NEW YORK CITY BAR

REPORT ON LEGISLATION BY
THE CRIMINAL JUSTICE OPERATIONS COMMITTEE
AND THE MASS INCARCERATION TASK FORCE

A.9117-A **M. of A. Cruz**
S.8688-A **Sen. Bailey**

AN ACT to amend the criminal procedure law, in relation to facilitating appellate review of rulings that implicate issues of public concern.

THIS BILL IS APPROVED

The New York City Bar Association ("City Bar") supports passage of the above-referenced Bill, which would ensure that appellate courts are able to meaningfully review and address allegations of police misconduct arising in criminal cases.

I. BACKGROUND

In the wake of the protests following the police killing of George Floyd, the New York Legislature recognized the urgency of holding police officers accountable to the public. Specifically, the Legislature repealed Civil Rights Law § 50-a, which had shielded police personnel records from disclosure and banned the use of chokeholds by police officers.[1]

[1] Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. Times, June 12, 2020, https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html; *see also* New York City Bar Association, *Promote Police Transparency with the Repeal of CRL 50*-a, June 9, 2020, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/promote-police-transparency-repeal-crl-50-a (explaining that "[t]ransparency is vital to regulation police powers in a democracy" and urging the repeal of CRL 50-a); New York City Bar Association, *Police Reform Efforts in New York State and New York City: More to Do*, Sept. 29, 2020, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/additional-police-reform-efforts-ny-abuse-and-violence (applauding the repeal of CRL § 50-A and "argu[ing] that substantial and systematic change is the only appropriate response to address abusive—and sometimes deadly—use of force by police officers, often deployed without consequence, and the only way to ensure that police officers are held to the highest standard as public servants")(all websites last visited June 7, 2024).

But our law provides other important mechanisms to ensure police accountability. During pretrial suppression hearings in criminal cases, law enforcement officers are subject to the crucible of cross-examination, and must prove that their conduct met the strictures of the bill of rights. During these hearings, courts may "for example" determine "whether the police lied about the circumstances leading to a stop, seizure or arrest; whether the police stopped an individual on the basis of racial profiling or for another illegitimate reason; or whether, in making a stop the police exceeded the scope of legally permissible force."[2]

Suppression hearings provide important fora for individuals to vindicate their constitutional rights, and appellate review of suppression hearings ensures that Government does not exploit its own misconduct in order to obtain convictions.[3] This review also has important effects beyond protecting the rights of defendants in individual cases. By applying the exclusionary rule to evidence obtained in violation of defendants' constitutional rights, suppression courts play a vital role in reviewing the propriety of police conduct, setting the Constitutional standards which apply to such conduct, and ensuring that those standards are met.[4]

Recognizing the importance of appellate review of suppression decisions, the Legislature carved out an exception to the general rule that trial court rulings are waived by a guilty plea and granted appellate courts the authority to review suppression claims even in cases where the defendant pleads guilty—an authority that exceeds that of federal courts.[5] The ability to review suppression decisions after guilty pleas is crucial for the appellate courts to be able to exercise oversight over suppression decisions since 98 percent of felony cases are resolved by guilty pleas.[6]

But the legislative will that appellate courts have broad power to review suppression decisions has been thwarted by a procedural device the Legislature has never sanctioned—the

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[2] Barbara Zolot, *The Gov't Tool You've Never Heard of That Conceals Police Misconduct*, New York Law Journal, Sept. 18, 2020, https://www.law.com/newyorklawjournal/2020/09/18/the-govt-tool-youve-never-heard-of-that-conceals-police-misconduct/.

[3] *See id.* (describing recent appellate cases condemning: "police pursuit of a Black man, who was exiting public housing, based on a report of shots fired blocks away and a description of a 'black [man in] a black jacket,' *People v. Bilal*, 170 A.D.3d 83 (1st Dept. 2019); the 'incredible and patently tailored' testimony of an officer who claimed at the suppression hearing to have seen, through his rearview mirror, the accused in the front seat of his car, 1 1/2 car lengths away, pass a woman a two-inch long object that the officer further claimed was identifiable as drugs, *People v. Maiwandi*, 170 A.D.3d 750 (2d Dept. 2019); the frisk of a Black man, who was standing with a group of people outside a bar where a shooting had occurred at some undetermined prior time, where the suspect was described as Hispanic, not Black, *People v. Roberts*, 158 A.D.3d 1141 (4th Dept. 2018); and the stop and pointed questioning of a Black man walking his dog in a 'high-crime area,' *People v. Wallace*, 181 A.D.3d 1214 (4th Dep't 2020)"). A.D.3d 1214 (4th Dept. 2020).

[4] *Mapp v. Ohio*, 367 U.S.643, 654 (1961) (explaining that the exclusionary rule ensures that the protections of the Bill of Rights are more than "a form of words," and deters police misconduct); *People v. De Bour*, 40 N.Y.2d 210, 218 (1976) ("Since [crime prevention] is highly susceptible to subconstitutional abuses it will be subject to the greatest scrutiny; for whereas a policeman's badge may well be a symbol of the community's trust, it should never be considered a license to oppress.").

[5] C.P.L. § 710.70.; Peter Preiser, *Practice Commentaries, CPL § 710.70* (citing Fed. R.Crim. P.11(a)(2)).

[6] Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. Times, Aug. 7, 2017, https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?_r=0.

appeal waiver. If the prosecution insists that a defendant waive his or her right to appeal as a condition of pleading guilty, that person will be foreclosed from raising even preserved suppression issues on direct appeal.[7] The use of appeal waivers is ubiquitous and defendants are almost invariably required to waive their right to appeal as a condition of pleading guilty.[8] As a result, appellate courts are effectively deprived of the ability to review suppression decisions, preventing individual defendants' rights from being vindicated, police misconduct from being exposed, and the development of constitutional rules that constrain police conduct.

II. THE PROPOSED LEGISLATION

The proposed legislation (A.9117-A/S.8688-A) offers a simple fix to restore the appellate courts' ability to review suppression decisions. Criminal Procedure Law section 710.70(2) currently states that an appellate court "may" review a suppression decision "notwithstanding the fact that such a judgment is entered upon a plea of guilty." The current statute's permissive language allows for defendants to waive their right to raise suppression on appeal. The proposed legislation would amend the statute to state that appellate courts "shall" review suppression claims "notwithstanding the fact that such a judgment is entered upon a plea of guilty and notwithstanding an otherwise enforceable waiver of the right to appeal" (emphasis added). It would thus unambiguously remove suppression issues from the ambit of appeal waivers.

It is hard to imagine any serious negative impact from this bill. While, in theory, an appeal waiver that encompasses suppression claims is an extra bargaining chip for the defendant to use in plea bargaining, in practice, given the near-mandatory requirement of appeal waivers as conditions of plea bargains, "defendants receive no benefit in exchange for . . . appeal waiver[s]" and "are often rendered victims of 'situational coercion' by these automatic, non-bargained-for waivers."[9] Nor will removing suppression claims from appeal waivers' ambit reduce finality or predictability. Even a valid appeal waiver does *not* actually deprive a defendant of the right to appeal. The defendant always retains the right to raise a number of claims, including the waiver's validity. And the law of appeal waivers is extremely complicated and difficult to navigate,[10] resulting in their regular invalidation by intermediate appellate courts.[11] Uncertainty as to whether an appeal waiver will be upheld on appeal undercuts any potential gain in predictability.

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[7] *People v. Kemp*, 94 N.Y.2d 831 (1999).

[8] *See People v. Thomas*, 34 N.Y.3d 545 593 (2019) (Wilson, J. dissenting) (explaining that "defendants are expected, almost without exception, to waive their right to appeal upon pleading guilty" and noting that '[a]ppeal waivers have become a 'purely ritualistic device'—they are 'standard' and 'art and parcel of plea bargaining'") (quoting *People v. Batista*, 167 A.D.3d 69, 81 (2d Dep't 2018) (Scheinkman, P.J., concurring)).

[9] *Thomas*, 34 N.Y.3d at 593 (Wilson, J., dissenting).

[10] *Id.* at 591 (describing the law of appeal waivers as a "Daedalean maze").

[11] *See* Paul Shechtman, *Large Number of Invalidated Appeal Waivers Illustrates Need for Change*, New York Law Journal, Jan. 6, 2021, https://www.law.com/newyorklawjournal/2021/01/06/large-number-of-invalidated-appeal-waivers-illustrates-need-for-change/ (noting that intermediate appellate courts had invalidated 90 appeal waivers in the year following the Court of Appeals' decision in *People v. Thomas*, and more than 380 in the five years before *Thomas*).

For much the same reasons, the bill should not result in a flood of appellate litigation taxing judicial resources. In practice, many defense attorneys appeal suppression rulings as a matter of course, notwithstanding the presence of an appeal waiver. Removing suppression claims from appeal waivers' ambit thus should not significantly increase the number of appeals. However, it *will* reduce the complexity of those appeals, as appellate judges will no longer have to perform the complex analysis required to determine if the appeal waiver is valid before reaching the merits of the suppression decision. At the same time, the bill preserves the requirement that claims be preserved in the lower court to be reviewable on appeal. Thus rather than increasing the strain on our appellate courts, this bill may, in fact, reduce their burden.

The Legislature should enact the proposed legislation to ensure that appellate courts are empowered to review and regulate police conduct and hold police officers accountable for violating constitutional rights.

III. CONCLUSION

For the aforementioned reasons, we respectfully urge our elected officials to support A.9117-A/S.8688-A.

Criminal Justice Operations Committee
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Updated and Reissued June 2024*

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** This report was first published in December 2021 during the terms of the following chairs: Tess M. Cohen, Chair, Criminal Justice Operations Committee; Sarah J. Berger and Jullian D. Harris-Calvin, Co-Chairs, Mass Incarceration Task Force).*