a false statement of fact (DR 7- 102[A][5]); participating in the creation or preservation of evidence when the attorney knows, or it is obvious, that the evidence is false (DR 7-102[A][6]); counseling or assisting the client in conduct the lawyer knows to be illegal or fraudulent (DR 7-102[A][7]); and knowingly engaging in other illegal conduct (DR 7-102[A][8]; see also, EC 7-26). Additionally, DR 7- 102(B)(1) mandates that "[a] lawyer who receives information clearly establishing that * * * [t]he client has, in the course of the representation, perpetrated a fraud upon a * * * tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected * * * tribunal, except when the information is protected as a confidence or secret" (emphasis added).

From *People v. Andrades*, 4 NY3d 355 (2005):

In *People v DePallo* (96 NY2d 437 [2001]), we held that defense counsel properly balanced the duties he owed to his client and the duties he owed to the court and to the criminal justice system when, during a jury trial, counsel notified the court that his client had offered perjured testimony and refused to use that testimony in his closing argument to the jury. We left open the question of the propriety of a similar disclosure under circumstances where the court sits as the factfinder. We address that issue in the case now before us and hold that counsel's disclosure to the court, which was open to the inference that his client intended to perjure himself upon taking the stand, did not deprive defendant of a fair hearing or of the effective assistance of counsel…

In light of the ethical obligations of an attorney in this state, and in accordance with United States Supreme Court jurisprudence, an attorney faced with a client who intends to commit perjury has the initial responsibility to attempt to dissuade the client from pursuing the unlawful course of action (see Nix v Whiteside, 475 US at 169-170; People v DePallo, 96 NY2d at 441). Should the client insist on perjuring himself, counsel may seek to withdraw from the case. If counsel's request is denied, defense counsel, bound to honor defendant's right to testify on his own behalf, should refrain from eliciting the testimony in traditional question-and-answer form and permit defendant to present his testimony in narrative form. However, in accordance with DR 7-102 (a) (4), counsel may not use the perjured testimony in making argument to the court.

From *People v. Berroa*, 99 NY2d 134 (Attorney gives stipulation at trial that alibi witnesses never mentioned defendant out of town at time of offense)

Whether a conflict of interest operates on the defense is a mixed question of law and fact (see People v Harris, 99 NY2d 202, 210, 783 N.E.2d 502, 2002 N.Y. LEXIS 3571, 753 N.Y.S.2d 437 [2002]; People v Ming Li, 91 N.Y.2d 913, 917-918, 692 N.E.2d 558, 669 N.Y.S.2d 527 [1998]). Here, however, there is no support in the record to conclude anything but that, as a matter of law, the conflict created by the adverse stipulation bore "a substantial relation to 'the conduct of the defense'" (McDonald, 68 N.Y.2d at 9, quoting [143] People v Lombardo, 61 NY2d 97, 103, 460 N.E.2d 1074, 472 N.Y.S.2d 589 [1984]). It may well be that defendant's retrial will produce the same result, but there will be no question that defendant will have the benefit of representation that is not at cross purposes.

People v. Berroa, 99 N.Y.2d 134, 142-143, 782 N.E.2d 1148, 1155, 753 N.Y.S.2d 12, 19, 2002 N.Y. LEXIS 3581, 17-18 (N.Y. 2002)

From People v. Lewis 2 NY2d 224: (attorney testifies against client at *Sirois* hearing)

As we stated in *Berroa*, "when a lawyer is called to testify against the client's interest the conflict is obvious" (99 N.Y.2d at 140). Here, had the court or the defense attorney pointed out the potential conflict, the prosecutor would have disclosed that he wanted testimony from defendant's attorney to close the circumstantial loop and prove that only

defendant knew of the statement and the identity of the witness. Because counsel's testimony, however, went unprotested, the prosecutor was able to make his point and, with the help of defense counsel, prevail at the Sirois hearing. Our dissenting colleagues agree that the prosecution should not have been permitted to call defendant's attorney as a witness at the Sirois hearing but would, at most, order a new Sirois hearing. In our view, a new trial is also required because defense counsel crossed the line when, without protest, he gave testimony against his client. True, the testimony was an addendum to the informal remarks he made earlier, but by testifying, he became a witness for the prosecution. We agree with the dissenters that the testimony was neither earth-shattering nor insignificant (dissenting op at 231). That being so, it is inapt for us to weigh the importance of the testimony and draw fine distinctions as to where on the spectrum of harm it falls. If, as we all agree, the attorney's testimony had at least some significance, it was enough to rupture the attorney-client relationship not only for the Sirois hearing but for the balance of the trial itself. Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

People v. Lewis, 2 N.Y.3d 224, 229, 809 N.E.2d 1106, 1108-1109, 777 N.Y.S.2d 798, 800-801, 2004 N.Y. LEXIS 639, 7-8 (N.Y. 2004)

Questions:

Can you tell if a client is lying?
Do you have to engage in a narrative approach?
Do you have to disclose to the judge?
Do you use the testimony in summation? What if only part is a lie?
What happens if you are called to testify as a witness against your client?

From nysba.org/professionalstandards

RULE 3.3:
CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b) – including the prohibitions against offering and using false evidence – apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the

testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Tips & Tactics
On
Grand Jury Practice

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TIPS AND TACTICS ON GRAND JURY PRACTICE

Jill Paperno and Erik Teifke
March 7, 2015

History of the Grand Jury

- What they say:
- The traditional purpose of the Grand Jury is to prevent prosecutorial excess by ensuring that "before an individual may be publicly accused of crime and put to the onerous task of defending himself from such accusations, the State must convince a Grand Jury composed of the accused's peers that there exists sufficient evidence and legal reason to believe the accused guilty" *(People v. Iannone,* 45 N.Y.2d 589, 594, 412 N.Y.S.2d 110, 384 N.E.2d 656, *supra; see, People v. Ford,* 62 N.Y.2d 275, 282, 476 N.Y.S.2d 783, 465 N.E.2d 322, *supra).*

  People v. Lancaster, 69 N.Y.2d 20, 25, 503 N.E.2d 990, 992 (1986)

What we know

Article 190 of the CPL

- A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, **impaneled by a superior court** and constituting a part of such court, the functions of which are to hear and examine evidence concerning offenses and concerning misconduct, nonfeasance and neglect in public office, whether criminal or otherwise, and to take action with respect to such evidence as provided in section 190.60.

  N.Y. Crim. Proc. Law § 190.05 (McKinney)

The Basics

CPL 190.25 (3) Proceedings of a grand jury are not valid unless at least sixteen of its members are present. The finding of an indictment, a direction to file a prosecutor's information, a decision to submit a grand jury report and every other affirmative official action or decision requires the concurrence of at least twelve members thereof.

N.Y. Crim. Proc. Law § 190.25 (McKinney)

Who else?

3. (a) The district attorney;
(b) A clerk to help;
(c) A stenographer
(d) An interpreter. – must be sworn to accurately interpret, keep secret
(e) A public servant holding a witness in custody. – must take oath
(f) An attorney representing a witness pursuant to section 190.52 of this chapter while that witness is present.
(g) An operator of video equipment
3-a – sign language interpreter

Who else?

- (h) A social worker, rape crisis counselor, psychologist or other professional providing emotional support to a child witness twelve years old or younger who is called to give evidence in a grand jury proceeding concerning a crime defined in article one hundred twenty-one, article one hundred thirty, article two hundred sixty, section 120.10, 125.10, 125.15, 125.20, 125.25, 125.26, 125.27, 255.25, 255.26 or 255.27 of the penal law provided that the district attorney consents. Such support person shall not provide the witness with an answer to any question or otherwise participate in such proceeding and shall first take an oath before the grand jury that he or she will keep secret all matters before such grand jury within his or her knowledge.
-

SHHHHHHH!

- 4. (a) Grand jury proceedings are secret, and no grand juror, or other person …, may, except in the lawful discharge of his duties or upon written order of the court, disclose the …testimony, evidence, or any decision, result or other matter attending a grand jury proceeding… Nothing contained herein shall prohibit a witness from disclosing his own testimony.

  N.Y. Crim. Proc. Law § 190.25 (McKinney)

Who instructs the GJ?

- 6. The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes.

  N.Y. Crim. Proc. Law § 190.25 (McKinney)

Rules of Evidence

1. Except as otherwise provided in this section, the provisions of article sixty, governing rules of evidence and related matters with respect to criminal proceedings in general, are, where appropriate, applicable to grand jury proceedings.

N.Y. Crim. Proc. Law § 190.30 (McKinney)

- Exceptions listed in 190.30

Going Rogue – is it always bad?

Going rogue – the GJ calling witnesses

- 5. Nothing in subdivisions two, three or four of this section shall be construed to limit the power of the grand jury to cause any person to be called as a witness pursuant to subdivision three of section 190.50.

  N.Y. Crim. Proc. Law § 190.30 (McKinney)

CPL 190.50
Let the games begin!

3. The grand jury may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury desires to hear any such witness … it may direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction…

4. Notwithstanding the provisions of subdivision three, the district attorney may demand that any witness thus called… sign a waiver of immunity …

N.Y. Crim. Proc. Law § 190.50 (McKinney)

How do we get them interested?

(Do you know how hard it is to find an inoffensive seduction slide?)

We can ask!

6. A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, **either orally** or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.

N.Y. Crim. Proc. Law § 190.50 (McKinney)

Take a letter, Maria…

- Write letter to the foreperson
- Request witness be heard and provide as much identifying and contact information as possible
- In a timely manner
- Directed to the prosecutor
- WITH A DESCRIPTION OF WHAT THE WITNESS WOULD SAY

Back to 190.30
Witness competency

6. Wherever it is provided in article sixty that the court in a criminal proceeding must rule upon the competency of a witness to testify or upon the admissibility of evidence, such ruling may in an equivalent situation in a grand jury proceeding, be made by the district attorney.

N.Y. Crim. Proc. Law § 190.30 (McKinney)

Watch for this in your motions

7. Wherever it is provided in article sixty that a court presiding at a jury trial must instruct the jury with respect to the significance, legal effect or evaluation of evidence, the district attorney, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.

N.Y. Crim. Proc. Law § 190.30 (McKinney)

Immunity

- 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
- 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:
- (a) He has effectively waived such immunity pursuant to section 190.45; or
- (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.
- (Or documents as described in statute)

N.Y. Crim. Proc. Law § 190.40 (McKinney)

Waiver of immunity

1. …a written instrument subscribed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled…

2. A waiver of immunity is not effective unless and until it is sworn to before the grand jury…

3. A person who is called by the people…and requested by the district attorney to …(waive immunity)….has a right to confer with counsel before deciding whether he will comply with such request…he must be accorded a reasonable time in which to obtain and confer with counsel…The district attorney must inform the witness…Any waiver obtained, subscribed or sworn to in violation of the provisions of this subdivision is invalid and ineffective.

4. If a grand jury witness (waives immunity) upon a written agreement with the district attorney that the interrogation will be limited to certain specified subjects… and if after the commencement of his testimony he is interrogated and testifies concerning another subject…he receives immunity with respect to any further testimony which he may give concerning such other subject…

Witness immunity – CPL 190.40

Why would you ever agree to this?

- Client may wish to prosecute someone else
- May be part of a deal
- Client may wish to testify

But if simply because DA asks, what does your gut say?

CPL 190.50

- When does the client get notice
- What notice does the client have to give
- When does the client testify
- How do you prepare the client
- What if the grand jury has already voted
- What about client priors, other charges and more?
- What about documents the client "has to" sign?

What about me? CPL 190.52

- 2. The attorney for such witness may be present with the witness in the grand jury room. The attorney may advise the witness, but may not otherwise take any part in the proceeding.

  N.Y. Crim. Proc. Law § 190.52 (McKinney)

Release upon failure to act CPL 190.80

Upon application of a defendant who on the basis of a felony complaint has been held by a local criminal court for the action of a grand jury (after PH or waiver) …, and who has been confined in such custody for a period of more than forty-five days, or, in the case of a juvenile offender, thirty days, without the occurrence of any grand jury action or disposition pursuant to subdivision one, two or three of section 190.60, the superior court …must release him on his own recognizance unless:

(a) The lack of a grand jury disposition … was due to the defendant's request, action or condition, or occurred with his consent; or

(b) The people have shown good cause why such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded grand jury action within the prescribed period or rendered the same against the interest of justice.

IN THE BOWELS OF THE BEAST

In the grand jury room

- Watch the grand jurors
- Smile or look appropriate
- Dress appropriately
- Have client dressed appropriately or have them apologize if not (but not in the clothes they came in with – check with the jail)
- Have them ready with narrative
- County
- Write down questions
- Note if extensive prosecution – interference with right to testify
- Remind client if necessary

I. WHAT IS A PRELIMINARY HEARING?

The official answer:

Pursuant to CPL 180.10(2), a preliminary hearing is a "prompt" hearing following arraignment on a felony complaint "upon the issue of whether there is sufficient evidence to warrant the court in holding him for action of a grand jury, but he may waive such right."

> In a very real sense, as scholars and practitioners agree, since the prosecutor must present proof of every element of the crime claimed to have been committed, no matter how skeletally, the preliminary hearing conceptually and pragmatically may serve as a virtual minitrial of the prima facie case (see Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases* [3d ed., 1974], § 139 et seq.). In its presentation, the identity of witnesses, to greater or lesser degree, testimonial details and exhibits, perforce will be disclosed. Especially because discovery and deposition, by and large, are not available in criminal cases, this may not only be an unexampled, but a vital opportunity to obtain the equivalent. It has even been suggested that "in practice [it] may provide the defense with the most valuable discovery technique available to him" (*United States ex rel. Wheeler v. Flood*, 269 F.Supp. 194, 198 [WEINSTEIN, J.]; see Hawkins v. Superior Ct., 22 Cal.3d 584, 588–589, 150 Cal.Rptr. 435, 586 P.2d 916 [MOSK, J.]).

People v. Hodge, 53 N.Y.2d 313, 318, 423 N.E.2d 1060, 1063 (1981)

> But what does "held for action of a grand jury mean?
>
> The phrase "held for action of a grand jury" is not defined in a formal sense in the Criminal Procedure Law. An order of a local criminal court holding a defendant for grand jury action, however, "presupposes that a felony complaint has been filed, [the] defendant has been arraigned on the complaint and following a preliminary hearing (unless waived by the defendant), the local criminal court has found reasonable cause to believe the defendant committed a felony (see, CPL 180.10, 180.30, 180.70)" (People v. D'Amico, 76 N.Y.2d 877, 879, 561 N.Y.S.2d 411, 562 N.E.2d 488 [1990]).

Concurring opinion, Judge McGuire in *People v. Ashe*, 74 A.D.3d 503, 507, 901 N.Y.S.2d 843 aff'd, 15 N.Y.3d 909, 939 N.E.2d 140 (2010).

(Note that the statute does not indicate that the hearing must only be held if a defendant is in custody, or that the requirement of a "prompt" hearing is only if the defendant is in custody. Given the statutory language used in Article 180, it does not appear that the language "held for action of the grand jury" requires that a defendant be physically held in custody.)

The unofficial answer:

A preliminary hearing can be something that wins the case. From a defense perspective, it is a treasure trove. A preliminary hearing may be an opportunity to:

A. Explore a theory or several theories of the case;
B. Lock witnesses into versions of events before they have been fully prepared to testify;
C. Lock witnesses into "I don't know" and "I don't recall" answers;
D. Give lying witnesses an idea of what lies ahead if they continue to lie;
E. Give the prosecutor a sense of what lies ahead if they continue to prosecute a bad case or a case based on a lying witness;
F. Give the client a sense of how the case may play out at trial and whether the plea offer, if any, if still available, is a good one;
G. Give the client a sense of how you handle court, and either enhance, or possibly destroy, the client's confidence in you;
H. Give the prosecutor the opportunity to vet the case and see whether the top count, or even all of the charges, should be prosecuted;
I. Get discovery you are entitled to pursuant to statute and case law
J. Maybe you win – no reasonable cause on some charges or all can result in dismissal, lower bail, or vacatur of the order of protection (not common).
K. All of the above and more.

> Since the hearing provides an occasion for appraising witnesses and others who are likely to participate in the ultimate trial, at least as often as not attentive and sensitive counsel gain knowledge and insight that will be of invaluable assistance in the preparation and presentation of the client's defense. **Moreover, judicious exercise may be made of the power of subpoena, which, in the discretion of the court, is available at a preliminary hearing** (emphasis added)(see CPL 180.60, subd. 7; Amsterdam, Segal & Miller *Trial Manual for the Defense of Criminal Cases*, op. cit., § 142). Its use to call to the stand witnesses whom the People have not elected to summon may present the only way in which a recalcitrant though material witness can be interrogated (*Myers v. Commonwealth*, 363 Mass. 843, 298 N.E.2d 819). This may turn out to be a

> fortunate perpetuation of critical testimony of witnesses who later may not be available for trial (cf. *People v. Simmons*, 36 N.Y.2d 126, 131, 365 N.Y.S.2d 812, 325 N.E.2d 139). Most important, early resort to that time-tested tool for testing truth, cross-examination, in the end may make the difference between conviction and exoneration. (See, generally, Bailey & Rothblatt, *Successful Techniques for Criminal Trials*, § 25.)

People v. Hodge, 53 N.Y.2d 313, 319, 423 N.E.2d 1060, 1063 (1981).

As you can see, the preliminary hearing is a potential gold mine. But in order to maximize its value, you have to understand the law and prepare your case, often in a very short time.

These days, as discussed below, it is less common to have a preliminary hearing go forward than it used to be, but they certainly do occur each week in Monroe County, and you should be ready to handle one. You should be aware that in homicide cases and sex offenses the prosecutor usually rushes the case into the grand jury so if you have one of these cases, the chance of doing a preliminary hearing is pretty slim.

II. THE RULES

CPL 180.30 – waiver of the hearing

Pursuant to CPL 180.30 a defendant may waive a preliminary hearing. If the defendant waives the hearing, the defendant must either hold the defendant for action of the grand jury, or make inquiry to determine whether the felony complaint should be dismissed and a local court accusatory instrument be filed.

If the case is held for action of the grand jury pursuant to CPL 180.30(1) the case is referred to the "the superior court" overseeing the grand jury. The case is considered pending in local court until all of the documents relating to the case are "received by the superior court."

Practice tip: *If there is one piece of advice you take away from this training, this is it:* ***DO NOT GIVE UP ANY RIGHTS UNLESS YOU GET SOMETHING IN EXCHANGE, OR THERE IS A GOOD STRATEGIC REASON FOR DOING IT.***

If you do not get anything in exchange for giving up the hearing, why give up something that can provide such a benefit to the defense? (See I, above.)

Reasons to waive a hearing may include:

A. A plea offer that will not be available after indictment – but be aware, nearly every prosecutor in Monroe County must get several levels of approval on plea offers, so you should **see if the prosecutor has had approval before waiving a hearing and put the offer and the fact there has been approval on the record prior to waiving the case**; instead, adjourn to set.

B. The real possibility of a plea offer that will not be available after indictment (But see A)

C. If the case will be easy for the prosecutor to prove, such as a statement PH, then the prosecutor's agreement to provide full discovery;

D. In the rare case with a frail witness, a strategic decision not to go forward because the sole or important witness may not be available for trial and the transcript might be offered by the prosecution – EXTREMELY RARE – do not use this as an excuse not to do a hearing.

If you waive a hearing, make sure you place on the record all of the details of the plea offer your client will receive, or other benefits to be provided, in exchange for the waiver (unless it's a strategic decision with a frail witness, a contract or something else you do not want the prosecutor and/or public to know).

Reasons not to waive a hearing:

A. You're tired
B. It's a Friday and everyone's going out
C. Anything that has not gained a benefit for your client in exchange for the waiver

CPL 180.40 – dreams of days past – returning the case to local court after waiver or hearing

CPL 180.40 permits a prosecutor to apply to have a case returned to local court before the case is presented to the grand jury. This used to be a common practice; presently, it does not exist in Monroe County.

CPL 180.50 – reduction of charges

Whether or not there has been a hearing, the local court may **upon consent of the prosecutor** make inquiry to determine whether there should be a charge other than a felony, and if so, whether the felony should be reduced. This happens when defendants agree to plead to misdemeanors or violations in local criminal court, but it is rare, if it has ever happened, that the type of inquiry described in the statute occurs without a pre-arranged plea.

CPL 180.60 – This is it – "Proceedings upon felony complaint; the hearing; conduct thereof.

The statutory requirements for the hearing are set forth in CPL 180.60. The important ones are:

(2) The defendant may as a matter of right be present at such hearing.

So a defendant has the right to be present at a hearing, but does the defendant also have the right to waive his/her appearance? The Second Department addressed this issue (but found harmless error) in *People v. Allman,* 133 AD2d 638 stating, "We also agree with the defendant's contention that he should have been permitted to waive his appearance at the preliminary hearing." *People v. Allman*, 133 A.D.2d 638, 639, 519 N.Y.S.2d 747, 748 (N.Y. App. Div. 1987).

Practice tip – There are times we waive a defendant's appearance at the hearing. If the case is an identification case, it's often a good idea to try to persuade your client not to be in the courtroom during the witness's testimony. This is sometimes a hard sell. But if you are going to be asking the witness to describe particular features of the perpetrator, you don't want the witness looking at your client and describing him or her. Sometimes that explanation works. Some clients still insist on being present and rarely, but occasionally clients are not identified. But it really is best to have a client absent him/herself during the hearing.

An issue that arises during the hearing is whether the client's choice to be absent during the hearing means that the prosecutor does not have to prove that the person described by the witness is the defendant. In preparing these materials I could not find any legal support for that proposition.

It is important to note that even if a client waives his/her appearance for an identifying witness, s/he can be present for the other witnesses.

Practice tip – If you are about to do a hearing (or waive one), ask the prosecutor if the witnesses are in the courtroom. Inexperienced prosecutors may have them waiting in the courtroom. When the defendant comes out to do a colloquy on waiving his/her right to be present, the witnesses have the opportunity to view under the most suggestive of circumstances. So ask that the witnesses be removed from the courtroom to a location away from the door before your client is brought out.

(3) The Court must read to the defendant the felony complaint and any supporting depositions

We usually waive this. But there could be an occasion where you would want this done. It's probably only something you would want to try under a bizarre and extreme circumstance.

(4 and 5 omitted here)

(6) The defendant may, as a matter of right, testify in his own behalf.

Do everything you can to keep this from happening. If your client managed to invoke his/her right to counsel, why give a statement now? Prepare your client for the question s/he will be asked as to whether the defense has any proof, and explain to your client that s/he should not testify. Reasons include that you do not have all the evidence in the case, whatever he/she says can be used against him/her later at trial, and even small inconsistencies or failures to recall can be damaging later. The judge is likely to hold the defendant in custody, so the testimony will only be an opportunity for the prosecutor to get to know and prepare for the defense before trial. If a statement has been offered, the client's version has already been presented. Let them know this is not the trial of the case, and they can testify at trial.

(7) Upon request of the defendant, the court may, as a matter of discretion, permit him to call and examine other witnesses or to produce other evidence in his behalf.

Although the Court may permit this, it is highly unlikely you would be doing anything here except helping the prosecutor prepare for his/her case. Do not do this.

(8) "Upon such a hearing, only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that the defendant committed a felony; except that (certain evidence listed in CPL 190.30[2] and [3] may be admissible)"

This is the meat and potatoes (or tofu and seitan) of this statute. First, you should note, that the standard of proof at the hearing is set forth here – reasonable cause to believe the defendant committed ***a*** felony, not necessarily the felony charged in the felony complaint. That is the language that is used at the hearing and in any argument you make at the conclusion. That is the burden the prosecution must meet.

Second, this statute establishes what evidence may be admitted. Contrary to popular belief, the rules of evidence do apply at preliminary hearings. The only hearsay evidence which is admissible is the hearsay permitted before the Grand Jury as set forth in 190.30 (2) and (3), and only if it's sufficiently reliable. This evidence includes (subd 2) expert reports on firearms, autopsies, fingerprints, etc. as well as (subd 3), a person's ownership of property, defendant's lack of license to enter, nature and monetary amount of damage to property and defendant's lack of right to damage it, and a number of other types of evidence.

But if the Court is admitting a deposition under one of these exceptions, make sure the statement does not go beyond what is statutorily permissible, and make sure that if it is an expert report, it meets the requirements of such reports, and if it is the other type of statement it is under oath.

Because this is not a trial, but instead a statutorily created procedure, it is unlikely *Crawford* objections will be sustained.

(9) The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings.

You may wish to make this application in a YO case or, under rare circumstances, in a high publicity or other unusual case.

(10) Such hearing should be completed at one session. In the interest of justice, however, it may be adjourned by the court but, in the absence of a showing of good cause therefore, no such adjournment may be for more than one day.

CPL 180.70 Proceedings upon felony complaint; disposition of felony complaint after hearing.

This statute provides the options available to the court at the conclusion of the hearing.

(1) Subdivision 1 states that if there is reasonable cause found (except as in subdivision 3), the court must order the defendant be held for the action of the grand jury of the appropriate superior court, and the paperwork must be transmitted. **Until transmitted, the action is deemed to be still pending in the local criminal court.**

Practice tip: If the proof came in poorly for the prosecution, consider making an application for the client's release or reduction of bail after the hearing. The court has jurisdiction prior to the transmittal of the papers.

(2) If there is not reasonable cause to believe the defendant committed a felony, but there is reasonable cause to believe s/he committed a misdemeanor or violation, the court may reduce the charge to a non-felony using the procedures set forth in CPL 180.50(3).

(3) If the court finds reasonable cause to believe the defendant committed a felony and a non-felony, the court may reduce to a non-felony if it is satisfied the reduction is in the interest of justice and **if the prosecutor consents.** This does not apply to armed felonies or A felonies.

(4) If there is not reasonable cause to believe the defendant committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody **if he is in custody**, or if he is at liberty on bail, it must exonerate the bail. (Note – again, the statute does not apply these procedures only to individuals in custody.)

CPL 180.70 is the source of a lot of controversy in Rochester City Court because it is our contention the judges are doing it wrong. If a defendant has been released, the statute does not bar a preliminary hearing. In fact, Article 180 does not provide for a situation in which the Court "waives the case to the grand jury." The options are specific, and that is not one of them. For an excellent discussion on procedures following a preliminary hearing, see *People v. Cleghorn*, 190 Misc. 2d 421 (Tompkins County, 2001).

Dismissal at a preliminary hearing is a termination in favor of the accused. (See CPL 160.50.) If a case is terminated in favor of a defendant, a defendant is entitled to be released on charges and have the record sealed under most circumstances. Although there is a Rochester City Court decision about sealing records (see *People v. Hogan*, 5 Misc. 3d 151 [Rochester City Court, 2004]) this writer, who sought sealing in the *Hogan* case, disagrees with that decision. A defendant is entitled to have an order of protection vacated. So if the prosecution does not go forward with a preliminary hearing, many of us request dismissal, release of bail, sealing and vacatur of the order

of protection. Some courts have agreed with this perspective. Others, including several judges in City Court, generally do not.

Be aware – even if you win the preliminary hearing the prosecution can still indict the case.

180.75 – Juvenile offenders

Juvenile offenders are young teenagers charged with specific VFOs. The PH procedures are similar, but the court's actions may differ at the conclusion of the hearing. Read this statute when you represent a juvenile offender. Or before.

180.80 – Proceedings upon felony complaint; release of defendant from custody upon failure of timely disposition

A defendant has the right to a preliminary hearing within 144 hours of his/her detention on the felony complaint. If the felony complaint has not been disposed of or a hearing has not commenced, the client is entitled to be released on the charge. Although the statute mentions 120 hours excluding week-ends, generally the prosecution has 144 hours due to the way time is calculated. (Are there any situations when the limit is truly 120 hours?) The calculation of time is especially important to monitor in Town Courts. Clerks and Town Court judges do get this wrong, and schedule hearings for beyond the 144 hours when a hearing must be commenced. If the hearing has not commenced, and your client is not being held on any other charges, our client gets a "get out of jail free" card. You can apply to your judge or the Part I County Court judge for your client's release. But first check your math. Be aware that a client may have been in custody on the felony complaint hours before s/he was booked into the jail. Note that the 144 hours commences at the time of the defendant's **arrest** (not his/her subsequent arraignment).

As with every other rule, this one also has exceptions. Subdivision 1 notes the client does not have to be released if the "failure to dispose of the felony complaint or to commence a hearing was due to the defendant's request, action or condition, or occurred with his consent." Subdivision 2 notes the defendant does not have to be released if the prosecutor files a written certification that an indictment has been voted, or if the grand jury or prosecutor's information has been filed by the grand jury. Subdivision 3 permits an extension of the period if the prosecution has shown "good cause" why the defendant should not be released and defines "good cause". This exception is often used when the complainant or defendant is in the hospital as a result of the incident, though courts have, on occasion, conducted PHs in hospitals.

III. GRAND JURY

Article 190 of the Criminal Procedure Law sets forth the rules relating to grand jury presentations. As defined in Section 190.05 of the Criminal Procedure Law,

> A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting a part of such court, the functions of which are to hear and examine evidence concerning offenses and concerning misconduct, nonfeasance and neglect in public office, whether criminal or otherwise, and to take action with respect to such evidence as provided in section 190.60.

In Monroe County, there are usually at least two grand juries sitting at any one time. The grand jury sits for a term of the court (CPL 190.15), which is usually a month in length, although upon application of the D.A. the period can be extended (190.15[1]). As the grand jury sits, its decisions as to which cases are indicted, which are returned to lower court and which are dismissed are publicized periodically in a document called "the risings." (Not the Bruce Springsteen rising.) So there are times that a prosecutor may commence a grand jury presentation, but delay the grand jury's decision to see whether your client is accepting an offer. The prosecutor may tell you that the grand jury has its "final rising" on a particular date, and that the prosecutor must know your client's decision prior to that date.

Proceedings of the grand jury are not valid unless at least sixteen members are present (CPL 190.25). At least twelve members must agree for a charge to be indicted (CPL 190.25).

The Grand Jury is a secret process (See CPL 190.25[4][a]); only specified individuals may be present during the grand jury's work. The list of those who may be present is contained in CPL 190.25(2). The public may not be present. Your client may not be present unless s/he chooses to testify, and then may only be present during his/her testimony.

Although the Court and the District Attorney are the legal advisors to the grand jury, there is no judge presiding in the room during grand jury conduct. Instead, the prosecutor reads the law to the grand jury and generally runs the show. If you have a dispute about something that is occurring in grand jury in one of your cases, you may seek to have the County Court Part I Judge resolve the matter by requesting to see the judge with the prosecutor.

Section 190.30 of the Criminal Procedure Law sets forth the evidentiary rules applicable to the grand jury. Notably, there are certain types of hearsay evidence that are admissible in grand jury, but hearsay is limited to the specific types of evidence set forth in that statute.

If you represent a witness who may appear before the grand jury, or a defendant against whom a case is being presented, you must become familiar with the statutes relating to compulsion of evidence and immunity (CPL 190.40), waiver of immunity (CPL 190.45), the statute that addresses who may call witnesses and the procedures when a defendant is a witness (CPL 190.50), and the statute that addresses an attorney's role before the grand jury when representing a witness (CPL 190.52).

If you represent a defendant before the grand jury, unless s/he is a cooperating witness who has been offered immunity, you will be expected to review with your client the law relating to immunity and waiver of immunity. Your client will have to sign a waiver of immunity that you will witness.

Although the District Attorney's Office has traditionally requested that the defendant sign an extensive waiver that exceeded the language of the Criminal Procedure Law, and also required that defense counsel sign an affirmation and acknowledge its signature in grand jury that defense counsel knows his/her role, a recent case decided by the Fourth Department confirms that the practice of requiring waiver beyond what the statute sets forth is unlawful.

In *People v. Brumfield*, in which the defendant was convicted after trial, the Fourth Department ruled:

> CPL 190.50(5) provides that, if a defendant serves upon the People a notice of his intent to testify before the grand jury, appears at the appropriate time and place, and signs and submits to the grand jury "a waiver of immunity pursuant to [CPL] 190.45," the defendant "must be permitted to testify before the grand jury" (CPL 190.50[5][b]; see CPL 190.50[5][a]). In the event that the defendant complies with those procedures and is thereafter not permitted to testify, the appropriate remedy is dismissal of the indictment (see CPL 190.50[5][c]). The parties do not dispute that defendant complied with the first two requirements of the statute. The only dispute is whether defendant signed "a waiver of immunity pursuant to section 190.45" (CPL 190.50[5][b]). CPL 190.45(1) provides that a waiver of immunity "is a written instrument" in which a person who is to testify before the grand jury stipulates that he or she "waives [the] privilege against self-

> incrimination and any possible or prospective immunity to which he [or she] would otherwise become entitled, pursuant to [CPL] 190.40, as a result of giving evidence in such proceeding." Here, the paragraphs in the waiver of immunity form that defendant left intact stated that defendant waived his privilege against self-incrimination and any immunity to which he would otherwise be entitled pursuant to CPL 190.40. Thus, defendant signed a waiver of immunity form that complied with the requirements of CPL 190.45(1) and was therefore required to be permitted to testify before the grand jury (see CPL 190.50[5][b]). It is well settled that a defendant's statutory right to testify before the grand jury " 'must be scrupulously protected' " (*People v. Smith*, 87 N.Y.2d 715, 721, quoting *People v. Corrigan*, 80 N.Y.2d 326, 332). We conclude that, because defendant complied with the requirements of CPL 190.50(5) but was nevertheless denied his right to testify before the grand jury, the court erred in denying defendant's motion to dismiss the indictment. We therefore reverse the judgment of conviction, grant the motion, and dismiss the indictment without prejudice to the People to re-present any appropriate charges under counts two through five of the indictment to another grand jury (see generally *People v. Pattison*, 63 AD3d 1600, 1601, lv denied 13 NY3d 799).

People v. Brumfield --- N.Y.S.2d ---- (Fourth Dept. Sept. 27, 2013). Although the Court ruled on the waiver issue and did not reach the attorney affirmation issue, it seems that a refusal to allow defendant to testify because the attorney refuses to sign an affidavit not required by the statute or acknowledge it in grand jury might also result in a reversal.

A word about grand jury practice

Because handling preliminary hearings requires a working knowledge of grand jury practice, you must read the grand jury statutes (CPL Article 190). You should be aware of the following:

1. If your client wishes to testify before the grand jury, you must send the prosecutor a written notice of your client's intent to testify. If the prosecutor is presenting on short notice, do your notice by email and fax, with an explanation included that you cannot send the letter by U.S. mail because of the short notice you received. (CPL 190.50[5][a])

Some attorneys send these notices on each case. But if you choose to engage in this practice, you must notify the prosecutor if your client is not testifying before the

grand jury, as your client will be body-ordered to the grand jury, and may be left sitting, without you there, initially bewildered and eventually angry.

2. Generally, it's a bad idea for your client to testify before the grand jury. You don't yet know the evidence the prosecutor has in the case, you don't yet know whether your client's version varies greatly with that evidence or with any statement s/he may have made to the police, the client's testimony can be used at trial, the grand jury is likely to indict any case the prosecutor presents to them, and you may be revealing more than you should to the prosecutor prior to trial, allowing the prosecutor to try to prepare the witnesses to refute your defense. There are exceptions to the bad idea rule, but not many.

3. You are entitled to **reasonable** notice of the prosecutor's presentation of the case if your client has been held for action of the grand jury on an undisposed of felony complaint and/or if notice has been served by the defense:

> The Criminal Procedure Law imposes a new obligation on prosecutors under CPL 190.50(5)(a): a defendant must be informed that a Grand Jury proceeding against that person is pending, in progress or about to occur, if that person has been arraigned on an undisposed felony complaint charging an offense which is a subject of the prospective or pending Grand Jury proceeding. CPL 190.50(5)(a) then adds in pertinent part that "[w]hen a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his [or her] own behalf if, prior to the filing of any indictment * * * he [or she] serves upon the district attorney of the county a written notice making such request" (emphasis added). Once an accused serves such notice requesting an appearance before the Grand Jury, the District Attorney "must notify the fore[person] of the grand jury of such request, and must subsequently serve upon the applicant * * * a notice that [the applicant] will be heard by the grand jury at a given time and place. Upon appearing at such time and place * * * such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration" (CPL 190.50[5][b]). The District Attorney must afford defendant "reasonable *413 time" to exercise the right to appear as a witness at the Grand Jury (CPL 190.50[5][a]).

People v. Evans, 79 N.Y.2d 407, 412-13, 592 N.E.2d 1362, 1364 (1992)

Reasonable notice is not five or ten business hours after you've been assigned. (See CPL 190.50[5][a], *People v. Degnan, 246 AD2d 819, "*Insofar as is pertinent to this

appeal, CPL 190.50(5)(a) provides that the District Attorney must notify the defendant or his or her attorney of a pending Grand Jury proceeding in such manner as to afford the defendant reasonable time to exercise his or her right to appear as a witness therein. Defendant asserts that the one-day notice provided by the People here was insufficient to allow him a reasonable opportunity to exercise his right to appear as a witness in the Grand Jury proceeding. We agree." *People v. Degnan*, 246 A.D.2d 819, 820, 667 N.Y.S.2d 808, 809 (1998)) If you get notice that is unreasonable, send a letter to the prosecutor that the notice is unreasonable, and that you will be filing a five day motion seeking dismissal of the case after indictment if they do not provide you with reasonable notice.

4. A defendant has the right to testify before a grand jury that has not voted the case if the defense serves timely notice.

> Our reading of CPL 190.50(5) together with its history and purpose warrants the conclusion that the Legislature intended that individuals who give timely notice reasonably prior to the prosecution's presentment of evidence and prior to the Grand Jury vote on an indictment are entitled to testify before the vote. *People v. Evans*, 79 N.Y.2d 407, 413, 592 N.E.2d 1362, 1365 (1992)

So ask your prosecutor if they have voted the case yet; if they have, do not have your client testify. They will not tell you if you do not ask (and may not tell you if you do!). Tell them you will be filing a five-day motion (CPL 190.50[5][c]) unless they withdraw the case from that grand jury and present to another that has not voted the case.

5. If a defendant is out of custody on a felony and the case is no longer pending in local criminal court, the defendant is not entitled to notice of the presentation of the case unless the defendant has requested the opportunity to testify in writing (as 190.50[5][a] has been interpreted by courts). Similarly, if the case has been referred to the grand jury following a preliminary hearing or a defendant waives the preliminary hearing, you are not entitled to notice.

> As a general rule, the target of a Grand Jury investigation is not entitled to any sort of notice that a Grand Jury proceeding against him is in progress or about to occur. The one exception is where a person has been arraigned on a "currently undisposed of felony complaint" charging the offense to be presented to the Grand Jury (subd. 5[a]). The purpose of this is to preserve some opportunity for a defendant to negate probable cause and avoid indictment. **Thus the exception does not apply where defendant waives a preliminary hearing at arraignment or if the case is presented to the Grand Jury after the**

> **defendant has been held for the Grand Jury on the basis of a preliminary hearing.**

Commentary N.Y. Crim. Proc. Law § 190.50 (McKinney)

Because many judges in Monroe County do not adhere strictly to Article 180, a question remains as to whether a defendant with an adjourned date for "screen" has an undisposed of felony pending in local criminal court, as undisposed of felonies are addressed in a statute that doesn't specifically describe this situation. To be on the safe side, if your client wants to testify before the grand jury, serve notice whether or not the client is in custody or the case has been adjourned in local court.

If notice is served, it must notify the prosecutor of intent to testify on either all charges pending before the grand jury, or the specific charge the defendant wants to testify about. A notice served on one charge will not be deemed notice on another matter. See *People v. McNamara*, 99 A.D.3d 1248, 951 N.Y.S.2d 816 (2012) leave to appeal denied, 21 N.Y.3d 913, 988 N.E.2d 893 (2013).

And if the prosecutor does not provide notice of grand jury presentation when s/he is required to, the defense must file a "five day motion" to properly challenge the failure:

> Special note should be taken of the fact that, although a motion to dismiss an indictment for failure to honor a defendant's request to appear before the Grand Jury is, technically speaking, a "pretrial motion" (see CPL §§ 210.35 [4], 255.10), **the timing is not governed by the forty-five day period specified in CPL § 255.20. This motion must be made within five days after arraignment or it is waived (see CPL § 190.50[5(c)]).** (Emphasis added)

Commentary, N.Y. Crim. Proc. Law § 190.50 (McKinney)

IV. PREPARING FOR THE PRELIMINARY HEARING

If the prosecutor has not extended an offer worth considering (a whole other training), and if the case has not been presented to the grand jury, you are doing the hearing. As with all hearings, you should prepare. Preparation involves meeting the client, knowing the applicable law, investigating the case, and preparing for the witnesses.

A. The Law

When you are assigned to a felony, look up the statute defining the crime. If you are new to felonies, take a look at the Office of Court Administration Criminal Jury Instructions and see what a jury would be told would have to be proven at trial. If the statute defining the crime contains "terms of art" which have a specific legal meaning make sure you are familiar with those too.

Between a review of the accusatory and supporting documents, if any, and a meeting with your client, you should have a sense of what the possible defenses might be. Make sure the possible defenses comport with the law. For example, if a client describes a fistfight where he pulled a gun, justification is not going to be a likely winning defense at trial, so you may want to explore other areas too.

Discovery at the hearing – statutory rights

It is important to be familiar with the law relating to discovery at preliminary hearings. These rules are found both in the Criminal Procedure Law and case law. The Criminal Procedure Law sets forth the documents you are entitled to at a preliminary hearing:

CPL 240.44 sets forth the discovery you must be given **upon request** at a pre-trial hearing. The statute requires disclosure at the conclusion of the direct examination. The defense is entitled to "any written or recorded statement…made by such witness…which relates to the subject matter of the witness's testimony." The statute also requires disclosure of any criminal convictions and pending criminal actions against a witness if they're known by the prosecution.

Although the statute requires a request by defense counsel, and doesn't require disclosure until after the direct exam, most prosecutors will provide you with the discovery before the hearing. If you forget to ask, make sure you always keep it as part of your cross in every pre-trial hearing. (More later.) If the prosecutor says they will give it to you after the direct, make a point of letting the judge know that you'll need a break between direct and cross to review the discovery because the prosecutor has not turned it over.

This is also where *Brady* meets the real world. Prosecutors may claim they are "not aware" of the pending charges or prior convictions because there are some prosecutors, not all, who believe they can insulate themselves from the damaging information about their cases by not looking at it. But the Fourth Department has squarely addressed this issue in *People v. Valentin:*

> It is not determinative that the prosecutor denied any contemporaneous actual knowledge of the eyewitness's criminal convictions as a consequence of his self-professed standard practice of not checking into such matters. "The requirement that the *Brady* material be in the People's possession or control * * * has not been interpreted narrowly" (*People v. Santorelli*, 95 N.Y.2d 412, 421, 718 N.Y.S.2d 696, 741 N.E.2d 493; see *People v. Bryce*, 88 N.Y.2d 124, 128, 643 N.Y.S.2d 516, 666 N.E.2d 221; *People v. Vilardi*, 76 N.Y.2d 67, 73, 556 N.Y.S.2d 518, 555 N.E.2d 915). "A prosecutor must 'learn of any favorable evidence known to the others acting on the government's behalf in the case' and promptly disclose any such material evidence to the defendant" (*Santorelli*, 95 N.Y.2d at 421, 718 N.Y.S.2d 696, 741 N.E.2d 493; see *People v. Wright*, 86 N.Y.2d 591, 598, 635 N.Y.S.2d 136, 658 N.E.2d 1009; People v. Novoa, 70 N.Y.2d 490, 498, 522 N.Y.S.2d 504, 517 N.E.2d 219). Here, the criminal record of the eyewitness was readily available to the prosecutor and certainly known to other individuals in his office who recently had prosecuted the eyewitness (see *Pressley*, 234 A.D.2d at 954, 652 N.Y.S.2d 436).

People v. Valentin, 1 A.D.3d 982, 983, 767 N.Y.S.2d 343 (2003). See also *People v. Kelly*, 88 N.Y.2d 248 for a discussion of what *Rosario* the prosecutor is charged with possessing.

Discovery at the hearing – case law

In addition to the statutory discovery requirements, there are also case based requirements. The statute codified *People v. Rosario* 9 NY2d 286, which required that statements of a witness must be provided to the defense. The language in *Rosario* is really broad – it supports the disclosure of all sorts of documents.

The Second Department, in *People v. Butts,* found *Rosario* applicable to preliminary hearings prior to the codification of the *Rosario* case. The Court stated:

> (W)e feel it important to state that with respect to the question of the right of a defendant to inspect and use prior statements of a preliminary examination witness, we are in accord with the portion of the opinion of the learned Justice at Special Term which deals with that subject. Applying the rationale of *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881, absent the necessities of effective law enforcement which might require that the statement be kept secret or confidential, the State has no interest in interposing any obstacle to the disclosure of a prior statement by a preliminary examination

> witness which may expose the prosecution's case and persuade the committing magistrate to refuse to bind the accused over (see *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387; *People v. Malinsky*, 15 N.Y.2d 86, 262 N.Y.S.2d 65, 209 N.E.2d 694).

Butts v. Justices of Court of Special Sessions of Town of Greenburgh, 37 A.D.2d 607, 323 N.Y.S.2d 619, 621 (1971). But be aware, there are cases that went the other way prior to the codification of *Rosario.*

The District Court of Nassau County addressed the entitlement to 240.44 material after enactment of the statute codifying *Rosario*:

> ”CPL Section 240.44 states: “Subject to a protective order, at a pre-trial hearing held in a criminal court at which a witness is called to testify, each party, at the conclusion of the direct examination of each of its witnesses, shall, upon request of the other party, make available to that party to the extent not previously disclosed:1. Any written or recorded statement, including any testimony before a grand jury, made by such witness other than the defendant which relates to the subject matter of the witness's testimony.” After examining the relevant case law and statutes, this court holds that in the course of a hearing upon a felony complaint the defense is entitled to examine and utilize prior statements of testifying witnesses relevant to the testimony elicited on direct examination for the purpose of cross-examination. The U.S. Supreme Court has held that the preliminary hearing is a critical stage of the proceedings (*Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 [1970]) at which the right of counsel attaches and the Court of Appeals stated *People v. Malinsky*, 15 N.Y.2d 86 at 90, 262 N.Y.S.2d 65, 209 N.E.2d 694, “We made it unmistakably clear in *People v. Rosario*, 9 N.Y.2d 286 [213 N.Y.S.2d 448, 173 N.E.2d 881] that defense counsel must be permitted to examine a witness' prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be made of it on cross-examination, provided only that the statement ‘relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential’ (p. 289). And, obviously, it matters not whether the witness is testifying upon a trial or at a hearing. In either event, ‘a right sense of justice’ entitles the defense to ascertain what the witness said about the subject under consideration on an earlier occasion.”

People v. Diggs, 140 Misc. 2d 794, 795-96, 531 N.Y.S.2d 723, 724 (Dist. Ct. 1988)

In *People v. McPhee*, Judge Robert Kohm of the Queens County Court concluded that *Rosario* was applicable to competency hearings. In his decision he reviewed the history of CPL 240.44 and *Rosario,* finding the enactment of CPL 240.44 and 240.45 modified the *Rosario* requirements

The Preiser Commentaries on CPL 180.60 state:

> Another similarity to a trial is the statutory availability of the witness's prior statements for defense use in cross-examination. CPL § 240.44; *People v. Diggs*, 140 Misc.2d 794, 531 N.Y.S.2d 723 (Dist.Ct. Nassau Co.1988). Note however, a basic distinction between *Rosario* rights at trial and here. At trial, a party's obligation to turn over the material is automatic; whereas at a pre-trial hearing, the material is required only "upon request of the other party." Thus, if request is not made, the right is waived. Compliance with a request for the material is important if the witness subsequently becomes unavailable and the People would like to use the preliminary hearing testimony at trial (see CPL §§ 670.10, 670.20; *People v. Arroyo*, 54 N.Y.2d 567, 446 N.Y.S.2d 910, 431 N.E.2d 271 [1982] cert. denied, 456 U.S. 979, 102 S.Ct. 2248, 72 L.Ed.2d 855).

Every few months or years a newer prosecutor may claim that because the records do not specifically address the exact topic of the testimony or are contained in a police report not signed by the witness, they are not *Rosario.* But a look at the original case and statute support a different conclusion.

Practice tip: When preparing for a hearing, copy the discovery and keep the original pristine. Then split the copied discovery into files relating to each witness. If a witness is an officer who prepared a civilian deposition, make two copies, one for the officer and one for the civilian. Then when beginning a cross on a witness ask the witness if s/he prepared each document in your file. After you ask that, ask if they prepared any other reports or documents, including emails or digital records, in relation to their work on the case. If they did, immediately request the records as Rosario*. And ask them if the prosecutor took notes when speaking to them. Then request that material as* Consolazio *material.*

A judge was recently heard saying that discovery was not required at a preliminary hearing and that the prosecutor did not have to give copies of the officer's statements. The Court's conclusion was inconsistent with the language CPL 240.44, inconsistent with Preiser's Commentaries, and inconsistent with the few cases that have addressed this issue since the codification of *Rosario*. Although many cases support

the principle that full discovery is not required prior to indictment, prior statements of a testifying witness are.

People v. Consolazio

And how cool is this:

> With respect to the *Rosario* branch of defendant's argument, we hold that the trial court erroneously concluded that the worksheets did not constitute 'prior statements' of prosecution witnesses within the contemplation of the rule of that case. The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature. Thus it has been held that a witness' statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is 'a record of a prior statement by a witness within the compass of the rule in People v. *Rosario* and therefore not exempt from disclosure as a 'work product' datum of the prosecutor'. (*People v. Hawa*, 15 A.D.2d 740, affd. 13 N.Y.2d 718; and see *People v. Horton*, 19 A.D.2d 80, 25 A.D.2d 720, affd. 18 N.Y.2d 355, cf. *People v. Butler*, 33 A.D.2d 675, affd. 28 N.Y.2d 499.) Accordingly, we conclude that the prosecutor's worksheets, containing as they do abbreviated notes capsulizing witnesses' responses to questions relating directly to material issues raised on defendant's trial, fall within the reach of our *454 holding in Rosario. Indeed this was obliquely recognized by the District Attorney, who with commendable candor informed the trial court that the signatures of the witnesses were not affixed to the questionnaire forms when completed in the hope that Rosario disclosure could thereby be obviated.

People v. Consolazio, 40 N.Y.2d 446, 453-54, (1976).

B. Preparation –

Investigation

As you are getting familiar with the law and possible defense theories of the case, you must also be investigating. Your investigation will not be concluded prior to the hearing, but it should be started, and should be focused on getting information you can use or theories you can probe at the hearing.

Recordings

If your case involves a stop on a city street, you should immediately try to preserve any video from city street surveillance cameras by contacting Skip Shukoff by email at Corporation Counsel (shukoffi@cityofrochester.gov), and requesting he preserve any video in the area. He will need the date, time, location, charge and CR number, as well as your client's name. If there is video it will have to be subpoenaed but since these videos are destroyed pretty quickly, the first job is to preserve it.

If your case involves a jail incident, you should also request preservation of the video. Make this request to the counsel to the sheriff, currently Jennifer Sommers.

If your case involves a 911 call (and most do) and you believe the call may assist you in cross-examining witnesses, you should try to get a subpoena signed and the recording made returnable on or before your court date.

If your case involves a business you may wish to see if the business has cameras, and if so, send an investigator out with a subpoena to get a copy of any recordings.

If your case involves cell phones or an incident in public, consider having an investigator attempt to review cell phones of interested parties (if they are cooperative) and photograph the screens, asking the parties to preserve the information on the phone so that you might be able to get a copy of the phone's information at a later date.

Viewing location

Although you may not be able to get out and view the scene prior to the preliminary hearing, you should if it involves a serious case and locations will be addressed at the hearing. But time constraints being what they are, at a minimum, go on the internet and view the houses in the area, and copy the maps. Become familiar with the orientation of the house/business/streets – north, south, east and west – so that when you question the officers you can be specific with directions. Police often testify about the locations around a house using these directional terms, so become familiar with which side of the house is north, which is south, etc.

Print out copies of maps of the area, and keep them in the file. You may well be using them at the hearing.

Review photographs, or the location, and consider whether what the witness is saying makes sense – if there are claims about forced entry, for example, take a look at

whether there appear to be any new forced entry signs to the house, as well as the condition of the house.

Check the internet

Consider "googling" the names of all of the parties in the case to see if they have been involved in crimes or incidents of notoriety. You would be surprised at how often witnesses' names appear in archived news reports on the web.

Check PACER (the federal government court filing system) and CHRS (the New York system) for witnesses' records. And of course, check CMS for conflicts.

Check Facebook, but never represent yourself to be someone who you are not. In other words, if the profile is open to the public or you have a witness who has access, you may look and copy, but do not claim to be someone you are not.

Value and other issues

Although value and certain type of other information may be proven at the hearing through depositions without live witness testimony, be prepared to address these issues in case there is live witness testimony. Check value of an item by reviewing its value on the internet. Print information that may be helpful.

Watch for whether the object is what it is claimed to be. In one case, the owner of a car was claiming its value based on its status as a classic car. However, a review of the books showing various years' models reflected that the car had in fact been restored using grilles and other objects from cars of other years.

Interviewing witnesses

If your client indicates s/he has witnesses, you should have an investigator go out and see the witnesses as soon as possible. Although you will not be introducing their testimony at the hearing, they may provide you with information that you can use to cross-examine the witnesses who do testify.

You should also have your investigator go out to see the complainant and the prosecution witnesses. This is the best time to do that, as the prosecution does not expect you to have an investigator our yet and may not even have spoken with them. Although it is unethical for prosecutors to inform witnesses not to talk to defense counsel, those who are unfamiliar with this perspective sometimes do. But if you get an

investigator out early, prepared for a full questioning of the witness, you may have an opportunity now you will not have later.

Since the witnesses are adverse, there is no harm in having the investigator take detailed notes of everything they say. Some staff think of all the questions you would like answered by the witness and write them out for the investigator, or accompany the investigator on the investigation.

Preparation of questions

As you prepare for the hearing, consider both the information you have and the information you do not have. Do not just rely on the depositions or anticipated testimony of the prosecution witness to prepare your cross, but consider what does not make sense, what seems to be missing, and which elements do not seem to be well supported. Be creative in your preparation. Do not worry about whether the hearing will take too long – the more information you get the better.

In ID cases consider the following:

How long was the person viewed
Lighting at each point during the viewing
Appearance including:
Height (and height of witness, so you can establish relative heights)
Weight
Skin tone
Anything unusual about eyes, nose, mouth, teeth
Scars
Tattoos
Age
Hair length, color
Eye color
Left handed, right handed
Clothing – shirt, pants, shoes, jacket, etc.
Jewelry

In any case consider having the witness testify to each thing that occurred minute by minute. For example, first viewing or contact of the person who committed the crime, how long viewed during that time, lighting, who else was present, location of witness, location of person who committed the crime, when they moved where did they go, distance from witness, how long viewed there, angle, etc. each step of the way.

In a DWI consider the following:

Where officer was when first observed car
How many cars behind
Lights/sirens activiated?
Route taken
While on (first leg of route) distance traveled
How long first leg took
Observations during that time
Number of times, if any, crossed line (or if no crossing, you ticketed for all violations observed, did not observe him crossing lines during this time)
If stop signs, lights, etc, number passed through on that leg of route
Didn't fail to stop, etc.
Didn't fail to signal

Do this for each leg of the route. Break down the field sobriety the same way.

In sex offenses consider breaking down every minute of contact, prior to and including during the offense and including articles of clothing worn at each point, where physical contact was made on the body at each point, where they were on furniture and in a room at each point, and what was said at each point.

V. AT THE HEARING

Talking to the client

Before the hearing, discuss with your client that you will have to listen to the witnesses so if the client has something to say they must write it down (and give them paper and a pen). If the client cannot read or write make another plan, such as telling the client you will check in with them before concluding your cross on each witness. If there is a potential ID case, urge your client to waive his/her appearance during the hearing. Discuss that the judge will ask the client whether s/he wishes to testify, and that the client should decline (and why).

Rosario

The prosecutor will likely give you *Rosario* before the hearing. Make sure you review it and incorporate it into your questions.

Know your goals

As with any hearing, you must know your goals before you begin questioning the witness. This will help guide you in how to approach the witness. Generally you are not likely to win a preliminary hearing, so you must consider other goals, such as locking in testimony of witnesses, establishing witnesses' lack of knowledge about the case, establishing a witness is lying, etc. In every case, but especially the rare case where you have a chance of winning the hearing, watch the testimony carefully to make sure that the prosecutor has dotted the "I's" and crossed the "t's". For example, did the prosecutor have the witness identify the defendant and did the prosecutor establish jurisdiction? If you are trying to win the hearing, make sure you do not elicit information that supports the charges that the prosecutor failed to elicit.

Questioning the witnesses

Use of language

One of the most important opportunities presented by preliminary hearings is the opportunity to create a prior statement of a witness that can be used for cross-examination at trial. So you must be mindful of the language you use, and how you use it. If you ask the witness "When you saw the defendant enter the house" in a burglary case, for example, any answer you receive after that will be useless at trial, since all the jury will hear was that the defendant entered the house. Use language carefully.

In a potential ID case, instead of "the defendant" or "the suspect":
"When you saw the man the first time"
"When the person did (A), (B) or (C)…"

With a witness whose veracity you are challenging:
"On the date you say this happen"
"Then you claim he did (A), (B) or (C)

Follow all the rules of cross – short sentences, one thought per sentence, etc. so that the hearing transcript will be usable. If you have a cop or other experienced witness trying to muck up your transcript with lengthy run on sentences, go back and break it down.

A transcript may be offered at trial under certain circumstances if the defense has had a full and fair opportunity to cross examine a witness. You may wish to keep this in mind during your cross examination of the witness at the hearing, considering whether

there are areas of cross examination that you have been barred from exploring (which will make it less likely that the transcript could be used in a future proceeding.

Often these portions of the hearing during occur during the identification aspect of the hearing. You may be (and should be) questioning about the identification procedures the witness participated in, as they will be used to establish your client's identity at the hearing. A judge will claim, "Counselor, this is not a *Wade* hearing." You reply that the Court must assess the reliability of the witness and the strength of the testimony, so that although it is not a *Wade* hearing, the identification issues are critical to the hearing. Note – as you question about prior identification procedures, ask the witness if s/he was ever shown a single photograph of the defendant. This seems to be happening in some cases with inexperienced prosecutors and police officers.

Establishing "I don't knows"

When at trial, you generally do not want to ask questions for which you do not know the answers, generally there is no harm in doing this at the hearing. There are few risks in asking these questions at a hearing, unless you are about to elicit something extremely damaging to your client that the prosecution would never have learned. Unlikely. So you should ask as many questions as you can that will elicit "I don't know" answers. If the witness does not know how long one thing took, start asking about timing of everything else. If they do not know about aspects of the appearance of the defendant, or other people present, or what was said, go after it like a Scottish Terrier with a chipmunk or a stupid mini-pinscher mix with a pen (long story and we finally got most of the ink out). These questions and answers can be the basis for establishing lack of evidence at trial.

Timing, distance and other measurements

Try to get the witness to commit to lengths of times, distances and other measurements (especially if they are provably wrong) as you can use that to discredit the witness later. If you ask how many people were present and they say "I don't know" it's a nice start, but see if you can start narrowing – Five? Ten? At some point the prosecutor (or the judge who used to be a prosecutor) will argue the question has been asked and answered and you'll have to stop.

Know terms

Make sure you are familiar with all the terms about to be used in the hearing – whether medical, legal, business or other.

Have they answered the question?

When you ask a question and you don't get the answer, in any cross, ask it again. When you get the objection "asked and answered" argue that it was not answered. Don't just give up.

Issues to be aware of:

Although a defendant's statement is not enough for conviction at trial, courts have found it sufficient to hold the defendant for action of the grand jury.

If the prosecutor is going forward with a statement PH, remember that pursuant to CPL 60.45 the preliminary hearing is a "criminal proceeding", so you may explore voluntariness. If the prosecutor objects to the questions concerning reliability of the statement, argue that the prosecutor must establish reasonable cause, and the evidence must be reliable.

If witnesses are not competent due to age, mental infirmity or for some other reason, brush up on the rules concerning testimony of such witnesses, and consider preparing a voir dire to submit to the court for those witnesses.

If the client waives his/her appearance at the hearing, the judge or prosecutor may claim that the issue of identification has been waived. There is no legal support for this that I could find. So object, note that the statute does not state that the defendant has to be present, but it does require proof that the prosecutor establish reasonable cause the defendant committed the crime. If the client waives, the prosecutor will usually prove identification through testimony of the witness who will describe participation in an identification proceeding, and then the police officer who will indicate the person picked out was your client.

Summation

You should do a brief closing argument at the conclusion of the hearing, explaining the reasons that the prosecutor has failed to establish reasonable cause to believe your client committed a felony. Consider moving to dismiss all unproven charges, and then asking for lower bail. Take another look at the elements of the charges, as well as identification, and work from that.

Making the Most of Your Suppression Hearings

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MAKING THE MOST OF YOUR SUPPRESSION HEARINGS

Jill Paperno and Erik Teifke

PRACTICES APPLICABLE TO ALL HEARINGS

PREPARATION

prep·a·ra·tion - ˌprepəˈrāSH(ə)n/

The action or process of making ready or being made ready for use or consideration. "The preparation of a draft contract"

synonyms: devising, putting together, drawing up, construction, composition, production, getting ready, development More

plural noun: preparations "she continued her preparations for the party

synonyms: arrangements, planning, plans, preparatory measures

PREPARATION

- Know your goals
- Know the burdens
- Anticipate the legal issues
- Prepare – Investigate, subpoena, talk to witnesses, review maps
- Review the law (if you didn't when you wrote the motions)
- Create a timeline of events, including arrest, Miranda, questioning

PREPARATION, CONT'D

- Prepare your cross, set up the files
- Disclose any discovery that may be required
- Subpoena records – video, 911, booking photo, medical or ambulance records showing client's injuries, personnel files of cops, client's school records and psychiatric records, map and aerial photos
- Will client or witnesses testify? If so, direct and cross them

PREPARATION, CONT'D

❖ Subpoena witnesses – (Does law permit you to subpoena police or civilian witnesses in this particular hearing)

Witnesses may include – Witnesses who differ with police version,

PC – lack of consent

Huntley – client's limitations with language, processing

Foundation witnesses for videos or 911, other police officers

DON'T FORGET IMPORTANT THINGS

Doing multiple hearings, don't forget to cover all the issues.

LIMITATIONS ON RIGHT TO CALL WITNESS - *WADE*

"Indeed we have held in respect to pretrial hearings more directly addressing the guilt or innocence of an accused that a defendant's right to require the production of a witness with relevant testimony could be outweighed by countervailing policy considerations (*People v Petralia*, 62 NY2d 47, 52-53)…Similar policy considerations, as already noted, militate against a rule that would render the identifying witness subject to compulsory process at the behest of the defendant absent some indication that the pretrial identification procedure was suggestive.

CHIPP

This is not to say, however, that an identification witness's testimony may never be required. Such a witness's testimony might become necessary if the hearing evidence raises substantial issues as to the constitutionality of the lineup, the resolution of which could not be properly resolved without testimony from the identification witness. Thus, in *People v Ocasio* (134 AD2d 293, 294) the court held that testimony from the identifying witnesses was needed when a detective's testimony about showing a photo array to several witnesses left open the possibility that a witness who had already viewed the array influenced or suggested another witness's identification of defendant.

- *People v. Chipp*, 75 N.Y.2d 327, 337-338, 552 N.E.2d 608, 614-615, 553 N.Y.S.2d 72, 78-79, 1990 N.Y. LEXIS 230, 20-22 (N.Y. 1990)

LIMITATIONS ON RIGHT TO CALL WITNESS - *MAPP*

- The motion court providently exercised its discretion in denying defense counsel's request for an adjournment at the close of the People's case during the *Mapp* hearing, in order to subpoena a police officer for the defense case. Defendant failed to demonstrate a reasonable excuse for failing to subpoena that officer prior to the hearing, and also failed to demonstrate the materiality of that officer's testimony at the hearing (see, *People v Foy*, 32 NY2d 473, 476).

People v. Charlton, 1997 N.Y. App. Div. LEXIS 4494, 1, 239 A.D.2d 104, 657 N.Y.S.2d 552 (N.Y. App. Div. 1st Dep't 1997)

KNOW YOUR GOALS

- Win the hearing
- Obtain discovery – Rosario, testimony of witnesses
- Lock in testimony –

I don't knows

Contradictory

Favorable to the case

- Get subpoenaed material

KNOW YOUR GOALS CONT'D

- Develop theory (theories) of the case through eliminating bad evidence, developing helpful testimony
- Show client you know what you're doing (You do, right?)
- Show cops and prosecutor this will not be a walk in the park
- Remind the judge this will not be a walk in the park
- Set up appeal
- Create climate for better plea offer

AT THE HEARING

- Ask D.A. for *Rosario*
- Review *Rosario* with testifying witness on the stand – and *Consolazio*, and digital – emails, etc. – Ask if the *Rosario* included all important information in case (to reduce the credibility of later additions at trial)
- Know your foundations and have equipment ready for recordings, videos

AT THE HEARING CONT'D

- Close the doors – ask witnesses if what they've testified to is all they recall seeing/hearing/doing so they don't come back at trial or later in the hearing with something else
- Consider whether the prosecution has failed to call necessary witnesses to meet the burden of going forward (*People v. Berrios)* – Gaps in the evidence, Fellow officer, *Lypka-Havelka,* arresting officer, officer who conducted lineup?

AT THE HEARING, CONT'D

- Did you get your grand jury testimony? Review it – consider whether there are new motions to make about sufficiency of the evidence and defectiveness of the proceedings. Renew your motions.

BEYOND THE SCOPE?

While an attorney is bound by the scope of a re-direct examination, he is not bound by the scope of the direct examination. *People v. Kennedy*, 70 A.D.2d 181 (2nd Dept. 1979)[" it is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]; *People v. Sanders*, 2 A.D.3d 1420 (4th Dept. 2003).

TO SUM OR NOT TO SUM

- Have cases or case law with you if you have to sum there
- Ask to sum in writing

TIPS ON QUESTIONING WITNESSES AT THE HEARINGS

- Don't let the officer drone on and muck up your record
- Picture the transcript while you are questioning
- If you don't get an answer, ask it again (Best tip I ever got)
- Clarify
- Don't fill in evidentiary gaps left by the prosecution – i.e., if they fail to establish probable cause, don't review facts and establish it yourself
- People don't want to look bad – use that to your advantage.

QUESTIONING WITNESSES CONT'D

- Get your "I don't knows"
- Did you get an answer to your question? If not, ask again. Don't be derailed.
- Get your inconsistencies
- Get the answers consistent with a theory of the case (or begin to rule it out)
- Decide whether questions should be open ended or leading – depends on theory of the case, goals at the hearing

  When to use open-ended, when to use leading

DOING THE CROSS

- How do you make it most useful for trial? Structure
- How do you take notes
- Do you impeach with prior inconsistencies the witnesses may n ot know of – reasons to impeach, reasons not to
- Getting the inconsistencies with witnesses you may bring in
- Don't stop because people are bored or angry

HUNTLEY HEARINGS

HUNTLEY HEARING GOALS

- Goals in addition to the usual ones:

1] Convince Judge to suppress the statement - [hey , it happens once in a while, really it does]

2] Generate support for your anticipated trial arguments [the statement was false, the statement was really that of the officer instead of your clients' etc.]

3] Limit the modification and impact of the statement

GROUNDS FOR SUPPRESSION

- 1] Miranda violation
  - a] Right to remain silent violation
  - b] Right to counsel violation
- 2] Traditional involuntariness
- 3] statement resulted from unlawful seizure of the defendant

BURDENS *HUNTLEY*

❖ The prosecutor opens the hearing with the burden of going forward that:

[1] *Miranda* warnings were not required because the suspect was either

[a] not in custody or

[b] not interrogated [the statement was spontaneous], or

BURDENS, CONT'D

[2] Miranda warnings were given and the suspect waived his rights.

This is usually accomplished by having the cop testify that the suspect was either not in custody, not interrogated, or was advised of his rights and proceeded to waive them and make a statement.

BURDENS, CONT'D

- If this can be accomplished, the burden then shifts to the suspect to prove that he :

  [1] was the subject of a custodial interrogation [and therefore should have been advised of his rights but was not] or

  [2] was advised but did not make a valid waiver of his Miranda rights.

The prosecutor has the burden of proving by a preponderance of the evidence that a waiver has occurred. *Colorado v. Connelly*, 479 US 157.

STRATEGIES

- Line by line - Your words or his
- Counting the lines and contrasting with time spent
- Who spoke first, what said, who spoke next
- Verbatim? How long between when statement made and when notes made? (May have to explain verbatim)
- Trauma, injured, last slept, ate, medication deprived, high or drunk?

AND SPEAKING OF STRATEGY

Know theirs:

Reid technique

Silences increase anxiety

Intentional error in the statement

Minimization

CONTENT CAN BE QUESTIONED

❖ The questions asked and the answers given *are* relevant at a Huntley hearing. *People v. Remaley*, 26 NY2d 427 (1970); *People v. David*, 44 AD2d 548 (1st Dept. 1974).

MAPP HEARINGS

MAPP HEARING GOALS

- In addition to usual goals, trying to suppress the evidence
- Getting a picture of the entire case – often the *Mapp* hearing covers much of the trial.

GROUNDS FOR SUPPRESSION

Review your case – 4th Amendment cases are FACT SPECIFIC

Are there issues relating to:

Nature of stop on street

Traffic stop

Warrantless search of house

Consent to search

Level of intrusion – always create the highest level with the lowest basis

MAPP HEARING BURDENS

Standing - May not have to be proven at the hearing, but might

"One seeking standing to assert a violation of his Fourth Amendment rights must demonstrate a legitimate expectation of privacy. One may have an expectation of privacy in premises not one's own, e.g., an overnight guest (*Minnesota v Olson*, 495 US 91) or a familial or other socially recognized relationship (*People v Rodriguez*, 69 NY2d 159; *People v Ponder*, 54 NY2d 160)."

People v. Ortiz, 83 N.Y.2d 840, 842, 633 N.E.2d 1104, 1105, 611 N.Y.S.2d 500, 501, 1994 N.Y. LEXIS 325, 3 (N.Y. 1994)

BURDEN – GOING FORWARD

The People must, of course, always show that police conduct was reasonable. Thus, though a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to "the burden of going forward to show the legality of the police conduct in the first instance (*People v. Malinsky*, 15 N Y 2d 86, 91, n. 2)" (*People v. Whitehurst*, 25 N Y 2d 389, 391 [emphasis in original])…

GOING FORWARD, CONT'D

These considerations require that the People show that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest or, in cases such as those here, that no search at all occurred because the evidence was dropped by the defendant in the presence of the police officer."

- *People v. Berrios*, 28 N.Y.2d 361, 367-368, (N.Y. 1971)

BURDEN OF ESTABLISHING A VIOLATION

"Thus far, we have made it clear that where a defendant challenges the admissibility of physical evidence or makes a motion to suppress, he bears the ultimate burden of proving that the evidence should not be used against him." (*Berrios*)

STRATEGIES AT *MAPP* HEARINGS

- Ask each officer about peripheral issues in detail – where was each police car, officer, civilian, timing of events not in reports – set up inconsistencies
- Go through minute by minute in DWI or traffic – Area covered, lanes, cars, traffic lights, speed at each location, traffic signs, establish driving wasn't bad enough for whatever happened next

OTHERS?

COMMON NONSENSE

Dealing with:

- "High crime area"
- "Furtive movements"
- "Bulge"
- "Open air drug market"
- Client known to the police
- "Gang member"

WADE HEARINGS

GOALS IN ADDITION TO THE USUAL

- Getting the in-court and out-of-court identification suppressed
- Locking in the details of descriptions and opportunities to view the perpetrator
- Getting to question the eyewitnesses
- Establishing police claims at hearing differ from witness's description of procedure (investigator talks to witness)

BURDENS AT THE WADE HEARING

"On a motion to suppress eyewitness identification testimony, the defense bears the over-all burden of proof to establish that a pretrial identification procedure was unduly suggestive (see, *People v Sutton*, 47 AD2d 455; *People v Carter*, 117 Misc 2d 4, 13; see also, *People v Berrios*, 28 NY2d 361, 367), once, as in the instant case, the People have met their initial burden of going forward to establish the reasonableness of the police conduct and the lack of suggestiveness of the pretrial identification procedures."

People v. Jackson, 108 A.D.2d 757, 757-758

BURDENS, CONT'D

- People have initial burden of going forward and establishing reasonableness of police conduct and lack of (undue) suggestiveness of the pretrial identification procedures – must be proof of procedure, reasonableness under circumstances;
- Defendant has burden to establish undue suggestiveness

BURDENS, CONT'D

❖ "It is only when the defense has established that a pretrial identification was so impermissibly suggestive as to deny the defendant due process of law that the burden of proof shifts to the People to demonstrate, by clear and convincing evidence that the eyewitness' in-court identification of defendant was based upon a source independent of the tainted procedure (see, *People v Rahming*, 26 NY2d 411, 417; *People v Sutton*, supra, p 460)." (*Jackson)*

RODRIGUEZ, INDEPENDENT BASIS

❖ If prosecution alleges identification confirmatory (so that there is no need for *Wade* hearing) and defense contests, *Rodriguez* hearing.

❖ If you do the *Wade* hearing and it is concluded that identification was product of suggestive procedure, prosecutor must now establish independent basis.

FOR ALL *WADE* HEARINGS

- Establish the initial description and lack of other identifying features;
- Get the 911;
- Establish how people in array/lineup/showup did not match the initial description (isn't that suggestive)

STRATEGIES AT HEARING

- Original description given and how varies from who was shown – review all possible identifying features whether or not they were mentioned:

Height

Weight

Build

Race/ethnicity

Skin tone

Hair – length, color, style

Face – unusual features, scars

MORE FEATURES

Facial hair – moustache, beard, goatee, other

Eyes – color, unusual features

Lips, Nose, Ears, Teeth, Tattoos

Clothing – shirt, pants, shoes, jacket, designs or logos

Age, Anything unusual about movement

Voice – anything unusual

Right handed, left handed

LOOK AT YOUR CLIENT

❖ Establish lack of any description of any identifying features your client has (scars, tattoos, skin disfigurement) WITHOUT HIGHLIGHTING TO THE WITNESS

STRATEGIES

- Showup – Lighting, location, time from incident, distance, weather, description dissimilarities, police around, cuffs, uniforms, police cars, more?
- Lineup – (Don't let them know you're a lawyer) Who said what to whom, differences in features, differences from description
- Photo array – How arranged, who said what to whom, how long viewed, percentage likely it was the perpetrator

ADVERSE INFERENCE

- The Fourth Department ruled in February that a hearing court is obligated under some circumstances to grant an adverse inference charge against the prosecution in considering the proof, where an arm of the State has failed to preserve evidence (*People v Manigualt*, 2015 N.Y. App. Div. LEXIS 1329 (N.Y. App. Div. 4th Dep't Feb. 13, 2015)). While obviously this will sometimes be less valuable than the same charge before a jury, it may also give a wavering judge a firm enough basis to rule in your favor in a close case.

DO YOU EVER WAIVE A HEARING?

Making the Most of Your Pre-trial Hearings:
Burdens of Proof and Practical Tips
(Jill Paperno 2/25/15)

Preliminary Hearing:

Standard of Proof

CPL 180.70 – Standard of proof – Whether there is reasonable cause to believe that the defendant committed a felony and therefore to warrant the Judge in holding the defendant for action of the Grand Jury.

CPL 70.10(2) – "Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." There is no requirement that a legally sufficient or prima facie case be presented (see, *People v. Haney*, 30 NY2d 328, 333; Preiser, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 11A, CPL 180.70 at 158) or that all the elements of the offense be established to the degree required either at trial or in the Grand Jury (see, *People v. Rice*, 148 Misc 2d 204). *People v. Evans*, 185 Misc. 2d 85

Burden:

"A preliminary hearing is basically a first screening of charges; its function is not to try defendants and it does not require the same degree of proof or quality of evidence as is necessary to support an indictment or conviction at trial; the court's initial duty at such a hearing is to determine whether the People have met the burden of demonstrating reasonable cause to believe that the felony for which the defendants are criminally responsible was committed by them." *People v. Rosa*, 169 Misc. 2d 350.

Wade Hearing

(To determine if the identification procedure was unduly suggestive. If so, was there an independent basis for the witness to select the defendant. If the parties knew each other, was the identification confirmatory? If that is disputed, then the defense may have a *Rodriguez* hearing. *People v. Rodriguez*, 79 N.Y.2d 445)

- Burden on prosecution to go forward to establish reasonableness of police conduct and lack of suggestiveness

- Burden on defense to establish undue suggestiveness

- If defense meets burden, then prosecution must show, by clear and convincing evidence, that there is independent basis for in-court identification.

  On a motion to suppress eyewitness identification testimony, the defense bears the over-all burden of proof to establish that a pretrial identification procedure was unduly suggestive (see, *People v Sutton*, 47 AD2d 455; *People v Carter*, 117 Misc 2d 4, 13; see also, *People v Berrios*, 28 NY2d 361, 367), once, as in the instant case, the People have met their initial burden of going forward to establish the reasonableness of the police conduct and the lack of suggestiveness of the pretrial identification procedures. In such a case, no reversible error is committed if the People fail to call the identifying witness at the *Wade* hearing (see, *People v Sutton*, supra, p 459; *People v Carter*, supra). It is only when the defense has established that a pretrial identification was so impermissibly suggestive as to deny the defendant due process of law that the burden of proof shifts to the People to demonstrate, by clear and convincing evidence that the eyewitness' in-court identification of defendant was based upon a source independent of the tainted procedure (see, *People v Rahming*, 26 NY2d 411, 417; People v Sutton, supra, p 460).

People v. Jackson, 108 A.D.2d 757, 757-758, 484 N.Y.S.2d 913, 915, 1985 N.Y. App. Div. LEXIS 43089, 2-3 (N.Y. App. Div. 2d Dep't 1985)

Showups:

- People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in pretrial identification procedures.

  The prosecution must initially demonstrate the showup was reasonable under the circumstances. – close geographic and temporal proximity

- The People must also present proof relating to showup itself to demonstrate not unduly suggestive.

- Defense bears ultimate burden of proving showup is unduly suggestive and subject to suppression.

  While the defendant bears the ultimate burden of proving that a showup procedure is unduly suggestive and subject to suppression, the burden is on the People first to produce evidence validating the admission of such evidence (*People v Chipp*, 75 NY2d 327, 335). Initially, the People must demonstrate that the showup was reasonable under the circumstances. Proof that the showup was conducted in close geographic and temporal proximity to the crime will generally satisfy this element of the People's burden (see, *People v Duuvon*, supra). This does not end the inquiry, however. The People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate that the procedure was not unduly suggestive. As we noted in *People v Chipp* (supra), "the People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure" (75 NY2d, at 335 [emphasis added]; see also, *People v Riley*, 70 NY2d 523, 531; *People v Berrios*, 28 NY2d 361).

People v. Ortiz, 90 N.Y.2d 533, 537, 686 N.E.2d 1337, 1339, 664 N.Y.S.2d 243, 245, 1997 N.Y. LEXIS 3212, 8-9 (N.Y. 1997)

> Showup identifications are disfavored, since they are suggestive by their very nature (*People v Rivera*, 22 NY2d 453). Nevertheless, prompt showup identifications which are conducted in close geographic and temporal proximity to the crime are not "presumptively infirm," and in fact have generally been allowed (*People v Duuvon*, 77 NY2d 541, 543-544). This is not to say that showup identifications are routinely admissible. Indeed, while in *Duuvon* this Court upheld the admissibility of identification testimony resulting from a showup, we emphasized there that the proof "must be scrutinized very carefully for [evidence of] unacceptable suggestiveness and unreliability" (*People v Duuvon*, supra, 77 NY2d, at 543). Where there is "no effort to make the least provision for a reliable identification and the combined result of the procedures employed" establish that the showup was unduly suggestive, the identification must be suppressed (*People v Adams*, 53 NY2d 241, 249).

People v. Ortiz, 90 N.Y.2d 533, 537, 686 N.E.2d 1337, 1339, 664 N.Y.S.2d 243, 245, 1997 N.Y. LEXIS 3212, 7-8 (N.Y. 1997)

Lineup:

> A photo array will be found to be unduly suggestive and improper if it is so arranged as to "create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 N.Y.2d 327, 336, 553 N.Y.S.2d 72, 552 N.E.2d 608 [1990], cert denied 498 U.S. 833, [697] 112 L. Ed. 2d 70, 111 S. Ct. 99 [1990]; *People v Jackson*, 282 A.D.2d 830, 832, 725 N.Y.S.2d 406 [2001], lv denied 96 N.Y.2d 902, 756 N.E.2d 88, 730 N.Y.S.2d 800 [2001]). The

initial burden is on the prosecution to establish the absence of undue suggestiveness (see *People v Kirby*, 280 A.D.2d 775, 777, 721 N.Y.S.2d 130 [2001], lv denied 96 N.Y.2d 920, 758 N.E.2d 663, 732 N.Y.S.2d 637 [2001]). Our review in this matter establishes that the procedures used in preparing and submitting the photo array to the victim were reasonable and not unduly suggestive.

People v. McDonald, 306 A.D.2d 696, 696-697, 760 N.Y.S.2d 373, 374, 2003 N.Y. App. Div. LEXIS 7161, 2 (N.Y. App. Div. 3d Dep't 2003)

Rodriguez hearing:

- Prosecution must establish parties known to one another or witness knows defendant well enough as to be impervious to police suggestion

  In any event, the prosecuting body bears the burden of proof in any case where it claims that a citizen identification procedure was "merely confirmatory" (id. at 452, 583 N.Y.S.2d 814, 593 N.E.2d 268). Thus, the prosecutor must establish that "the protagonists are known to one another, or where (as here) there is no mutual relationship, that the witness knows defendant so well as to be impervious to police suggestion" (id.). Whether an identification procedure is merely confirmatory is "a question of degree" (*People v Collins*, 60 N.Y.2d 214, 219, 469 N.Y.S.2d 65, 456 N.E.2d 1188 [1983]). Accordingly, a prosecutor would be expected to develop at the hearing sufficient details of the extent and degree of the witness's and the accused's prior relationship, their encounters, and how they knew one another, so as to provide the hearing court with a basis for ruling, as a matter of law, that the witness was impervious to suggestion [279] (*Rodriguez,* 79 N.Y.2d at 451, 583 N.Y.S.2d 814, 593 N.E.2d 268). Thus, "[w]hen a crime has been committed by a family member, former friend or long-time acquaintance of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person" (Collins, 60 N.Y.2d at 219, 469 N.Y.S.2d 65, 456 N.E.2d 1188). A confirmatory identification cannot be based on a prior relationship which is "fleeting or distant" (id.; see also *People v Newball*, 76 N.Y.2d 587, 591-592, 561 N.Y.S.2d 898, 563 N.E.2d 269 [1990]).

In re Duane F., 309 A.D.2d 265, 278-279, 764 N.Y.S.2d 434, 444, 2003 N.Y. App. Div. LEXIS 9912, 26-28 (N.Y. App. Div. 1st Dep't 2003)

Wade Hearing Strategy:

1. Preliminary questions and preparation

A. Preparation

There are generally three types of identification proceedings that are used by police. They include showups (common), photo arrays (common) and lineups (less common). For each proceeding, know the law and burdens at the hearing. In addition:

Showup:

- Become familiar with the location – visit, make copies of maps and photograph locations.

- Observe lighting

- Review weather conditions on the date of the incident and/or showup procedure

- Review legal standards for the hearing

- Have the witness(es) interviewed by an investigator – what was the description of the perpetrator, what did the police say prior to the viewing, did the police indicate they had a suspect, did the police tell them they were right afterwards, were they in proximity to others during or prior to the viewing, could they overhear radio communications, did the person they viewed differ in appearance in any way from the perpetrator, what was it that led them to pick out the defendant

- Consider issues particular to your case

Lineup or array:

- Find out names, ages, other details of individuals in array

- Try to establish through officer at hearing that information if it differs from client information

- Have the witness(es) interviewed by an investigator – what was the description of the perpetrator, what did the police say prior to the viewing, did the police indicate they had a suspect, did the police tell them they were right afterwards, were they in proximity to others during or prior to the viewing, did the person they viewed or selected differ in appearance in any way from the perpetrator, what was it that led them to pick out the defendant, how convinced were they that the person they selected was right – 50%, 70%? What were the words they used to tell the officer? Did the officer read instructions?

B.. What are your goals at the hearing?

Your goals at the hearing will be governed in nearly every case by your defense theory, or possible defense theory of the case.

Goals may include:

i. Getting the out-of-court and in-court identifications suppressed.

- Establish that the identification was unduly suggestive
- Undue suggestiveness may get an independent basis hearing in which the complainant has to testify. If there was insufficient independent basis, identification may be suppressed.

Reasonableness and suggestiveness

Reasonableness:

Were there less suggestive alternatives available
Was identification in presence of other identification witnesses
Were witnesses talking to each other or police in each other's presence
What words were used to get witness there?
What words used during instructions?
Was proceeding recorded?
What words did witness use? Were those words recorded?

For showups:

Was the distance too great, the detention too long? (When did call come in, when was defendant apprehended, when was showup, where was showup?)
Was the conduct in detaining the defendant unreasonable
Were witnesses in proximity to radios with police conveying information to each other

Suggestiveness:

For lineups and arrays:

Did the defendant appear to be a significantly different age, different appearance, stand out in another way? Was the photo lighter, darker, defendant's head different angle, facial expression, teeth or no teeth, head larger, something else?
How was witness told of lineup?
Double blind? Sequential?
Was witness told attorney would be there?
Do fillers or defendant match description given?

For showups:

Defendant in handcuffs, how many police surrounding, taken from police car in front of witness
How was witness told would be viewing showup?
Investigation – see if witness will discuss what was said prior to viewing – "We have a suspect we'd like you to see?"
Did officer record questions and answers, viewing of showups?
Photos taken of individuals in showups prior to and during showup
Was clothing placed on or taken off defendant? Anything rearranged?
What was said afterwards?
Location of parties, anything going on at the time that witnesses could hear?

If the prosecution claims that the parties knew each other, and the defense is in a position to deny this, defense may get a *Rodriguez* hearing, in which the complainant has to testify.

ii. Making a record of the inadequacy of the identification (Setting up the case for trial)

At the hearing, you can question whether the individuals in the photo array or lineup appeared similar to the description given by the complainant or witness. In that way you can get the officer to describe the appearance of the witness. Establish all of the details given and not given, including:

Height
Weight
Build
Race/ethnicity
Skin tone
Hair – length, color, style
Face – unusual features, scars
Facial hair – moustache, beard, goatee, other
Eyes – color, unusual features
Lips
Nose
Ears
Tattoos
Clothing – shirt, pants, shoes, jacket, designs or logos
Age
Anything unusual about movement
Voice – anything unusual
Right handed, left handed

Look at your client and notice if your client has any unusual features. Do not call attention to the specific feature, but instead question about it in the course of the other features (i.e. – A defendant with a scar on his cheek - Did the complainant state that there was anything unusual about his nose? His lips? His eyes? His face?)

iii Establishing inconsistencies of the complaining witness (Setting up the case for trial)

If the complainant gave a detailed description but it differs from the individuals in the array, question the officer about the description, ostensibly to establish suggestiveness – that the officer was suggesting someone other than an individual who matched the description. So list the details of the description and the way in which each individual varies from the description. This can be used at trial both to cross-examine the witness about the discrepancies between the description and your client, and to establish any inconsistencies between trial testimony of the witness and the initial description.

iv. Getting the complainant on the stand either through an independent basis hearing or a *Rodriguez* hearing

a. Waive the client's appearance so that the witness is not looking at your client while describing the perpetrator

b. Go through the entire history of the incident –second by second, including:

Length of time
When the witness first became aware of the perpetrator
Angle viewed, for how long at each angle
Distance from the perpetrator, how long for each distance
Focus, including gun focus
If ordered not to look, what the witness did
Lighting (get photos of area to see what lighting really was)
Time of day
Shadows – trees, buildings
Clothing covering parts of face or shadowing face
Others around – what they were doing
No gaps in events – from start to finish everything that happened

If it is a *Rodriguez* hearing, or if the complainant claims prior contact, go through every prior contact between the parties, including date, time, location, how viewed, distance, what perpetrator was wearing, what was going on, how long viewed, etc.

v. Other goals – getting a plea offer, getting subpoenaed material, setting up an appeal, more.

Fourth Amendment hearings:

Dunaway:

> We decide in this case the question reserved 10 years ago in *Morales v. New York*, 396 U.S. 102 (1969), namely, "the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest." Id., at 106.

Dunaway v. New York, 442 U.S. 200, 202, 99 S. Ct. 2248, 2251, 60 L. Ed. 2d 824, 829, 1979 U.S. LEXIS 126, 7 (U.S. 1979)

Mapp

> Today we once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only [655] courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that HN6 all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Mapp v. Ohio, 367 U.S. 643, 654-655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1089-1090, 1961 U.S. LEXIS 812, 20, 86 Ohio L. Abs. 513, 16 Ohio Op. 2d 384, 84 A.L.R.2d 933 (U.S. 1961)

Ingle

> The issue is whether a police officer may stop an automobile, arbitrarily chosen from the stream of traffic on a public highway only because of the unusual but irrelevant appearance of the vehicle, solely to examine the motorist's license and registration, or to inspect the vehicle for possible equipment violations.

People v. Ingle, 36 N.Y.2d 413, 414, 330 N.E.2d 39, 40, 369 N.Y.S.2d 67, 69, 1975 N.Y. LEXIS 1821, 4 (N.Y. 1975)

Payton

> We now reverse the New York Court of Appeals and hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

Payton v. New York, 445 U.S. 573, 576, 100 S. Ct. 1371, 1374-1375, 63 L. Ed. 2d 639, 644, 1980 U.S. LEXIS 13, 7 (U.S. 1980)

Burdens in Fourth Amendment Hearings

Standing

> One seeking standing to assert a violation of his Fourth Amendment rights must demonstrate a legitimate expectation of privacy. One may have an expectation of privacy in premises not one's own, e.g., an overnight guest (*Minnesota v Olson*, 495 US 91) or a familial or other socially recognized relationship (*People v Rodriguez*, 69 NY2d 159; *People v Ponder*, 54 NY2d 160).

People v. Ortiz, 83 N.Y.2d 840, 842, 633 N.E.2d 1104, 1105, 611 N.Y.S.2d 500, 501, 1994 N.Y. LEXIS 325, 3 (N.Y. 1994)

Going forward

> The People must, of course, always show that police conduct was reasonable. Thus, though a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to "the burden of going forward to show the legality of the police conduct in the first instance (*People v. Malinsky*, 15 N Y 2d 86, 91, n. 2)" (*People v. Whitehurst*, 25 N Y 2d 389, 391 [emphasis in original]). [368] These considerations require that the People show that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest or, in cases such as those here, that no search at all occurred because the evidence was dropped by the defendant in the presence of the police officer.

People v. Berrios, 28 N.Y.2d 361, 367-368, 270 N.E.2d 709, 713, 321 N.Y.S.2d 884, 888-889, 1971 N.Y. LEXIS 1321, 15-16 (N.Y. 1971)

Violation

> Thus far, we have made it clear that where a defendant challenges the admissibility of physical evidence or makes a motion to suppress, he bears the ultimate burden of proving that the evidence should not be used against him (see, e.g., *People v. Baldwin*, 25 N Y 2d 66, 70; *People v. Whitehurst*, 25 N Y 2d 389, 391; *People v. Malinsky*, 15 N Y 2d 86; see, also, *Nardone v. United States*, 308 U.S. 338, 341-342). Indeed, the very words employed by the Legislature in fashioning the motion to suppress suggest no other rational conclusion.

People v. Berrios, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888, 1971 N.Y. LEXIS 1321, 14-15 (N.Y. 1971)

Preparing for the Hearing:

Predict the likely issues:

- Sufficient basis for car stop or street encounter
- Consent to search
- Inventory search
- Search exceeded permissible scope
- Other

Investigate:

- Subpoena materials – 911, video, police reports, other (police personnel?) (Videos may reveal location not as described, events not as described in reports)
- View maps
- View location
- Take photos
- Talk to witnesses with an investigator
- Take measurements? (DWI or car search case when stop for traffic violation – (distances, signs, traffic control devices, number lanes, etc.)

Prepare Timeline

Decide what the goals are of the hearing –

- Suppress evidence
- Create testimony for trial
- Get better offer
- Show client how you work
- Show cops how you work
- Obtain *Rosario* and other evidence
- Develop theory of the case
- Obtain subpoenaed material
- Make a record for appeal

Have necessary materials available – copies for impeachment, introduction, photos for use at the hearing (photos of location showing inconsistent with officers' claims, lighting, etc.)

Prepare Cross – You can never over-prepare – review and sort materials.
Consider – if you are seeking to get information at the hearing, do you use non-leading or leading?
If you are seeking to lock in testimony, limit the officers' claims of client's wrongdoing to try to win the case, leading or non-leading?
Can you set up objections – object when the prosecution questions on an area that you want to question on – if you expect the judge to overrule, use that as opportunity to explore on cross

Always try to make out the highest level of intrusion, and the lowest level of *Debour.*

At the hearing:

In general

Go through the *Rosario*
Lock in testimony - don't let them drone on
Ask the question again if you don't get an answer the first time
If you get too expansive an answer, break it down – picture the transcript and how to use it at trial
Do not fill in gaps if the prosecution has failed to establish lawfulness of the search

Specific types:

DWI

Minute by minute, foot by foot, the distance the client traveled and the lack of violations along the route
How the client stopped, opened the window, got the license, insurance card, etc., stepped out of the car

Traffic stop:

Minute by minute, lack of violations, supporting argument that the minimal traffic violation that was observed did not warrant actions of officer (see *People v. Marsh*, 20 N.Y.2d 98, 100, 228 N.E.2d 783, 785, 281 N.Y.S.2d 789, 791, 1967 N.Y. LEXIS 1386, 5 [N.Y. 1967])

Dealing with:

"High crime area"
"Furtive movements"
"Bulge"
"Open air drug market"
Client known to the police
"Gang member"

THE HUNTLEY HEARING

The Right to a Hearing
Defense Goals
Grounds for Suppression
Waiving the Hearing
Preparation
- **The Client Interview**
- **Discovery Materials**
- **Other Records**
- **Cop Rules + Regulations**
- **Cop Interrogation Methods**
- **Jury Instructions**

Rosario Material
- **Rosario Violation**

Construct a Time-line
Interrogation Environment
Miranda Warnings
- **When Required?**

- **When is one in Custody?**
- **What is Interrogation?**
- **The Right to Remain Silent**
  - **Invoking the Right to Remain Silent**
  - **Waiving the Right to Remain Silent**
- **The Right to Counsel**
  - **When is it attached?**
  - **Invoking the Right to Counsel**
  - **Interrogation on Other Matters**
- **Adequacy of Miranda Warnings**
- **When have these Rights been Waived?**

Burden of Proof at the hearing
Hearsay
The "Spontaneous" Statement
- **Burden of Proof**
- **After the Statement**

Theories of Suppression when there has been Illegal Interrogation
- **"Cat out of the Bag"**
- **Continuos Interrogation**

Pedigree Questions Traditional Involuntariness
Witherspoon - must the prosecutor call all cops?
Defense Evidence
Statements to Private People
Pinning Down Witnesses
Handling the Judge
Objections
Content of the Statement is Relevant
Refreshing a Witness's Recollection

Failure to Record the Interrogation
Memorandum of Law
Reopening the Hearing

Burden of Proof Flow Charts
- **Miranda Violation**
- **Traditional Involuntariness**
- **Agency**
- **"Cat out of the Bag"**
- **Continuous Interrogation**

The Right to a Hearing

Recognizing the strong correlation between the admission of a defendant's inculpatory statement and a verdict of guilt, the United States Supreme Court held that due process entitles a defendant to a *pre-trial* determination of whether or not his alleged statement to law enforcement was voluntary. Jackson v. Denno, 378 U.S. 368 (1964).
The New York Court of Appeals responded to this decision by holding that not only was a defendant entitled to this pre-trial determination of voluntariness, but that any such statement must be proven to be voluntary by the prosecutor *beyond a reasonable doubt*. People v. Huntley, 15 N.Y.2d 72 (1965).

The Defense Goals at the Huntley Hearing:

1] Convince Judge to suppress the statement - [hey , it happens once in a while, really it does]
2] Get prosecution witnesses committed and pinned down
3] Get discovery / Rosario materials
4] Show client you are a strong advocate - This hearing is likely the first chance the client has to see you in action.
5] Expose flaws in the prosecution's case that could result in a revised plea offer.
6] Generate support for your anticipated trial arguments [the statement was false, the statement was really that of the officer instead of your clients' etc]

Grounds for Suppression

1] Miranda violation
    a] Right to remain silent violation
    b] Right to counsel violation
2] Traditional involuntariness
3] statement resulted from unlawful seizure of the defendant

Waiving the hearing

Never waive hearing …. unless you get something you consider to be of greater value in return, such as:
    [1] Rosario material beyond what you would have received at hearing anyway [all GJ testimony?]
    [2] Better offer
    [3] A promise that an offer will remain open.
    Etc.

Preparation

The Client Interview

You should also conduct a thorough interview with your client regarding the circumstances of the interrogation. The client was there and may tell you something you can use.
The client interview should be done as early on in the case as possible while his memory is fresh. To effectively interview your client you will need to have a good grasp of the issues involved in statement suppression litigation. Otherwise, you may erroneously treat a detail as insignificant when it could have been used to obtain suppression.

A non-exhaustive list of topics and questions you should pose to your client include:

[1] Cop-client interactions :

Cop contact

- Describe each cop. [race, gender, age etc.]
-Tell me everything the cops asked you.
-Tell me everything the cops told you.
-Tell me everything the cops said to each other. [clients will often tell you that they heard two cops disagree over whether or not to make an arrest, whether or not to arrest everyone, etc.]
-Tell me how the cops were dressed. [uniforms? Plain clothes? Badges? Weapons?]
-How many cop were there at each point? [at scene of arrest? In cop on the way to the station? In the interrogation room? Etc.]
-Did any cop handle w weapon?
Which one?
Where?
When?

- Restraints

Were you handcuffed or otherwise restrained?
When?
By which cop [or security guard?]
Where?
Were the cuff removed?
Where were they removed?
By which cop?
Did that cop say anything when he removed the cuffs?

- Bathroom / Food + Drink

Were you taken to the bathroom?
When?
By which cop?
Was anything said to you during this bathroom trip?
Was anything asked of you?
How many trips there?
Etc.
Were you given food or drink?
When?
Did they ask you if you wanted this or did you ask?

- Communication

Did you communicate with anyone other than police [guardian, parent, friend, co-defendant, witness etc.]

At scene?
While in cop car?
While at station?

If so:
What was said to you?
By you?
Who was present? *3*
Etc.

- Promises

Were any made to you
What were they?
Who made the promise?
What was the promise?
What did you do or say after the promise?
Etc.

- Sentencing

Was this discussed?
Who brought it up?
What was said?
Etc.

- Co-defendant

Did you see the co-defendant at the station?
Did the cops tell you anything about him?
Did they show you a statement they said was from the co-defendant?

- Evidence

Did the cops tell you about the evidence they say they had? [DNA, prints etc.]
What did they tell you?
Did they show you any evidence?
What was shown to you?
What was your reaction? [verbally, physically]
Did they show you any photographs?

- Polygraph

Did the cops mention this at all?
What was said?
Did you agree to take the test?
Was the test done?
Where?
Who was present?
What was asked?

Did the cops talk to you afterwards about the results?

- Denials

Did you ever deny involvement?
What exactly did you say?
How did the cops react?
Did they say they thought you were guilty?
What was your reaction?
How many times did you deny involvement?

- Breaks

Did the cops stop questioning you at any point and then resume the questioning?
When was this?
Did they say why they were taking a break?
How long was the break?
Where were you during this period?
What did they say or do when they returned?
Did you say anything after the break?
What did you say?

[2] Miranda

- Where you advised of your rights? [go through the "rights" so the client knows what exactly you are talking about]
- Where was this done? [cop car, station etc.]
- When was this done?
- Which cop read them?
- Did they read from a card?
- Did they ask you about your educational back-round at any point?
What point?
What did they ask?
What did you say?
- When did this take place relative to:
Your arrival at the station?
The bathroom break?
The discussion of sentencing?
The call to your mom?
Etc.
- Right to remain silent
Did you ever say you did not want to talk to them or did not want to continue talking to them?
When?
Where were you at that point?
What cop did you say this to?
What were your exact words?
What response, if any, did you get from the cops?
Did they try to talk you into continuing?
Did they leave?

After you said you did not wish to talk, did you end up ever talking anyway?

Why?

What was said to or done to you first?

- Right to Counsel

Did you ever say anything about a lawyer?

What exactly did you say?

How many times did you mention this?

Where were you?

At what point in the interrogation?

What was the police reaction?

What did they do? Say?

Did they continue to talk to you?

Did you continue to talk?

If so, what did you say after you asked for the lawyer?

Did they say they would get you a lawyer?

Did they try to talk you out of having a lawyer?

How so?

Did they offer you a way to get a lawyer?

Did you ask to call a lawyer?

[3] Written Statement

-Was one created?

- Who wrote it?

- What exactly did this statement say?

- At what point was it created?

- Was it created in your presence?

- Did you sign it?

- Did you sign anything? [fingerprint card, deposition, PDR etc.]

- Did you read it before signing? [aloud, to yourself?]

- Was it read to you?

- Did you understand what was written?

- Did you recognize errors?

- Were you asked you make any corrections you desored?

- Did you?

- Did you ask to write your own statement?

[4] Educational back-round

Do you suffer from any learning disabilities?

Were you in special education classes?

Can you read?

How well?

Can you write?

[5] Arrest History [adult + juvenile]

Have you been arrested before?

When ? Where?

Have you ever been read your rights in the past?

When?

[6] Physical / Mental Health

Do you suffer from any illnesses?
Injuries?
Are you on any medications?

Discovery Materials

Read and become familiar with all documents provided in discovery, not only reports from cops that you expect to testify. You need to know when the testifying cop has contradicted himself. You will also need to know what others said so you know when the testifying cop has contradicted them.

If the statement your client allegedly made was made somewhere other than in a cop car or the police station, you may want to visit the scene.

Other Records

Aside from the materials traditionally provided to you by the prosecutor, you should seek other evidence that may prove useful at the hearing. These include the following:

[1] You may want to look at the **booking photo** of your client to determine you how he looked when he was interrogated. The photo may contradict the cop's claim that your client was completely coherent and sober when he was interrogated.
You can demand the photo from the prosecutor or have the Judge sign a subpoena for it.

[2] You may also want to acquire and review all **OEC [911] records** prior to the hearing. These records will often help you contradict a cop's claim that an event took place at a certain time.
For example, In a DWI case a cop swore he did not make the decision to arrest the defendant for DWI until he made numerous observation and the defendant failed several FSTs. He swore that only after this thorough investigation did he arrest him and order his car to be towed. The OEC records, however, clearly showed the cop was lying because they recorded the call for the tow truck as occurring before the cop even approached the car and engaged the driver. Without those records the Judge surely would have fallen for the cop's perjury and upheld the arrest.

[3] **Ambulance + Hospital records** generated after the arrest may support your argument that your client was ill, injured, or intoxicated when she was interrogated.

[4] The **medical/ mental health history** of your client may support your argument that your client was too limited mentally to appreciate and waive her constitutional rights. But then again, the chances of your client being the stupidest person in the interrogation room are pretty slim .

[5] **School records** may support your argument that your client cannot read or write well enough to have understood what she was signing.

[6] **Phone records [or a witness]** could be used to support your argument that your client's family tried to call the police and tell them she was represented by counsel and were ignored.

[7] **Maps + Aerial Photographs** may support your argument that the cops should not have stopped and interrogated your client in the first place because the address they were responding to was far away from the location where your client was stopped.

Police Interrogation Methods

The truth or falsity of your client's statement is not the primary issue at the Huntley hearing. However, these hearings should always be conducted, from the defense perspective, with an eye toward the trial. At the trial, if the police claim your client confessed, you will definitely want to convince the jury that the confession is false. If you cannot do so, a conviction is almost certain.

You need look no further than the many high-profile DNA exoneration cases to find instances where innocent people have confessed to crimes, including murder. These false confessions often resulted directly from dangerously faulty police interrogation techniques.

You should become familiar with the prevalent cop interrogation techniques, the most prevalent of which is the Reid Method. Knowledge of these techniques is invaluable when cross-examining the cop at the hearing. If familiar with these techniques, you will recognize when the cops have used them in your case.

Not only will your familiarity with these techniques allow you to recognize when the technique has been used on your client but it will also allow you to recognize when the technique has been used improperly. The cop will likely admit that for the techniques to work, it must be correctly and carefully employed. If you can then identify a failure on the part of the cop to follow the technique, you can use that failure to support your argument that the statement which resulted was involuntary [at the hearing] or false [at trial].

To acquire information about the interrogation training your cop has had, you can begin by issuing a discovery demand to the prosecutor. If unable to get this information prior to the hearing, you could ask the cops during cross-examination what training they have had specifically on interrogation techniques. If you learn the name of the training agency and the date of the training, you could also generate a subpoena for these materials. You can then educate yourself on these specific techniques in preparation for cross-examination at trial.

Among the common police techniques are the use of minimization. The police will often suggest to your client ways the client can minimize his conduct. This is done in an effort to make the client more comfortable admitting involvement. It is common for the police to suggest to our clients that perhaps they committed the act but did so while they were "blacked out", that they genuinely did not know the girl was 14, that they only had the gun for a few days after finding it, or that they only kept the gun because they feared for their lives, etc. The police know full well that these claims either hint at seldom if ever successful defenses ["balcked out"] or do not amount to a legal defense at all [possessing a gun out of a fear for safety].

Another police tactic is the inclusion in your client's written statement of corrections purportedly made by the client before the statement was signed. The police claim that corrections made to the statement after it was drafted but before it was signed is evidence that your client must have carefully read the statement. This is done to counter defense efforts to portray the statement as that of the officer and not of the client. The officer will tell your client to place his initials above each correction. In these cases, you can cross examine the officer at the hearing in an effort to reveal that the corrections were not the result of your client's careful examination of the statement but instead resulted from the investigator having drawn your otherwise inattentive client's attention to the error they planted in the statement.

> Q: There are two places in the three page statement where a word is crossed out and another is inserted right?
> A: Yes.
> Q: You wrote the original word?

A: Yes.
Q: You wrote all three pages?
A: Yes.
Q: And the words that were crossed out and replaced, you asked my client if that part was correct or needed to be changed?
A: I asked him but he told me what the change should be.
Q: And then you made the change and told him to initial what you had just changed?
A: Yes.
Q: You have been trained to interrogate people?
A: Yes.
Q: And you were specifically trained to draft statements for people that included information that was not correct right?
A: Yes.
Q: You were also trained to make sure the person's attention is drawn to the intentionally false portion and then to have them suggest a correction and initial the correction?
A: Yes.

Jury Instructions

Issues such as the voluntariness of a statement can be relitigated at trial. There are jury instructions specifically designed for these situations.
You should be familiar with these instructions and conduct the suppression hearings with them in mind.
* These jury instructions are attached.

Rosario material

The first thing you should do at a hearing is place a formal request for Rosario material on the record. Without a request you are not entitled to Rosario material. CPL § 240.44.
Even if you were just handed a packet of documents, make the request. You should also list, on the record, which documents you have been given as well as any documents you think may exist but have not been provided.
Be prepared to address the argument from the prosecution team [prosecutor, Judge etc] that a certain document is not Rosario material.
Rosario material includes documents, records or recordings made by or in the possession of the police or prosecutor. You are only entitled [provided you make a request] to the Rosario material for the witnesses that testify, not all potential witnesses.
A witness need not draft a document for that document to qualify as Rosario material for that witness. If the testifying cop told another cop something that the other cop then wrote down, that written document is Rosario material for both cops. Even a slight notation renders that document Rosario material.
You should also ask each witness about what documents they created or contributed to. Prosecutors often either do not know what is and what is not Rosario material or they fail to ask the cop for everything. More often than not the cop will admit he created or contributed to a document that he never gave the prosecutor. You should always ask each cop if he took notes. You should also ask him about certain documents you know are likely to exist because cops often forget what paperwork they completed until you ask them.

The Rosario Violation

If you learn during the hearing that there is Rosario material that has not been disclosed, you should demand immediate disclosure. If the prosecutor cannot produce the document immediately you should request that the witness's entire testimony be stricken. If the Court seems reluctant to compel the prosecutor to follow the law and disclose the Rosario material, you should remind the Judge that your client has a 6th Amendment right under the U.S. Constitution to confront and cross examine the witness and that this right will be violated if the prosecutor is allowed to get away with withholding the material in question. This will surely result in a request by the prosecutor to suspend or adjourn the hearing until the item is produced. This will also tick off the Judge.

If the item in question was previously requested, you should make a statement to that effect on the record: "Judge, the record should reflect that I requested all notes generated by the police in this case 60 days ago. Had the prosecutor complied with this request we could have concluded this hearing without interruption". This is yet another reason to make a comprehensive discovery demand early on in the case demanding all documents in the possession of the police.

If you receive Rosario material at the outset of a hearing or even during a hearing, make sure to take all the time you need to review it. There is no point in getting it if you are not prepared to use it. Simply tell the Judge you need time to review the material. If the Judge complains tell him that this delay could have been avoided had the prosecutor disclosed the material earlier.

If a Rosario violation is revealed at the hearing but the document you are entitled to is, in your estimation, not something you feel the need to have in order to complete your cross-examination of the cop, you may elect to proceed without it. If you do so, be sure to extract a promise from the prosecutor *on the record* that he will provide that material within X days.

The following is a partial list of documents that could exist in your case:

Simplified vehicle and traffic information
supporting depositions
supporting deposition for breath test administration
report of refusal to submit
alcohol influence report
hand written notes (People v. Buster, 69 NY2d 56); People v. Serrando, 184 A.D.2d1094, (1 Dept. 1992)
audio/visual recordings
crime reports
Miranda warnings card
police accident report
prisoner data report
interview log
search warrant affidavit *
inventory of property taken *
disposition of seized property form *
daily activity summary (People v. Goins, 73 NY2d 989)
investigative action report
tow report
seized vehicle report *
subject resistance report
property custody report
evidence bag labels (People v. Geathers, 172 AD2d 134)

prior testimony: PH, GJ, pre-trial hearing, etc…
911 tapes [People v. Ronald Morris, 647 NYS2d 893 (4th Dept. 1996)]
grand jury referral form
prosecution notes containing summary of witness testimony (People v. Barrigar, 233 AD2d 845)
prosecution notes of witness interviews (People v. Bell, 140 AD2d 937)
hospital records containing witness statements, if possessed by DA (People v. Campbell, 186 AD2d 212)
laboratory notes which form basis for laboratory report (People v. Christopher, 101 AD2d 504; People v. DeGata, 86 NY2d 40- FBI DNA lab notes)
parole, probation, medical examiner and prison records, if possessed by DA
ballistics report
fingerprint analysis report
testimony at CPL 60.20 hearing (People v. LaSalle, 1997 N.Y. Slip Op. 08121)
technicians evidence and photo reports
consent to search forms
domestic violence incident report
*teletype request form **
*post pursuit form **
*mental hygiene information form **
*eyewitness identification report **
*query viewing report **
*lineup report **
*cooperating individual working agreement **
*confidential informant personal history report **
*suspected sexual assault report form **
*sexual offense evidence collection kit label **
computer hard drive? Probably not : People v. Giraldo, 270 AD2d 97.
parole notes of prosecution witness People v. Fields , 146 A.D.2d 505, 537 N.Y.S.2d 157medical examiners autopsy report People v. Solomon, 160 Misc.2d 945
victim's application for crime victim compensation - People v. King, 241AD2d329.
Etc.

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Construct a timeline

Through your cross-examination, you should attempt to develop a detailed time-line of events starting with the first contact with police until the end of contact with the police.
Break it into chunks: Contact on street, contact in cop car at scene, contact in car on way to station, contact between cop car and interrogation room, contact in interrogation room etc.
For each chunk: who was present? what environment?, condition of defendant? What was said to defendant? by whom? what did suspect say?
For each statement made to and by the suspect: who was present? was that statement recorded anywhere? Etc.
You want to learn the time-line of events but you do not necessarily want to make the cop comfortable by proceeding in chronological order. There is no need to cross-examine the cop about the initial encounter before cross-examining him about the alleged administration of the Miranda warnings for example. A chronological cross examination just makes it easier for the cop to keep his story straight. Feel free to jump around from one portion of the cop-client encounter to another during your cross examination.

The Interrogation Environment

Learn details about each location where the police had contact with your client.

What type of car was he in?
Who was in that car when he was there?
Was he locked inside?
How long was he in there?
Were the windows up or down?
Which interrogation room?
[You could then ask to inspect this room at some point, even photograph it.]
Was client locked in room?
Dimensions?
Windows?
Was he ever removed ?
Why?
How many times?
When?
By who?
Etc.

Miranda Warnings

While there are five Miranda warnings, in the end, these warnings are designed to address two basic rights: [1] the right to remain silent and [2] the right to counsel.
* A copy of a typical warnings card has been attached

When are Miranda Warnings Required?

There is no need for the police to advise a suspect of his Miranda rights unless two factors are present: [1] the suspect is in **custody** and [2] the police intend to **interrogate** him.

When is Someone in Custody?

Test: whether a reasonable person, innocent of any crime, would believe that he was not free to leave the company of the police. People v. Yukl, 25 NY2d 585 (1969).

If the person is not in custody, there is no need to provide Miranda warnings.

The Court must consider the totality of the circumstances when deciding whether or not a person was in custody.
"Neither formal arrest nor mere investigatory focus is the hallmark of whether interrogation is custodial. " People v. Turkanich, 137 AD2d (2nd Dept. 1988).

A non-exhaustive list of factors to be considered include:
[1] The degree of cooperation shown by the suspect
[2] Did the cops display a weapon?
[3] Where the encounter took place
[4] How much or little freedom did the suspect have during the encounter
[5] Did the cops advise the suspect of his rights? [if they did, he was not necessarily in custody]
[6] Did the cops say anything about whether or not suspect was free to leave?
[7] Was the questioning investigatory or more accusatory?
[8] Was the suspect confined to a hospital bed and incapable of moving? People v. Tanner, 31 AD2d 148 (1st dDpt. 1968).[9] how was the suspect transported to the location of the interrogation?

[10] Was the suspect accompanied by a relative or friend [note that if the suspect is an adult he has no right to be accompanied by a friend or relative] ?
[11] Was the suspect hand cuffed or otherwise restrained at any point?
[12] Was the suspect frisked?
[13]Did the police appear to be focusing the investigation on the suspect?
[14] Was the suspect confined involuntarily to a psychiatric hospital? People v. Turkanich, 137 AD2d (2nd Dept. 1988)
[15] Was the suspect a recent immigrant from a country with a very different and perhaps oppressive political structure who could not understand English? People v. Turkanich, 137 AD2d (2nd Dept. 1988)
Etc.

The presence of one or more of these factors will not necessarily result in a finding of custody.

Your questioning should focus on these factors and anything else that may elicit responses from which you can make an argument that your client was in custody when the statements were made.

The condition of the suspect [age, education, mental illness etc] is not really a factor in this custody analysis. It is , of course, relevant when the issue is the voluntariness of a statement or the validity of an alleged Miranda rights waiver. This is because custody is based not upon what your client felt, but instead, upon what a reasonable innocent person would feel when subjected to the influences that exist in your case.

What Constitutes Interrogation?

[1] Any express questioning or its functional equivalent.
[2] Any words or actions that the police should know is likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980).

The following have not been found to constitute interrogation:

[1] A cop's questions that appeared to leave open the possibility that the suspect was not involved in the crime under investigation and therefore not designed to elicit an incriminating answer? People v. Cerrato, 24 NY2d 1 (1969).
[2] A cop accusing a suspect on the street of being a liar, to which he replied that he was involved. People v. Huffman, 61 NY2d 795 (1984).
[3] Questions designed to clarify a situation. People v. Rifkin, 289 AD2d 262 (1st Dept. 2001).
[4] Questions designed to protect the public safety such as "Where is the gun?" People v. Quarles, 63 NY2d 923 (1984).
[5] A cop, prior to any Miranda warnings, tells a suspect that he thinks the suspect is involved and should rat on other perpetrators. People v. Vasquez, 90 NY2d 972 (1997).
Etc.

The Right to Remain Silent

The right to remain silent is one of the two basic rights a person has when being interrogated in custody. If this right is invoked, the interrogation must cease.

We have covered the circumstances under which a person must be advised that he in fact has this right [custodial interrogation]. But you must also be familiar which the circumstances under which he has effectively invoked this right.

Invoking the Right to Remain Silent

According to the U.S Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease..".
This is definitely the case you want to refer the Judge to when the invocation of this right is in issue because subsequent case law has apparently undermined this sweeping holding.

Practically speaking, there must be an *unequivocal* invocation of this right. Anything less may not be effective.
The following do not constitute an unequivocal invocation of the right :

[1] A denial of wrongdoing. People v. Otero, 217 AD2d 796 (3rd Dept. 1995).
[2] The expression of an intention to think about whether or not to remain silent. People v. Jandreau, 277 AD2d 998 (4th Dept. 2000).
[3] The expression of the intention to wait and talk with the Judge. People v. Pierre, 309 AD2d 570 (1st Dept. 2003).
[4] A suspect's refusal to answer the questions of a particular cop. People v. Jones, 277 AD2d 329 (2nd Dept. 2001).
[5] A refusal to sign a statement. People v. Hendricks, 90 NY2d 956 (1997). People v. Curry, 287 AD2d 252 (1st Dept. 2001);
[6] A suspect's momentary silence upon being advised of his rights. People v. Brand, 13 AD3d 820 (3rd Dept. 2004).
[7] A suspect's periodic silence during interrogation. People v. Cohen, 226 AD2d 903 (3rd Dept. 1996).
[8] A suspect's refusal to answer some questions while answering others. People v. Morton, 231 AD2d 927 (4th Dept. 1996); People v. Lewis, 152 AD2d 600 (2nd Dept. 1989).
[9] The statement : " Ain't nothing I got to tell you". People v. Allen, 147 AD2d968 (4th Dept. 1989).
[10] A statement to the effect that the suspect he will not answer questions unless certain conditions are met. People v. Contini, 283 AD2d 323 (1st Dept. 2000). Etc.

The following have been considered unequivocal invocations of the right to remain silent:

[1] A statement to the effect that the person does not want to say anything. People v. Antonio, 86 AD2d 614 (2nd Dept. 1982).
[2] "I have nothing further to say." People v. Douglass, 8 AD3d 980 (4th Dept. 2004).
[3] " I do not want to talk about it". People v. Brown, 266 AD2d 838 (4th dept. 1999).
[4] A suspect's actual long-term silence upon being advised of his rights. People v. Breland, 145 AD2d 639 (2nd Dept. 1988).

The right to remain silent may not be invoked by anyone other then the suspect or his attorney, unless done by the parent or guardian of a suspect under 16 years of age.

Waiving the Right to Remain Silent

Recall that the admissibility of the statement will turn on the ability of the prosecutor to prove not only that the cops [1] advised the suspect of his rights but that the [2] suspect then waived the rights. The prosecutor has the burden of proving that the suspect waived his rights.

This waiver may be :
[1] express [a statement from the suspect that he is willing to waive his rights] or
[2] implied [for example: where a suspect makes no such statement but then responds to post-Miranda questions]. People v. Davis, 55 NY2d 731 (1981).

A waiver may also be either:
[1] oral [for example : where a suspect states that he does waive his rights but then refuses to sign a statement to that effect] or
[2] written.
You should first identify the variety of waiver that is being alleged [oral + express, oral + implied, written + express]. In each case you should demand all documents that contain a recording of this alleged waiver. These could include: notes, Miranda card, IAR, your client's written and/or signed statement etc.

An alleged **written and express** waiver is the easiest for the prosecutor to prove. You can expect the prosecutor to have the cop testify that Miranda warnings were given, that the suspect appeared to understand them, and that he then stated that he would waive his rights and agree to talk. The cop may then testify that he recorded the suspect's words on the warnings card or on the suspect's alleged written and/or signed statement. The prosecutor will then seek to introduce the writing, a Miranda warnings card for example, into evidence. The cop may also testify that the suspect himself wrote the waiver on some document.

* In this jurisdiction the cops almost always read the warnings from a two-sided card. One side of that card contains the five warnings followed by two "waiver questions". These questions are posed to the suspect after the five warnings are given. The card contains spaces after each of the two questions where the cop is to record any response from the suspect. Be sure to read the law enforcement agency's rules and regulations regarding the administration of the Miranda warnings so you will know when the cop has failed to follow them.

* If the prosecutor has the cop testify that he recorded your client's response to the waiver questions on the card and then recites the responses on the record, a subsequent attempt by the prosecutor to move the card into evidence could be met with a bolstering objection.

The failure of a cop to follow the rules and regulations or his failure to read the written warnings from the card verbatim will not necessarily render a subsequent waiver invalid. People v. Anderson, 146 AD2d 638 (2nd Dept. 1989). However, such a failure can be used at trial to undermine a jury's confidence in the cop's competence or the thoroughness of the investigation. It could also help you advance a theory that the cop may have violated other departmental rules in the case.

An alleged **implied** waiver will be more difficult to prove. The prosecutor might have the cop testify that the Miranda warnings were given, that the suspect appeared to understand them, that he refused to answer when asked whether or not he would waive his rights, and then he began to talk anyway.

The issue in implied waiver cases will be whether or not the words or actions of the suspect in the post-Miranda period constituted a waiver. The cop should be questioned about exactly what the suspect said that led him to conclude there was a waiver. The actions of the cop or cops, as well as those of the suspect, must be carefully explored.

For example: A cop claims your client never did say he was waiving his rights but that after the rights were read he began to answer their questions. Unchallenged, this will be considered an implied waiver. People v. Gonzalez, 288 AD2d 883 (4th dept. 2001). You should focus your cross-examination on just what the circumstances were at that time. For example, was the suspect sobbing uncontrollably such that he may not have heard or grasped the warnings?

The Right to Counsel

The right to counsel is the other of the two basic rights a person has when being interrogated in custody. If this right is invoked, the interrogation must cease.

When has the Right to Counsel Attached ?

[1] When an accusatory instrument has been filed against the person.

If you believe the statement was made after an accusatory instrument was filed you should be prepared to prove this either through cross-examination or through defense evidence such as documents or witnesses. People v. Rosa, 65 N.Y.2d 380 (1985). A review of the records at the court clerk's office will reveal the date and time the accusatory instrument was filed.

[2] By the actual entry of counsel in the case.

This can be proven either through cross-examination or through the testimony of defense witnesses, which may include the attorney herself.

[3] By the suspect's invocation of the right to counsel.

Invoking the Right to Counsel

Once the request for counsel is made, the police must cease all questioning until counsel is present. If a person is in custody and she invokes her right to counsel , she cannot waive this right unless and until counsel is actually present. People v. Rogers, 48 Ny2d 167 (1979); People v. Cunningham, 49 NY2d 203 (1980).

Even if, after invoking the right to counsel, a person starts talking to the police, the right to counsel has still not been waived.

For the right to counsel to attach, the request must be ***unequivocal*** and requires a statement that can be "reasonable construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police". McNeil v. Wisconsin, 501 US 171 (1991).

The suspect has not invoked the right to counsel where the suspect:

[1] The suspect states she is *considering* getting counsel. People v. Lattanzio, 156 AD2d 757 (3rd Dept. 1989).
[2] The suspect asks the cop if he needs counsel. People v. D'Eredita, 302 AD2d 925 (4th Dept. 2003).
[3] The suspect asks the cops if he *should* have a lawyer or tells them he should have a lawyer. People v. Manzi, 292 AD2d 849 (4th Dept. 2002); People v. Thompson, 271 AD2d 555 (2nd Dept. 2000).
[4] The suspect states that he *might* want to talk to a lawyer. People v. Fridman, 71 NY2d 845 (1988).
[5] The suspect states that he does not want a lawyer now but asks if he can ask for one later. People v. Snickles, 206 AD2d 675 (3rd Dept. 1994).
[6]The suspect states that he *intends* to talk to his lawyer. People v. Carrier, 270 AD2d 800 (4th Dept. 2000).
[7]The suspect states that his *family will be getting* him a lawyer. People v. Raco, 168 AD2d 806 (3rd Dept. 1990).
[8] A parent of the suspect tells the cops an attorney for their adult child was en route to the station. People v. Grice, 100 N.Y.2d 318 (2003).

The following have been found to constitute an actual invocation of the right to counsel:

[1] A response of "No" when asked if he will talk to the cops without counsel. People v. Glover, 87 NY2d 838 (1995).
[2] A suspect asking a third party, while in the presence of the police, to call his lawyer . People v. Buxton, 44 NY2d 33 (1978).
[3] A suspect stating he wants a lawyer.
[4] Where an attorney or the attorney's professional associate informs police that the suspect is represented by counsel. People v. Grice, 100 N.Y.2d 318 (2003).
[5] Where a parent of a juvenile suspect tells police he wants a lawyer. People v. Mitchell, 2 N.Y.2d 272 (2004).
Etc.

Cross-examination in this area should focus on:

What did he say?
What was your response?
Did you record his exact words?
Did anyone record his words?
Etc.

If the police claim he made a statement after he requested counsel, then you will need to question on the circumstances:

What time was the request?
What time are you claiming he made the statement?
What was done in the interim to get him counsel?
Did the interrogation cease immediately?
Or did you linger in the room?
What was said to him after the request?
What was said in his presence?
Who had contact with him between the request and the statement?
What was done in his presence during this period?
* *Even acts could be enough to provoke a statement and constitute a right to counsel violation*

Interrogation on Other Matters

If a suspect is in custody on one case and either [1] has counsel or [2] requests counsel, any custodial interrogation on any subject, whether related or unrelated must cease. People v. Burdo, 91 N.Y.2d 146 (1997).
You should therefore determine at the outset, whether or not your client had counsel on another matter at the time she was interrogated. If she did, you should be prepared to prove this at the hearing. This can be done through the testimony of the defendant, the testimony of the attorney on the other matter, perhaps court records etc.

Adequacy of the Miranda Warnings

The cops need not use any particular language when advising a suspect of his rights. They are merely required to communicate the basic thrust of the warnings. People v. Anderson, 146 AD2d (2nd Dept. 1989).

When has a Suspect Waived his Rights?

For a waiver to be valid it must be [1] voluntary and [2] knowing / intelligent.

[1] **Voluntary**. To be considered voluntary, the waiver must be the "product of free and deliberate choice". Colorado v. Spring, 479 US 564 (1987)
[2] **Knowing / Intelligent**. To be considered knowing / intelligent, it must be " made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it". Colorado v. Spring, 479 US 564 (1987). A waiver need not be intelligent in the sense it was a good idea.

At the hearing, the prosecutor will attempt to establish a valid waiver through the testimony of the cops. The cop will surely testify that he explained the rights to your client. He will also testify that before doing so he questioned your client in an effort to judge his understanding, his physical condition, and his sobriety, or lack thereof. The cop will then testify that no pressure, force, threats, or promises were made to your client in an effort to obtain the waiver.
This testimony, standing alone, will be enough to prove a valid waiver. You should cross-examine the cops in an effort to show that the waiver may not have been as valid as claimed.

Among the standard areas of inquiry are the following:

[1] **Education**. The cop will testify that he asked your client questions about his educational backround and perhaps his ability to read and write.
While the prosecutor will not inquire further, you should. Ask not only about what efforts were made to determine his educational backround, but more importantly, what efforts could have been made but were not.

Did you ask him what grade he last completed?
Did you ask him when he was last in school?
Did you ask him if he was in special education classes while in school?
Did you ask him if he suffered from a learning disability?
Did you ask him if he suffered from dyslexia?
Did you have him read something aloud to make sure he could read well?
Etc.

[2] **Sobriety / Lack Thereof**. The prosecutor will merely ask the cop if he is trained to recognize when someone is intoxicated and whether or not your client was, in his opinion, intoxicated, at the time of the interview. An objection may be appropriate if the prosecutor has failed to lay an adequate foundation for the cop's opinion that your client was intoxicated.
You should ask the cop as many questions as you can on this topic.

Did you ask him if he drank anything that day?
Did you ask him how much?
Did you ask him what he drank [beer, liquor, etc]
Did you ask him the size of the drinks?
Did you ask him what time he drank them?
Did you ask him if he is on any medication ?
Did you ask him to take any FSTs?
Breathalyzer?
Even an Alco-Sensor test?
Etc.

[3] **Mental / Physical health**. The cop will merely testify that your client did not appear ill or injured. You should again question the cop about all of the steps he could have taken to determine your client's condition but failed to take.

Did you ask him if he was ill?
Did you ask him if he was injured?
Did you ask him if he was taking medication?
Did you ask him if he had been prescribed meds. but had not been taking them?
Did you ask him when he last slept?
Did you ask him if he suffered from any mental illness?
Etc.

What is the Burden of Proof at a Huntley Hearing and Which Party has it?

The prosecutor opens the hearing with the ***burden of going forward***. Depending upon the particulars of the case, the prosecution can meet this burden by proving by a that :
[1] Miranda warnings were not required because the suspect was either
[a] not in custody or
[b] not interrogated [the statement was spontaneous], or
[2] Miranda warnings were given and the suspect waived his rights.

This is usually accomplished by having the cop testify that the suspect was either not in custody, not interrogated, or was advised of his rights and proceeded to waive them and make a statement.

If this can be accomplished, the burden then shifts to the suspect to prove that he :
[1] was the subject of a custodial interrogation [and therefore should have been advised of his rights but was not] or
[2] was advised but did not make a valid waiver of his Miranda rights.

The prosecutor has the burden of proving by a *preponderance of the evidence* that a waiver has occurred. Colorado v. Connelly, 479 US 157.

Hearsay

Hearsay is admissible at a Huntley Hearing to establish any material fact. CPL§ 710.60(4). However, hearsay alone will not be sufficient. People v. Gonzalez, 80 N.Y.2d 883 (1992). Therefore, at a hearing you will occasionally see a cop testify about what another cop said.

The "Spontaeous" Statement

Recognizing that suppression may otherwise result, cops will often claim your client's statement was "spontaneous" and therefore not the product of interrogation in two situations:

[1] **Miranda:** Often, the cops claim your client's statement was made while in custody and before any Miranda warnings were administered. Realizing that suppression could result, the cops will often claim that the statement was "spontaneous".
In a Miranda setting, the spontaneity of a statement will depend upon whether or not it was the product of "express questioning or its functional equivalent". People v. Bryant, 59 NY2d 786 (1989).

[2] **Right to counsel**: Cops will occasionally concede that the statement was indeed made after your client requested an attorney. They will then claim that they honored his request and that the statement was made by your client spontaneously.
In a right to counsel setting, spontaneity is found where the statement was not the result of "inducement , provocation, encouragement or acquiescence, no matter how subtly employed".
People v. Maerling, 46 NY2d 289 (1978). The test is whether or not the statement was made "without apparent external cause, i.e., self-generating". People v. Stoesser, 53 NY2d648 (1981). In fact, just because " a statement was volunteered or not made in direct response to questioning, however does not render it spontaneous. Rather, it must satisfy the test for a blurted out admission, a statement which is in effect forced upon the officer." People v. Grimaldi, 52 NY2d 611 (1981).

It will clearly be more difficult to sustain a "spontaneous" statement claim in a right to counsel case than it will be in a Miranda case. Police activity that does not rise to the level of "express questioning or its functional equivalent" may very well be considered "inducement , provocation, encouragement or acquiescence, no matter how subtly employed".

You should therefore identify which situation you are dealing with and proceed accordingly.

In both situations, but especially in right to counsel situations, you should question the cops very thoroughly about everything they said and did in your client's presence between the time he invoked his right to counsel and the time the statement was allegedly made.

The following cop activity *after the invocation of the right to counsel* could undermine a claim that your client's statement was "spontaneous":
[1] Arranging for the suspect to make a telephone call and them hiding nearby while eavesdropping on the conversation. People v. Moss, 179 AD2d 271 (4th Dept. 1992).
[2] Showing the suspect his co-defendant's alleged confession. People v. Lucus, 53 NY2d 678 (1981).
[3] Advising the suspect of Miranda warnings a second time after he invoked his right to counsel. People v. Huyler, 110 AD2d 1064 (4th Dept. 1985).
[4] Questioning a suspect about other crimes after his lawyer called and told them to cease all questioning on one charge. People v. Rogers, 48 NY2d 167 (1979).

Who has the Burden of Proof when a Statement is Alleged to be Spontaneous ?

The prosecutor has the burden of proof when she claims the defendant's statement was not the product of interrogation, but instead was spontaneous. People v. Roberts, 12 AD3d 835 (3rd Dept. 2004).
This is often accomplished by having the cop testify that there was no police activity or statement that they could have reasonably believed would have provoked an incriminating response.
When the spontaneity of a statement is in issue, you should cross-examine the cop in an effort to reveal some police question, statement, or action which they should have known would have caused the defendant to utter the statement in question. Even talk between two cops within earshot of the defendant may qualify. You should therefore, during cross-examination, painstakingly elicit every last detail of the entire cop-client encounter, not merely the period immediately before the statement was allegedly made.

Example:

What did you [Cop A] say to my client?
What did Cop B say to him?
What did Cop B say to you while in the interrogation room?
What did you say to Cop B while in the interrogation room?
Were there any other cops in the area?
Where were they?
Were they working on this case?
Did anyone communicate with them while my client was present?
What was said?
Was the door to the interrogation room open during the interrogation?
Was he taken to the bathroom?
By you or some other cop?
Was that other cop working this case?
What was said to my client by the other cop during the escort to the bathroom?
Did my client ask him questions?
What were the answers given to him?
Where was the co-defendant during this time?
Was he on the same floor?
Was he ever escorted by the interrogation room where my client was?
Was the co-defendant's statement in the room where my client was?
As it shown to him?
Were any photographs in the room?
Were they visible?
Etc..

After the "Spontaneous" Statement

If a statement is actually "spontaneous" , a cop's requests for clarification or repetition is not considered interrogation. People v. Scotchmer, 285 AD2d 834 (3rd Dept. 2000).
If, instead, the cop responds with questions about the investigation, an interrogation may be found to have occurred. People v. Ackerman, 162 AD2d 793 (3rd Dept. 1990).

** Cops throw around the word "spontaneous" during Huntley hearings much like they throw around the phrase "in plain view" during Mapp hearings. These are phrases that cops and prosecutors know the Judge will fall for every time. And in fact, without regard to the ridiculousness of the claim, Judges dutifully deny suppression motions for no other reason than the fact some cop took the stand and aped these words.*
However, you should always object to the use of these phrases by cops on the stand. These are legal conclusions that cops are not competent to advance.

Two Theories of Suppression in cases where there has been an Illegal Intgerrogation

'Cat out of the bag"

When the police elicit a statement in violation of Miranda and later elicit one in compliance with Miranda, the defendant could argue that the second statement was compelled by the first.
Here, the defendant has the burden of proof. He must prove that he was so committed to the first that he felt compelled to make the second. People v. Tanner, 30 NY2d 102 (1972).This may require the defendant to testify because his state of mind will be in issue. People v. O'Hanlon, 252 AD2d 670 (3rd Dept. 1998).

Example:
D is approached by the cops on the street. He is told to walk over to the cop car. He is then asked about his possible involvement in a burglary. He says he only entered the building because he was hungry and wanted food. The police did not read him his rights before this statement is made. The suspect is removed to the PSB where later he is read his rights and formally questioned about the burglary. He then repeats what he said before . He states that he would not have entered if he had enough food to eat and that he was sorry for breaking in to the building.
The court agrees the first statement was the result of a custodial interrogation and that statement, absent Miranda, is not admissible.
However, the Court could still find that the second statement, given after the Miranda warnings, was admissible.
To obtain suppression of the second statement the defendant may need to testify that he only made that statement because he already committed to the first one. He could testify perhaps that he already committed to the admission and was simply repeating the prior statement or expanding on it. He could add that he felt the damage was already done and that he saw no point in now making a denial.
In a nut shell - the cat was already out of the bag and there was no way to get it back in there. Basically, the defendant felt he might as well keep talking.

Continuous Interrogation

Not to be confused with the "Cat out of the bag" theory is the "continuous interrogation" theory.
This theory holds that once a statement is illegally obtained by police through a custodial interrogation all subsequent statements are tainted and must be suppressed as well. People v. Chapple, 38 NY2d 112 (1975).

Example:
D is interrogated about a crime and makes a statement without having been advised of his Miranda warnings. The police later advise him of his of his warnings and again interrogate him and he makes another statement.
The first statement is not admissible, but what of the second?
What effect did the break between the first and second interrogation have on the admissibility of the second statement?
In this situation, the burden is on the prosecutor to prove that the second portion of the interrogation was not merely a continuation of the first interrogation, but a distinct interrogation. The prosecutor must prove that the two periods of interrogation were separated by a "pronounced break".
The defense will argue that the whole affair was instead, one continuous interrogation.

Therefore, the defense will want to question the cops in such a way that any break was minimal as opposed to "pronounced".

Did the cops even leave the room?
Was D ever alone during this time ?
How long was the break? People v. White, 10 NY3d 286 (2008).
When exactly was the first statement made? [if they cannot prove this how can they prove a long break?]
What happened with D during this time?
Was the suspect asleep during this time? People v. Moyer, 292 AD2d 793 (4th Dept. 2002).
What was said in D's presence during this time?
What was made visible to D?
Were both parts of the interrogation done in the same location? People v. Mallaussena, 10 NY3d 904 (2008); People v. Moyer, 292 AD2d 793 (4th Dept. 2002); People v. Segarra, 9 Mics. 3d 1115 (NY Sup 2005)[changing room does not, alone, constitute a break].
Were the same police personnel involved? People v. White, 10 NY3d 286 (2008); People v. Moyer, 292 AD2d 793 (4th Dept. 2002)
Etc…

"Pedigree Questions"

Just what is and is not a "pedigree question" is not well understood and will vary with the facts of the case. Often you will see a statement that your client is alleged to have made in response to booking type questions but the prosecutor will not have served any CPL § 710.30 notice for that statement. If you move to preclude the prosecutor will argue that such statements fall under the "pedigree exception" to the notice requirement.

The test for whether or not a statement falls into the "pedigree exception" to the notice requirement is whether or not the question was "reasonable likely to elicit an incriminating response". People Rodney, 85 NY2d 289 (1995). Or, should the cop have known, under the circumstances of the case, that the question was likely to invoke an incriminating response.

Pedigree questions are those that directed solely to administrative concerns such as:

What is your date of birth?
What is your address?
Weight? Height?
Do you have any illnesses? Tattoos?
Etc.
People v. Antonio, 86 AD2d 614 (2nd dept. 1982); People v. Hester, 161 AD2d 665 (2nd dept. 1990).

Whether or not a statement falls under the pedigree exception depends upon the facts of the case. For example, in a drug case where a home was searched and contraband was discovered, a question to a suspect about where she lives may very well result in an incriminating answer.

If you do not move to preclude [because you not were given notice] or your motion to preclude is denied, you are entitled to argue that these statements should be suppressed. At the Huntley hearing, the prosecutor must still prove that these statements were made only after the defendant was advised of and waived his constitutional rights. If the court agrees with the prosecutor that the statements fall under the pedigree exception, you are entitled to fully explore the circumstances under which these statements were made, just as you would do with any other statements.

Keep in mind that by moving to suppress you may be waiving the right to appeal the court's decision denying preclusion. People v. Kirkland, 89 NY2d 903 (1996).

Suppression because of Traditional Involuntariness [as opposed to a Miranda violation]

A statement is considered involuntary in two situations:

[1] When it is the product of a Miranda violation [right to remain silent or right to counsel] or
[2] "When it is obtained from him:

(a) By any person by the use or threatened use of actual ***physical force*** upon the defendant or another person, or by means of any other ***improper conduct*** or ***undue pressure*** which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or
(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:
(i) by means of any ***promise*** or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or
(ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States." CPL § 60.45.

Unlike when a defendant claims a Miranda violation, when a defendant alleges that the cops obtained a statement from him that was involuntary in the traditional sense, the prosecutor must disprove such a claim ***beyond a reasonable doubt***. In these situations the defendant never has any burden of proof.

Witherspoon - When Must Prosecutor call other Cops?

The more cops that are forced to testify at the hearing, the better for the defense because you will have the chance to cross-examine them prior to the trial.

However, the prosecutor need not call all cops involved unless the defense can identify a "bona fide factual predicate" which shows that uncalled cops possess material evidence on the issue of voluntariness. People v. Witherspoon, 66 NY2d 973 (1985).

You should therefore try to generate some evidence in the record that you can point to in support of your claim that the prosecutor has not sustained his burden of proof because he failed to call additional witnesses.

For example: Cop A testifies that he met your client at 3:00 at which time he administered Miranda warnings and then elicited a statement.. Cop A testifies that he believes that prior to 3:00 your client was questioned by Cop B but that he does not know what was said.
In this circumstance you would argue that the prosecutor cannot sustain his burden without calling Cop B because Cop B may very well have engaged in a pre-Miranda interrogation that calls into question the voluntariness of the post-Miranda statements.

Even if you cannot identify a "bona fide factual predicate" , the prosecutor may still be unable to meet his burden without calling all cops that had contact with the defendant where:

> [1] the defendant testifies that he was physically abused by a cop other than the ones that testified for the prosecutor. People v. Valeius, 31 NY2d 51 (1972).
> [2] the defense introduces evidence that the D was physically injured while in police custody. People v. Yarter, 51 AD2d 835 (3rd Dept. 1976).
> [3] the defendant testifies that he did ask a cop, other than the ones that testified for the prosecutor, for an attorney and none was provided. People v. Anderson, 69 NY2d 651 (1986).
> [4] the defendant testifies that a cop, other than those that testified, said or did something to him which made him feel he had no choice but to accompany them to the police station. People v. Travis, 162 AD2d 807 (3rd Dept. 1990).

In these circumstances, and perhaps others, the prosecutor cannot meet his burden without offering the testimony of the cops in question.

Defense Witnesses [including the defendant]

A defendant's testimony generally cannot be used against him at trial in the prosecutor's case in chief. Simmons, V. United States, 390 US 377 (1968). However, a defendant's testimony at a suppression hearing may be admissible at his trial if it was not related to his constitutional claim.

For example:
In a murder case, the suspected murder weapon is allegedly found in the defendant's car after a traffic stop. The defendant moves to suppress because the stop was unlawful in that he had not been speeding. The defendant's testimony about the basis for the stop cannot be used against him at trial. However, any testimony he choose to offer about the murder may be. So if he testifies: " I was not speeding , that cop is a lying sack of shit! And another thing, I shot that guy because he called me an asshole!", he runs the risk the second part could be admissible at his trial.
You should therefore counsel your client about these dangers before he testifies and you should structure your direct examination accordingly.

Likewise, the prosecutor may not question a testifying defendant about whether or not he is guilty. People v. Blackwell, 128 Misc.2d 599. Any such questions should be met with an immediate objection followed by a motion to strike.

A defendant has a limited right to call witnesses at a suppression hearing. People v. Chipp, 75 N.Y.2d 327 (1990).

The Suppression of Statements to Private People

You can move to suppress but not preclude these.
CPL 710.30 only applies to statements to cops.
However, some statements , even those allegedly made to private citizens, may be inadmissible. CPL§ 60.45(2)(a) ; People v. Pagan, 211 AD2d 532 (1st Dept. 1995).

Private citizens include:

[1] security guards
[2] a jailhouse snitch. People v. Cardona, 41 NY2d 333 (1977).
[3] a witness or complainant.
Etc..

There are two grounds upon which such statements can be suppressed:
[1] **Agency**. The private citizen was really acting at the behest of the cops and therefore an agent of the cops. Therefore, the defendant was entitled to Miranda warnings just as he would have been had the cops elicited the statement.
If a statement was made to these types of witnesses the prosecutor has the burden of proving the witness was not acting at the behest of the cops. This is true if the issue is raised in the defense notice of motion. People v. Mendoza, 211 AD2d 493 (1st Dept. 1995).

[2] **Involuntary**. You could allege that the statement was involuntarily [in the traditional sense because Miranda does not apply] made. If you do so, the prosecutor may be required to prove otherwise and may be forced to offer the testimony of that person at a hearing.

Obviously, given that there are no notice requirements for the intention to offer the statements to private people, you may not ever learn of these statements until trial [a discovery demand for any such statements may be a good idea]. However, if you do learn that someone is claiming your client made a statement to some non-cop you may want to move to suppress it as involuntary.

Pinning down witnesses

Unless this is your first day on the job, you are aware that police officers, often with a push from the prosecutor, will try to tailor their testimony so as to avoid constitutional objections.
However, they often do not appreciate the issues in these cases at the hearing stage. This is especially true of street cops. The seasoned investigators often know what they want to accomplish and adjust their testimony accordingly. In any event, prosecutors often do not prepare officers as thoroughly for hearings as they do for trials. You should therefore take advantage of this by committing the officer as much as possible at the hearing. If properly done, no amount of trial adjustments to that testimony can undo the damage. But if you leave them an opening they will try squeeze through it at trial..

Ex: At the hearing you ask the cop "What did he say then?" and the cop says "Nothing". This is a seemingly good answer. However, the cop can now claim at the trial when you try to impeach him, that he was not sure what point in the encounter you were talking about when you asked that question at the hearing. Although it is very tedious, be sure to orient the witness to the exact point during the encounter you are talking about as often as possible.

Ex: Immediately after you placed him in the rear of your cop car in front of 123 Fake Street, did he say anything?

At the conclusion of the hearing you should know exactly what this witness will say at trial. That is a comforting thought because there will be no surprises. The witness will either testify at trial consistent with their hearing testimony or will testify differently and be impeached with their hearing testimony.

Handling the Judge

The primary concern of course is not upsetting the judge by asking too many questions during the hearing. Ha! Just kidding. This should never be a concern. It is always better to do a thorough job and tick the Judge off than abandon a line of questioning because the Judge appears annoyed.
And do not abandon a line of inquiry just because an objection has been sustained. Just ask your next question.
If the Judge would rather be doing something else rather than listening to testimony then he or she is in the wrong line of work. Or the judge could grant your motion to dismiss, summarily grant your motion to suppress, or even make you a reasonable plea offer. But if the judge does not want to take these steps, there is no reason for you to reward the judge by failing to thoroughly cross-examine the witnesses.
Abandoning your line of questioning serves only to positively reinforce the Judge's behavior. If, instead, you are prepared enough to meet every sustained objection with a demand for a basis and a counter argument the Judge may relent and allow your questions in the first place because she will eventually identify that as the path of least resistance .

Objections

Anticipate the objections you will get and have counter arguments prepared. You should be prepared to cite case law and even offer the Judge a copy of a decision that supports your position.
Judges will often back down when you push back like this. Again, their natural inclinations often appear to be to defer to the prosecutor's position. If it becomes clear to the judge that assisting the prosecutor will prolong the hearing or result in questionable rulings that will be the subject of appellate review, they may very well choose to serve their self- interest rather the interests of the prosecutor.

Ex: What are you claiming he said after you returned from the bathroom?
DA: objection!
Judge: Sustained.
Defense: What was the basis for the objection?
Judge: I said sustained!
Defense: Judge, the record must reflect the reason for the objection otherwise the appellate court will have difficulty determining whether or not your decision to sustain is correct.
Judge: prosecutor, I assume you objected because this hearing deals merely with the voluntariness of the statement and therefore the specific content of the statement is not relevant.
DA: er, uh… exactly!
Judge: Sustained on that basis. Ask your next question counselor.
Defense: Judge, I have a decision from the NYS Court of Appeals which supports my position that the questions asked and the answers given are very relevant at such a hearing. I will cite People v. Remaley, 26 NY2d 427 (1970). I even have a copy for the Court's review.
Judge: Proceed counselor but keep it brief.

If the Court begins to realize that each sustained objection will lead to a lengthy exchange it may very well stop interfering and just let you ask your questions.

BTW - Content *is* relevant

The questions asked and the answers given *are* relevant at a Huntley hearing. People v. Remaley, 26 NY2d 427 (1970); People v. David, 44 AD2d 548 (1st Dept. 1974). You may want to have copies of these decisions with you for hearings.
Therefore ask the cops which questions they asked and which answers they received. Ask them what order the questions were in as well. Make sure to ask them exactly what was said to the defendant immediately prior to each alleged statement.

And there is really no such thing as a "beyond the scope" objection to a question asked on cross examination

Prosecutors will often try to derail an effective cross examination by objecting to a question as "beyond the scope of direct". And puzzlingly, Judges will entertain this objection when they should not. While an attorney is bound by the scope of a *re-direct* examination, he is not bound by the scope of the direct examination. People v. Kennedy, 70 A.D.2d 181 (2nd Dept. 1979)[" it is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]; People v. Sanders, 2 A.D.3d 1420 (4th Dept. 2003).

You are therefore free to ask an officer called as a witness on another suppression issue (4th Amendment, Wade etc) about anything related to the admissibility of the statement. This can be very revealing because the prosecutor will not have prepared that officer to testify about another subject and therefore the officer will not have been prepared in advance for how to make the police activities appear lawful. And this is yet another reason that you should try to convince the court that hearing are needed on as many issues as possible [Remember, we do not move for hearings, we move to suppress and judges respond by granting hearing so they can learn enough to decide the motion].

For the Huntley part of a multi-issue hearing, the prosecutor will surely call the Investigator who interrogated your client at the police station in an effort to prove the statements made there were lawfully obtained. For the 4th Amendment part of the hearing, the prosecutor will surely call the officers who stopped, searched, or arrested your client. You are not precluded from cross examining the officers who stopped your client about matters that the prosecutor chose not to cover. You can question those officers in an effort to elicit information that supports your motion to suppress the statement as well.

> Example: [at a Huntley, 4th Amendment Hearing, an officer testifies on direct examination about just the stop and search of your client]
> Q: Officer, you were present at the scene where my client was arrested?
> A: Yes.
> Q: And you have just testified about how you and your partner stopped my client?
> A: Yes
> A: And you testified about the search of his backpack and person?
> Q: He was then cuffed and placed in your patrol car?
> A: Yes.
> Q: That was at 3:00?
> A: Yes.
> Q: There were other police officers that arrived to assist you?
> A: Yes.
> Q: You alerted your partner and all other officers at the scene or on their way to the scene that you found a gun?
> A: Yes.
> Q: You did this by using your radio?
> A: Yes.
> Q: And you were also receiving information over your radio while at the scene?
> A: Yes.
> Q: Do you know where your partner was when you were searching the car?
> A: Not the entire time, no.
> Q: Your partner was in the patrol car during at least part of that time right?

A: Yes, I think he was.
Q: Aware what all the other officers were doing while you were busy searching the car?
A: No.
Q: And my client was driven from the scene at 3:24?
A: Yes.
Q: So for the 24 minutes he was in your patrol car, you were not dealing with him?
A: Right.
Q: But because you were searching his car, you do not know what other officers had contact with him right?
A: Right.
Q: And you therefore do not know what they said to my client right?
A: Right.
Q: Did you provide him with Miranda warnings before he was driven away?
A: No.
Q: Did anyone?
A: Not that I am aware of.
Q: Who drove him to the station?
A: We transferred him to another car and they drove him?
Q: Do you know if those officers provided Miranda?
A: I don't know.
Q: Do you know what those officers said to him during that ride?
A: No.

What began as a direct examination about the stop and search has now yielded information that could be used to support your motion to suppress the statements your client is alleged to have made for a 5th or 6th Amendment [Miranda] violation. Because you did not restrict your cross examination, as the prosecutor did, to the police stop and search, you now have support for an argument that any number of officers could have posed your client a question [interrogation] while he was in the police car [custody] without first providing Miranda warnings and that your client could have heard transmissions between officers.

Example: [The investigator testifies that when he questioned your client at the station about a gun that was found in the car, your client said "I have never even looked in the trunk!" And that he said this *before* the Investigator ever mentioned where the gun had been located. This is a seemingly damaging statement in a case where your client denies knowledge of the presence of the gun]

Q: After his arrest he was placed in your patrol car?
A: Yes.
Q: Your patrol car was parked behind the car my client was riding in by about 10 feet?
A: Yes.
Q: And it was then that you searched his car?
A: Yes
Q: You located a gun in the trunk?
A: Yes.
Q: And you also called a technician who then photographed and removed the gun?
A: Yes.

With this testimony of events that took place *after* the stop and arrest [and is beyond the scope of the direct], you are in a position to now argue that your client's subsequent statement to the Investigator is not as damaging as it appears because your client's knowledge about the location of the gun could have been derived from his observations while in the police car.

Refreshing a witness's recollection

Cops will often ask to look at a report before they answer a question. Do not automatically permit them to do so. You are in control of whether or not they handle any exhibit when you are examining them.

Instead , make them admit they cannot possibly recall the event without looking at the document. Make them admit that they have no independent memory of the event and that without looking at the document that memory is lost for ever. Make them admit that they created the document specifically because they often forget events [given the passage of time, subsequent investigations, etc]. Make them admit that the document represents the only source of information in the possession of the police regarding that event. Make them admit that without that recording, the specifics of the event would have been lost.

Even after these concessions, do not feel you must permit the cop to read the document. You may want to see how many other things he is not able to recall. If you simply give him the document he will read the entire report and then be prepared to answer your next questions instead of giving you more "I do not know" answers.

In fact you need not ever permit him to read the document.

Impeachment

One reason for perhaps declining to permit the witness to refresh his recollection with a document is because you will only rarely impeach a cop with a prior inconsistent statement at a hearing. Unless you think the impeachment will contribute to suppression you should probably defer the impeachment until trial.

Impeachment of a cop with a prior inconsistent statement at a hearing will serve to (1) make that cop hostile and therefore less likely to give you the answers you want and (2) alert him and the prosecutor to the impeachment they can expect at trial.

If you expect before a hearing that you will be impeaching the witness, you may want to wait until the later part of your cross examination to do so. Impeachment often results in hostility, defensiveness, and less cooperation. You should consider grabbing the low hanging fruit early while the witness is as cooperative as they are likely to get and then exploring areas where the witness is likely to resist giving you the answers you want.

However, if the witness is reluctant to testify truthfully from the outset, you may want to impeach immediately to teach them a lesson. A witness who thought they could get away with not bring truthful or with saying "I don't recall" in response to every question needs to be taught a lesson early. A precise and forceful impeachment [with prior inconsistent statement, a rules violation etc] will communicate to the witness that you know how to make them pay for such behavior [behavior that presumably has worked on other defense attorneys]. Being impeached is embarrassing and painful. The impeached witness may very well fall into line and just tell the truth instead of advancing an agenda if they realize you are prepared, competent, and unafraid to push back.

POLICE GENERAL ORDERS

These are solid gold. No hearing cross examination should be done without knowledge of the police rules governing the subject [interrogations, searches etc]. These rules can often be obtained through Freedom of Information Law requests. If your request is denied, you can seek a subpoena. Ideally you would prefer not to have to seek a subpoena for fear that the prosecutor will learn what you are up to.

Officers are rarely prepared to be confronted with their own departmental rules. Prosecutors are often unfamiliar with these rules.

Violating police rules will not, in and of itself, render a statement inadmissible, but rules violations do impact the credibility of the witness, the thoroughness of the investigation, etc. And while judges are often unmoved by even dozens of rules violations, you will often get traction from a jury at the trial. And all hearings should be done with the trial in mind. Judges know that the police regularly violate police rules and they never consider it the least bit troublesome. Juries are often aghast when they learn that the police violated 15 different rules in the scope of a single investigation.

So how do you make the most of the rules violations?
You will know from your review of the police reports whether or not some rules have been violated. You can read what the police claim they did and compare that to what the rules require them to do. Outside of the failures you detect from your review of the police reports, you will learn of many more rules violations *during* your cross examination. If you are not familiar with the rules you will not know whether or not they were violated. If you are familiar, you can ask the officer whether or not they did or did not perform a certain act. Each time they did something they were told not to do you impeach them. Each time they failed to do something they are required to do you impeach them.
As with other forms of impeachment, you first commit the officer to the act or omission and then get them to concede the existence of the rule before extracting the concession that they violated the rule.

When exposed as rules violators, officers will often dig themselves a hole trying to avoid embarrassment instead of simply acknowledging their failure. This response just compounds the prosecution's problem by revealing the witness to be not only a rule breaker but a rule breaker who refuses to accept responsibility for the violation.

> Example: [Investigator has testified that she elicited a written statement from your client after an interview]
> Q: Investigator, who wrote this statement?
> A: That is your client's statement.
> Q: Who took out a pen and wrote these words?
> A: I did.
> Q: Ok, and you wrote these words after questioning my client for over an hour?
> A: Yes
> Q: Did you write any notes during the questioning?
> A: No. I did complete the Miranda card.
> Q: Right – but outside of the notations you placed on the card, did you write anything anywhere at all during the questioning?
> A: No.
> Q: You obviously could have but chose not to right?
> A: Right.
> Q: You spoke for over an hour and then after that you began to wrote?

A: Yes.
Q: And you wrote the statement you then had him sign?
A: Yes.
Q: And when you decided to write the statement you did that from memory?
A: Yes.
Q: You tried to remember what was said during that hour?
A: Yes.
Q: You had no notes to refer to, you were forced to use only your memory of that hour's worth of talking?
A: Yes.
Q: This 2 page statement you wrote does not contain everything my client said does it?
A: It is the sum and substance of what he said.
Q: It is a summary then of what he said during that hour?
A: Yes.
Q: So some of what he said made it into the statement and some did not?
A: Everything important is in there?
Q: Do you know everything he said that is not in there?
A: No.
Q: Well, who got to choose what made it into the statement and what was left out?
A: Me.
Q: Who chose the punctuation?
A: I did.
Q: Who chose the sentence structure?
A: I did.
Q: These are not precise word for word quotes because you were doing your best to summon what you heard from your memory right?
A: Like I said, it is sum and substance of what he said.
Q: Ok, so you are telling us that he said these things but you summarized what he said using your own terminology?
A: Yes.
Q: So you wrote it and then handed it to him to review?
A: Yes.
Q: And he sat there and read it to himself and then signed it?
A: Yes.
Q: So he read it himself, so you didn't have to read it to him then?
A: Yes.
Q: So he was never given the option of writing his own statement?
A: We write the statements, that is how it is done.
Q: But you could have handed him the pen and paper and asked him to write down his account right?
A: I don't do that because of a concern for safety.
Q: What would be unsafe about that?
A: We don't want suspects to have the pen in their hand because it could be used against us as a weapon.
Q: Ok, so you had that fear with my client?
A: I always have that concern.
Q: Interesting. Then tell us whose signature appears at the bottom of the statement?
A: His.
Q: And tell us how he accomplished that without having a pen in his hand?
OBJECTION…

Q: Anyway, upon arrival at the station you placed my client into an interrogation room?
A: It was an interview room.
Q: Not an interrogation room?
A: We call them interview room.
Q: Did you record the interrogation?
A: I did not record the interview, no.
Q: Really? Well once inside you did interrogate him right?
A: I conducted an interview, yes.
Q: Ok. So the police department considers these interview rooms not interrogation rooms you are saying?
A: Yes.
Q: So interrogation would not be the most accurate term to describe what took place in this room.
A: Correct, we conduct interviews.
Q: You are aware of course that you have rules for your job right?
A: Yes.
Q: Rules you are duty-bound and required to follow?
A: Yes.
Q: These rules are called General Orders and are distributed to every member of the department?
A: Yes.
Q: They are mandatory reading?
A: Yes.
Q: You have surely read the rules right?
A: At some point yes.
Q: There are rules on various subjects?
A: Yes.
Q: There is a rule specifically for questioning citizens in custody?
A: Yes.
Q: And if you ever had the slightest uncertainty about what the department requires of you on this subject, you can simply reread that rule right?
A: Yes.
Q: And these rules are job requirements for you?
A: Yes.
Q: They are in no way optional right?
A: Yes.
Q: The department went to the trouble of explaining to you exactly what you must and must not do when it comes to questioning right?
A: Yes.
Q: General Order 123 is the order explaining the rules for questioning people?
A: I do not know the number.
Q: You admit there is a rule for that subject right?
A: Yes.
Q: As an Investigator, questioning people is a significant part of your responsibilities right?
A: Yes.
Q: You do it very often right?
A: Yes.
Q: So the rule governing how you must do that task is a rule that you absolutely need to know on a daily basis right?
A: Yes.
Q: Because if you do not understand that rules very well, you could be breaking the rules you

swore to follow right?
A: Yes.

Q: The General Order we talked about a moment ago related to questioning people in custody has a title right?
A: Yes
Q: They all do right?
A: Yes
Q: And the title of that General Order is INTERROGATION PROCEDURES correct?
A: I have not seen it in a while.
Q: Would reading that now help you remember what the title is?
A: Yes.
Q: Having read the G.O., can you now remember?
A: Yes.
Q: And what does your department call that General Order?
A: Interrogation procedures.
Q: So your department does not use the word interview in that title, they use the word INTERROGATION don't they?
A: Yes.
[TAKING EXHIBIT BACK]
Q: Ok. That G.O. contains mandatory requirements for how you MUST do INTERROGATIONS, right?
A: Yes.
Q: You are required to follow these rules right?
A: Yes.
Q: You are required to take statements in a specific way right?
A: Yes.
Q: You are required to do things according to the rules to make sure that statements you take are accurate?
A: Yes.
Q: And complete?
A: Yes.
Q: And to make sure that a statement you say someone made is really their statement, not yours?
A: Yes.
Q: Because the statements you say people make are used in court?
A: Yes.
Q: Ok – now because of that concern, that rule absolutely requires the officer taking a written statement to use the citizen's own words in that statement right?
A: If that is what it says.
Q: Do you agree now that the rule s does say that or would you like to read it again?
A: That is the rule.
Q: And again, this rule is something that has been in place for many years right?
A: Yes.
Q: And you have been required to follow it for the 14 years you have been in the department?
A: Yes.
Q: So what I am reading you cannot possibly be news to you right?
A: Right.
Q: The rule goes even further to say that you are never ever to summarize a citizen's statement through use of your own terminology right?
A: Right.

Q: In fact, the rule says that EXTREME CAUTION should be used NOT to do this right?
A: Yes.
Q: You violated that rule didn't you?
A: Yes.
Q: In addition, the rules say you MUST, in other words you ARE REQUIRED TO, read any written statement OUT LOUD where you do not have the citizen do so, right?
A: Yes.
Q: And you violated that rule too didn't you?
A: Yes.

As you can see, this can be very fun. And that is using just one section of just one general order. Once you create this type of hearing record, you will know before trial that you have some great impeachment at your disposal when the time comes.

* Consideration should also be given to establishing all of the police activities at the hearing [with knowledge of the rules in mind] and then waiting until trial to confront the cops with all of the errors they made.

Failure to Record the Interrogation

Be sure to ask the cops about whether or not they recorded the statements. Ask them whether or not the could have done so but chose not to.
It is important to make a record or the failure to record at the hearing.

* Two motions you should be making in cases where the cops claim your client made a custodial statement are:
[1] A motion to suppress the statement simply because the police intentionally failed to record it.
[2]A motion to suppress that statement as involuntary. You should contend that the failure to record should be considered along with other factors in the Court's decision regarding whether or not the statement was voluntary. Given the failure to record, the prosecutor can only offer an inherently less reliable, oral account of the interrogation and therefore cannot sustain his burden of proof.

Just making the motion is not good enough. You need to preserve the issue by establishing at the hearing that the cop could have recorded the statement yet failed to do so.

Memorandum of Law

After the hearing, the attorneys will be given an opportunity to make statement in support of their respective positions. Then the Judge must make a finding of fact on the record or in a written decision. CPL§ 710.60(6).

We have all witnessed this pathetically predictable display. The Judge basically says he has fallen hook, line, and sinker for every morsel of cop perjury that was presented and he therefore has no choice but to deny your motion.

Feel free to demand specific conclusions of law from the Judge.

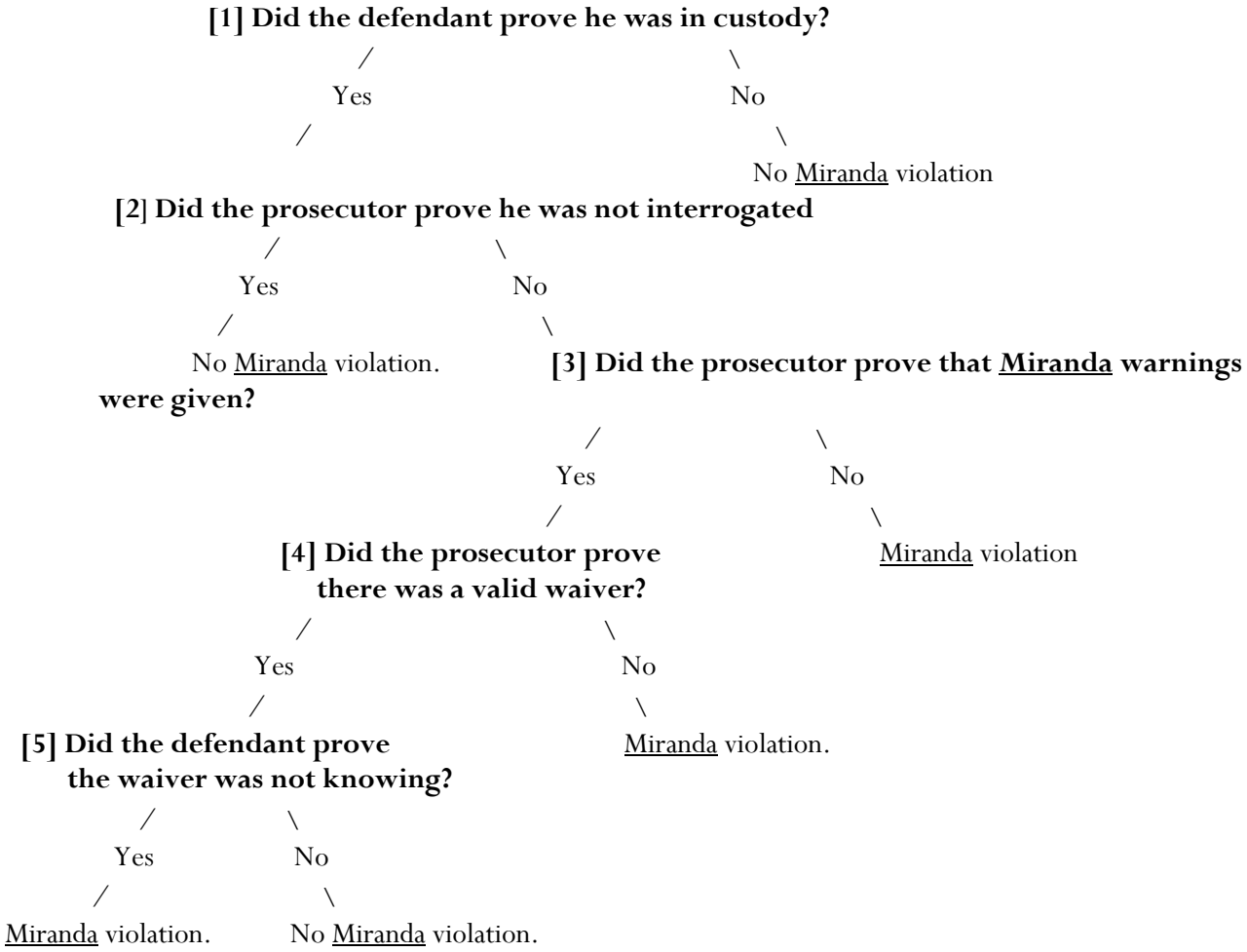
If you want time to organize your arguments, review the transcript, or research issues you should request that the Court reserve decision until after you have submitted a memorandum of law. Most Judges will give you this opportunity.
* It is a good idea to write the name of the hearing stenographer on your file in case you chose to order the transcript.

Re-opening the Hearing

A motion by the prosecutor to re-open the hearing so he can offer additional evidence should always be opposed. You will see these motions when , after the conclusion of the hearing, the defense makes a seemingly meritorious argument that the evidence was insufficient for one reason or another and suppression is therefore required.
In this jurisdiction, realizing that the suppression of a statement could cost them their job, terrified prosecutors will nervously implore the Judge [who was likely a co-worker months earlier..] for another chance to prove their case.
The prosecutor, having had a full and fair opportunity to present evidence should not be given this second chance. People v. Havelka, 45 NY2d 636 (1978). These hearings take place months after arraignment and the prosecutor presumably could have used that time to prepare for the hearing and research the relevant issues.

Burden of Proof Flow Charts

Miranda Violation



If you claim a statement was **Involuntary** in the Traditional Sense:

Did **Prosecutor Prove** Voluntariness BRD?

/ \

Yes No

/ \

Statement may be admissible Statement inadmissible

If you claim your client's statement was made to a private person acting as an **agent** of the police

Did the prosecutor prove the person was not a police agent?

/ \

Yes No

/ \

Statement may be admissible Statement inadmissible

If you claim statement inadmissible under the "Cat -out-of -the-bag" theory:

Question: Has the **defendant offered** proof that the second statement was tainted by the first

/ \

Yes No

/ \

Did the **prosecutor offer** sufficient rebuttal testimony? Statement not inadmissible on these grounds.

Yes No

/ \

Statement not inadmissible Statement inadmissible on these grounds

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<u>If you claim a post-Miranda statement is inadmissible because it was made during a continuous interrogation that followed an inadmissible pre-Miranda statement</u>:

<u>Question: Has the **prosecutor proven** that there was a "pronounced break" in the interrogation between the two statements?</u>

/ \

Yes No

/ \

Statement may be admissible Statement inadmissible

CJI JURY INSTRUCTIONS

STATEMENTS (ADMISSIONS, CONFESSIONS)

NOTE: When properly raised at trial, the voluntariness of a defendant's statement to law enforcement must be submitted to the jury upon the defendant's request.[i] *The question of whether a defendant's statement was voluntary will turn on such factors as whether the defendant was in custody, if so, whether he/she was given and waived his/her Miranda rights*[ii]*, and whether the statement was voluntary in the traditional Fifth Amendment sense. The question of whether the defendant's expanded right to counsel under the New York State Constitution was violated need not be submitted.*[iii]

No one jury instruction can apply to all situations given the varied circumstances surrounding the giving of statements, and the different instructions requested. What follows is a series of instructions on the most common issues from which the trial court can fashion a charge tailored to the facts and issues of an individual case.

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Introduction

I will now discuss the law as it relates to testimony concerning [a] statement(s) of the defendant made to a police officer [or assistant district attorney].

Our law does not require that a statement by a defendant be in any particular form. It may be oral, or written, or electronically recorded.

[A statement in written form need not have been (written or) signed by the defendant provided that the defendant adopted the statement. A defendant adopts a statement when he/she knowingly acknowledges the contents of the statement as his/her own. In deciding whether the statement was adopted, the presence or absence of the defendant's signature may be considered.]

There is no requirement that a statement be made under oath.

Pedigree Statements

There is testimony that, while the defendant was in custody, the police asked him/her "pedigree" questions relating to: (*specify, e.g., his/her name, address, date of birth, type and place of employment)*.

Under our law, a police officer may ask those questions of a person who is in custody, and the officer is not required to advise the defendant of his/her rights before doing so.[iv] Thus, if you find the defendant made such statements, you may consider them in your evaluation of the evidence. In determining whether the statement was made, you can apply the tests of truthfulness and accuracy that we have already discussed.[v]

Custodial Statements

There is testimony that, while the defendant was in custody, he/she was questioned by the police and made certain [oral and/or written] statement(s). [There is (also) testimony that the defendant made a videotaped statement to an assistant district attorney.]

Under our law, before you may consider any such statement as evidence in the case, you must first be convinced that the statement attributed to the defendant was in fact made [or adopted] by him/her. In determining whether the defendant made [or adopted] the statement, you may apply the tests of believability and accuracy that we have already discussed.

Also, under our law, even if you find that the defendant made a statement, you still may not consider it as evidence in the case unless the People have proven beyond a reasonable doubt that the defendant made the statement voluntarily.[vi]

How do you determine whether the People have proven beyond a reasonable doubt that the defendant made a statement voluntarily?

Miranda Rights[vii]

Initially, under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney]. If any one of those three conditions is not met, a statement made in response to questioning is not voluntary and, therefore, you must not consider it.

[There is no particular point in time that the police [or assistant district attorney] are required to advise a defendant in custody of his/her rights, so long as they do so before questioning begins. A defendant in custody need be advised only once of the rights, regardless of how many times, or to whom, the defendant speaks after having been so advised; (provided the defendant is in continuous custody from the time he/she was advised of his/her rights to the time he/she was questioned and there was no reason to believe that the defendant had forgotten or no longer understood his/her rights.[viii])]

While there are no particular words that the police [or assistant district attorney] are required to use in advising a defendant, in sum and substance, the defendant must be advised:

1. That he/she has the right to remain silent;

2. That anything he/she says may be used against him/her in a court of law;

3. That he/she has the right to consult with a lawyer before answering any questions; and the right to the presence of a lawyer during any questioning; and

4. That if he/she cannot afford a lawyer, one will be provided for him/her prior to any questioning if he/she so desires.

Before you may consider as evidence a statement made by the defendant in response to questioning, you must find beyond a reasonable doubt that the defendant was advised of his/her rights, understood those rights, and voluntarily waived those rights and agreed to speak to the police [or an assistant district attorney]. If you do not make those findings, then you must disregard the statement and not consider it.

[NOTE: *Add if the defendant's mental capacity to understand the warnings is in issue*:

A person may validly waive [his/her] rights, regardless of whether or not [he/she] had a full understanding of the criminal law or procedures or, in particular, how what [he/she] says on waiving [his/her] rights may be used later in the criminal process.

What must be shown for a valid waiver is that the individual grasped the plain meaning of the warnings that [he/she] did not have to speak to the interrogator; that any statement might be used to [his/her] disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued.[ix]]

Traditional Involuntariness [x]

Under our law, a statement is not voluntary if it is obtained from the defendant by the use or threatened use of physical force [upon the defendant or another person].

In addition, a statement is not voluntary if it is obtained by means of any other improper conduct or undue pressure which impairs the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement.[xi]

Expanded Charge on Traditional Voluntariness

In addition to the foregoing charge on "Traditional Voluntariness," the following expanded charge may be appropriate:

In considering whether a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement, you may consider such factors as:

The defendant's age, intelligence, and physical and mental condition; and

The conduct of the police during their contact with the defendant, including, for example, the number of officers who questioned the defendant, the manner in which the defendant was questioned, the defendant's treatment during the period of detention and questioning, and the length of time the defendant was questioned.

It is for you to evaluate and weigh the various factors to determine whether in the end a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement.

Promise by the Police

Under our law, a statement of a defendant is not voluntarily made when it is obtained from the defendant by a public servant engaged in law enforcement activity [or by a person then acting under his/her direction or in cooperation with him] by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself/herself.[xii]

Under that law, a promise or statement of fact made to a defendant does not by itself render the defendant's subsequent statement involuntary. A defendant's statement would be involuntary only if the promise or statement made to him/her created a substantial risk that he/she might falsely incriminate himself/herself.

Delay in Arraignment [xiii]

Under our law, when a person is arrested, the police must bring him or her to court for arraignment without unnecessary delay. Before bringing an arrested defendant to court, the police [may conduct a lineup], may complete the paperwork associated with the processing of the arrest, may question witnesses or conduct other investigation relevant to the case, and may question the defendant.

It is not for the jury to determine precisely when the defendant should have been arraigned; however, you may consider whether the police unnecessarily delayed the defendant's arraignment; and, if so, whether that delay, along with other relevant factors, affected the defendant's ability to make a choice about whether to make a statement.

A statement is not involuntary solely because of the length of time before a defendant is arraigned. That length of time is only one of the factors that you may consider in determining whether a statement was voluntary.

Conclusion

If the People have not proven beyond a reasonable doubt that a statement of the defendant was voluntarily made, then you must disregard that statement and not consider it.

If the People have proven beyond a reasonable doubt that a statement of the defendant was voluntarily made, then you may consider that statement as evidence and evaluate it as you would any other evidence.

ADDITIONAL CHARGES

I. Custodial but Spontaneous Statement

Under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney].

If, however, a defendant in custody spontaneously volunteers a statement, that statement may be considered by the jury, regardless of whether or not the defendant was advised of his/her rights or waived them.

[In this case, the People concede that at the time of the statement, the defendant was in police custody (and had not been advised of his/her rights). The People, however, contend that the defendant spontaneously volunteered a statement.]

For a statement to be spontaneously volunteered, the spontaneity must be genuine and not the result of any questioning, inducement, provocation, or encouragement by the police.[xiv]

Under our law, questioning includes words or actions by the police [or assistant district attorneys], which they should know are reasonably likely to elicit an incriminating statement.

If you find that the People have proven beyond a reasonable doubt that the statement was spontaneously volunteered, you may then consider that statement as evidence and evaluate it as you would any other evidence.

If you find that the People have not proven beyond a reasonable doubt that the statement was spontaneously volunteered, then you must disregard the statement and not consider it.

II. Issue As To Custody of Defendant

Under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney].

On the other hand, a defendant who is not in custody when questioned by the police [or assistant district attorney], need not be advised of his/her rights, and any voluntary statement may be considered by the jury.

Under our law, a person is in custody when he/she is physically deprived of his/her freedom of action in any significant way.[xv]

The fact that the defendant was being questioned by police [or that the questioning took place inside a police station] does not necessarily mean the defendant was in custody.

Whether the defendant was in custody at the time of the questioning is not determined by what the defendant himself/herself believed or what the police believed[xvi]. In other words, the test is not whether the defendant believed he/she was in custody or the police believed he/she was in custody. The test is what a reasonable person, innocent of any crime, in the defendant's position, would have believed. If that reasonable person would have believed that he/she was in custody, then the defendant was in custody. If that reasonable person would have believed that he/she was not in custody, then the defendant was not in custody.[xvii]

To decide whether a reasonable person, innocent of any crime, in the defendant's position, would have believed

that he/she was in custody, you must examine all the surrounding circumstances, including but not limited to:

Select as appropriate: [xviii]

the reason the defendant was speaking to the police or being questioned by the police;

where the questioning took place; [whether the defendant appeared at the police station voluntarily;]

how many police officers took part in the questioning;

whether the questioning was investigative or accusatory;

whether the questioning took place in a coercive atmosphere;

whether the defendant was handcuffed or physically restrained;

whether the police treated the defendant as if he/she were in custody;

whether the defendant was offered food or drink;

whether the defendant had been allowed to leave after the questioning.

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i. *People v. Huntley*, 15 N.Y.2d 72 (1965); *People v Cefaro*, 23 NY2d 283, 286-287 (1968); *People v. Sanchez*, 293 A.D.2d 499 (2nd Dep't. 2002).

ii. *People v. Graham*, 55 N.Y.2d 144 (1982).

iii. *People v. Medina*, 146 A.D.2d 344 (1st Dep't 1989) *aff'd. People v. Bing [Medina]*, 76

N.Y.2d 331 (1990); *People v. Daniels*, 159 A.D.2d 513 (2nd Dep't 1990); *People v. Dawson*,166 A.D.2d 808 (3rd Dep't. 1990).

iv. *People v. Rodney,* 85 N.Y.2d 289 (1995); *People v Berkowitz,* 50 N.Y.2d 333, n. 1 (1980); *People v Rodriquez,* 39 N.Y.2d 976 (1976); *People v Ryff*, 27 N.Y.2d 707 (1970) (identification questions); *People v Rivera,* 26 N.Y.2d 304 (1970) (defendant's address).

v. Such statements also need to have been voluntarily made, but it is unlikely that the voluntariness of such statements will be in issue.

vi. CPL 60.45(1). *People v. Huntley, supra*, 15 N.Y.2d 72.

vii. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *People v. Graham, supra,,* 55 N.Y.2d 144.

viii. *People v. Hotchkiss*, 260 A.D.2d 241 (1st Dep't. 1999); *People v Crosby*, 91 A.D.2d 20, 29 (2d Dep't. 1983).

ix. *See People v. Williams*, 62 N.Y.2d 285, 288-89, 476 N.Y.S.2d 788, 465 N.E.2d 327 (1984)(An "individual may validly waive Miranda rights so long as the immediate import of those warnings is comprehended, regardless of his or her ignorance of the mechanics by which the fruits of that waiver may be used later in the criminal process." Thus, a "functionally illiterate, borderline mentally retarded man who also suffered from organic brain damage...[and] had previously been hospitalized for psychotic episodes" who "would not have understood [the] rationale [of the Miranda warnings] or the full legal implications of confessing" but who understood the "immediate meaning" of the pre-interrogation warnings, could and here did waive his Miranda rights.). *See also People v. Love*, 57 N.Y.2d 998, 457 N.Y.S.2d 238, 443 N.E.2d 486 (1982) (although the defendant was in a psychiatric hospital at the time of interrogation, his waiver of his pre-interrogation warnings was valid); *People v. Thasa*, 32 N.Y.2d 712, 344 N.Y.S.2d 2, 296 N.E.2d 804 (1973) (the defendant was found mentally incapable of waiving his pre-interrogation rights). *But see Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), decided after the foregoing cases, in which the United States Supreme Court held that a waiver of *Miranda* rights is effective in the absence of government coercion, irrespective of the defendant's mental state.

x. *See People v. Anderson*, 42 N.Y.2d 35 (1977).

xi. CPL 60.45(2)(a).

xii. CPL 60.45(2)(b).

xiii. *See People v. Ramos*, 99 N.Y.2d 27 (2002).

xiv. *People v. Maerling*, 46 N.Y.2d 289, 302 (1978).

xv. *People v. Rodney*, 21 N.Y.2d 1, 9 (1967).

xvi. *See Stansbury v. California,* 114 S.Ct. 1526 (1994).

xvii. *See People v. Yukl,* 25 N.Y.2d 585 (1969).

xviii. *See People v. Centano*, 76 N.Y.2d 837 (1990) ("The Appellate Division correctly applied the standard established in *People v Yukl* (25 NY2d 585, 589) and concluded that a reasonable person, innocent of any crime would not have believed he was in custody under the circumstances. It based its conclusion on evidence in the record that (1) defendant appeared at the precinct voluntarily and presented himself to the police as a friend of Ivory eager to assist in investigating his death, (2) the atmosphere at the precinct was not coercive, (3) the questioning was investigative, not accusatory, (4) the police did not treat defendant as if he were in custody but rather informed him expressly that he was not a suspect, (5) defendant was never handcuffed or physically restrained, (6) the questioning was not continuous but was interrupted frequently, (7) defendant never protested the questioning, (8) defendant was fed and allowed to relax in the station house by watching a baseball game, (9) the police advised defendant that he was not required to take a polygraph test, (10) defendant was asked, not ordered, to return to the precinct after his first polygraph, (11) defendant was allowed to sleep alone in an unlocked room in the station house, and (12) defendant was permitted to go unescorted into a store the following morning. Taken together, these facts are sufficient to establish that the interrogation was noncustodial.")

A. Yes.

Q. And you left an error in the statement as an interrogation technique, correct?

A. That is correct.

Q. And the idea is that if you intentionally place an error in there it will, when someone is reading the statement and they catch the error and make a change in the document, it will help to demonstrate that the person read the statement, correct?

A. Yes.

Q. But in this case Mr. Sampson read the entire statement and didn't catch the error, did he?

A. He did not point it out.

Q. And so at that point you were left with the possibility that if you asked him to sign the statement he was going to sign a statement with some factual inaccuracies based on your understanding of what had occurred, correct?

A. That's correct.

Q. So you had to point out to him that there was something in error about the document, right?

A. That's correct.

Q. Because you weren't going to have him sign it with the erroneous information you left in, right?

A. That is correct.

Q. And, clearly, he didn't observe that erroneous information as he was reading it, right?

A. He didn't chose to point it out to me.

Q. He didn't indicate to you in any way that he saw an error in the document, right?

A. He explained to me later why he did not point it out.

Q. As he read through the document immediately afterwards he didn't indicate to you that he saw an error in the document, correct?

A. No, only after I pointed it out.

Q. And after you pointed it out, if he had been embarrassed about not being able to read the document he might have given you an explanation, correct?

MS. GRAY: Objection, speculation.

THE COURT: Sustained.

BY MS. PAPERNO:

Q. So you pointed out an error in the document to him; is that right?

A. I pointed out a line where the sentence was.

Q. Which line was that? I'm going to bring you People's Exhibit 2.

A. It is the fifth line.

Q. So what you are referring to is that on the fifth line there is a statement the officer removed my pistol

from my jeans and handed it to Officer Luety who just pulled up, correct?

A. Yes.

Q. And that's the line you pointed out; is that right?

A. Yes.

Q. With respect to the line that's on the second to the third lines in the statement, I had a nine millimeter, black, semi-automatic handgun in my jeans, that was another reference to the gun being in his jeans, correct?

A. Yes, that's correct.

Q. And you didn't point that one out, did you?

THE COURT: Ms. Paperno, may I see that exhibit?

MS. PAPERNO: Yes, Judge.

THE COURT: I know it was received in evidence, but just one moment before the officer answers your question. Thank you.

(Pause in the proceedings.)

THE COURT: Thank you.

BY MS. PAPERNO:

Q. And you didn't point that line out to him, did you?

A. No.

Q. And he didn't point it out to you either, did

he?

A. No.

MS. PAPERNO: I just need another minute or two, Judge, to look at my notes.

(Pause in the proceedings.)

MS. PAPERNO: Thank you. I have no further questions at this time.

THE COURT: Any redirect for the officer?

MS. GRAY: Yes, your Honor, just briefly.

REDIRECT-EXAMINATION

BY MS. GRAY:

Q. Officer Luety, you mentioned that when you pointed out the intentional error that you left in the written statement the defendant explained to you why he didn't point it out to you or bring it to your attention?

MS. PAPERNO: Objection, leading and form of the question.

THE COURT: Overruled. Was that your testimony?

THE WITNESS: Yes.

THE COURT: Next question.

BY MS. GRAY:

Q. What explanation did the defendant give you for not intentionally pointing out that intentional error?

A. He said that he was guilty of carrying the gun

and that it really doesn't matter because he's going to plead guilty anyways.

MS. GRAY: I have nothing further, your Honor.

THE COURT: Any recross?

MS. PAPERNO: Yes, thank you, Judge.

RECROSS-EXAMINATION

BY MS. PAPERNO:

Q. Now, you included in your investigative action report everything that was important to your work on this case, correct?

A. Yes.

Q. You certainly included in the statement all of the important things that Mr. Sampson said to you, correct?

A. Yes.

Q. In your investigative action report you did not include any statement from Mr. Sampson indicating that he said he was guilty and he was going to plead guilty anyway or words to that effect, did you?

A. No.

Q. And that wasn't in the statement you took from him either, was it?

A. It does say that he is guilty of this offense.

Q. It doesn't say his explanation for why he didn't

point out the error was that he was guilty anyway and he was going to take a plea, does it?

A. That is correct.

MS. PAPERNO: Thank you. No further questions.

(Pause in the proceedings.)

THE COURT: I have a question or two and then I'll permit each counsel if they want to follow-up my question.

Ms. Gray, can you hand up to the Court People's Exhibit 2 that was received in evidence, the statement?

MS. GRAY: Yes, Judge.

THE COURT: Officer, as I look at Exhibit 2, I don't see any corrections on here and I thought I understood your testimony to mean that you intentionally made an error in the statement that the gun was in his jacket, not his jeans, when, in fact, it was told to you it was in his jeans to see if he would catch them; is that correct?

THE WITNESS: It was told it was in his jacket and I said that it was in his jeans on the statement.

THE COURT: Okay. So in the statement you wrote that it was in his jeans, but it was told to you

Rochester Police Department
General Order

EFFECTIVE DATE:	SUBJECT:	ORDER#
June 14, 2004	INTERROGATION PROCEDURES	411
RESCINDS:	**REFERENCE STANDARD(S):**	**PAGE**
G.O. 411 (06/01/87)	**CALEA:** 1.2.3,.5; 42.2.1-.3; 44.2.2; 82.2.1 **NYS:** 50.2	1 of 4
ATTACHMENT(S):		
(A) Miranda Notification & Waiver Form; (B) Interview Form, RPD 1187; (C) Voluntary Statement, RPD 1184		

I. POLICY

A. It is the policy of the Rochester Police Department (RPD) to comply with all legal mandates governing custodial interrogation and to document the compliance on RPD forms provided for that purpose.

II. PROCEDURE

A. Notification and Waiver Form

1. At the beginning of any custodial interrogation (questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way), the person to be interviewed must be read his rights exactly as printed on the notification and waiver form (Attachment A).

2. Miranda Warnings are NOT required:

   a) When an officer questions a motorist during a vehicle stop for a traffic infraction; if the motorist is in custody for a traffic misdemeanor or felony, such as DWI, the warnings are required.

   b) When an officer conducts a brief interview of a person temporarily detained in a "stop &frisk" situation based upon reasonable suspicion pursuant to New York Criminal Procedure Law §140.50.

3. After the notification, the person to be interviewed may waive his rights but he must do so voluntarily, knowingly, and intelligently. (The burden of proof that a waiver was made within the meaning of the law rests upon the government.)

4. The request to waive will be made in the wording provided on the waiver form and the person's exact response entered.

5. Immediately after the notification and waiver has been completed, the officer advising will complete in his own handwriting the reverse side of the form.

   a) On the line titled "Education", the officer will indicate whether the person to be interviewed can read and write.

   b) An area for the signature of the person to be interviewed has purposely not been provided since the signature is not required but can be requested by the interviewer.

6. A defendant need only be Mirandized once. It is not necessary for each officer who has contact with the defendant to repeat the Miranda warnings.

7. When the notification and waiver card is completed, it will become part of the Grand Jury Referral Package.

B. Interview Form, RPD 1187 (Attachment B)

1. Interview Form, RPD 1187, will be used to document the time(s), location(s), and officer(s) present during each step of a custodial interrogation. The form will be handwritten as the activity occurs and any and all officers involved in the investigation will use one form.

2. The form will begin at the inception of the custody and continue with the delivery of the suspect to the Booking Office or to the release of the suspect. The form will include but not be limited to:

   a) The notification and waiver of rights;

   b) The interview and the periods of time during which no interview was being conducted;

   c) The suspect's verbal statement;

   d) The period during which a statement is being typed;

e) The time the statement is read to/by the defendant;

f) The signing of the statement;

g) Any comfort afforded the individual (food, drink, personal services, phone calls, etc.).

3. The completed form will become part of the Grand Jury Referral Package.

C. Voluntary Statement Form, RPD 1184, (Attachment C)

1. All written statements received by Department personnel will be prepared using RPD 1184.

2. The body of the statement will include:

a) The time and location of the statement;

b) A transcription of the defendant's account of the crime in his own words. Extreme caution should be used not to shorten a defendant's statement through the use of the interviewer's terminology;

c) Each page will be numbered (e.g., page _of).

3. Officers should read the statement out loud to the defendant or have the defendant read it out loud to himself.

4. Officers will have the defendant correct any mistakes in the statement and give him the opportunity to make any changes he desires after the statement is read out loud. The defendant should be requested to initial any corrections or changes.

5. The defendant's signature (specific location not provided) will appear at the end of the statement as determined by the defendant. Officers will request that defendant cross out any blank space between the signature and the body of the statement.

6. Witness(es)' signature(s) will be entered and labeled as such after the defendant's signature.

7. If a defendant offers a verbal statement but refuses to sign a formal statement, that statement (e.g., an oral synopsis by the interviewing officer) will be recorded on an Investigative Action Report (IAR), RPD 1191, and made part of the Grand Jury Referral Package. If a defendant assists in the preparation of a written statement but refuses to sign it, the unsigned statement will be made a part of the case package.

8. Anytime a defendant gives a statement of any kind, whether verbal or written, it must be noted as follows:

   a) In a misdemeanor or violation case, it must be noted in the Accusatory Instrument, in the Crime Report or an IAR;

   b) In a felony case, it must be noted in the Accusatory Instrument, a Crime Report or an IAR, AND the Grand Jury Referral Form in the space provided.

      NOTE: The prosecutor must give advance notice to the defense attorney any time he desires to use a statement by the defendant in court. If the proper notice is not given, then the statement will be inadmissible. It is, therefore, critical that officers note the existence of any statement.

Attachments