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New York Criminal Law Newsletter

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of the New York State Bar Association

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Evidentiary Privileges

(Grand Jury, Criminal and Civil Trials)

Sixth Edition

Author
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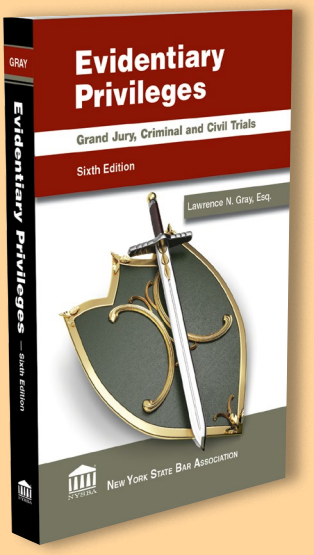
Former Special Assistant Attorney General
NYS Office of the Attorney General

A valuable text of first reference for any attorney whose clients are called to testify before grand juries, or in criminal or civil trials, *Evidentiary Privileges,* 6th edition, covers the evidentiary, constitutional and purported privileges that may be asserted at the grand jury and at trial.

Updated with case law and sections throughout, the author provides in-depth discussions on trial privileges and procedures including state and/or federal cases and relevant legislation. *Evidentiary Privileges* features the transcript of a mock grand jury session, providing cogent examples of how some of the mentioned privileges and objections have been invoked in real cases.

Lawrence N. Gray is the author of numerous publications on criminal law and trial. This edition of *Evidentiary Privileges* draws from the author's experience as a former special assistant attorney general and his many years of practice in the field of criminal justice.

Contents at a Glance:



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Message from the Chair

In preparation for writing my final message to you as Chair of the Criminal Justice Section, I reflect on all the meetings, public speeches, previous chair messages and articles in which I proclaimed: "We are prosecutors. We are defense attorneys. We are judges." Perhaps I misconstrued the dynamic? I look back now with experience on this topic and I look toward the future with naiveté as I come to this conclusion: "We are human beings. We are citizens. We are lawyers." This paradigm shift challenges our members to remove the constraints of their "day jobs" initially outlined above and instead look at criminal justice through the lenses of the later. If accepted, this challenge could prove to unify us with the goal of achieving greater success on important legislative advancements.

As citizens we addressed bail reform and discovery reform. Resolution of these issues is not limited to the roles we play at work. First, bail reform impacts our citizens in a profound way. Nearly 70% of tens of thousands of jailed New Yorkers are pre-trial detainees. The presumption of innocence is waning under a current system that forces people to either pay cash or remain incarcerated until the case is resolved. This is a system that hurts our poorest citizens and promotes mass incarceration. Citizens who cannot afford freedom lose families, jobs and housing. We should continue to look at this issue as citizens of New York State and finally pass the Bail Elimination Act. This advancement in criminal justice would end money bail, reduce the number of our citizens wasting away as pre-trial detainees, and elevate standards of due process.

Second, as citizens we must take a hard look at discovery reform. Most citizens would agree that New York State has one of the worst criminal justice discovery statutes in the United States. Currently, the government may withhold vast amounts of information from the citizen accused, such as witness statements, grand jury testimony, investigative notes and police reports until just before a trial begins. This fact comes as a surprise to most New Yorkers, including lawyers who practice civil litigation where the concept of anything but full disclosure is unfathomable. Imagine the surprise of the first-time offender fighting to maintain her freedom and exercising her right to trial only to learn that she is not entitled to know the proof the government believes demonstrates her guilt.

"There is no question that implicit bias is a human condition that cuts across our entire criminal justice system. It is not simply on the front lines of law enforcement. It exists too at the end of our journey toward justice during the jury trial."

As human beings we addressed implicit bias in criminal justice at our Annual Meeting CLE in January 2019. Certainly, this issue affects prosecutors, defense attorneys, law enforcement and judges. For example, police officers risk their lives every day at work. They are exposed to the worst of humanity. They are required to make split second decisions based on training and instinct. At the program, we examined how effective implicit bias training of police officers could be developed with the goal of creating safer communities with fewer arrests. There is no question that implicit bias is a human condition that cuts across our entire criminal justice system. It is not simply on the front lines of law enforcement. It exists too at the end of our journey toward justice during the jury trial. To that end, our leadership has come together to advance new jury charges on implicit bias to be used in criminal jury trials. The manner in which this Section looks at implicit bias is a prime example of how looking through the lenses of a "human being" can be a powerful and effective means of change.

However, our citizens are not just those accused of crimes. We must consider the impact Discovery Reform has on crime victims. Victims can be particularly vulnerable to threats and intimidation from the unscrupulous offender. A new approach to discovery in New York can accommodate these concerns while providing the accused with all of the evidence they deserve to defend themselves against the power of our own government.

As lawyers we face a greater challenge on the creation of the new Prosecutorial Conduct Commission. We must not look at this as prosecutors, defense counsel or judges. This unique and unprecedented commission faced opposition from our Section's prosecutors on philosophical and constitutional grounds. In my view as a lawyer, these concerns are legitimate. As defense counsel, I am reminded of our daily struggles to prevent wrongful convictions. I do not accept the concept that our existing disciplinary

mechanism for lawyers in general is adequate to address claims of prosecutorial misconduct. Prosecutors are entrusted with the power of an army of law enforcement agencies and should be held to a higher standard. This power, coupled with inadequate discovery rules, is a petri dish cultivating an environment ripe for unlawful and wrongful convictions.

Reflecting on the issue, I envision a pendulum swinging from side to side—oscillating between one extreme and another. For decades we have allowed a criminal justice system in New York to be so unfair, so unjust and so one-sided that we have grown skeptical of our brethren. We profess a need for more public accountability for prosecutors who violate ethics rules and criminal procedure laws. In previous messages, I warned of the dangers of a "revolution" because necessary changes can often be made without the radical overthrow of the system in favor of a new one. I believe the Prosecutorial Conduct Commission is an instance of revolution. Some would say a worthy revolution. Others would say it is unwarranted. In the end, we members of the Criminal Justice Section need to shed the biases of our "day job" and look at this issue as lawyers, lawyers sworn to uphold the Constitutions of the United States and of New York State.

The Prosecutorial Conduct Commission is the nation's first of its kind. As with many first initiatives, the legislation is imperfect and is replete with constitutional infirmities. As lawyers we must reject a statutory scheme that violates the rules of law that we are entrusted to protect. In my view as a lawyer, the legislation must overcome constitutional objections to be viable. I do not profess to be a constitutional law scholar, so those of us entrusted with making those decisions will be the final say on its legitimacy. We lawyers, however, see this issue as more than merely academic analysis of constitutional review and application. The pendulum has swung. Citizens have spoken. The age-old struggle for fairness has reached a breaking point and the concept of such a commission is the by-product. I suggest that before we purchase it with the currency of jurisprudence, we need to remove the masks we wear on the battlefields and approach the issue as we did many others, as human beings, as citizens and as lawyers.

It has been my honor to serve you as Chair of this Section for the past two years. My tenure wraps up June 1, 2019. We look forward to new leadership headed by Robert Masters, Esq. My hope is that we are guided in the direction that my naiveté has been allowed to imagine.

Tucker C. Stanclift

Message from the Editor

The Criminal Justice Section unites the various elements of the criminal justice world to pursue a single goal: advance the quality of justice. We bring together the defense bar, prosecutors and judges, all working together for the betterment of a system. Different perspectives, indeed, but a shared purpose.

There has been vigorous debate within the Section concerning the need for a commission on prosecutorial conduct. From my editor's perch, I have been able to see the arguments advanced by both sides of the issue as to whether there is a need for such a body. As a former prosecutor, I understand the feelings that are evoked by the commission's creation. Most of all, I wonder about the impact this new body will have on the independence of the prosecution function. We've seen that principle attacked recently, much to the disappointment, if not outright fear, of many.

As I watched and listened to the debate over the establishment of the commission, I reflected back to my very early days as a prosecutor. I recall sitting side by side in Bronx Criminal Court with Legal Aid attorneys. We shared our observations about cases, judges and the system. We played softball together. We grew up as lawyers, all together.

I believe that we got along so well because we had the same basic DNA. We liked the idea of doing something for society, admittedly coming at the issue of criminal justice from two different angles.

So, when I was putting together the articles for this issue I took special note of what would be on the pages: a story about honorees from both the defense and prosecution function. An article on a significant legal issue from a jurist. A piece about legislation that will improve the quality of criminal justice on a variety of fronts.

This diversity of our Section is why we have two special columns in this issue. One is from a very recent law school graduate who is honing his appellate skills on defense matters. The other is from a young prosecutor. I asked them to write not so much about what they do but why they do it. These two young lawyers represent our future.

Jay Shapiro

Legislative Victories!

By Andrew Kossover

Seizing an Opportunity

There are times when we can find inspiration in fiction. For example, take Atticus Finch, the fictional lawyer in Harper Lee's *To Kill A Mockingbird,* whose first name is used by the New York State Association of Criminal Defense Lawyers (NYSACDL) in its quarterly publication, dedicated his advocacy to creating a more just system. His psyche, perhaps like all of ours, would only be at peace if a more just and fair criminal justice system could be established; one that doesn't discriminate against the poor or people of color. The recent New York State budget, containing historic criminal justice reforms, goes a long way towards granting us all some of that long-sought-after peace.

NYSACDL, on behalf of our members and the clients we all serve, has been dutifully advocating for criminal justice reforms for many years. To finally realize measures which will reduce mass incarceration, implicit bias, wrongful prosecutions and convictions ushers in a new era of accountability and fairness.

Before examining these reforms in detail, a brief synopsis of how we got here is in order. Ever since NYSACDL's Legislative Committee played a significant role in Rockefeller Drug Law Reform, it has deservingly enjoyed the recognition and platform as the "voice" of the criminal defense community. Year after year, state government has invited our comment on proposed criminal justice legislation and, in many cases, we have submitted memos in support, or in opposition to legislative initiatives. Upon the New York State Senate switching from a Republican controlled house to a Democratic majority following the 2018 midterm election, an opportunity for true significant criminal justice reform was realized. This Association partnered with several other lawyer groups, exonerees, and community grassroots/activist organizations to form the *Repeal the Blindfold Coalition*, a reference to attorneys and the accused being forced to make critical decisions without being sufficiently informed about the case against them. While primarily devoted to advocating for discovery reform, the Coalition also provided legislative input on bail and speedy trial reform.

Governor Cuomo pushed to have these criminal justice reforms made a part of his budget proposal rather than risk delay, inertia, and possible inaction this legislative session. The Governor succeeded and most of our preferred language was incorporated into the budget. These dramatic reforms will make the criminal justice system fairer, and fundamentally alter our practice in many ways.

The reforms are effective **January 1, 2020**. They will apply to all cases pending on that date–regardless of when the case commenced. Until then, with respect to some of the reforms (especially bail and discovery), we strongly encourage, and several courts have already voluntarily assumed, compliance based on legislative intent and fairness. Judges and prosecutors have enormous amounts of discretion to enact these changes today.

Editor's note: Portions of this article are reprinted here with permission of the New York State Association of Criminal Defense Lawyers. The CJS thanks Andrew Kossover for his assistance in providing this overview.

Andrew Kossover is the Ulster County Public Defender and a partner in Kossover Law Offices in New Paltz. He is the Chair of NYSACDL's Legislative Committee, and a Past President of NYSACDL.

2019 Criminal Justice Reforms—Preliminary Advisory

The Criminal Justice Section offers its gratitude and appreciation to the Legal Aid Society of New York City for compiling this summary of the recent historic criminal justice reforms. Thanks go out to John Schoeffel at the Legal Aid Society who approved the use of the attached edited summary for CJS publication purposes, and to Andy Kossover, the Ulster County Public Defender, for obtaining permission on the Section's behalf.

It is clear that these reforms, effective January 1, 2020, are significant. Bail and discovery are two areas that received attention in important areas.

Here is an overview of some of the principal changes:

Bail

Despite a push to formally add "dangerousness" as a consideration in determining bail, the statute does *not* include language regarding "community safety" as a factor. New York remains committed to the presumption of innocence. The new statute drastically reduces the use of cash bail through mandatory release, and provides additional procedural and due process safeguards.

The bill has a mandatory Desk Appearance Ticket (DAT) provision that provides court notifications for everything up to an E Felony. At the arrest phase, the bill mandates that an arresting officer must issue a Desk Appearance Ticket in all cases except those where the arrest is for a Class A, B, C, or D felony or a violation of some sex offenses, escape, and bail jumping. There are circumstances where the police are not required to issues DATs even on eligible cases, for example, if the court can issue an order of protection or suspend/revoke a driver's license. The arrestee "may" provide contact information to receive court notifications, including a phone number or email address.

The bill has a mandatory release or release with nonmonetary conditions for almost all misdemeanors and non-violent felonies. All persons charged with misdemeanors (except sex offenses and DV contempt), nonviolent felonies, robbery in the second, and burglary in the second, must be released on their own recognizance unless it is demonstrated and the court makes a determination that the principal poses a risk of flight to avoid prosecution. Otherwise, they must be released with nonmonetary conditions (pretrial services) that are the least restrictive condition(s) that will reasonably assure the principal's return to court.

For all other charges the system will largely remain the same. When charged with a "qualifying offense" the court may release the person on his or her own recognizance or under non-monetary conditions, fix bail, or if the offense is a qualifying felony, the court may remand the person. The offenses that qualify for money bail or remand are: violent felony offenses (except Rob 2 [aided] and Burg 2 [of a dwelling]); felony witness intimidation; felony witness tampering; Class A felonies other than drugs (except a "director of a drug organization" under 220.77); some felony sex offenses under 70.80; incest involving children; terrorism charges except 490.20; conspiracy to commit Class A felony under P.L. 125; and misdemeanor sex offenses and domestic violence misdemeanor contempt (still not remand eligible, continue to be eligible for bail as under current law).

Money bail now has additional protections from abuse. If monetary bail is set on a person charged with a qualifying offense, the court must set it in three forms including either *unsecured* or *partially secured* security bond. When setting money bail the court must consider the principal's financial circumstances, ability to post bail without posing an undue hardship, and the principal's ability to obtain a secured, unsecured or partially secured bond. Courts will now have to issue on-the-record findings to justify their determination.

New options will be available to courts to aid people in returning to court instead of using money bail. In all instances, the court or a designated pretrial service agency will notify all people ROR'd or released with conditions of all court appearances in advance by text messages, telephone call, email or first class mail. Prior to issuing a bench warrant for a failure to appear for a scheduled court date, the court will provide 48 hours' notice to the principal or principal's counsel that the principal is required to appear in order to give him or her the opportunity to voluntarily appear.

Additionally, electronic monitoring will be available for a limited subset of cases, but will be placed behind rigorous due process protections. Electronic monitoring is considered incarceration for 180.80 and 170.70 purposes, and may only be imposed for 60 days with the option of continuing only upon a de novo review before a court. Electronic monitoring must also be the least restrictive means to ensure return to court and be "unobtrusive to the greatest extent possible."

There are many more provisions in this bill. Stand by for a more complete summary soon.

Speedy Trial/CPL 30.30

DA's "ready" statement is not valid unless DA has filed a proper "certificate of compliance" affirming that discovery obligations under new CPL 245.20 discovery statute are complete (unless court finds "exceptional circumstances").

"Partial readiness"/"partial conversion" is no longer a valid doctrine for misdemeanors – DA cannot state

"ready" on some counts without certifying that all other counts are converted or dismissed.

VTL infractions are considered "offenses" for 30.30 purposes—this eliminates the problem of a lingering VTL 1192(1) or 509 count after a 30.30 dismissal of higher charges.

Where the DA states "ready" for trial, the judge must make an inquiry on the record as to their actual readiness.

30.30 release motions no longer have to follow the procedural rules for motions to dismiss—so they can be made orally and do not need to be on advance notice to the DA. Where periods are in dispute, the judge must conduct a prompt hearing and the DA has burden of proving excludability.

Denial of a 30.30 dismissal motion can be appealed following a guilty plea (and mandatory language indicates that the parties may not be able to waive such appellate review).

Subpoenas

The new statute discards the 24-hour notice requirement for defense subpoenas on government agencies, as well as any requirement of service on the DA. The defense now only needs a court-endorsed subpoena for governmental agencies, with minimum of three days for the agency to comply. The DA is not notified unless the agency voluntarily informs the DA.

When a subpoena is challenged by a motion to quash or questioned by the judge prior to endorsement, the defense must only show a factual predicate that the item or witness is "reasonably likely to be relevant and *material* to the proceedings." The prior standard set by case law was an advance showing that the item or witness was likely be "relevant and *exculpatory*."

Discovery

Discovery is automatic—not by written "demands" or discovery motions.

Statute requires true "open file" discovery from the DA. The provision listing the DA's discovery obligations states that DAs must disclose "*all items and information that relate to the subject matter of the case*" and that are in the DA's or law enforcement's possession, "including *but not limited to*" all of the listed items in new Article 245 (replaces Article 240). It also states that when interpreting the DA's discovery obligations, there is a **"presumption of openness"** and **"presumption in favor of disclosure."**

There is also a right to **full discovery before withdrawal of plea offers by the DA** (in situations where the offer requires a plea to a crime).

Discovery **from the defense** is also greatly expanded (list of known witnesses [not potential rebuttal witnesses), experts, etc. *after* prosecution completes its discovery obligations). See further discussion below.

Timing of DA's Discovery

The DA's discovery occurs "as soon as practicable but not later than **15 calendar days after defendant's arraignment" on any accusatory instrument—**including a misdemeanor complaint, felony complaint, or any other instrument. This means that the DA's discovery clock starts to run at criminal/town/city court arraignment in almost all cases.

The DA's 15-day period can be extended without motion by up to 30 calendar days if discoverable materials are exceptionally voluminous, or if they are not in the DA's actual possession "despite diligent, good faith efforts." In other words, if DAs are allowed to invoke this extension, full discovery will be required 45 days after first appearance.

There are certain automatic timing extensions for some types of evidence (grand jury minutes, expert witness information, exhibits, electronically stored information).

The DA can seek court-ordered modification of discovery time periods "in an individual case" based on showing of "good cause."

There is a special rule for the defendant's statements to law enforcement. Where the defendant has been arraigned on a felony complaint, the DA must disclose **all such statements no later than 48 hours before the scheduled time for defendant to testify at the grand jury**.

The DA must file and serve a "certificate of compliance" upon completion of discovery (aside from items under a protective order). The certificate must affirm due diligence and reasonable inquiries; turn over of all known information; and list disclosed items.

As noted in the "speedy trial" summary above, **DAs cannot validly state "ready" to stop the CPL 30.30 clock until a proper certificate of compliance is filed/served** (unless court finds "exceptional circumstances"—a high standard under existing 30.30 case law).

The DA must disclose defendant's **prior bad acts** that will be offered under either *Molineux* or *Sandoval* "not later than **15 calendar days before trial."**

DA's Discovery (Within 15/45 Days of First Appearance)

This includes:

- **Defendant's and co-defendant(s)' statements** to a public servant engaged in law enforcement activity. This is no longer limited to "jointly tried" co-defen-

dants, and no longer excludes statements made in course of criminal transaction.

- **Grand jury transcripts of any person who testified in relation to the subject matter** of the case, including defendants. Obviously, in many cases, grand jury proceedings will not have occurred (or minutes will not have been transcribed) when discovery is due 15 (or 45) days after first appearance. The DA gets an additional automatic 30-day extension if grand jury transcripts are unavailable due to limited court reporter resources (so disclosure in that situation can occur 75 days after first appearance). Beyond 75 days, the DA must seek court-ordered modification of discovery time period, and the minutes are subject to the general "continuing duty to disclose."
- **Names and "adequate contact information" for all persons (not just testifying witnesses)** whom the DA knows have information relevant to any charged offense or potential defense. The DA also must designate witnesses who "may be called." Physical address is not required, but defense can move for disclosure of physical address for "good cause."
- **All written or recorded statements of all persons** whom the DA knows have information relevant to any charged offense or potential defense, including all police and law enforcement agency reports and notes of police and other investigators.
- **Expert opinion evidence**, including credentials (CV, list of publications, and proficiency tests/results from past 10 years) and all written reports or, if no report exists, a written summary of facts/opinions in testimony and grounds for all opinions.
- **All electronic recordings**, including all 911 calls and all other recordings up to 10 hours in total length. If more than 10 hours exist, the DA must turn over those it intends to introduce at trial or hearing, plus known information describing additional recordings. Defense counsel then has right to obtain any of the other recordings it wants within 15 calendar days of request.
- **All photos and drawings**.
- **All reports of scientific tests/examinations**, including all records, underlying data, calculations and writings
- **All favorable evidence and information** known to DAs and law enforcement personnel acting in the case. This provision uses the same categories as OCA's "Brady Order," but all disclosures are moved up to 15 days (or 45 days) after first appearance. It also specifies that DAs must disclose "expeditiously upon its receipt."
- **List of all potentially suppressible tangible objects** recovered from defendant or co-defendant, with the DA's designation of: actual or constructive possession, abandonment, whether the DA will rely on statutory presumption of possession, and location where each item recovered if practicable. Right to inspect or test property as well.
- **Search warrants** and related documents.
- **"All tangible property"** that relates to subject matter of case, including designation of which exhibits DA will introduce at trial or pretrial hearing.
- **Complete record of judgments of conviction** for all intended DA witnesses and all defendants.
- **DWI cases—**records of calibration/certification/inspection/repair/maintenance for all testing devices for the periods 6 months before and 6 months after the test, including gas chromatography reference standard records.
- **Electronically stored information** ("ESI"—from computers, cell phones, social media accounts, etc.) seized or obtained by or on behalf of law enforcement, either from the defendant or from another source that relates to the subject matter of the case. If device/account belongs to the defendant, the DA must disclose complete copy of all of the ESI on device/account.

Pre-Plea Discovery

If the DA makes an offer that requires a plea to a crime (but not a violation), the DA must disclose all items and information that would be discoverable prior to trial **not less than three days before the plea deadline for felony complaints or not less than seven days before the plea deadline for other accusatory instruments**. The shorter period for felony complaints is designed to accommodate CPL 180.80 deadlines. Note that the pre-plea discovery provisions do not seem to apply to a sentencing promise by the judge on a plea to the top charge.

DAs cannot condition making a plea offer on waiver of discovery rights.

Where the defendant has rejected the plea offer and a violation of this discovery requirement is discovered, then the judge must consider the impact of the violation on defendant's decision to accept or reject the offer. If the violation "materially affected" the decision and the DA refuses to reinstate the offer, the court "must"—"as a presumptive minimum sanction"— "preclude the admission at trial of any evidence not disclosed as required" by statute.

Courts may also take "other appropriate action as necessary" on pre-plea discovery violations. For example, if the discovery violation involved a defendant who entered a plea (as opposed to one who did not accept the offer), the remedy could be vacating the conviction when

the discovery violation involved a *Brady* violation that would have changed the defendant's decision.

Discovery from Defense

Defense must provide its discovery to the DA **30 calendar days after service of DA's "certificate of compliance"** affirming the DA completed discovery. There are automatic timing extensions for certain types of evidence (expert witness information and exhibits).

Defense discovery obligations have been expanded to include witness names and statements within this 30-day period. But when the defense intends to call a witness for the "sole purpose of impeaching" a DA's witness, it does not have to disclose the person's name/address or statements until after the DA's witness has testified at trial.

Discovery from defense applies only to eight specific things that defense "intends to introduce" at trial or hearing, including:

1. Names, addresses and birth dates of witnesses whom defense intends to call at trial or hearing.
2. Written and recorded statements of witnesses whom defense intends to call at trial or hearing (other than the defendant).
3. Expert opinion evidence for experts whom defense intends to call at trial or hearing, including credentials and reports and underlying documents. If no written report was made, a written statement of facts/opinions to which the expert will testify must be disclosed.
4. Recordings that defense intends to introduce at trial or hearing.
5. Photos/drawings that defense intends to introduce at trial or hearing.
6. Other exhibits ("tangible property") that defense intends to introduce at trial or hearing.
7. Scientific testing/examination reports and documents that the defense intends to introduce at trial or hearing.
8. Summary of promises/rewards/inducements to intended defense witnesses, and requests for consideration by intended defense witnesses.

Defense counsel must file/serve a "certificate of compliance" upon completion of discovery (aside from items under a protective order). The certificate must affirm due diligence and reasonable inquiries; turn over of all required information; and list disclosed items.

Other Notable Discovery Provisions

Every New York police or law enforcement agency must, upon DA's request, **make available to the DA a "complete copy of its complete records and files"** relating to case to facilitate discovery compliance.

An arresting officer or lead detective must expeditiously notify the DA about **all known 911 calls, police radio transmissions, and other police video and audio footage and body-cam recordings** "made or received in connection with the investigation of an apparent criminal incident"—and the DA must expeditiously take all reasonable steps to ensure all known recordings "made or available in connection with the case" are preserved. If the DA fails to disclose a recording due to any failure to comply with this provision, the court "shall" impose an appropriate sanction.

The defense may move for a **court order that grants defense access to a relevant location or premises** to inspect, take photographs, or make measurements.

The defense may move for a **court order that grants discretionary discovery of any other items or information** not covered by the statute.

There are newly codified standards for imposing sanctions/remedies for discovery violations, based on existing case law.

Either party can obtain **expedited review by a single appellate justice of a ruling that grants or denies a protective order** relating to the name, contact information or statements of a person.

Note on Varying Start Dates for Different Statutory Clocks

Counsel must remember that the new CPL Article 245 (discovery), CPL 710.30 (statement/identification notices), and CPL 30.30 (speedy trial) will each have different triggering dates. Specifically:

1. Under the discovery statute (Art. 245), the DA's 15-day (or 45-day) period to provide discovery starts to run upon defendant's *arraignment on any accusatory instrument*, including a misdemeanor complaint or felony complaint.
2. Under the statement/identification notice statute (710.30), the DA's 15-day period to give notices starts to run upon defendant's *arraignment on an information or indictment*.
3. Under the "speedy trial" statute (30.30), the clock starts to run upon *filing of any accusatory instrument*, including a misdemeanor complaint or felony complaint.
4. But for DATs (which will be more common given the new bail reforms), the 30.30 clock starts to run *on the date when the defendant first appears* in court in response to the DAT [see 30.30(5)(b)] (for discovery in DAT cases, the DA's clock to provide discovery will still begin when defendant is *arraigned on a complaint*).

364-Day Maximum Sentence for Misdemeanors

The bill reduces the maximum sentence of Class A and certain unclassified misdemeanors from 1 year to 364 days. This law will benefit immigrant New Yorkers in several important ways.

It will eliminate the possibility of New York misdemeanors becoming aggravated felonies because of a one-year sentence. The Immigration and Nationality Act defines many aggravated felony offenses—including theft offenses, crimes of violence, and counterfeiting offenses—by an actual sentence of one year or longer. By reducing the possible maximum sentence, the bill eliminates the potential plea bargain of "an A and a year" and the possibility of a non-citizen defendant receiving an aggravated felony as a result of being convicted of an A misdemeanor after trial. In addition to subjecting a non-citizen to mandatory detention while in removal proceedings and to barring a lawful permanent resident from applying for United States citizenship, an aggravated felony conviction after 1996 leads to certain deportation.

The new law will also mean that one New York misdemeanor conviction that is a crime involving moral turpitude will no longer render a lawful permanent resident deportable from the United States. As a result of this bill it will take at least two misdemeanor crimes involving moral turpitude—whether they be A or B misdemeanors—to trigger the deportation statute.

Finally, under current immigration law, one crime involving moral turpitude that is an A misdemeanor or more serious bars non-citizens from applying for Non-LPR Cancellation of Removal—the only form of relief available in removal proceedings to many of our undocumented clients who have children, spouses, or parents who are U.S. citizens or lawful permanent residents. The new law should make it possible for many more of our non-citizen clients to successfully defend themselves against deportation and to remain with their families as contributing members of our communities.

Other Significant Reforms

- An end to license suspension for non-driving drug convictions.
- A prohibition on employment and housing discrimination against people with open ACDs.
- Application of Article 23A protections against baseless discrimination for people with criminal records to certain state-operated professional licenses.
- A prohibition on release of mugshots for certain cases.
- An expedited closure of three state prisons.
- A requirement for local police chiefs to report to DCJS on police use of force with demographic data and for the latter agency to release it publicly annually, and a version of the Domestic Violence Survivors Justice Act.
- Asset forfeiture reforms.

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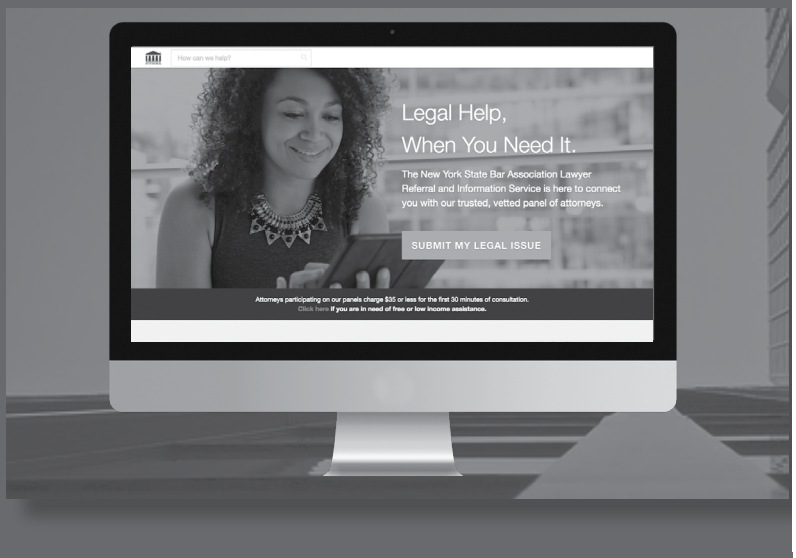

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NYSBA

2019 Criminal Justice Section's Annual Awards

At the CJS Annual Meeting, the Section had the opportunity to present awards to a number of distinguished honorees. The Awards Committee, chaired by Norman P. Effman, selected a stellar group who represent a cross-section of the criminal justice field.

Joseph M. LaTona, Esq.

Charles F. Crimi Memorial Award

Norm Effman presented the Charles F. Crimi Memorial Award to Joseph M. LaTona, Esq. This award recognizes the professional career of a defense lawyer in private practice that embodies the highest ideals of the Criminal Justice Section.

Joe started his practice in Western New York and was hired as an associate attorney in the firm of Condon, Klocke, Angie, Gervase & Sedita. He became a partner in the firm of Condon, LaTona, Pieri & Dillon. He was special counsel for the Lipsitz, Green law firm and became a senior partner. Joe entered sole practice in 2001.

Joe has attained an AV rating by Martindale Hubbel. He has been listed in each edition of the "Best Lawyers in America" since 1987. Since 2008, he has been listed in each edition of "Superlawyers – Upstate New York" edition.

Joe is a member of the New York State Bar Association, the Erie County Bar Association, the National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers.

Joe was co-counsel in the United States Supreme Court and sole appellate counsel in the Second Circuit Court of Appeals in *Marinello v. United States*, 584 U.S. ___, 138 S.Ct. 1101 (2018).

He was involved in several other white collar tax cases: *United States v. Todaro*, 744 F.2d 5 (2d Cir. 1984); *United States v. Manufacturers & Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983); and *United States v. Todaro*, 610 F.Supp. 923 (W.D.N.Y. 1985).

Joe attended Bishop Duffy High School in Niagara Falls, New York. He graduated from Rutgers College in New Brunswick, New Jersey, and attained his law degree from Creighton University School of Law.

Joe has two daughters, Jean and Laura, and two grandchildren, Nicholas and Samantha.

P. David Soares, Esq.

Outstanding Prosecutor Award

The Outstanding Prosecutor Award was presented by Robert J. Masters, Esq. to Albany County District Attorney P. David Soares, who is currently serving in his fourth term as Albany County District Attorney. This award recognizes a prosecutor who has made special contributions to not only the prosecution community, but also to the bar at large, and whose professional conduct evidences a true understanding of a public prosecutor's duty to advance the fair and ethical administration of criminal justice.

At an early age, David's parents instilled in him the value of family, education, hard work, and active participation within a strong community. Although David grew up in a rough neighborhood, loving friends and a strong community surrounded him. This upbringing encouraged David to believe in the goodness and potential of all people if given the proper guidance. As an ADA and now as the DA, David fights crime with the lessons his parents taught him, "help and protect those who may not be able to protect themselves." Having handled thousands of cases in city courts in Albany County as an Assistant District Attorney, David witnessed the failings of the criminal justices system first hand. In 2004, David sought office to ensure justice for Albany County residents and on January, 1 2005, David realized his goal of becoming District Attorney. Since taking office, David has devoted his energy to bringing "One Standard of Justice" to Albany County. He remains committed to leading an office that is Tough on Crime and Smart on Prevention by:

- Reducing street violence through creative, non-traditional means;
- Building hope for the people of Albany County by restoring communities;
- Dealing with the crisis of re-entry; and
- Emphasizing prevention over prosecution.

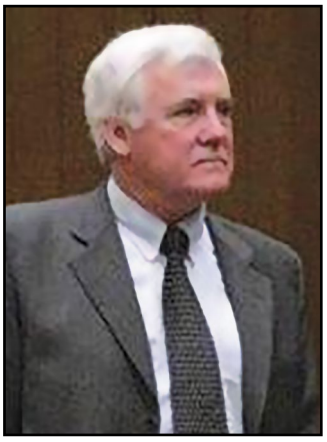
In partnership with local, state, and federal law enforcement agencies, David has been successful in both fighting crime and building hope in Albany County. DA Soares is the current President of the District Attorneys Association of the State of New York.

William J. Leahy, Esq.

The Michele S. Maxian Award for Outstanding Public Defense Practitioner

Section Chair Tucker C. Stanclift, Esq., presented The Michele S. Maxian Award for Outstanding Public Defense Practitioner to William J. Leahy, Esq., of the Office of Indigent Legal Services (ILS) for New York State. This award recognizes the achievements and contributions of an outstanding public defense practitioner.

Bill Leahy attended the University of Notre Dame (1968) and Harvard Law School (1974). After practicing for 10 years as a trial and appellate public defender for the Massachusetts Defenders Committee, he became the first leader of the Public Defender Division of the Massachusetts Committee for Public Counsel Services (CPCS) from 1984 to 1991, when he became the second Chief Counsel of that statewide agency until his retirement in July, 2010.



In February 2011, Bill began his tenure as Director of the Office of Indigent Legal Services (ILS) for New York State (www.ils.ny.gov), with the mission to improve the quality of representation that poor people receive in the criminal and family courts throughout the state. His office is implementing the 2014 settlement between the New York Civil Liberties Union and the State of New York in the right-to-counsel case of *Hurrell-Harring v. The State of New York*. In December 2016, ILS published the first binding and state-funded criminal defense caseload standards in the United States that require sharp reductions from the 1973 National Advisory Commission standards.

On March 15, 2013, Bill spoke at the United States Department of Justice's commemoration of the 50th anniversary of the *Gideon* decision, where he proposed the creation of a federal office to assist state-funded public defense and called for a White House Commission on the Fair Administration of Justice for the Indigent Accused.

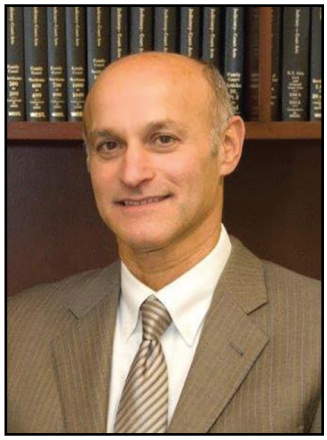
In April 2017, Governor Cuomo approved landmark legislative changes, under which Bill's office is now extending the key *Hurrell-Harring* public defense reforms — caseload relief, counsel at arraignment, and the provision of appropriate support services — throughout New York State, pursuant to plans which his office filed on December 1, 2017. His article, *The Right to Counsel in the State of New York: How Reform Was Achieved After Decades of Failure*, is published at 51 Indiana Law Review 145 (2018).

Hon. Lawrence K. Marks

The Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System

Hon. Lawrence K. Marks, Chief Administrative Judge, New York State Unified Court System, was presented with the Vincent E. Doyle, Jr. Award for Outstanding Judicial Contribution in the Criminal Justice System by Hon. Barry Kamins. This award honors outstanding judicial effort to improve the administration of the criminal justice system.

Lawrence K. Marks was appointed New York's Chief Administrative Judge in 2015. In that role, he oversees the day-to-day administration and operation of the statewide court system, with a budget of $3 billion, 3,600 state and local judges, and 15,000 non-judicial employees in more than 300 locations. He previously served as First Deputy Chief Administrative Judge, Administrative Director of the Office of Court Administration, and Special Counsel to the Chief Administrative Judge. Prior to joining the state court system, he was senior supervising attorney with the Legal Aid Society in New York City, a litigation associate with Hughes Hubbard and Reed, and law clerk to U.S. District Court Judge Thomas C. Platt. In 2009, he was appointed by Governor David Paterson as a Judge of the New York State Court of Claims; he was reappointed to that position in 2015 by Governor Cuomo. In addition to his administrative responsibilities, he hears cases in the Commercial Division in the Supreme Court, New York County. He has served as an adjunct professor at the law school and graduate school levels and is the editor and co-author of *New York Pretrial Criminal Procedure* (Thomson Reuters) as well as the author or numerous articles and government reports on justice system issues. He graduated from the State University of New York at Albany and Cornell University Law School.



Capt. Art C. Cody, USN (RET)

David S. Michaels Memorial Award

Andrew Kossover, Esq., presented the David S. Michaels Memorial Award in recognition of courageous efforts in promoting integrity, justice, and fairness in the criminal justice system to Captain Art C. Cody, USN (RET).

Captain Cody is Deputy Director of the Veterans Defense Program of the New York State Defenders Association. He began his career as an Army helicopter

pilot followed by a similar role in the U.S. Navy Reserve flying for a Strike Rescue/Special Operations Squadron. He served aboard USS Enterprise (CVN-65) in the initial response to the 9-11 attacks and was most recently deployed to Afghanistan (2011-2012) as the Staff Director of the Rule of Law Section, U.S. Embassy, Kabul. In total, his active and reserve military career spans over 30 years. As a civilian lawyer, he has represented criminal defendants for over 20 years and is former chair of the Capital Punishment Committee of the New York City Bar Association. He frequently presents nationally on the defense of veterans, provides counsel to lawyers for veterans, particularly those under sentence of death, and recently served as lead counsel in a veteran capital clemency hearing.

In addition to an aerospace engineering degree from West Point, he graduated *magna cum laude* from Notre Dame Law School where he was the Executive Editor of the *Notre Dame Law Review* and founded the Notre Dame Coalition to Abolish the Death Penalty. He is a recipient of the New York City Bar Association's Thurgood Marshall Award for Capital Representation and the Four Chaplains Legion of Honor Humanitarian Award for Lifetime Service. His military decorations include the Navy Bronze Star Medal, Meritorious Service Medal, Naval Aviator Badge, Army Aviator Badge, Army Parachutist Badge and the German Armed Forces Parachutist Badge. Additionally, he received the State Department's Meritorious Honor Award for his service in Kabul. He is married to the former Stacy A. Powell (USMA '83) and they have four children.

Elizabeth Glazer, Esq.

Outstanding Contribution to the Bar and the Community

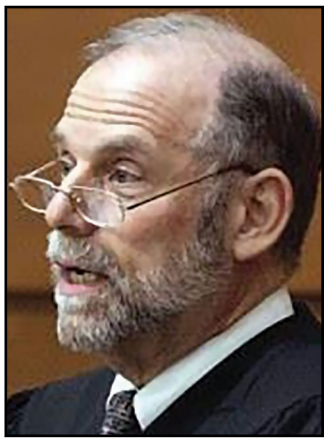
Elizabeth Glazer was recognized for her service to the bar and the community and was introduced by John M. Ryan, Esq. Ms. Glazer is the Director of the Mayor's Office of Criminal Justice. In that role, she serves as the senior criminal justice policy advisor to the Mayor and First Deputy Mayor. Ms. Glazer oversees citywide criminal justice policy and develops and implements strategies across city agencies and partners to enhance public safety, reduce unnecessary incarceration, and increase fairness. Previously, Ms. Glazer served as the Secretary for Public Safety to New York State Governor Cuomo, where she was responsible for the oversight and management of eight state agencies, including Corrections, Parole, State Police and National Guard. Ms. Glazer has also held a variety of leadership positions at the local, state and federal levels, including the United States Attorney's Office for the Southern District of New York where she pioneered the use of the racketeering laws to address the violent gang problem. Ms. Glazer received her B.A. from Harvard University and her J.D. from Columbia Law School. She clerked for then-U.S. Circuit Judge Ruth Bader Ginsburg.

Hon. Martin Marcus

Outstanding Contribution in the Field of Criminal Law Education

Hon. William Donnino introduced Hon. Martin Marcus, who received the Section's award for Outstanding Contribution in the Field of Criminal Law Education. Judge Marcus was recognized for his outstanding work in criminal law education, the promotion of interest in the practice of criminal law, and the provision to students of the opportunity to gain practical insight into the operation of the criminal justice system.

Judge Martin Marcus was first appointed to the New York Court of Claims in 1990 and has been assigned to Criminal Term of Bronx County Supreme Court ever since. He is a member of the Unified Court System's Criminal Jury Instructions Committee and the Committee on the Guide to New York Evidence. Before his appointment to the bench, he was a prosecutor for 14 years, first as an Assistant District Attorney assigned to the Rackets Bureau of the New York County District Attorney's Office, and then as First Assistant in the New York State Organized Crime Task Force. He was an adjunct professor at Brooklyn Law School, where he taught a seminar comparing French and German criminal procedure with American procedure from 1994 to 2013. He is a graduate of the University of Chicago and Yale Law School and clerked for the Hon. Jon O. Newman, then a United States District Judge for the District of Connecticut.



Judge Marcus has served as vice chair and member of the American Bar Association's Criminal Justice Council and chair and member of the ABA's Criminal Justice Stan-

dards Committee. He is now chairing the ABA Task Force developing the Fourth Edition of the ABA's *Criminal Justice Standards on Discovery*, chaired the ABA Task Force that developed the Third Edition of its *Criminal Justice Standards on DNA Evidence*, and served as reporter for the Third Edition of the ABA's *Criminal Justice Standards on Electronic Surveillance*. He is the co-author of *New York Criminal Law*, a treatise on New York's Penal Law (Thomson-West, 2016, 2007, 2002, 1996 ed.), author of *Above the Fray or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 Brooklyn L. Rev. 1193 (1992); and co-author of *Corruption and Racketeering in the New York City Construction Industry* (New York University Press 1990); and *The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany*, 87 Yale L.J. 240 (1977). Both in New York and China, Judge Marcus has participated in numerous international conferences on a variety of criminal justice topics, sponsored by the U.S.-Asia Law Institute of New York University Law School and the National Committee on U.S.-China Relations.

Criminal Justice Section at 2019 Annual Meeting

The Criminal Justice Section held its Annual Meeting program Wednesday, January 16, 2019, at the New York Hilton Midtown. At left, Bronx District Attorney Darcel D. Clark contributed to the conversation; below left, Jessica MacFarlane examined what scientific and medical studies can reveal about equity; and below right, Program Chair Xavier R. Donaldson of New York moderated the discussion on implicit bias.

Re-visiting *In re of Jimmy D.*: What a Great Idea!

By John Brunetti

This past December, an Associate Judge of the Court of Appeals called for the Court to revisit[1] its 2010 holding in *In re of Jimmy D*.[2] There, the Court ruled, 4 to 3, that while "the parent of a child has the right to attend the child's interrogation by a police officer, [] a confession obtained in the absence of a parent is not necessarily involuntary."[3] Since the present composition of the Court does not include any judge who participated in that decision, either in the majority or the dissent, chances are good that Judge Rivera's wish may come true. If so, there is another holding of the majority in *Jimmy D.* that should be revisited as well: Where "*Miranda* rights were validly waived and never reinvoked, the issue is voluntariness, not waiver."[4] The majority was talking about traditional voluntariness of a statement, not the voluntariness of a *Miranda* rights waiver. To this the dissent responded: "Contrary to the majority's view, the continuing validity of a *Miranda* waiver is not a nonissue after the waiver has first been made, even in the absence of the waiver's retraction. Logically, every response made during a custodial interrogation is a reaffirmation of the original waiver."[5] The U.S. Supreme Court decrees quoted in the discussion that follows tend to support the dissent's view.

What better place to start than *Miranda*[6] itself: "The mere fact that [a suspect] may have answered some questions . . . does not deprive him of the right to refrain from answering any further inquiries."[7] The Court's use of the word "any" is important here. The Court did not say "refrain from answering all further inquiries." Thus, the Court recognized that the suspect who initially waives *Miranda* and agrees to speak to the police is not thereafter limited to a binary choice of either answering every question or invoking his right to remain silent. After a suspect validly waives his *Miranda* rights and agrees to speak with the police, the suspect may be selectively silent as to some questions and answer others, and his conduct in doing so does not constitute an invocation of silence requiring termination of the interrogation.[8] Thus, when a suspect refuses to answer a question during the interrogation, *i.e.*, remain selectively silent as to that question, he is literally exercising his *Miranda* Fifth Amendment right to remain silent as to that question, and he may not be cross-examined about that refusal if he testifies at trial.[9]

The Supreme Court has described its *Miranda* ruling as follows: "[T]he Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles."[10] Thus, it would seem that where "*Miranda* rights were validly waived and never reinvoked, the issue"[11] remains whether subsequent statements have been obtained in violation of the Fifth Amendment (*Miranda*) as well as traditional voluntariness. But there's more from *Miranda.*

In *Miranda*, the Supreme Court literally said that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" and later asserted that one of "[t]he purposes of the safeguards prescribed by *Miranda* [is] to ensure that the police do not coerce or trick captive suspects into confessing."[12] Here again the Court's use of words is important.

The Court did not say "trick the suspect into agreeing to answer questions."

The Court said "trick the suspect into confessing." Absent a blurt out, the confession always comes after the initial rights advisement and initial waiver. So, *Miranda's* prohibition on deception would seem to apply during interrogation. That is what the dissent held *in Jimmy D.*, saying that *Miranda* "plainly conditions the validity of an interogee's[13] continuing waiver of rights upon the absence of '*any* evidence that the accused was threatened, tricked, or cajoled into [the] waiver.'"[14] This in not heresy. Despite popular belief otherwise, neither the Supreme Court[15] nor our Court of Appeals has ever ruled that deception of a suspect undergoing custodial interrogation to which *Miranda* applies is permitted.

The two cases often cited[16] to support a claim to the contrary are *Frazier v. Cupp*,[17] to which *Miranda* did not apply,[18] and *Oregon v. Mathiason*,[19] where the suspect was not in custody when police told him his fingerprints were found at the scene.

As for our Court of Appeals, each defendant in the Court's most famous deception cases, *People v. Tarsia*,[20] *People v. Tankleff*,[21] and *People v. Thomas*,[22] was not in custody when deceived, so *Miranda* did not apply.[23] When the Second Department reviewed the New York case law on deception in 2012, the result was that a "review of the case law amply demonstrates that when interrogating a suspect, the police may, as part of their investigatory efforts, deceive a suspect, and any resulting statement will not be suppressed for that reason alone."[24] The only authority cited for that proposition was two older cases where *Miranda* did not apply[25] and two more recent cases where the defendant was not in custody.[26]

The Supreme Court has repeatedly asserted that *Miranda* applies to the entire interrogation, not just the

John Brunetti is a Judge of the Oneida Indian Nation Court, retired Judge of the Unified Court System, and author of *New York Confessions* (Lexis Nexis Matthew Bender).

beginning. In *Moran v. Burbine*,[27] the Court held that "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."[28] The Court reiterated this principle in *Fare v. Michael C.*:[29] "[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have counsel."[30]

In *Moran* and *Fare,* the Court did not limit the scope of the *Miranda*-rights-waiver inquiry to the circumstances surrounding the defendant's initial decision to speak, but rather extended it to the circumstances surrounding the entire interrogation. Their two rule statements beg the question: Why must a suppression court consider the totality of the circumstances surrounding the entire interrogation when a *Miranda* violation is alleged unless the defendant's decision to answer each question during the interrogation is a waiver of *Miranda* rights?

The next Supreme Court decision on point is *Berghuis v. Thompkins*.[31] There, the Court held that where there is evidence that a suspect has been advised of his rights and understood them, an express *Miranda* waiver is not required, and the suspect's answering a question three hours into the interrogation, after remaining selectively silent, constituted an implied waiver of *Miranda* rights. The Court ruled that the defendant's act of answering the question that produced the incriminating answer (and follow-ups) was "'a course of conduct indicating waiver' of the right to remain silent."[32] Thus, the Court made clear that a suspect's act of answering a question is a waiver of the *Miranda* right to remain silent. But just in case there is doubt about each answer being a *Miranda* rights waiver, there's more.

In *Berghuis*, the Supreme Court literally said:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate.[33]

So, what right is the Court talking about when it says that as to each question asked during an interrogation, the suspect makes a "decision to waive, or not to invoke"? The answer is the *Miranda* right to remain silent.[34]

The *Berghuis* Court summed it up best: "In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police,"[35] even when defendant has remained mostly silent for the first three hours of the interrogation.

If the Court of Appeals does revisit *Jimmy D.* and accepts the dissent's view that "every response made during a custodial interrogation is a reaffirmation of the original waiver,"[36] the Appellate Division will no longer feel that it is "constrained" to follow *Jimmy D.* it as it did in *People v. Weaver*.[37] There, the First Department quoted from *Jimmy D.* in ruling that "[w]here, as here, a defendant's *Miranda* rights were validly waived and never reinvoked, the issue is voluntariness, not waiver" followed by footnote.[38] In that footnote, after conceding "that courts in other jurisdictions have embraced the theory advanced by defendant" and citing cases from seven of those jurisdictions,[39] the Court added "[o]ur highest court has not [embraced that theory], however, and we are therefore constrained to assess the admissibility of defendant's statements under the traditional voluntariness standard."[40] Perhaps, if the Court revisits *Jimmy D*, it may do so.

Endnotes

1. *Matter of Luis P.,* 2018 WL 6492691 (Dec. 11, 2018), Rivera, J., dissenting: (" Further, in light of the United States Supreme Court's jurisprudence on the consideration of a juvenile's age during custodial interrogation, further guidance on how juveniles are constitutionally distinct from adults, and recognition that the scientific studies on juveniles supporting the conclusions of its earlier cases has become stronger over the ensuing years, we should revisit *Matter of Jimmy D.*, 15 N.Y.3d 417.").
2. *In re Jimmy D.*, 15 N.Y.3d 417 (2010).
3. *In re Jimmy D.*, 15 N.Y.3d at 422–23.
4. *In re Jimmy D.*, 15 N.Y.3d at 422–23: "[S]ince Jimmy's Miranda rights were validly waived and never reinvoked, the issue is voluntariness, not waiver."
5. *In re Jimmy D.*, 15 N.Y.3d at 426–31 (2010).
6. *Miranda v. Arizona*, 384 U.S. 436 (1966).
7. *Id.* at 445.
8. *See, e.g., People v. Rodriguez*, 49 A.D.3d 431 (1st Dep't 2008), *lv. den.*, 10 N.Y.3d 964 (2008); *People v. Morton,* 231 A.D.2d 927 (4th Dep't 1996), *lv. den.,* 89 N.Y.2d 944 (1997); *People v. Baird*, 167 A.D.2d 693 (3d Dep't 1990), *lv. den.*, 77 N.Y.2d 903 (1991); *People v. Acquaah*, 167 A.D.2d 313 (1st Dep't 1990), *lv. den.*, 78 N.Y.2d 961 (1991); *People v. Madison*, 135 A.D.2d 655 (2d Dep't 1987), *aff'd,* 73 N.Y.2d 810 (1988).
9. *People v. Goldston*, 6 A.D.3d 736, 776 N.Y.S.2d 102 (3d Dep't 2004).
10. *Michigan v. Tucker*, 417 U.S. 433, 443 (1974).
11. *In re Jimmy D.*, 15 N.Y.3d at 422–23: "[S]ince Jimmy's Miranda rights were validly waived and never reinvoked, the issue is voluntariness, not waiver."
12. *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984).
13. Spelled as in the original quote.
14. *In re Jimmy D.,* 15 N.Y.3d at 428, citing *Miranda v. Arizona*, 384 U.S. at 476.
15. A WestLaw search of "trick! /4 cajol! and miranda" in the U.S. Supreme Court database yields only four cases in addition to *Miranda* and none approves of deception of the suspect through lies during a custodial interrogation: *Colorado v. Spring*, 1987 479

U.S. 564 (1987); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Orozco v. Texas*, 394 U.S. 324 (1969); and *Moran v. Burbine*,

16. *See, e.g.*, Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 13 (2010); Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 798–99 (2006); Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219, 316 (2006); Garcia, *Regression to the Mean: How Miranda Has Become a Tragicomical Farce*, 25 St. Thomas L. Rev. 293, 297 (2013); Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1, 28–29 n. 176 (2010). 475 U.S. 412 (1986).
17. *Frazier v. Cupp*, 394 U.S. 731(1969).
18. *Id.* at 738 ("But *Miranda* does not apply to this case.").
19. *Oregon v. Mathiason*, 429 U.S. 492 (1977).
20. *People v. Tarsia*, 50 N.Y.2d 1 (1980).
21. *People v. Tankleff*, 84 N.Y.2d 992 (1994
22. *People v. Thomas*, 22 N.Y.3d 629 (2014).
23. A WestLaw search of *People v. Tarsia*, the Court's first deception case, yields only three cases: *People v. Tankleff*, 84 N.Y.2d 992 (1994) (a non-custodial deception case); *People v. Inniss*, 83 N.Y.2d 653 (1994) (in relation to a preservation issue); and *People v. Shedrick*, 66 N.Y.2d 1015 (1985) (in relation to a polygraph); *see also People v. Aveni*, 100 A.D.3d 228, 237 (2012), where to support the 2012 assertion that "mere deception, without more, is not sufficient to render a statement involuntary," the Court cited *Tarsia (a non-custody case) and People v. Pereira*, 26 N.Y.2d 265 (1970) and *People v. McQueen*, 18 N.Y.2d 337 (1966), both non-*Miranda* cases. To support the assertion "[o]ur review of the case law amply demonstrates that when interrogating a suspect, the police may, as part of their investigatory efforts, deceive a suspect, and any resulting statement will not be suppressed for that reason alone" the Court cited *Pereira*, *McQueen*, and two non-custody cases *People v. Thomas*, 93 A.D.3d 1019, reversed but not on the non-custody issue, 22 N.Y.3d 629 (2014), and *People v. Jordan*, 193 A.D.2d 890.
24. *People v. Aveni*, 100 A.D.3d 228, 238 (2012), *appeal dismissed*, 22 N.Y.3d 1114 (2014).
25. *People v. Pereira*, 26 N.Y.2d 265 (1970) and *People v. McQueen*, 18 N.Y.2d 337 (1966).
26. *People v. Thomas*, 93 A.D.3d 1019, reversed but not on the non-custody issue, 22 N.Y.3d 629 (2014) and *People v. Jordan*, 193 A.D.2d 890.
27. *Moran v. Burbine*, 475 U.S. 412 (1986).
28. *Id.* at 421.
29. *Fare v. Michael C.*, 442 U.S. 707 (1979).
30. *Id.* at 725.
31. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).
32. *Id.* at 386, citing *North Carolina v. Butler*, 441 U.S. 369, 373.
33. *Berghuis v. Thompkins*, 560 U.S. at 388.
34. *Michigan v. Tucker*, 417 U.S. 433, 443 (1974): As the Supreme Court has described its *Miranda* ruling: "[T]he Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles."
35. *Berghuis v. Thompkins*, 560 U.S. at 388-389.
36. *In re Jimmy D.*, 15 N.Y.3d 417, 426–31 (2010).
37. *People v. Weaver*, 167 A.D.3d 1238, 1241, n. 1 (3d Dep't 2018).
38. *People v. Weaver*, 167 A.D.3d at 1241, n. 1.
39. *People v. Weaver*, 167 A.D.3d at 1241, n. 1 ["(*see, e.g. People v. McKee*, 2018 Mich.App LEXIS 375, at 31-35, 2018 WL 1072808, *11–12 [2018]; *Leger v. Commonwealth*, 400 S.W.3d 745, 750–751 [Ky. 2013]; *Lee v. State*, 418 Md. 136, 156–157, 12 A.3d 1238, 1250–1251 [2011]; *Spence v. State*, 281 Ga. 697, 698–701, 642 S.E.2d 856, 857–858 [2007]; *State v. Pillar*, 359 N.J. Super 249, 262, 268, 820 A.2d 1, 8, 11–12 [2003]; *Hopkins v. Cockrell*, 325 F.3d 579, 584–585 [5th Cir. 2003], *cert denied* 540 U.S. 1173, 124 S.Ct. 1198, 157 L.Ed.2d 1226 [2004]; *State v. Stanga*, 2000 SD 129, ——, 617 N.W.2d 486, 490–491 [2000])."].
40. *People v. Weaver*, 167 A.D.3d at 1241, n. 1.

The Meaning of Justice

By Christopher S. Bae

I started as a line assistant in the Queens District Attorney's Office in the Spring of 2016. As a Queens native, born of immigrant parents, and a product of the New York public school system—The Bronx High School of Science, SUNY Binghamton, CUNY Law School—accepting this job at the Queens District Attorney's Office was an honor and a privilege.

Two principles still remain fresh in my mind from my first-year training from what seems like a lifetime ago: 1) When in doubt, do the right thing, and 2) This is the best job you'll ever have. Looking back at my early struggles of Criminal Court and the oft crushing caseload that came with it, I've found that a unified effort in the pursuit of justice indeed made this job the best job that I'll ever have.

"Justice also means recognizing the community that you represent; every time you state your name for the record followed by 'For the People,' it is recognizing that your jury, victims, and witnesses come from the most diverse county in the world."

Even what seemed like simple cases provided big lessons. I recall a case where a woman alleged that a man grabbed her butt as he walked passed her in an aisle of a supermarket. The defendant was arrested and charged with forcible touching under Penal Law § 130.52. When I spoke with the woman, she seemed credible and confident, willing to move forward and hold the defendant accountable for his actions. But when I subsequently received and reviewed the surveillance video from the supermarket, I learned that the video told a different story. There she was shopping and standing in an aisle made narrower by boxes of goods stocked on the floor, and out comes our defendant walking down the same aisle. As he walks by her, with his arms swinging by his sides, and partially sidestepping the boxes on the floor, either the sleeve of his jacket or the back of his hand arguably grazed the woman's butt. It was debatable if it was his hand or his jacket, or if he ever made contact with her at all. But one thing was clear, this wasn't a "grab" as the woman initially thought.

When I reviewed the surveillance video with my supervisor, she agreed with my initial assessment that the video was troubling but advised me to bring the woman in, review the video together, and see what she had to say. And when I met with the woman and we reviewed the tape together, she candidly acknowledged that she had made a mistake and signed a dismissal form. I then notified defense counsel and moved to dismiss the case on the next court date. After the case was dismissed, defense counsel thanked me, saying had I not disclosed the surveillance video and instead offered a non-criminal disposition such as an adjournment in contemplation of dismissal or even a disorderly conduct, her client would have accepted and ran with it. But I wasn't deserving of her thanks because that's not how the system works. Unlike her, I don't have an individual client. I represent the People of the State of New York and the pursuit of justice. I have bosses who preach that we do the right thing. I have supervisors and colleagues who share the same goal of pursuing justice. And justice dictates equally zealous advocacy for exonerating the innocent as we have for convicting the guilty. That's how the system works.

Justice also means trying the tough cases that need to be tried. One of my first jury trials was for charges stemming from a domestic violence incident where after a heated argument, the jealous boyfriend, my defendant, punched the victim in the face, destroyed her cell phone with a hammer, and threatened to throw a cinderblock through her car windshield. We charged the defendant with third-degree assault, second-degree harassment, fourth-degree criminal mischief, and second-degree menacing. According to the victim, this wasn't the defendant's first jealous outburst and his outbursts got worse and worse over time. Although there was scant physical evidence, her allegations were credible and consistent with multiple third-party 911 calls. She was neither vindictive nor overzealous, nor was she asking that we throw the book at him. But she finally had enough and decided to make a stand, because in her mind we are all responsible for our actions. Although defense counsel

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and the court pushed hard for a non-criminal disposition, my supervisor and I agreed that doing the right thing in this situation was giving this victim an opportunity to take the witness stand, face her abuser, and tell the jury, "That's the man who did this to me."

Justice also means recognizing the community that you represent; every time you state your name for the record followed by "For the People," it is recognizing that your jury, victims, and witnesses come from the most diverse county in the world. And I'm proud to have worked for Judge Richard A. Brown who recognized this dynamic and proactively worked to better the communities that we serve. In 2015, he established the Office of Immigrant Affairs—for which I continue to serve as a liaison—to address the unique concerns of immigrants. Through the OIA we partnered with community organizations to get the word out that if you're the victim of a crime, our office will help you seek justice regardless of your immigration status. As a liaison, I help with the intake process when we receive complaints from the Korean immigrant community and I recall one complaint where the victim alleged that he was the target of immigration fraud where a purported attorney promised the desperate victim a Green Card in exchange for thousands of dollars but instead applied the victim for asylum. What really struck me was when the victim told me in Korean, "I was weary of contacting your office because I don't know who to trust here, but I'm reporting this incident because I saw you at the Korean Community Services event and I realized that there's one of us in the DA's office." I'm proud to work for a boss that recognizes that language barriers, cultural differences, fear of immigration repercussions, and a distrust of government make it difficult for victims to come forward, and is actively working to overcome these obstacles in the pursuit of seeking justice for our victims.

In a time where social justice and criminal reform issues seem to constantly make headlines, I am proud to work for an office that has been steadfast in doing the right thing in the pursuit of justice. It is worth repeating: this is truly the best job that I'll ever have.

My Year as an Appellate Public Defender

By Nicolas Duque Franco

As I approached my graduation from New York University School of Law last spring, I carefully considered what to do in my first year of practice. I had been fortunate to receive an offer to clerk for a federal district court judge starting in the Fall of 2019 and, in the interim, was interested in finding a one-year opportunity that could further my career goals and provide excellent training. I knew that I wanted to litigate, and I was hoping to do so as a public defender. As I had come to find out, however, those opportunities were few and far between for someone in my position. Most public interest fellowships that interested me required a two-year commitment, and local public defenders' offices expected new hires to stay at least two to three years. I was at a crossroads.

I found my solution at the Center for Appellate Litigation (CAL), a non-profit that represents indigent clients who want to appeal their convictions in the First Department. With the financial support of my university, and the guidance of CAL's leadership, I was able to secure a fellowship placement at CAL until my clerkship, and have been humbled by how much I have learned since joining the office last August. I credit that growth to the way in which leadership supports new hires, the emphasis CAL places on client-centered lawyering, and the creativity of the work done by the incredible attorneys who dedicate their time to CAL's mission.

Like many other new attorneys just joining the profession, I felt as though I didn't know what I was doing on Day 1. While I came to the role with some relevant experience, including internships at the Department of Justice and in public defense, as well as a year-long clinic with the Federal Defenders of New York, CAL presented me with a much greater level of responsibility, and an appellate practice different from the trial-level experiences I had encountered before. I found that managing my own docket, writing full appellate briefs, and handling the day-to-day processes of the job—e.g., how to file an appeal, how to set up a prison visit upstate, how to appear before the Appellate Division—were foreign to me.

Looking back on that first week now, I realize how far I've come because of the support I received from the attorneys, staff, and paralegals around me. CAL, for example, partners with another service provider in the Second Department, Appellate Advocates, to offer training to new attorneys across a wide variety of subject areas: prudential doctrines like preservation and harmless error, the mechanics of many commonly raised claims, and writing exercises that teach you how to draft statements of fact and appellate arguments. Today, I still refer to the detailed manuals we received in training whenever I brief a new issue or as a starting point for my research.

The office's model of supervision offers another helpful support for new lawyers. While one supervising attorney helps track your productivity, individual briefs are supervised by a rotating group of senior attorneys, each with their own method of delivering feedback, approaching the arguments, and appetite for risk. Similarly, the office encourages recent hires to argue their own cases. As a result, I have been fortunate to appear three times thus far in the Appellate Division under the guidance of my supervisor, David Klem. As a young lawyer, it is invaluable to be able to learn from so many attorneys in the course of a single year.

Importantly, the informal discussions I've had with CAL's attorneys about my work are equally valuable. I often talk to my officemate about how to frame a new argument and discuss with the other attorneys on my floor how I can best brief an issue or how to preempt a prosecutor's potential counterargument. We also have weekly meetings with a cross-section of the office that serve as a sounding board for novel claims, tough issues, or new cases. Together, these processes and structures make CAL an ideal place for a new appellate lawyer.

This first year in practice has also helped me understand how practicing with a client-centered approach translates to the more academic world of appellate law. For example, to help build strong relationships with clients shortly after being assigned to CAL, attorneys and client advocates — pre-law school hires that work with clients, support office projects, and provide critical services like parole representation — visit incarcerated clients at the various Department of Corrections and Community Supervision facilities around the state. The office aspires to visit every client at least once before CAL receives their record on appeal, and these visits can be highly beneficial. In addition to reminding the clients that, even while incarcerated, there is someone they can turn to for support, each visit also helps the office get a preliminary understanding of their case and address medical or conditions issues a client might be facing.

At these monthly visits, I have experienced some of the most fulfilling moments of my first year in practice, and I am reminded during each visit that every person CAL represents is so much more than the crime for which they were convicted. CAL's clients have families, dreams, and fears, just like anyone else, and part of our role as public defenders is to ensure that the system recognizes that humanity. My work at CAL consistently reminds me of that truth.

I have also come to appreciate the ways in which clients are as critical in an appeal as at trial or in a plea negotiation. Reflecting on this year, I recall several instances

Before graduating from NYU, **Nicolas Duque Franco** attended the University of Chicago (majored in English and minored in philosophy) and graduated in the spring of 2012.

where a client has helped identify issues in their cases or provided background as to why, or how, certain things happened during their prosecutions. CAL's guidelines on contacting clients, the expectation that CAL attorneys visit their clients in every appeal, the understanding that clients must be kept updated on their cases, and the office's commitment to visiting clients, even before receiving their records, all evince the office's core belief that the client comes first.

In addition to CAL's support structures and client-centric model, I have been inspired by the creativity of the office's attorneys. That creativity is evident in the individual appeals brought by the office. Recently, for example, the Court of Appeals recognized in *People v. Suazo*, 32 N.Y.3d 491 (2018) a constitutional right to a jury trial for all crimes that might subject someone to deportation. That decision followed from an appeal brought by one of our office's supervisors, Mark Zeno, and tracks a growing recognition by courts around the United States that deportation presents a unique, extreme penalty rivaling a person's loss of liberty.

Similarly, through the office's commitment to representing immigrants under the Immigrant Justice Project (IJP), CAL has helped dozens of non-citizen clients find relief from deportation and secure a future in the United States alongside their families. By attacking the validity of their convictions on *Padilla* and other legal grounds, our IJP attorneys and leaders, Robin Nichinsky and Marianne Yang, have meaningfully advanced the growing field of immigration law.

In working with IJP, I have been excited to see the traction that can come from approaching an appeal through this lens. As a new appellate lawyer, it is also helpful to learn skills—e.g., analyzing medical records, reviewing evidence, and interviewing people in our client's lives—through the fact-finding process in these cases that can complement the writing and research at the heart of a direct criminal appeal. Most importantly, working on these cases reminds me of the duty attorneys have to try to find new, more impactful ways to represent their clients. Innovation is critical.

My time at CAL has showed me the practical benefits of working at an office with a commitment to supporting new lawyers, taught me how to humanize the practice of appellate law, and reinforced the importance of creative lawyering. When I leave CAL this summer and enter the next phase of my career, I will approach it with these lessons in hand and with a gratitude for the attorneys and staff who have supported me and provided me with the opportunity to become a better advocate. Representing clients from some of the most underrepresented sectors of society, and seeing the clear need for robust criminal and civil legal services, has been a humbling and profound experience. I strongly encourage everyone reading this to consider the many ways in which we can all help address that need—by, for example, joining an organization, donating, doing pro bono work, or advocating for reform—and get involved today.

New York Court of Appeals Review

By Jay Shapiro

The Court of Appeals issued two decisions of note relating to criminal practice in the first quarter of 2019.

Past Recollection Recorded/Confrontation Clause

***People v. Tapia* (decided April 2, 2019)**

The Court held that it was not an abuse of discretion for the trial court to permit the prosecution to introduce into evidence the grand jury testimony of a witness as past recollection recorded. The witness, a retired police officer, could not recall the events surrounding the defendant's arrest. However, he did recall testifying truthfully and accurately before the grand jury. The requirements of admissibility are: "1) the witness must have observed the matter recorded; 2) the recollection must have been fairly fresh at the time when it was recorded; 3) the witness must currently be able to testify that the record is a correct representation of his or her knowledge and recollection at the time it was made; and 4) the witness must lack sufficient present recollection of the information recorded."

Additionally, the Court found no confrontational clause violation because the witness was available for cross-examination, even though his memory of the events was faulty.

Fourth Amendment—Monitored Telephone Calls

***People v. Diaz* (decided February 21, 2019)**

Defendant was incarcerated at Rikers Island. At trial, the prosecution introduced excerpts of four of his more than 1,000 telephone calls he had made from prison. The defendant was on sufficient notice that calls were being monitored but he argued that there was no notice that the recordings could be provided to prosecutors. The Court of Appeals held that there was no "additional Fourth Amendment protections" that prevented the Corrections Department from turning the recordings over to the prosecution.

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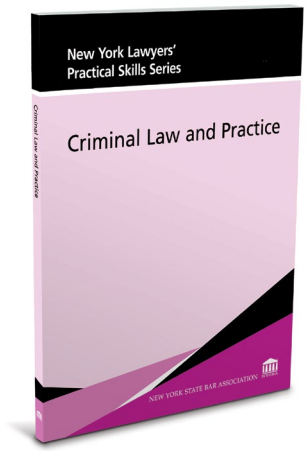

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Jay Shapiro, Esq.

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