Burdens of Proof at *Miranda* Statement Suppression Hearings

By John Brunetti

I. Introduction

A. The Decision in *People v. Huntley*—the Derivation of the "Beyond a Reasonable Doubt" Burden

Statement suppression hearings were not required in New York until 1964 when the United States Supreme Court declared New York's procedure for addressing allegedly involuntary statements unconstitutional in *Jackson v. Denno*.[1] Prior to *Jackson*, the New York procedure was dictated by its Court of Appeals cases that construed the New York Constitution as requiring a jury to pass upon the voluntariness of a defendant's statement beyond a reasonable doubt, unless there was no factual dispute such that the court could find involuntariness as matter of law.[2] The Supreme Court found this procedure constitutionally defective, holding that due process entitled the defendant to a clear-cut judicial determination of the voluntariness of his statement.

Faced with the task of conforming New York's procedure to the constitutional requirements set out in *Jackson*, our Court of Appeals rendered its decision in *People v. Huntley*.[3] The new procedure required that "the judge must find voluntariness beyond a reasonable doubt before the confession can be submitted to the trial jury," and placed the burden on the People to prove voluntariness. This rule was necessarily limited to traditional voluntariness claims because *Miranda* had not yet been decided. Once *Miranda* was decided, courts began to apply the *Huntley* standard to *Miranda* claims,[4] and as late as 1998, the First Department upheld the admissibility of a statement, saying, "[T]he suppression hearing testimony established beyond a reasonable doubt that the defendant knowingly and voluntarily waived his *Miranda* rights."[5] Nonetheless, it has accurately been observed by Professor Peter Preiser in his Practice Commentary to CPL 710.60 that "the People's burden of proof beyond a reasonable doubt in a *Huntley* hearing is an anachronism and might well be reconsidered by the Court upon proper argument."

B. The Melding of Search and Seizure Burdens Into Statement Suppression Litigation

The 1982 decision of the Court of Appeals in *People v. Love*[6] is often relied upon for the proposition that the defendant has the ultimate burden of persuasion to prove a *Miranda* violation. The Court found in *Love* that the defendant's bare allegation that he had been a patient in a psychiatric hospital at the time of the alleged *Miranda* rights waiver did not automatically discharge "the defendant's burden of persuasion."[7] The basis for attributing that burden of persuasion to that defendant in a statement suppression context was citation to *People v. DiStefano*,[8] a minimization wiretap case, which cites *People v. Berrios*,[9] the landmark case placing the burden of persuasion on the defendant in search and seizure cases. Neither *Berrios* nor *DiStefano* had anything to do with statement suppression burdens. Yet, the infection of their search and seizure burden pronouncements into statement suppression procedures has evolved over the years to the point that "where the prosecution in the first instance establishes the legality of the police conduct and the defendant's waiver of his [*Miranda*] rights, the burden of persuasion on motion to suppress [a statement] rests with the defendant."[10]

II. The Fluctuation of Burdens in Statement Suppression Hearings

The fluctuation of burdens under the procedural construct of suppression hearings allows the People's potential burdens to be broken down into three categories: (1) the burden of going forward; (2) the ultimate burden of persuasion; and (3) the burden to call a particular witness, usually on rebuttal. The fluctuations in burdens of going forward and ultimate persuasion are dictated, in part, by the notion that because constitutional rights are personal, it is fair to make the defendant prove a violation of those rights.[11] These burdens are also influenced by judicial recognition that requiring the People to prove a negative is "a requirement the law finds 'generally unfair.'"[12]

The People always have the burden of going forward. However, once the People have met their initial burden of going forward, it is the defendant who shoulders the ultimate burden of proving that, among other things, he was seized or in custody, such seizure was unlawful, his *Miranda* rights waiver was not knowing and/or his indelible right to counsel had attached.

III. The People's Burden of Going Forward

The People have the burden of going forward at any suppression hearing to establish (1) a lawful rationale for the conduct of government agents; or (2) a basis for averting suppression.[13] When the People fail to go forward with evidence sufficient to avert suppression,[14] then the court is justified in granting the motion to suppress because the People have failed to discharge their initial burden of going forward.

A. The People's Burden of Going Forward on *Miranda* Issues

When dealing exclusively with a *Miranda* issue, the People have a single burden to go forward that they may meet in one of two ways. They may concede that the defendant was in custody and was interrogated, and then go forward with evidence necessary to avert suppression, i.e., the defendant was adequately advised of his rights and validly waived them. In addition or as an alternative, they may go forward with evidence tending to show that the defendant was not in custody (e.g., appeared at the police station voluntarily) or that he was not interrogated (e.g., made a spontaneous admission). If the People adduce evidence sufficient to sustain their position that warnings were either given and waived or not required, the burden of going forward then may shift to the defendant to prove that either he was subjected to custodial[15] interrogation or his waiver was not knowing.[16]

B. The People's Burden to Go Forward With Proof That Defendant Was Adequately Advised of His Rights

If the defendant was subjected to custodial interrogation, then the burden is on the People to go forward with evidence demonstrating the legality of the police conduct by showing that the defendant was "adequately advised" of his *Miranda* rights and voluntarily and knowingly waived them. Once the People have shouldered their burden of going forward to show that the defendant was adequately advised of his *Miranda* rights and voluntarily and knowingly waived them, the burden shifts to the defendant to show that the waiver of his rights was not knowing.[17]

C. The People's Burden of Going Forward to Prove a Waiver

The People shoulder the burden of going forward with proof of a valid *Miranda* rights waiver as part of their burden of going forward with evidence to withstand suppression. The People may discharge their burden in a variety of ways because valid waivers of *Miranda* rights take many forms. These waivers may be oral or written.[18] They may be express or implied.[19] The simple act of answering a question about crime involvement after being advised of the four basic warnings may constitute a valid waiver.[20] The Court of Appeals expressly recognizes an implicit waiver as valid, such that confessing after being advised of one's rights is the equivalent of a waiver, and that is all that is necessary to "support a conclusion that defendant implicitly waived those rights."[21]

D. The People's Burden of Going Forward on a Voluntary Accompaniment Theory

When the People are faced with a situation where the defendant was not given *Miranda* warnings prior to a station-house interrogation by police, they may argue that warnings were not necessary because the defendant voluntarily accompanied the police to the station-house. Voluntary accompaniment is a species of consent, and thus, the Court of Appeals imposes a "heavy burden" upon the People to prove voluntary accompaniment.[22]

IV. The Burdens of Persuasion

A. The People's Burden to Prove Traditional Voluntariness Beyond a Reasonable Doubt

In New York, unlike in federal court,[23] the prosecution must prove the voluntariness of a defendant's statement beyond a reasonable doubt.[24] This legal principle was first applied solely in the context of traditional voluntariness cases well before the advent of *Miranda*. When the terminology is changed from "voluntariness" to "involuntarily made" as that term is defined in CPL 60.45, the assertion that the People must prove beyond a reasonable doubt that a defendant's statement was not "involuntarily made" is inaccurate because, as will be discussed later, it is the defendant who has the burden of proving that his waiver of *Miranda* rights was not knowing.

B. The Burden to Prove Custody for *Miranda* Issues

The United States Supreme Court has placed the burden on the defendant to prove that he was in custody so as to have been entitled to *Miranda* warnings prior to interrogation. In *Berkemer v. McCarty*,[25] the Supreme Court faulted the defendant for having "failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest." Whether or not the New York rule is the same is an issue once viewed as unsettled. Judge Simons' dissent in *People v. Alls*[26] interpreted the majority opinion in *Alls* to "improperly suggest that the burden of proof is on the People to establish that the defendant was not in custody for purposes of *Miranda*,"[27] and the First Department once felt it necessary to introduce one of its custody holdings by saying, "Regardless of which party is deemed to have the burden of proof on the issue of custodial interrogation."[28] More recent decisions are in accord with the federal rule which places the ultimate burden to prove custody upon the defendant.[29]

In 2011 the Third Department asserted not only that the People have the burden of proving that the defendant was in *Miranda* custody, but also that they must do so beyond a reasonable doubt: "[t]he burden is on the People to prove beyond a reasonable doubt that the individual was not in custody before *Miranda* warnings were given."[30] The only support for the Court cited for that proposition was one of its own decisions issued three years earlier[31] where all the Court correctly asserted was that "[t]he People bore the initial burden of proving beyond a reasonable doubt that defendant's statements were voluntary," without reference to custody, and the only post-*Miranda* case cited for that proposition was *People v Rosa*,[32]

a case that places the burden upon the defendant to prove the attachment of the New York right to counsel.

C. The People's Burden to Prove That the Defendant Was Not Interrogated

It is the People's burden to prove that a defendant's statement was spontaneous and did not result from police interrogation.[33] The People will sustain this burden by demonstrating that the defendant was not asked questions which a reasonable police officer would anticipate to evoke an incriminating response.[34] This is an objective test of whether the defendant's statement was "triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant," rather than "whether, through hindsight, defendant professes to believe police intended to provoke an incriminating response."[35] It is reasonable to assume the interrogating officer is in the best position to deny or admit making statements or engaging in conduct that a reasonable police officer would believe likely to evoke an incriminating response, so the onus of drawing out information on that subject lies with the People.

D. The People's Burden to Prove an Adequate Advisement of *Miranda* Rights

As the United States Supreme Court said in *Miranda*: "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given…."[36] If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[37] Thus, the People shoulder both the burden of going forward with a basis to avert suppression,[38] and the ultimate burden of persuasion to prove that the defendant was adequately advised of his rights to silence and counsel and waived them. Since a valid waiver is not possible unless the rights advisement is adequate, in order to prove a valid waiver, the People shoulder the burden to prove a valid rights advisement.

E. The People's Burden to Prove the *Miranda* Rights Waiver Was Voluntary

As discussed above, well before *Miranda* was decided, New York constitutional law required that the People prove to the trial jury the traditional voluntariness of a defendant's statement beyond a reasonable doubt. Subsequent to *Miranda*, courts began to require that the People prove to the suppression court the voluntariness of the *Miranda* rights waiver beyond a reasonable doubt.[39]

F. The Defendant's Burden to Prove the *Miranda* Rights Waiver Was Not Knowing

Experienced criminal litigators and judges may find the heading that introduces this segment misleading, if not downright inaccurate. Yet, the assertion that the defendant has the ultimate burden of persuasion[40] to prove that his *Miranda* rights waiver was not knowing is supported by Court of Appeals and Appellate Division case law worthy of quotation here. The Second Department: "[W]here the prosecution in the first instance establishes the legality of the police conduct and the defendant's waiver of his rights, the burden of persuasion on a motion to suppress [a statement] rests with the defendant";[41] "[T]he defendant offered no evidence and, thus, failed to meet his burden of persuasion concerning his state of mind at the time of his waiver."[42] The Court of Appeals: "That defendant was a patient in the Capital District Psychiatric Center at the time of the waiver is not sufficient to meet defendant's burden of persuasion, the People having shown the legality of the police conduct in the first instance."[43]

"[O]nce the People meet their initial burden of establishing the legality of the police conduct and the defendant's waiver of rights, the burden of proof at the suppression hearing shifts to defendant,"[44] to prove by a preponderance of the evidence that his waiver was not knowing, whether due to tender age,[45] mental impairment,[46] intoxication,[47] heroin withdrawal,[48] or some other factor. In the waiver context, the divergence in burdens for voluntary waivers and knowing waivers makes sense because only the defendant is privy to information that might render his waiver unknowing or unintelligent, whereas, when it comes to the voluntariness of the waiver, the police officers are certainly aware of their own treatment of a suspect.

G. The People's Burden to Disprove an Invocation of Rights Where There Is Some Evidence of an Invocation

When a statement suppression hearing begins, the People shoulder the burden of going forward with a basis to avert suppression by demonstrating either that the defendant was not in custody, not interrogated or was adequately advised of and waived his rights. In discharging their burden of going forward, the People are under no obligation to prove that the defendant did not invoke his right to silence or counsel. However, when there is testimony at a suppression hearing from the accused, or even a police officer, that could support an invocation finding, the People shoulder the burden of persuading the court that the defendant did not invoke silence or counsel. That is not the case when the defendant claims his right to counsel attached as a result of either the entry of counsel or commencement of a criminal action. In those two circumstances, the defendant shoulders the ultimate burden of persuasion.[49]

Once the defendant (or some other witness) testifies at a statement suppression hearing that the accused invoked his right to silence or counsel, it is up to the People to disprove that claim beyond a reasonable doubt. This

rule statement is drawn from a line of Appellate Division opinions (some where the Court of Appeals denied leave) that applied, correctly or not,[50] the doctrine of *People v. Huntley*,[51] (decided before *Miranda*) to *Miranda* suppression litigation issues and required that the People prove a valid *Miranda* rights waiver beyond a reasonable doubt.[52] The core obligation of this burden of persuasion is proof of a waiver, for if there is no waiver, a court need not reach issues of voluntariness or intelligence.[53] When there is some proof in the suppression hearing record that a defendant invoked silence or counsel at any time, even after an initial waiver,[54] it is impossible for the People to prove that a waiver of silence or counsel preceded statements which followed without, at the same time, proving that the defendant did not invoke silence or counsel.

In *People v. Pugh*,[55] decided in 1979, the Court required the People to disprove the defendant's invocation of silence claim beyond a reasonable doubt, whether the doubt arose from the defendant's testimony or that of the People's police witnesses: "divergence in their [officers'] testimony [may] give rise to a reasonable doubt as to whether defendant indicated at some point that he would prefer to remain silent."[56] Thus, since suppression is mandated where the court has a reasonable doubt about whether or not the defendant invoked his rights, the People necessarily shoulder the burden to remove that doubt. Federal courts and[57] the highest courts in other states agree.[58]

H. The Separate Burdens Where the First Admission Is Illegally Obtained

When the defendant is interrogated while in custody without having been advised of his rights, and he makes an admission, that statement is inadmissible. If the defendant is given his warnings after that first admission is made, and then makes a second admission, the defendant may argue that the second admission is the tainted product of the initial illegality consisting of his custodial interrogation without having been advised of his rights. Whether or not that second statement procured after the administration of *Miranda* warnings will be admissible will turn upon the application of the "continuous interrogation" and/or the "cat-out-of-the-bag" doctrines. Burden placement for these two doctrines differs.

i. The People's Burden of Proving That There Were Two Interrogations Rather Than "One Continuous Interrogation"

If a custodial interrogation was infected by police illegality, all statements produced by that interrogation will be subject to suppression unless there was a "pronounced break" in its continuity and it was conducted in the wake of an otherwise valid *Miranda* rights waiver. The burden rests with the People to prove a "pronounced break" in the continuity of the interrogation. Where the police are unable to pinpoint the precise point during an interrogation at which the defendant made his first admission, the People will be unable to prove that a "pronounced break" in the interrogation interrupted its continuity so as to save the second admission from being deemed tainted by the initial improper questioning.[59]

ii. The Defendant's Burden of Proving the "Cat-Out-of-the-Bag" Theory

When the defendant has made two statements, the first procured in violation of his constitutional rights and the second in compliance with them, he may argue that the second statement was compelled by the first. The defendant has the burden to prove such a "cat-out-of-the-bag" claim because the test is "whether the defendant felt so committed to this prior statement that he felt bound to make another."[60] The defendant is in the best position to prove how he felt, so he has the burden of doing so. In fact, a defendant has little chance of succeeding on such a theory if he does not testify at his suppression hearing.[61]

V. The People's Burden to Call Witnesses to Explain or Rebut Testimony

When the defense attributes conduct to an officer during the defense case at a suppression hearing that has bearing on a statement suppression issue, and there is some proof of that officer's interaction with the defendant, the People's failure to call that officer in rebuttal may result in suppression of the statement. That was the ruling in *People v. Valerius*,[62] where the People discharged their initial burden of going forward with regard to the admissibility of the statement by calling Officer Fuentes. Fuentes testified that the defendant emerged from a room in which he had been with Officer Cotter. Fuentes further testified that Cotter told him that the defendant had something to say, so Fuentes advised the defendant of his rights and took the defendant's confession.[63] After the People rested, the defendant testified that Officer Cotter physically abused him and verbally threatened him. The prosecution rested, assuming that the trial court would disbelieve defendant's claim of abuse. The Court of Appeals held that a voluntariness determination was not supportable because of the People's failure to call Officer Cotter. This was not a situation where the defendant's body displayed evidence of physical abuse. It was the defendant's uncontradicted testimony that an officer threatened him that was sufficient to preclude a finding of voluntariness beyond a reasonable doubt because the People did not call the officer to whom the threat was attributed to deny the allegations of coercion.

In *People v. Anderson*,[64] the defendant testified that he invoked his right to counsel to one of the officers in whose custody he was placed and who was not called by the People at the suppression hearing, either as part of their direct case or in rebuttal. The Court of Appeals reversed, finding that "while it is true that the People have no obligation to produce all police officers who had con-

tact with the defendant from arrest until the time that the challenged statements were elicited, this record does not support the determination by the lower courts that the defendant's right to counsel was not violated by questioning him after he had requested counsel."[65]

Endnotes

1. Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964).
2. "The New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary. *See*, Stein v. New York, *above*, 346 U.S. at 173 and n.17, 73 S. Ct. at 1087; People v. Valletutti, 297 N.Y. 226, 229, 486." Jackson v. Denno, 378 U.S. 368, 378, 84 S. Ct. 1774 (1964) (Black, J., concurring in part and dissenting in part).
3. People v. Huntley, 15 N.Y.2d 72, 78, 255 N.Y.S.2d 838 (1965).
4. *See, e.g.*, People v. Higgins, 28 A.D.2d 1016 (3d Dep't 1967); People v. Szwalla, 31 A.D.2d 979, 297 N.Y.S.2d 843 (3d Dep't 1969), *aff'd*, 26 N.Y.2d 655, 308 N.Y.S.2d 386 (1970).
5. People v. Hawkins, 254 A.D.2d 96 (1st Dep't 1998), *lv. den*., 92 N.Y.2d 982 (1988).
6. People v. Love, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982).
7. *Love*, 57 N.Y.2d at 999.
8. People v. Di Stefano, 38 N.Y.2d 640, 651 (1976).
9. People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971).
10. People v. Chavis, 147 A.D.2d 582 (2d Dep't 1989), *lv. den.*, 74 N.Y.2d 662 (1989), citing People v. Love, 57 N.Y.2d 998 (1982), and People v. Wilson, 143 A.D.2d 786 (2d Dep't 1988), *lv. den.*, 73 N.Y.2d 927 (1989), which cites *Love* and *Leftwich*. People v. Leftwich, 134 A.D.2d 371 (2d Dep't 1987), *lv. den.*, 70 N.Y.2d 957 (1988), cites only *Love*.
11. *See* People v. Wesley, 73 N.Y.2d 351 (1989), holding that because Fourth Amendment rights are personal, placing the burden on the defendant to prove his connection to the area searched is reasonable.
12. People v. West, 81 N.Y.2d 370, 386 (1993), citing People v. Rosa, 65 N.Y.2d 380 (1985).
13. Generally speaking, the People have the burden of going forward, also known as the burden of production, to establish either a lawful rationale for the conduct of the police agent or some other basis for averting suppression. *See generally* People v. Wesley, 73 N.Y.2d 351, 540 N.Y.S.2d 757 (1989).
14. People v. Bryant, 37 N.Y.2d 208, 211, 371 N.Y.S.2d 881 (1978); *see also* People v. Travis, 162 A.D.2d 807, 809, 557 N.Y.S.2d 975 (3d Dep't 1990), citing People v. Havelka, 45 N.Y.2d 636, 643, 412 N.Y.S.2d 345 (1978), where the Third Department found that the People failed to discharge their initial burden of going forward to prove probable cause when its alleged nonexistence was the basis for defendant's suppression claim. In addition, no reopening of the hearing was permitted because the People's failure to offer the particular evidence in question was not as a result of any error of law committed by the court.
15. *See, e.g.*, People v. Vidal, 44 A.D.3d 802, 844 N.Y.S.2d 55 (2d Dep't 2007), *lv. den.*, 9 N.Y.3d 1010, 850 N.Y.S.2d 398 (2007) ("The People made a prima facie showing that the defendant was not in custody prior to the administration of the *Miranda* warnings in this case. The defendant failed to demonstrate otherwise.").
16. People v. Tinning, 142 A.D.2d 402, 536 N.Y.S.2d 193, 195 (3d Dep't 1988), *lv. den*., 73 N.Y.2d 102, 541 N.Y.S.2d 777 (1989).
17. *Id.*
18. *See* North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755 (1979), where the Supreme Court held that an explicit statement of waiver is not necessary to support a finding that the defendant waived the rights guaranteed by *Miranda*. When asked if he understood his rights, the defendant replied that he did, but refused to sign the waiver at the bottom of the form. His waiver was valid.
19. People v. Hale, 52 A.D.3d 1177, 859 N.Y.S.2d 838 (4th Dep't 2008) ("court properly refused to suppress [defendant's] statements to the police, based on the court's determination that defendant implicitly waived his *Miranda* rights).
20. *See* People v. Davis, 55 N.Y.2d 731, 447 N.Y.S.2d 149 (1981) (incriminating response which immediately follows advisement of rights is a permissible implicit waiver); People v. Gianni, 33 N.Y.2d 547, 347 N.Y.S.2d 438 (1973) (waiver valid where the defendant interrupted the police in the process of administering warnings, and stated he waived his rights); People v. Goncalves, 288 A.D.2d 883, 732 N.Y.S.2d 765 (4th Dep't 2001), *lv. den*., 97 N.Y.2d 729, 740 N.Y.S.2d 702 (2002) (defendant implicitly waived *Miranda* rights by willingly answering officer's questions after receiving *Miranda* warnings); People v. Hastings, 282 A.D.2d 545, 722 N.Y.S.2d 759 (2d Dep't 2000) (implied waiver established where defendant was informed of his *Miranda* rights, understood them, and continued to speak with the officer); People v. Carrion, 277 A.D.2d 480, 481, 715 N.Y.S.2d 257 (3d Dep't 2001), *lv. den*., 96 N.Y.2d 757, 725 N.Y.S.2d 283 (2001) (defendant's action in speaking to the officer after rights advisement may constitute an affirmative waiver of *Miranda* rights); People v. Rodriguez, 167 A.D.2d 562, 562 N.Y.S.2d 232 (2d Dep't 1990) (defendant's willingness to answer questions after having been advised of his rights was a valid implied waiver); People v. Bretts, 111 A.D.2d 864, 865, 490 N.Y.S.2d 266 (2d Dep't 1985) (defendant was adequately advised of her rights, indicated that she understood them, but was never asked whether she was willing to make a statement without the assistance of a lawyer, prompting the ruling, "[S]ilence, coupled with an understanding of the rights and the course of conduct indicating waiver, is sufficient").
21. People v. Sirno, 76 N.Y.2d 967, 968, 563 N.Y.S.2d 730 (1990).
22. *See* People v. Dodt, 61 N.Y.2d 408, 417, 474 N.Y.S.2d 441 (1984), where an affirmative response to the suppression hearing question, "Did there come a time that this subject was asked to come down [to the police station]?" was insufficient proof of voluntary accompaniment, resulting in reversal and suppression; *See also*, People v. Gonzalez, 80 N.Y.2d 883, 587 N.Y.S.2d 607 (1992), where the hearing proof consisted of the three detectives' out-of-court statements to the People's only hearing witness that the defendant voluntarily accompanied them to the police station. Note that although the defendant sought suppression of his statements at a "*Huntley* hearing," the issue in *Gonzales* was the validity of the seizure, if any, and whether the "police acted legally in bringing him to the precinct." *Gonzalez*, 173 A.D.2d at 845.
23. As to the quantum of proof, the Supreme Court rejected a claim that it should be beyond a reasonable doubt in *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619 (1972). *See also* Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).
24. *See, e.g.*, People v. Anderson, 69 N.Y.2d 651, 511 N.Y.S.2d 592 (1986); People v. Witherspoon, 66 N.Y.2d 973, 498 N.Y.S.2d 789 (1985); *People v. Rosa*, 65 N.Y.2d 380, 492 N.Y.S.2d 542 (1985), *on remand*, 116 A.D.2d 489, 496 N.Y.S.2d 1003 (1st Dep't 1986), *lv. den.*, 67 N.Y.2d 950, 502 N.Y.S.2d 1043 (1986); People v. Valerius, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972).
25. Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984).
26. People v. Alls, 83 N.Y.2d 94, 112, 608 N.Y.S.2d 139 (1993), *cert. denied*, 511 U.S. 1090, 114 S. Ct. 1850 (1994).
27. *Alls* is not a ruling that placed the burden of proving custody upon the People in all cases, but rather one that recognized that a burden of proof on custody issues may shift to the People in prison inmate cases. The Court of Appeals found the inmate defendant was in custody because there was an "absence of proof" that could have led the defendant to reasonably believe he was free to decline to follow a correction officer's directions to proceed to a particular location. However, that observation was made in the context of the Court's recognizing that most prison inmates know that the

failure to follow a directive of a correction officer will result in "severe disciplinary sanctions," and that "the People could only have dispelled the inference of defendant's compulsion" by showing that he was offered a choice. Thus, *Alls* may be read to mean that a defendant shoulders the burden of proving custody, and that a prison inmate shoulders this burden by showing that he accompanied the authorities at a correction officer's direction and that failing to follow such a direction would likely have resulted in severe disciplinary sanctions. At that point, the burden shifts to the People to show that some statement was made to the defendant to dispel the institutional compulsion that required the inmate to accompany the correction officer.

28. *See* People v. Morales, 281 A.D.2d 182, 721 N.Y.S.2d 526 (1st Dep't 2001).

29. *See, e.g.*, People v. Vidal, 44 A.D.3d 802, 844 N.Y.S.2d 55 (2d Dep't 2007), *lv. den*., 9 N.Y.3d 1010, 850 N.Y.S.2d 398 (2007), where the Second Department placed the burden to prove custody on the defendant, saying, "[t]he People made a prima facie showing that the defendant was not in custody prior to the administration of the *Miranda* warnings in this case. The defendant failed to demonstrate otherwise"; *see also* People v. Colon, 5 Misc. 3d 365, 784 N.Y.S.2d 316 (Sup. Ct. N.Y. Co. 2004), for an excellent discussion of why the burden to prove custody is borne by the defendant.

30. People v. McCoy, 89 A.D.3d 1218, 933 N.Y.S.2d 425 (3d Dep't 2011), *lv. den.,* 18 N.Y.3d 960 (2012).

31. People v. Baggett, 57 A.D.3d 1093, 868 N.Y.S.2d 423 (3d Dep't 2008).

32. People v. Rosa, 65 N.Y.2d 380, 492 N.Y.S.2d 542 (1985).

33. *See* People v. Roberts, 12 A.D.3d 835, 784 N.Y.S.2d 692 (3d Dep't 2004) (defendant's "statements were thus subject to suppression unless the People established beyond a reasonable doubt that they were spontaneous"); People v. Wells, 288 A.D.2d 408, 733 N.Y.S.2d 634 (2d Dep't 2001) ("People sustained their burden at the hearing of proving beyond a reasonable doubt that the defendant's statement…was made voluntarily and spontaneously, and was not the product of police interrogation."); People v. Morgan, 226 A.D.2d 398, 640 N.Y.S.2d 586 (2d Dep't 1996), *lv. den.*, 88 N.Y.2d. 939, 647 N.Y.S.2d 173 (1996) (the People sustained their burden of demonstrating that the statement made by the defendant prior to his receipt of *Miranda* warnings was spontaneous and not the result of police interrogation or its functional equivalent); People v. Jackson, 211 A.D.2d 490, 621 N.Y.S.2d 323 (1st Dep't 1995), *lv. den.*, 85 N.Y.2d 939, 627 N.Y.S.2d 1001 (1995) (the People met their burden of proving that defendant's statement to the complainant, "Take your money," was spontaneous and, although uttered in the presence of police officers, was not the result of police custodial interrogation or its equivalent).

34. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980); People v. Lynes, 49 N.Y.2d 286, 425 N.Y.S.2d 295 (1980); People v. West, 237 A.D.2d 315, 654 N.Y.S.2d 390 (2d Dep't 1990), *lv. den.*, 90 N.Y.2d 899, 662 N.Y.S.2d 442 (1997); People v. Hylton, 198 A.D.2d 301, 603 N.Y.S.2d 560 (2d Dep't 1993), *lv. den.*, 82 N.Y.2d 925, 610 N.Y.S.2d 177 (1994).

35. *Lynes*, 49 N.Y.2d at 294.

36. Miranda v. Arizona, 384 U.S. 436, 470 (1966).

37. *Miranda* at 475.

38. People v. DeFrain, 204 A.D.2d 1002, 613 N.Y.S.2d 303 (4th Dep't 1994), *lv. den.*, 84 N.Y.2d 825, 617 N.Y.S.2d 145 (1994).

39. *See, e.g.*, People v. Higgins, 28 A.D.2d 1016, 283 N.Y.S.2d 699 (3d Dep't 1967), *cert. denied sub nom*., Higgins v. New York, 392 U.S.941, 88 S. Ct. 2320 (1968); People v. Szwalla, 31 A.D.2d 979, 297 N.Y.S.2d 843 (3d Dep't 1969), *aff'd*, 26 N.Y.2d 655, 308 N.Y.S.2d 386 (1970), *cert. denied sub nom.*, Szwalla v. New York, 408 U.S. 926, 92 S. Ct. 2509 (1972).

40. People v. Di Stefano, 38 N.Y.2d 640, 652, 382 N.Y.S.2d 5 (1976) ("It is the accused, not the People, who must shoulder the burden of persuasion on a motion to suppress evidence"); People v. Bornholdt, 33 N.Y.2d 75, 83, 350 N.Y.S.2d 369 (1973), in commenting upon affirmative defenses, "That is to say, the defendant has the burden of going forward with evidence on the issue as well as the burden of persuasion thereon, but merely by a preponderance of the evidence"; People v. Kirkpatrick, 32 N.Y.2d 17, 25, 343 N.Y.S.2d 70 (1973), in commenting upon rebuttable presumptions in criminal cases, "Of course, the corollary principle, favoring the defendant, is that a plausible rebuttal may very well place the burden of going forward again on the prosecution if it is to sustain its overall burden of persuasion which is to establish guilt beyond a reasonable doubt"; People v. Laietta, 30 N.Y.2d 68, 75, 330 N.Y.S.2d 351 (1972), in commenting on entrapment as an affirmative defense, "[I]t is old law that presumptions, burdens of going forward, and burdens of persuasion in criminal cases may be placed on defendants."

41. People v. Chavis, 147 A.D.2d 582, 537 N.Y.S.2d 875 (2d Dep't 1989), *lv. den.*, 74 N.Y.2d 662, 543 N.Y.S.2d 405 (1989), citing People v. Love, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982), and People v. Wilson, 143 A.D.2d 786, 533 N.Y.S.2d 313 (2d Dep't 1988), *lv. den.*, 73 N.Y.2d 927, 539 N.Y.S.2d 312 (1989), which cites *Love* and *Leftwich*. People v. Leftwich, 134 A.D.2d 371, 520 N.Y.S.2d 849 (2d Dep't 1987), *lv. den.*, 70 N.Y.2d 957, 525 N.Y.S.2d 840 (1988), cites only *Love*.

42. People v. Smith, 220 A.D.2d 704, 633 N.Y.S.2d 71 (2d Dep't 1995); *see also* People v. Grady, 6 A.D.3d 1149, 1150, 775 N.Y.S.2d 662 (4th Dep't 2004), *lv. den*., 3 N.Y.3d 641, 782 N.Y.S.2d 412 (2004) ("People met 'their initial burden of establishing the legality of the police conduct and defendant's waiver of rights,' and defendant failed to establish that he did not waive those rights, or that the waiver was not knowing, voluntary and intelligent"); People v. King 234 A.D.2d 923, 924, 653 N.Y.S.2d 464, 466 (4th Dep't 1996), *lv. den.*, 89 N.Y.2d 1012, 658 N.Y.S.2d 255 (1997) ("Once the People meet their initial burden of establishing the legality of the police conduct and defendant's waiver of rights, the burden of proof at the suppression hearing shifts to defendant").

43. People v. Love, 57 N.Y.2d 998, 999, 457 N.Y.S.2d 238 (1982). Four years earlier, the Court, without negative comment, observed in a footnote, "The trial court suppressed this statement on the ground that the 'People have failed to establish that the defendant while confined in a mental hospital following a hysterical reaction, was capable of knowingly, intelligently and voluntarily making a statement.' " People v. Singer, 44 N.Y.2d 241, 246 n.1, 405 N.Y.S.2d 17 (1978). However, not only is *Love* the more recent case, it is an express statement of a legal principle.

44. People v. King, 234 A.D.2d 923, 653 N.Y.S.2d 464 (4th Dep't 1995), *lv. den.*, 89 N.Y.2d 1012, 658 N.Y.S.2d 251 (1997), citing People v. Love, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982), People v. Billington, 163 A.D.2d 911, 559 N.Y.S.2d 850 (4th Dep't 1990), *lv. den.*, 76 N.Y.2d 891, 561 N.Y.S.2d 553 (1990), and People v. Chavis, 147 A.D.2d 582, 537 N.Y.S.2d 875 (2d Dep't 1989), *lv. den.*, 74 N.Y.2d 662, 543 N.Y.S.2d 405 (1989); *see also* People v. Grady, 6 A.D.3d 1149, 775 N.Y.S.2d 662 (4th Dep't 2004), *lv. den.*, 3 N.Y.3d 64, 782 N.Y.S.2d 412 (2004) ("defendant failed to establish that he did not waive those [*Miranda*] rights, or that the waiver was not knowing, voluntary and intelligent"); People v. Duncan, 279 A.D.2d 887, 720 N.Y.S.2d 578 (3d Dep't 2001), *lv. den.*, 96 N.Y.2d 828, 729 N.Y.S.2d 448 (2001) (where defendant contended that suppression was required because the *Miranda* warnings were vague and he was unable to understand them because of his diminished mental capacity, court found that he failed to sustain his burden of proving as much); People v. Williams, 279 A.D.2d 276, 277, 719 N.Y.S.2d 227 (1st Dep't 2001), *lv. den.*, 96 N.Y.2d 869, 730 N.Y.S.2d 44 (2001) (once the People met their burden of going forward, "the burden of persuasion shifted to defendant to show that he was not mentally competent to voluntarily waive his rights."); People v. Guillery, 267 A.D.2d 781, 782, 701 N.Y.S.2d 150 (3d Dep't 1999), *lv. den.*, 94 N.Y.2d 920, 708 N.Y.S.2d 359 (2000) (where the defendant

contended "that her subnormal intelligence rendered it impossible for her to comprehend the *Miranda* warnings," the burden shifted to her to prove as much).

45. People v. Smith, 217 A.D.2d 221, 635 N.Y.S.2d 824 (4th Dep't 1995), *lv. den.*, 87 N.Y.2d 977, 642 N.Y.S.2d 207 (1996), *writ of error denied*, 242 A.D.2d 985, 669 N.Y.S.2d 115 (4th Dep't 1997) (a 13-year-old who was interrogated in the presence of two close relatives and given warnings tailored to the level of understanding of which he was capable was found to have fully understood his rights and waived them).

46. People v. Comfort, 6 A.D.3d 871, 775 N.Y.S.2d 127 (3d Dep't 2004) ("The People established the legality of the police conduct and the waiver by defendant. Thus, the burden shifted to defendant to establish that her statement was involuntary by reason of her diminished mental capacity."); People v. Chirse, 132 A.D.2d 615, 517 N.Y.S.2d 772 (2d Dep't 1987), *lv. den.*, 70 N.Y.2d 749, 520 N.Y.S.2d 1025 (1987).

47. *See* People v. Reynolds, 240 A.D.2d 517, 658 N.Y.S.2d 433 (2d Dep't 1997), *lv. den.*, 91 N.Y.2d 878, 668 N.Y.S.2d 577(1995) (defendant failed to establish he was intoxicated when his statement was made). The cases on this subject speak of insufficient evidence to establish the threshold proof, presumably as a result of a lack of proof from the defendant. *See, e.g.*, People v. Angel, 185 A.D.2d 356, 586 N.Y.S.2d 622 (2d Dep't 1992), *lv. den.*, 80 N.Y.2d 1025, 592 N.Y.S.2d 674 (1992), *lv. den.*, 81 N.Y.2d 1069, 601 N.Y.S.2d 588 (1993); *but see* People v. McLane, 256 A.D.2d 10, 682 N.Y.S.2d 24 (1st Dep't 1998), *lv. den.*, 93 N.Y.2d 901, 689 N.Y.S.2d 713 (1999), which groups the voluntariness of the waiver with the knowing portion in saying that the People met their burden of proving beyond a reasonable doubt that defendant's videotaped statement was unaffected by alcohol and was knowingly, intelligently, and voluntarily made.

48. *See, e.g.*, People v. Frejomil, 184 A.D.2d 524, 584 N.Y.S.2d 181 (2d Dep't 1992), *lv. den.*, 80 N.Y.2d 903, 588 N.Y.S.2d 829 (1992) (there was insufficient evidence to support the defendant's claim that he was suffering from heroin withdrawal when he made his statement).

49. People v. Rosa, 65 N.Y.2d 380, 386, 492 N.Y.S.2d 542 (1985).

50. See the discussion in sections [I][A] and [B], *supra*.

51. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965).

52. People v. Wells, 288 A.D.2d 408, 733 N.Y.S.2d 634 (2d Dep't 2001) ("People sustained their burden at the hearing of proving beyond a reasonable doubt that the defendant's statement… was made voluntarily and spontaneously, and was not the product of police interrogation."); People v. Hawkins, 254 A.D.2d 96, 679 N.Y.S.2d 7 (1st Dep't 1998), *lv. den.*, 92 N.Y.2d 982, 683 N.Y.S.2d 763 (1998) ("The suppression hearing testimony established beyond a reasonable doubt that defendant knowingly and voluntarily waived his Miranda rights."); People v. Sappleton, 234 A.D.2d 81, 651 N.Y.S.2d 296 (1st Dep't 1996), *lv. den.*, 89 N.Y.2d 1100, 660 N.Y.S.2d 394 (1977) ("[T]he People proved beyond a reasonable doubt that [the defendant] knowingly, voluntarily and intelligently waived his Miranda rights."); People v. Mikel, 152 A.D.2d 603, 543 N.Y.S.2d 712 (2d Dep't 1989) ("[T]he People failed to prove beyond a reasonable doubt that the defendant voluntarily waived his rights."); People v. Ringer, 140 A.D.2d 642, 528 N.Y.S.2d 674 (2d Dep't 1988) ("The People have failed to meet their burden of proving beyond a reasonable doubt that the statements made by the defendant were voluntarily made after a waiver of the defendant's right to counsel.").

53. When a court does reach the issue of whether or not the defendant made a "knowing" waiver, the defendant may shoulder the ultimate burden of proving that his *Miranda* rights waiver was not knowing. *See, e.g.*, People v. King, 234 A.D.2d 923, 653 N.Y.S.2d 464 (4th Dep't 1995), *lv. den.*, 89 N.Y.2d 1012, 658 N.Y.S.2d 251 (1997).

54. Although New York's burden rules in statement suppression litigation place more of a burden on state prosecutors than the federal rules place on their federal counterparts, at least four Justices of the Supreme Court agree that in waiver-invocation analysis, there is no difference between an invocation which comes in immediate response to initial warnings and one which comes after an initial waiver of rights. That agreement is found in Justice Souter's concurring opinion in Davis v. U.S., 512 U.S. 452, 471, 114 S.Ct. 2350 (1994), where the Court held that a suspect's utterance, "maybe I should talk to a lawyer," was too ambiguous to either constitute an invocation of counsel or require a clarification inquiry by interrogators. Justice Souter expressed disagreement with the failure of the Court to require a clarification inquiry. He rejected any notion that an initial *Miranda* waiver of counsel and a subsequent invocation should be treated any differently, saying: "Nor may the standard governing waivers as expressed in these statements be deflected away by drawing a distinction between initial waivers of Miranda rights and subsequent decisions to invoke them, on the theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect shoulder a burden of showing a clear subsequent assertion. Miranda itself discredited the legitimacy of any such distinction."

55. People v. Pugh, 70 A.D.2d 664, 416 N.Y.S.2d 832 (2d Dep't 1979).

56. *Pugh*, at 665.

57. As recently as 1993, the United States District Court for the Eastern District of New York ruled in a *Miranda* statement suppression context as follows: "The government has satisfied its burden of proving the voluntariness of defendant's statement and that defendant did not equivocally invoke his right to counsel." U.S. v. Jones, 810 F.Supp. 453 (E.D.N.Y. 1993). More recently, the United States District Court for the District of Idaho corrected the Idaho Supreme Court on the issue of burden placement, saying: "To the extent that the Idaho Supreme Court applied a rule that requires a defendant to shoulder a burden to affirmatively prove that he had invoked his right to silence or counsel, this was an incorrect statement of law. Rather, the prosecution must demonstrate that a defendant has waived his rights before a statement that was made during custodial interrogation will be admissible." Rhoades v. Arave, 2007 U.S. Dist. LEXIS 38572 (D. Idaho 2007).

58. The Supreme Court of Wyoming has reasoned that, since the state has the burden of proving a statement voluntary, and the state has the burden of proving a consent voluntary, then "that same standard applies in the context of the accused's invocation of counsel." Burk v. State, 848 P.2d 225 (Wyo. 1993). An even more compelling analysis directly on point is found in the 2005 Oregon Supreme Court opinion in *State v. James,* where the Court directly confronted [and rejected] the prosecution's claim that, once the People go forward with a basis to avert suppression, the burden "shifts to defendant to prove that he subsequently invoked the right to counsel." The Court concluded that, as part of the state's burden to persuade the suppression court that there was a voluntary waiver of *Miranda's* right to counsel, the state bore the burden of proving that the defendant did not invoke his right to counsel. State v. James, 339 Or. 476, 123 P.3d 251 (2005). The Court explained its summary holding as follows:

> The burden of persuasion regarding compliance with the right to counsel remains with the state and does not shift. As the party with the burden of persuasion, the state bears an initial burden of production to show that the police afforded the right to counsel or that defendant validly waived his or her right to counsel. Once the state has offered such evidence, the trier of fact can accept it. And, because the trier of fact may accept that evidence, the defendant risks losing unless the defendant produces evidence that he or she subsequently invoked the right to counsel. The state then can decide to adduce still further evidence that the defendant did not invoke or validly waived his or her rights, or it can risk success on the record as it stands at that point. If the trial court

finds from the evidence in the record—whatever that evidence is, and whoever offered it—that the defendant unequivocally invoked his or her right to counsel, and that the authorities continued their questioning, the court must suppress the defendant's subsequent statements. If the trial court finds that the defendant did not invoke his or her right to counsel, or invoked it but validly waived that right after invoking it, the subsequent inculpatory statements are not subject to suppression. And, finally, when, as here, the trial court determines that the evidence regarding invocation of the right to counsel is in equipoise the state necessarily has failed to meet its burden of persuasion, and the state loses.

59. People v. Anderson, 178 A.D.2d 605, 577 N.Y.S.2d 873 (2d Dep't 1991).

60. People v. Tanner, 30 N.Y.2d 102, 331 N.Y.S.2d 1 (1972).

61. *See* People v. O'Hanlon, 252 A.D.2d 670, 672, 675 N.Y.S.2d 404 (3d Dep't 1998), *lv. den.*, 92 N.Y.2d 951, 681 N.Y.S.2d 481 (1998) ("[t]he so-called 'cat-out-of-the-bag' is inapplicable as no evidence was adduced at the suppression hearing establishing that, at the time of his utterances, defendant felt committed and constrained by his earlier admission"); People v. Schultz, 187 A.D.2d 466, 467, 590 N.Y.S.2d 729 (2d Dep't 1992) ("[a]dditionally, the defendant did not testify at the suppression hearing and no evidence was adduced in support of his contention that the station-house statement was involuntarily given on constraint of the prior inadmissible statement, under the so-called 'cat out of the bag' theory"); People v. Alaire, 148 A.D.2d 731, 737–38, 539 N.Y.S.2d 468 (2d Dep't 1989) ("since the defendant did not testify at the hearing, there is no factual basis for concluding that the latter statement was tainted by the earlier one"); People v. Shipman, 156 A.D.2d 494, 495, 548 N.Y.S.2d 574 (2d Dep't 1989), *lv. den.*, 75 N.Y.2d 924, 555 N.Y.S.2d 43 (1990) ("[t]he defendant did not testify at the hearing and there was no evidence adduced to support his contention that the statements made by him at the precinct were involuntarily given on constraint of his first statement, under the so-called 'cat-out-of-the-bag' theory").

62. People v. Valerius, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972).

63. *Valerius*, 31 N.Y.2d at 54, n.2.

64. People v. Anderson, 69 N.Y.2d 651, 511 N.Y.S.2d 592 (1986).

65. *Anderson*, 69 N.Y.2d at 653.

John Brunetti has served as a Judge of the Court of Claims and Acting Supreme Court Justice assigned to criminal matters since 1995. He is the author of *New York Confessions* published by Lexis Nexis Matthew Bender as well as a number of law review articles and judicial training handouts. He has also previously contributed several articles to our *Newsletter*.