New York Supreme Court

Appellate Division – Second Department

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,*

-against-

EUGENE POLHILL, *Defendant-Appellant.*
(AD-No. 10-01680)

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THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,*

-against-

COLLIN LLOYD-DOUGLAS, *Defendant-Appellant.*
(AD-No. 10-03736)

***

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,*

-against-

JERMAINE DUNBAR, *Defendant-Appellant.*
(AD-No. 10-04786)

BRIEF OF *AMICUS CURIAE*
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INTRODUCTION

These three cases present important questions about the constitutionality of the Queens District Attorney's pre-arraignment interrogation program. Under the program, the District Attorney identifies individuals in custody who are ready to be arraigned but unable to retain private counsel, primarily because they are indigent. Instead of allowing these unrepresented individuals to proceed to arraignment, the District Attorney diverts them into an interrogation room. In the interrogation room, a prosecutor advises suspects that there is an urgent need for them to divulge information about the subject matter of their arrest directly to prosecutors prior to arraignment. Only after the interrogation is over is the suspect then allowed to proceed to arraignment where a judge appoints counsel, makes a probable cause determination, informs the defendant of the charges, and sets bail. The District Attorney has interrogated thousands of people under these circumstances.

The Appellants assert that evidence elicited from them during the pre-arraignment interrogation program should be suppressed because the statements were involuntary and the program violates the rules of ethics. The Queens District Attorney argues that the suspects gave a valid waiver of their *Miranda* rights before giving statements. The District Attorney also argues the program does not violate ethical rules, and that even if it did suppression would not be appropriate. *Amici* submit this brief to raise three points not addressed by the parties.

First, the District Attorney's pre-arraignment interrogation program violates suspects' right to a prompt probable cause determination. Following a warrantless arrest, the Fourth Amendment and New York criminal procedure law allow police to perform only a narrow range of administrative steps incident to arrest and necessary to prepare for an initial appearance. Pre-arraignment interrogation of unrepresented suspects is not a necessary administrative step. Any argument to the contrary is foreclosed by the plain language of New York's prompt arraignment statute, and New York precedent holding that pre-arraignment interrogations violate the right to a prompt arraignment as a matter of law.

Second, the pre-arraignment interrogation program violates the Fifth Amendment. The Queens District Attorney's protocol is equivalent to a practice struck down by the United States Supreme Court in *Missouri v. Seibert.* The Queens District Attorney employs a deliberate interrogation strategy intended to subvert, in advance, any subsequent *Miranda* warnings. Prosecutors initiate the interrogation by advising suspects of the purported urgency of discussing their arrest, priming them to divulge information. Prosecutors then interject a *Miranda* warning and proceed to let the suspect reply to the enticement. Like the protocol in *Seibert,* the pre-arraignment interrogation program nullifies the intended effect of the *Miranda* warning and renders the warning constitutionally invalid.

Third and finally, because the program results in systemic and reoccurring

violations of the Fourth and Fifth Amendments, New York law, and the rules of ethics, the program should be ended. Suppression of the evidence elicited from these three defendants, while important relief for the Appellants, is an incomplete remedy with regard to the program as a whole and the thousands of indigent individuals that have been, and will continue to be, affected by its operation. In light of the fundamental rights violated by the programmatic pre-arraignment interrogation of unrepresented suspects, and the ongoing and widespread violations of ethical rules that occur as a result, the Court's ruling in these three cases should bring the program to a definitive end.

INTEREST OF AMICI CURIAE

Amici are non-profit organizations and bar associations that participate in advocacy, legislation, and litigation related to criminal justice issues and/or that provide direct services to indigent criminal defendants in New York. Individual statements of interest for each *amicus curiae* appear in Appendix A.

STATEMENT OF FACTS

The facts related to the defendants' individual experiences with the pre-arraignment interrogation program are fully described in detail in Appellants' briefs. *Amici* highlight those facts that each of these three defendants shares with one another and with every indigent defendant who has been subjected to in-custody interrogation by Queens prosecutors instead of being promptly arraigned

and appointed counsel.

In New York, a suspect's first court appearance after a warrantless arrest occurs at arraignment, where a judge makes a probable cause determination, informs the defendant of the charges, sets bail, and appoints counsel if the suspect is indigent. *See* CPL § 180.10 (1)-(6). The steps necessary to prepare for the initial appearance in New York City are well known. After arrest, police officers complete arrest paperwork, obtain the suspect's pedigree information, and transport the suspect to Central Booking at the courthouse. Fingerprints, if taken, are transmitted to the Division of Criminal Justice Services, where a rap sheet is produced and returned to Central Booking. The Criminal Justice Agency ("CJA") interviews each suspect for the purpose of making a bail recommendation and the arresting officer consults with prosecutors to draft the criminal complaint. *See* Criminal Court of the City of New York, Annual Report 2010, at 17-26 (detailing necessary procedures, *see* "Court Operations-Arraignments").

When these steps are completed, the suspect is administratively ready to appear in court. All that remains is for the papers to be filed by the district attorney. Once the district attorney delivers that paperwork to the court, the court dockets the case and schedules the suspect for the next available appearance. *Id.* at 19. The suspect is then brought from Central Booking to appear before a judge.

Pursuant to the Queens District Attorney's pre-arraignment interrogation

program, however, suspects who are otherwise administratively ready to be arraigned are diverted by prosecutors from proceeding to court and into an interrogation room. Prosecutors begin by making introductory remarks and then read from a prepared script. First, suspects are informed of "the charges" they will face "when [they] go to court."[1] (*See, e.g.,* Lloyd-Douglas: Ex. to Response Br., at 1 (Dec. 4, 2011) ("Interview Form"); Dunbar: Interrogation DVD, 12:03:57 (Apr. 24, 2009)). The suspect is told that "in a few minutes" he will be read his rights and be "given an opportunity to explain what you did at that date, time, and place." (Dunbar: Interrogation DVD, at 12:04:27; Interview Form, at 1).

Without any *Miranda* warning, an interrogator then states the following:

> If you have an alibi, give us as much information as you can, including the names of any people you were with. If your version of the events that day is different from what we have heard, this is your opportunity to tell us your story. If there is something you would like us to investigate concerning this incident, if you tell us about it, we will look into it. Even if you have already spoken to someone else, you do not have to talk to me. This will be the only opportunity you will have to talk to me prior to your arraignment[2] on these charges.

(Interview Form, at 1). After the script, the suspect is read a *Miranda* warning.

The District Attorney's pre-arraignment interrogation program is not

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[1] *Amici* refer to documents contained in Appellants' trial court records in parentheses and using the following citation format: (Appellant's Surname: Description of Document, Pin-cite (Date)). Papers filed in other matters use the same method, with case numbers added.

[2] The interrogations recorded on DVD indicate that the phrasing actually used in many cases is: "This will be the only opportunity you will have to talk to me *before you go to court* on these charges." (*See, e.g.,* Dunbar: Interrogation DVD, at 12:04:55).

authorized by statute, and there are no written criteria governing which suspects the District Attorney selects to interrogate before arraignment. Instead, the diversion of certain suspects from their impending arraignment and into an interrogation room is based upon subjective criteria. In some cases, the seriousness of the alleged offense is a factor. (*Brown v. Blumenfeld*, A.D. No. 10-09688, Ex. 6 to Opening Br. [Suppression Hg. Tr., Testimony of Asst. Dist. Atty. Garg] ("Garg Tr.") at 170:11-12). In other cases, the District Attorney simply "wants[s] to investigate [them] further." (*Id.* at 170:14-15). Whether or not an unrepresented suspect is interrogated can also depend on the time of day. (*Id.* at 164:1-3).

The District Attorney's Office is careful, however, to ensure that it targets only those suspects who are unable to retain an attorney. (*Id.* at 164:23-25; 165:1-5). The District Attorney allows suspects who are able to retain counsel to proceed directly to their prompt probable cause determination. (*Id.*)

ARGUMENT

The pre-arraignment interrogation program (1) violates suspects' constitutional and statutory right to a prompt probable cause determination; (2) violates the Fifth Amendment by ensuring that the *Miranda* warnings delivered in the course of the interrogation are ineffective; and (3) contravenes ethics rules prohibiting prosecutors from giving legal advice to unrepresented parties and from

engaging in misrepresentation. The Court should find the program as a whole is unlawful and unethical.

I. THE PRE-ARRAIGNMENT INTERROGATION PROGRAM VIOLATES THE RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION.

After a warrantless seizure, a suspect has a constitutional right to a prompt probable cause determination.[3] Fourth Amendment case law and New York statutory law have long been clear that this determination may not be delayed except to (1) complete administrative steps that are necessary to advancing the suspect to arraignment, and (2) that the completion of these administratively necessary steps must be accomplished within twenty-four hours before the delay becomes presumptively unconstitutional. The pre-arraignment interrogations fail the first prong of this test. Notwithstanding the District Attorney's assertions that pre-arraignment interrogation aids "efficiency," a program of pre-arraignment interrogations of unrepresented suspects is not a necessary administrative step and violates the right to a prompt probable cause determination as a matter of law.

[3] For individuals arrested on a warrant, this probable cause determination occurs at the time the warrant is issued. Individuals arrested on a warrant are protected from pre-arraignment interrogation without defense counsel present by New York's indelible right to counsel, which attaches at the time the warrant is issued. *See, e.g., People v. Harris*, 77 N.Y.2d 434, 440 (N.Y. 1991) ("[I]n New York once an arrest warrant is authorized, criminal proceedings have begun, the indelible right to counsel attaches and police may not question a suspect in the absence of an attorney.").

A. The Government Must Provide an Individual Arrested Without a Warrant With a Prompt Probable Cause Determination.

Over four decades ago the United States Supreme Court established that an individual subjected to a warrantless arrest must be brought promptly before a judicial officer for a probable cause determination in order to comply with Fourth Amendment's guarantee against unreasonable seizures. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). The Supreme Court explained:

> [A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for *a brief period of detention to take the administrative steps incident to arrest.* Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate.

Id. at 113-14 (emphasis added).

The Fourth Amendment's mandate is incorporated into New York Criminal Procedure Law § 140.20 ("Section 140.20"), which codifies the right to a prompt probable cause determination and, in addition, statutorily guards the right to a prompt arraignment where counsel will be appointed and the terms of pre-trial release will be determined. *See People v. Ramos*, 99 N.Y.2d 27, 35 n. 8 (N.Y. 2002) (noting that the right to a prompt arraignment codified in Section 140.20 is "grounded in the Fourth Amendment's proscription against unreasonable seizures"). Section 140.20 makes unambiguously clear that a prompt hearing must occur immediately after arrest, and provides greater specificity regarding the

limited types of "administrative steps incident to arrest" that can justify the postponement of a prompt hearing for any length of time:

> Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all *recording, fingerprinting and other preliminary police duties* required in the particular case, must, except as otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question.

CPL § 140.20 (1) (emphasis added). To effectuate the guarantee against unreasonable seizures, the right to a prompt hearing places two restrictions on the government that are related, but analytically distinct.

First, as a threshold matter, only "administrative steps" incident to the arrest or necessary to advancing the suspect to a probable cause determination are permissible under any circumstances, regardless of how long those steps may take to complete. *See* CPL § 140.20 (1); *e.g. People ex rel. Maxian v. Brown*, 164 A.D.2d 56, 61-63 (2d Dep't 1990); *affirmed at* 77 N.Y.2d 422, 427 (holding under Section 140.20 that "a pre-arraignment detention" cannot be prolonged except to "accomplish the tasks required to bring an arrestee to arraignment"). Once those steps are completed and the suspect is administratively ready for an initial appearance, this marks the end of any constitutionally reasonable delay. *See Maxian*, 164 A.D.2d at 66 (finding delays beyond the point of administrative

readiness "unnecessary"); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (same). Thus, once the suspect is administratively ready for the prompt probable cause determination—whether that occurs within one hour or twenty-three hours—the Fourth Amendment requires an immediate hearing. *See, e.g., United States v. Perez*, 733 F.2d 1026, 1027, 1035 (2d Cir. 1984) (finding delay was "unnecessary and unreasonable" where arrestee was administratively ready for arraignment 90 minutes after arrest, but was not arraigned until 23 hours after arrest in order to allow for pre-arraignment interrogation by prosecutors).

Second, even demonstrably necessary administrative steps must be completed within a reasonable time frame. Thus, after a certain amount of time—24 hours under New York law—the delay is presumed to be constitutionally excessive even if all the steps being completed in the interim are administratively necessary. *See Maxian,* 164 A.D.2d at 67 (holding more than 24 hours presumptively unreasonable to complete necessary administrative steps); *cf. McLaughlin*, 500 U.S. at 56 (holding 48 hours presumptively unreasonable).

B. New York Law Makes Clear that Pre-Arraignment Interrogation Violates the Right to a Prompt Probable Cause Determination.

The plain language of Section 140.20 makes clear that pre-arraignment interrogations do not fall within the narrow category of necessary administrative steps that police officers are permitted to complete after a warrantless arrest and

prior to a prompt arraignment. Courts applying the statute have found pre-arraignment interrogations "unnecessary" and impermissible as a matter of law.

Under Section 140.20, "recording, fingerprinting and other preliminary police duties" are the only administrative steps permitted before arraignment. *See also Maxian*, 77 N.Y.2d at 425 (detailing the types of necessary administrative steps prior to arraignment under New York criminal procedure). Close adherence to the plain language of Section 140.20 is required to safeguard the important constitutional rights it protects, and courts have applied it "strictly." *Maxian*, 164 A.D.2d at 63.

In *People v. DeJesus*, the First Department held that a delay in bringing an arrestee to arraignment to allow the prosecutor to interview witnesses and conduct a pre-arraignment interrogation was, as a matter of law, "unnecessary delay" within the meaning of Section 140.20—even though the defendant was ultimately arraigned in under 24 hours.[4] *See* 63 A.D.2d 148, 152-53 (1st Dep't 1978). In that case, the suspect was fully processed and administratively ready for arraignment on the evening of the arrest. *Id.* at 153. Because the initial appearance was delayed to enable administratively unnecessary questioning by investigating

[4]The opinion seems to indicate that almost *48 hours*—from 1 P.M. on October 3 to the morning of October 5—passed before the arraignment, *see DeJesus*, 63 A.D.2d at 149-152, but this is a typographical error. The opinion sets forth the precise chronology from arrest to arraignment, which makes clear the defendant was arraigned in just under 24 hours.

prosecutors, however, the court held that "[t]he statute was violated. There was unnecessary delay." *DeJesus*, 63 A.D.2d at 153-54.

Similarly, in *People v. Wynn*, the New York County Supreme Court considered a "pre-arraignment procedure" implemented by police for budgetary reasons. 424 N.Y.S.2d 664, 667 (N.Y. Sup. Ct. 1980). In *Wynn*, the suspect's initial court appearance was delayed by the police pre-arraignment program, and during that delay the suspect was interrogated by an Assistant District Attorney without defense counsel present. *Id.* The court began by noting that, under Section 140.20, "delay of arraignment for no other purpose than to gain time to procure inculpatory statements in the absence of unwaived counsel is 'unnecessary' delay." *Id.* at 665. Finding the record insufficient to definitively establish purposeful delay, the court nevertheless found the delay caused by the "pre-arraignment procedure" was unlawful because it was not a necessary administrative predicate to prepare the suspect for arraignment:

> The court finds that the pre-arraignment procedure . . . is not properly adopted by the legislature or judiciary and not analyzed in the laboratories of the legislature and judicial processes. It has been engrafted onto the tissue of the Criminal Procedure Law to which it is a foreign body. It is a growth upon the arraignment procedure, without benefit of the latter's immunilogical safeguards. . . . Not sanctioned by the legislature or court, it must a priori be deemed unnecessary as a matter of law, notwithstanding its convenience to the police system. Delay during its course must be deemed unnecessary delay.

Wynn, 424 N.Y.S.2d at 667; *see also People v. Dairsaw*, 46 N.Y.2d 739, 740 (N.Y. 1978) (holding defendant was entitled to instruction that delay was unnecessary as a matter of law because, even though defendant appeared in court within 24 hours, his arraignment had been delayed to allow for police questioning); *cf. People v. Lovello*, 1 N.Y.2d 436, 438 (N.Y. 1956) (finding under former Code Crim. Pro. § 165 and Penal Law § 1844 that once the administrative prerequisites for submission to the court are completed, additional steps that further delay arraignment are "unnecessary . . . as a matter of law" and "illegal").

C. The Pre-Arraignment Interrogation Program Violates the Fourth Amendment and Section 140.20.

The pre-arraignment interrogation program is not administratively necessary and thus violates the plain language of Section 140.20. Any argument to the contrary is foreclosed by precedent finding that pre-arraignment interrogations violate the statute. In addition, any argument that pre-arraignment interrogation is an administrative necessity is contradicted by the fact that criminal suspects in Queens County, including the defendants in these cases, are administratively ready for arraignment when the District Attorney diverts them from going to court and into an interrogation room. Although the District Attorney has defended the program by asserting it aids convenience and efficiency, those alleged interests do not permit the District Attorney to unilaterally and systematically override

suspects' right to a prompt probable cause determination. Moreover, upon examination, the benefits claimed by the District Attorney are illusory.

The District Attorney's program has nothing to do with "a police officer" completing "recording, fingerprinting and other preliminary police duties" that are necessary to bring the arrestee to court for arraignment. *See* Section 140.20. Indeed, the record is clear that suspects' initial appearances are delayed by the District Attorney for reasons that have nothing to do with resolving administrative impediments to a prompt court appearance. *See* Statement of Facts, *supra* at 6. The interruption of criminal suspects' impending appearance in front of a judicial officer for the purpose of a prosecutor conducting additional questioning outside the presence of defense counsel is "unnecessary delay" as a matter of law, regardless of the length of that delay. *See* Section 140.20; *DeJesus*, 63 A.D.2d at 153-54; *Wynn,* 424 N.Y.S.2d at 667.

Any argument that the pre-arraignment interrogation program is administratively necessary is belied by the fact that the criminal suspects are administratively ready for their initial appearance when they are intercepted by the District Attorney to be interrogated. *See* Facts, *supra* at 5. These suspects' arraignment is not scheduled, however, because the District Attorney delays the filing of paperwork with the court during the pre-arraignment interrogation. (*See* Garg Tr., at 163:7-8 ("[s]ometimes interviews are done once the paperwork is

complete . . . ")). Thus, the District Attorney's withholding of that paperwork prevents the court from docketing their cases and scheduling suspects for the next court arraignment.

Indeed, the record in these cases suggests that all necessary administrative tasks had been completed and the accusatory instrument was ready to file before the interrogations were initiated. For example, in Appellant Dunbar's case, he was administratively ready for arraignment at least *eighteen hours* before the People brought him to the court.[5] (*See* Dunbar: Intake Bureau Crime Report ("Intake Report"), at 9 (stating "Accusatory Ready" at 5:53 P.M.; "Affidavit Has Been Approved" at 6:23 P.M.)). The court was open and arraigning until late that night, and was open again early the next morning.[6] Appellant Dunbar, however, was not arraigned until after noon the next day—immediately after the interrogation. (Dunbar: Intake Report, at 3 (noting arrest at 12:30 P.M., Apr. 23, 2009); Interrogation DVD, 12:03:14 (interrogation begins at 12:03 P.M., Apr. 24, 2009)).[7]

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[5] Appellant Dunbar's is the only trial record which includes an "Intake Report" with all pages included. Appellant Polhill's Intake Report is missing the first and last pages, and Appellant Lloyd-Douglas' Intake Report does not appear in the file at all.

[6] In Queens, the Criminal Court is open from 9 A.M. until 1 A.M., seven days a week. *See* New York State Unified Court System, Queens County Webpage (last visited Mar. 13, 2012), http://www.nycourts.gov/courts/11jd/.

[7] The record indicates that all three Appellants were in custody for prolonged periods before eventually being interrogated, and were arraigned immediately after the pre-arraignment interrogation was over. When Appellants' arrest notations are compared with the corresponding Interrogation DVD time-stamps, it is evident that Appellant Polhill had been in custody for about 19 hours (Polhill: Presentence Report, at 3 (noting arrest at 10:23 P.M., Apr. 6, 2009);

Just how far the program falls outside the narrow range of administrative steps permitted under Section 140.20 is illustrated by the court's ruling in *Wynn*. In *Wynn*, the court condemned the fact that the District Attorney "exploited the fact that the personnel of the police, prosecutorial and judicial systems were as yet unpositioned for formal arraignment because of" the police department's administratively unnecessary pre-arraignment procedure. 424 N.Y.S.2d at 670. The District Attorney's program goes even a step further than the protocol considered in *Wynn*. The District Attorney is not merely taking advantage of an existing (but nevertheless impermissible) delay caused by another agency. Rather, the District Attorney causes the suspects' path to a prompt probable cause determination to be interrupted, and then exploits that interruption to interrogate the suspect without defense counsel present.

In the context of these appeals, the District Attorney has argued that depriving criminal court judges of a suspect's prompt appearance in the courtroom benefits the court and "all parties" by leading to the discovery of alibi information, advancing charges supported by sufficient evidence, exonerating the innocent before a case is even docketed, and assisting with bail recommendations. (Lloyd-

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Interrogation DVD (commencing 5:39 P.M., Apr. 7, 2009)); Appellant Dunbar for about 23 hours (Dunbar: Intake Report, at 4 (noting arrest at 12:59 P.M., Apr. 23, 2009); Interrogation DVD (commencing 12:03 P.M., Apr. 24, 2009)); and Appellant Lloyd-Douglas for about 23 hours (Lloyd-Douglas: DCJS Report, at 1 (noting arrest at 2:00 P.M., June 12, 2008); Interrogation DVD (commencing 12:10 P.M., June 13, 2008)) when each was eventually interrogated. Each was arraigned immediately thereafter.

Douglas: Response Br., AD No. 10-03736, at 15 n. 5, 18 (Dec. 14, 2011)). The right to a prompt probable cause determination, however, would still be violated even if these justifications were fully credited.

Purported benefits in administrative convenience do not transform a program of discretionary post-arrest interrogations into necessary administrative steps prior to arraignment. To the contrary, given the "serious and lasting personal and economic harm" suffered by individuals during pre-trial incarceration, *Maxian,* 77 N.Y.2d at 427, pre-arraignment procedures "not sanctioned by the legislature or court[] must a priori be deemed unnecessary as a matter of law, *notwithstanding its convenience.*" *Wynn,* 424 N.Y.S.2d at 667 (emphasis added). This is particularly true when the District Attorney's alleged interest has an overwhelming impact on one class of persons: indigent suspects who cannot afford a lawyer and must wait until arraignment for counsel to be appointed.

Moreover, these purported administrative benefits the District Attorney claims are *de minimis* at best, if not non-existent. As pointed out by the Appellants in their *Miranda* arguments, and of equal force in this context, there is no merit to the assertion that the pre-arraignment interrogation leads to any meaningful gains

in the efficient discovery of "alibis and exculpatory leads."[8] *See also United States v. Foley*, 735 F.2d 45, 48 (2d Cir. 1984) (holding with regard to a similar interrogation program that "most if not all of the practice's claimed advantages would appear to be equally available immediately after arraignment"). Similarly, any argument that the pre-arraignment interrogations are "administratively necessary" to assist with bail determinations would fail.[9] There is already a legislatively sanctioned, well-established CJA procedure for gathering data pertinent to a securing order and advising the court with an appropriate bail recommendation.

The Queens District Attorney's pre-arraignment interrogation program violates the Fourth Amendment and Section 140.20 because it is not administratively necessary. As discussed in Section III, *infra*, the Court's ruling in this case should make clear that the program is unlawful.

II. THE PRE-ARRAIGNMENT INTERROGATION PROGRAM VIOLATES THE FIFTH AMENDMENT.

In addition to Appellants' arguments that their individual statements were involuntary, *Amici* write separately to emphasize that the program as a whole

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[8] In fact, New York law specifically contemplates that prosecutors will make a written demand for alibi and witness information after arraignment. *See* CPL § 250.20 (prosecutors' demand for alibi information must be made within "twenty days after arraignment").

[9] None of the scripted questions are even directed to factors relevant to a bail determination. *Cf.* CPL § 510.30 (listing relevant factors).

violates the Fifth Amendment. Like the program that was found unconstitutional by the United States Supreme Court in *Missouri v. Seibert*, the warnings issued in the context of the pre-arraignment interrogation program are insufficient to provide a suspect with an adequate warning under *Miranda v. Arizona*. Thus, the program violates the Fifth Amendment, and the statements elicited from these—and any other—defendants should be deemed involuntary and inadmissible.

A. *Miranda* Warnings Must Have Their Intended Effect For Any Subsequent Waiver To Be Constitutionally Valid.

Miranda warnings must be "adequate and effective" for any waiver to be knowing and intelligent, and leading interrogation tactics that intentionally blunt *Miranda*'s meaning render subsequent waivers involuntary and invalid. In *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (plurality opinion), the Supreme Court struck down a police protocol where *Miranda* warnings were neutralized by interrogators just before the warnings were given, and were therefore not effective. The technique in that case was to "question first" and elicit a statement from a suspect, then *Mirandize*, immediately seek waiver, and invite the suspect to simply repeat the earlier inculpatory statement for the record. *Id.* at 605-06.

The Court concluded that pre-warning interrogation techniques that are designed to "circumvent" or "obscure" *Miranda*'s force are unconstitutional. *Id.* at

618 (Kennedy, J., concurring).[10] The Court noted that "when *Miranda* warnings are inserted in the midst of a coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Seibert*, 542 U.S. at 613-14 (plurality opinion) (internal citation omitted). Such "intentional misrepresentation of the protection that *Miranda* offers" makes any subsequent waiver invalid as a matter of law. *Id.* at 620 (Kennedy, J., concurring).

B. The Pre-Arraignment Interrogation Program is Purposefully Designed to Make Subsequent *Miranda* Warnings Ineffective.

Like the protocol considered in *Seibert*, the pre-arraignment interrogation program employs a deliberately misleading two-part interrogation strategy purposefully designed to make subsequent *Miranda* warning ineffective. A pre-*Miranda* script read by prosecutors is designed to elicit a substantive response from the suspect, and is the first phase of a continuous "interrogation" that is merely punctuated by a subsequent *Miranda* warning.[11]

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[10] Justice Kennedy, the fifth vote in *Seibert*, agreed "that statements obtained through the use of [the question-first] technique are inadmissible" because when "[t]he *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given," the "technique [is] based on a deliberate violation of *Miranda*." *See Seibert*, 542 U.S. at 618, 620 (Kennedy, J.). He disagreed, however, with the plurality concerning the precedential value of *Oregon v. Elstad*, 470 U.S. 298 (1966). *Id.* at 620 (Kennedy, J.).

[11] As a Queens County Criminal Court has found, citing *Seibert*, the "initial script is the functional equivalent of questioning because it is reasonably likely to elicit a response." (*See People v. Floyd*, N.Y. Sup. Ct. Queens Cnty. No. 08-3034, Order of Justice Kron, at 4 (Sept. 9,

Interrogators begin by seeking substantive details designed to elicit a response from the suspect ("give me as much information as you can"; "your version of events"; "tell us your story") and witness identities ("including the names of any people you were with"). Moreover, the interrogators frame their pre-*Miranda* interrogations in deceptive terms, characterizing the uncounseled interrogation as an "opportunity" to have the arrestees' version of events investigated—specifically, their "*only* opportunity."[12]

The script also communicates a false urgency, before the *Miranda* warning is given, to divulge information immediately to prosecutors. Prosecutors advise suspects that, "this will be your only opportunity to speak to us before you go to court on these charges." This concluding statement, uttered immediately before the *Miranda* warnings are given, is meant to leave no meaningful choice: talk now or there will be adverse consequences and missed opportunities for not doing so.[13]

2009)). In fact, suspects *do* respond to the script immediately, before the ineffective *Miranda* warning is given. Appellant Dunbar, for example, began responding before his interrogator even finished reading off "the charges" identified in very first sentence of the script. (*See* Dunbar: Interrogation DVD, at 12:04:11).

[12] In Appellant Dunbar's case, the court below stated in its Conclusions of Law that this phrase in particular—implying that the interrogation would be suspects' last chance to have their cases investigated—"is not true." (Dunbar: Decision on Huntley/Wade Motion, at 8 (Feb. 23, 2010)). "Certainly the People cannot argue that if at any time after the defendant was arraigned and assigned counsel, he would be precluded from bringing to their attention some aspect of the case which could, or should be investigated by the District Attorney." (*Id.*).

[13] That the entire script is delivered politely does not make it less effective in muting the *Miranda* warning that follows. Indeed, it may ultimately operate to create a false illusion of neutrality on the part of the prosecutors.

The pre-*Miranda* script entirely dilutes the force of the subsequent warnings. The District Attorney's intent in delivering the script is illustrated by the fact that preceding the *Miranda* warnings with these scripted statements serves no communicative purpose. A program intended to clearly communicate the constitutional choice *Miranda* requires would have no use for a pre-*Miranda* script; it would simply start with a *Miranda* warning.[14] Instead, the script is functional: leading with the script primes the suspect for a waiver, induces incrimination, and creates the false illusion that there will be adverse consequences if the suspect invokes *Miranda*'s protections. Thus, the constitutional right to remain silent is obscured and undercut before the *Miranda* warning is given.

The pre-arraignment interrogation program deliberately nullifies *Miranda* warnings in order to induce a suspect to waive Fifth Amendment rights, and is unconstitutional as a matter of law. *See Seibert*, 542 U.S. at 617. The prefatory script primes suspects to waive and give uncounseled incriminating statements before *Miranda* warnings are delivered. The "waivers" obtained by prosecutors in the pre-arraignment interrogation program are constitutionally infirm, and any subsequent statements elicited are involuntary as a matter of law. *See id.* at 613.

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[14] As Appellant Lloyd-Douglas's hearing officer observed below, the "preferable procedure in questioning defendants would be to first advise them of their *Miranda* rights, *then* advise them that if they wanted something investigated, they should let the authorities know about it." (Lloyd-Douglas: Order Denying Suppression, at 8 (Sept. 17, 2009) (emphasis in original)).

III. THE COURT SHOULD FIND THE PRE-ARRAIGNMENT INTERROGATION PROGRAM UNLAWFUL AND UNETHICAL IN ADDITION TO ORDERING SUPPRESSION IN THESE APPEALS.

Appellants convincingly argue that their individual statements to prosecutors should be suppressed because their pre-arraignment interrogations violated the Fifth Amendment and the rules of ethics.[15] Suppression in these three cases, however, is incomplete to address reoccurring constitutional violations caused by the program. In addition to finding suppression is an appropriate remedy for these three defendants, the Court should bring to an end a program which has already affected thousands of individuals and will continue to result in widespread violations of constitutional and statutory rights, and the rules of ethics.

A. The Pre-Arraignment Interrogation Program as a Whole is Unconstitutional and Unlawful.

Suppression is unlikely to effectively resolve broader questions about the constitutionality and legality of the program. Because the program results in widespread violations of important constitutional and statutory rights that are certain to reoccur, *Amici* urge this Court to make clear that the Fourth and Fifth Amendments, and Section 140.20, flatly prohibit the Queens District Attorney's

[15] The violation of the right to a prompt arraignment was raised by Appellant Dunbar and rejected by the trial court (*See* Dunbar: Decision on Huntley/Wade Mot., at 7-8). Even if this issue was not preserved below, however, "th[at] failure ... would not preclude the court from reviewing the matter in a proper case as a matter of discretion in the interest of justice." *See People v. Jones*, 81 A.D.2d 22, 42 (2d Dep't 1981) (citing CPL § 470.15).

pre-arraignment interrogation program.

The Court should resolve the broader questions regarding the constitutionality and legality of the entire pre-arraignment interrogation program because "the issue is likely to recur and the public interest would be served by achieving early certainty." *Clara C. v. William L.*, 96 N.Y.2d 244, 251 (N.Y. 2001). The District Attorney's vigorous defense of the program in these cases, and in *Brown v. Blumenfeld*, indicates an intention to continue the program unless an order from this Court makes clear that the program is unlawful. Indeed, the District Attorney has continued the program despite numerous and repeated expressions of judicial disapproval by Queens County criminal courts.

Even with the suppression of evidence in these (or other) cases, the District Attorney will still have a powerful incentive to continue obtaining information through pre-arraignment interrogations to use against defendants for a myriad of purposes where admissibility is not a factor, including plea bargaining, bail setting, informing trial strategy, and as impeachment evidence. Moreover, moving to suppress every statement elicited as a result of this illegal program would result in judicial inefficiency, and is likely to result in serious fundamental rights being adjudicated inconsistently even though the program's constitutional implications

are universal.[16] For all these reasons, the Court should find the pre-arraignment interrogation program is unlawful in addition to suppressing statements in the three cases on appeal.

B. The Pre-Arraignment Interrogation Program Results in Unavoidable Breaches of Ethical Rules.

Appellants' briefs establish that the pre-arraignment interrogation program violates two important ethical rules.[17] These conclusions are amply supported by numerous *amici curiae* opinions, including the expert opinion of dozens of ethics scholars, ethics experts, and bar associations.[18] These same authorities also establish that suppression is an appropriate remedy for the violation of ethical

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[16] Finding the program unconstitutional and unlawful in the context of these appeals is also critical because individuals subject to the program are unlikely to be able to avail themselves of alternate remedies. Because the District Attorney only targets individuals who have no attorney during their pre-arraignment incarceration, those defendants are unlikely to be able to file *habeas corpus* proceedings or civil actions to vindicate their rights. *Cf. Ramos*, 99 N.Y.2d at 36 (noting that writs of *habeas corpus* and actions under 42 U.S.C. § 1983 are among the available remedies for violations of the right to a prompt probable cause determination).

[17] First, when conducting the pre-arraignment interrogation, prosecutors act in violation of DR-104 (A) (2), which prohibits attorneys from giving advice to a party who is not represented when the lawyer's interests "have a reasonable possibility" of being in conflict with the unrepresented party's interests. This advice would violate DR-104 (A) (2) even if it were not misleading, but the fact that it is inaccurate also violates DR 1-102 (A) (4), which prohibits lawyers from engaging in "misrepresentation."

[18] (*See Brown v. Blumenfeld*, A.D. No. 10-09688, Mem. of *Amici Curiae* New York Cnty. Lawyers' Assoc. Ethics Instit., Assoc. of Prof'l Responsibility Lawyers, and Prof'l Responsibility Profs. and Practitioners, at 16-24 (Nov. 9, 2010) (concluding that pre-arraignment interrogations violate ethical proscription against giving legal advice to unrepresented adverse parties and against misrepresentation); Mem. of *Amicus Curiae* Lawrence J. Fox on Behalf of Certain Law Profs., at 10-17 (Nov. 9, 2010) (same); Mem. of *Amicus Curiae* The Legal Aid Society, at 6-14 (Nov. 18, 2010) (same); Mem. of Blumenfeld, at 35-44 (Nov. 30, 2010) (same); Br. of *Amicus Curiae* New York Civil Liberties Union, at 9-11 (Dec. 13, 2010) (same)).

rules. *Amici* join those arguments in full. For the sake of brevity and given the ample briefing already submitted to the court on these issues, *Amici* write here to emphasize that the Court should hold that the program as a whole is unethical, in addition to finding that the violations merit suppression in the three individual cases on appeal.

It is well-settled that New York courts have the "inherent power . . . to protect the rights of parties and witnesses, and generally to further the administration of justice." *People v. Jelke*, 308 N.Y. 56, 63 (N.Y. 1954). When ethical violations threaten the integrity of judicial process, New York courts have not hesitated to invoke this inherent authority to fashion appropriate remedies. *See, e.g., People v. Paperno,* 54 N.Y.2d 294, 299-300 (N.Y. 1981) (affirming New York court's inherent authority to deter ethical violations).

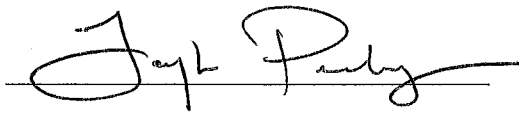
In other cases considering the ethical dimensions of programs similar to the pre-arraignment interrogation program, courts have noted that suppression is but one "among the panoply of remedies available to [the courts] for violations of [ethical rules]." *See United States v. Hammad*, 858 F.2d 834, 841 (2d Cir. 1988); *Foley*, 735 F.2d at 49 (acknowledging that it was within the court's province to "find the [prosecutor's pre-arraignment interrogation] practice to be unlawful or unethical" even if suppression was not the appropriate remedy in that case).

The Court should find the pre-arraignment interrogation program is

unethical, in addition to suppressing the evidence in the individual cases on appeal. The Court's ruling in these three cases should definitively end the ongoing and unavoidable ethical violations caused by the pre-arraignment interrogation program, and ensure there will be no subsequent reincarnation of any similar program with superficial changes that would still result in the same fundamental ethical breaches.

CONCLUSION

The constitutional, statutory and ethical principles implicated by the pre-arraignment interrogation program are meant to ensure basic fairness and balance in the adversarial criminal justice process. Without any legislative or judicial sanction, the District Attorney has unilaterally overridden core constitutional rights by selectively targeting thousands of unrepresented and indigent individuals for pre-arraignment interrogation. The Court should find the program violates the constitution, New York law, and the rules and ethics, and bring an end to the Queens District Attorney's pre-arraignment interrogation program.



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CERTIFICATE OF COMPLIANCE

I certify in compliance with Section 670.10.3 of the Rules of the Second Department that:

1. This brief was prepared on a computer using Microsoft Word.

2. The typeface is Times New Roman

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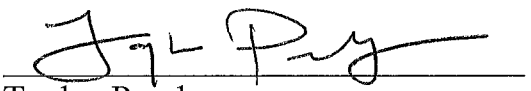
4. The brief contains 6,584 words, excluding tables and addendum.



Taylor Pendergrass

APPENDIX A

Amicus Curiae Statements of Interest

New York Civil Liberties Union: The New York Civil Liberties Union ("NYCLU") is a non-profit membership organization and the New York State affiliate of the American Civil Liberties Union. The NYCLU is devoted to the protection and enhancement of fundamental constitutional freedoms, including the rights of criminal defendants. The NYCLU has filed numerous *amicus curiae* briefs in cases involving criminal justice issues, including *Batson* challenges (*People v. Hecker*, 15 N.Y.3d 625 (2010)), the need for defendants to be informed of severe collateral consequences of their pleas (*People v. Harnett*, 16 N.Y.3d 200 (2011), and ensuring that that indigent defendants are able to obtain pre-trial release (*McManus v. Horn*, Court of Appeals, Argued Feb. 7, 2012). In particular, the NYLCU has previously filed an *amicus* brief in the Second Department related to these issues in *Brown v. Blumenfeld.* The NYCLU and its members have an interest in ensuring a just and fair pre-trial criminal justice process that respects the fundamental constitutional rights of individuals accused of committing crimes.

American Civil Liberties Union: The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in

the Constitution and federal and state civil rights laws. The Criminal Law Reform Project of the ACLU seeks an end to excessively harsh policies that result in mass incarceration and stand in the way of a just and equal society. Through this project, the ACLU works to reduce the number of people entering jails and prisons by focusing on reform at the front end of the criminal justice system. The ACLU has appeared as *amicus curiae* on criminal justice issues in the United States Supreme Court and state courts throughout the country.

Brennan Center for Justice: The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a non-partisan, non-profit public policy and law institute that focuses on fundamental issues of justice and democracy. The Justice Program of the Brennan Center ("Justice Program") works to secure the promise of *Gideon v. Wainwright*, through advocacy, research and litigation, including efforts aimed to ensure that all people are treated fairly as they are taken through the criminal justice system.

The Justice Program has filed a number of amicus briefs in support of the rights of the indigent accused before the United States Supreme Court, federal courts of appeal, and state courts of all levels. The Justice Program's experiences provide it with a unique perspective on the issues raised in this lawsuit, and it has

an interest in ensuring a just and fair pre-trial criminal justice process that respects the constitutional rights of the accused.

New York State Defenders Association: The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1700 public defenders, legal aid attorneys, 18-b counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to nearly 6,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. The New York State Defenders Association is contractually obligated "to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the governor, the legislature, the judiciary and other appropriate instrumentalities." NYSDA has been granted *amicus curiae* status by New York courts in numerous cases dealing with the rights of criminal defendants.

Pretrial Justice Institute: The Pretrial Justice Institute (PJI) is a private, non-profit organization, headquartered in Washington, D.C., that is dedicated to improving the quality of pretrial justice. PJI has joined the NYCLU in its *amicus*

curiae brief on assuring that indigent defendants are provided meaningful pretrial release opportunities (*McManus v. Horn*, Court of Appeals, Argued February 7, 2012). For 35 years, PJI has worked toward enhancing the delivery of a fair, safe, and effective process between the points of arrest and disposition of criminal charges.

New York State Association of Criminal Defense Lawyers: The New York State Association of Criminal Defense Lawyers (hereinafter "NYSACDL") is a not for profit organization of more than 600 members who practice in the field of criminal defense in the State of New York. Founded in 1986, NYSACDL is dedicated to protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar.

NYSACDL's goals are to: serve as a leader and partner in advancing humane criminal justice policy and legislation; promote the rights of criminal defendants through the adoption of policy positions, targeted concerted action, and the submission of amicus briefs on issues of significance to the fair administration of criminal justice and the protection of civil liberties; advocate for individual and systemic accountability in the criminal justice system, with a particular emphasis on instances of judicial and prosecutorial misconduct; develop a broad, inclusive and vibrant membership of private criminal defense practitioners and public

defenders throughout New York State; provide a forum for our members to exchange ideas and information, with a particular emphasis on mentoring those who are new to the profession; and, provide quality continuing legal education in the area of criminal defense.

Accordingly, NYSACDL, consistent with those missions, joins in this *Amicus Curiae* Brief opposing the constitutionality of the Queens County District Attorney's pre-arraignment interrogation program – consistent with the position NYSACDL took in November 2010 as *Amicus Curiae* in *Brown v. Blumenfeld*, Second Department Docket No. 2010-09688.

Five Borough Defense: Five Borough Defense is an unincorporated association of public defenders, civil rights attorneys, law students, academics, and others who directly represent, and advocate on behalf of, the civil rights of indigent New Yorkers. Since 2006, Five Borough Defense has provided a forum for the public defense community to discuss, strategize, and encourage the vigorous defense of indigent New Yorkers. Members of Five Borough Defense represent at arraignment indigent defendants throughout New York City, including Queens County. During our initial interviews, we frequently encounter clients who are scared, tired, injured, hungry, upset, and confused. Above all, our clients want to know if they are going home - none ask to speak to an assistant of the district

attorney. It greatly concerns members of Five Borough Defenders that the Queens County District Attorney delays defense attorney's entry into the adversarial process by holding in one hand the accusatory instrument it intends to file momentarily, while reading off a misleading Miranda waiver grasped in the other.

The Bronx Defenders: The Bronx Defenders is a public defender office in the heart of the South Bronx. Our mission is to not only zealously defend the accused but to address the underlying causes of our clients' involvement in the criminal justice system as well as protect them from the devastating collateral consequences of that involvement. We represent 28,000 people in the criminal justice system each year. Typically, our representation begins at arraignments. The current practice in Bronx County is that suspects who are otherwise administratively ready for arraignment are diverted to a video interrogation room where a detective and prosecutor are present. The prosecutor often informs the individual that they will be given an opportunity to explain their involvement in the offense for which they were arrested, and then reads Miranda warnings. This practice occurs for all felony cases, as well as many misdemeanor cases, including those charging domestic violence, operating a motion vehicle under the influence, and assault. In Bronx County, the arrest to arraignment time is routinely over 24 hours and often over 30 hours. The Bronx Defenders represents thousands of

individuals each year who are affected by this pre-arraignment interview practice. As such, The Bronx Defenders has a unique interest in the subject-matter of this litigation. Our clients are particularly harmed by the violation of their right to a prompt probable cause determination described in Point I of this Brief.