Being Heard at Hearings 2019

Local Criminal Court Practice CLE Program

Monday, March 18
NYC

Friday, March 22
Buffalo

Thursday, March 28
Albany & Webcast

Friday, March 29
Long Island & Westchester

Monday, April 8
Syracuse

Thursday, April 11
Rochester

3.5 MCLE Credits; 2.5 Areas of Professional Practice; 1.0 Skills

Sponsored by the Criminal Justice Section & the Committee on Continuing Legal Education of the New York State Bar Association

This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Program Description

Bail hearings, preliminary hearings, grand jury and suppression hearings are ripe with opportunities to humanize your client before the Court, gather critical information about the case, and eliminate illegal or improper information being submitted to a jury. The Being Heard at Bail Hearings CLE program focuses on effective Pre-Trial advocacy in the defense of an accused. We will examine each type of hearing and provide useful tactical tips to advance your client's interests, obtain favorable plea offers, and allow the Court to feel Justice is being served by favorable defense rulings.

Program Agenda

9:00 a.m. – 9:10 a.m. **Welcome and Introduction**

9:10 a.m. – 10:00 a.m. **I. Bail Hearings**

- Alternatives to Bail
- Humanizing Your Clients

1.0 Credit in Areas of Professional Practice

10:00 a.m. – 10:50 a.m. **II. Preliminary Hearings and Grand Jury Strategies**

1.0 Credit in Skills

10:50 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:15 p.m. **III. Suppression Hearings**

1.5 Credits in Areas of Professional Practice

12:15 p.m. – 12:30 p.m. **Q&A**

Timed Agenda – Afternoon Program

1:00 p.m. – 1:10 p.m. **Welcome and Introduction**

1:10 p.m. – 2:00 p.m. **I. Bail Hearings**

- Alternatives to Bail
- Humanizing Your Clients

1.0 Credit in Areas of Professional Practice

2:00 p.m. – 2:50 p.m. **II. Preliminary Hearings and Grand Jury Strategies**

1.0 Credit in Skills

2:50 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 4:15 p.m. **III. Suppression Hearings**

1.5 Credits in Areas of Professional Practice

4:15 p.m. – 4:30 p.m. **Q&A**

Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.

http://www.nysba.org/BeingHeardatHearings2019Materials/

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.


Follow Continuing Legal Education on Twitter for Quick and Relevant Program Information!
@NYSBACLE

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

Lawyer Assistance Program

1.800.255.0569

New York 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, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

NYSBA CLE

Bringing you the best and most relevant continuing education to help you be a better lawyer. Last year over 2,000 lawyers and judges volunteered for a NYSBA CLE. For decades, CLE volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York.

View a Complete Listing of Upcoming CLE Programs at
www.nysba.org/CLE

Table of Contents

Being Heard at Hearings: Local Criminal Court Practice

BEING HEARD AT HEARINGS:
LOCAL CRIMINAL COURT PRACTICE 2019

Sponsored by

**The Criminal Justice Section and the
Committee on Continuing Legal Education
of the New York State Bar Association**

Materials Submitted by

**Jonathan D. Cohn, Esq.
Gerstenzang, Sills, Cohn & Gerstenzang
210 Great Oaks Boulevard
Albany, New York 12203**

**Excerpted from
Handling the DWI Case in New York by
Peter Gerstenzang, Esq. and Eric H. Sills, Esq.
Reprinted with permission of
West Publishing Company**

TABLE OF CONTENTS

PRELIMINARY HEARINGS AND GRAND JURY STRATEGIES

What is the purpose of the preliminary hearing?

The purpose of the preliminary hearing is to assure that a defendant is not held in custody unless there is reasonable cause to believe that the defendant committed a felony offense. If the People are unable to proceed forward at a preliminary hearing, the defendant is released from custody on the charges. However, this does not preclude the People from presenting the case to the Grand Jury in the future. See generally Muldoon, Handling a Criminal Case in New York § 5:1 (2012-2013).

When does a preliminary hearing take place?

The preliminary hearing must take place within 120 hours from the time of the arrest or, if there is a Saturday, Sunday, or legal holiday during such time then the hearing must take place within 144 hours. See CPL § 180.80; Muldoon at § 5:13.

What is the People's burden at the preliminary hearing?

At the hearing, the People must present only non-hearsay evidence "to demonstrate reasonable cause to believe that the defendant committed a felony." CPL § 180.60(8); Muldoon at § 5:19. The exceptions to this rule are reports from experts and technicians in professional and scientific fields along with certain sworn statements. Id.

How is the preliminary hearing conducted?

A hearing upon a felony complaint must be conducted as follows:

1. The district attorney must conduct such hearing on behalf of the people.

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

3. The court must read to the defendant the felony complaint and any supporting depositions unless the defendant waives such reading.

4. Each witness, whether called by the people or by the defendant, must, unless he would be authorized to give unsworn evidence at a trial, testify under oath. Each witness, including any defendant testifying in his own behalf, may be cross-examined.

5. The people must call and examine witnesses and offer evidence in support of the charge.

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

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.

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 reports of experts and technicians in professional and scientific fields and sworn statements of the kinds specified in subdivisions two and three of section 190.30 are admissible to the same extent as in a grand jury proceeding, unless the court determines, upon application of the defendant, that such hearsay evidence is, under the particular circumstances of the case, not sufficiently reliable, in which case the court shall require that the witness testify in person and be subject to cross-examination.

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.

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 therefor, no such adjournment may be for more than one day.

CPL § 180.60.

What happens at the conclusion of the hearing?

If the Court finds that there is reasonable cause to believe that the defendant committed a felony, the defendant is held for the action of the Grand Jury. With one exception, the matter is then transferred to such superior court. If the Court finds that there is not reasonable cause to believe that the defendant committed any offense, Court must dismiss the felony complaint and release the defendant from custody. See CPL §§ 180.70(1), (3), (4).

Why waive the preliminary hearing?

If the parties agree on a reasonable amount of bail, the defendant may agree to waive the hearing in order make bail and be released from custody. In addition, the People may agree to continue plea negotiations if the defendant waives their preliminary hearing.

When does defendant have to be notified of People's intent to present case to Grand Jury?

CPL § 190.50(5)(a) provides that:

> 5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision:
>
> (a) When 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 own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. *The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal*

> *court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding*. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein.

(Emphasis added). The Practice Commentaries thereto elaborate as follows:

> Subdivision [5] preserves the New York statutory right established in 1940 for the defendant to appear as a witness in his own behalf (federal defendants have no such right). Naturally, any such witness will have to execute a waiver of immunity, because otherwise the process would immunize the very target of the potential criminal charges. 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*. 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. 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," the timing is not governed by the [45]-day period specified in CPL § 255.20. This motion must be made within [5] days after arraignment or it is waived (see CPL § 190.50[5(c)]).

Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL § 190.50, at 10 (emphasis added) (citations omitted).

In People v. Ortiz, 150 Misc. 2d 602, 570 N.Y.S.2d 262 (Kings Co. Sup. Ct. 1991), the defendant -- who had originally only been charged with misdemeanor DWI -- moved to dismiss the felony DWI indictment against him on the ground that he was not given notice of the District Attorney's intent to present the case to the Grand Jury. The Court sympathized with the defendant's argument, but held that:

> The language of [CPL § 190.50] is clear. Only defendants facing "felony complaints" are entitled to notice of the intent to present the matter to the Grand Jury. There is no authority for a trial judge to substitute his view, for what is the clear language of the statute. * * *
>
> Although I find it peculiar that a person charged with rape or robbery would be entitled to notice that the matter will be presented to the Grand Jury, and a person charged with the felony of [DWI] is not accorded the same treatment, the language of the statutes, i.e., [CPL § 190.50 and CPL § 170.20] is so clear that the defendant's application must be denied.

Id. at ___, 570 N.Y.S.2d at 263-64. See also People v. Conway, 97 A.D.2d 659, ___, 469 N.Y.S.2d 185, 186 (3d Dep't 1983) ("Counsel's failure to move to dismiss the indictment because of lack of notice pursuant to CPL 190.50 did not render his representation incompetent, for notice is required only when a defendant has been arraigned in a local criminal court upon a currently undisposed-of felony complaint. The charge against defendant in the local criminal court was a misdemeanor charge and thus defendant was not entitled to notice pursuant to CPL 190.50"); People v. Anderson, 45 A.D.2d 561, ___, 360 N.Y.S.2d 712, 714 (3d Dep't 1974) ("the failure to provide for a preliminary hearing in cases such as the present when the defendant is not being held on a felony charge prior to indictment is not a failure of due process upon the ground that [CPL § 170.20] is unconstitutional. The simple fact is that [CPL § 180.10] does not require a preliminary hearing where the sole charge before the local criminal court is a misdemeanor and that was the case herein"). See generally People v. Wells, 1995 WL

538923 (Suffolk Co. Ct. 1995) (faxed CPL § 190.50 notice sufficient where defense counsel received actual notice of impending Grand Jury proceeding).

Proving the predicate conviction -- Grand Jury issues

In People v. Van Buren, 82 N.Y.2d 878, 879-80, 609 N.Y.S.2d 170, 170 (1993), the Court of Appeals applied Vollick, see previous section, to Grand Jury proceedings:

> The only evidence submitted by the prosecutor to the Grand Jury as prima facie proof of defendant's prior conviction was a certificate of conviction for driving while intoxicated (DWI), indicating that within the last 10 years a Robert L. Van Buren had been convicted in Genesee County for a DWI violation under [VTL] § 1192. No additional evidence as to the identity of the previously convicted individual was presented.

The Court of Appeals held that:

> To make a prima facie showing that the offense of felony DWI has been committed, sufficient proof must be adduced before the Grand Jury to establish that the person charged has a prior conviction for [DWI] . . . within the last 10 years. That a person named Robert L. Van Buren was convicted of [DWI] within the preceding 10-year period even in the same county did not constitute prima facie proof that defendant was the person previously convicted of DWI within the last 10 years. The certificate of conviction standing alone, without some further, connecting evidence tending to show that defendant was the same Robert L. Van Buren named in the certificate, was insufficient to "establish every element of [the] offense charged."

Id. at 880-81, 609 N.Y.S.2d at 171 (citations omitted).

In People v. Smith, 258 A.D.2d 245, 697 N.Y.S.2d 783 (4th Dep't 1999), the Appellate Division, Fourth Department, held that a class D felony DWI was properly reduced to a class E felony

where the defendant's DMV abstract presented to the Grand Jury was not properly authenticated. In so holding, the Court reasoned that:

> [D]efendant's DMV abstract qualifies for admission under the common-law public document exception to the hearsay rule. * * *
>
> The inquiry into the admissibility of the DMV abstract, however, does not end with the determination that it is admissible over a hearsay objection. Following that determination, the question remains whether the document has been properly authenticated. Authentication of official records is governed by CPLR 4540. . . . We reject the People's contention that the DMV abstract is not a copy but an original document that requires no certification of attestation. * * *
>
> [Regarding the DMV abstract at issue in this case, t]he seal of the State of New York is not embossed on the document in a manner resisting forgery; it is printed on the background of each page. Further, it is clear that the data regarding defendant's driving record was placed on the document after the seal was affixed. Similarly, the certification is in the identical location on each page of the DMV abstract and appears to have been printed prior to the transfer of data regarding defendant's driving record. As a result, the document provides no assurances that any comparison has been made between the copy and the original record, and there is no basis for the assertion of the Commissioner of the Department of Motor Vehicles that it is "a true and complete copy of an electronic record on file" in the Department of Motor Vehicles.
>
> Because "strict compliance with the rules requiring authentication" of public documents was lacking, the court properly determined that the DMV abstract did not constitute competent and admissible evidence of the alleged [predicate] DWI conviction.

7

> Accordingly, the order reducing the severity of the DWI charge under the first count of the indictment should be affirmed.

Id. at ___-___, 697 N.Y.S.2d at 786-87 (citations omitted). Cf. People v. Baker, 183 Misc. 2d 650, 705 N.Y.S.2d 846 (Oneida Co. Ct. 2000).

In People v. Keller, 214 A.D.2d 825, ___, 625 N.Y.S.2d 325, 326-27 (3d Dep't 1995), the Appellate Division, Third Department, held that:

> Insofar as the felony DWI charge is concerned, . . . the indictment cannot stand, for although proof of defendant's prior convictions had been placed in evidence, it does not appear from the record that the Grand Jury was furnished with any legal instruction as to the findings necessary to justify indictment for the higher grade offense. This significant omission could have resulted in prejudice to defendant; hence, dismissal of the first count of the indictment was mandated.

Cf. People v. Smith, 72 A.D.2d 940, ___, 422 N.Y.S.2d 223, 224 (4th Dep't 1979) ("the district attorney instructed the Grand Jury by paraphrasing the statutory language of [VTL § 1192(2), (3) and (5)]. The instructions were sparse but fall far short of any omission which would impair the integrity of the Grand Jury proceedings").

In People v. Elias, 55 Misc. 3d 707, 709, 711-12, 48 N.Y.S.3d 570, 571, 573 (Queens Co. Sup. Ct. 2017), the Court dismissed a felony DWI indictment where, *inter alia*:

> During [the Grand Jury] presentation, the prosecutor committed fundamental errors such as usurping the fact-finding role of the grand jurors, acting as an unsworn witness, improperly delegating instructions as to the law to a police witness and improperly introducing documents. * * *
>
> [T]he prosecutor attempted to establish through documentary evidence that defendant's 2009 conviction of California Vehicle Code § 23152(b) elevated the defendant's current

[DWI] charges from unclassified misdemeanors to class E felonies. In this effort, the prosecutor introduced an uncertified [5] page document that appears to be a summary of defendant's 2009 court proceeding as exhibit No. 3 and a certified document titled "Misdemeanor Sentencing Memorandum -- Vehicle Code" from the Superior Court of California, County of Los Angeles as exhibit No. 4. Exhibit No. 3 appears to be incomplete in that it consists only of odd numbered pages and appears to indicate that the defendant pleaded nolo contendere to California Vehicle Code § 23152(b). After the introduction of these documents, in a conclusory fashion, the prosecutor instructed the grand jurors that defendant's 2009 conviction for California Vehicle Code § 23152(b) constituted a violation of [VTL] § 1192.

This was an error by the prosecutor to instruct the grand jurors that defendant's California conviction in 2009 also constituted a violation of the misdemeanor or felony sections of [VTL] § 1192 in that she usurped the role of the grand jurors to determine for themselves whether the facts supporting the defendant's conviction of California Vehicle Code § 23152(b), that is his conduct, would constitute the crime or crimes of [DWI] in New York. In light of the language set forth in [VTL] § 1192(8) the prosecutor was required to establish that the conduct which was the basis of defendant's 2009 conviction in California constituted a misdemeanor or felony violation of any provision of [VTL] § 1192. The prosecutor did not read to the grand jurors the applicable California [DWI] statute and did not provide to the grand jurors the defendant's allocution of his guilty plea and his admission as to his conduct on September 23, 2009 which was the basis of a violation of California Vehicle Code § 23152(b).

The prosecutor also failed to instruct the grand jurors that if they were to find defendant's conduct that resulted in his 2009

> California conviction was the same as to violate a misdemeanor or felony provision of [VTL] § 1192 and that if such conviction was to fall within the preceding 10 years, that the grand jurors may find the defendant's current [DWI] charges to be class E felonies.

(Footnotes omitted). It should be noted that the unofficial (*i.e.*, West Publishing) version of this case differs in multiple respects from the New York Official Reports version (albeit in matters of form rather than substance).

In People v. Rattelade, 226 A.D.2d 1107, ___, 642 N.Y.S.2d 1, 1 (4th Dep't 1996), the Appellate Division, Fourth Department, held as follows:

> Defendant appeals from a judgment convicting him of [2] counts of felony [DWI]. He contends that there was legally insufficient evidence before the Grand Jury of his predicate DWI conviction. That issue, however, is not before us because "the insufficiency of the evidence * * * before the Grand Jury is not reviewable upon appeal from the ensuing judgment of conviction, which is based on legally sufficient trial evidence." The breathalyzer test record and an abstract of the motor vehicle operating record, exhibits that were before the Grand Jury, provide the "further, connecting evidence tending to show that defendant [is] the same [person] named in the certificate [of conviction]." The certificate of conviction, also an exhibit before the Grand Jury, indicates that an individual named Rejean Rattelade was previously convicted of DWI within the last 10 years. Each of the above exhibits states that the date of birth of an individual named Rejean Rattelade is September 26, 1960.

(Citations omitted).

In People v. Carlsons, 171 Misc. 2d 943, ___, 656 N.Y.S.2d 116, 119 (Nassau Co. Sup. Ct. 1997), the Court held that:

> Although the court is not dismissing the first count of the indictment charging operation of a motor vehicle while under the influence of alcohol as a felony, the court notes that the legal instruction concerning the defendant's prior conviction was inaccurate. The assistant district attorney charged the Grand Jury that "this conviction and the proof relating thereto is not to be considered by you for any other purpose other than to prove the elements of the charges which you are considering today." In his instructions, the prosecutor failed to caution the Grand Jury concerning the "limited purpose" for which the prior conviction was being admitted. In this case, the prior conviction was admissible only to show that the defendant had previously been convicted of violating VTL § 1192(4) within the preceding 10 years. It was not admissible on the question of whether defendant had been operating the vehicle on the day in question or as to the element of whether he was intoxicated at the time. The Grand Jurors should have been charged accordingly. Parenthetically, the Court notes that it would have been preferable to inform the Grand Jurors simply that defendant had been convicted of violating VTL § 1192(4), without advising them that the conviction related to driving while his ability was impaired by drugs. However that may be, the Court is cognizant that "a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law." Since the inaccuracy in the legal instructions did not impair the integrity of the Grand Jury proceeding, the proceeding was not defective as to Count One.

(Citations omitted).

In People v. Gleichmann, 89 Misc. 2d 648, ___, 392 N.Y.S.2d 227, 227 (Nassau Co. Ct. 1977), the defendant claimed that "when he testified before the Grand Jury he was improperly cross-examined concerning prior arrests and convictions." The Court rejected the claim, holding, in pertinent part:

11

> The precepts of Sandoval and Duffy have, in at least [2] cases, been found to apply to proceedings before the Grand Jury.
>
> In the present case, however, evidence of a prior [DWI] conviction was not introduced solely on the issue of credibility. The defendant is charged with [DWI] as a felony. In order to establish that a felony has been committed the People must prove that the defendant had previously been convicted of such an offense. * * *
>
> Although this may result in prejudice to a defendant who is testifying before a Grand Jury, the problem would appear to be one which the Legislature, rather than the Courts, should address itself to.

Id. at ___, 392 N.Y.S.2d at 228 (citations omitted).

Duty of prosecutor to present witnesses to Grand Jury

People v. Butterfield, 267 A.D.2d 870, ___, 702 N.Y.S.2d 140, 141 (3d Dep't 1999), "present[ed] a question of first impression relating to the timeliness of a defense request pursuant to CPL § 190.50(6) that the Grand Jury hear the testimony of a witness designated by defendant." "Noting the absence of any statutory provision relative to the timing of a request pursuant to CPL 190.50(6), County Court reasoned that advance notice was required to enable the prosecutor to apprise the Grand Jury of the request and for the Grand Jury to consider same." Id. at ___, 702 N.Y.S.2d at 142. In reversing the defendant's convictions of DWI and AUO 1st and dismissing the indictment, the Appellate Division, Third Department, held that "a defense request pursuant to CPL 190.50 is timely if delivered or communicated to the prosecutor *at any time* prior to the presentment of the case to the Grand Jury." Id. at ___, 702 N.Y.S.2d at 143 (emphasis added).

In People v. Stanton, 241 A.D.2d 687, ___, 660 N.Y.S.2d 169, 170 (3d Dep't 1997):

> The Grand Jury testimony of the People's witnesses established that defendant was the driver of an automobile that was involved in

> a motor vehicle accident on March 7, 1996 and that he was intoxicated. In his testimony before the Grand Jury defendant claimed he was not the driver, maintaining instead that he was asleep in the backseat of the vehicle which was being driven by Keith Gillette whom he indicated was in the courthouse and presumably available to testify before the Grand Jury. After the last witness's testimony, a Grand Juror asked the Assistant District Attorney (hereinafter ADA) if Gillette was going to testify. The ADA replied that he was not and further informed the Grand Jury that "[w]ho comes in front of the grand jury and gives testimony is in the prosecutor's discretion." The Grand Jury then proceeded to return an indictment against defendant charging him, *inter alia*, with the crime of operating a vehicle while under the influence of alcohol. County Court subsequently dismissed the indictment on the ground that it was defective within the meaning of CPL 210.35(5).

In affirming the dismissal of the indictment, the Appellate Division, Third Department, held that:

> The ADA's advice was clearly erroneous in view of CPL 190.50(3), which authorizes the Grand Jury to call witnesses who it believes possess relevant knowledge or information. The People have wide discretion in presenting their case to the Grand Jury. They are not required to search for evidence favorable to the defendant or even to present all evidence in their possession that is favorable to the accused, although such information might allow the Grand Jury to make a more informed determination. However, the prosecutor is charged with a duty of fairness and serves a dual role as both an advocate and a public officer, and must not only seek convictions but also see that justice is done. Under the unique circumstances presented in this case, with the other occupant of the car apparently available to testify coupled with a Grand Juror's question indicating a desire to hear that testimony, we find that prejudice to

> defendant may have resulted from the improper comments of the prosecutor. Thus, County Court was correct in dismissing the indictment.

Id. at ___, 660 N.Y.S.2d at 170-71 (citations omitted).

Duty of prosecutor to present Brady material to Grand Jury

The People are required to both (a) properly instruct the Grand Jury on the law, and (b) bring certain exculpatory evidence to the Grand Jury's attention. See People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 (1986); People v. Valles, 62 N.Y.2d 36, 476 N.Y.S.2d 50 (1984).

In People v. Livingston, 175 Misc. 2d 322, ___, 668 N.Y.S.2d 443, 444 (Broome Co. Ct. 1997), the Court dismissed an indictment charging the defendant with DWI where the People failed to show the Grand Jury a videotape of the defendant performing field sobriety tests in a manner that apparently did not support the People's case:

> It is clear to this Court that any objective review of the videotape clearly indicates that the defendant's performance of those tests was far from failing. Accordingly, as exculpatory evidence the videotape should have been made available to the Grand Jury.

In this regard, the Court of Appeals has repeatedly made clear that:

> Prosecutors occupy a dual role as advocates and as public officers and, as such, they are charged with the duty not only to seek convictions but also to see that justice is done. In their role as public officers, they must deal fairly with the accused and be candid with the courts.

People v. Steadman, 82 N.Y.2d 1, 7, 603 N.Y.S.2d 382, 384 (1993). See also People v. Santorelli, 95 N.Y.2d 412, 420-21, 718 N.Y.S.2d 696, 700 (2000) ("Prosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities -- constitutional, statutory, ethical, personal

-- to safeguard the integrity of criminal proceedings and fairness in the criminal process"); People v. Pelchat, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 83 (1984).

SUPPRESSION HEARINGS

When is a Huntley hearing required?

CPL § 710.60(3)(b) "expressly provides that the absence of factual basis does not permit denial of a motion to suppress a statement claimed to have been involuntarily made to a law enforcement official." People v. Weaver, 49 N.Y.2d 1012, 1013, 429 N.Y.S.2d 399, 399 (1980). "Thus, . . . there *must* be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim." Id. at 1013, 429 N.Y.S.2d at 399. See also People v. Jones, 95 N.Y.2d 721, 725 n.2, 723 N.Y.S.2d 761, 764 n.2 (2001); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993).

On the other hand, CPL § 710.60(2)(b) "provides that the court must summarily grant a motion to suppress if '[t]he people stipulate that the evidence * * * will not be offered in evidence *in any criminal action or proceeding* against defendant.'" People v. White, 73 N.Y.2d 468, 475-76, 541 N.Y.S.2d 749, 753 (1989) (citation omitted). In White, the Court of Appeals noted that "[t]he Criminal Procedure Law does not define the term 'stipulation' and no authority has been cited interpreting that term as used in the statute." Id. at 476, 541 N.Y.S.2d at 753. In this regard, the Court held that "[w]e accept the definition, recently stated by one court, that a stipulation is '"[a]n agreement, admission, or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect of some matter incident to the proceeding, for the purpose, ordinarily, of avoiding delay, trouble and expense."'" Id. at 476, 541 N.Y.S.2d at 753 (citations omitted).

In White, prior to the defendant's *first* trial the People stated that a Huntley hearing was unnecessary because the People did not intend to use the defendant's statements. Applying the above definition to the facts of the case, the Court of Appeals found that this statement constituted a stipulation precluding the People from offering the statements at the defendant's *second* trial. Id. at 476, 541 N.Y.S.2d at 753. See generally People v. Boughton, 70 N.Y.2d 854, 855, 523 N.Y.S.2d 454, 455 (1987) (where the People withdraw their 710.30 notice, they cannot change their mind after the 15-day time period has run).

Scope of a Huntley hearing

The Court of Appeals made clear in People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 962-63 (1979), that:

> Clearly, statements obtained by exploitation of unlawful police conduct or detention must be suppressed, for their use in evidence under such circumstance violates the Fourth Amendment (Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824). It is therefore "incumbent upon the suppression court to permit an inquiry into the propriety of the police conduct." Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted.

(Quoting People v. Wise, 46 N.Y.2d 321, 329, 413 N.Y.S.2d 334, 339 (1978)) (footnote omitted). See also People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998); People v. Sanchez, 236 A.D.2d 243, ___, 653 N.Y.S.2d 563, 564-65 (1st Dep't 1997).

In Misuis, the Court of Appeals reversed the Appellate Division, vacated the defendant's guilty plea, and remitted the case for a probable cause hearing where:

> At the hearing on defendant's motion to suppress [various] admissions, his counsel repeatedly attempted to interrogate the two officers in an effort to discover whether the police had probable cause to make the arrest. His avowed intention was to show that the detention was unlawful and thus any statements made as a result of the claimed unlawful arrest and detention tainted any admissions. However, at the insistent urging of the prosecutor the court refused to permit that inquiry and permitted only questions concerning the voluntariness of the statements themselves.

47 N.Y.2d at 980, 419 N.Y.S.2d at 962.

The same conclusion was reached in People v. Whitaker, 79 A.D.2d 668, ___, 433 N.Y.S.2d 849, 850 (2d Dep't 1980):

> As the People concede, the suppression court erred in severely limiting the defendant's cross-examination of the sole arresting officer who testified, with respect to the issue of whether there was probable cause to arrest defendant. It is well-settled that on a motion to suppress a defendant's postarrest statements, the suppression court is required to permit the defendant to "delve fully into the circumstances attendant upon his arrest", for "[a] statement, voluntary under Fifth Amendment standards, will nevertheless be suppressed if it has been obtained through the exploitation of an illegal arrest."

(Citations omitted). See also People v. Lopez, 56 A.D.3d 280, 867 N.Y.S.2d 83 (1st Dep't 2008); People v. Roberts, 81 A.D.2d 674, 441 N.Y.S.2d 408 (2d Dep't 1981); People v. King, 79 A.D.2d 1033, 437 N.Y.S.2d 931 (2d Dep't 1981); People v. Specks, 77 A.D.2d 669, 430 N.Y.S.2d 157 (2d Dep't 1980). See generally People v. Gonzalez, 71 A.D.2d 775, ___, 419 N.Y.S.2d 322, 323-24 (3d Dep't 1979).

Defendant waives 710.30 notice claim by moving to suppress rather than preclude

Where the People fail to comply with the requirements of CPL § 710.30, the remedy is preclusion -- *unless* the defendant moves to suppress, rather than preclude, and the motion to suppress is denied. In this regard, CPL § 710.30(3) provides that:

> In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in [CPL § 710.30(1)] may be received against [the defendant] upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in [CPL § 710.70(2)].

It is critical to note that the waiver provision contained in CPL § 710.30(3) applies even if the defendant had initially moved to preclude and the motion was improperly denied -- prompting the defendant to subsequently move to suppress. In this regard, in People v. Kirkland, 89 N.Y.2d 903, 904-05, 653 N.Y.S.2d 256, 257 (1996), the Court of Appeals held that:

> When the People intend to offer identification testimony from a witness, a notice of intent must be served upon the defendant specifying the evidence which the People intend to offer (CPL 710.30). The notice requirement is excused when a defendant moves for suppression of the identification testimony (CPL 710.30[3]). Since the defendant here moved to suppress the identification testimony and received a full hearing on the fairness of the identification procedure, any alleged deficiency in the notice provided by the People was irrelevant.

(Citations omitted). See also People v. Merrill, 87 N.Y.2d 948, 641 N.Y.S.2d 587 (1996); People v. Newball, 76 N.Y.2d 587, 590, 561 N.Y.S.2d 898, 900 (1990). Notably, the Appellate Division majority in Merrill, relying on People v. Bernier, 73 N.Y.2d 1006, 541 N.Y.S.2d 760 (1989), held that "[a] defendant who initially moves to preclude and loses does not waive his right to preclusion by later participating in a Wade hearing." 212 A.D.2d 987, ___, 624 N.Y.S.2d 702, 702 (4th Dep't 1995). This holding seems to be a correct application of Bernier. Nonetheless, the Court of Appeals reversed, with no opinion, for the reasons stated in the dissenting opinion at the Appellate Division.

Kirkland and Merrill are difficult to reconcile with Bernier. In Bernier:

> Defense counsel learned during trial jury selection that a person with respect to whom no CPL 710.30(1) pretrial notice had been given would be called as the prosecution's main identifying witness. He then made a motion to preclude the testimony based on lack of notice and surprise. Inasmuch as the People failed to present or establish any excuse for not giving the required notice, the court should have granted the preclusion motion and suppressed the identification testimony. Instead, it denied the motion on condition that the prosecution make available the officers who investigated the robberies. After speaking with an officer, defense counsel stated on the record that he had "no idea based on the information I have whether [Gedeon the unnoticed witness] made any kind of out-of-court identification and if he did

> *maybe* we need a Wade Hearing with respect to that. *I have no idea*." (Emphasis added.) When the prosecutor then acknowledged that an out-of-court identification had been made, the court ordered a Wade hearing.

73 N.Y.2d at 1007-08, 541 N.Y.S.2d at 761 (citations omitted).

The Court of Appeals held that the Appellate Division correctly reversed the defendant's conviction. In this regard, the Court rejected the People's claim that "defendant . . . waived the preclusion protection pursuant to the exception of CPL 710.30(3) by making a suppression motion or participating in a suppression hearing," holding that "[t]he waiver exception cannot become operative in a case such as this when the defendant clearly moved initially to preclude and lost." Id. at 1008, 541 N.Y.S.2d at 761. The Bernier Court further held that defense counsel, who merely acquiesced in the Wade hearing ordered by the trial court, "made no suppression motion qualifying under CPL 710.30(3)." Id. at 1008, 541 N.Y.S.2d at 761.

In light of Kirkland and Merrill, where the defendant believes that his or her motion to preclude has been improperly denied, a strategy decision has to be made as to whether to preserve this issue for appeal or rather to waive the issue by moving to suppress the evidence. See, e.g., People v. Lopez, 84 N.Y.2d 425, 427, 618 N.Y.S.2d 879, 881 (1994) ("Electing to preserve for appellate review his claim that the notice was insufficient, defendant did not seek suppression and no Huntley or Wade hearings were held"); People v. O'Doherty, 70 N.Y.2d 479, 483, 522 N.Y.S.2d 498, 500 (1987) ("Supreme Court . . ., over defendant's objection, held a Huntley hearing"); People v. Amparo, 73 N.Y.2d 728, 729, 535 N.Y.S.2d 588, 589 (1988) ("The exception contained in CPL 710.30(3) -- where a defendant has 'moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible' -- is inapplicable here. Defense counsel did not make a motion for suppression of the oral statement on the ground that it was in substance inadmissible at trial . . . . Rather, defense counsel moved only for preclusion of the oral statement on account of late notice, which does not fall within the exception contained in CPL 710.30(3)").

In this regard, it is critical to note that a motion by the defendant to suppress "any and all" statements on the ground of involuntariness -- together with participation in a Huntley hearing -- constitutes a waiver of the preclusion issue. See, e.g., People v. Sturiale, 262 A.D.2d 1003, ___, 693 N.Y.S.2d 374, 375 (4th Dep't 1999) ("defendant sought suppression of 'any and

all' statements made by him. Because the oral statements were the very subject of the suppression hearing, the sufficiency of the CPL 710.30 notice was irrelevant"). Cf. People v. St. Martine, 160 A.D.2d 35, ___, 559 N.Y.S.2d 697, 700-01 (1st Dep't 1990) ("Defendant, in the instant matter, did not, by seeking to suppress any and all statements, in effect waive his right to object to the admission of statements of which he was at the time of the motion still unacquainted"); People v. Holley, 157 Misc. 2d 402, ___, 596 N.Y.S.2d 1016, 1018 (N.Y. City Crim. Ct. 1993) ("this court finds that the request to suppress 'any and all statements' covered only those statements for which notice had been given and not every statement contained in the police paperwork served at the arraignment"); People v. Utria, 165 Misc. 2d 54, ___, 626 N.Y.S.2d 948, 952 (N.Y. City Crim. Ct. 1995) ("the defendant does not waive the right to seek and obtain preclusion when he moves to suppress 'all statements', since he does not waive his right to object to the admission of statements of which he was unaware at the time of the motion"); People v. Wright, 127 Misc. 2d 885, ___ n.*, 487 N.Y.S.2d 688, 691-92 n.* (Nassau Co. Ct. 1985):

> When defendant moved for "a Huntley hearing," he must have been addressing the statement contained in the CPL 710.30 notice, for that is the only one of which he had formal notice the People intended to offer.
>
> The fact that the defendant may be aware of a number of other statements he made to public officials is irrelevant. It is for the People to tell defendant which statements they intend to offer at the trial. It is not every statement the defendant makes that the People intend to offer at the trial. It is their obligation to be specific, so that when defendant requests a Huntley hearing, the request can be directed at those statements the People intend to offer at the trial, notice of which is the very essence of CPL 710.30.

It should also be kept in mind that the 710.30 notice issue will be waived by a guilty plea.

When is a Wade hearing required?

In People v. Boyer, 6 N.Y.3d 427, 813 N.Y.S.2d 31 (2006), the Court of Appeals summarized the law as it pertains to when a Wade hearing is required:

> The People ask us to extend the "confirmatory identification" exception derived from People v. Wharton, 74 N.Y.2d 921, 550 N.Y.S.2d 260, 549 N.E.2d 462 [1989] to situations where a police officer's initial encounter with a suspect and subsequent identification of that suspect are temporally related, such that the two might be considered part of a single police procedure. To do so, however, would run afoul of CPL 710.30. Moreover, such an exception would eliminate the protections offered by a Wade hearing even when the initial police viewing -- albeit part of a single police procedure -- was fleeting, unreliable and susceptible of misidentification. * * *
>
> The Applicable Law
>
> CPL 710.30 could not be clearer. The Legislature has prescribed that, within 15 days of arraignment, the prosecution must serve upon the defendant notice of its intention to introduce at trial "testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such" (CPL 710.30[1][b]). Upon the service of notice, "the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress" the identification (CPL 710.30[2]). If notice is not given, the prosecution will be precluded from introducing such evidence at trial, unless (1) it is permitted to serve a late notice for good cause shown, or (2) the defendant has moved to suppress the identification testimony and the motion is denied (see CPL 710.30[2], [3]). Neither of these exceptions is relevant here.

CPL 710.30 underscores and facilitates the defendant's right, prior to trial, to test the reliability of any out-of-court identifications that the People intend to introduce. The statutory scheme ensures that the identifications are not the product of undue suggestiveness, and lessens the possibility of misidentification. The statutory mandate is plain and the procedure simple: the People serve notice, the defendant moves to suppress and the court holds a Wade hearing to consider the suppression motion. A court may summarily deny a suppression motion without a hearing only if "[t]he motion papers do not allege a ground constituting [a] legal basis for the motion" (CPL 710.60[3][a]). Thus, once the People serve notice that they intend to introduce identification testimony, the defendant may choose to respond with a motion to suppress that testimony and, so long as the motion alleges undue suggestiveness, the defendant is generally entitled to a Wade hearing.

We have recognized, however, two instances when, as a matter of law, the identification at issue could not be the product of undue suggestiveness. Under such circumstances, the defendant is not entitled to a Wade hearing and thus the People are not obligated to provide notice pursuant to CPL 710.30(1)(b). This so-called "confirmatory identification" exception carries significant consequences and is therefore limited to the scenarios set forth in People v. Wharton and People v. Rodriguez, where there is no risk of misidentification. As we noted in Rodriguez, a court may summarily deny a Wade hearing (and hence no CPL 710.30 notice would be required) where the court concludes that, as a matter of law, the identifying, civilian witness knew the "defendant so well that no amount of police suggestiveness could possibly taint the identification."

> Here, we are concerned only with the Wharton scenario. In Wharton, an experienced undercover officer observed the defendant face-to-face during a planned buy-and-bust operation. The officer then radioed his backup team with a description of the defendant, who was immediately arrested. As planned, within five minutes of the arrest, the purchasing officer drove past the defendant specifically for the purpose of identifying him, and then again identified him a few hours later at the police station.
>
> Under such circumstances, we held that the defendant was not entitled to a Wade hearing (and thus would not be entitled to CPL 710.30 notice) to test the officer's identification.
> * * *
>
> [T]he quality of the officer's initial viewing must be a critical factor in any Wharton-type analysis. The risk of undue suggestiveness is obviated only when the identifying officer's observation of the defendant is so clear that the identification could not be mistaken. When there is a risk that the quality of the initial observation has eroded over time, we have consistently held that police identifications do not enjoy any exemption from the statutory notice and hearing requirements.

Id. at 429, 431-33, 813 N.Y.S.2d at 31-32, 33-34 (citations omitted). See also People v. Dixon, 85 N.Y.2d 218, 623 N.Y.S.2d 813 (1995); People v. Rodriguez, 79 N.Y.2d 445, 583 N.Y.S.2d 814 (1992); People v. Newball, 76 N.Y.2d 587, 561 N.Y.S.2d 898 (1990).

In Rodriguez, *supra*, the Court of Appeals held that:

> The People bear the burden in any instance they claim that a citizen identification procedure was "merely confirmatory." The unusual treatment accorded such identifications -- no CPL 710.30 notice or Wade hearing is necessary -- requires that the exception be narrowly confined to situations where "'suggestiveness' is not a

> concern." Thus, the People must show 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.
>
> Contrary to the People's argument, prior familiarity should not be resolved at trial in the first instance. The Legislature mandates *pretrial* resolution of the admissibility of identification testimony where it is alleged that an improper procedure occurred (see, CPL 710.20[6]; 710.60). Moreover, when the defendant's theory at trial is mistaken identity, the exploration of prior familiarity on cross-examination may actually bolster the People's case.

79 N.Y.2d at 452, 583 N.Y.S.2d at 818-19 (citation omitted). See also People v. White, 73 N.Y.2d 468, 473, 541 N.Y.S.2d 749, 751 (1989) (CPL § 710.30 does not apply to judicially supervised identifications which occur when the defendant is represented by counsel); People v. Gissendanner, 48 N.Y.2d 543, 552, 423 N.Y.S.2d 893, 899 (1979) ("In cases in which the defendant's identity is not in issue, or those in which the protagonists are known to one another, 'suggestiveness' is not a concern and, hence, the statute does not come into play").

In People v. Coker, 121 A.D.3d 1305, ___, 995 N.Y.S.2d 288, 290-91 (3d Dep't 2014), the Appellate Division, Third Department, held that:

> [T]he People were [not] required to provide notice pursuant to CPL 710.30 regarding their intent to offer identification testimony at trial. The evidence at the preclusion hearing established that, when police arrived at the scene, Jacqueway -- without any prompting by police -- pointed to defendant and stated to police that "[h]e's right there on the sidewalk." As this identification of defendant occurred spontaneously without any police involvement, CPL 710.30 notice of such identification was not required.

When is a pre-Wade hearing required?

As the previous section demonstrates, a Wade hearing is not required where the identification procedure at issue is merely "confirmatory." Ironically, however, a hearing is often required to determine whether the identification procedure was truly confirmatory (*i.e.*, the determination whether the identification procedure was truly confirmatory is for the Court -- not the People -- to make). In this regard, in People v. Williamson, 79 N.Y.2d 799, 801, 580 N.Y.S.2d 170, 171 (1991), the Court of Appeals held that:

> The case must be remitted for a hearing to determine whether a Wade hearing is required. If, after that pre-Wade hearing, the court concludes that a Wade hearing is not required, the judgment should be amended to reflect that determination and the judgment of conviction and sentence treated as affirmed. If, after the pre-Wade hearing, the nisi prius court determines that a Wade hearing is required, a Wade hearing should be held and further proceedings, including a new trial, should be carried out as circumstances may warrant.

Similarly, in People v. Rodriguez, 79 N.Y.2d 445, 453, 583 N.Y.S.2d 814, 820 (1992), the Court of Appeals held that:

> [T]he case should be remitted to Supreme Court for a hearing to determine whether the identification procedure was confirmatory. If, after that hearing, the court concludes that the People have not sustained their burden, a Wade hearing should be held and further proceedings, including a new trial, should be had as the circumstances may warrant.

See generally People v. Ross, 160 Misc. 2d 1, 603 N.Y.S.2d 652 (Bronx Co. Sup. Ct. 1993) (non-eyewitness can testify at pre-Wade hearing to establish victim's prior familiarity with defendant for purposes of invoking confirmatory identification exception to CPL § 710.30(1)(b)).

When is a probable cause hearing required?

A warrantless arrest is presumptively illegal. See, e.g., Broughton v. State of New York, 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 94 (1975) ("Whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful"); People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998) ("When the validity of a warrantless arrest is challenged, the presumption of probable cause disappears and the People bear the burden of coming forward with evidence showing that it was supported by probable cause").

In addition, "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, 655, 81 S.Ct. 1684, 1691 (1961). See also Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). In this regard, obtaining a breath or blood sample from a DWI suspect for alcohol and/or drug analysis constitutes a "search" and "seizure" within the meaning of the 4th Amendment. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966); People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1976).

In Brown v. Illinois, *supra*, the defendant "was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by Miranda v. Arizona. Thereafter, while in custody, he made two inculpatory statements. The issue [was] whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue [was] whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the Miranda warnings sufficiently attenuated the taint of the arrest." 422 U.S. at 591-92, 95 S.Ct. at 2256 (citation omitted). In other words, the issue in Brown was whether statements that were voluntarily made under the 5th Amendment were admissible at trial if the statements were the fruits of an illegal arrest without probable cause.

The United States Supreme Court held that:

> The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from

those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.

If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at 601-03, 95 S.Ct. at 2260-61 (citations and footnotes omitted).

Brown is not a model of clarity, and it apparently confused the Appellate Division, Fourth Department, in People v. Dunaway, 61 A.D.2d 299, 402 N.Y.S.2d 490 (4th Dep't 1978) (as the United States Supreme Court reversed it in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979)). In Dunaway, the Supreme Court held that:

> [D]etention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation.

442 U.S. at 216, 99 S.Ct. at 2258. This is where the so-called Dunaway hearing (a.k.a. probable cause hearing) comes from.

Since virtually every DWI arrest is warrantless -- and thus presumptively unconstitutional -- it would seem that probable cause hearings would be available for the asking. However, this is not the case. See, e.g., People v. Gruden, 42 N.Y.2d 214, 217, 397 N.Y.S.2d 704, 706 (1977) ("Generally hearings are not available merely for the asking"). Rather, CPL § 710.60 sets forth the procedure governing suppression motions. Critically, however, if the defendant's motion papers are sufficient, then the Court literally *must* grant a Dunaway (*i.e.*, probable cause) and/or a Mapp (*i.e.*, suppression) hearing. See *infra*.

The defendant's motion papers are sufficient when they (a) challenge the lawfulness of the defendant's arrest, and (b) assert sworn allegations of fact in support of such claim that raise a factual dispute on a material point. See CPL § 710.60(3), (4). In this regard, it is well settled that an attorney's affirmation signed by defense counsel is sufficient to satisfy the pleading requirements of CPL § 710.60 (*i.e.*, an affidavit of the defendant is not required). See, e.g., CPL § 710.60(1) ("Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated"); People v. Mendoza, 82 N.Y.2d 415, 425, 604 N.Y.S.2d 922, 926 (1993); People v. Mabeus, 47 A.D.3d

1073, ___, 850 N.Y.S.2d 664, 666 (3d Dep't 2008); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999); People v. Marquez, 246 A.D.2d 330, ___, 667 N.Y.S.2d 359, 360 (1st Dep't 1998); People v. Ayarde, 220 A.D.2d 519, ___, 632 N.Y.S.2d 174, 175 (2d Dep't 1995); People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 500 (1st Dep't 1995); People v. Vasquez, 200 A.D.2d 344, ___, 613 N.Y.S.2d 595, 596 (1st Dep't 1994); People v. Foster, 197 A.D.2d 411, ___, 602 N.Y.S.2d 395, 395 (1st Dep't 1993); People v. Aponte, 193 A.D.2d 529, ___, 598 N.Y.S.2d 937, 937 (1st Dep't 1993); People v. Moore, 186 A.D.2d 591, ___, 588 N.Y.S.2d 388, 389 (2d Dep't 1992); People v. Rodriguez, 185 A.D.2d 802, ___, 586 N.Y.S.2d 968, 968-69 (1st Dep't 1992); People v. Miller, 162 A.D.2d 248, ___, 556 N.Y.S.2d 607, 607 (1st Dep't 1990); People v. Huggins, 162 A.D.2d 129, ___, 556 N.Y.S.2d 75, 75-76 (1st Dep't 1990); People v. Marte, 149 A.D.2d 335, ___, 539 N.Y.S.2d 912, 913 (1st Dep't 1989); People v. Lee, 130 A.D.2d 400, ___, 515 N.Y.S.2d 260, 262 (1st Dep't 1987); People v. Patterson, 129 A.D.2d 527, ___, 514 N.Y.S.2d 378, 379 (1st Dep't 1987); People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986); People v. Sutton, 91 A.D.2d 522, ___, 456 N.Y.S.2d 771, 772 (1st Dep't 1982).

The Court of Appeals has made clear that:

> A trial court is *required* to grant a hearing if the defendant "raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue" of whether evidence was obtained in a constitutionally permissible manner.

People v. Burton, 6 N.Y.3d 584, 587, 815 N.Y.S.2d 7, 9 (2006) (emphasis added) (citation omitted). See also CPL § 710.60(3), (4); People v. Mendoza, 82 N.Y.2d 415, 426, 604 N.Y.S.2d 922, 926 (1993); People v. Gruden, 42 N.Y.2d 214, 215, 397 N.Y.S.2d 704, 705 (1977); People v. Bennett, 240 A.D.2d 292, ___, 659 N.Y.S.2d 260, 261 (1st Dep't 1997) ("It is not necessary that a moving defendant raise an issue of fact as to every factual allegation put forth by the prosecution in order for a hearing to be ordered").

Nonetheless, many prosecutors oppose the granting of a Dunaway/Mapp hearing in literally every single case, reflexively asserting that the defendant has failed to allege sufficient facts to entitle him/her to a hearing regardless of the facts alleged in the defendant's motion papers. In this regard, the People typically cite cases such as People v. Roberto H., 67

A.D.2d 549, 416 N.Y.S.2d 305 (2d Dep't 1979), in which the defendant failed to allege a single fact in support of his motion to suppress.

A review of Roberto H. demonstrates that defense counsel's affirmation in that case was patently inadequate to justify a suppression hearing. Specifically, as the Roberto H. Court noted:

> With regard to the remaining portions of the motion to suppress, defense counsel submitted a supporting affirmation alleging:
>
> "That your affirmant has been served with a notice, a copy of which is annexed hereto, by the District Attorney's office that testimony will be offered at the trial of this matter identifying the defendant as the perpetrator of the within crimes.
>
> "That your affirmant submits that should it appear that the identification herein was made under circumstances highly suggestive, unfair and prejudicial to the defendant, so as to deny him due process of law in violation of the 'FOURTH', 'FIFTH', 'SIXTH' and 'FOURTEENTH' Amendments to the United States Constitution, that evidence should be suppressed from the trial of this matter and your affirmant requests a hearing to determine that issue.
>
> * * * * * *
>
> "That upon information and belief, upon the date of his arrest an illegal and unlawful search was conducted by arresting law enforcement officials.
>
> "That the District Attorney has failed to disclose the exact facts and circumstances surrounding the search and it is your affirmant's belief that contraband which is the subject of the within indictment was obtained therefrom.

> "That your affirmant respectfully submits that if it should appear that the search conducted was an unreasonable search and seizure in violation of defendant's 'FOURTH', 'FIFTH' and 'FOURTEENTH' Amendment Rights of the United States Constitution, the contraband obtained therefrom should be suppressed from use upon the trial of this matter and your affirmant requests a hearing to determine that issue."
>
> *It is abundantly clear from these excerpts, which comprise the sum and substance of the allegations in support of the motion, that defendant failed to comply with the requirements of CPL 710.60. The affirmation fails to allege any facts whatever, let alone facts in support of the grounds for the motion*.

Id. at ___, 416 N.Y.S.2d at 306-07 (emphasis added).

Simply stated, there was literally not one single fact alleged by the attorney in Roberto H. that either (a) dealt with any of the specific facts of the case, and/or (b) stated a ground for suppression.

Another case that is frequently misapplied by the People is People v. Gruden, 42 N.Y.2d 214, 397 N.Y.S.2d 704 (1977). In Gruden, *the defendants* brought speedy trial motions pursuant to CPL § 30.30. The defendants' motion papers alleged sufficient facts which, if undisputed, would require that the motions be summarily *granted* without a hearing. "The People did not dispute the facts alleged in the defendants' motion papers. Instead they consented to a hearing." Id. at 215, 397 N.Y.S.2d at 705. The People claimed that the relevant statute should be construed "so as to preclude the court from summarily granting the motion to dismiss unless the facts are expressly conceded by the People to be true, arguing that a failure on the part of the People to controvert is not necessarily to be deemed a concession under the statute." Id. at 216, 397 N.Y.S.2d at 705.

In other words, in Gruden *the People* claimed that they were entitled to an evidentiary hearing on every speedy trial motion even if none of the defendants' factual allegations were in dispute. The specific holding in Gruden was as follows: "Generally hearings are not available merely for the asking. We

therefore hold that the court may summarily grant a motion to dismiss unless the papers submitted *by the prosecutor* show that there is a factual dispute which must be resolved at a hearing." Id. at 217, 397 N.Y.S.2d at 706 (emphasis added). See also id. at 216, 397 N.Y.S.2d at 706 ("Obviously it is not the statutory language but *the prosecution's* interpretation of it which is unusual. Normally what is not disputed is deemed to be conceded. Generally a party *opposing* a motion cannot arbitrarily demand a hearing to conduct a fishing expedition") (emphases added). Simply stated, Gruden dealt with the sufficiency of *the People's* responding papers (*not* the defendant's motion papers); and, as in Roberto H., not one single fact was alleged in the relevant papers.

A fair reading of Gruden is that if the defendant's motion papers do not dispute any of the material factual allegations surrounding the stop, arrest, detention, search, etc., then the defendant should not expect a suppression hearing to be granted. On the other hand, if the defendant's motion papers do raise a "factual dispute on a material point," then a suppression hearing *must* be granted. In other words, where the defendant contests material factual assertions raised by the People, a hearing is required as a matter of law (*i.e.*, discretion plays no part in the analysis).

Where material facts are in dispute, the Court is called upon to assess credibility -- which cannot be done in the absence of a hearing involving live witnesses and the opportunity for cross-examination. In this regard, the People frequently quote the "hearings are not available merely for the asking" line in Gruden out of context. Gruden makes clear that a party generally cannot demand a hearing without putting forth any facts whatsoever in support of its position. By contrast, Gruden clearly does not stand for the proposition that Courts should scour defense motions looking for any excuse to deny a suppression hearing. Indeed, the Court of Appeals has indicated that even where the defendant's motion papers are deficient, a Court should both (a) seriously consider granting the defendant a requested suppression hearing as a matter of discretion, see Mendoza, 82 N.Y.2d at 429-30, 604 N.Y.S.2d at 928-29, and (b) grant the defendant "the opportunity to seek leave to cure the defect, often a simple matter." Id. at 430, 604 N.Y.S.2d at 929. See also People v. Bonilla, 82 N.Y.2d 825, 827, 604 N.Y.S.2d 937, 938 (1993) (same).

Notably, CPL § 710.60(6) requires that "[r]egardless of whether a hearing [i]s conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its

conclusions of law and the reasons for its determination." See also Bonilla, 82 N.Y.2d at 827-28, 604 N.Y.S.2d at 938. Where material facts are disputed, a Court cannot fairly and impartially make the "findings of fact" required by CPL § 710.60(6) without holding a hearing, because:

> The question of probable cause is a mixed question of law and fact. Determination of the facts and circumstances bearing on the issue, which hinges primarily on questions of witness credibility, is a question of fact. However, it is a question of law whether the facts found to exist are sufficient to constitute probable cause.

People v. Morales, 42 N.Y.2d 129, 134, 397 N.Y.S.2d 587, 590 (1977). More specifically, in People v. Oden, 36 N.Y.2d 382, 384, 368 N.Y.S.2d 508, 511 (1975), the Court of Appeals held that:

> Probable cause exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing that the offense has been committed. The question of probable cause is a mixed question of law and fact: the truth and existence of the facts and circumstances bearing on the issue being a question of fact, and the determination of whether the facts and circumstances found to exist and to be true constitute probable cause being a question of law. If the facts and circumstances adduced as proof of probable cause are controverted so that conflicting evidence is to be weighed, if different persons might reasonably draw opposing inferences therefrom, or if the credibility of witnesses is to be passed upon, issues as to the existence or truth of those facts and circumstances are to be passed upon as a question of fact; however, when the facts and circumstances are undisputed, when only one inference can reasonably be drawn therefrom and when there is no problem as to credibility, or when certain facts and circumstances have been found to exist, the issue as to whether they amount to probable cause is a question of law.

(Citations omitted).

In the absence of a hearing, the "facts" alleged in the parties' motion papers are merely *allegations of fact* -- they do not constitute evidence. "While it may turn out that [the defendant's claims are not] borne out by the facts ultimately found, the existence of sworn allegations supporting . . . viable legal arguments mandates that a hearing be held." People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986).

The Court of Appeals has expressly rejected a prosecution claim that the "defendant must offer an innocent explanation for his conduct." People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995). See also People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 501 (1st Dep't 1995) (same); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999) (defendant "need not prove his entire case in the motion papers").

Rather, the standard to be used in deciding whether the defendant's motion papers raise a factual dispute on a material point was set forth by the Court of Appeals in Mendoza: "We conclude that the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." 82 N.Y.2d at 426, 604 N.Y.S.2d at 926. See also People v. Jones, 95 N.Y.2d 721, 723 N.Y.S.2d 761 (2001). In this regard, Mendoza makes clear that "[i]t would be unreasonable to construe the CPL to require precise factual averments when, in parallel circumstances, defendant . . . does not have access to or awareness of the facts necessary to support suppression." 82 N.Y.2d at 429, 604 N.Y.S.2d at 928.

In People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994), the Appellate Division, First Department, stated that:

> [I]t should be stressed that whether or not the defendant knew he had done something illegal was not the relevant issue in determining whether there had been an unreasonable search and seizure; it was rather whether the *police* knew a sufficient amount about any transgressions by the defendant to render their intrusion upon him legal. Plainly, the defendant was not

> obliged globally to assert his innocence of all wrongdoing as a condition of maintaining his motion to suppress. All that he was obliged to do was to raise an issue as to the legality of the arrest, and to do that no more could reasonably have been required than that he cast into question, to the extent possible given the nature of the factual context and the information made available to him, whether the arresting officers' knowledge of any wrongdoing by him was sufficient to constitute probable cause. * * *
>
> As Mendoza implicitly recognizes, and as is in any case obvious, it was not the Legislature's intention in enacting CPL § 710.60 to create an insuperable barrier to the assertion of possibly meritorious suppression claims.

Id. at ___-___, 613 N.Y.S.2d at 597-98.

Even if the defendant's factual allegations are deficient, the Court of Appeals has indicated a preference that a suppression hearing be granted where the defendant claims that the People's evidence was unlawfully obtained. In this regard, the Mendoza Court stated that, in addition to the three traditional factors used to decide the sufficiency of a defendant's motion papers, a fourth factor -- "(4) Court's Discretion to Conduct a Hearing" -- comes into play. See 82 N.Y.2d at 429, 604 N.Y.S.2d at 928.

In explaining why it is preferable for a Court to conduct suppression hearings where the defendant claims that evidence was unlawfully obtained, the Mendoza Court stated:

> The CPL does not mandate summary denial of defendant's motion even if the factual allegations are deficient (see, CPL 710.60[3] ["The court *may* summarily deny the motion"] [emphasis added]). If the court orders a Huntley . . . hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses, the court may deem it appropriate in the exercise of discretion to consider the Mapp motion despite a perceived pleading deficiency.

> Indeed, considerations of judicial economy militate in favor of this procedure; an appellate court might conclude that summary denial of the Mapp motion was improper, requiring the parties and witnesses to reassemble for a new hearing, often months or years later.

Id. at 429-30, 604 N.Y.S.2d at 928-29. See also People v. Higgins, 124 A.D.3d 929, ___, 1 N.Y.S.3d 424, 428-29 (3d Dep't 2015) ("we wholly reject the People's contention that County Court erred in granting defendant's request for a Mapp/Dunaway hearing. Although a defendant seeking a suppression hearing must make sworn factual allegations supporting his or her motion, CPL 710.60 'does not mandate summary denial of defendant's motion even if the factual allegations are deficient.' Here, the People had consented to a Huntley hearing 'grounded in the same facts involving the same police witnesses.' Principles of judicial economy clearly weighed in favor of conducting any related suppression hearings, and we cannot find any error in so proceeding") (citations omitted).

In keeping with this stated preference that suppression hearings be granted where the defendant's motion papers are minimally sufficient, appellate courts in New York "have frequently criticized the practice of summarily denying suppression motions without a hearing where defendant sets forth a minimally sufficient showing to warrant a hearing on the suppression issue," People v. Harris, 160 A.D.2d 515, ___, 554 N.Y.S.2d 170, 171 (1st Dep't 1990), and routinely hold appeals in abeyance and order that improperly denied suppression hearings be conducted. See, e.g., People v. Hightower, 85 N.Y.2d 988, 629 N.Y.S.2d 164 (1995); People v. Mendoza, 82 N.Y.2d 415, 604 N.Y.S.2d 922 (1993); People v. White, 137 A.D.3d 1311, 28 N.Y.S.3d 423 (2d Dep't 2016); People v. Chamlee, 120 A.D.3d 417, 991 N.Y.S.2d 313 (1st Dep't 2014); People v. Atkinson, 111 A.D.3d 1061, 975 N.Y.S.2d 227 (3d Dep't 2013); People v. Jennings, 110 A.D.3d 738, 972 N.Y.S.2d 104 (2d Dep't 2013); People v. Jones, 73 A.D.3d 662, 901 N.Y.S.2d 274 (1st Dep't 2010); People v. Acosta, 66 A.D.3d 792, 887 N.Y.S.2d 187 (2d Dep't 2009); People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dep't 2009); People v. Trotter, 54 A.D.3d 1065, 863 N.Y.S.2d 924 (2d Dep't 2008); People v. Otero, 51 A.D.3d 553, 858 N.Y.S.2d 157 (1st Dep't 2008); People v. Mabeus, 47 A.D.3d 1073, 850 N.Y.S.2d 664 (3d Dep't 2008); People v. Joyner, 46 A.D.3d 473, 848 N.Y.S.2d 146 (1st Dep't 2007); People v. Bacon, 6 A.D.3d 241, 774 N.Y.S.2d 332 (1st Dep't 2004); People v. Phillips, 4 A.D.3d 233, 771 N.Y.S.2d 658 (1st Dep't 2004); People v. Muhammed, 290 A.D.2d 248, 736

N.Y.S.2d 19 (1st Dep't 2002); People v. Mathison, 282 A.D.2d 283, 722 N.Y.S.2d 872 (1st Dep't 2001); People v. Butler, 280 A.D.2d 399, 720 N.Y.S.2d 788 (1st Dep't 2001); People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dep't 1999); People v. Nenni, 261 A.D.2d 900, 689 N.Y.S.2d 912 (4th Dep't 1999); People v. Wright, 256 A.D.2d 106, 682 N.Y.S.2d 154 (1st Dep't 1998); People v. Face, 247 A.D.2d 336, 669 N.Y.S.2d 289 (1st Dep't 1998); People v. Lewis, 247 A.D.2d 227, 668 N.Y.S.2d 356 (1st Dep't 1998); People v. Marquez, 246 A.D.2d 330, 667 N.Y.S.2d 359 (1st Dep't 1998); People v. Perilla, 240 A.D.2d 313, 660 N.Y.S.2d 113 (1st Dep't 1997); People v. Bennett, 240 A.D.2d 292, 659 N.Y.S.2d 260 (1st Dep't 1997); People v. Sanchez, 236 A.D.2d 243, 653 N.Y.S.2d 563 (1st Dep't 1997); People v. Vittegleo, 226 A.D.2d 1128, 642 N.Y.S.2d 827 (4th Dep't 1996); People v. Ayarde, 220 A.D.2d 519, 632 N.Y.S.2d 174 (2d Dep't 1995); People v. Bailey, 218 A.D.2d 569, 630 N.Y.S.2d 499 (1st Dep't 1995); People v. Youngblood, 210 A.D.2d 948, 621 N.Y.S.2d 265 (4th Dep't 1994); People v. Holmes, 206 A.D.2d 604, 614 N.Y.S.2d 474 (3d Dep't 1994); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994); People v. Altruz, 198 A.D.2d 423, 604 N.Y.S.2d 134 (1st Dep't 1993); People v. Foster, 197 A.D.2d 411, 602 N.Y.S.2d 395 (1st Dep't 1993); People v. Aponte, 193 A.D.2d 529, 598 N.Y.S.2d 937 (1st Dep't 1993); People v. Cole, 187 A.D.2d 873, 590 N.Y.S.2d 542 (3d Dep't 1992); People v. Moore, 186 A.D.2d 591, 588 N.Y.S.2d 388 (2d Dep't 1992); People v. Rodriguez, 185 A.D.2d 802, 586 N.Y.S.2d 968 (1st Dep't 1992); People v. Davis, 169 A.D.2d 379, 564 N.Y.S.2d 320 (1st Dep't 1991); People v. Miller, 162 A.D.2d 248, 556 N.Y.S.2d 607 (1st Dep't 1990); People v. Huggins, 162 A.D.2d 129, 556 N.Y.S.2d 75 (1st Dep't 1990); People v. Harris, 160 A.D.2d 515, 554 N.Y.S.2d 170 (1st Dep't 1990); People v. Zarate, 160 A.D.2d 466, 554 N.Y.S.2d 137 (1st Dep't 1990); People v. Whiten, 151 A.D.2d 708, 543 N.Y.S.2d 944 (2d Dep't 1989); People v. Alvarez, 151 A.D.2d 684, 543 N.Y.S.2d 935 (2d Dep't 1989); People v. Marte, 149 A.D.2d 335, 539 N.Y.S.2d 912 (1st Dep't 1989); People v. Astride, 147 A.D.2d 407, 538 N.Y.S.2d 5 (1st Dep't 1989); People v. Lee, 130 A.D.2d 400, 515 N.Y.S.2d 260 (1st Dep't 1987); People v. Patterson, 129 A.D.2d 527, 514 N.Y.S.2d 378 (1st Dep't 1987); People v. Marshall, 122 A.D.2d 283, 504 N.Y.S.2d 782 (2d Dep't 1986); People v. Sutton, 91 A.D.2d 522, 456 N.Y.S.2d 771 (1st Dep't 1982); People v. Calhoun, 73 A.D.2d 972, 424 N.Y.S.2d 247 (2d Dep't 1980); People v. Carter, 72 A.D.2d 963, 422 N.Y.S.2d 258 (4th Dep't 1979); People v. Carrasquillo, 70 A.D.2d 842, 418 N.Y.S.2d 3 (1st Dep't 1979); People v. Werner, 55 A.D.2d 317, 390 N.Y.S.2d 711 (4th Dep't 1977).

The Appellate Division, First Department's decision in People v. Estrada, 147 A.D.2d 407, ___, 538 N.Y.S.2d 5, 5-6 (1st Dep't 1989), is illustrative:

> Defendant made a pretrial motion to suppress his confession, claiming that it was the product of an illegal arrest. In his motion papers, defendant alleged that prior to his arrest he had not been observed with any contraband or acting in a suspicious manner. He claimed, therefore, that there had not been probable cause for his arrest. As the People now concede, and as is in any case evident, defendant's allegations were sufficient to require that a Dunaway hearing be held. Justice Rothwax, however, summarily denied the defendant's Dunaway motion without a hearing. Although the summary denial may have appeared efficient at the time, its ultimate consequence will be unnecessarily to delay the adjudication of defendant's case. If this were an isolated case it would not merit comment but we have on at least six previous occasions had to hold appeals in abeyance and remand for hearings upon suppression motions inappropriately denied by the same judge.

(Citations omitted). Notably, following the remand the New York County Supreme Court "granted defendant-appellant's motion to suppress on the District Attorney's concession that it was unable to proceed. The prosecution concede[d] that without this confession it [was] unable to sustain its burden of proof. In view of this concession the indictment [was] dismissed." People v. Estrada, 152 A.D.2d 499, ___, 544 N.Y.S.2d 475, 475 (1st Dep't 1989).

In People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 962-63 (1979), the Court of Appeals made clear that:

> Clearly, statements obtained by exploitation of unlawful police conduct or detention must be suppressed, for their use in evidence under such circumstance violates the Fourth Amendment (Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824). It is therefore "incumbent upon the suppression court to permit an inquiry into the propriety

> of the police conduct." Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted.

(Quoting People v. Wise, 46 N.Y.2d 321, 329, 413 N.Y.S.2d 334, 339 (1978)) (footnote omitted). See also People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998); People v. Sanchez, 236 A.D.2d 243, ___, 653 N.Y.S.2d 563, 564-65 (1st Dep't 1997). See generally People v. Gonzalez, 71 A.D.2d 775, ___, 419 N.Y.S.2d 322, 323-24 (3d Dep't 1979).

In Misuis, the Court of Appeals reversed the Appellate Division, vacated the defendant's guilty plea, and remitted the case for a probable cause hearing where:

> At the hearing on defendant's motion to suppress [various] admissions, his counsel repeatedly attempted to interrogate the two officers in an effort to discover whether the police had probable cause to make the arrest. His avowed intention was to show that the detention was unlawful and thus any statements made as a result of the claimed unlawful arrest and detention tainted any admissions. However, at the insistent urging of the prosecutor the court refused to permit that inquiry and permitted only questions concerning the voluntariness of the statements themselves.

47 N.Y.2d at 980, 419 N.Y.S.2d at 962.

The same conclusion was reached in People v. Whitaker, 79 A.D.2d 668, ___, 433 N.Y.S.2d 849, 850 (2d Dep't 1980):

> As the People concede, the suppression court erred in severely limiting the defendant's cross-examination of the sole arresting officer who testified, with respect to the issue of whether there was probable cause to arrest defendant. It is well-settled that on a motion to suppress a defendant's postarrest statements, the suppression court is required to permit the defendant to "delve fully into

> the circumstances attendant upon his arrest", for "[a] statement, voluntary under Fifth Amendment standards, will nevertheless be suppressed if it has been obtained through the exploitation of an illegal arrest."

(Citations omitted). See also People v. Lopez, 56 A.D.3d 280, 867 N.Y.S.2d 83 (1st Dep't 2008); People v. Roberts, 81 A.D.2d 674, 441 N.Y.S.2d 408 (2d Dep't 1981); People v. King, 79 A.D.2d 1033, 437 N.Y.S.2d 931 (2d Dep't 1981); People v. Specks, 77 A.D.2d 669, 430 N.Y.S.2d 157 (2d Dep't 1980). See generally People v. Williamson, 79 N.Y.2d 799, 800, 580 N.Y.S.2d 170, 171 (1991) ("We agree that it was error to restrict cross-examination under these circumstances . . . . Unlike the Appellate Division, however, we conclude that the error requires a reversal") (citation omitted); People v. Garriga, 189 A.D.2d 236, ___, 596 N.Y.S.2d 25, 29 (1st Dep't 1993) ("We also find reversible error in the excessive constraints placed upon defense counsel in cross-examination of the People's witnesses both at the Mapp hearing and at trial").

Practically speaking, probable cause hearings are granted routinely as a matter of judicial and prosecutorial economy. In the authors' experience, many prosecutors are willing to stipulate to a so-called Huntley/Dunaway/Mapp hearing. Such hearings tend to resolve most of the issues that would arise at trial, and give both sides a preview of the case (which generally results in a pre-trial disposition). Thus, pre-trial hearings are often a very efficient use of scarce judicial resources.

Another factor warrants consideration. Many people accused of DWI have no prior experience with the criminal justice system. They expect to be treated fairly and impartially by both the People and the Court. When the People vehemently oppose the granting of a probable cause hearing, and the Court finds that an arrest was lawful based solely on a police officer's hearsay accusations, the defendant is often left with the perception that the system is biased and unfair, which undermines respect for the rule of law.

What is bail?

"Bail is the *right to release* pretrial."

U.S. Supreme Court

Stack v. Boyle (1951)

"The amount must be no more than is necessary to guarantee his presence at trial." People ex rel Lobell v. McDonnell, 296 NY 109, 111 (1947).

But what is it really?

"[U]sually one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?" —Robert F. Kennedy

Bail over the decades:

In 1990, 37% of felony cases in the us had money bail set.

1990

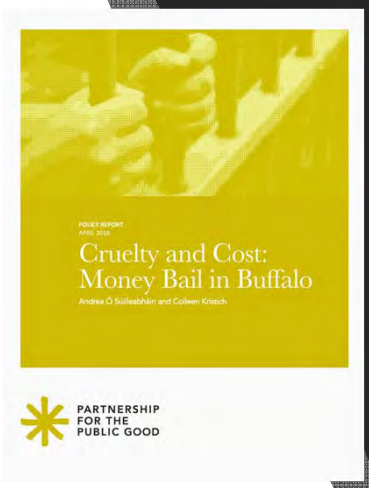
2009

By 2009, that percentage increased to 61% of all felony cases.

Money bail is out of reach

The average felony bail set in the US is $10,000.

Yet almost half of all Americans do not have $400 on hand in case of emergency.



Erie county's criminal justice system

- Buffalo's Partnership for Public Good published Cruelty and Cost: Money Bail in Buffalo in April 2018. They found:
- 1,200 people incarcerated in Erie County on any given day
- 64% are people held pretrial
- Observed 240 arraignments handled by six city court judges
- Median bail observed on those 240 cases was
- $1,000 for a violation,
- $5,000 for a misdemeanor, and
- $10,000 for a felony

Kunkeli v. Anderson (January 31, 2018)

"It is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution."

Judge Maria Rosa
State Supreme Court
Dutchess County, NY

Pushing ability to pay at a bail hearing

The Vera institute of Justice has developed a bail "calculator" that produces an assessment of a person's ability to pay based on answers to 30 questions about a person's sources of income, liquid assets, and financial obligations. Prior to arraignment, attorneys should conduct an initial interview and assess the amount and form of bail that would be appropriate, and then provide that information to the court.

Bail Calculator

BACKGROUND INFORMATION

NAME:

CELL PHONE: (___ ___ ___) ___ ___ ___ ___

ZIP CODE: ___ ___ ___ ___ ___

NYSID: ___ ___ ___ ___ ___ ___ ___

DOB: ___ / ___ / ___

GENDER ☐ MALE ☐ FEMALE ☐ NON BINARY

CASE INFORMATION

DATE (M/D/Y) ___ / ___ / 2018

AR:

DOCKET #: 2018BX ___ ___ ___ ___ ___

TOP CHARGE:

☐ DAY SHIFT ☐ BRONX DEFENDERS

☐ EVENING SHIFT ☐ LEGAL AID SOCIETY

☐ WEEKEND SHIFT ☐ 18(B) ☐ OTHER

INCOME

ARE YOU A STUDENT? ☐ YES ☐ NO

ARE YOU EMPLOYED? ☐ YES ☐ NO HOW LONG? ___ YEARS ___ MONTHS

EMPLOYER NAME:

HOURLY OR SALARY? ☐ HOURLY ☐ SALARY

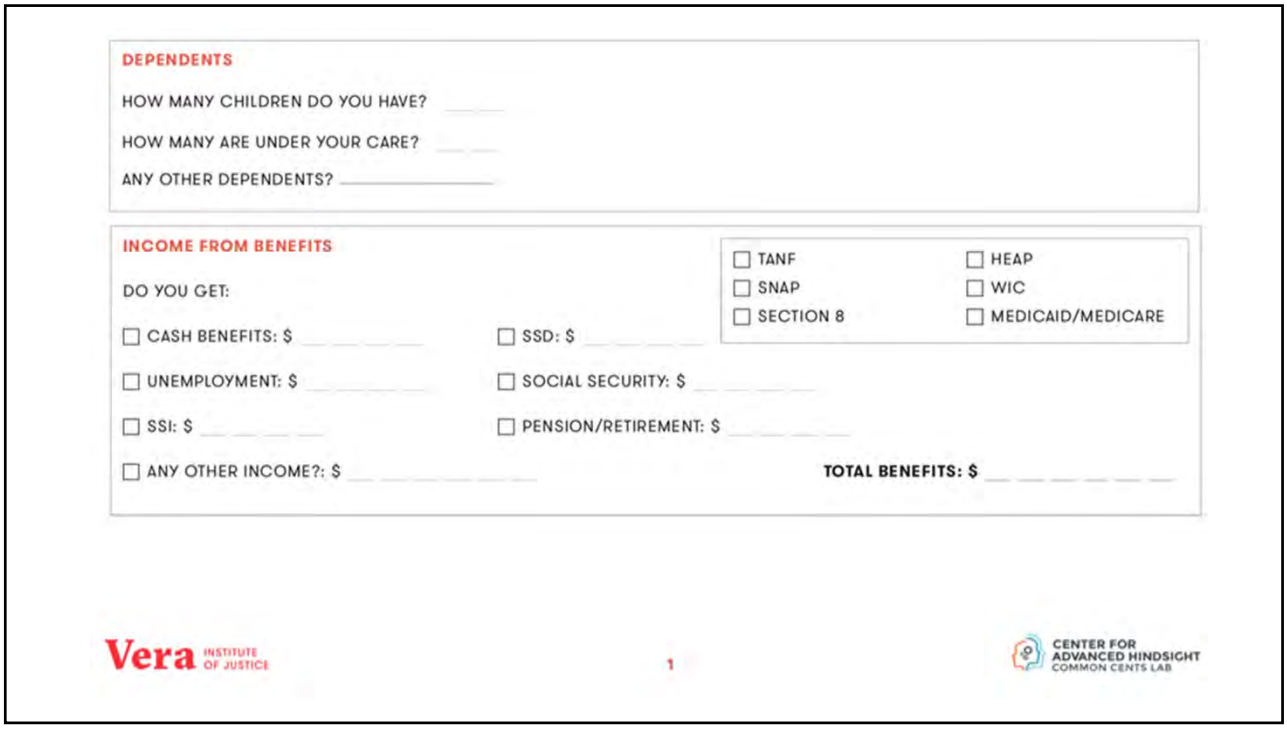
HOURLY WAGE: $ ___ /HR

HOURS PER WEEK: ___ /WK

ANNUAL SALARY: $

MONTHLY SALARY: $

TOTAL MONTHLY INCOME: $



DEPENDENTS

HOW MANY CHILDREN DO YOU HAVE? _____

HOW MANY ARE UNDER YOUR CARE? _____

ANY OTHER DEPENDENTS? _____

INCOME FROM BENEFITS

DO YOU GET:

- ☐ CASH BENEFITS: $ _____
- ☐ SSD: $ _____
- ☐ UNEMPLOYMENT: $ _____
- ☐ SOCIAL SECURITY: $ _____
- ☐ SSI: $ _____
- ☐ PENSION/RETIREMENT: $ _____
- ☐ ANY OTHER INCOME?: $ _____

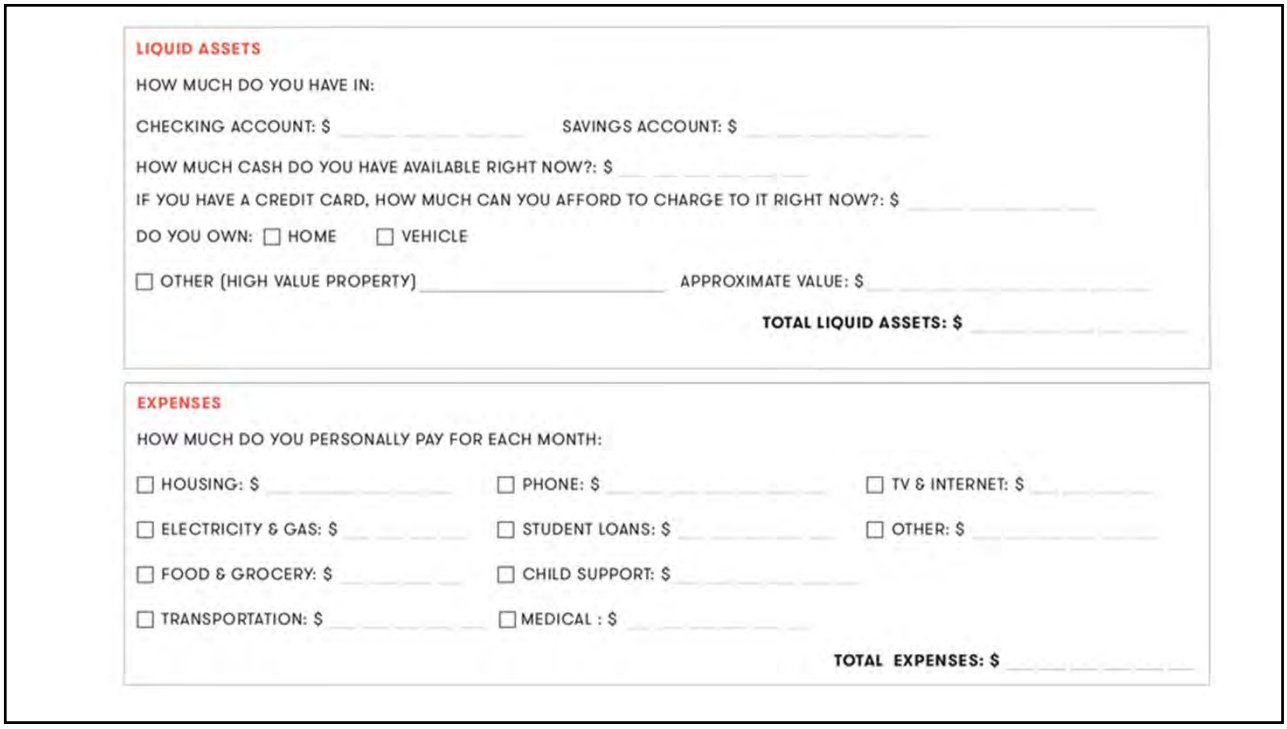
- ☐ TANF
- ☐ SNAP
- ☐ SECTION 8
- ☐ HEAP
- ☐ WIC
- ☐ MEDICAID/MEDICARE

TOTAL BENEFITS: $ _____

Vera INSTITUTE OF JUSTICE

1

CENTER FOR ADVANCED HINDSIGHT COMMON CENTS LAB



LIQUID ASSETS

HOW MUCH DO YOU HAVE IN:

CHECKING ACCOUNT: $ _____ SAVINGS ACCOUNT: $ _____

HOW MUCH CASH DO YOU HAVE AVAILABLE RIGHT NOW?: $ _____

IF YOU HAVE A CREDIT CARD, HOW MUCH CAN YOU AFFORD TO CHARGE TO IT RIGHT NOW?: $ _____

DO YOU OWN: ☐ HOME ☐ VEHICLE

☐ OTHER (HIGH VALUE PROPERTY) _____ APPROXIMATE VALUE: $ _____

TOTAL LIQUID ASSETS: $ _____

EXPENSES

HOW MUCH DO YOU PERSONALLY PAY FOR EACH MONTH:

- ☐ HOUSING: $ _____
- ☐ PHONE: $ _____
- ☐ TV & INTERNET: $ _____
- ☐ ELECTRICITY & GAS: $ _____
- ☐ STUDENT LOANS: $ _____
- ☐ OTHER: $ _____
- ☐ FOOD & GROCERY: $ _____
- ☐ CHILD SUPPORT: $ _____
- ☐ TRANSPORTATION: $ _____
- ☐ MEDICAL : $ _____

TOTAL EXPENSES: $ _____

CALCULATIONS

TOTAL MONTHLY INCOME: $ _____ +

TOTAL LIQUID ASSETS: $ _____ +

TOTAL BENEFITS: $ _____ +

TOTAL EXPENSES: $ _____ –

GROSS MONTHLY DISPOSABLE INCOME: $ _____

INDIVIDUAL BAIL ESTIMATE

☐ PARTIALLY SECURED: $ _____

☐ UNSECURED: $ _____

☐ SECURED: $ _____

☐ CASH: $ _____

☐ CREDIT: $ _____

OTHER PAYERS

IS THERE SOMEONE I CAN CALL TO HELP YOU WITH BAIL? ☐ YES ☐ NO

RELATIONSHIP? ☐ SPOUSE/PARTNER ☐ PARENT ☐ SIBLING ☐ EMPLOYER ☐ OTHER

NAME: _____ PHONE: _____

SURETY CONTRIBUTION: $ _____

BAIL RECOMMENDATION:

☐ PARTIALLY SECURED: $ _____ ☐ UNSECURED: $ _____ ☐ SECURED: $ _____ ☐ CASH: $ _____ ☐ CREDIT: $ _____

CASE OUTCOME

☐ RESOLVED ☐ RELEASE ON RECOGNIZANCE ☐ SUPERVISED RELEASE ☐ BAIL SET

D.A. REQUEST: $ _____ BAIL AMOUNT SET: $ _____

WAS THE BAP RECOMMENDATION MADE ON THE RECORD? ☐ YES ☐ NO

Financial Assessment	Responses
Introductory Information	
First Name	
Last Name	
NYSID	
Employment Information	
Are you paid hourly or by salary?	
Hourly wage (if paid hourly)	$ -
Hours per week (if paid hourly):	0
Weekly income (if hourly):	$ -
Monthly income (if hourly):	$ -
Monthly income (if commission):	$ -
Annual Salary:	$ -
Monthly income (if salary):	$ -
Cash Benefits	
Do you receive cash assisstance like Temporary Assistance for Needy Families (TANF)?:	$ -
Do you receive unemployment income?	$ -
Do you receive Supplemental Security Income (SSI)?	$ -
Do you receive Social Security Disability (SSD/SSDI)?	$ -
Do you receive Social Security (retirement)?	$ -
Do you receive any other pension or retirement income?	$ -
Do you receive any other income?	$ -
Income from cash benefits:	$ -
Liquid Assets	
Checking Account	$ -
Saving Account	$ -

Bail Recommendations:	
Misdemeanor-Partially secured/unsecured	$ -
Felony- Partially secured/unsecured	$ -
Misdemeanor-Cash	$ -
Felony-Cash	$ -
Misdemeanor- Credit	$ -
Felony- Credit	$ -
Immediate Cash, Partially Secured	$ -

Outcome		
Bail recommendations made:		
	$ -	
DA Request		
Case outcome:		
Bail Amount Set		
Was BAP recommendation made on record?		

Criminal Procedure Law § 520.10

- Authorized forms of bail:
- (a) cash bail
- (b) an insurance company bail bond
- (c) a secured surety bond
- (d) a secured appearance bond
- (e) a partially secured surety bond
- (f) a partially secured appearance bond
- (g) an unsedured surety bond
- (h) an unsecured appearance bond
- (i) credit card or similar device;...

Vocabulary

- obligor = person paying bail
- principal = defendant
- surety = person other than defendant
- appearance bond = bail where defendant is obligor
- surety bond = bail where someone else, and maybe also defendant, is obligor

Partially secured surety bond

- Bail bond secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking where the obligor consists of one or more sureties. One of the sureties may be the principal/defendant.

Partially secured appearance bond

- Bail bond secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking where the obligor is the principal/defendant only.

Unsecured surety bond

- Bond not secured by any deposit of or lien upon property but with a promise to appear in court where the obligor consists of one or more sureties. One of the sureties may be the principal/defendant.

Unsecured appearance bond

- Bond not secured by any deposit of or lien upon property but with a promise to appear in court where the obligor is the principal/defendant only.

- Bail must be set at $2,500 or less for misdemeanors and felonies Credit card bail must be paid at courthouse Cannot split bail payment between credit card and cash

Credit card

Criminal Procedure Law § 510.30

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:

(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 [FN1] of the family court act , or, of pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any; and

Criminal Procedure Law § 530.30

1. When a criminal action is pending in a local criminal court, other than one consisting of a superior court judge sitting as such, a judge of a superior court holding a term thereof in the county, upon application of a defendant, may order recognizance or bail when such local criminal court:

   (a) Lacks authority to issue such an order, pursuant to paragraph (a) of subdivision two of section 530.20 ; or

   (b) Has denied an application for recognizance or bail; or

   (c) Has fixed bail which is excessive. In such case, such superior court judge may vacate the order of such local criminal court and release the defendant on his own recognizance or fix bail in a lesser amount or in a less burdensome form.

2. Notwithstanding the provisions of subdivision one, when the defendant is charged with a felony in a local criminal court, a superior court judge may not order recognizance or bail unless and until the district attorney has had an opportunity to be heard in the matter and such judge has been furnished with a report as described in subparagraph (ii) of paragraph (b) of subdivision two of section 530.20 .

3. Not more than one application may be made pursuant to this section.

Make your appeal count!

- entitled to only one review under § 530.30 by a county court judge
- OCA directive that a bail review on misdemeanors must be granted within 5 days, but often done the same or very next day for any type of case
- do not have to argue “change of circumstances”
- DA must be notified and given opportunity to be at hearing
- make your arguments again under § 510.30 and § 520.10 for alternative forms of bail and ability to pay

SETTING PEOPLE FREE:

OR SECURING RELEASE OF YOUR HUMANIZED CLIENT

ROBERT G. WELLS, ESQ.
Attorney at Law
120 East Washington Street
Syracuse, New York 13202
Telephone: (315) 472-4489

SETTING PEOPLE FREE:

OR SECURING RELEASE OF YOUR HUMANIZED CLIENT

1. Cash Bail Bond System/Industry
    a. People Held for Minor and Non-Violent Offenses
        i. Lose Jobs
        ii. Lose Home
        iii. Lose Private/Civil Medical Providers and Medications
        iv. Plead Guilty to Get Out Even If Not Guilty
2. The Laws (Bills) are Changing.
    a. Especially for Misdemeanor and Non-Violent Felonies.
    a. Different Experiences in Different Jurisdictions
    b. More Similar to Federal Release/Detention Structure
        i. Presumption in Favor of Release?
        ii. Unsecured Bond; Partially Secured Bond
        iii. Treatment then Release
        iv. Pretrial Supervision
        v. Electronic Tracking
    c. Change Ain't Always Good for Everyone.
        vi. Nominal Bail
        vii. Charitable Bail Organizations
        viii. Free 'em or Keep 'em?
            1. Kneejerk: Uh…I'll Keep 'em.
3. Humanize First
    a. Hardest Truth
        i. To Represent Someone Else, You Have to Know Yourself.
            1. What Are Your Own Strengths and Weaknesses?
            2. What do you have to offer them?
        ii. To Represent Someone Else, You Also Have to Know Them.

iii. Discovering the Person.

3. Shut Up and Listen
4. Don't Interrupt
5. They may hand you the defense or the keys to release.
6. I Don't Bring Charging Documents to First Meeting
    a. I want to know what you want to tell me first.
        i. That's more important to me now.
        ii. Background, not the case, brings release.
    b. We'll get to what others say soon enough.
7. May be first time someone ACTUALLY listened to their story.
8. May be first time someone tells their story.
    a. Fully
    b. Honestly
    c. Remember: It's a story, not a speech.

4. Theory Will Follow Story. Theme Will Follow Theory…All the Way to Verdict.
    a. Discovering the Story.
        1. Spence Article attached.
        2. Every Client and Every Case is a Story.
        3. The Story is Already There
            a. You are a reporter, not an author.
        4. Hardwired for Stories
            a. Movies to Commercials to Songs
            b. Best Teaching is Through Stories
                i. Old Jewish Teaching: Truth, naked and cold, had been turned away from every door in the village. Her nakedness frightened the people. When Parable found her she was huddled in a corner, shivering and hungry. Taking pity on her, Parable gathered her up and took her home. There, she dressed Truth in story, warmed her and sent her out again. Clothed in story, Truth knocked again at the doors and was

readily welcomed into the villagers' houses. They invited her to eat at their tables and warm herself by their fires.

c. Release may be its own Chapter in the Story of Your Case

5. Best to Make the Strongest Arguments Irrespective of Changes in the Law.
   a. It will take a while to adjust Judicial and Prosecutorial Thinking
6. There's a Statute for That
   a. CPL §510.30 (2):

2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:

(a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section 354.2 [FN1] of the family court act , or, of

pending cases where fingerprints are retained pursuant to section 306.1 of such act, or a youthful offender, if any; and

(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vii) Where the principal is charged with a crime or crimes against a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, the following factors:

(A) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household as that term is defined in subdivision one of section 530.11 of this title, whether or not such order of protection is currently in effect; and

(B) the principal's history of use or possession of a firearm; and

(viii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(ix) If he is a defendant, the sentence which may be or has been imposed upon conviction.

7. Apply in Writing Whenever Possible
    a. District Attorney Never Responds in Writing

b. In Bail Application tell the Story of Client's History, Background and Circumstances
    i. Don't Sound Like a Lawyer
c. Address Each Statutory Factor Seriatim
d. Support with Documentation Available
    i. Family
    ii. Letters of Support and Character
    iii. Education
    iv. Medical
    v. Treatment
    vi. Employment

8. Bring People to Hearing
    a. Visible Support
    b. Can Testify or Otherwise Be Heard on:
        i. Willingness to Post
        ii. Willingness to House
        iii. Willingness to Employ
        iv. Verify Facts of Application
        v. Speak to Release Factors Within Personal Knowledge

9. Example of Application to Be Admitted to Bail or Recognizance:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

APPLICATION TO BE ADMITTED TO BAIL OR RECOGNIZANCE

Indictment No.:
Index No.:

CARL CLIENT,

Defendant.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

ROBERT G. WELLS, an attorney admitted to practice before the Courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. That I am the attorney of record for **CARL CLIENT** and am fully familiar with all of the facts and proceedings heretofore had herein.

2. That this Application is made to admit **CARL CLIENT** to bail or recognizance during the pendency of this prosecution pursuant to Criminal Procedure Law §510.30 (2) (a).

3. That **CARL CLIENT** voluntarily and willingly waived extradition from his life-long home state of Georgia to appear before this Court and defend against these charges.

5. An application is pending before this Court to admit pro hac vice, **HERBERT LAWYER, ESQ.,** who is **CARL CLIENT's** counsel in Georgia, to be co-counsel in the instant matter.

6. That annexed hereto, fully made a part hereof as if fully set forth here at length, and marked Exhibit "A", appears a letter from **HERBERT LAWYER, ESQ.** wherein he relates and represents to this Court his familiarity with the character of **CARL CLIENT** and sets out the experience he has had with **CARL CLIENT** in representing him. It appears, upon information and belief, that **CARL CLIENT** stands before this Court with no convictions for any crime, except for an ancient conviction for driving under the influence of alcohol in or about 1998, some twenty-one years ago.

7. **Mr. LAWYER** reports no history of failure to appear in Court by Mr. **CLIENT**, nor the issuance of any bench warrant to require **Mr. CLIENT'S** attendance at any court proceeding at any time. On the contrary, **Mr. CLIENT** has appeared willingly, voluntarily, and without fail at each and every court appearance every time. This is irrespective of whether the charge was small, or grave in nature and consequence. It is simply not Mr. **CLIENT's** nature to abscond in the face of charges. It is provably demonstrated from his history.

8. **Mr. LAWYER** further has provided information and documentation regarding nine separate parcels of real property owned by **Mr. CLIENT'S** parents in Georgia which are of considerable value and are offered to secure his release, or to secure any bail or bond as ready collateral for such release. **Mr. CLIENT's** parents will gladly pledge these properties without any fear that **Mr. CLIENT** will abscond or fail to appear.

9. **Mr. LAWYER** states: "I unhesitatingly assure Your Honor that it would be condign to enlarge **Mr. CLIENT** on reasonable bond. I leave to the court, as I must, to its sole determination the amount." **Mr. LAWYER** stands ready to answer any questions the Court wishes to pose to him.

10. I referred the Court back to **Mr. LAWYER'S** letter with the attached real property documentation.

11. **Mr. CLIENT** is employed. He maintains and manages the subject real properties from the top down. He rents them. He collects rent. He repairs and maintains the properties and grounds. He attends to payment of taxes. Any and all matters related to these properties are done and accomplished by **Mr. CLIENT.**

12. **Mr. CLIENT's** parents, **CAROL PARENT** and **EDDIE PARENT,** are not young people. The income from these properties are important to them. Without their son, these

properties will fall into disrepair and the management of them will become a burden they may not be able to abide. They need their son, in this respect especially. **Mr. CLIENT's** parents state that "We will gladly post, as security, all of the property that we own, every inch of every piece." They state they are confident that he will not flee the jurisdiction. They are willing to risk a lifetime of struggle upon this proposition. They represent that he will appear promptly when required to do so.

13. **Mr. CLIENT's** parents further point out that **Mr. CLIENT's** many children rely upon him for their support and need him to be released as well.

14. A true and accurate copy of the sworn and verified letter from both of **Mr. CLIENT's** parents is annexed hereto, made a part here of, and is marked as Exhibit "B".

15. The Court will next find annexed hereto a letter from **SUSAN SMITH** with whom **Mr. CLIENT** enjoys a stable and long relationship. She relates to the Court that they have seven children together. She is expecting their eighth child on February 9, 2019. I am informed and believe that she is in the hospital at this writing for delivery of that child.

16. **Ms. SMITH** relates that their family is suffering financially and otherwise as a direct result of **Mr. CLIENT's** incarceration in New York State. She represents and believes fervently that **Mr. CLIENT** will follow whatever conditions may be attached to his release. She states that he has shown his reliability in the past whenever required to appear in court. She states under no circumstances would **Mr. CLIENT** abandon her and the children. She states specifically "He will never leave us. He will never flee the jurisdiction."

17. Pursuant to CPL §510.30 (2) (a) (i), the foregoing speaks to **Mr. CLIENT's** character, reputation and habits. Upon information and belief there are no difficulties or problems with **Mr. CLIENT's** mental condition and the same is not at issue.

18. Pursuant to CPL §510.30 (2) (a) (ii), the foregoing speaks to **Mr. CLIENT's** employment and financial resources. He does not have the financial resources with which to abscond, relocate, and hide for a lifetime. Nor would he be able to do that with eight children and their mother.

19. Pursuant to CPL §510.30 (2) (a) (iii), the foregoing speaks to **Mr. CLIENT's** family ties and length of his residence in his community. While **Mr. CLIENT** does not have substantial ties with this community, he does have lifelong and permanent ties to his own community.

20. Pursuant to CPL §510.30 (2) (a) (iv), the foregoing speaks to **Mr. CLIENT's** criminal record, which is nonexistent. He has otherwise offended no law, rule, or regulation even of his home state, except for a driving violation twenty-one years ago.

21. Pursuant to CPL §510.30 (2) (a) (v), upon information or belief we are unaware of any previous adjudication of **Mr. CLIENT** as a juvenile delinquent.

22. Pursuant to CPL §510.30 (2) (a) (vi), **Mr. CLIENT** demonstrably has always appeared, unfailingly and promptly, for court appearances and has no history with respect to flight to avoid criminal prosecution whatever.

23. Pursuant to CPL §510.30 (2) (a) (vii) and (viii) regarding the weight of evidence against **Mr. CLIENT** and the available sentences if convicted, to date, we have been supplied with information from the Attorney General regarding eavesdropping warrants and pen registers. Beyond this, we cannot assess the alleged weight of the evidence. We know that no one factor in this statute is completely determinative. We will certainly not concede any fact, or concede any probability of conviction, and a weighing and balancing of all CPL §510.30 (2) (a) factors continues to militate in favor of ordering bail or recognizance for **Mr. CLIENT.**

24. Not only is the presumption of innocence in his favor, but he has voluntarily waived extradition to appear here and answer the charges. His lack of resistance to coming to New York betokens his intention to appear voluntarily whenever so required.

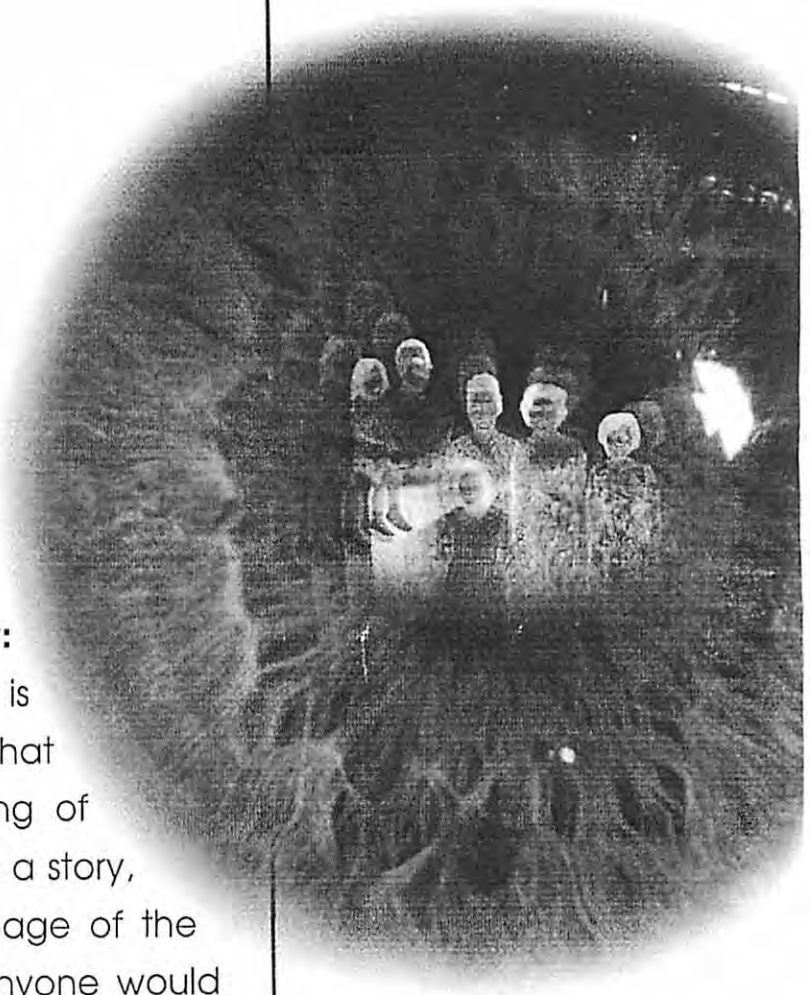
25. The Court may also impose one or more conditions upon releasing a principal or fixing bail which conditions or combination of conditions will be sufficient to ensure the appearance of **Mr. CLIENT**.

WHEREFORE, we respectfully pray this Court to admit **Mr. CLIENT** to bail or recognizance upon such reasonable terms and conditions as this Court deems just and proper.

_____

ROBERT G. WELLS
Attorney for **CARL CLIENT**
Office and Post Office Address
120 East Washington Street
Syracuse, New York 13202
Telephone: (315) 472-4489

Discovering the Story



Gerry L. Spence

Everything in life is a story: Everything. We are born—which is a story—and we die, the end of that story and perhaps the beginning of another. Our life in between was a story, a book, in fact, every day a page of the story. The question is whether anyone would want to read that book. More to the point, would we want anyone to read it?

Is it a boring, empty story, one we've lived devoted to distractions that lead nowhere like the bear in the cage at the zoo who walks endlessly back and forth across the full length of his small pen and at the conclusion of his life has traveled thousands of miles leading no where? At the end of our book of life what is written on the last page? What if, after having filled the book with the pages of our story, there is written but two words: "So what?"

The other night at a party I was sitting across the table from an older man who was accompanied by his breathlessly beautiful young wife, the raven hair, the peachy skin, the Barbie doll body wearing the scanty stuff to show it, and as the evening wore on I asked the woman seated next to me who the man was. She replied, "Oh, you don't know? That is Mr. So-and-So. He's a billionaire." She didn't know what businesses he owned or what he did to gain his fortune. She only knew he had a billion dollars. I said, "What must it be like to be smothered in billions of dollars and no one knows what you have done with your life except to become a billionare?"

She said, "I think that would be quite wonderful." She and her husband had many millions of their own. "Is it more important to have notoriety?" she asked with faint sarcasm.

"No," I said. "I was just wondering if it is more important that one's life's story, famous or not, tells something beyond the amount of money one has made." The book of life.

Discovering the Story

I think of the single mother I met the other day who raised seven children by herself. Her husband had abandoned her many years before. All of her children were educated and contributing members of society. The last page of her story would not read, "So what." But I have strayed from *my* story.

We view most of our lives in terms of story. We are fascinated by movies because of their stories in which we inhabit the life of those on the screen. Most advertisements we suffer on television are in story form. Even the nightly news is conveyed as story. *The Wall Street Journal* and the *New York Times* most often begin a feature with the story of an individual caught up in it.

"What's the story?" is the universal question. Our kids come home from school with a note from the teacher and we want to know the story. In short, almost every human action is experienced in the context of a broader story. The father going to work is engaged in the story of the office, the conflicts, the power struggles—and when he comes home at night he tells the story to his wife. The mother may be working too. Hers is likely a different story—one of sacrifice and frustration, one in which she needs to fulfill her nurturing role of mother and yet maintain her independence as an equally respected member of society.

That we see our lives and all of their chapters as stories is genetic. If we were to retreat in time to that moment when man became a member of a language-speaking species we would discover that all of his history, all of his religion, his belief system, his culture is told and handed down in story. Consequently man became a great storyteller. The wise old members of the tribe maintained their positions of respect based on stories they passed on and the learning their stories engendered. The story of great hunts and terrible battles were passed from generation to generation and became the history of the tribe. History, itself, is the connection of the present to the past by story.

How we perceive history depends on who is telling the story. Do we know our history from the story of the wealthy who founded this country—Washington, the richest man in the colonies, and Jefferson and all of the other slave owners who were men of wealth and position, or do we know the revolution from the standpoint of the small farmer who joined Washington's militia in order to earn a promised day's pay when pay was short? These are different stories and the history of our country depends on which story is being told.

The Bible is based on the stories that were handed down over the generations, sometimes not too accurately. But because they were the stories of our biblical ancestors they become revered, indeed, holy so that those stories are not only connected to the living, but to the dead, not only to the here and now, but, as it were, to eternity.

If we were to retreat in time to that moment when man became a member of a language-speaking species we would discover that all of his history, all of his religion, his belief system, his culture is told and handed down in story. Consequently man became a great storyteller.

We all have our own stories. Sometimes we can understand ourselves better if we can hear ourselves tell those stories to others. One of the stories of my childhood I remember best was waiting with my mother in our hunting tent for my father to come back from the day's hunt. Early in the morning when it was still dark my father took off alone with his rifle and a peanut butter sandwich stuck in the back of his hunting vest. Shortly he was lost to us in those vast, frightening mountains. He was after an elk. He hunted for the meat. In those depression days we lived on what my father put on the table from his hunting and what my mother harvested and canned from our garden.

My mother and I worried about my father all day. Neither of us dared say much because we were too afraid to consider what our lives would be in this wilderness without this powerful, protective man. To me it was the horror of all horrors. The day dragged on. To fill the time and to keep our minds off the worry we took a long walk into the woods. Always we were listening for the report of a rifle. Then we heard shots off in the distance.

We held our breaths. Were we hearing three shots, one quickly after the other, which my father said was his signal that he needed help? No, thank God, the shots were far apart. Perhaps it was another hunter who came on to a herd of elk. Perhaps my father was having luck this day. He was a great hunter and a man of the mountains. If anyone was safe out there it would surely be he. Still we worried.

Then it began to grow dark. But we remembered what he had told us many times: The best hunting was at dawn and dusk. We shouldn't be concerned. But telling us not to worry did not chase away the worries.

"Well, maybe he didn't get a shot all day and had to wait at a clearing hoping to get a shot," I said. "That would make him late."

"Yes, but maybe he got something earlier," my mother said, "and he's having to pack it down. You know how he does it—cuts it up into quarters and hauls a quarter down on his back for a ways until he's tired and then he goes back and gets the next quarter, and by the time he gets home it could be midnight."

But maybe he was lost, or maybe he fell and broke a leg and no one would ever find him. That was a maybe we didn't talk about. What would we do if he didn't come back? Now, every sound outside the tent was grabbed by our grasping ears. Was it the sound of his feet through the dry grass? Every noise in the night, the far off muffled night sounds, were heard. Could it be my father?

I remember walking with my mother in the near dark to the edge of the bluff overlooking the meandering willow bordered creek below so that we might have a better chance to hear his coming. The

night had grown darker and clouds had covered the stars. At last we could not see much beyond the rock ledge where we stood. How could my father see where he was going in such darkness? Surely he would fall into a crevasse or slip as he waded the creek. Surely he would be lost by now because there were no stars to guide him and he had no compass except the compass of his mind which he said had never failed him.

Then far across the way we heard what sounded like a tiny bell. What could that be? Hear it? There it is again! My father had no bells. We listened. The sound of the tinkling gradually grew louder. The ringing bell was coming toward us. Suddenly we were frightened. Some bell-ringer, some ghost, some monster ringing its way through the darkness was approaching. I grabbed my mother's hand and she squeezed mine.

Then out of the darkness burst my father, a wide smile on his face. And I ran to him and grabbed him and held on to him as if I would never let loose and I was weeping with joy. My mother just stood there holding back her tears and I heard her say, "I'm so glad you got home all right."

"Don't get the blood on you," my father said to me. His hands were covered with dried blood, and I knew what that meant: He'd made his kill and the blood was from his having dressed the elk. His hunting vest bulged in the back where he'd stuffed the elk's liver and its heart, and the blood had soaked through. The blood made me happy because as we all knew, he was a great hunter, better than all of the other hunters in the world. Now my father would make a fire and my mother would cook the liver for supper and we would be happy again, and live happily ever after.

I grabbed his bloody hand and held it as we walked back to the camp together, and the first thing I said to my father when we all got back to camp was, "Tell us the story, Daddy."

"As soon as we get this liver frying, I'll tell you all about it."

I couldn't wait, and I said, "No, Daddy, tell us now."

"What were the bells?" my mother asked.

"They were the bells on a string of pack horses that came along. They were going back to camp empty and the cowboy offered to haul down my kill. Good man."

"Tell us the story, Daddy," I insisted

And so he began. It was his story of stalking, of the excitement of the flush, the herd bolting though the timber, and how my father picked out a young bull and aimed through his old peep sight and led the bull just right—he illustrated how he moved his rifle in front of the running elk—and just at the moment the bull was about to disappear into the dense woods my father fired. He told how the bull fell to his knees and skidded across the forest floor, and how when he got to the bull, he was already dead—a clean shot through the heart. "You always aim just behind and a little above the elbow for a good heart shot," he said. "The bull never knew what hit him. Ought to be real tasty meat. No stress on the animal at all."

> We all have our own stories. Sometimes we can understand ourselves better if we can hear ourselves tell those stories to others.

My father's story became a part of my history—and his. It was a story that elevated my father even higher onto my hero's platform—this great hunter, this sure shot, this brave provider of the meat for our table. This man, my father, who respected the animal that he killed and was happy that he'd made a clean shot and hadn't wounded the bull so there'd been no suffering. And I knew that he so respected the animals that he brought home that nothing was wasted, not the heart, not the liver—not even the tongue which my mother made into delicious sandwiches with mustard and lettuce. And he sent off the hide for tanning from which my mother made our leather winter jackets.

This is but one of many stories of my childhood. Perhaps you know me better from having read this story. At last, all of us are a compendium of stories which, when told, tell us more about the person than all of the pedantics of psychoanalysis. Indeed, that discipline itself is founded on the interpretation of the patient's story. Without the patient's story there can be no psychiatrist. And too often, I suspect, the psychiatrist's analysis tells us more about the psychiatrist's story than about the patient.

If we are to be successful in presenting our case we must not only discover its story, we must become good story tellers as well. Every trial, every presentation, every plea for change, every argument for justice is a story. If the argument is reduced to the abstract language with which we are so often assaulted, nothing usually happens.

The other day a woman told me the story of how she and her younger brother were caught out in a hurricane. If we are told that hurricanes consist of high-velocity winds blowing circularly around a low-pressure center known as the eye of the storm which develops when warm and saturated air prevalent in the doldrums is underrun and forced upward by denser, cooler air we may know something of the mechanics of a hurricane, but we know little about it.

But when the woman told me her story, I immediately knew something of a hurricane that only her story could tell. She began, "When I was a little girl about seven, one day my five-year-old brother and I had been playing down by the beach when the wind suddenly came up without warning and the waves began pounding the shore. We were so taken in our play that we paid no attention to the growing storm. Finally the breakers grew higher and higher and the wind became so strong that Jimmy had to hold on to me so that he wouldn't be blown along the ground like a piece of paper in a windstorm. The waves started pounding after us, chasing us, and we were screaming. But the noise of the wind and the sound of the beating waves was so loud that no one could hear us.

"Some of the waves were as high as telephone poles, and across the way we saw

the roof of the our neighbor's house go flying down the street. We began running as fast as we could but we couldn't run fast enough to stay ahead of the wind. I almost lost Jimmy and grabbed him by a foot as he blew past me. I could hear the waves beating on the shore behind us, chasing us like some monster. I knew we were going to die. We started to crawl on our hands and knees toward our house.

"Then I saw our mother come rushing out the door, but the wind caught her and blew her back into the house. The door flew off. I saw her come out again holding on to the door sill. She was screaming, but we couldn't hear her words. I don't know how we did it, but at last we got to the house and my mother ran out and pulled us inside. We stumbled down to the cellar and sat there crying. Then we saw we were safe and began to laugh. It was only the wind, my mother said."

How to discover the story. What is the story of our case? It's not just a trial about "the plaintiff" who was injured in a car accident and suffered damages. It's not just a story about a complaining employee who has been discharged because he's too old. Nor is it a diatribe about the evils of polluting the environment. Such issues may be of interest to a select audience but nothing happens to the blood when we read the above sentences.

A prospective client, Danny Patterson, comes in. I ask him to take a chair and I pull one up. Nothing between us—no desk which sets up a psychological Berlin Wall that says that on my side of the desk resides all power and wisdom and that on his side of the desk is a frightened man who feels self conscious and afraid.

Danny is a slight, serious appearing man of about forty-five. If we ask simply what his case is about, here's what we will likely hear:

"Well, the cops came to our house—two big burly guys and they searched our house, tore things up and then arrested me and my wife, Judy, and took us in cuffs to jail. We were charged with possession of an illegal substance—marijuana—and with resisting arrest and assault on an officer with a deadly weapon. Our bail was set at $100,000 cash which we couldn't make. While we were waiting for our preliminary hearing the D.A. dismissed the cases against us because the stuff they took out of our house wasn't marijuana but some alfalfa leaves we kept in a plastic envelope to feed our guinea pig. We want to sue the police and the city for false arrest."

Obviously that's not the whole story. Most people can't explain the horror they've experienced, and most interviewers can't hear or feel what that experience must have been like. As Danny tells us his story let's *become* Danny. Let's try to *feel* what he and his wife felt and experienced.

LAWYER: Danny, take me to that morning when they arrested you. Let's actually be there, right now. What are you doing?

DANNY: Well, I'd just let the dog out.

> At last, all of us are a compendium of stories which, when told, tell us more about the person than all of the pedantics of psychoanalysis. Indeed, that discipline itself is founded on the interpretation of the patient's story.

LAWYER: No, you are *letting* the dog out."

DANNY: Right. (He picks up on the idea that we want to be in the present.) It's cold and fresh snow is on the ground and the dog starts raising hell, barking at something around the side of the house. I see some tracks in the snow and I step off the porch and follow the tracks and then I see 'em—a couple of toughs looking into our bedroom window.

(As the story proceeds we continue absorbing the experience still attempting to *become* Danny Patterson. I often rely on a magic phrase that lets the protagonist know I understand him and that helps me experience his feelings. The phrase is, "It must have been..." or "You must be...")

Example:

LAWYER: So you must be startled and suddenly afraid. So what are you doing"

(Note: The present tense brings the event to the here and now instead of a memory.)

DANNY: I holler at 'em. "What the hell you doin' there?" And they come charging at me, the big one in the front. He's a real mean looking guy in a rumpled suit. About six-two. The other one, a shorter one, sorta fat, is in a suit and tie, right behind them. If they hadn't been in suits they'd a looked like a couple of bums.

LAWYER: If I were you I'd be running back into the house, slamming the door and locking it. (We project ourselves into Danny's experience, trying to think and feel as he did at that moment.)

DANNY: That's just what I'm doing.

LAWYER: What happens next?

DANNY: I call the police.

LAWYER: What are you saying to them?

DANNY: I say, "This is Danny Patterson at 24 Melrose Lane and there's a couple of thugs trying to break into my house. And before I can get their answer the thugs are beating at my front door.

LAWYER: What are you doing now?

DANNY: I'm so scared I drop the phone. I'm not about to open that door. I run to the closet and get my shotgun. I hunt birds. I pump in a shell and holler, "The cops are coming. You get the hell out of there." And this guy hollers back, "We are the cops."

LAWYER: (I feel how it must be: I have a gun in my hands. It's loaded. A couple of toughs are beating down my front door. They claim they're the cops. The cops have no business here. I haven't done anything wrong. If I let them in they may rob us and kill us.) What are you saying back to these guys, Danny?

DANNY: I say, "You got a warrant?" And the cop says, "You let us in peaceful like and it'll go a lot easier on you."

LAWYER: You must be shaking all over. Probably can't hold the gun steady. You must be thinking, I never shot a person in my life.

DANNY: Yes.

LAWYER: What happens next?

DANNY: I decide to let 'em in. About that time my wife, Judy, comes out of the bedroom. She's been in bed with the flu. She suffers from asthma too. She's coughing and asking me what's going on. She's scared to death when she sees me standing in front of the door with a shotgun and she hollers at me, "Danny, what are you doing?"

LAWYER: You must be thinking, What else can I do? Maybe they are the cops. But what if they aren't and they try to harm Judy or me, and I have to shoot one of them? Maybe both of them? You must really be scared.

(The thugs turn out to be cops, show their badges. Then they ask him if they can search his house. He asks why and they say, "For whatever the fuck we're looking for.")

LAWYER: What are you doing now, Danny?

DANNY: I'm just standing here not saying anything. I never gave them permission. They just start tearing things apart. I'm horrified. They're pulling out everything in the closets and dumping our clothes all over the floor. They're taking the shoes out of their racks and scattering them wherever they drop. They're pulling out all the pans and dishes, and they break a couple of plates and one cup—my favorite that my grandfather gave me. They're dumping the cupboards bare and scattering sugar and flour and cereal all over the kitchen. They're emptying the garbage can in the middle of the floor on top of the flour. Judy and I are stunned. We're afraid to say anything for fear we'll be beaten or killed. One of cops, the fat one, already took my shot gun, "for evidence," he says.

LAWYER: Are either of the cops saying anything to you?

DANNY: The tall cop says, "You are hiding the meth, you meth-head." I'm trying to tell him I don't even know what the stuff is, and they just keep on threatening to wreck our house if I don't tell them where it is.

LAWYER: Danny, what am I seeing when I look at this tall cop?

DANNY: He gets up close to me and lights a cigarette and throws the match on the floor. We don't allow smoking in our house. He's hollering in my face.

LAWYER: But what does the cop look like up close, Danny?

> Every trial, every presentation, every plea for change, every argument for justice is a story. If the argument is reduced to the abstract language with which we are so often assaulted, nothing usually happens.

DANNY: He's got bad teeth in front and he needs a shave.

LAWYER: What else are you observing about this guy?

DANNY: I can smell the tobacco on his breath and his mouth is turned down when he talks. Kinda of a high pitched voice like Mike Tyson's. Funny voice for a big man and when he walks his arms swing around like they're hanging loose at his shoulders.

LAWYER: What is this guy saying now?

DANNY: He's saying, "Maybe we should tear up the fucking floor boards. Probably got it hidden down there. You better come clean or we'll tear up this fucking house. Dave, go get the crowbar." Judy is crying and coughing. I say, "Please, officer. I don't do drugs. I'm a boy scout leader."

Then the other cop says, "Hey, Dave, this meth-head is a fucking Boy Scout leader.'" They are both laughing and they dump over a chest of drawers to see what's behind it. All of the kids' pictures fall to the floor and the glass in a couple of the frames break.

LAWYER: What happens next?

DANNY: The cop named Dave hollers, "Bingo!" He jerks up a plastic bag from one of the drawers with some green leaves in it. He sticks the bag in his pocket, and he snaps the cuffs on me and tells the fat cop to cuff Judy and they haul us off to jail. Judy is still in her nightgown and robe. They let her get her slippers.

(We continue taking Danny's story, *but always in the present tense.* When Danny slips into the past tense we bring him back to the present. We want him to relive the experience, and we want to live it with him.)

DANNY: When we get to the jail they dump us into the drunk tank. We aren't drunk. We don't drink. It's cold in there. Judy is sick and coughing and barely able to talk. She lies down on one of the benches. She's shivering and I'm afraid she might die or something. I take off my jacket and lay it over her. She could die in here. Then a jailer comes by and looks in. I'm asking him for a blanket but he says, "We don't give drunks blankets. You sober up in the cold better." I'm trying to tell him we weren't drunk but he says they all say that.

LAWYER: What is it like in there? What do you see and smell? (Nothing creates a more vivid story than the smells and sights and sounds that are encountered.)

DANNY: The place stinks.

LAWYER: Of what?

(Danny is looking off into the distance as if he can see and smell and hear it all at this moment.)

DANNY: Smells like vomit. And a couple of drunks are throwing up over in the corner making a lot of noise, and a couple are lying on the floor—look dead—and one is screaming like he's seeing horrible sights—screaming and screaming, "They are two-headed dogs and they are coming!" We are both petrified with fear.

I beg the jailer to send someone for my wife's medicine. But he doesn't even answer me. I sit down beside Judy on the bench and put her head on my lap and try to cover her with my upper body as best I can and I kept checking to see that she's still breathing.

(I see the momentary approach of tears in his eyes that are quickly pushed back. Five days later the cops concluded that the substance was not marijuana and the D.A. dismisses the case, except the assault with a deadly weapons charge which they agreed to reduce to simple assault if Danny would plead guilty.)

Danny's story was made vivid and memorable because the lawyer put himself into the hide of Danny, tried to feel it as Danny felt it, and encouraged him to relive the experience by having him speak in the present tense. Most stories we hear from lawyers are poorly constructed previews of the story to come, previews that would not compel us to rush to the movie house.

We can tell our story to our secretary, or at home we can tell our story to our spouse who will add to it from Judy's standpoint. How is it to be the helpless woman, sick and embarrassed, in a drunk tank? We can tell the story to one of our friends over a cup of coffee and this time we can become Judy ourselves. As I become Judy and try to understand what she must have experienced I can almost hear her say, "I thought I was going to die I was so embarrassed being hauled off like that. I've never been in a jail. I've never even been in a police car. It was cold outside and the police car was cold and I was sick. All I could think of was, what will my mom and dad say? What will the neighbors think? What will I tell the boss? Maybe we will both lose our jobs. I was too scared and sick to know what to say or do."

After we tell a woman colleague or friend the story, let's ask her to become Judy before we interview Judy. We will likely garner better insights by this method that will aid us in the interview. Judy can tell us what it was like to be in jail with a bunch of drunken roughs. We can hear our friend, as Judy, say, "I was afraid I would be gang raped. I was too sick to scream. I thought, My God, what if I get a disease in here? I was having trouble breathing, and some drunk asked me, 'What's wrong with ya, sister?' and I couldn't even answer him."

On the second day, Judy was transferred to a woman's holding cell populated with prostitutes and drug addicts. One was banging her head on the concrete wall, and screaming. Another woman claimed Judy was a snitch and grabbed her by the hair and drug her to the floor and kicked her and cursed her. Judy was too sick to resist. When we talk with Judy we will be fully aware of the experiences she no doubt endured. If we state facts that are not accurate, she will correct us. But having experienced Judy beforehand, we will have acquired a knowledge of her experience that will help us with our questions to her and which will help her tell her story with more clarity and power.

Most stories we hear from lawyers are poorly constructed previews of the story to come, previews that would not compel us to rush to the movie house.

This is only the beginning of the story for Danny and Judy. We can discover, by becoming Danny and Judy, what it's like to face false charges, the nightmarish prospect of being confined in such an inescapable hell. We will feel what it's like to be dragged into court as a common criminal in those orange pajamas where people gawk at us, probably snickering behind our backs, and where we must look up to see a strange face peering down at us, a bored, unfriendly face on a man in black who is only too ready to pass judgment on us.

We'll discover the anger that wells up, that wants to burst free and strike back. But we're helpless to strike back, helpless to even curse our jailers. Our home—we saw it torn apart, the disrespect for our small castle. (The guinea pig died for lack of food and water.) The whole experience was like a rape.

Already we've seen the jail, its gray, miserable, cold walls of concrete and steel. We've felt the tension of people in cages like caged beasts and we've known fear, and smelled the evil smells of decaying men and lost women. We've heard the screams and the slamming of steel doors and the hateful orders of the jailers. It has been as if we were trapped in the darkest pits of human existence.

We can expand our understanding of the story by asking a friend, "What would you fear most in such a situation?" The friend might say, "I'd be afraid they might dummy up the evidence against me."

Let's tell the story to older people. Ask them "What would you feel if you were Danny? What would this experience mean to you?" The older person might talk about how the experience would smear a filthy smudge across an otherwise exemplary life.

Tell the story to children and ask them what would they feel if they were Danny or Judy and what would make them feel the worst. Perhaps the child will cry over the death of the guinea pig.

Tell the story to a tough neighbor and ask, "What would you have done?" He might say he would have shot the cop when he came bursting through the door. Eventually the full spectrum of emotions will come into view. It's not that the story gets longer. It's that it gets more pungent, deeper and more complete than the first view we were given.

The wonder of the method is that rarely will we discover from these diverse sources a fact or feeling that Danny and Judy didn't experience. Like most of us,

they are limited in their ability to bring to the surface those myriad fears and feelings that we have difficulty in remembering and expressing. By hearing the responses to this story from many we've come closer to experiencing what Danny and Judy went through. At last, it is an exercise in exploring the self—in discovering that part of us that seems small, powerless and frightened, that part that cries for justice. And only when we've discovered it in ourselves will we be ready to tell it in the courtroom when we ask a jury to assess damages for Danny and Judy's false arrest.

The focus group approach. Focus groups have nearly become standard in the last decade—a random gathering of persons in the locale where the trial will be held, people who represent a cross section of the jury one is likely to draw. Professionals who sometimes call themselves "trial consultants" go to some pains to gather several such representative groups to whom both sides of the various issues in the case are presented by the lawyers—usually from the same firm, and the deliberations of this "mock jury" are televised for later study after which the professionals share their insights with the lawyers on how best to present their case. Focus groups are used by the government, by politicians, by ad agencies, indeed, by any who want to know how best to discover the story and thereafter to tell it.

I use focus groups somewhat differently than many. Some see the process as a means to discover the most effective way to deal with some troublesome issue, how to form the lawyer's approach so that he'll have the best chance of winning. Too often it is an intellectual exercise that asks which set of facts and which arguments will best convince these inscrutable rascals we call jurors?

I believe the value of a focus group is to learn how to better tell the story and the best way to tell the story is always from the inside out. It's hard to tell our story until we know it, that is, until we've felt it—heard it with our third ear, seen it with the eyes of our client, until we have been gripped by it in deep places and have finally lived it. Only then are we ready to tell our story to the focus group—our objective, to learn even more: Have we told the whole story? What part did we omit? Were we blind to areas in the story that others readily saw? Sometimes we're oblivious to the obvious. I have never tried a case to a jury which, after the case was submitted and decided, a juror didn't tell me something about the case that I overlooked. We all have blind spots in our inner eyes.

Is it necessary to present our case to a focus group? I went for most of my career without knowing much about that tool. Instinctively I created my own focus group—my wife, family, friends, the cab driver, the local waitress at the coffee shop. The scope of this book does not extend to a detailed discussion of focus groups, but suffice to say, we can create our own without the expense of professional services simply by randomly gathering together any group of folks, the friends of the people in our office or a group we gather from an ad in the paper that might read: "Want to hear an interesting story? We'd like to get your reaction to it. If you have a free day next Thursday, call us. Our phone number." Numerous ways abound to bring people together. The last focus group I did in a death penalty case a few months before this writing cost a total of $100 for the juror's lunch, from which I gleaned untold riches in new insights.

> Eventually the full spectrum of emotions will come into view. It's not that the story gets longer. It's that it gets more pungent, deeper and more complete than the first view we were given.

Telling a summary of the story: Often people will ask what your case is about. Can you answer the question in a short paragraph? If you can't you haven't discovered the story yet. What, for example, is Danny and Judy's story about?

Perhaps it's a story about rape since rape occurs when something is taken from us against our will. Here Danny and Judy were first raped when their privacy was taken from them by police who were more like thugs than police officers and who used threats to enter their home. Then they maliciously ripped apart their home and ravaged it looking for illegal drugs. Danny and Judy were thrown into jail with drunks where they were humiliated and frightened, their rights as innocent citizens raped. They were raped because they'd committed no crime and were guilty of no wrong. It's a story about rape by the justice system that, when its rape was exposed, raped Danny and Judy one last time by demanding that they plead guilty to a crime they didn't commit. That in a nutshell is what this case is about—rape.

Discovering the theme: Every case, has a theme—like a title to a song. If we want raises for our school teachers, the theme may be, "Teachers need love too." If we want the boss to give us a raise, the theme may be, "An employee you needed needs you now." In Danny and Judy's case the theme might be, "The rape of Danny and Judy." As we tell the story the theme will find its way to the surface. When I write a book, the title never comes first. It grows out of the story.

In a recent pipeline explosion case that killed twelve people, all members of the same family, my theme was, "Their profit before people." In a suit against a company that negligently applied metal working fluids to increase the life of their tools to the permanent injury of its workers the theme was, "Save the tools, not the workers."

Why do we need a theme for our case? It usually contains the essence of our story—the quintessential statement that continues to emerge from out of the chaos of words, that redirects us to the cause when the arguments lead to other places and fuzz our focus. The theme speaks of the underlying morality of the case—what is right or what is wrong. It is the final argument in a single phrase.

Political candidates shroud themselves with themes and usually smother themselves in the flag. "He's tough on criminals." "The man you can trust." Nearly every advertised product has a theme: "Things go better with Coke; " "Less fill-

ing, tastes better," for Miller's. Budweiser focuses on our sense of slavery—the working person having toiled all day comes home for his reward— "This Bud's for you." Nike says, "Just do it." Towns have themes: "The Big Apple," for New York, "The World's largest Hot Springs," Thermopolis, Wyoming. The anti-abortionist's theme is "The right to life." Their opposite is, "Woman's choice."

Years ago when tobacco companies were permitted to lie to the public more openly than they now do we heard from Old Gold Cigarettes, "Not a cough in a carload." They failed to tell us how many cancers there were in a carload. And years later, targeting the women whom the tobacco companies wanted to addict, they told her, "You've come a long way baby," her pride to be represented by a cigarette in her mouth.

The theme is the means by which we focus the justice of our case. Every cause has a theme. "Give me Liberty or Give me Death," was a battle cry of the American Revolution. "Save the Union" was the theme of the Civil War. One of World War II's themes was "Making the World Safe for Democracy." Perhaps one of the many failures of the Vietnam War was that there was no convincing theme. In short, without a powerful theme we will win no wars, win no cases, sell no products, and advance no causes. A theme becomes the heart of our presentation.

Brainstorming: The setting of the theme will often become the product of brainstorming, a process by which the team sits down in a room without a phone, with lunch served in the room if necessary, and with people uncommitted to anything except the program ahead of them—brainstorming. It's fun because it's creative and ideas are bounced around the room like playing children. I like to assign one person the job of writing on the blackboard or a flip chart in large letters so we can all see and remember what has been suggested.

The brainstorming team is composed of anyone who is likely to have an original thought. Membership is not directed toward measurable intellect, or awesome degrees. It seeks people with creative minds. I enjoy the fresh minds of the young, the assistants in the office, the lawyers who have had experience in the area but are not drooping from the weariness of the ages. I like women as well as men. Children can offer suggestions that we will likely overlook.

The process is without structure. No one is in control. We experience the free association of the members' thoughts, ideas and emotions as they occur. One person's idea will tickle the creative process of others and again from others, and the storm of ideas and images and sayings will grow as the members play off of each other. The most frequent phrase heard is, "Yes, and..." as an emerging idea is born from one just offered by another. Someone writes the ideas down on a flip chart.

The group, in effect, becomes a single organism and the individuals composing the group are the cells. Someone familiar with the story, say, Danny and Judy's, will begin. Questions are asked. "How does this story make you feel?"

> I have never tried a case to a jury which, after the case was submitted and decided, a juror didn't tell me something about the case that I overlooked. We all have blind spots in our inner eyes.

"I'm pissed off at the police. I had a similar situation three years ago with a client and the police tried to cover it up."

"Yes, and we should make this sort of conduct public and get it stopped."

"Ask for punitive damages. Big time."

"What about the people of the town worrying about a big verdict increasing their taxes?"

"We have to deal with that in *voir dire*." (Jury selection)

"Can punitive damages be given against the city in this case?"

"Better assign that issue to Halley. She can give us an answer."

"This is a civil rights violation and we can go into Federal Court."

"Maybe. Let's get Halley to look at that too."

"Let's build a model of the holding cell and let the jury go into it. How big is it?"

"12 by 20. Too big to haul into the courtroom but we can get video shots of the real thing. We can get a court order."

"Yes. And the sounds in there, the drunks hollering and the doors slamming—scare you half to death. We can tape the sounds."

"Maybe we should find out the names of the prisoners who were in there at the time and talk to them."

"And the jail keepers. Subpoena them. Make them talk with depositions."

"We need to look at the police reports. What did those cops report?"

"Yes, and the booking process. We need to show how it feels to be booked, to have mug shots taken of you like you are a common criminal. We need the mug shots to show the jury. Then they fingerprint you and you're afraid to say anything because some cop might attack you."

"It's hard to believe that cops like that have nice families and kids at home and that they go to church on Sunday."

"Yeah, who are these cops? What have they done in the past? Where did they get the idea that there was meth in that house? We've got to take some depositions."

The questions go on and the ideas develop. Several hours can be constructively spent brainstorming the case and as the case emerges, more brainstorming sessions can be held. We will discover the kinds of documents that will be helpful, the investigation that needs completing, and we may even begin to inquire into the law of the case and which lawyer should lead the case. We may consider the court where the case ought to be filed, a choice of the judge, and even how the parties should dress when they go into court—the ideas are as endless and as free as the fertile minds that create them.

Free association brainstorming: Brainstorming can take on yet a different form. Our case may be about a farmer whose crop was insured against hail damage. The insurance company, let us call it the Honest Crop Insurance Company, refused to pay after the hail storm ruined Farmer Smith's crop of oats. The company claimed that the crop had already been destroyed by drought.

Setting the scene: Let's gather up four or five people in a room who know the fundamental facts of the case. First we want to set the scene. We have pictures of the farm and the oat fields that have been destroyed. The group has seen the pictures. But what do they really show? When these same pictures are shown to the jury they give a one dimensional view of the place. Isn't there more? If we took the jury to the farm after the hail storm, say a week later, what would they experience? The picture fails to touch most of what can be experienced at the scene with the five senses. Let's discover what has been left out:

Let's chose a single word that brings us to the case. Let's say, the word, oats. We might ask the question of the group, "What comes to mind when you hear the word, oats?"

"I see the field," Joyce, our legal assistant says.

"What does it *look* like?"

"It's yellow, the oat straw is lying on the ground all bent over. Looks like some giant animal has lain down on it. Oats are supposed to stand up and waive in the breeze."

"Can you walk through it?"

"Yes," Joyce says, already setting the scene in her mind. "But it's like walking on wet straw covered ground."

"Take a handful of the oats. How does it *feel* in your hand?"

"The straw is wet, and limp and the oat pods are empty. Sort of like holding wet noodles in your hand."

"Is there a *smell* to it?"

"Yes, the smell is musty. The oats have started to rot on the ground. The hail melted and the wet straw and the oats are molding."

"You're standing out there in the field in your shoes. What about them?"

"They're muddy."

"And as you stand there, what do you *hear*?"

"It is very eerie and quiet. Usually you would hear the sound of the farm equipment harvesting the grain. But things are strangely silent."

We may turn to another member of our brainstorming team: We ask Jack, the janitor, what he sees. He sees the distant farm house.

"How far away is it," we ask.

> Perhaps one of the many failures of the Vietnam War was that there was no convincing theme. In short, without a powerful theme we will win no wars, win no cases, sell no products, and advance no causes. A theme becomes the heart of our presentation.

"'Bout a quarter mile."

"What does the house look like?"

"It's a tall two-story plain looking house, white siding. Porch."

"Anything on the porch?"

"Yes, a couple of rocking chairs.

"Anyone on the porch or in the chairs?"

"No, but there's an old dog lying next to the rocker."

"Is he friendly?"

"Yes, he's one of those collie dogs. Wags his tail a lot and jumps up on you."

Next we might turn to Cindy, another lawyer in the firm. "What do you see inside the house, Cindy?"

"I see the farmer, Mr. John P. Smith, and his wife, Mary, sitting at the kitchen table."

"What are they doing?"

"They are going through a stack of bills."

"What are they saying to each other."

"Nothing. They are just looking at the bills and then looking at each other."

"What do you see on their faces?'

"Dismay. Fear. Confusion. Their crop is ruined and they can't make their payments."

We can go on from here introducing the other factors in the case, the worthless insurance policy they paid good money for, the promises that were made to them by the insurance agent before he took their money to pay the premium. How they had saved from their crop the year before to pay the insurance, the money that they would have otherwise used to buy Mary a new set of drapes for the living room and for John, a badly needed repair to the barn roof. We will take the couple though the whole year, the planting of the crop in the spring, the rising hope for a good crop and their sense of security that if the crop was ruined by hail, they were covered. There was a drought, all right. But the crop was made early in the season. Not as many bushels per acre that they had hoped for, but enough to get by, to pay the bills and to keep the bankers away from the door. But now this.

Sharing: Each member of the group has had his or her own experience—with failure and disappointment, with false promises and fraud. Each has had a set of experiences that when told will likely add another facet to the story. A part of every person is a part of us. And we have experienced a part of every experience of every other person. If we are told of a ship wreck in a hurricane we have experienced our own near collision with a truck in a blizzard. The galvanic experiences are the same. We are flooded with adrenaline. We gasp and load our lungs with air against the danger. Our heart beats faster. Our blood pressure elevates. We sweat.

Hank, the guy who rents the space across the hall and does computer programming, may say, "Yeah, and the fear of the bank coming to take away my equipment and maybe take away my place is some-

thing I have nightmares about sometimes. I dream about my arguments against them repossessing my house and car and how I end up even begging, and they don't listen. Just like talking to people without ears." The stories that each of us have experienced, although with differing details, are the same in their substance. For every story we hear we inhabit part of that story as our own. Each of us has lived a different version of farmer Smith's story in one form or another and each of us can share our own experience that involves false promises and the injuries that result. By relating personally to farmer Smith's story with our own we are able to access the feelings that the Smiths have experienced.

And lest we forget, the jurors, too, as experienced members of the human race, have lived their own stories which they will vividly relive as they hear the Smith story told by one who, himself, has vividly felt those same feelings. Because the story-teller has, so to speak, been there he can, with credibility and power, pass on those feelings to the jurors.

And lest we forget, the jurors, too, as experienced members of the human race, have lived their own stories which they will vividly relive as they hear the Smith story told by one who, himself, has vividly felt those same feelings. Because the story-teller has, so to speak, been there he can, with credibility and power, pass on those feelings to the jurors.

But how is all this fantasy relevant to the real facts in the Smith case? When we sit down and begin to talk to farmer Smith we'll find out that he can't tell us very much about what has happened to him. He can't bring it to the forefront of his mind when we ask him simply what happened. He's not good at story telling. He can't set the scene. About all he can say is that his oats were down from the hail storm and the insurance company won't pay.

On the other hand, absent our brainstorming session, we ourselves may not know the questions to ask to bring out the facts that will give the story the texture and power that is born of the senses, that will turn the case from a flat, two dimensional presentation to a vivid many dimensional, moving story. Brainstorming has given us a better view of the case than the client can import to us. It has provided us with a rich source of visuals—all of us think in pictures. We now know the questions to ask farmer Smith, and although his answers may vary slightly from the pictures created by our team, nevertheless, the amended story, as set straight by farmer Smith, will now be many fold more complete and compelling than the one we would have retrieved from Smith alone.

As the input of our brainstormers escapes spontaneously into the room, we will eventually take on the case of the insurance company as well. We'll hear things like, "If we pay Smith we'll end up paying a whole county of farmers trying to gouge us. Got to make a stand with Smith. Call in the experts. Get the weather people ready to lay out the facts on the drought. Offer him fifty percent on a confidential settlement. He'll take it. He's in debt up to his ass. Move the case out of the county. Too many farmers and farm businesses there. Get old George Hoffman to defend. He talks farmer talk and jurors will think he's one of 'em. Go out and measure his fields exactly. Dollars to a dime he has overstated his acreage and we can show the jury that he's the one who is guilty of fraud." On and on.

We will discover the feelings of the team members toward the case, both negative and positive when, at the conclusion of our session, we hear the feedback of the members in response to a single question: "You have been both the Smiths and the insurance company. How do you feel about this case?" Each member of the team will have varying thoughts about it. Jake, the janitor may think the Smiths are asking for too much money, that they are taking advantage of the situation while Joyce our legal assistant says no, it's the insurance company that's taking advantage of the drought as an excuse for paying nothing. Some may think the case should be settled and others will talk about the possibility of punitive damages to keep insurance companies from doing this sort of thing to other farmers. In the end, we have learned what our case is about and know it even better than our client who experienced it. ®

Faculty Biographies
By Location

CRIMINAL JUSTICE SECTION

TUCKER C. STANCLIFT - CRIMINAL JUSTICE

TUCKER C. STANCLIFT

CRIMINAL JUSTICE SECTION

Tucker C. Stanclift of Stanclift Law PLLC in Queensbury has been the chair of the Criminal Justice Section since June 2017.

He focuses his practice area in criminal law, DWIs, civil litigation, personal injury, and vehicle and traffic law.

Long active with the State Bar, he is a former chair of the Young Lawyers Section and a member of the Committee on Continuing Legal Education. He is also a member-at-large on the Executive Committee.

Stanclift received his undergraduate degree from St. Bonaventure University and earned a law degree from the University at Buffalo Law School. He has also studied Shakespeare at Oxford University, is a member of the Glens Falls Community Theater, the Hudson River Shakespeare Company and is a former member of the board of directors for the Charles R. Wood Theater in Glens Falls.

NYC

Andrew M. J. Bernstein

bernstein@bcmlaw.com

Andrew M. J. Bernstein is an experienced and well-respected federal and state criminal defense attorney. He is an extremely zealous advocate, with a truly likable nature, which makes Andrew stand out as a trial attorney and negotiator. Andrew has represented more than 2,000 individuals in federal and state court and has tried many criminal cases to verdict, ranging from violent felony offenses to traffic infractions.

Due to his strong reputation, attorneys in other areas of law often refer their client's criminal matters to Andrew. Clients appreciate his level of personal attention and discretion.

Prior to entering private practice, Andrew was a Trial Attorney at The Legal Aid Society of Manhattan. After four years with The Legal Aid Society, Andrew co-founded Bernstein & Clarke PLLC, and is a founding member of Bernstein Clarke & Moskovitz PLLC.

EDUCATION

Touro Law School, J.D. *cum laude* 2011 (Editor-in-Chief, Moot Court Honors Society; 2009 Touro Law School Moot Court Competition, 1st Place; Top Student in Study of Advanced

The Pennsylvania State University, B.A. (Crime, Law, and Justice) 2006

ADMITTED

New York
U.S. District Court for the Southern District of New York
U.S. District Court for the Eastern District of New York

AWARDS

2017 Super Lawyers, Rising Star in Criminal Defense (New York Metro Area)
Premier Top 100 Trial Attorneys in the State of New York, American Academy of Trial Attorneys (2015, 2016)
Premiere Practitioner in the Field of Criminal Trial Attorneys in the State of New York, American Academy of Trial Attorneys (2015, 2016)
Public Interest Lawyer of the Year Award, Touro Law School (2014)

Andrew M. J. Bernstein

SELECTED IN 2018
THOMSON REUTERS

ASSOCIATIONS

Southern District Criminal Justice Act Mentorship Program, Member
New York State Associates of Criminal Defense Lawyers
National College of DUI Defense
New York State Bar Association
Eileen M. Burke Foundation, Board Member

Buffalo

NEW YORK STATE BAR ASSOCIATION
NYSBA

Cheryl Meyers Buth
Meyers Buth Law Group PLLC
21 Princeton Place
Suite 105
Orchard Park, NY 14127
cmbuth@mblg.us
(716) 508-8598

Cheryl Meyers Buth grew up in Western New York. She earned her undergraduate degree from the State University of Buffalo and her law degree from the University of Toledo College of Law. She is the founding member of the MEYERS BUTH LAW GROUP pllc located in Orchard Park, New York.

In the summer of 2012 she gained greater notoriety as the attorney in a case that the *Buffalo News* has called one of the ten most infamous cases in Western New York in the past 50 years. As a member of the defense team Ms. Meyers Buth, among other things, delivered the closing argument in the case that persuaded the jury to acquit the client of manslaughter and all other felony charges.

Ms. Meyers Buth is recognized as one of Buffalo's premier federal court lawyers. She has conducted complex trials in RICO, street gang, homicide and white collar fraud cases.

While perhaps best known as a criminal defense lawyer, Ms. Meyers Buth also has a busy civil litigation practice. Having previously represented clients as diverse as WalMart and members of the Teamsters union, she now appears on behalf of correctional officers (NYSCOPBA), medical practices, and insurance companies, as well as individual plaintiffs and defendants. She is a popular legal commentator who frequently appears on the Buffalo NBC affiliate, WGRZ-TV ch. 2.

In 2015, Ms. Meyers Buth was certified as an agent for the National Basketball Players' Association. In addition to her role as a founding partner in her law firm, she is the owner of R1 Sports Mgnt (www.R1SportsMgnt.com), a sports and entertainment agency that represents players, coaches, tv news reporters/hosts, authors, musicians/vocalists, and other performing artists.

Ms. Meyers-Buth is licensed to practice in New York, Pennsylvania and Ohio. Additionally, she is admitted to federal courts in the Western District of New York, Northern District of New York and the Second Circuit Court of Appeals.

NORMAN P. EFFMAN - VICE-PRESIDENT, 8TH JUDICIAL DISTRICT

NORMAN P. EFFMAN - VICE-PRESIDENT, 8TH JUDICIAL DISTRICT

NORMAN P. EFFMAN
VICE-PRESIDENT, 8TH JUDICIAL DISTRICT

Norman P. Effman was elected vice-president of the 8th Judicial District.

Effman has been the executive director of the Wyoming County-Attica Legal Aid Bureau since 1981. That agency conducts prisoners' rights litigation. Since 1990, Effman has also served as the Wyoming County public defender.

He has practiced criminal law in both the private and public sector for more than 46 years. From 1992–1998, Effman served on the Attorney Grievance Committee of the Appellate Division, Fourth Department, Eighth Judicial District.

A member of the Criminal Justice Section's executive committee since 1982, he is currently the chair of its Awards Committee and co-chair of its Correctional System Committee. He is the immediate past chair of the Committee on Mandated Representation.

He serves as a member of the NYS Permanent Commission on Sentencing and as a member of the Independent Judicial Election Qualification Commission for the 8th Judicial District. He is also vice-president of the Board of Directors of the New York State Defenders Association.

Effman is a graduate of SUNY Buffalo and SUNY Buffalo School of Law.

Herbert L. Greenman

Contact
Herbert L. Greenman

- hgreenman@lglaw.com
- 716 849 1333, ext. 355
- 716 855 1580
- vCard

Herbert L. Greenman is a senior partner with Lipsitz Green Scime Cambria. He concentrates his practice in the area of criminal defense and has extensive experience in matters that include criminal trials, criminal appeals, constitutional law, narcotic cases, and search and seizure.

Mr. Greenman began his career as an assistant district attorney for Erie County, prosecuting drug felonies from 1973 to 1974. He has been in private practice since 1974 and has earned several awards and distinctions throughout his career, including the Thurgood S. Marshall Award for Outstanding Criminal Practitioner from the New York State Association of Criminal Defense Lawyers.

Awards and Recognitions

Bar & Court Admissions

New York, 1973

Education

- State University of New York at Buffalo, J.D., 1972
- State University of New York at Buffalo, B.A., 1968
- Bowling Green State University

Publications

Numerous articles for seminars, including updates on criminal law (federal and state), motion practice, trial procedures, search and seizure, and federal sentencing guidelines

Speaking Engagements

- Lecturer at several seminars for the New York State Bar Association, the Bar Association of Erie County, and the Federal Bar
- Previous instructor from 1979-99 at the State University of New York at Buffalo School of Law, Trial Techniques Program for second- and third-year students

Professional Activities

- Member, Bar Association of Erie County
- Member, New York State Bar Association

Practice Areas

- Criminal Defense Trials and Appeals
- Criminal Appeals
- Driving While Intoxicated
- Federal Charges
- State Charges

- Traffic Violations
- White-Collar Crime

Awards and Recognitions

The Best Lawyers in America
Named to *Best Lawyers in America* from 1989 to 2019; recognized for Bet-the-Company Litigation, Criminal Defense: General Practice, Criminal Defense: White-Collar, and DUI/DWI Defense

Super Lawyers
Named to *Upstate New York Super Lawyers* for Criminal Defense from 2007 to 2018; no more than 5 percent of attorneys in any state are named to this publication. Among the Top 10 attorneys named to *Upstate New York Super Lawyers* in 2016.

Best Lawyers "Lawyer of the Year" 2014
Named "Lawyer of the Year" in Buffalo for Criminal Defense: Non-White-Collar for 2014 by *Best Lawyers in America*

Who's Who in Law
Named to *Business First/Buffalo Law Journal*'s final edition in 2012 of "Who's Who in Law" for Criminal Defense

AV Rated by Martindale-Hubbell
The highest peer rating standard. This rating signifies that a large number of the lawyer's peers rank him or her at the highest level of professional excellence for their legal knowledge, communication skills and ethical standards.

Legal Elite of Western New York
Named to *Business First/Buffalo Law Journal*'s Legal Elite of Western New York

In the News

Local and national media regularly cover the attorneys of Lipsitz Green Scime Cambria. Click on the links below for recent media coverage for Herbert Greenman.

Buffalo Law Journal and *Buffalo News* cover Herbert Greenman's receipt of national award

Rebecca L. Town, Esq.
Legal Aid Criminal Defense Unit
50 Delaware Ave
Buffalo, NY 14202-3803
rebecca.town@gmail.com
(716) 913-1210

Rebecca Town is a staff attorney in the Criminal Defense Unit at the Legal Aid Bureau of Buffalo, working at the intersection of indigent defense and criminal justice reform. She has nearly a decade of experience as a trial attorney litigating thousands of criminal cases from arraignment to disposition. She has worked on campaigns ranging from pretrial justice to prison reform in coalition with advocates across the state.

Along with her work in the courtroom, Ms. Town is very involved with the community. Appointed by the County Executive in 2014, she serves as a member of the Erie County Board of Ethics. She co-chairs the Women's Bar Association of Western New York's Criminal Law Committee leading an effort to re-institute an Alternative Dispute Resolution program in Buffalo City Court. Ms. Town is also currently collaborating with the Erie County District Attorney's office to host a joint training on implicit racial bias. As a frequent mentor to aspiring law students, Ms. Town partners with the University at Buffalo's Discover Law program, the Black Law Student Association and various local high schools.

Ms. Town is considered a growing thought leader on criminal justice reform issues such as bail, speedy trial, discovery and marijuana legalization. She has been frequently invited to give testimony before the NY State Assembly and Erie County Legislature and has been quoted by local and national news networks such as CNN and FiveThirtyEight.com.

Ms. Town earned her Bachelors of Arts at the State University of N.Y. at Buffalo where she graduated magna cum laude in 2003, and her Juris Doctorate from the University at Buffalo School of Law in 2009.

Albany & Webcast

Jonathan D. Cohn
Albany Program Chair
Gerstenzang, Sills, Cohn & Gerstenzang
210 Great Oaks Blvd
Albany, NY 12203
jcohn@pgdwi.com
(518) 456-6456

Jonathan D. Cohn is a partner in the law firm of Gerstenzang, Sills, Cohn & Gerstenzang. He received his Bachelor's Degree from Lafayette College, where he graduated with honors. He is a 2008 cum laude graduate of Albany Law School, where he was selected as a member of the Government and Law Journal. Mr. Cohn was one of a select group to be published as a member of the journal. Mr. Cohn is also the state delegate for the National College for DUI Defense ("NCDD"). Prior to joining the firm, Mr. Cohn was an Assistant District Attorney in the Rensselaer County District Attorney's Office, who handled all aspects of criminal law. He also gained a thorough understanding of the Criminal Procedure Law and Penal Law as a Law Clerk to Honorable Karen A. Drago, Schenectady County Court Judge.

Mr. Cohn's practice is focused on criminal defense – with an emphasis on alcohol-related offenses.

Lee Carey Kindlon, Esq.
The Kindlon Law Firm, PLLC
52 James Street
Suite 5
Albany, NY 12207-2747
lkindlon@kindlon.com
(518) 434-1493

Lee Kindlon, the founding partner of the Kindlon Law Firm, has represented clients in some of the area's most high-profile criminal cases. From those hard-fought courtroom battles, he uses his experience to benefit clients across the legal spectrum. Lee's experience in civil litigation includes matters based on contract, fraud, civil rights violations and negligence. He has successfully resolved a number of high-value personal injury and wrongful death cases.

Lee's practice also includes the representation of corporations and professionals in white collar criminal cases. From preventative advice for companies to successful resolution for those charged with financial crimes, fraud or larceny, Lee has the knowledge and experience to provide excellent legal representation.

After receiving his commission in the Marine Corps during law school, Lee returned to active duty in January 2003, and was stationed at Camp Lejeune, North Carolina. During his three and a half years on active duty with the Marines, Lee worked as a Judge Advocate, first in Legal Assistance, and then as the prosecutor for Marine Corps Base Camp Lejeune. In September 2005, he deployed to Iraq as a Battalion Judge Advocate and was stationed in Fallujah until April 2006. Now a Lieutenant Colonel, he remains part of the Marine Corps Reserve as the Reserve Officer in Charge of Appellate Defense for the Navy-Marine Corps Court of Appeals.

Lee, an Albany native, attended Williams College, where he played football and graduated in 1998 with a degree in History. After graduation, Lee attended the University of Connecticut School of Law. He concentrated his studies in Constitutional and Criminal Law and received his law degree in 2002.

Lee was admitted to practice in New York State in December 2002 and the District of Columbia in January 2008. He is also admitted to practice in the United States District

Courts for the Northern and Western Districts of New York, the Second Circuit Court of Appeals and he is certified to practice in all military courts.

Lee Kindlon is a nationally-recognized speaker on evidence in both state and federal court as well as state and federal gun laws. He has been asked to speak to groups across the state on matters of veterans in the criminal justice system and has taught CLE courses on matters across the legal spectrum. Lee has also had the honor of teaching service members around the world about the Laws of Armed Conflict, the Geneva Conventions and lessons learned as a Judge Advocate in the Marine Corps.

NEW YORK STATE BAR ASSOCIATION
NYSBA

Hon. Carmelo M. LaQuidara
Rensselaer City Court
62 Washington Street
Rensselaer, NY 12144

Judge Carmelo M. LaQuidara graduated from Albany Law School in 1997. He worked as an Assistant District Attorney in Rensselaer County from May 1998 until February of 2004, and served as the Bureau Chief of the Domestic Violence Unit. Judge LaQuidara has been in private practice since 2004, focusing almost exclusively on Criminal Defense work. In 2007, he was appointed as a Judge in the Rensselaer City Court where he continues to preside over criminal cases today.

Thomas J. O'Hern, Esq.
Office of Thomas J. O'Hern, Esq.
210 Great Oaks Boulevard
Albany, NY 12203
dwicase@aol.com
(518) 456-0146

Thomas O'Hern has been practicing law for 33 years. His practice focuses on Criminal Defense with an emphasis on DWI cases and Vehicular Crimes. Mr. O'Hern is listed as a top DWI attorney in the following publications: *The Best Lawyers in America®, The New York Area's Best Lawyers®.* Mr. O'Hern is also rated AV® by Martindale-Hubbell, one of the oldest publications in America that rates attorneys. He is a 1985 graduate of Bridgeport University Law School. During the course of his career he has tried cases in both State and Federal Court. He has successfully tried numerous multi-defendant criminal cases in Federal Court.

Mr. O'Hern has been a lecturer for the New York State Bar Association for the past twenty years (Chair, Representing a DWI Defendant in New York from Arraignment to Disposition, and Speaker at the Big Apple X Program held in New York City, May of 2010) ; the New York State Association of Criminal Defense Lawyers; the New York State Office of Court Administration; New York State Defenders Association, Albany County Bar Association, and the New York State Magistrates Association. In addition, he teaches for various law enforcement, defense and judicial associations.

NEW YORK STATE BAR ASSOCIATION
NYSBA

Hon. Jennifer G. Sober
Rensselaer County Court
80 Second Street
Troy, NY 12180

Judicial Offices

Judge, County Court, Rensselaer County, Elected, 2017 to 2027

Other Professional Experience

Law Office of Jennifer G. Sober, Criminal Defense Attorney, 2004 to 2017

Rensselaer County District Attorneys Office, Assistant District Attorney, 2004 to 2004

Albany County District Attorneys Office, Assistant District Attorney, 1999 to 2004

Admission to the Bar

NYS, Appellate Division, Third Department, 1999

Education

J.D., Albany Law School, 1998

B.A., University Center of New York at Albany, 1995

Long Island

NEW YORK STATE BAR ASSOCIATION
NYSBA

Hon. William J. Condon
Suffolk County Supreme Court
210 Center Drive
Riverhead, NY 11901-3303

Hon. William J. Condon is a former prosecutor, having tried to verdict dozens of significant violent felony cases with the Suffolk County District Attorney's Office. In addition to that, he has extensive trial experience in New York State Supreme Court, having tried in excess of sixty cases to verdict representing both Plaintiffs and Defendants in significant civil litigation. Judge Condon has been a practicing trial lawyer for over twenty-two years and has appeared before jurists in every jurisdiction in the greater New York metropolitan area. He’s very active within the Long Island community, and has served on the local Board of Education as well as the Library Board. Judge Condon is also very active as a Coach for youth sports and belongs to several local civic associations, including the Fraternal Order, Sons of Italy and the Ancient Order of Hibernians.

Marc Gann

Founding Partner

516-294-0300 phone

516-294-0477 fax

Email Marc Gann ›

Marc Gann, Founding Partner

One of the most highly regarded trial lawyers in Nassau County

Marc Gann is one of the most highly regarded criminal defense lawyers on Long Island, and has handled countless high-profile cases across the New York metropolitan area. He handles criminal cases of all shapes and sizes, from simple traffic or DUI cases to the most serious major felonies.

Marc possesses particular experience defending murder and drug cases, including serious conspiracy matters in both New York state and federal courts, and has also taken verdicts on major felony cases including burglary, robbery and fraud.

An attorney respected by his peers

Marc Gann earns most of his clients via referral from other lawyers, court personnel or past clients. Martindale Hubbell also agrees that he is an attorney of the highest level of skill and ethics, having awarded him the AV rating.

Like his fellow partners, Marc Gann was a prosecutor in Nassau County for several years. He then spent several years in Baltimore handling criminal and civil cases before returning to New York to form Collins Gann McCloskey & Barry PLLC.

In addition to defending criminal cases, Marc also counsels sports nutrition companies and has litigated personal injury and other civil cases.

Giving back to the legal community

Marc has served as the President and been elected Director of the Nassau County Bar Association, and is a former chairman of the Criminal Courts Law and Procedure Committee of the Bar. This group honored him with the Association’s 2001 Directors’ Award for his contributions to the legal community.

He lectures to local and state bar associations as well as the National Institute of Trial Advocacy, and served as Team Leader for the 2002 National Institute of Trial Advocacy program at Hofstra University Law School. He is also a

member of the Touro Law School faculty.

A Long Island criminal defense attorney ready to help

Like his partners at the Nassau County law firm Collins Gann McCloskey & Barry PLLC, Marc Gann can help you build the strongest possible defense for your criminal case. Contact them online or at 516-294-0300 today.

Practice areas

- Criminal law
- Personal injury
- Commercial litigation
- Regulatory law

Admitted

- New York, 1985
- Maryland, 1985

Education

- Hofstra University School of Law, Hempstead, New York, 1984
  - Law Journal: Real Property Law Journal
  - Special Professor of Law
- B.A., Franklin and Marshall College, 1981

Professional associations

- Nassau County Bar Association, Member, Past President; Past Chair, Criminal Law and Procedure Committee
- New York State Bar Association
- New York State Bar Foundation, Fellow
- Former Assistant District Attorneys Association of Nassau County, Past President

Honors

- AV® Preeminent™ Peer Review Rated by Martindale-Hubbell®
- Criminal Courts Law and Procedure Committee of the Bar, Nassau County Association 2001 Directors' Award for Outstanding Contributions to the Legal Community
- Bar Register of Preeminent Lawyers

Dana L. Grossblatt, Esq.
Law Offices Of Dana Grossblatt
Suite 265
471 North Broadway
Jericho, NY 11753-2106
dgrossblatt@verizon.net
(516) 496-8494

Dana Grossblatt graduated with honors from University of Massachusetts at Amherst with a Bachelor of Arts in English. She went on to earn her Juris Doctor from Brooklyn Law School. Dana began work at the Kings County District Attorney's Office in January 1992. There she learned litigation skills by working in numerous bureaus such as the Early Case Assessment Bureau, misdemeanor trials, Grand Jury, and Homicide Grand Jury. Ultimately Dana was assigned to the Orange Zone Felony Bureau where she tried countless Robberies, Burglaries and drug cases. Shortly thereafter Dana was promoted to Senior Assistant District Attorney where she was tasked to oversee the trial work of newer assistants. It was during this time that Dana began trying homicides and other high publicity cases.

Upon leaving the District Attorney's Office in 1997 Dana worked as an associate at Robert Sweeney's Office, which handled in house litigation for State Farm Insurance. The trials, depositions, conferences and motion practice she undertook at that firm gave her a fundamental understanding of civil litigation.

In 2002 opened her own law firm, The Law Office of Dana Grossblatt, in which she focused on criminal defense. As a criminal defense attorney regularly litigates numerous trials every year including homicide and high publicity trials. She has earned a reputation as a fierce and relentless advocate on behalf of her clients. The cases in the courthouse with difficult defendants, overwhelming evidence and no offer on the table have become Dana's specialty.

In 2014 Dana Grossblatt became President of the Criminal Courts Bar Association of Nassau County. She was only the 2nd woman and the first mother to have done so. While on the board she was instrumental in the creation of the Criminal Courts Bar Foundation Charity. The charity has supported the childcare center in Family Court,

Westbury Middle School after school programming, the Prisoner Toy Project, and Youth Empowerment workshops.

Dana Grossblatt has been married for 28 years to Alan Comroe and they have two children. Shelby graduated from Indiana University this year and Zachary will be a sophomore at the University of Miami.

Anthony M. La Pinta, Esq.
Reynolds Caronia Gianelli & La Pinta P.C.
200 Motor Pkwy
Suite C17
Hauppauge, NY 11788-5114
lapintaesq@aol.com
(631) 300-0033

Anthony M. La Pinta is one of Long Island's most accomplished and respected trial attorneys. A lawyer for over twenty-six years, his practice is limited to representing clients in federal and state criminal defense and plaintiff's personal injury matters. Mr. La Pinta represents the highest standards in the legal community. He has achieved the highest rating of "Preeminent-AV" by the prestigious Martindale-Hubbell attorney peer review directory and has been selected to the 2014, 2015, 2016 and 2017 New York Metro editions of "Super Lawyers Magazine." Mr. La Pinta has been described by judges and adversaries as "an attorney of the highest caliber," and "one of the finest lawyers" on Long Island.

Mr. La Pinta has successfully defended many high profile cases that have drawn national media attention. He has extensive experience representing individuals and businesses that have been investigated or charged with white collar, nonviolent and violent crimes at the trial and appellate levels. Mr. La Pinta has achieved particular success in obtaining trial acquittals, developing sentencing mitigation, and securing post judgment relief. He has represented clients charged with murder, racketeering, conspiracy, money laundering, computer crimes, mail and wire fraud, public corruption, narcotics possession and distribution, tax evasion, arson, health care and insurance fraud, gambling, larceny, robbery, burglary, DWI/traffic offenses, and all other felony and misdemeanor crimes in federal, state and local courts. Some of his past clients include law enforcement officials, financiers, politicians, attorneys and physicians.

By also maintaining a significant civil law practice, Mr. La Pinta represents plaintiffs in all serious personal injury matters including wrongful death, motor vehicle accidents, premises liability, medical malpractice, mesothelioma cases, product liability, civil rights violations, construction accidents, and professional liability cases. He has obtained numerous noteworthy trial verdicts and settlements in courts throughout the New York metropolitan region.

In addition to his teaching positions as an adjunct professor at Touro Law School and St. Joseph's College, Mr. La Pinta is also a routine lecturer for the Nassau and Suffolk County Bar Associations, the Federal Bar Association for the Eastern District of New York and the National Institute for Trial Advocacy (NITA). He is a past President of the Suffolk County Criminal Bar Association, a former Chairperson of the Suffolk County Bar Association's Ethics and Professionalism Committee and a current member of the Attorney Grievance Committee for the Tenth Judicial District. Mr. La Pinta also serves as counsel to The Village of Babylon, The Board of Trustees of Suffolk County Community College and The Suffolk County Democratic Committee. He has also been a contributor and legal commentator for Court TV, Fox News, Newsday and News 12 – Long Island.

Mr. La Pinta earned his undergraduate degrees from The State University of New York College at Oswego and his law degree from Temple University. He is admitted to practice law in New York, New Jersey and Connecticut, as well as in the Federal District Courts of the Southern and Eastern Districts of New York, the District of New Jersey and the Second Circuit Court of Appeals. He is currently the Managing Partner of Reynolds, Caronia, Gianelli & La Pinta, P.C., located in Hauppauge, New York.

Mr. La Pinta is a proven, experienced litigator who brings enormous energy, personal attention and an unmatched determination to every client he represents. His reputation and ability as a fierce and respected advocate has produced outstanding results for his clients.

NEW YORK STATE BAR ASSOCIATION
NYSBA

Hon. Christopher G. Quinn
Nassau County Court
99 Main Street
Hempstead, NY 11550

Since 2006 Judge Christopher G. Quinn has been the Supervising Judge of the Nassau County District Court. He is an elected County Court Judge and an Acting Supreme Court Justice. During his tenure as Supervising Judge, Nassau County District Court has created a Mental Health Court, a Veterans part as well as an Adolescent Diversion Part which is one of seven pilots across the state. Judge Quinn serves on a number of Boards including the St. Joseph's Hospital, the Long Island Metropolitan Lacrosse Foundation and the Wantagh/Seaford PAL. He has been honored by the Fraternal Order of Court Officers, the Criminal Courts Bar Association and the Court Officers Benevolent Association of Nassau County. Judge Quinn has been endorsed by the Nassau and Suffolk County PBA's, as well as the Superior Officers and Detectives Unions. He has also been endorsed by the Unions and Fraternal organizations representing the employees of all the courts in Nassau and Suffolk counties. Judge Quinn has been screened by the Judiciary Committee of the Nassau County Bar Association and has received their highest rating "Well Qualified".

Westchester

Clare J. Degnan, Esq.
Executive Director
The Legal Aid Society Of Westchester County
150 Grand Street
1st Floor
White Plains, NY 10601
cjd@laswest.org
(914) 286-3477

For 25 years, Ms. Degnan has served WLAS as Associate Counsel, Senior Associate Counsel, Deputy Bureau Chief, Mount Vernon Bureau Chief, Deputy Chief Counsel of Local Courts, and Acting Executive Director. In July 2015, Ms. Degnan was appointed as the first female Executive Director in WLAS's history. She is a member of the NYS Bar Criminal Justice Section as Co-chair of the Towns, Villages, and Justice Courts Sub-committee. She is also a member of the Wrongful Convictions Sub-committee of the NYS Bar Association. Under her leadership, WLAS was awarded Offices of Indigent Legal Services grants to fund and develop the Regional Immigration Assistance Center and the Assigned Counsel Resource Center. As a member of the newly formed Chief Defender's Association of New York, Ms. Degnan is participating in the state-wide effort to develop uniform best practices for mandated representation.

Richard L. Ferrante
Ferrante & Siddiqui
399 Knollwood Road, Suite 111
White Plains, NY 10603
ferrantelaw@aol.com
(914) 997-1777

Richard Ferrante is a graduate of the State University of New Yew York at Albany, Albany, NY. Mr. Ferrante received his law degree from the Elizabeth Haub School of Law at Pace University in White Plains, New York.

Upon graduating law school, Mr. Ferrante was appointed as an Assistant District Attorney in the Westchester County District Attorney's Office by District Attorney Carl Vergari. Mr. Ferrante was assigned to several different branch offices, including the Mount Vernon branch. In that capacity, Mr. Ferrante prosecuted hundreds of misdemeanors and felonies.

In 2001, Mr. Ferrante was a founding member of the law firm of Quinn, Ferrante, and Mellea. That firm had been General Counsel to the Yonkers Police Association, the largest police department in the County of Westchester, and the New York City Police Department Sergeant's Benevolent Association. Additionally, Mr. Ferrante represented police officers in administrative and criminal proceedings in numerous jurisdictions. Mr. Ferrante has also represented Court Officers and Corrections Officers from the County and State systems in a variety of legal matters.

In 2015, Mr. Ferrante was a founding member of the law firm of Ferrante & Siddiqui, LLP, with Saad Siddiqui, Esq. Mr. Ferrante maintains a diversified practice including criminal, personal injury, negligence, and real estate law.

Mr. Ferrante is admitted to practice in New York State.

PLI PRACTISING LAW INSTITUTE

Faculty/Author Profile

Hon. Elyse Lazansky

Town of North Castle

Town Justice

Armonk, NY, USA

Biography

Elyse Lazansky spent 13 years as a Westchester County prosecutor in the Special Prosecutions Division. In 2003, she was elected to the bench of the North Castle Town Court in Armonk, New York and has served there ever since. As Town Justice for the North Castle Justice Court, she presides over all Town Court cases including criminal misdemeanors, such as domestic violence, sex crimes, drug possession, larceny and assaults, and felony hearings, and also a wide range of civil cases. She also supervises and manages the North Castle Court (two judges and three clerks). She has been a lecturer and trainer for the New York State Judicial Institute, Office of Court Administration, Columbia University's Lawyering in the Digital Age program, and for community groups and youth programs.

Syracuse

Robert G. Wells, Esq.
NYS Association of Criminal Defense Lawyers
Suite 825
120 East Washington Street
Syracuse, New York 13202
dfndr@hotmail.com
(315) 472-4489

Robert G. Wells is a federal criminal defense practitioner with over forty years of experience in the United States District Courts and Second Circuit Court of Appeals, as well as in all levels of State Courts. He was trained at Gerry Spence's Trial Lawyers College. He is the 2018 President of the New York State Association of Criminal Defense Lawyers. He is a member of the NYSACDL Board of Directors, Executive Committee, and the CLE Committee. He has acted as an instructor for the United States Courts teaching lawyers in San Francisco, Dallas, Los Angeles, Portland, Chicago and Atlanta. He has taught for the New York State Association of Criminal Defense Lawyers on matters ranging from Sentencing, Direct Examination and Cross Examination, along with Electronic Evidence Presentation. He has instructed for the FBI and the Board of Certified Fraud Examiners. He has delivered the only acquittal in the United States District Court for the Northern District of New York on an indicted environmental case in the last thirty years. Mr. Wells is also published in Atticus Magazine.

Rochester

Julie Cianca, Esq.
Monroe County Public Defenders Office
10 Fitzhugh St N
Rochester, NY 14614-1267
jcianca@monroecounty.gov
(585) 428-5101

Julie has BA from University of Notre Dame with an entirely useful major in philosophy, and then attended Albany Law School and was admitted to the bar in 1993. She started working at the Monroe County Public Defender's office in 1994, and remained there through 2002. In 2002 she worked with Ernstrom and Dreste, practicing construction law, and not too long after, in 2003, she went back to public defense and worked at the then in its infancy Assigned Counsel Office. Two years later, she found herself back at the Public Defenders office where she has happily remained ever since. Julie served as non-violent felony supervisor for two years, as town court supervisor for eight years. parole supervisor for a brief period and is now in charge of implementing continuing legal education programs both for the office and the defense community. Julie is a regular CLE presenter, predominately in areas of sex offense defense and working with expert testimony, and has taken nearly 100 felony cases to trial, including six murder trials.

Mark A. Foti, Esq.
The Foti Law Firm, P.C.
16 West Main Street
Suite 100
Rochester, NY 14614-1707
mail@markfoti.com
(585) 461-1999

Mark Foti, Esq. is a general practitioner, primarily focused on criminal defense litigation. He has handled thousands of criminal cases. He is an attorney experienced in obtaining favorable plea bargains and defending clients at trial when an acceptable agreement cannot be reached.

NEW YORK STATE BAR ASSOCIATION
NYSBA

Michelle Crowley, Esq.
District Attorney Office
Monroe County
47 S. Fitzhugh St.
Rochester, NY 14614

Michelle Crowley returned to the Monroe County District Attorney's Office in 2012 after serving in the Ontario County District Attorney's Office. Crowley began her career as a prosecutor in Orange County where she was the head of the Domestic Violence Unit before moving to Monroe County in 2002, becoming one of the Major Felony Bureau's top prosecutors. In her 15 year career, Ms. Crowley has prosecuted hundreds of violent felony cases, including homicides. Crowley, whose official title is *Director of Attorney Training and Grand Jury*, is responsible for ensuring that prosecutors working within the office comply with the continuing legal education requirement mandated by the State of New York for all practicing attorneys. In this role, Crowley works with Assistant District Attorneys both individually and in groups providing comprehensive and consistent training in an effort to leave them in the best position possible to obtain convictions and ensure the safety of the community. A native of Elmira, New York, Ms. Crowley performed her undergraduate studies at Ithaca College and completed her Juris Doctorate at the Albany School of Law.

Hon. John L. DeMarco
Monroe County Court
99 Exchange Boulevard
Hall of Justice
5th Floor
Room 545
Rochester, NY 14614

Judicial Offices

Supervising Judge, Treatment Courts, Seventh Judicial District, Designated, 2016 to Present

Acting Justice, Supreme Court, Monroe County, Appointed by Chief Administrative Judge Ann Pfau, 2010 to Present

Judge, County Court, Monroe County, Elected, 2010 to 2019

Supervising Judge, Town and Village Justice Courts for Ontario, Wayne, Cayuga, Seneca, Steuben and Yates Counties, Designated, 2014 to 2016

Justice, Town of Irondequoit, Elected, 2001 to 2005; Re-elected, 2006 to 2009

Other Professional Experience

Phillips Lytle LLP, Rochester, NY, Partner, 1999 to 2009

Hodgson Russ LLP, Rochester, NY, Partner, 1995 to 1999

Harris, Evans, Fox & Chesworth, Associate, 1989 to 1995

Town of Irondequiot, Municipal Attorney, 1993 to 2001

Monroe County, Assistant District Attorney, 1986 to 1988

Admission to the Bar

NYS, Appellate Division, Fourth Department, 1986

Federal District Court, Western and Northern Districts of New York

Education

J.D., California Western School of Law, 1985

B.S., St. John Fisher College, 1982

Publications

People v Orpin, 8 Misc3d 768

People v Schreier, 29 Misc3d 1191

People v Flowers, 35 Misc3d 324

People v Watford, 943 NYS2d 740

People v Moorer, 39 Misc3d 603

People v Williams, 43 Misc3d 827

People v Leone, 43 Mis3d 306

People v Rankin, 46 Misc.3d 791 (2014)

People v Edelman, 45 Misc3d 556

People v. Daniel Luther, 2014, N.Y. Slip Op. 24432

People v. Anthony Johnson, 2015, N.Y. Slip Op. 25224

People v Lora, 1015 NY Slip Op 25455

People v Frumosa, 2015 NY Slip Op 51982(U)

People v Jurs, 2015 NY Slip Op 25456

People v Martinez, ---NYS3d, 2018 Slip Op 28250 (Monroe County Ct, 2018)

People v Perkins, 58 Misc 3d 171 (Monroe County Ct, 2017)

People v Agnello, 58 Misc 3d 215 (Monroe County Ct, 2017)

Professional & Civic Activities

Board of Directors, Italian Heritage Foundation, 2005 to Present

Board of Directors, Justinian Order, St. John Fisher College, 2015 to Present

Matthew Schwartz, Esq.
Chief of the Special Investigations Bureau Matthew Schwartz
Monroe County District Attorney's Office
Ebenezer Watts Building Suite 832
Rochester, NY 14614

Mr. Schwartz has been an Assistant District Attorney for 11 years. In January 2012, he accepted the position of Chief of the newly restructured Special Investigations Bureau. He joined the Monroe County District Attorney's Office in February 2004, after serving as an Assistant District Attorney in the Schenectady County District Atorney's Office. Prior to his current position, Mr. Schwartz served as Deputy Chief of the Special Investigations Bureau and as an Assistant District Attorney in the Local Courts Bureau, the County Court Bureau, the Special Investigations Bureau, and the Major Felony Bureau. Mr. Schwartz is a graduate of Albany Law School (2001). He is admitted to practice law in New York and Massachusetts. Mr. Schwartz has also taught a variety of subjects for the New York State Prosecutors Training Institute (NYPTI).