

THE APPELLATE DIVISION, FOURTH DEPARTMENT
IN COLLABORATION WITH
THE OFFICE OF COURT ADMINISTRATION
ATTORNEY FOR THE CHILD CONTRACTS

presents:

Focus on Juvenile Justice

Tuesday, March 19, 2013
SUNY at Buffalo
Center for Tomorrow
Buffalo, New York

- 9:00 a.m. REGISTRATION AND MATERIALS DISTRIBUTION
- 9:30 a.m. WELCOME
Tracy Hamilton, Esq.
Director, Attorneys for Children Program
- 9:40 a.m. The Role and Responsibilities of The AFC in JD Proceedings: A Practical Perspective
Professor Randy A. Hertz
Vice Dean, NYU Law School
Director, Clinical & Advocacy Programs
- 11:15 a.m. Break
- 11:30 a.m. Panel Discussion: Ethical Issues in JD Proceedings
Hon. James Dillon
Erie County Supreme Court
Professor Randy A. Hertz
Vice Dean, NYU Law School
Director, Clinical & Advocacy Programs
Theresa Lorenzo, Esq.
Attorney for Children
Legal Aid of Buffalo
- 12:40 p.m. LUNCH (provided)
- 1:40 p.m. JD Case Law & Statutory Update
Professor Randy A. Hertz
Vice Dean, NYU Law School
Director, Clinical & Advocacy Programs
- 2:40 p.m. Break
- 2:55 p.m. Juvenile Justice Reforms: Improving Outcomes for Youth & Families
Tim Roche
Associate Commissioner
NYS Office of Children and Family Services
- 4:10 p.m. Conclusion

The Appellate Division, Fourth Department has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from March 2, 2011 to March 1, 2014. This program has been approved for a total of six (6.0) credit hours, of which one and one-half (1.5) credit hours can be applied toward the professional practice (family law) requirement, two and one-half (2.5) credit hours can be applied toward the skills requirement, and two (2) credit hour can be applied toward the ethics and professionalism requirement. This program is suitable for experienced or newly admitted attorneys.

Randy A. Hertz

Randy Hertz is the Vice Dean of N.Y.U. School of Law and the director of the law school's clinical program. He has been at the law school since 1985, and regularly teaches the Juvenile Defender Clinic and a simulation course entitled Criminal Litigation. Before joining the N.Y.U. faculty, he worked at the Public Defender Service for the District of Columbia, in the juvenile, criminal, appellate and special litigation divisions. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise entitled "Federal Habeas Corpus Law and Practice," and also the co-author, with Professors Anthony G. Amsterdam and Martin Guggenheim of N.Y.U. Law School, of a manual entitled "Trial Manual for Defense Attorneys in Juvenile Delinquency Cases." He is an editor-in-chief of the *Clinical Law Review*. In the past, he has served as the Chair of the Council of the ABA's Section of Legal Education and Admissions to the Bar; a consultant to the MacCrate Task Force on Law Schools and the Profession: Narrowing the Gap; a reporter for the Wahl Commission on ABA Accreditation of Law Schools; a reporter for the New York Professional Education Project; and the chair of the AALS Standing Committee on Clinical Legal Education. He received NYU Law School's Podell Distinguished Teaching Award in 2010; the Equal Justice Initiative's Award for Advocacy for Equal Justice in 2009; the Association of American Law Schools' William Pincus Award for Outstanding Contributions to Clinical Legal Education in 2004; the NYU Award for Distinguished Teaching by a University Professor in 2003; and the American Bar Association's Livingston Hall award for advocacy in the juvenile justice field in 2000.

**DEVELOPMENTS IN
JUVENILE DELINQUENCY LAW AND PROCEDURE
(January - December 2012)**

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February 10, 2013

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**DEVELOPMENTS IN
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[The following outline covers significant decisions of the U.S. Supreme Court, Court of Appeals, and the Appellate Divisions, and some decisions of the New York Supreme Court and Family Court. Within each subject matter category, the cases are arranged by the level of the court and then by chronological order.]

I. Initial Appearance and Related Issues

A. Appointment of Counsel and Other Counsel-Related Issues

People v. Solomon, 20 N.Y.3d 91, 956 N.Y.S.2d 457 (2012): The defendant’s conviction is reversed because defense counsel had an actual conflict of interest in that he was “simultaneously representing, in an unrelated matter, a police officer who testified for the People that defendant had confessed to one of the charged crimes.”

People v. Colville, 20 N.Y.3d 20, 955 N.Y.S.2d 799 (2012): In an opinion that reaffirms and applies the ethical and legal rules governing “how decision making authority is allocated” between counsel and the accused in a criminal case, the Court of Appeals holds that the decision of whether to seek a jury instruction on a lesser-included offense is “a matter of strategy and tactics, ultimately for the defense attorney to decide,” and not one of those “fundamental” decisions that are “reserved to the accused” (like “how to plead and whether to waive a jury”). Defense counsel asked the trial court to submit lesser-included offenses to the jury but the judge deferred to the defendant’s contrary wish to “go [] for broke” by submitting only the top charge to the jury. The Court of Appeals reverses the ensuing conviction because the judge, “[b]y deferring to defendant, ... denied him the expert judgment of counsel to which the Sixth Amendment entitles him.”

People v. Beard, 100 A.D.3d 1508, 953 N.Y.S.2d 805 (4th Dept. 2012): The trial court violated the defendant’s federal and state constitutional right to counsel of choice by going ahead with the trial despite the defendant’s having “articulat[ed] complaints about his assigned counsel that were sufficiently serious to trigger the court’s duty to engage in an inquiry regarding those complaints.” The “[d]efendant’s allegations – in particular, the allegation that he had never previously spoken to his assigned counsel and that he was unaware his trial was commencing that day – [we]re serious on their face and should not have been ‘summarily dismiss[ed]’” even though the trial judge felt that there was a compelling reason to go ahead with the trial because the D.A.’s Office had brought in a confidential witness from Texas.

B. Sufficiency of the Petition

(1) Dismissal for Legal Insufficiency

People v. Suber, 19 N.Y.3d 247, 946 N.Y.S.2d 552 (2012): When a misdemeanor Information contains a defendant’s admission, “the absence of allegations in the information corroborating defendant’s statement[]” does not render the charging instrument legally insufficient because “the precise [statutory] language that the Legislature chose when the Criminal Procedure Law was adopted unmistakably establishes that corroboration was intended to be a component of the *prima facie* case for an indictment but not an information.”

In the Matter of Shakeim C., 97 A.D.3d 675, 948 N.Y.S.2d 360 (2d Dept. 2012): The trial court erred in dismissing the petition for failure to “specify which complainant is the alleged victim in each count.” The Appellate Division concludes that the petition, when read in conjunction with the supporting depositions, “clearly identified” “the alleged victims, the alleged perpetrators, and the crimes charged.”

(2) Dismissal in the Furtherance of Justice

In the Matter of Steven C., 93 A.D.3d 91, 939 N.Y.S.2d 468 (2d Dept. 2012): In a case in which testimony at trial showed that a police officer’s Supporting Deposition annexed to the Petition was actually based on hearsay even though it appeared to be based on personal knowledge (which constituted a “latent defect” and thus did not invalidate the Petition as legally insufficient), the Second Department reverses an adjudication of delinquency and grants dismissal in the furtherance of justice on the ground that “the attesting officer’s execution of the defective affidavit, submitted as the primary support for the institution of this juvenile delinquency proceeding, constituted exceptionally serious misconduct of law enforcement personnel in the presentment of the petition,” “pos[ing] a grave risk to the assurances of due process afforded to juveniles by the Family Court Act . . . [that] should not be countenanced.”

People v. Basile, 34 Misc.3d 1218(A), 2012 WL 279474, 2012 N.Y. Slip Op. 50130(U) (Integrated Youth Part, West. County Ct. Jan. 31, 2012): The court grants dismissal in the furtherance of justice of a charge of Criminal Contempt in the Second Degree that arose from a series of disputes between the respondent and her mother. The court explains that the defendant “is a young woman needing help and guidance, not a criminal sentence or conviction,” and that the defendant’s mother is

“us[ing] law enforcement and the courts in an attempt to ‘discipline’ Defendant.”

II. Discovery and Subpoenas

A. *Brady*

Smith v. Cain, 132 S. Ct. 627 (2012): The prosecution committed reversible error by failing to turn over a detective’s notes containing statements by an eyewitness that he could not identify the perpetrator and could only give a very general description. This evidence was “material” for *Brady* purposes and required reversal because the undisclosed statements “directly contradict[ed]” the witness’s testimony and “the State’s other evidence [was not] . . . strong enough to sustain confidence in the verdict.” Although the prosecution pointed to other statements by the eyewitness on the date of the crime that supported the witness’s ability to make an identification, and the prosecution sought to explain away the undisclosed statements as the product of the witness’s “fear of retaliation,” reversal is nonetheless required because there is no way for a reviewing court to determine “which of [the witness’s] contradictory declarations the jury would have believed,” and the Court cannot say with sufficient “confidence” that the jury would have “disbelieved [the witness’s] undisclosed statements.”

B. Voluntary Disclosure Form (§ 710.30 Notice)

People v. Boone, 98 A.D.3d 629, 949 N.Y.S.2d 494 (2d Dept. 2012): Pursuant to the rule established in *People v. Chase*, 85 N.Y.2d 493, 626 N.Y.S.2d 721 (1995), the prosecution was required to give “statement notice,” notwithstanding the prosecution’s position that the statement was spontaneous, because the accused has “the right to have a court review the circumstances under which the statement was given and to determine its voluntariness, including whether it was truly spontaneous.”

People v. Pallagi, 91 A.D.3d 1266, 937 N.Y.S.2d 486 (4th Dept. 2012): The prosecution’s statement notice was inadequate because it reported only “exculpatory statements” of the defendant but a sheriff’s deputy testified at trial to a statement by the defendant that she was given a ride to the mall by a friend, and the prosecutor cross-examined the defendant about this statement and argued in summation that “the friend was part of the scheme to steal property.” The omission of this statement from the VDF violated the prosecutor’s statutory obligation to “provide defendants ‘with notice that adequately set[s] out the sum and substance of [the] statements [presented by the People at trial] and permit[s] [defendants] to intelligently identify them.’”

C. *Rosario*

People v. Lebovits, 94 A.D.3d 1146, 942 N.Y.S.2d 638 (2d Dept. 2012): A late production of *Rosario* material (after defense counsel had already completed cross-examination) required reversal of the conviction and could not be cured by recalling the witness and re-opening cross-examination because “the untimely disclosure of the [detective’s] interview notes [of the complainant] precluded the defense from fully and adequately preparing for cross-examination and set a trap for the defendant which had already sprung at the time the notes were finally furnished.”

D. Other Discovery Issues

People v. Riley, 19 N.Y.3d 944, 950 N.Y.S.2d 506 (2012): The trial court did not abuse its discretion by denying the defendant the requested sanction of an adverse inference for the prosecution’s return of stolen property (copper pipes) to the owner without notice to the defense as required by P.L. § 455.10. The Court of Appeals explains that a sanction is required only when the prosecution “does not demonstrate an absence of prejudice,” and the trial court did not abuse its discretion in finding an absence of prejudice based on the following circumstances: “the People advised defense counsel to arrange a mutually convenient time to examine the copper pipes about six weeks before they were returned, and defense counsel did not follow up; the police retained a representative sample, which was admitted into evidence without objection; and defense counsel was provided with nearly 200 photographs of the copper pipes and the buildings.”

People v. Sinha, 19 N.Y.3d 932, 951 N.Y.S.2d 697 (2012): The prosecution’s failure to provide defense counsel with a printout of an e-mail message that the prosecution used at trial did not violate CPL § 240.20(1)(c)’s requirement of disclosure of “[a]ny written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment ... made by, or at the request or direction of a public servant engaged in law enforcement activity.” The Court of Appeals explains that the People “properly complied with section 240.20 when they gave defense counsel copies of the forensic reports, prepared by the investigators who analyzed the [computer’s] hard drive,” and these “were the only ‘reports or documents’ concerning scientific tests or experiments performed on the hard drive.” Moreover, the prosecution “provided defense counsel a ‘mirror’ copy of the contents of defendant’s computer’s hard drive, as well as exact copies of other computer disks recovered from defendant’s apartment.” The Court notes that “our decision might be different” if “the documents at issue [were] of such a nature that they could only have been produced through the expertise of a qualified expert,” “but there is no showing that this was the case

here” given that the specific e-mail that the prosecution “did not print out ... was available to defense counsel on the mirror copy of the hard drive.”

People v. Kelley, 19 N.Y.3d 887, 948 N.Y.S.2d 870 (2012): The trial court violated the defendant’s right to a fair trial by allowing the prosecution to present DNA evidence from a mid-trial forensic test of physical evidence that the police had previously failed to send for testing. Because the new evidence, which refuted the defense’s theory, emerged after “defendant had already testified and the trial was too far along for defense counsel to present a new defense theory,” the trial court should have either “precluded the submission of this evidence or declared a mistrial.”

E. Alibi Notice

People v. Hicks, 94 A.D.3d 1483, 943 N.Y.S.2d 344 (4th Dept. 2012): No alibi notice was needed for (and the trial judge acted improperly in precluding, for lack of alibi notice) a defense witness who would have testified to the defendant’s whereabouts and activities an hour before the crime and would have supported the defendant’s account of his interactions with the complainant shortly before the crime, thereby “contradict[ing] the victim’s version of events leading up to the crimes.” This testimony did not constitute an alibi as defined in the statute (testimony that, “at the time of the commission of the crime[s] charged,” the accused “was at some place or places other than the scene of the crime”) and “[t]he fact that such [testimony] may, in addition to its intended purpose, also be taken as circumstantial alibi evidence does not require that alibi notice be given.” By improperly precluding the witness, the trial court violated the defendant’s due process right to call witnesses.

F. Subpoenas

In the Matter of Jose E., 100 A.D.3d 629, 953 N.Y.S.2d 625 (2d Dept. 2012): If a “recalcitrant complainant” fails to appear voluntarily at the Presentment Agency’s office for a pre-petition interview to determine the suitability of adjustment and to participate in the petition preparation process if the case is not adjusted, the Presentment Agency may “issue a subpoena to [the] recalcitrant witness” pursuant to F.C.A. § 307.2. In this case, the Presentment Agency permissibly exercised its authority under the statute to issue “a subpoena to the complainant directing it to appear at its offices” during the “pre-petition adjustment process” after “multiple unsuccessful attempts to secure the complainant’s voluntary appearance.”

III. Suppression Motions: Law and Procedure

A. Suppression Motions Practice Generally

(1) Re-Opening the Suppression Hearing Based on New Evidence

People v. Kevin W., 91 A.D.3d 676, 935 N.Y.S.2d 660 (2d Dept. 2012):
The trial court erred in responding to the prosecution’s motion to re-argue the suppression ruling by re-opening the suppression hearing and allowing the prosecution to present the testimony of a second police officer: “[T]he People were given every opportunity to present their evidence at the original hearing and there is no basis to justify their being provided with a second bite of the apple.”

B. *Mapp* Motions

(1) *DeBour* Levels I and II

People v. Lee, 96 A.D.3d 1522, 947 N.Y.S.2d 241 (4th Dept. 2012):
Although the police had a basis for a Level II common law inquiry, “the length of defendant’s detention exceeded that allowed pursuant to a common-law inquiry when, after first being asked for identifying information, defendant was held for 24 minutes while the first officer at the scene went to residences in the neighborhood searching for evidence of a crime.” Once the officer began the process of canvassing the area, the Level II common-law inquiry “became an investigatory detention, a level three intrusion necessitating a reasonable suspicion that defendant had committed a crime.”

(2) *Terry* Stops and Frisks

People v. Miranda, 19 N.Y.3d 912, 950 N.Y.S.2d 615 (2012):
Distinguishing People v. Brannon, 16 N.Y.3d 596, 925 N.Y.S.2d 393 (2011), where the police needed “reasonable suspicion that the knife he observed was a gravity knife before he took it,” the Court of Appeals holds that this requirement does not apply “[w]here a knife (even if not necessarily an illegal one) becomes plainly visible to a police officer in the course of an authorized common law inquiry due to the suspect’s own movement and no intrusive conduct on the officer’s part.” In such a circumstance, “the officer is permitted to seize it, so long as the ensuing intrusion is ‘minimal’ and ‘consonant with the respect and privacy of the individual.’” In this case, “the officer observed that defendant was armed while questioning him late at night in a high crime area after determining

that he was trespassing; under these circumstances, it was reasonable for the officer to retrieve the knife and make an arrest when it turned out to be unlawful.”

People v. Shuler, 98 A.D.3d 695, 949 N.Y.S.2d 758 (2d Dept. 2012): Although the police had reasonable suspicion that the defendant was attempting to steal a bicycle and thus the police could conduct a *Terry* stop, the frisk of the defendant (which resulted in the seizure of drugs in the defendant’s pocket) was unconstitutional because the bulge that the officers observed in the defendant’s pocket “appeared to be a hard ball,” not “a gun or a knife.” The court notes that, although “a hard ball may be improvised as a weapon,” this “does not by itself justify a frisk” under the *Terry* standard.

People v. Morrow, 97 A.D.3d 991, 948 N.Y.S.2d 463 (3d Dept. 2012): The police did not have a lawful basis for a *Terry* stop based on the defendant’s fitting a “general description” for “an African-American male in his early to mid-thirties with short hair” (which, the court observes, “undoubtedly could fit any number of individuals in this area”), his exiting of the apartment building where the perpetrator reportedly had been selling drugs, plus his looking back at the police as they followed him in a police car, and his apparent “agitat[ion].” Although the defendant’s subsequent statement to the police “denying that he came from the building” that he had been observed exiting, “coupled with his appearance and movements,” “may have authorized” a Level II common law inquiry, it did not furnish a reasonable basis to “suspect that defendant had committed a crime or was armed with a weapon.”

In re Jaquan M., 97 A.D.3d 403, 948 N.Y.S.2d 51 (1st Dept. 2012): A firearm seized from the respondent’s backpack should have been suppressed because, although there was a founded suspicion of criminal activity and thus a basis for a common law inquiry, the police did not have a sufficient basis for a *Terry* stop of the respondent. The respondent was observed at 9:35 p.m. in a drug-prone location, peering up and down the street, using his cellphone, and removing an object slowly from his waistband and placing it carefully and gently in the outer pocket of his backpack, causing the bag to be bottom-heavy. The police questioned the respondent (which was a permissible common law inquiry in light of the “seemingly furtive behavior at night and in a high-crime neighborhood”) but thereafter detained the respondent and searched his backpack, finding the firearm. In suppressing the firearm, the Appellate Division explained that “[r]easonable suspicion could not be formed in this case based strictly on the officers’ observation of appellant removing an object from his

waistband, because they conceded that the object bore no obvious hallmarks of a weapon”; “there were plausible, non-criminal reasons” for the respondent’s “seemingly suspicious behavior”; and “[t]he fact that appellant was in a high-crime area and on his way to another high-crime area does not, without more, constitute a factor sufficient to create reasonable suspicion.”

In re Darryl C., 98 A.D.3d 69, 947 N.Y.S.2d 483 (1st Dept. 2012): The Appellate Division suppresses a firearm because the police lacked reasonable suspicion for a *Terry* frisk. Although the interaction between the police and the respondent took place in “an area of gang activity, drug dealing and violent crime” and the respondent apparently reacted to the arrival of the police by placing a black object that had been in his hand into his pocket and thereafter, upon being questioned about it by an officer, gave “seemingly evasive answers” that might have suggested his possession of “some form of contraband,” these circumstances justified merely “further questioning under the common-law right to inquire,” not a frisk. The circumstances gave rise to “a mere hunch, at best, not a reasonable suspicion, that defendant might be armed.”

People v. Carmichael, 92 A.D.3d 687, 938 N.Y.S.2d 197 (2d Dept. 2012): The police lacked a *Terry* basis for pursuing the defendant and accordingly the gun he discarded during the chase had to be suppressed. Even though the defendant responded to the approach of the police by “‘tens[ing]” his arm “‘around the vicinity’ of his waistband” and thereafter fled from the police and this occurred in a high-crime neighborhood, “these factors, even in combination, did not provide a *Terry* basis for reasonably believing that “the suspect may be engaged in criminal activity.”

(3) **Automobile Stops and Searches**

United States v. Jones, 132 S. Ct. 945 (2012): The “attachment of a Global-Positioning-System (GPS) tracking device to an individual’s vehicle, and subsequent use of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.” In reaching this conclusion, the majority opinion, authored by Justice Scalia, classifies the attachment of the GPS device to the undercarriage of the vehicle as a physical trespass or “occupation” of “private property” by the government “for the purpose of obtaining information,” and therefore finds that this “physical intrusion” was necessarily a “‘search’ within the meaning of the Fourth Amendment when it was adopted.” A concurring opinion by Justice Alito, joined by three other Justices (Breyer, Ginsburg, and Kagan) rejects the majority’s

reliance on “18th-century tort law” and reaches the same result as the majority by “asking whether respondent’s reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove,” and concludes that although “relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable,” “the use of longer term GPS monitoring” – such as occurred in this case, where “law enforcement agents tracked every movement that respondent made in the vehicle he was driving” for “four weeks” – “impinges on expectations of privacy” and thus constitutes a “search” for purposes of the Fourth Amendment. (*Note: The New York Court of Appeals previously held on state constitutional grounds in *People v. Weaver*, 12 N.Y.3d 433, 882 N.Y.S.2d 357 (2009) that the police must obtain a warrant in order to attach a GPS device to an automobile.*)

People v. Garcia, 20 N.Y.3d 317, 2012 WL 6571117, 2012 N.Y. Slip Op. 08670 (N.Y. Ct. App. Dec. 18, 2012): The Court of Appeals makes clear that the four-level “graduated framework set forth in *People v. DeBour* and *People v. Hollman* for evaluating the constitutionality of police-initiated encounters with private citizens [on the street] applies with equal force to traffic stops.” In the present case, the police conducted an unlawful common law inquiry during a traffic stop by asking the driver whether anyone in the car had a knife. The occupants’ apparent nervousness did not provide the requisite justification of a “founded suspicion that criminal activity is afoot.”

People v. Walker, 20 N.Y.3d 122, 957 N.Y.S.2d 272 (2012): Upon the police officers’ lawful arrest of a driver for driving with a revoked license and their decision to impound the vehicle, the police were not constitutionally required to “inquire whether defendant’s passenger, who was not the registered owner of the car, was licensed and authorized to drive it” away in lieu of police impoundment of the vehicle. The “state police procedure to ‘tow the vehicle’ if the operator’s license ‘is either suspended or revoked’ and the registered owner is not present” is “a reasonable procedure, at least as applied to this case, where no facts were brought to the trooper’s attention to show that impounding would be unnecessary” (in that “[n]either defendant nor his girlfriend asked the trooper if the girlfriend could drive the car, or told him that she had a driver’s license and the owner’s permission to drive it”).

People v. Smith, 98 A.D.3d 590, 949 N.Y.S.2d 474 (2d Dept. 2012): Even though the officer saw a green substance that “appeared to be marijuana” in the defendant’s mouth as he exited his car, and smelled marijuana on

the defendant, this did not provide probable cause to search his car, given that no such odor came from inside the vehicle and the officers never recovered marijuana from the defendant nor the ground outside his vehicle. A gun that was thereafter found in the vehicle could not be justified under the “inevitable discovery” doctrine because it was primary, not secondary, evidence.

People v. McFarlane, 93 A.D.3d 467, 939 N.Y.S.2d 460 (1st Dept. 2012): The defendant’s statement consenting to a search of his car did not authorize the police officer to open the locked glove compartment because the “officer’s request to ‘take a look’ into the car or ‘check’ it for contraband could reasonably have been understood to be a request to search the vehicle, possibly to include closed containers, but it did not reasonably imply a request for permission to open the locked glove compartment.”

(4) Consent

People v. McFarlane, 93 A.D.3d 467, 939 N.Y.S.2d 460 (1st Dept. 2012): The defendant’s statement consenting to a search of his car did not authorize the police officer to open the locked glove compartment because the “officer’s request to ‘take a look’ into the car or ‘check’ it for contraband could reasonably have been understood to be a request to search the vehicle, possibly to include closed containers, but it did not reasonably imply a request for permission to open the locked glove compartment.”

(5) Exigent Circumstances

People v. Mormon, 100 A.D.3d 782, 954 N.Y.S.2d 152 (2d Dept. 2012) and People v. Harper, 100 A.D.3d 772, 954 N.Y.S.2d 127 (2d Dept. 2012): In two decisions issued on the same day concerning the “emergency exception” to the warrant requirement, the Second Department concludes that the exception did not apply in either case. In *Mormon*, where the emergency was an apparent shooting in the defendant’s apartment which he shared with his girlfriend and their children, the exception did not apply because the “warrantless entry and ensuing search, which occurred at least 45 minutes after the police arrived on the scene and almost two hours after the time of the alleged shooting, were conducted after a minimal police investigation which failed to establish that any children were in imminent danger.” In *Harper*, where the police investigation of a dispute in an apartment building resulted in their finding a victim, “bleeding from several cuts and lacerations,” who said that “she had been stabbed by the

two women who lived in the apartment directly above hers,” the exception did not apply because “the altercation had ended by the time the police arrived, the injured complainant had been identified, and the two alleged assailants [were] apprehended” before the police entry and search of the apartment.

People v. Hunter, 92 A.D.3d 1277, 938 N.Y.S.2d 719 (4th Dept. 2012): A warrantless entry of an apartment was not justifiable under the “hot pursuit” exception to the warrant requirement. Although the police followed the defendant to the apartment building after a buy-and-bust transaction, “there was no immediate or continuous pursuit of [defendant] from the scene of a crime” (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984)): The police lost sight of the defendant when he entered the building and conducted a 25-minute search of the building before narrowing down their search to the defendant’s apartment.

(6) Search Warrants

People v. Gavazzi, 20 N.Y.3d 907, 2012 WL 5906686, 2012 N.Y. Slip Op. 08054 (N.Y. Ct. App. Nov. 27, 2012): Suppression was required because the search warrant did not comply with the statutory requirement that the warrant bear “[t]he name of the issuing court” (C.P.L. § 690.45(1)). Even though “[t]he standard for adherence with the statutory requirement is ‘substantial – rather than literal – compliance,’” the Court of Appeals concludes that the standard was not met in this case because “the Village Justice who signed the warrant included no designation of his court, his signature is illegible, there is no seal, and the caption typed by the trooper refers to a nonexistent town.”

People v. Fomby, __ A.D.3d __, 956 N.Y.S.2d 633 (3d Dept. 2012): DNA evidence is suppressed and the conviction overturned because the search warrant that authorized “the buccal swab used to obtain the DNA sample” was issued without notice to the defendant and “the opportunity to be heard in opposition” to the warrant and without “exigent circumstances” justifying the lack of notice.

(7) Probable Cause or Reasonable Suspicion Based on Information Known to Another Police Officer

People v. Powell, 101 A.D.3d 756, 955 N.Y.S.2d 608 (2d Dept. 2012): The arrest of the defendant was unlawful, and physical evidence and identification testimony are suppressed as fruits of the unlawful arrest, because the prosecution failed to show that “the officers who stopped and

detained the defendant” were acting “upon the direction or as a result of communication with” the fellow officers who “interviewed an eyewitness [and] had sufficient information to constitute probable cause.” Although an arresting officer need not have “personal knowledge sufficient to establish probable cause” and an arrest can be based upon information known to a fellow officer, there must be a showing by the prosecution that the arresting officer “actually received” the information or a directive from the fellow officer who possessed probable cause.

C. *Huntley* Motions

Howes v. Fields, 132 S. Ct. 1181 (2012): Questioning of an incarcerated prisoner, which is not automatically subject to *Miranda* since “service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody,” does not necessarily rise to the level of *Miranda* “custody” when the prisoner is taken aside and questioned in private about “events that took place outside the prison.” A case of this sort is subject to the customary case-based analysis of “all of the features of the interrogation,” and the Court concludes that “[a]ll of the[] objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave.” The Court emphasizes that the prisoner “was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted,” the prisoner “was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was ‘not uncomfortable,’” and “was offered food and water, and the door to the conference room was sometimes left open.”

People v. Aveni, 100 A.D.3d 228, 953 N.Y.S.2d 55 (2d Dept. 2012): The defendant’s confession should have been suppressed because the police obtained his confession by means of deception that was so “fundamentally unfair as to deny due process.” The police “deceiv[ed] [the defendant] into believing that [the victim] was [still] alive,” said “that the physicians treating her needed to know what drugs she had taken or else she could die,” and declared that “[i]f you ... don’t tell ... the truth now ... it could be a problem,” thereby “implicitly threatening [the defendant] with a homicide charge if he remained silent.”

In re Ariel R., 98 A.D.3d 414, 950 N.Y.S.2d 17 (1st Dept. 2012): The trial court abused its discretion and committed reversible error by refusing to allow the respondent to call his treating psychiatrist to the witness stand at a *Huntley* hearing to testify about his ability to understand *Miranda* warnings. Even though the psychiatrist did not conduct a test of the respondent’s “specific ability to comprehend the *Miranda* warnings,” this went “only to the weight of the testimony, rather than to its admissibility.” Moreover, the psychiatrist’s opinion

was particularly relevant in this case, given the evidence that respondent was “at least somewhat mentally retarded.”

People v. Perry, 97 A.D.3d 447, 948 N.Y.S.2d 594 (1st Dept. 2012): The defendant’s initial statement was the product of “custodial interrogation” and therefore the failure to administer *Miranda* warnings required its suppression regardless of the hearing court’s finding that the statement was “voluntarily made because defendant wanted to protect his family.” A subsequent *Mirandized* statement at the police station should have been suppressed as a fruit of the earlier *Miranda* violation because “it was obtained as part of a single continuous chain of events” and the interrogating officer “used the same theme of protecting defendant's family to elicit both statements.”

People v. Huntsman, 96 A.D.3d 1390, 947 N.Y.S.2d 235 (4th Dept. 2012): Applying *People v. Lopez*, 16 N.Y.3d 375, 923 N.Y.S.2d 377 (2011), the Appellate Division suppresses a statement for violation of the state constitutional right to counsel because the interrogating officer had been present at the defendant’s arraignment in another county on another charge (after which the defendant was remanded into the officer’s custody for transportation to the other county) and thus the officer “should be charged with the knowledge, actual or constructive, that defendant had requested counsel on the charges for which he had just been arraigned.”

People v. Baez, 95 A.D.3d 654, 944 N.Y.S.2d 539 (1st Dept. 2012): “Custody” for purposes of *Miranda* was established by a police officer’s ordering a car’s occupants to exit the vehicle during a traffic stop and then, upon finding a gravity knife in the car, stating to the group that “unless the knife’s owner came forward,” the officer “could arrest the entire group.” The Appellate Division concludes that this threat of “the possibility of arrest” would have caused a reasonable person to believe that the police had “restricted his or her freedom of movement and that he or she was free to leave.” Moreover, “the police officer’s threat to arrest the entire group if the owner did not come forward was the functional equivalent of interrogation under *Miranda*, given that the police knew or should have known that the statement ‘was reasonably likely to elicit an incriminating response.’” Thus, there was “custodial interrogation” and *Miranda* warnings should have been administered.

People v. Harris, 93 A.D.3d 58, 936 N.Y.S.2d 233 (2d Dept. 2012): “The defendant’s statement, during a custodial interrogation, ‘I think I want to talk to a lawyer,’ unequivocally invoked his right to counsel,” and required suppression of the inculpatory “statements subsequently given by the defendant in the absence of counsel.”

In the Matter of P.G., 36 Misc.3d 463, 945 N.Y.S.2d 532 (N.Y. Fam. Ct. May 22, 2012) (Bogacz, J.): In a factual context similar to that of *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 912 N.Y.S.2d 537 (2010) (a 4-3 decision in which the majority denied suppression of a statement of a 13-year-old youth who was questioned by an officer after obtaining permission from the parent and child to question the child by himself), the Family Court suppresses a statement of a 10-year-old, distinguishing *Jimmy D.* on the following grounds: the respondent was 10 years old and a fourth grader while *Jimmy D.* involved a 13-year-old seventh grader; the police in this case did not provide the parent with an opportunity to consult with her son beforehand as was the case in *Jimmy D.*; and the police in this case obtained permission for the solo questioning exclusively from the parent and, given that *Miranda* rights are personal and cannot be waived by a parent on behalf of a child, “it appears to follow that the right to waive the presence of a parent – already present – at a custodial interrogation is also personal to the juvenile, requiring the youth’s assent, as happened in *Jimmy D.*”

D. Wade Motions

Perry v. New Hampshire, 132 S. Ct. 716 (2012): The Supreme Court rejects the defense’s argument that a pretrial *Wade* hearing should be available even in cases in which an out-of-court identification was not police-arranged. In this case, an eyewitness, when asked for a description of the perpetrator, said that he was the person whom she had seen from her window, “standing . . . next to the police officer.” When, as in this case, “the police have [not] arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime,” the “due process check on the admission of eyewitness identification” does not require a pretrial hearing, and any questions of reliability of the identification can be left for trial and the “safeguards generally applicable in criminal trials,” including “vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.”

IV. Timing of the Factfinding Hearing

A. Speedy Trial Motions

In the Matter of Jabare B., 93 A.D.3d 719, 939 N.Y.S.2d 878 (2d Dept. 2012): The expedited speedy trial time limit of 14 days for remand cases was violated by the trial court’s conducting the pretrial suppression hearing in an “unjustifiedly protracted” manner, taking the testimony of two witnesses “in a piecemeal fashion during eight court dates” over the course of “approximately seven weeks” even though the respondent was detained throughout this time.

B. Defense Request for an Adjournment

In re Angel C., 93 A.D.3d 602, 941 N.Y.S.2d 561 (1st Dept. 2012): The Family Court “properly exercised its discretion” in denying the respondent’s “request for a third continuance” to “attempt to secure the testimony” of a co-perpetrator “who had entered an admission to the delinquency petition.” The court explains that respondent’s counsel “did not show that the proposed witness could provide materially exculpatory testimony, or any likelihood that [counsel] could obtain the witness’s testimony if granted another adjournment.”

V. Admissions

Missouri v. Frye, 132 S. Ct. 1399 (2012) and Lafler v. Cooper, 132 S. Ct. 1376 (2012): In two cases decided on the same day, the Supreme Court makes clear that “the constitutional right to counsel [and the corollary requirement of effective assistance of counsel] extend[] to the negotiation and consideration of plea offers that lapse or are rejected.” *Frye*, 132 S. Ct. at 1404. (“In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. [In *Lafler*] . . ., the favorable plea offer was reported to the client but, on advice of counsel, was rejected. . . . [leading to] trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain.” *Lafler*, 132 S. Ct. at 1383.) With regard to the first-stage question of whether counsel’s performance was deficient, the Court does not announce a general standard “to define the duties of defense counsel” in negotiating pleas and counseling clients about plea offers, because this first-stage issue could be resolved in *Frye* by holding simply that “defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both” (*Frye*, 132 S. Ct. at 1408) and the State conceded in *Lafler* that “counsel’s advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment” (*Lafler*, 132 S. Ct. at 1383). With respect to the second-stage issue of prejudice, the Court holds that “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.” *Lafler*, 132 S. Ct. at 1385.

People v. Mox, 20 N.Y.3d 936, 2012 WL 6115635, 2012 N.Y. Slip Op. 08441 (N.Y. Ct. App. Dec. 11, 2012): The Court of Appeals finds a guilty plea colloquy defective, and voids the plea, because the trial court failed to respond to the “defendant’s statements that he was ‘in a psychotic state’ and ‘hearing voices’ on the day of the crime” by conducting

an adequate inquiry into “whether defendant’s decision to waive a potentially viable insanity defense was an informed one such that his guilty plea was knowing and voluntary.”

People v. Maracle, 19 N.Y.3d 925, 950 N.Y.S.2d 498 (2012): Although the defendant’s guilty plea included a waiver of “her right to appeal her *conviction*,” that did not preclude an appeal of the “harshness of the sentence,” which the defendant pursued after “she failed to comply with a condition set by the court” and “the sentence went from one of probation to a maximum sentence of imprisonment on each count of the indictment.” The Court of Appeals explains that the CPL distinguishes between “a conviction and a sentence,” and the defendant “never expressly waived her right to appeal the sentence.”

People v. Alexander, 19 N.Y.3d 203, 947 N.Y.S.2d 386 (2012): The defendant’s guilty plea was voluntary and valid even though it was conditioned on the defendant’s withdrawal of “any and all motions that [were] outstanding,” which included a recently filed pro se constitutional speedy trial motion, and waive[r] [of] the right to appeal.” The particular circumstances of this case took it outside the scope of prior Court of Appeals decisions invalidating guilty pleas in which prosecutors conditioned a guilty plea on withdrawal or waiver of appellate review of a speedy trial motion. In this case, the trial court merely informed the defendant that the guilty plea would have the effect of obviating the judge’s ruling on various pending writs and motions that the defendant (a “prolific pro se litigant”) had filed in the trial court. “There were no such conditions or ‘strings’ attached to the People’s plea offer” and no “prosecutor[ial] . . . manipul[at]ion [of] plea bargaining so as to preclude judicial consideration of constitutional speedy trial claims.”

People v. Picca, 97 A.D.3d 170, 947 N.Y.S.2d 120 (2d Dept. 2012): Applying the Supreme Court’s holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Appellate Division holds that the trial court erred in summarily denying a motion to vacate a guilty plea on the ground that defense counsel failed to advise the defendant that the plea would subject him to the consequence of mandatory removal. Even though the defendant was already subject to mandatory removal due to a prior conviction and the evidence against him in the new case was strong and the plea offer was favorable, the Appellate Division concluded that it could not necessarily be said that he “was not prejudiced by his counsel’s failure to advise him of the removal consequences of his plea” and thus an evidentiary hearing should have been held on the motion.

VI. Fact-Finding Hearing

A. Generally

(1) Accused's Right to Be Present

People v. McCune, 98 A.D.3d 631, 949 N.Y.S.2d 747 (2d Dept. 2012): The trial court committed reversible error by excluding the defendant from the portion of a *Sirois* hearing at which the prosecution laid the foundation for a finding of the defendant's forfeiture of Confrontation Clause and hearsay objections by presenting a witness who testified "that he was afraid to testify [at trial] because of the threats made against him by the defendant's friends and family." The Appellate Division explains that a *Sirois* hearing must be deemed a "material stage of the trial," and thus that the defendant has the right to be present, because "testimony is heard that could possibly lay the foundation for the introduction into evidence at a defendant's trial of a witness's prior statements, including grand jury testimony, rather than live testimony from the witness that is subject to cross examination," and "[a]ccordingly, a defendant's absence at a *Sirois* hearing has a substantial effect on his ability to defend the charges against him."

(2) Accused's Right to Consult with Counsel During Trial

People v. Gamble, 18 N.Y.3d 386, 941 N.Y.S.2d 1 (2012): The Court of Appeals rejects the defendant's claim that "the positioning of court officers directly behind him during the course of the trial" violated the accused's "fundamental right" to "'consult [defense] counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to what has been said.'" The Court concludes that the defendant "did not meet his burden in showing that the positioning of the court officers directly behind him impeded his ability to converse privately with his attorney," especially given that "the relief sought by defense counsel – a request that the court officers sit in their normal places two inches farther away from defendant – would not have made counsel's communications with defendant any more confidential," and given further that the "defendant had been charged with a disciplinary infraction for allegedly assaulting a correction officer at Rikers Island" and had "acted aggressively in court during the pendency of this case before a different judge."

(3) Effect of Judge’s Midtrial Transfer to a Different Court

In re Marcus B., 95 A.D.3d 15, 942 N.Y.S.2d 38 (1st Dept. 2012): The trial judge’s midtrial transfer to a different court (from Family Court to Civil Court) was not an adequate basis for declaring a mistrial without the respondent’s consent and commencing the trial anew before a different judge, given that “the hearing was virtually completed and the Civil Court to which the Judge was reassigned is located only a few blocks away from the Family Court” and “there is nothing in the record to suggest that it was ‘physically impossible’ for the Judge to finish the case due to death or illness.” Because there was no “manifest necessity” for a mistrial, further prosecution was barred by the Double Jeopardy Clause.

B. Evidentiary Issues

(1) Confrontation Clause Issues

Williams v. Illinois, 132 S. Ct. 2221 (2012): This case presented the question of how the Court’s previous rulings in *Melendez-Diaz* and *Bullcoming* apply to a bench trial in which a testifying expert relied on the findings of a DNA report for her analysis but the “report itself was neither admitted into evidence nor shown to the [judicial] factfinder” and the testifying expert “did not quote or read from the report” or “identify it as the source of any of the opinions she expressed.” *Id.* at 2230. In this trial for rape, the prosecution presented three forensic experts: a state forensic scientist who testified that he identified semen on a vaginal swab taken from the victim and then preserved it for further testing; a state forensic scientist who testified to developing a DNA profile of the defendant from a blood sample taken from him; and, to provide the final links, a forensic expert (Sandra Lambatos) who testified that the defendant’s DNA profile matched the DNA profile that an outside laboratory (Cellmark) derived from the semen on the vaginal swab. The defense objected on Confrontation Clause grounds to Lambatos’ testimony that Cellmark’s DNA profile came from the semen on the vaginal swabs – a fact that Lambatos did not personally know (since “she did not conduct or observe any of the testing on the vaginal swabs”) and that she drew from the Cellmark report – but the Illinois Supreme Court ruled that there was no Confrontation Clause violation because Lambatos referenced the report merely for the limited purpose of explaining the basis for her expert opinion and thus the statement was not admitted for the truth of the matter. The U.S. Supreme Court affirmed but in a fragmented set of opinions that complicate and confuse the state of Confrontation Clause rules on forensic reports. A plurality opinion, authored by Justice Alito, and joined by Chief

Justice Roberts and Justices Kennedy and Breyer, concluded that there was no Confrontation Clause violation because the out-of-court statement about the source of the Cellmark DNA profile was not admitted for the truth of the matter and this was a bench trial and thus, unlike in a jury trial, the trier of fact could be relied upon to understand that the expert's "statement regarding the source of the Cellmark report" could not be "consider[ed] ... for its truth." *Id.* at 2240. A dissenting opinion, authored by Justice Kagan, and joined by Justices Scalia, Ginsburg and Sotomayor, concluded that "Lambatos's statement about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements." *Id.* at 2268. Justice Thomas, who concurred in the plurality's judgment, thereby providing the fifth vote for affirming the lower court's ruling, stated explicitly that he "shares the dissent's view" that "Cellmark's statements were introduced for their truth," *id.* at 2255, 2259, and that this classification is not vitiated by the fact that this was a bench trial, *id.* at 2259 n.1, but Justice Thomas nonetheless joined the plurality in affirming the conviction because of his idiosyncratic view that forensic reports like the Cellmark report at issue in this case "lack[] the requisite 'formality and solemnity' to be considered 'testimonial'" for purposes of the Confrontation Clause." *Id.* at 2255. Thus, as Justice Kagan observed in her dissent, Justice Thomas's opinion provides a fifth vote for the dissent's view that the challenged testimony in this case must be regarded as having come in for the truth of the matter, a classification that would result in a Confrontation Clause bar under the Sixth Amendment standards applied by all members of the Court other than Justice Thomas. *See id.* at 2268.

People v. Reid, 19 N.Y.3d 382, 948 N.Y.S.2d 223 (2012): Addressing an aspect of *Crawford v. Washington* and the Confrontation Clause rules that has not yet been resolved by the U.S. Supreme Court, the Court of Appeals holds that the doctrine of "opening the door" applies to these rules and that accordingly a "defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution." The court explains that this result is necessary to "avoid unfairness and to preserve the truthseeking goals of our courts" because, "[i]f evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury 'by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context'" – "secure [in the] knowledge that the concealed parts would not be admissible, under the Confrontation Clause." The determination whether a defendant

“opened the door” “must be decided on a case-by-case basis” by means of the following “twofold” inquiry: “whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.” Applying this rule to the present case, the Court of Appeals concludes that the testimonial statement in question – a confession by a non-testifying co-perpetrator (who had initially been a co-defendant but whose trial was severed from the defendant’s under *Bruton v. United States* because of the confession) – was partially admissible because defense counsel “elicit[ed] from witnesses that the police had information that [another individual named] McFarland was involved in the shooting, ... suggesting that more than one source indicated that McFarland was at the scene, and ... persistently presenting the argument that the police investigation was incompetent,” and defense counsel thereby “opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that McFarland was not at the shooting.” Under these circumstances, the Court of Appeals holds, the otherwise inadmissible statement “was reasonably necessary to correct defense counsel’s misleading questioning and argument” and to “prevent the jury from reaching the false conclusion that McFarland had been present at the murder.”

People v. Jaikaran, 95 A.D.3d 903, 943 N.Y.S.2d 223 (2d Dept. 2012): The trial court violated both the hearsay rule and the defendant’s 6th Amendment right to confrontation by “precluding the defendant’s counsel, during the cross-examination of the complainant, from submitting into evidence certain portions of the complainant’s hospital records,” which contained statements of the complainant that contradicted her testimony. The “hospital records were properly certified” pursuant to CPLR § 4518(a) and “were admissible under the business records exception to the hearsay rule,” and the statements in question were “germane to the medical diagnosis and treatment of the complainant” and “critical to the complainant’s credibility.” Even if the prosecution is correct that the statements were covered by the physician-patient privilege, this statutory privilege “must yield to the defendant’s constitutional right of confrontation.”

(2) **Hearsay**

People v. Jaikaran, 95 A.D.3d 903, 943 N.Y.S.2d 223 (2d Dept. 2012): The trial court violated both the hearsay rule and the defendant’s 6th Amendment right to confrontation by “precluding the defendant’s counsel,

during the cross-examination of the complainant, from submitting into evidence certain portions of the complainant's hospital records," which contained statements of the complainant that contradicted her testimony. The "hospital records were properly certified" pursuant to CPLR § 4518(a) and "were admissible under the business records exception to the hearsay rule," and the statements in question were "germane to the medical diagnosis and treatment of the complainant" and "'critical to the complainant's credibility.'" Even if the prosecution is correct that the statements were covered by the physician-patient privilege, this statutory privilege "'must yield to the defendant's constitutional right of confrontation.'"

People v. Parchment, 92 A.D.3d 699, 938 N.Y.S.2d 174 (2d Dept. 2012): A recoding of an anonymous 911 call was not admissible under the "present sense impression" exception to the hearsay rule because the caller's "us[e] [of] the past tense" indicated "that he was recalling and describing events that he observed in the recent past, rather than as it was occurring," and thus the statement did not satisfy the "contemporaneity" prong of the "present sense impression" exception.

(3) Other Crimes Evidence

People v. Bradley, 20 N.Y.3d 128, 2012 WL 5845017, 2012 N.Y. Slip Op. 07858 (N.Y. Ct. App. Nov. 20, 2012): The trial court committed reversible error by allowing the prosecution to introduce evidence of the defendant's prior uncharged assaults as rebuttal to a justification defense in a case in which the defendant was charged with stabbing her estranged boyfriend and presented expert testimony that she had been a frequent victim of sexual and physical abuse and suffered from post-traumatic stress disorder and battered women's syndrome. Although the *Molineux* doctrine may allow the prosecution to present other crimes evidence to help establish *mens rea* in a case in which "there is an issue raised as to whether a defendant acted culpably," the other crimes evidence must be "demonstrably relevant to the specific state of mind issue in the case and it must be found, on balance, more probative than prejudicial." The Court of Appeals explains that the prosecution's evidence of the defendant's prior uncharged assault on a different man in the past did not "in any direct or logical way" "disprove[]" the defendant's justification defense that "she reasonably believed that [the complainant] was about to seriously harm her" at the time she stabbed him.

(4) Rape Shield Law

People v. Halter, 19 N.Y.3d 1046, 955 N.Y.S.2d 809 (2012): In a bench trial of a defendant for sexual abuse of his daughters, the trial court did not abuse its discretion by applying the Rape Shield Law to preclude defense cross-examination of one daughter about her sexual relationship with an older boy. The Court of Appeals explains that the “evidence fell squarely within the ambit of the Rape Shield Law, which generally prohibits ‘[e]vidence of a victim’s sexual conduct’ in a prosecution for a sex offense under Penal Law article 130,” and that, although the statute “vests the trial court with discretion to consider the admission of such evidence ‘in the interests of justice,’” the defense did not pursue its alleged goal of using the relationship to establish a motive on the daughter’s part to fabricate (which could have been done by “elicit[ing] the general nature of the relationship between the two teenagers”) but “instead focused solely on alleged sexual behavior” of the daughter. Moreover, the trial court permitted the defense to elicit other evidence about the daughter’s conduct that could have been used to support the defense’s theory of the case. The trial court “complied with the two-part Rape Shield Law procedure” by first “allow[ing] defendant to describe without restriction his proposed line of inquiry” and then issuing a ruling as to what subjects would or would not be permitted in cross-examination and thereby putting the defendant “‘on notice of [the court’s] reasoning and creat[ing] a record for appeal.’”

(5) Expert Testimony

People v. Bedessie, 19 N.Y.3d 147, 947 N.Y.S.2d 357 (2012): In a case raising “for the first time” the question of “the admissibility of expert testimony proffered on the issue of the reliability of a confession,” the Court of Appeals adopts the general rule that “in a proper case expert testimony on the phenomenon of false confessions should be admitted.” The Court explains that “there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions.” On the facts of this case, however, the Court of Appeals upholds the trial court’s exclusion of the expert proffered by the defense because “the expert here did not propose testimony relevant to this defendant or her interrogation.” The defense expert “did not proffer testimony that defendant exhibited any of the personality traits that research studies have linked to false confessions.” The expert would have testified about circumstances that might have distorted the complainant’s account and the possible motivations of a detective in failing to videotape

the questioning of the defendant, none of which was a “a factor or circumstance that might induce a [defendant to make a] false confession.”

People v. Nazario, 100 A.D.3d 783, 953 N.Y.S.2d 652 (2d Dept. 2012): The trial court abused its discretion in denying the defense’s *in limine* request to present, at trial, a psychology professor to testify about “several factors that might affect the accuracy of an identification.” Applying the criteria of *People v. LeGrand*, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007) for assessing whether the defense is entitled to call an expert on eyewitness identification, the Appellate Division concludes that the defense had the right to do so in this one-witness-identification case in which the identification resulted from a “police-arranged showup less than 30 minutes after the alleged robbery occurred” but there was “little or no corroborating evidence connecting the defendant to the crime.” The Appellate Division notes that “[t]he fact that the victim was confronted by the defendant on a clear, sunny day, and had an unobstructed view of the defendant at close range, does not constitute corroborating evidence of the identification for purposes of determining whether expert testimony regarding the accuracy of an eyewitness identification is admissible.”

(6) “Opening the Door”

People v. Richardson, 95 A.D.3d 1039, 943 N.Y.S.2d 599 (2d Dept. 2012): In deciding whether a litigant “opened the door” to otherwise inadmissible evidence, the trial court should consider “whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what, if any, otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.” In this case, in which the defense called a witness to testify that a certain individual “was with the other perpetrators immediately before the crime took place” (so as to support the defense’s theory that the other individual, not the defendant, was the additional perpetrator), the trial court committed reversible error by permitting the prosecutor to elicit from the witness on cross-examination that one of the other perpetrators stated that the other individual “did not participate in the attempted robbery.” The witness’s direct examination testimony did not “open the door” to this out-of-court statement because “the testimony of the defense witness was neither incomplete nor misleading.”

(7) Collateral Estoppel

People v. O’Toole, 96 A.D.3d 435, 946 N.Y.S.2d 127 (1st Dept. 2012): In a retrial of a defendant for second-degree robbery after reversal of the

conviction on appeal, the first jury's acquittal of the defendant on counts of first-degree robbery and second-degree attempted grand larceny operated as collateral estoppel at the second trial and barred the prosecution from "presenting evidence at the retrial that defendant's accomplice pointed what appeared to be a pistol at the complaining witness during the alleged robbery, and that defendant also attempted to extort regular payments of protection money from the complaining witness on the day of the robbery and on a later occasion." Under the collateral estoppel (or "issue preclusion") doctrine, the prosecution is barred from relitigating "issues necessarily resolved in [a] defendant's favor at an earlier trial," "giv[ing] a practical, rational reading to the record of the first trial." The court rejects the prosecution's attempt to characterize the previous acquittals as "resulting from inadequate corroboration of the complaining witness's testimony" and to thereby activate a common law rule limiting the application of the collateral estoppel doctrine when "a defendant is acquitted of crimes subject to the statutory requirement that the testimony of an accomplice be corroborated." The court explains that the corroboration rule's limitation applies only when "a statutory corroboration requirement governs," thereby creating "the possibility ... that an acquittal flows not from a factual issue being resolved in the defendant's favor as a purely factual matter, but 'merely [because] the People had not met the requirement of corroboration,'" but "[t]he same cannot be said here, where no statutory corroboration requirement was applicable."

C. The Defense Case

(1) Right to Present a Defense

People v. Spencer, 20 N.Y.3d 954, 2012 WL 6195810, 2012 N.Y. Slip Op. 08567 (N.Y. Ct. App. Dec. 13, 2012): The trial court violated the defendant's "constitutional right 'to present a complete defense'" by precluding, as "collateral," the evidence the defense sought to present to "establish that complainant had a motive to frame defendant" because of the complainant's close friendship with a third party who, according to the defense, was the real perpetrator. The Court of Appeals reiterates the central rule that "provided that counsel has a good faith basis for eliciting the evidence, 'extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground.'"

People v. Bradley, 99 A.D.3d 934, 952 N.Y.S.2d 260 (2d Dept. 2012): In a trial of the defendant for intentionally slamming a door on his wife's hand, the trial court violated the defendant's 6th Amendment right to present a

defense and due process right to a fair trial by precluding the defense from presenting witnesses to testify that the wife told them that the “door was accidentally closed on her hand.” This was not merely a situation of a prior inconsistent statement bearing on a witness’s credibility but a *Chambers v. Mississippi* situation of “material and exculpatory evidence” on “a core factual issue.”

People v. Badia, 94 A.D.3d 622, 942 N.Y.S.2d 114 (1st Dept. 2012): Because the defense theory was that “defendant had unwittingly agreed to aid in the drug enterprise at . . . [an]other participant’s behest,” the defendant was entitled to use cross-examination of the police to “explore what the police investigation of the other participant had revealed” and the judge’s foreclosure of this line of cross-examination violated the defendant’s constitutional right to present a defense and to confront the witnesses against him.

(2) Justification Defense

People v. Powell, 101 A.D.3d 1369, 956 N.Y.S.2d 294 (3d Dept. 2012): Even assuming that the defendant was the “initial aggressor,” he nonetheless was entitled to a jury charge on the justification defense because the evidence, “viewed in the light most favorable to the defendant, would support a finding that he withdrew from the encounter prior to his subsequent use of force.”

(3) “Claim of Right” Defense in Larceny Cases

People v Pagan, 19 N.Y.3d 91, 945 N.Y.S.2d 606 (2012): In a second-degree robbery case arising from a dispute over a cab fare, in which the cab passenger was charged with taking money from the cabdriver at knifepoint, the defendant was not entitled to a “claim of right” instruction under P.L. § 155.15(1) (which establishes a defense to larceny when “the property was appropriated under a claim of right made in good faith”) because this defense “may not be raised in a robbery when a defendant takes money to satisfy a preexisting debt” (since “[f]orcibly taking the property of another, even when one honestly believes it to be one’s own property ‘entails the risk of physical or mental injury to individuals’)” and furthermore the accused “cannot be said to have a good faith belief that the [particular] bills are his own” (in contrast to a case in which “a defendant takes a painting, or a car, or a television set, [where] he may have an honest belief that it is his own property he is retrieving”).

(4) Alibi Defense

People v. Shelton, 98 A.D.3d 988, 951 N.Y.S.2d 69 (2d Dept. 2012): Although “[t]here is nothing inherently improper about [the prosecutor’s] cross-examining a defense witness concerning his [or her] failure to come forward [with exculpatory information] at an earlier date,” the prosecution must a proper foundation for this type of cross-examination by showing that the witness “(i) was aware of the nature of the charge pending against the defendant; (ii) had reason to recognize that he or she possessed exculpatory information; (iii) had a reasonable motive for acting to exonerate the defendant; and (iv) was familiar with the means of making such information available to law enforcement authorities.” In this case, the trial court committed reversible error by “allowing the prosecutor to impeach the alibi witness’s credibility by virtue of her prior silence as to certain exculpatory information concerning the defendant, without having first laid this proper foundation.”

(5) Defendant’s Right to Testify

People v. Harden, 99 A.D.3d 1031, 953 N.Y.S.2d 689 (3d Dept. 2012): The trial court violated the defendant’s federal and state constitutional rights to testify in his own behalf by denying the defendant’s request, which “came right after the close of proof, during the charging conference, but before summations,” to “reopen the proof and permit him to testify in his defense.”

D. Presumptions and Inferences

(1) “Drug Factory” Presumption of P.L. § 220.25(2)

People v. Rosado, 96 A.D.3d 547, 947 N.Y.S.2d 434 (1st Dept. 2012): The First Department “clarif[ies] the scope of the drug factory presumption” of P.L. § 220.25(2), explaining that “it should only apply to crimes requiring intent to sell, or crimes involving amounts of drugs greater than what is required for misdemeanor possession,” and thus not “seventh-degree possession,” because “implicit in the idea of a drug factory is that drugs are being prepared for sale.”

People v. Kims, 96 A.D.3d 1595, 947 N.Y.S.2d 729 (4th Dept. 2012): The trial court erred in giving a jury instruction on the “drug factory” presumption of P.L. § 220.25(2) in a case in which the defendant was not in “close proximity to [the] controlled substance at the time such controlled substance was found.” The defendant was apprehended by the

police in his car after exiting his apartment and it was not until several minutes later that the police entered the apartment and found drugs in the apartment.

E. Insufficiency of the Evidence

(1) Explanation of the Verdict in a Bench Trial

In the Matter of Danasia Mc., 94 A.D.3d 1122, 943 N.Y.S.2d 549 (2d Dept. 2012): The Appellate Division rejects the respondent’s claim that the Family Court judge’s omission of the phrase “moral certainty” in explaining the findings in “a wholly circumstantial case” should be deemed to mean that the Family Court failed to apply the correct “circumstantial evidence standard.” The Appellate Division explains that “it is presumed that the Judge sitting as the trier of fact [in a bench trial] made his [or her] decision based upon “appropriate legal criteria” and “it is not necessary to use the words ‘moral certainty’ in evaluating a wholly circumstantial case . . . as long as the factfinder engages in the ‘more complex and problematical reasoning process necessarily undertaken in cases of purely circumstantial evidence,’” and the record shows that “the Family Court engaged in the aforesaid ‘complex and problematical reasoning process.’”

(2) Aiding and Abetting

In the Matter of Christopher M., 94 A.D.3d 1119, 943 N.Y.S.2d 171 (2d Dept. 2012): The court dismisses, as legally insufficient, a petition charging riot in the second degree and unlawful assembly, which was based on allegations that the respondent was part of a group that was facing another group and engaging in various “threatening” actions. The court explains that the petition did not specify any act of the respondent’s that constituted the *actus reus* for the charged crimes and also did not “allege facts specific to the respondent from which it may be inferred that he shared a community of purpose with others to engage in the [charged crimes].”

(3) “Physical injury” and “Serious Physical Injury”

People v. Thomas, 100 A.D.3d 1035, 952 N.Y.S.2d 828 (3d Dept. 2012): The “serious physical injury” element of assault in the first degree was not adequately established by a stab wound, 12 inches long and 3 inches deep, because “no main vessels were injured,” the “surgery to explore and staple the wound lasted less than 20 minutes,” the victim was “discharged within

about 12 hours of arriving at the hospital,” and the “physician who treated him testified that the wound would typically heal within 6 to 12 weeks and that he would experience pain with movement during such time.”

People v. Young, 99 A.D.3d 739, 951 N.Y.S.2d 735 (2d Dept. 2012): The “physical injury” element of second degree robbery was not adequately established by the complainant’s testimony that the defendant “either ‘punched’ or ‘pushed’ her, causing her to fall to the ground,” resulting in her “experienc[ing] generalized pain and soreness in her neck, arms, legs, and feet,” which “‘intensified’ after she returned to work one week after the incident,” and for which she was prescribed Tylenol when she “went to a hospital after the incident and underwent X-rays.”

People v. Daniels, 97 A.D.3d 845, 948 N.Y.S.2d 431 (3d Dept. 2012): “Serious physical injury” was not established by evidence that the complainant was stabbed in the head, without penetration of the skull, causing a concussion and residual headaches that had ceased approximately six months later.

In the Matter of Shawn D.R.-S., 94 A.D.3d 1541, 943 N.Y.S.2d 706 (4th Dept. 2012): The “physical injury” element of assault in the third degree was not adequately established by evidence that “respondent and another individual hit the victim several times in the face and back of the head, causing him to suffer three minor cuts on his face, swelling on his nose and behind his ear and a red bruise on his neck,” given that “[t]he victim testified at the fact-finding hearing that the injuries did not hurt and, although he sought medical attention approximately three hours after the incident, there is no evidence that he needed stitches, that he was prescribed pain medication or that he received any further treatment,” and “neither the victim nor his mother testified that the victim had any lingering pain or scarring in the days following the incident.” However, there was sufficient evidence of the lesser included offense of attempted assault in the third degree because “respondent’s intent to cause physical injury can be inferred from his act of repeatedly punching the victim in the head with a closed fist.”

People v. Tucker, 91 A.D.3d 1030, 936 N.Y.S.2d 386 (3d Dept. 2012): “Serious physical injury” was not established by victim’s having suffered “eight stab wounds,” seven of which were “described by doctors as superficial” while the most serious one was treated with “a few sutures” and the victim’s “blood loss was not massive and his vital signs were essentially normal throughout his time in the hospital.”

(4) Menacing

People v. Perry, 19 N.Y.3d 70, 967 N.E.2d 1195, 944 N.Y.S.2d 750 (2012): In the course of rejecting a defense argument that the evidence supported a lesser included offense of criminal possession of a weapon without the “intent to use the same unlawfully against another,” the Court of Appeals concludes that the defendant’s “own account . . . [that] he showed [the complainant] a gun ‘to scare him’” made out the *actus reus* and *mens rea* for the crime of menacing in the second degree.

In re Shaquille M., 94 A.D.3d 445, 941 N.Y.S.2d 586 (1st Dept. 2012): There was sufficient evidence of menacing in the second degree based on testimony establishing that the respondent “made threatening gestures with a knife in a crowd of people standing at a bus stop,” manifesting an “inten[t] to place the teenagers on the bus, as well as the complaining witness, who was standing in close proximity to appellant, in fear of physical harm” and “negat[ing] the possibility that [he] was waving the knife as some type of innocent horseplay.”

In re Angel C., 93 A.D.3d 602, 941 N.Y.S.2d 561 (1st Dept. 2012): In a case in which the Family Court made findings of both assault in the third degree and menacing in the third degree, the finding of menacing is vacated for legal insufficiency because “there was no evidence of any threatening behavior separate from the assault.”

VII. Disposition

Miller v. Alabama, 132 S. Ct. 2455 (2012): The Court applies the reasoning of its previous decisions in *Roper v. Simmons* (2005) (categorically barring the death penalty for offenders who were below the age of 18 at the time of the crime) and *Graham v. Florida* (2010) (categorically barring a sentence of life imprisonment without the possibility of parole (LWOP) for offenders who were below age 18 in non-homicide cases) to hold that, even in homicide cases, the 8th Amendment prohibits a *mandatory* sentence of LWOP if the offender was below the age of 18 at the time of the crime. The two cases before the Court both involved a mandatory sentence of LWOP, and the Court held that “the mandatory penalty schemes at issue here” unconstitutionally “prohibit[ed] [the] sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender,” thereby “contraven[ing] *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”

In the Matter of Teriyana A. Mc., 100 A.D.3d 902, 955 N.Y.S.2d 120 (2d Dept. 2012): The Appellate Division reverses a delinquency adjudication (upon a finding of attempted

assault in the third degree) and a disposition of a year of probation, and remands for imposition of the less restrictive alternative of an ACD. The court explains that “[t]he appellant, who was 15 years old at the time of the underlying offense, had no record of ever having previously committed an act which, if committed by an adult, would constitute a criminal offense” and “[t]here is no indication that the appellant ever used drugs or alcohol, or that she was affiliated with a gang.”

In re Besjon B., 99 A.D.3d 526, 951 N.Y.S.2d 868 (1st Dept. 2012): The Appellate Division reverses a delinquency adjudication (upon findings of assault in the third degree and menacing in the third degree) and a disposition of a year of probation, and remands for imposition of the less restrictive alternative of a supervised ACD. The court explains that “[a]ppellant was 11 years old at the time of the incident, which was his only conflict with the law,” “[t]he circumstances of the assault were not particularly egregious,” and that, “[a]lthough appellant's school record had been unsatisfactory, it had greatly improved by the time of the disposition.”

In re Osriel L., 94 A.D.3d 523, 941 N.Y.S.2d 841 (1st Dept. 2012): The Appellate Division reverses a delinquency adjudication and a disposition of a year of probation, and remands for imposition of the less restrictive alternative of a supervised ACD. The court explains that the respondent was “12 years old at the time of the underlying offense and adjudication, had no prior record [and] . . . no background of serious trouble at home, at school, or in the community,” and “[t]here are no indications that appellant ever used drugs or alcohol, or was affiliated with a gang,” and furthermore the respondent “accepted responsibility for his nonviolent theft of property.”

In re Jonnevin B., 93 A.D.3d 572, 942 N.Y.S.2d 43 (1st Dept. 2012): The Appellate Division reverses a delinquency adjudication and a disposition of a year of probation, and remands for imposition of the less restrictive alternative of a supervised ACD. The court explains that “[t]here is no reason to believe appellant needs any court-imposed supervision beyond the supervision that can be provided under an ACD” given that “[t]he underlying offense was simple possession of a toy or imitation revolver,” “[a]ppellant was 14 years old at the time of the adjudication, and this was his first offense,” and, although “appellant was living in an unstable home at the time of the offense,” there were signs of progress in that appellant had “been placed in a stable foster home, where he posed no behavioral problems and had been attending school without any absences or further disciplinary issues.”

In re Hakeem F., 92 A.D.3d 403, 937 N.Y.S.2d 584 (1st Dept. 2012): The Appellate Division reverses a delinquency adjudication and a disposition of a Conditional Discharge, and imposes an ACD instead as the least restrictive alternative because the accused “came from a stable home environment,” “had no prior history of criminality,” “his misconduct did not involve weapons, violence, or injury,” “there was no indication that appellant ever used drugs or alcohol or was affiliated with a gang,” “[a]ppellant

accepted full responsibility for his offense and demonstrated sincere remorse and insight into his misconduct,” and, although “appellant would have benefitted from monitoring with regard to his attendance at school and his academic performance, this could have been provided for in the terms and conditions of an ACD.”

VIII. Post-Dispositional Issues

In re Lopez v. Evans, __ A.D.3d __, 957 N.Y.S.2d 59 (1st Dept. 2012): The Due Process Clause precludes the holding of a parole revocation hearing for a “parolee who has been found mentally incompetent to stand trial in a criminal prosecution based on the same charges that are at issue in the revocation proceeding.”

People v. Campbell, 98 A.D.3d 5, 946 N.Y.S.2d 587 (2d Dept. 2012): The Sex Offender Registration Act (SORA) does not apply to juvenile delinquency adjudications and thus the New York State Board of Examiners of Sex Offenders “exceeded its authority by adopting that portion of the Guidelines which includes juvenile delinquency adjudications in its definition of crimes for the purpose of determining a sex offender’s criminal history” and “the Supreme Court erred in considering the defendant’s juvenile delinquency adjudication in determining the defendant’s appropriate risk level designation under SORA.” In reaching this conclusion, the Appellate Division relies on Family Court statutes and caselaw establishing “that the Legislature has sought to protect young persons who have violated the criminal statutes of this State from acquiring the stigma that accompanies a criminal conviction.”

In re Rayshawn P., __ A.D.3d __, 955 N.Y.S.2d 306 (2d Dept. 2012): F.C.A. § 3555.1’s procedure for “staying, modifying, or terminating an order” cannot be used to initiate a probation revocation proceeding. “[B]ecause the Legislature has created a detailed scheme specifically dealing with VOPs, those provisions, not § 355.1(1), must be applied.”

In the Matter of Mario S., 38 Misc.3d 444, 954 N.Y.S.2d 843 (N.Y. Fam. Ct., Queens Co. Nov. 21, 2012) (Hunt, J.): Upon a request from a respondent who was adjudicated a delinquent, the court issues “an order pursuant to 8 U.S.C. § 1101(a)(27)(J) finding him eligible for ‘special immigrant juvenile’ (‘SIJ’) status.” The court finds that the respondent satisfies the statutory criteria that he was “dependent upon the Family Court by virtue of the juvenile delinquency proceeding which resulted in his placement in state custody,” that “reunification with at least one of his parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law,” and that “it is not in his best interests to return to Mexico, his country of birth.”

In the Matter of M.S., 37 Misc.3d 1223(A), 2012 WL 5857296, 2012 N.Y. Slip Op. 52145(U) (N.Y. Fam. Ct., West. Co. Nov. 19, 2012) (Malone, J.): The court grants the motion of the 16-year-old respondent pursuant to § 375.2 to seal the records of his prior

arson case (in which he entered an admission to criminal mischief and was placed on a year of probation) and to destroy his fingerprints pursuant to F.C.A. § 354.1. The respondent's motion showed that he "successfully completed his probation, has done well in school, and seems to be on the road to becoming a productive member of society," and the Presentment Agency did not file any response papers.

In the Matter of Langston F., 36 Misc.3d 837, 949 N.Y.S.2d 605 (N.Y. Fam. Ct., Queens Co. July 13, 2012) (Hunt, J.): The court did not have jurisdiction to grant OCFS' petition to extend placement for a 19-year-old respondent in foster care over his objection because F.C.A. § 355.3(6) provides that "no placement may be made or continued beyond the respondent's eighteenth birthday without the child's consent."

**Using *Crawford v. Washington*: A Sequence of Steps
for Defenders in Responding to a Prosecutor's Attempt to
Introduce an Individual's Out-of-Court Statement**

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- I. Introduction to *Crawford v. Washington*, 541 U.S. 36 (2004)
- A. Until the issuance of the *Crawford* decision in 2004, Confrontation Clause claims were governed by *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that when a witness is unavailable, the prosecution may be able to present hearsay testimony without running afoul of the Confrontation Clause if the statement is adequately trustworthy and reliable, and which used the following as the markers of “reliability”: (1) whether the proffered evidence falls within a “firmly rooted hearsay exception”; or (b) whether the proffered evidence is shown to have “particularized guarantees of trustworthiness.”
- B. In *Crawford* and its follow-up cases (*Davis v. Washington*, *Giles v. California*, *Melendez-Diaz v. Massachusetts*, *Michigan v. Bryant*, and *Bullcoming v. New Mexico*, and *Williams v. Illinois*), the U.S. Supreme Court abrogated the *Ohio v. Roberts* test and held that hereafter the governing rule is that the prosecution cannot introduce into evidence at trial a “testimonial statement” of a witness whom the prosecution will not call to the witness stand unless either (1) the accused previously had an adequate opportunity to cross-examine the now-unavailable maker of the out-of-court statement (*see Crawford*, 541 U.S. at 680); or (2) the accused can be deemed to have forfeited the protections of the Confrontation Clause by “caus[ing] ... [the maker of the out-of-court statement] to be absent” from court by “engag[ing] in conduct *designed* to prevent the witness from testifying” and with the express “intent[ion] to prevent [the] witness from testifying” (*Giles v. California*, 554 U.S. 353, 359, 361 (2008)). The Supreme Court and the lower courts have used varying language to define the concept of a “testimonial” statement (*see, e.g., Crawford*, 541 U.S. at 52: “[v]arious formulations of this core class of testimonial statements exist”), but the formulation that encompasses and best explains all of the rulings of the Supreme Court thus far is the following one: “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.” *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).
- C. The range of implications of *Crawford* is potentially very broad and may include unexpected areas. For example, in *People v. Goldstein*, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2005), the New York Court of Appeals held that the defendant’s Confrontation Clause rights under *Crawford v. Washington* were violated by the prosecution’s presentation of a forensic psychiatrist who, in testifying at trial to refute the defense of mental disease or defect, “recounted [hearsay] statements made to her by people who were not available for cross-examination.” *Id.* at 122, 810 N.Y.S.2d at 101. Although the expert’s opinion was admissible because the hearsay information was “of a kind accepted in the profession as reliable in forming a professional opinion” (*id.* at 124, 810 N.Y.S.2d at 124), the Court of

Appeals concluded that the hearsay statements underlying the opinion were inadmissible under *Crawford* and the Confrontation Clause because the authors of the statements were not available for cross-examination. The prosecution argued that the statements were not subject to *Crawford*'s Confrontation Clause analysis because they "were not evidence in themselves, but were admitted only to help the jury in evaluating [the psychiatrist's] opinion, and thus were not offered to establish their truth," but the Court of Appeals rejected this argument, concluding that "[s]ince the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true." *Id.* at 128, 810 N.Y.S.2d at 105.

- II. A Sequence of Steps for Defenders in Responding to a Prosecutor's Attempt to Introduce an Individual's Out-of-Court Statement at Trial¹
- A. First Step: If a prosecutor seeks to introduce an out-of-court statement at trial or if the defense anticipates that the prosecutor will attempt to do so, the defense should consider challenging the introduction of this statement on the following grounds, either at trial or prior to trial in a motion *in limine*:
- (1) On state law hearsay grounds and also on constitutional (Confrontation Clause) grounds. Even if the hearsay objection seems very strong, the Confrontation Clause claim should be added when available in order to federalize the issue and thereby preserve the ability to raise a constitutional claim on appeal and perhaps later in federal habeas corpus proceedings. *See, e.g., People v. Lopez*, 25 A.D.3d 385, 808 N.Y.S.2d 648 (1st Dept. 2006) (defense counsel's objection on hearsay grounds was insufficient to preserve Confrontation Clause claim).
 - (2) On both federal and state constitutional grounds, so as to preserve both the federal constitutional claim for appeal and federal habeas corpus

¹ This memorandum's discussion is limited to prosecutorial attempts to use an out-of-court statement at trial. At a suppression hearing, hearsay objections ordinarily would not lie because of the C.P.L. provision authorizing the admission of hearsay at a suppression hearing. *See* C.P.L. § 710.60(4). *But cf. United States v. Matlock*, 415 U.S. 164, 176-77 (1974) (indicating that hearsay objections may be available even in the suppression context if there are sufficient questions about the reliability of the out-of-court statement). It appears that *Crawford* does not extend to a pretrial suppression hearing. *See People v. Brink*, 31 A.D.3d 1139, 1140, 818 N.Y.S.2d 374, 374-75 (4th Dept. 2006); *People v. Robinson*, 9 Misc.3d 676, 802 N.Y.S.2d 868 (County Ct., Suffolk Co. 2005). The Court of Appeals has not yet addressed the applicability of *Crawford* to a pretrial hearing, although the Court of Appeals has held that "*Crawford* does not apply at sentencing proceedings." *People v. Leon*, 10 N.Y.3d 122, 126, 855 N.Y.S.2d 38, 40 (2008).

proceedings and preserve the ability to argue to the Appellate Division or the Court of Appeals that the state constitution's Confrontation Clause (N.Y. Const. art. I, § 6) should be construed more broadly than its federal constitutional counterpart. *See, e.g., People v. Clay*, 88 A.D.2d 14, 926 N.Y.S.2d 598 (2d Dept. 2011) (rejecting Confrontation Clause claim on federal constitutional grounds and then declining to consider whether different result should be reached under state constitution because "appellant does not argue that the State Constitution is more protective of the right of confrontation than the Federal Constitution").

B. (Possible) Next Step: Dealing with a prosecutorial rejoinder that the out-of-court statement is not being offered for the "truth of the matter":

(1) Legal effect of a prosecutorial assertion that an out-of-court statement is not being offered for the truth of the matter: This assertion, if valid, will overcome both a hearsay objection and a Confrontation Clause objection:

- (a) By definition, a statement that is not offered for the "truth of the matter" is not "hearsay."
- (b) Both the U.S. Supreme Court and the New York Court of Appeals have stated that an out-of-court statement that is not offered for the "truth of the matter" does not implicate Confrontation Clause rights under *Crawford*. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *People v. Reynoso*, 2 N.Y.3d 820, 821, 781 N.Y.S.2d 284, 284 (2004) ("The prosecution's eliciting of "a statement that a non-testifying codefendant had made to a detective" did not violate the Confrontation Clause because the "statement was admitted not to establish the truth of the matter asserted, but rather to show the detective's state of mind.").

(2) Possible defense rejoinders:

- (a) Although the prosecution *claims* that the statement is not being offered for the "truth of the matter," the prosecution actually "want[s] and expect[s] the jury [or judge in a bench trial] to take the statement[] as true" and therefore the statement should be deemed as actually being "offered for the[] truth, and . . . [therefore as] hearsay." *People v. Goldstein*, 6 N.Y.3d 119, 127-28, 810 N.Y.S.2d 100, 105-06 (2005).

- (i) In *Goldstein*, in which the Court of Appeals held that a prosecution expert's testimony about hearsay statements underlying her diagnosis violated the Confrontation Clause, the Court rejected the prosecution's argument that the statements "were not offered to establish their truth" but merely to "help the jury in evaluating [the psychiatrist's] opinion." *Id.* at 127-128, 810 N.Y.S.2d at 105-06. The Court of Appeals explained that "[s]ince the prosecution's goal was to buttress [the psychiatrist's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true," the statements must be deemed to have been offered for the truth. *Id.*
 - (ii) The same principle emerges from caselaw holding that police testimony relaying a statement of a non-testifying declarant violated the hearsay rule and/or the Confrontation Clause notwithstanding prosecutorial assertions that the statement was not offered for its truth. *See, e.g., People v. Berry*, 49 A.D.3d 888, 889, 854 N.Y.S.2d 507, 509-10 (2d Dept. 2008) (prosecutor's eliciting of inferential hearsay from a detective – who testified that he obtained a personal address book from a witness during a police station interview, photocopied a page from the book, and then put out a "wanted card" for the defendant, thus implying that the witness identified the defendant as the perpetrator – violated the Confrontation Clause). *See also People v. Rivera*, 96 N.Y.2d 749, 751, 725 N.Y.S.2d 264, 265 (2001) (recognizing that such police testimony can constitute improper inferential hearsay but concluding on facts of case that defense counsel opened door to admission of challenged testimony).
- (b) If there is no basis for questioning the prosecution's representation that the statement is not being offered for the truth or if such an objection is rejected by the court, then the defense should respond by questioning the non-truth purpose for which the statement is actually being offered and then, if appropriate, arguing that the purpose identified by the prosecution is insufficiently relevant or is more prejudicial than probative. Any attempt on a prosecutor's part to introduce a statement for some purpose other than the truth at a criminal trial should presumptively raise a question about what the purpose is and why that purpose is relevant to the trial and not more prejudicial than probative.

- (i) In some cases, the prosecution may attempt to substantiate a claim of “not for the truth” by asserting that the statement is needed in order to “complete the narrative.” An assertion of this sort should be questioned on the basis of *People v. Resek*, 3 N.Y.3d 385, 787 N.Y.S.2d 683 (2004), which (in the context of “other crimes” evidence) reined in the pre-existing practice of liberally allowing the introduction of otherwise inadmissible evidence on the ground that it is needed to “complete the narrative” and which recognized that this practice is a “delicate business” and that “there is the danger” that such evidence “may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value.” *See id.* at 389, 787 N.Y.S.2d at 684-85. *See also, e.g., People v. Maier*, 77 A.D.3d 681, 682-83, 908 N.Y.S.2d 711, 712-13 (2d Dept. 2010).

C. Next Step: Arguments that the statement should be barred on hearsay grounds

- (1) If the prosecution doesn’t claim that the statement is non-hearsay on the ground that it is not being offered “for the truth of the matter asserted” or if the prosecution makes such a claim and the claim is rejected by the court, then the defense should seek to prevent the introduction of the statement on any applicable hearsay and Confrontation Clause grounds. It will often be easier to start with the hearsay arguments, especially if they’re strong and straightforward, since a court that is inclined to bar the statement may feel on firmer ground in doing so on the more familiar ground of hearsay. *See, e.g., People v. Isaac*, 4 Misc.3d 1001(A), 791 N.Y.S.2d 872 (Dist. Ct., Nassau Co. 2004) (2004 WL 1389219) (after initially engaging in a lengthy *Crawford* Confrontation Clause analysis and rejecting the defense’s *Crawford* claim, the trial judge rules for the defense on the much simpler and more straightforward hearsay ground).
- (2) A hearsay objection apparently will lie even if the declarant who made the out-of-court statement testifies at the trial and is subject to cross-examination:
 - (a) Prior to 2001, it was unclear whether New York State follows the Federal rules’ approach of defining hearsay as “a statement, other than one made by the declarant *while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801 (emphasis added). *Compare* 57 NY JUR.2D, Evidence and Witnesses § 268, at 527 (1986) (suggesting that hearsay rule should not exclude a witness’s own prior

statements because “the utterer of the quoted statement which is the source of the hearsay testimony” is present to be cross-examined) *with* PRINCE, RICHARDSON ON EVIDENCE § 8-102, at 498 (11th ed., Farrell 1995) (adopting the federal approach of treating out-of-court statements offered for their truth as hearsay without regard to whether the “statement [was] made by a [testifying] witness”) and *with* *People v. Edwards*, 47 N.Y.2d 493, 496, 419 N.Y.S.2d 45, 47 (1979) (approvingly citing the foregoing section of RICHARDSON ON EVIDENCE).

- (b) In *Nucci v. Proper*, 95 N.Y.2d 597, 721 N.Y.S.2d 593 (2001), the Court of Appeals signaled that it favors the stricter, federal approach. The Court of Appeals held that a witness’s recounting of another individual’s out-of-court statement was hearsay and should not have been admitted even though the latter individual was herself a witness at trial and therefore “availab[le] for cross-examination.” *Id.* at 604, 721 N.Y.S.2d at 597. In reaching this conclusion, the Court of Appeals disavowed the trial court’s broad reading of an earlier Court of Appeals decision, *Letendre v. Hartford Accident & Indemnity Co.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968), as rendering the hearsay rule inapplicable when the declarant testifies at trial and is available for cross-examination. Significantly, the New York lower court caselaw and treatises that have favored the less stringent, non-federal rule have supported this approach by interpreting *Letendre* in precisely the manner that has now been rejected by the Court of Appeals in *Nucci*. Finally, the Court of Appeals noted in *Nucci* that New York does not generally follow other states’ approach of “permitting the admission of prior, unsworn oral statements where the declarant is available and subject to cross-examination.” *Nucci*, 95 N.Y.2d at 604 n.2, 721 N.Y.S.2d at 597 n.2. Although the facts of *Nucci* involved a witness’s recounting of *another witness’s* out-of-court statement rather than the witness’s own out-of-court statement, the Court of Appeals’ comments and its circumscribing of *Letendre* suggest that the Court of Appeals favors the federal approach.
- (c) In many instances, a witness’s in-court recitation of his or her own out-of-court statement also constitutes a “prior consistent statement,” which would be inadmissible under the general prohibition against “prior consistent statements” unless either (I) the cross-examiner has attacked the witness’s statement as fabricated and the prior statement was made before the claimed motive to falsify arose (*see, e.g., People v. McLean*, 69 N.Y.2d

426, 428, 515 N.Y.S.2d 428, 429-30 (1987); *People v. Rosario*, 68 A.D.3d 600, 601, 892 N.Y.S.2d 338, 339-40 (1st Dept. 2009)); or (II) the statement is admissible under another hearsay exception (see *People v. Buie*, 86 N.Y.2d 501, 509-13, 634 N.Y.S.2d 415, 420-22 (1995)).

(d) *Note:* If the declarant testifies at trial and is subject to cross-examination, a Confrontation Clause claim apparently is not available in such a scenario. See *Crawford*, 541 U.S. at 59 n.9 (“when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial.”).

(3) In arguing that a statement should be barred on hearsay grounds, the defense should, where appropriate, invoke hearsay caselaw that makes it clear that the proponent of the hearsay evidence (which, in this situation, would be the prosecution) bears the burden of establishing the elements of the asserted exception to the hearsay prohibition. See, e.g., *Tyrrell v. Wal-Mart Stores, Inc.*, 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001) (trial court’s introduction of a hearsay statement as a spontaneous declaration and *res gestae* on ground that “there was ‘no evidence to suggest that the statement was anything other than a spontaneous declaration’” had the effect of “improperly shift[ing] the burden of establishing the exception to the hearsay rule”; trial court should have required the proponent of the hearsay to “show that at the time of the statement the declarant was under the stress of excitement caused by an external event sufficient to still her reflective faculties and had no opportunity for deliberation”).

D. Next Step: Confrontation Clause argument under *Crawford v. Washington* (if the court rejects the hearsay objection):

(1) Determining whether an out-of-court statement is “testimonial” and therefore subject to *Crawford*’s rule that “testimonial statements” cannot be introduced into evidence by the prosecution unless the witness is unavailable and the accused has had “a prior opportunity for cross-examination”:

(a) What’s clearly “testimonial” under *Crawford*:

(i) Testimony in a prior formal proceeding (e.g., a Grand Jury proceeding, Preliminary Hearing, or former trial). See

Crawford, 541 U.S. at 68 (“Whatever else the term [“testimonial”] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial”).

- (ii) Statements to the police during interrogation of an individual who’s suspected as an accomplice or co-perpetrator. This is the scenario of *Crawford* itself. See also, e.g., *People v. Ryan*, 17 A.D.3d 1, 790 N.Y.S.2d 723 (3d Dept. 2005) (introduction, at trial, of statements made to law enforcement officers by the defendant’s accomplices, violated the Confrontation Clause).
 - (iii) Guilty plea allocution by a co-perpetrator. See *People v. Hardy*, 4 N.Y.3d 192, 791 N.Y.S.2d 513 (2005) (introduction, at trial, of a non-testifying co-defendant’s plea allocution violated the Confrontation Clause as interpreted in *Crawford*).
 - (iv) Affidavits prepared for litigation. See *Crawford*, 541 U.S. at 51-52.
- (b) What’s probably (or possibly) not “testimonial” under *Crawford*:
- (i) Statement by a co-conspirator made during and in furtherance of the conspiracy. See *Crawford*, 541 U.S. at 56.
 - (ii) “[S]tatements to physicians in the course of receiving treatment.” *Giles v. California*, 554 U.S. 353, 376 (2008) (*dicta*). See, e.g., *People v. Duhs*, 16 N.Y.3d 405, 922 N.Y.S.2d 843 (2011) (child victim’s statement to pediatrician during medical examination of child’s injuries was not “testimonial” because “the primary purpose of the pediatrician’s inquiry was to determine the mechanism of injury so she could render a diagnosis and administer medical treatment”).
 - (iii) Maybe “dying declarations.” See *Crawford*, 541 U.S. at 56 n.6 (“many dying declarations may not be testimonial” and “authority for admitting even those that are”); *Michigan v. Bryant*, 131 S. Ct. 1143, 1177 (2011) (Ginsburg, J., dissenting) (“Were the issue properly tendered here, I

would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.”); *People v. Clay*, 88 A.D.2d 14, 926 N.Y.S.2d 598 (2d Dept. 2011) (holding that “dying declarations,” even when testimonial, are an exception to the Confrontation Clause of the U.S. Constitution; court reserves the question whether a different result should apply under the state constitution, which was not before the court because “appellant does not argue that the State Constitution is more protective of the right of confrontation than the Federal Constitution”). Cf. *People v. Falletto*, 202 N.Y. 494, 499-500, 96 N.E. 355, 357 (1911) (“Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, which is the best method known to bring out the full and exact truth. The fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down. Such evidence is the mere statement of what was said by a person, not under oath, usually made when the body is in pain, the mind agitated, and the memory shaken by the certainty of impending death. A clear, full, and exact statement of the facts cannot be expected under such circumstances, especially if the declaration is made in response to suggestive questions, or those calling for the answer of ‘Yes’ or ‘No.’ Experience shows that dying declarations are not always true.”).

- (iv) Business records in certain circumstances: In *Crawford*, the U.S. Supreme Court indicated in *dicta* that “business records ‘by their nature [are] not testimonial.’” *Crawford*, 541 U.S. at 56. Subsequently, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court narrowed this broad formulation and stated that business records are “generally” non-testimonial if they were “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial,” but that records and reports *are* testimonial if they were “prepared specifically for use at ... trial.” *Id.* at 2539-40. See also *id.* at 2538 (even though “at common law the results of a coroner’s inquest were admissible without an opportunity for confrontation,” “coroner’s reports ... were not accorded any special status in American practice”); *id.* at 2539 (even

if “a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it” might “qualify as an official record” in that “it was prepared by a public officer in the regular course of his official duties,” the record is nonetheless “testimonial” and “the clerk [i]s nonetheless subject to confrontation” if the record was created for the purpose of providing “substantive evidence against the defendant whose guilt depended on the nonexistence of the record”); *People v. Pacer*, 6 N.Y.3d 504, 814 N.Y.S.2d 575 (2006) (rejecting the prosecution’s argument that an “affidavit prepared by a Department of Motor Vehicles official ... describing the agency’s revocation and mailing procedures, and averring that on information and belief they were satisfied” could be introduced at trial on a charge of “aggravated unlicensed operation of a motor vehicle in the first degree” as “a business record or public record, and thus outside the scope of the Confrontation Clause”; introduction of this affidavit by a government official who was “not a ‘neutral’ officer” on “an essential element of the crime” violated the Confrontation Clause).

- (c) Criteria for assessing whether a 911 call or an in-person statement by a witness at the scene of a crime is “testimonial” for purposes of the Confrontation Clause:
 - (i) A “statement[] made to law enforcement personnel during a 911 call or at a crime scene” is “nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Davis v. Washington*, 547 U.S. 813, 817, 822 (2006).
 - (ii) The judicial assessment of the “primary purpose of the interrogation” should be made by “objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.” *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011). “[T]he existence *vel non* of an ongoing emergency” at the time of the police questioning is not “dispositive of the testimonial inquiry” – since “whether an ongoing emergency exists is simply one factor” (*id.* at 1160) – but it

is “among the most important circumstances informing the ‘primary purpose’ of an interrogation” (*id.* at 1157) because “statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation” (*id.* at 1162). “[T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.” *Id.*

- (iii) Applying this standard in *Davis v. Washington*, the Court held that a portion of a 911 call was nontestimonial and was not subject to *Crawford*'s rule because “the circumstances of [the complainant's] interrogation [by the 911 operator] objectively indicate [that the interrogation's] primary purpose was to enable police assistance to meet an ongoing emergency,” in that the complainant “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events,’” “any reasonable listener would recognize that [the complainant] ... was facing an ongoing emergency,” the complainant’s “call was plainly a call for help against bona fide physical threat,” “the nature of what was asked and answered ... viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn ... what had happened in the past” (even with respect to “the operator’s effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon”), and the complainant’s “frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.” 547 U.S. at 827-28.
- (iv) Applying the standard in *Davis*'s companion case of *Hammon v. Indiana*, the U.S. Supreme Court concluded that an in-person statement to the police by the complainant in a domestic disturbance at her home (when the police went there in response to a report of the disturbance) was “testimonial” under *Crawford* and that its introduction at trial violated the Confrontation Clause because “[t]here was no emergency in progress,” the officer “was not seeking to determine (as in [the companion case,] *Davis*) ‘what is happening,’ but rather ‘what happened,’” and the statement

“recounted, in response to police questioning, how potentially criminal past events began and progressed.” *Id.* at 829-30.

- (v) Applying the standard in the subsequent case of *Michigan v. Bryant*, the Court held that a mortally wounded shooting victim’s statement to the police, in which the victim identified and described the shooter and the location of the shooting, was not “testimonial” because “the circumstances of the encounter [between the victim and the police] as well as the statements and actions of [the victim] and the police objectively indicate that the ‘primary purpose of the interrogation’” was “‘to enable police assistance to meet an ongoing emergency.’” 131 S. Ct. at 1166-67 (quoting *Davis*, 547 U.S. at 822). The Court emphasized that “there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]”; the victim’s “encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers’ arrival and well before they secured the scene of the shooting – the shooter’s last known location”; the victim was “lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen” and “[h]is answers to the police officers’ questions were punctuated with questions about when emergency medical services would arrive,” and thus it cannot be said that “a person in [his] situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution’”; the questions asked by the officers were “the exact type of questions necessary to . . . solicit[] the information necessary to enable them ‘to meet an ongoing emergency’”; and “[n]othing in [the victim’s] responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had ended.” *Id.* at 1164-66.

- (d) Criteria for assessing whether a forensic laboratory report is “testimonial” for purposes of the Confrontation Clause:
- (i) In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court held that “certificate[s] of analysis” of a controlled substance, prepared by Massachusetts Department of Health laboratory drug examiners and attesting that “material seized by the police and connected to the defendant was cocaine,” were “testimonial” for Sixth Amendment purposes and therefore, “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the accused] had a prior opportunity to cross-examine them,” the admission of the certificates violated the Confrontation Clause under *Crawford v. Washington*. *Id.* at 2532.
 - (ii) In a follow-up to *Melendez-Diaz*, the Court considered in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), whether “the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” *Id.* at 2710. The Court held that “surrogate testimony of that order does not meet the constitutional requirement.” *Id.* The Court explained that “[t]he accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.” *Id.*
 - (iii) In *Williams v. Illinois*, 132 S. Ct. 2221 (2012), the Court considered the application of *Melendez-Diaz* and *Bullcoming* to a bench trial in which a testifying expert relied on the findings of a DNA report for her analysis but the “report itself was neither admitted into evidence nor shown to the [judicial] factfinder” and the testifying expert “did not quote or read from the report” or “identify it as the source of any of the opinions she expressed.” *Id.* at 2230. In this trial for rape, the prosecution presented three forensic experts: a state forensic scientist who testified that he identified semen on a vaginal swab taken from the victim

and then preserved it for further testing; a state forensic scientist who testified to developing a DNA profile of the defendant from a blood sample taken from him; and, to provide the final links, a forensic expert (Sandra Lambatos) who testified that the defendant's DNA profile matched the DNA profile that an outside laboratory (Cellmark) derived from the semen on the vaginal swab. The defense objected on Confrontation Clause grounds to Lambatos' testimony that Cellmark's DNA profile came from the semen on the vaginal swabs – a fact that Lambatos did not personally know (since “she did not conduct or observe any of the testing on the vaginal swabs”) and that she drew from the Cellmark report – but the Illinois Supreme Court ruled that there was no Confrontation Clause violation because Lambatos referenced the report merely for the limited purpose of explaining the basis for her expert opinion and thus the statement was not admitted for the truth of the matter. The U.S. Supreme Court affirmed but in a fragmented set of opinions that complicate and confuse the state of Confrontation Clause rules on forensic reports. A plurality opinion, authored by Justice Alito, and joined by Chief Justice Roberts and Justices Kennedy and Breyer, concluded that there was no Confrontation Clause violation because the out-of-court statement about the source of the Cellmark DNA profile was not admitted for the truth of the matter and this was a bench trial and thus, unlike in a jury trial, the trier of fact could be relied upon to understand that the expert's “statement regarding the source of the Cellmark report” could not be “consider[ed] ... for its truth.” *Id.* at 2240.. A dissenting opinion, authored by Justice Kagan, and joined by Justices Scalia, Ginsburg and Sotomayor, concluded that “Lambatos's statement about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements.” *Id.* at 2268. Justice Thomas, who concurred in the plurality's judgment, thereby providing the fifth vote for affirming the lower court's ruling, stated explicitly that he “shares the dissent's view” that “Cellmark's statements were introduced for their truth,” *id.* at 2255, 2259, and that this classification is not vitiated by the fact that this was a bench trial, *id.* at 2259 n.1, but Justice Thomas nonetheless joined the plurality in affirming the conviction because of

his idiosyncratic view that forensic reports like the Cellmark report at issue in this case “lack[] the requisite ‘formality and solemnity’ to be considered “‘testimonial’” for purposes of the Confrontation Clause.” *Id.* at 2255. Thus, as Justice Kagan observed in her dissent, Justice Thomas’s opinion provides a fifth vote for the dissent’s view that the challenged testimony in this case must be regarded as having come in for the truth of the matter, a classification that would result in a Confrontation Clause bar under the Sixth Amendment standards applied by all members of the Court other than Justice Thomas. *See id.* at 2268.

- (A) Employing reasoning similar to Justice Kagan’s, the New York Court of Appeals held in *People v. Goldstein*, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2005), that the defendant’s Confrontation Clause rights were violated by the prosecution’s presentation of a forensic psychiatrist who, in testifying at trial to refute the defense of mental disease or defect, “recounted [hearsay] statements made to her by people who were not available for cross-examination.” *Id.* at 122, 810 N.Y.S.2d at 101. Although the prosecution argued that the statements were not subject to *Crawford*’s Confrontation Clause analysis because they “were not evidence in themselves, but were admitted only to help the jury in evaluating [the psychiatrist’s] opinion, and thus were not offered to establish their truth,” the Court of Appeals rejected this argument, concluding that “[s]ince the prosecution’s goal was to buttress [the psychiatrist’s] opinion, the prosecution obviously wanted and expected the jury to take the statements as true.” *Id.* at 128, 810 N.Y.S.2d at 105.
- (iv) As Justice Kagan observed in her dissenting opinion in *Williams v. Illinois*, the various *Williams* opinions leave “significant confusion in their wake. What comes out of four [plurality opinion] Justices’ desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice’s one-justice view of those holdings, is – to be frank – who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what

way or to what extent they are altered because no proposed limitation commands the support of a majority.” 132 S. Ct. at 2277.

- (v) The Confrontation Clause standard for forensic reports in New York is further muddled by uncertainty surrounding the status of a standard adopted by the New York Court of Appeals prior to the issuance of *Melendez-Diaz* in 2009. In two pre-*Melendez-Diaz* opinions, the New York Court of Appeals adopted a multi-pronged approach for assessing whether forensic reports are “testimonial” for Confrontation Clause purposes. In *People v. Rawlins*, 10 N.Y.3d 136, 855 N.Y.S.2d 20 (2008) and *People v. Freycinet*, 11 N.Y.3d 38, 862 N.Y.S.2d 450 (2008), the Court of Appeals held that the classification of a forensic report as “testimonial” for Confrontation Clause purposes turns upon the following factors: “(1) whether the agency that produced the record is independent of law enforcement; (2) whether it reflects objective facts at the time of their recording; (3) whether the report has been biased in favor of law enforcement; and (4) whether the report accuses the defendant by directly linking him or her to the crime.” *People v. Brown*, 13 N.Y.3d 332, 339-40, 890 N.Y.S.2d 415, 419 (2009) (describing the *Rawlins-Freycinet* rule). The rationale for the Court of Appeals’ rule appears to be inconsistent in various ways with the U.S. Supreme Court’s reasoning in the subsequently-issued decision in *Melendez-Diaz* but the Court of Appeals reaffirmed the rule in its post-*Melendez-Diaz* decision in *People v. Brown*, *supra*. However, after *Brown*, the U.S. Supreme Court issued *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), which implicitly refutes the New York Court of Appeals’ treatment of some forensic experts’ analyses as merely “objective.” In *Bullcoming*, the Court rejected the state’s attempt to characterize blood-alcohol analysis report as non-testimonial for Confrontation Clause purposes on the theory that the report contained “simply observations of an ‘independent scientis[t]’” (*id.* at 2717) and the Court also rejected the lower court’s view of the report as non-testimonial on the theory that it “present[ed] no interpretation and exercis[ed] no independent judgment” (*id.* at 2714).

- (2) What happens if the scenario *is* covered by *Crawford*? If the statement was “testimonial,” then it is inadmissible against the defendant, even if it satisfies a hearsay exception, unless one of the following rules applies:
- (a) Prior adequate opportunity to cross-examine: A testimonial statement is admissible, notwithstanding the denial of an opportunity for defense counsel to cross-examine the declarant at trial, if the declarant is currently unavailable and the accused previously had an adequate opportunity to confront/cross-examine the declarant. *See Crawford*, 541 U.S. at 68 (“Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination”).
 - (i) If the accused’s prior opportunity for cross-examination of the declarant was at a hearing where the opportunity for cross-examination was curtailed – as is typically the case at a Preliminary Hearing or a Family Court probable cause hearing – the *Crawford* guarantee of confrontation is not satisfied. *See, e.g., People v. Fry*, 92 P.3d 970, 972 (Colo. 2004); *People v. Torres*, 962 N.E.2d 919, 932-34, 357 Ill. Dec. 18, 31-33 (Ill. 2012); *State v. Stuart*, 279 Wis. 2d 659, 672-76, 695 N.W.2d 259, 265-67 (2005). *See also Lee v. Illinois*, 476 U.S. 530, 546 n.6 (1986) (state’s argument that the accused “was afforded an opportunity to cross-examine [the author of the out-of-court statement] . . . during the suppression hearing” and that this opportunity satisfied the Confrontation Clause is rejected by the Court because the limited nature of the inquiry at a suppression hearing precluded an “opportunity for cross-examination sufficient to satisfy the demands of the Confrontation Clause”).
 - (b) Forfeiture of Confrontation Clause rights by wrongdoing: If the accused can be deemed to have forfeited the protections of the Confrontation Clause by “caus[ing] ... [the maker of the out-of-court statement] to be absent” from court by “engag[ing] in conduct *designed* to prevent the witness from testifying” and with the express “intent[ion] to prevent [the] witness from testifying.” *Giles v. California*, 554 U.S. 353, 359, 361 (2008). Under the longstanding “*Sirois* rule” in New York, the prosecution must show at a pretrial *Sirois* hearing, “by ‘clear and convincing evidence’ that the witness is ‘unavailable’ to testify at trial and that the defendant, through his or her misconduct, intentionally made

the witness unavailable.” *People v. Byrd*, 51 A.D.3d 267, 273, 855 N.Y.S.2d 505, 510 (1st Dept. 2008). *See also, e.g., People v. Steward*, 54 A.D.3d 880, 864 N.Y.S.2d 488 (2d Dept. 2008); *In re Duane F.*, 309 A.D.3d 265, 274-78, 764 N.Y.S.2d 434, 440-43 (1st Dept. 2003); *In re Jonathan D.*, 22 Misc.3d 1126(A), 2009 WL 455355, 2009 N.Y. Slip Op. 50298(U) (N.Y. Family Court, Bronx Co. 2009) (Merchan, J.). *See also People v. McCune*, 98 A.D.3d 631, 949 N.Y.S.2d 747 (2d Dept. 2012) (defendant has a right to be present at *Sirois* hearing, including during witness’s testimony about alleged threats or other forms of intimidation by defendant).

- (c) “Opening the door”: In *People v. Reid*, 19 N.Y.3d 382, 948 N.Y.S.2d 223 (2012), the Court of Appeals held that the doctrine of “opening the door” applies to the *Crawford* doctrine and accordingly a “defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution.” The Court of Appeals explained that this result is necessary to “avoid unfairness and to preserve the truthseeking goals of our courts” because, “[i]f evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant’s actions at trial, then a defendant could attempt to delude a jury ‘by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context’” – “secure [in the] knowledge that the concealed parts would not be admissible, under the Confrontation Clause.” The determination whether a defendant “opened the door” “must be decided on a case-by-case basis” by means of the following “twofold” inquiry: “whether and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.” Applying this rule to the present case, the Court of Appeals concludes that the testimonial statement in question – a confession by a non-testifying co-perpetrator (who had initially been a co-defendant but whose trial was severed from the defendant’s under *Bruton v. United States* because of the confession) – was partially admissible because defense counsel “elicit[ed] from witnesses that the police had information that [another individual named] McFarland was involved in the shooting, ... suggesting that more than one source indicated that McFarland was at the scene, and ... persistently presenting the argument that the police investigation was

incompetent,” and defense counsel thereby “opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that McFarland was not at the shooting.” Under these circumstances, the Court of Appeals holds, the otherwise inadmissible statement “was reasonably necessary to correct defense counsel’s misleading questioning and argument” and to “prevent the jury from reaching the false conclusion that McFarland had been present at the murder.”

**SUPPRESSION MOTION PRACTICE
IN JUVENILE DELINQUENCY CASES**

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I. Introduction: The Potential Benefits of Suppression Motions Practice

Counsel not only should, but must, file every non-frivolous motion that can aid the respondent's defense. See NYS BAR ASS'N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-7 (2009) ("As appropriate, the attorney should move for suppression or preclusion of physical evidence, identification testimony and/or the child's statements"); See, e.g., People v. Cyrus, 48 A.D.3d 150, 848 N.Y.S.2d 67 (1st Dept. 2007) (defense counsel was ineffective because, *inter alia*, he failed to file *Huntley* motion despite grounds for doing so); People v. Montgomery, 293 A.D.2d 773, 742 N.Y.S.2d 126 (3d Dept. 2002), *lv. app. denied*, 98 N.Y.2d 699, 747 N.Y.S.2d 418 (2002) (defense counsel was ineffective in failing to file *Mapp/Dunaway* motion despite grounds for doing so and no "legitimate strategic or tactical explanation" for failing to do so); People v. Donovan, 184 A.D.2d 654, 585 N.Y.S.2d 70 (2d Dept. 1992) (defense counsel was ineffective because, *inter alia*, he failed to file *Mapp* motion); People v. Miller, N.Y.L.J., 10/8/96, at 30, col. 3 (App. Term, 9th & 10th Jud. Dist.) (defense counsel's failure to challenge an obvious defect in the search warrant constituted ineffective assistance of counsel); People v. Hoyte, 183 Misc.2d 1, 701 N.Y.S.2d 276 (Sup. Ct., Bronx Co. 1999) (defense counsel was ineffective in failing to file *Mapp* and *Dunaway* motions that were "at, the least, colorable"). See also People v. Langlois, 265 A.D.2d 683, 697 N.Y.S.2d 360 (3d Dept. 1999) (counsel was ineffective in failing to file *Sandoval* motion).

There is a wide range of possible defense goals that may be furthered by the filing of a suppression motion. In certain cases -- for example, in narcotics possession cases -- winning the motion usually results in dismissal of the case. In other cases, the results of victory, while less dramatic, may be equally important. For example, suppression of the respondent's confession or an out-of-court identification may so weaken the prosecution's case that a better plea bargain may be offered or, if the case goes to trial, the respondent's chances of prevailing on a reasonable doubt defense are greatly increased.

A suppression hearing often offers significant opportunities for discovery of the Presentment Agency's case. This is particularly true of Wade independent source hearings and Mapp hearings on the question of probable cause to arrest, but other claims also may result in a preview of part or all of the Presentment Agency's case.

Another important benefit of suppression hearings is the opportunity to elicit testimony from Presentment Agency witnesses that can be used to impeach the witness at trial. Civilian witnesses frequently make concessions at suppression hearings that they would not make at trial, either because the prosecutor did not sufficiently prepare the witness for the suppression hearing or because the witness's attention was diverted by the suppression hearing's focus upon an issue that is not directly related to the facts of the offense. Police officers may also make useful concessions about inconsistent statements of the complainant or an eyewitness when such facts help vindicate the police officer's own conduct in searching, seizing, or interrogating the respondent. Even when a prosecution witness does not make any obviously significant

concessions at a suppression hearing, the mere fact that the witness has to tell his or her story twice, once at the suppression hearing and again at trial, may result in the witness's changing a material fact and opening himself or herself up to an impeaching cross-examination at trial.

Evidentiary hearings on motions to suppress also provide "batting practice" in cross-examining the Presentment Agency's witnesses. Counsel can try out potentially dangerous lines of cross-examination to decide whether to use those questions at trial. Of course, the consequence of the Individual Assignment System is that the judge who presides over the trial will already have heard the damaging answers at the pretrial suppression hearing. Nonetheless, if counsel does not re-ask the question at trial, that damaging answer does not formally become part of the trial record and the judge cannot expressly rely on the damaging answer in determining guilt or innocence. Similarly, on appeal, if defense counsel raises a claim of insufficiency of the evidence, the appellate court will not be able to consider the damaging answer and often will not even be aware of it. "Batting practice" also is significant in that counsel can gain important insights into the witness's personality, biases, and susceptibility to particular techniques prior to developing cross-examination questions for trial.

There are various other incidental benefits to suppression hearings. If counsel is uncertain whether an admission is advisable, the preview of the Presentment Agency's case at a suppression hearing will usually provide the needed information regarding the strengths and weaknesses of the prosecution's case. If counsel is already convinced that an admission is necessary but the respondent has an unrealistic view of his or her chances of acquittal at trial, a suppression hearing -- in which the respondent sees and hears the witnesses against him or her -- will often prove decisive in forcing the respondent to confront the realities of the situation and recognize the need for an admission. Finally, the client's observation of the defense attorney actively fighting on his or her behalf at a suppression hearing will usually increase the client's trust in the attorney; that factor may prove decisive when counsel later has to advise the client on important issues such as whether to enter an admission or whether to take the witness stand at trial.

II. Filing Deadlines

If the respondent is paroled pending the factfinding hearing, F.C.A. § 332.2(1) requires that suppression motions be filed "within thirty days after the conclusion of the initial appearance." If the respondent is detained and the trial is scheduled for a date earlier than the expiration of the thirty-day filing deadline, motions must be filed "before commencement of the fact-finding hearing." F.C.A. § 332.2(1). A detained respondent is entitled to a "hear[ing] and determin[ation] of pre-trial motions on an expedited basis." F.C.A. § 332.2(4). In remand cases, counsel should ordinarily raise suppression claims by means of an Order to Show Cause rather than a motion, since the Show Cause procedure avoids the procedural requirement that a Notice of Motion "be served at least eight days before the time at which the motion is noticed to be heard." C.P.L.R. § 2214(b).

It is essential that counsel comply with the filing deadlines, since an untimely motion “may be summarily denied.” F.C.A. § 332.2(3). See, e.g., People v. Knowles, 112 A.D.2d 321, 491 N.Y.S.2d 770 (2d Dept. 1985), app. denied, 66 N.Y.2d 920, 498 N.Y.S.2d 1035 (1985); In the Matter of TM, 26 Misc.3d 823, 2009 WL 4681262, 2009 N.Y. Slip Op. 29503 (Fam. Ct., Kings Co. Nov. 16, 2009) (Elkins, J.) (precluding *Huntley/Wade* motion that was filed after 30-day deadline of FCA § 322.2; respondent’s application for extension of time is denied because defense counsel’s stated reason for missing the deadline – “law office failure” – does not supply good cause for late-filing and “[n]othing in Respondent’s motion suggests that the interest of justice will be served by permitting late filing”). In cases in which counsel is unable to comply with the deadline for some reason -- such as the prosecution’s failure to provide discovery in a timely fashion -- counsel should take steps prior to the expiration of the filing deadline to guard against later preclusion of the motion. This can be accomplished in various ways. The simplest approach is to speak with the prosecutor assigned to the case and obtain his or her consent to the extension of the 30-day deadline for a specified period of time. Cf. People v. Martinez, 111 A.D.2d 30, 488 N.Y.S.2d 706 (1st Dept. 1985) (recognizing that prosecutor can waive procedural requirements governing defendant’s filing of motion). Alternatively, in cases in which the impediment to timely filing is the lack of certain information that counsel will later obtain through discovery or investigation, counsel can file the motion within the statutory period on the basis of the facts known to counsel, and state in the motion that it will be supplemented later with the missing information. Yet another alternative is to file a motion with the court seeking extension of the filing deadline and stating the basis for the request.

If counsel misses a filing deadline, s/he should seek the prosecutor’s agreement to late-filing the motion. Even in the absence of the prosecutor’s consent, late-filing must be permitted if the motion is “based upon grounds of which the respondent could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have [been] raised within the statutory period.” F.C.A. § 332.2(3). See, e.g., People v. Perrilla, 240 A.D.2d 313, 660 N.Y.S.2d 113 (1st Dept. 1997) (trial court erred in refusing to expand suppression hearing to include *Dunaway* claim that omitted from suppression motion partly because defense counsel was misled by inaccurate Voluntary Disclosure Form); In re Anthony S., 162 A.D.2d 325, 557 N.Y.S.2d 11 (1st Dept. 1990) (Family Court abused its discretion by denying leave to late-file suppression motion which attorney for the child was unable to file prior to fact-finding hearing because she was appointed to case only four days before trial and respondent’s detention status impeded access to client); People v. Loizides, 123 Misc.2d 334, 473 N.Y.S.2d 916 (Suffolk Co. Ct. 1984) (motion to dismiss indictment could be late-filed because it was based upon facts which counsel first learned at trial through examination of Rosario material); People v. DeRuggiero, 96 Misc.2d 458, 409 N.Y.S.2d 88 (Sup. Ct., Westchester Co. 1978) (same); People v. Frigenti, 91 Misc.2d 139, 141, 397 N.Y.S.2d 313 (Sup. Ct., Kings Co. 1977) (court was obliged to permit late-filing of suppression motion where defense counsel filed timely demand for discovery of facts needed for motion, prosecution failed to comply in a timely manner, and defense counsel filed suppression motion promptly after gaining discovery).

In cases in which counsel cannot cite such grounds for excusing the procedural default,

counsel should request that the court nonetheless exercise its discretion to permit late-filing “in the interest of justice and for good cause shown.” F.C.A. § 332.2(3). See, e.g., People v. Perry, 128 Misc.2d 430, 436-37, 488 N.Y.S.2d 977, 981-83 (Sup. Ct., N.Y. Co. 1985) (applying “interests of justice” exception to permit defendant to raise Dunaway claim in midst of Wade hearing because counsel did not engage in a “deliberate bypass” of procedural requirements for timely filing, late-filing would not engender delay since hearing was already underway, preclusion of motion “might well give rise to a post-conviction claim of inadequate assistance and a possible reversal” (id. at 437, 488 N.Y.S.2d at 983), and preclusion of meritorious suppression claim would “fail to vindicate society’s interest in constitutional police activity and would impose a double injustice on the defendant” (id.)).

If counsel’s attempts to late-file prove to no avail and a motion significant to the respondent’s defense is precluded, counsel should consider moving to withdraw on the basis of ineffectiveness of counsel. If the court grants such a motion to withdraw, the pretermitted motion can be filed by the new attorney for the respondent. See People v. Ferguson, 114 A.D.2d 226, 498 N.Y.S.2d 800 (1st Dept. 1986).

III. Drafting the Motion

A. General Considerations

(1) Determining the Degree of Detail with Which to Set Forth Law and Facts

When drafting suppression motions, counsel generally should present only enough factual information and legal argument to satisfy the requirements for obtaining a suppression hearing and avoid summary dismissal on the pleadings. Excessive detail is of little benefit in winning a motion since in the vast majority of cases, the motion will be won or lost on the basis of the testimony adduced at the hearing and the legal arguments made at the conclusion of the hearing. Furthermore, extensive detail runs the risk of providing the prosecution with discovery of the defense case and ammunition for impeaching defense witnesses at the motions hearing and at trial.

Occasionally, however, there may be tactical reasons for presenting greater detail. For example, when counsel is pressing a novel claim, it may be necessary to set forth the law more extensively in order to persuade the judge that there is a valid legal claim justifying a suppression hearing. Or, for example, when there is a strong basis for suppression, extensive pleading of law and facts may lead the judge to treat the motion more seriously and grant defense counsel greater leeway in cross-examining prosecution witnesses.

The more specific requirements and tactical considerations for drafting suppression motions vary according to the type of suppression claim raised. These are discussed below.

(2) Identifying Sources of Factual Allegations

C.P.L. § 710.60(1) -- incorporated by reference in F.C.A. § 330.2(1) -- requires that the factual allegations in a suppression motion be supported with a statement of the “sources of such information.” A failure to identify the sources can result in the judge’s summarily denying the motion. See, e.g., People v. Martinez, 111 A.D.2d 30, 488 N.Y.S.2d 706 (1st Dept. 1985).

But, in identifying the sources of information, counsel faces a central dilemma: Attribution of a fact to a specific defense witness may render the witness subject to impeachment with the motion in the event that s/he denies that fact at the suppression hearing or trial. Compare People v. Newman, 216 A.D.2d 151, 628 N.Y.S.2d 649 (1st Dept. 1995), app. denied, 87 N.Y.2d 849, 638 N.Y.S.2d 608 (1995) (trial court did not err in permitting prosecutor to cross-examine defendant about factual recitation in defense counsel’s affirmation in support of suppression motion, which was expressly identified as based on defendant’s statements) and People v. Rivera, 58 A.D.2d 147, 396 N.Y.S.2d 26 (1st Dept 1977), aff’d, 45 N.Y.2d 889, 413 N.Y.2d 146 (1978) (trial court did not err in permitting prosecutor to impeach defendant at trial with incriminating statement which defendant made to his attorney and which counsel set forth in affidavit in support of suppression motion) with People v. Jones, 190 A.D.2d 31, 596 N.Y.S.2d 811 (1st Dept. 1993) (prosecutor should not have been allowed to impeach defendant with his attorney’s affirmation in support of suppression motion because counsel “specifically stated that his information had been gathered from various sources ... [and] none of the specific events described in the suppression motion could fairly be characterized as either an ‘admission’ or a prior inconsistent statement by defendant”) and People v. Raosto, 50 A.D.3d 508, 856 N.Y.S.2d 86 (1st Dept. 2008) (prosecutor should not have been allowed to impeach defendant with “averments by former counsel in motion papers ... [that] were not fairly attributable to defendant, either directly or by inference”). See also People v. Brown, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (trial court properly allowed the prosecutor to impeach the testifying defendant with his lawyer’s contrary representations during the *Sandoval* hearing, given that the defendant was the “only source of the information” for counsel’s statements, counsel was acting as the defendant’s authorized agent in making the statements, and the statements were made in formal court proceedings, held in defendant’s presence, for the purpose of obtaining a favorable pretrial ruling; but impeachment of testifying defendant with withdrawn alibi notice was impermissible because such a use of a withdrawn alibi notice could inhibit a defendant from abandoning a factually inaccurate alibi defense and could impinge upon the defendant’s right to testify); People v. Johnson, 46 A.D.3d 276, 278, 847 N.Y.S.2d 74, 76 (1st Dept. 2007) (“the trial court properly permitted the prosecutor to impeach defendant by way of statements made by her attorney at the bail hearing as it is a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony”); People v. Moye, 11 A.D.3d 212, 212, 782 N.Y.S.2d 257, 258 (1st Dept. 2004), lv. app. denied, 4 N.Y.3d 765, 766 (2005) (trial court did not err in permitting the prosecution to impeach the defendant at trial with his defense lawyer’s statement at arraignment: defendant “was concededly the source of the information” and defense counsel “was acting as [defendant’s] agent” at arraignment in “relaying information supplied by the defendant ... for the purpose of obtaining [a] favorable ruling” on bail).

Accordingly, in identifying the sources of information, counsel should carefully consider whether a particular statement, albeit apparently innocuous, may later prove to be a damaging admission. If the statement may be damaging, and if the motion can be written without it, counsel should avoid any risks by simply omitting the statement. If the statement must be included, counsel should, whenever possible, cite the sources in as general a fashion as possible to avoid attribution to a specific witness. See, e.g., People v. Jones, 190 A.D.2d at 33, 596 N.Y.S.2d at 812 (impeachment of defendant with counsel’s affirmation was impermissible because counsel “specifically stated that his information had been gathered from various sources, including court records, a ‘prior proceeding’ in this case, ‘records in [his] office,’ and conversations with prosecutors”). “By alleging that his affirmation was made upon information and belief and generally setting forth his sources, defense counsel satisfie[s] his statutory obligation.” People v. Marshall, 122 A.D.2d 283, 284, 504 N.Y.S.2d 782, 783 (2d Dept. 1986).

(3) Invoking the State Constitution in Addition to the U.S. Constitution

In a number of areas of the law, the New York courts have construed the New York State Constitution as conferring broader protections than the U.S. Constitution as construed by the U.S. Supreme Court. See generally People v. Harris, 77 N.Y.2d 434, 437-38, 568 N.Y.S.2d 702, 704 (1991) (“Our federalist system of government necessarily provides a double source of protection and State courts, when asked to do so, are bound to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court.... Sufficient reasons appearing, a State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart.”); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11-18 (1995); Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN’S L. REV. 431 (1987).

In the suppression context, the New York Court of Appeals has issued several decisions construing the state constitution to establish a standard that is more protective than the one adopted by the U.S. Supreme Court. See, e.g., People v. Harris, 77 N.Y.2d at 435-41, 568 N.Y.S.2d at 702-06 (Dunaway motions; rejecting attenuation-of-taint analysis of New York v. Harris, 495 U.S. 14 (1990), and reinstating Court of Appeals’ original ruling in Harris case on state constitutional grounds); People v. Torres, 74 N.Y.2d 224, 544 N.Y.S.2d 796 (1989) (Mapp motions; rejecting Michigan v. Long, 463 U.S. 1032 (1983) and adopting more protective standard for search of interior of car during brief detention and frisk of occupants); People v. Griminger, 71 N.Y.2d 635, 529 N.Y.S.2d 55 (1988) (Mapp motions; rejecting standard established in Illinois v. Gates, 462 U.S. 213 (1983) for determining sufficiency of search warrant, in favor of more protective Aguilar-Spinelli standard); People v. Bethea, 67 N.Y.2d 364, 502 N.Y.S.2d 713 (1986) (Huntley motions; rejecting Oregon v. Elstad, 470 U.S. 298 (1985) and preserving traditional cat-out-of-the-bag doctrine in its entirety); People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985) (Mapp motions; rejecting “good faith” exception established in United States v. Leon, 468 U.S. 897 (1984)); People v. Adams, 53 N.Y.2d 241, 440 N.Y.S.2d 902 (1981) (Wade motions; rejecting standard for identification suppression established in

Manson v. Braithwaite, 432 U.S. 98 (1977) in favor of traditional suggestiveness analysis of United States v. Wade, 388 U.S. 218 (1967) and Stovall v. Denno, 388 U.S. 293 (1967)). See also People v. Diaz, 81 N.Y.2d 106, 112 n.2, 595 N.Y.S.2d 940, 944-45 n.2 (1993) (Mapp motions; after noting that U.S. Supreme Court had granted certiorari to determine viability of “plain touch” exception in Minnesota v. Dickerson, Court of Appeals rejects exception on state as well as federal constitutional grounds).

When drafting motions, counsel should always cite the applicable state constitutional provision in addition to the federal Constitution. A failure to specifically cite the state constitution may result in the court’s declining to apply state constitutional analysis. See, e.g., People v. Pacer, 6 N.Y.3d 504, 509 n.3, 814 N.Y.S.2d 575, 577 (2006) (granting relief on confrontation clause claim on federal constitutional grounds but declining to address state constitution’s confrontation clause because “[d]efendant has neither preserved nor argued any claim based on our State Constitution”). Whenever possible, counsel should also identify a rationale for construing the state constitution more protectively than the U.S. Constitution.

In the suppression context, where the relevant state constitutional provisions essentially mirror their federal counterparts, counsel generally will not be able to rely on the jurisprudential principle that a difference in the wording of the constitutional texts may provide a basis for construing the state constitution more broadly than the U.S. Constitution. See, e.g., People v. Harris, 77 N.Y.2d at 438, 568 N.Y.S.2d at 704 (“interpretive analysis which examines the language of the provisions” generally does not justify divergence from federal standard in search-and-seizure cases because “the language of the Fourth Amendment of the Federal Constitution and section 12 of article I of our own Constitution not only contain similar language but share a common history”). But see People v. Scott, 79 N.Y.2d 474, 486, 583 N.Y.S.2d 920, 927 (1992) (noting that New York Constitution’s search-and-seizure guarantee contains protection against interception of telephone and telegraph communications that is not found in Fourth Amendment).

As the New York Court of Appeals repeatedly has recognized, a “noninterpretive analysis” permits a state court to construe a state constitutional provision more protectively than its federal counterpart -- notwithstanding an “identity of language in the two [federal and state constitutional] clauses” (People v. Reynolds, 71 N.Y.2d 552, 557, 528 N.Y.S.2d 15, 17 (1988)) -- if the court is “persuaded that the proper safeguarding of fundamental constitutional rights requires that [the court] do so” (People v. Scott, 79 N.Y.2d at 480, 583 N.Y.S.2d at 923). “Noninterpretive review proceeds from a judicial perception of sound policy, justice and fundamental fairness.” People v. P.J. Video, Inc., 68 N.Y.2d 296, 303, 508 N.Y.S.2d 907, 911 (1986), cert. denied, 479 U.S. 1091 (1987).

In urging a judge to construe the state constitution to reach a result other than the one dictated by federal law, counsel can rely on the following factors, which have been cited by the Court of Appeals as justifying departures from federal constitutional doctrines notwithstanding the identity of language of the relevant federal and state constitutional provisions:

(i) The importance of the right at stake. “When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor.” People v. P.J. Video, 68 N.Y.2d at 304, 508 N.Y.S.2d at 912-13.

(ii) The need for a state rule to guard against the U.S. Supreme Court’s dilution of what had previously been a clear-cut federal constitutional rule. The Court of Appeals has stated that it is appropriate for the New York courts to invoke the state constitution in order “to provide and maintain ‘bright line’ rules to guide the decisions of law enforcement and judicial personnel who must understand and implement [the courts’] decisions in their day-to-day operations in the field.... [Prior state constitutional decisions] reflect a concern that the [federal constitutional] rules governing police conduct have been muddied, and judicial supervision ... diluted, thus heightening the danger that our citizens’ rights against unreasonable police intrusions might be violated.” People v. P.J. Video, 68 N.Y.2d at 305, 508 N.Y.S.2d at 913. Accord People v. Johnson, 66 N.Y.2d 398, 407, 497 N.Y.S.2d 618, 624 (1985). Therefore, when a U.S. Supreme Court “ruling [is] a similar dilution of the requirements of judicial supervision,” People v. P.J. Video, Inc., 68 N.Y.2d at 305, 508 N.Y.S.2d at 913, the state courts are justified in resorting to the state constitution to “establish[] a clear and definable standard of review ... to protect the rights of New York citizens.” Id. at 307, 508 N.Y.S.2d at 914.

(iii) If, prior to the issuance of an unfavorable U.S. Supreme Court decision, the state courts followed a more favorable rule and any of these preexisting state court decisions cited the state constitution in addition to the U.S. Constitution, this state constitutional precedent provides a basis for preserving the state rule. See, e.g., People v. Class, 67 N.Y.2d 431, 433, 503 N.Y.S.2d 313, 314 (1986).

(iv) The existence of a state constitutional rule that, although not directly bearing upon the issue, justifies divergence from federal law because it allows the state court to conclude that the constitutional context for deciding the issue is different from that which the Supreme Court confronted when fashioning the federal rule. See, e.g., People v. Harris, 77 N.Y.2d at 439-41, 568 N.Y.S.2d at 704-06 (although state constitutional caselaw on right to counsel had no direct bearing upon case, Court of Appeals concludes that caselaw gave police an additional motivation for evading search-and-seizure rules at issue and therefore justified divergence from U.S. Supreme Court’s analysis of search-and-seizure law).

(v) The existence of a state statute, from which the court can glean a state-based policy or interest that justifies a divergence in constitutional analysis. See, e.g., People v. Scott, 79 N.Y.2d at 487-88, 583 N.Y.S.2d at 927-28 (relying in part on state statutes governing criminal and civil trespass to fashion state constitutional version of “open fields” doctrine that is more protective than Oliver v. United States, 466 U.S. 170 (1984)).

(vi) The existence of state caselaw identifying general policies or concerns that justify the court’s approaching the constitutional issue at stake in a manner different from that which the U.S. Supreme Court employed. For example, the New York Court of Appeals has

stated that in New York, the exclusionary rule does not merely serve the purpose of deterring police misconduct; it also serves the broader purpose of guarding against judicial sanctioning of unlawful police action. Thus, in People v. Bigelow, the Court of Appeals rejected the “good faith” exception of United States v. Leon, because the exception was predicated upon the assumption that the exclusionary rule is solely “intended to deter police misconduct.” Bigelow, 66 N.Y.2d at 427, 497 N.Y.S.2d at 637. While the U.S. Supreme Court had carved out a good faith exception on the ground that “no deterrent purpose would be served by excluding ... evidence the police had seized in objective good faith” (*id.*), the Court of Appeals concluded in Bigelow that a good faith exception is inconsistent with the state exclusionary rule’s additional goal of ensuring that no “premium is placed on the illegal police action.” Id.

(vii) “[A]ny distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.” People v. P.J. Video, 68 N.Y.2d at 303, 508 N.Y.S.2d at 911. See, e.g., People v. Scott, 79 N.Y.2d at 488, 583 N.Y.S.2d at 929 (rejecting “open fields” doctrine of federal law, in part because doctrine’s underlying rationale “that law-abiding persons should have nothing to hide on their property and, thus, there can be no reasonable objection to the State’s unpermitted entry on posted or fenced land to conduct a general search for contraband ... presupposes the ideal of a conforming society, a concept which seems foreign to New York’s tradition of tolerance of the unconventional and of what may appear bizarre or even offensive”); People v. P.J. Video, 68 N.Y.2d at 308-09, 508 N.Y.S.2d at 915-16 (diverging from federal constitutional rules for issuance of search warrants for allegedly obscene material, in part because obscenity cases traditionally call for consideration of “contemporary community standards”).

B. Huntley Motions

The standards for sufficiency of suppression motions in Family Court are identical to those in the Criminal Procedure Law. See F.C.A. § 330.2(1) (specifically incorporating the C.P.L. standards). Under these standards, Huntley motions need only “allege a ground constituting [a] legal basis for the motion.” C.P.L. § 710.60(3)(a). Such motions are exempt from any requirements of sufficiency of the factual exposition. See C.P.L. § 710.60(3)(b); See also People v. Burton, 6 N.Y.3d 584, 587 n.1, 815 N.Y.S.2d 7, 10 n.1 (2006) (“The factual allegation requirement does not apply to motions to suppress allegedly involuntary statements made by a defendant or improper identifications”); People v. Jones, 95 N.Y.2d 721, 725 n.2, 723 N.Y.S.2d 761, 765 n.2 (2001) (“Sworn allegations of fact are not required in motions for suppression of either involuntarily made statements or identification testimony resulting from improper procedures.”); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993); People v. Weaver, 49 N.Y.2d 1012, 1013, 429 N.Y.S.2d 399, 399 (1980). Thus, “there must be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim.” People v. Weaver, 49 N.Y.2d at 1013, 429 N.Y.S.2d at 399. Accord People v. Clemons, 166 A.D.2d 363, 561 N.Y.S.2d 425 (1st Dept. 1990); People v. Knight, 124 A.D.2d 935, 508 N.Y.S.2d 679 (3d Dept. 1986). See also People v. Credle, 28 A.D.3d 397, 812 N.Y.S.2d 871 (1st Dept. 2006) (trial court “erred in summarily denying defendant’s motion to suppress statements,” which “asserted that he was questioned and that his

statements to a police officer were involuntary”).

This standard applies not only to due process claims of coercion but also to Miranda claims and violations of the right to counsel. C.P.L. §§ 710.60 and 710.20(3) apply to all statements “involuntarily made, within the meaning of section 60.45.” The latter section defines “involuntary” statements as statements obtained from the accused by a law enforcement official or any “person then acting under his direction or in cooperation with him ... in violation of such rights as the [accused] may derive from the constitution of this state or of the United States.” C.P.L. § 60.45(2)(b)(ii). See also F.C.A. § 344.2(2)(b)(ii). Accordingly, a statement obtained in violation of Miranda or the right to counsel must be deemed an “involuntary” statement, see People v. Graham, 55 N.Y.2d 144, 447 N.Y.S.2d 918 (1982), and motions advancing such claims are subject to the same procedural requirements as those governing due process involuntariness claims.

The same standard applies as well to motions to suppress a statement on the ground that the police violated the non-constitutional, statutory safeguards established in F.C.A. § 305.2 -- parental notification, parental presence during interrogation, parental receipt of Miranda warnings, and use of a special room for interrogation. F.C.A. § 344.2(2)(b)(iii) broadens the C.P.L.’s definition of “involuntary” statements to include any statements taken by law enforcement officers or their agents “in violation of section 305.2.”

For the tactical reasons explained above, a Huntley motion should say little more than that the statement was coerced or that the police (or an individual acting under their direction or in cooperation with them) violated the requirements of Miranda v. Arizona or the respondent’s federal and state constitutional right to counsel or the statutory protections of F.C.A. § 305.2.

C. Wade Motions

(1) Law and Tactics Generally

Wade motions are governed by the same standard applicable to Huntley motions: A Wade motion need only “allege a ground constituting [a] legal basis for the motion,” C.P.L. § 710.60(3)(a), and is exempt from requirements of sufficiency of the factual exposition. See C.P.L. § 710.60(3)(b); People v. Dixon, 85 N.Y.2d 218, 222, 623 N.Y.S.2d 813, 815 (1995) (“Alleging facts to support a motion to suppress testimony concerning an out-of-court identification is a burden that a defendant no longer carries on a motion for a Wade hearing Accordingly, a defendant’s failure to plead sufficient facts in support of the motion to suppress testimony of a prior identification is not a proper ground to summarily deny a motion for a Wade hearing.”); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993). See also People v. Burton, 6 N.Y.3d 584, 587 n.1, 815 N.Y.S.2d 7, 10 n.1 (2006) (“The factual allegation requirement does not apply to motions to suppress ... improper identifications”).

Thus, a Wade motion satisfies the statutory requirement of sufficiency and gives rise to a

hearing whenever there is an allegation that an identification procedure was unnecessarily suggestive in violation of due process or that the police violated the respondent's right to counsel at a lineup. See, e.g., People v. Dixon, 85 N.Y.2d at 220-25, 623 N.Y.S.2d at 814-17 (defendant's summary allegation that "the identification procedure `utilized by law enforcement officials ... [was] unfair, creating a substantial likelihood of misidentification'" was sufficient to require Wade hearing because "the parties' submissions did not establish, as a matter of law, that the identification was free from the risk of police suggestion" and "a defendant's failure to plead sufficient facts in support of the motion to suppress testimony of a prior identification is not a proper ground to summarily deny a motion for a Wade hearing"); People v. Rodriguez, 79 N.Y.2d 445, 583 N.Y.S.2d 814 (1992); In the Matter of Anthony B., 212 A.D.2d 601, 622 N.Y.S.2d 550 (2d Dept. 1995); People v. Lawhorn, 192 A.D.2d 359, 595 N.Y.S.2d 777 (1st Dept. 1993).

As in Huntley motions, the tactical benefits of sketchy pleading militate for limiting a Wade motion to the sparsest possible exposition of facts and law. Thus, a Wade motion should ordinarily do little more than identify the type of identification procedure challenged and allege that the procedure was unnecessarily suggestive in violation of federal and state constitutional guarantees of due process or that the police violated the respondent's federal and state constitutional rights to counsel. But, where the right to a Wade hearing turns upon an issue of fact, the Wade motion often will have to allege facts sufficient to resolve the threshold factual question. See, e.g., In the Matter of Felix D., 30 A.D.3d 598, 818 N.Y.S.2d 142 (2d Dept. 2006) (trial court properly denied the Wade motion on the papers because the information before the court showed that the challenged identification procedure was conducted by school officials and was not "police arranged" and the respondent's allegation of police involvement or influence was entirely "conclusory"). Such threshold factual questions most often arise in situations of alleged "confirmatory identifications," which are discussed in the next subsection.

(2) Confirmatory Identifications

In drafting Wade motions, counsel must take into account the special requirements applicable to "confirmatory identifications." The courts have applied this term to two types of situations: identifications by a complainant or eyewitness who was well-acquainted with the suspect before the crime; and identifications by police officers in buy-and-bust cases. See generally People v. Dixon, 85 N.Y.2d at 223-24, 623 N.Y.S.2d at 816. The rules governing each of these situations, and the implications for Wade motions, are discussed below.

(a) Previous Relationship Between Eyewitness and Accused

In cases in which the police conduct an identification procedure with a complainant or eyewitness who was previously acquainted with a criminal defendant or juvenile respondent, the accused is entitled to neither 710.30 notice of the procedure nor a Wade hearing if "as a matter of law, the witness is so familiar with the [accused] that there is `little or no risk' that police suggestion could lead to a misidentification." People v. Rodriguez, 79 N.Y.2d 445, 450, 583

N.Y.S.2d 814, 818 (1992). Accord People v. Breland, 83 N.Y.2d 286, 609 N.Y.S.2d 571 (1994). The justification for dispensing with 710.30 notice and a Wade hearing in such cases is that “there is virtually no possibility that the witness could misidentify the [accused],” regardless of “how[] suggestive or unfair the identification procedure might be.” People v. Rodriguez, 79 N.Y.2d at 450, 583 N.Y.S.2d at 818.

“The unusual treatment accorded such identifications -- no CPL 710.30 notice or Wade hearing is necessary -- requires that the exception be narrowly confined to situations where “suggestiveness” is not a concern.” Id. at 452, 583 N.Y.S.2d at 818. If there is any question about the applicability of the “confirmatory identification” exception, the trial court must hold a pre-Wade hearing to determine the need for a Wade hearing. See id. at 451, 583 N.Y.S.2d at 818 (trial court should consider “factors such as the number of times ... [the complainant] viewed defendant prior to the crime, the duration and nature of the encounters, the setting, the period of time over which the viewings occurred, the time elapsed between the crime and the previous viewings, and whether the two had any conversations”). At such a hearing, “[t]he People bear the burden ... [to prove their claim] that [the] citizen identification procedure was ‘merely confirmatory.’” Id. at 452, 583 N.Y.S.2d at 818. See also, e.g., People v. Coleman, 73 A.D.3d 1200, 903 N.Y.S.2d 431 (2d Dept. 2010) (prosecution failed to meet its burden at a Rodriguez hearing of “establishing that the defendant was so well known to the complaining witness that he was impervious to police suggestion”: Although a detective testified that the identifying witness “viewed the defendant ‘every day’” and “provided the police with an alleged nickname of the defendant,” the detective also acknowledged that “the complaining witness never spoke to, interacted with, or conversed with the defendant” and “[n]o evidence was offered as to the length of the viewings, the distance at which they took place, the time of day, or the lighting conditions.”).

In cases in which a pretrial identification procedure was held but the prosecution claims that the witness was so familiar with the respondent as to obviate the need for a Wade hearing, the prosecution must notify defense counsel of this claim in the Voluntary Disclosure Form. See, e.g., People v. Naranjo, 140 Misc.2d 43, 529 N.Y.S.2d 953 (Sup. Ct., N.Y. Co. 1988). See also People v. Chase, 85 N.Y.2d 493, 626 N.Y.S.2d 721 (1995) (notwithstanding prosecution’s claim that statement was spontaneous, a statement notice was required; “[i]t is for the court and not the parties to determine whether a statement is truly voluntary ... [or was prompted by] the functional equivalent of interrogation”). If the respondent disputes the claim of “confirmatory identification,” s/he should file a motion requesting that the court hold a Wade hearing or, in the alternative, a pre-Wade hearing to assess the claim of confirmatory identification. See, e.g., People v. Mosley, 136 A.D.2d 500, 523 N.Y.S.2d 820 (1st Dept. 1988) (trial court erred in summarily dismissing Wade motion on the basis of State’s representation that the show-up was merely a “confirmatory identification” by an eyewitness who knew the defendant; allegation in the defense motion that defendant did not know the eyewitness raised a material issue of fact necessitating an evidentiary hearing). See also People v. Doyle, 134 Misc.2d 338, 341, 510 N.Y.S.2d 987, 989 (Sup. Ct., Kings Co. 1987) (even when an identification procedure “involves parties who had a prior relationship,” accused is entitled to Wade hearing if the circumstances of

the offense prevented the complainant or eyewitness from reliably viewing the perpetrator during the crime).

(b) Buy-and-Bust Cases

In “buy and bust” cases in which the undercover officer identified the respondent in a pretrial identification procedure, the respondent is not entitled to either 710.30 notice of the identification or a Wade hearing if “the identification was made by a trained undercover officer who observed [respondent] during the face-to-face drug transaction” and the pretrial identification procedure was conducted “at a place and time sufficiently connected and contemporaneous to the arrest itself as to constitute the ordinary and proper completion of an integral police procedure.” People v. Wharton, 74 N.Y.2d 921, 922-23, 550 N.Y.S.2d 260, 261 (1989). Accord People v. Roberts 79 N.Y.2d 964, 582 N.Y.S.2d 996 (1992); People v. Morales, 37 N.Y.2d 262, 372 N.Y.S.2d 25 (1975).

The Court of Appeals has signaled to the lower courts that this “buy and bust” exception should be applied narrowly, and that Wade hearings are generally the preferred procedure even for “confirmatory” show-ups by police officers in buy-and-bust cases, because of “the precarious nature of the process of identifying individuals in the fast-paced environment of drug transactions.” People v. Mato, 83 N.Y.2d 406, 411, 611 N.Y.S.2d 92, 94 (1994). See also People v. Boyer, 6 N.Y.3d 427, 813 N.Y.S.2d 31 (2006) (rejecting prosecution’s request to extend the *Wharton* “confirmatory identification” category to other scenarios in which “a police officer’s initial encounter with a suspect and subsequent identification of that suspect are temporally related, such that the two might be considered part of a single police procedure” and emphasizing that “[t]he risk of undue suggestiveness is obviated only when the identifying officer’s observation of the defendant is so clear that the identification could not be mistaken”).

The respondent is entitled to a Wade hearing even in buy and bust cases if:

- There was a significant lapse in time between the crime and the identification procedure. See, e.g., People v. Boyer, 6 N.Y.3d at 432-33, 813 N.Y.S.2d at 34 (“When there is a risk that the quality of the initial observation has eroded over time, we have consistently held that police identifications do not enjoy any exemption from the statutory notice and hearing requirements”). Compare People v. Williams, 85 N.Y.2d 868, 626 N.Y.S.2d 49 (1995) (undercover officer’s viewing of the defendant’s photograph, two days after the buy-and-bust operation, did not fall within the category of “confirmatory identifications” that are exempt from the requirement of a Wade hearing) and People v. Mato, 83 N.Y.2d at 411, 611 N.Y.S.2d at 94 (defendant entitled to Wade hearing because 3 weeks elapsed between alleged sale and show-up identification) and People v. Gordon, 76 N.Y.2d 595, 599-601, 561 N.Y.S.2d 903, 905-06 (1990) (“the 10-day lapse between the November 27 buy and the December 7 show-up ... heighten[ed] the real danger of calculated or careless misidentification” and defendant therefore

was entitled to Wade hearing) and People v. Smith, 203 A.D.2d 495, 610 N.Y.S.2d 594 (2d Dept. 1994), app. dismissed, 85 N.Y.2d 914, 627 N.Y.S.2d 337 (1995) (trial court erred in summarily denying Wade hearing where undercover officer's identification of defendant's photograph occurred a week after the second of two drug transactions) and People v. DiGirolamo, 197 A.D.2d 531, 602 N.Y.S.2d 182 (2d Dept. 1993) (undercover officer's stationhouse show-up identification of defendant 15 days after second drug transaction with defendant was not "confirmatory" and did not justify denial of Wade hearing) with People v. DeRosario, 81 N.Y.2d 801, 803, 595 N.Y.S.2d 372, 374 (1993) (show-up held 4-5 hours after sale was "confirmatory") and People v. Roberts, 79 N.Y.2d 964, 582 N.Y.S.2d 996 (1992) (show-up which was held less than 5 hours after second of two drug transactions with defendant within one-week period was "confirmatory") and People v. Caceres, 187 A.D.2d 440, 589 N.Y.S.2d 902 (2d Dept. 1992) (stationhouse identification 4 hours after sale was "confirmatory").

- Although nominally a "buy and bust" (in the sense that an undercover officer purchased drugs from the accused), the case does not present the specific factors that led the Court of Appeals to dispense with Wade hearings in buy-and-bust cases. See, e.g., People v. Gordon, 76 N.Y.2d 595, 600-01, 561 N.Y.S.2d 903, 906 (1990) ("The November 27 police operation in this case was not a 'buy and bust.' The police chose not to arrest the participants in that buy and the undercover officer radioed no description of defendant to her backup team.... Actually, the only likeness to [buy and bust] cases is that the station house identification was made by the undercover officer who made the original drug buy, and that surely cannot justify dispensing with necessary protections affecting identification procedures."). See also People v. Boyer, 6 N.Y.3d at 432-33, 813 N.Y.S.2d at 34 ("In Wharton, an experienced undercover officer observed the defendant face-to-face during a planned buy-and-bust operation. The officer then radioed his backup team with a description of the defendant, who was immediately arrested. As planned, within five minutes of the arrest, the purchasing officer drove past the defendant specifically for the purpose of identifying him, and then again identified him a few hours later at the police station. Under such circumstances, we held that the defendant was not entitled to a Wade hearing (and thus would not be entitled to CPL 710.30 notice) to test the officer's identification We further stated that there is no 'categorical rule exempting from requested Wade hearings confirmatory identifications by police officers by merely labeling them as such. Where the nature and circumstances of the encounter and identification may warrant, a hearing should and undoubtedly will be held' Thus, the quality of the officer's initial viewing must be a critical factor in any Wharton-type analysis. The risk of undue suggestiveness is obviated only when the identifying officer's observation of the defendant is so clear that the identification could not be mistaken.").

- Unlike a typical “buy and bust,” the undercover officer did not “observe[] [respondent] ... [in a] face-to-face drug transaction.” People v. Wharton, 74 N.Y.2d 921, 922-23, 550 N.Y.S.2d 260, 261 (1989). Cf. People v. Newball, 76 N.Y.2d 587, 591-92, 561 N.Y.S.2d 898, 901 (1990) (concluding that identification was not “confirmatory” because, inter alia, the officer “observed the person for only a few minutes and from a distance of no closer than 50 feet”). See also People v. Boyer, 6 N.Y.3d at 433, 813 N.Y.S.2d at 34 (“the quality of the officer’s initial viewing must be a critical factor in any Wharton-type analysis. The risk of undue suggestiveness is obviated only when the identifying officer’s observation of the defendant is so clear that the identification could not be mistaken.”).
- The officer’s actions or reports (or those of other officers) provide a basis for doubting the reliability of the identification despite the use of a buy-and-bust procedure. See, e.g., People v. Williams, 79 A.D.2d 929, 435 N.Y.S.2d 1 (1st Dept. 1981), appeal dismissed, 53 N.Y.2d 866, 440 N.Y.S.2d 188 (1981) (trial court should have suppressed undercover officer’s identification as unreliable because testimony at the Wade hearing showed that the undercover officer initially expressed uncertainty and arresting officer thereafter produced definitive identification by telling undercover officer that buy money was found on defendant); People v. Chillis, 60 A.D.2d 968, 969, 401 N.Y.S.2d 612 (4th Dept. 1978) (trial court erred in denying Wade hearing where undercover officer had amended vague description first recorded in his report to more precisely fit defendant).

In buy-and-bust cases, as in alleged “confirmatory identifications” by a witness previously acquainted with the respondent, the prosecution should announce in the Voluntary Disclosure Form that it is invoking the “confirmatory identification” exception. See People v. Chase, 85 N.Y.2d 493, 626 N.Y.S.2d 721 (1995) (notwithstanding prosecution’s claim that statement was spontaneous, a statement notice was required; “[i]t is for the court and not the parties to determine whether a statement is truly voluntary ... [or was prompted by] the functional equivalent of interrogation”). A failure to give timely notice will result in preclusion if the court concludes that the “confirmatory identification” exception was inapplicable. See, e.g., People v. Newball, 76 N.Y.2d 587, 589, 561 N.Y.S.2d 898, 899 (1990). To seek a Wade hearing, defense counsel should allege any facts that take the case outside the classic “buy and bust” situation or otherwise call into question the reliability of the undercover officer’s identification.

D. Mapp and Dunaway Motions

Mapp and Dunaway motions must satisfy both the above-described requirement of “alleg[ing] a ground constituting [a] legal basis for the motion,” and the additional requirement of setting forth “sworn allegations of fact [that] ... support the [legal] ground alleged.” C.P.L. § 710.60(3)(a)-(b). See generally People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922,

924 (1993).

(1) Sufficiency of Legal Basis for Motion

With respect to the sufficiency of the legal argument, counsel can satisfy the statutory standard fairly easily by identifying the constitutional, statutory, or common law violations that justify the relief sought. Compare People v. Werner, 55 A.D.2d 317, 390 N.Y.S.2d 711 (4th Dept. 1977) (reversing trial court's summary denial of Mapp motion and holding that the motion was sufficient in that it asserted that the defendant was unlawfully arrested and that fruits of search incident to that arrest therefore had to be suppressed) with People v. Roberto H. (Anonymous), 67 A.D.2d 549, 552, 416 N.Y.S.2d 305, 307 (2d Dept. 1979) (upholding trial court's summary denial of a suppression motion whose "affirmation fails even to allege improper conduct on the part of the law enforcement authorities, the very keystone of a suppression motion").

(2) Sufficiency of Factual Allegations

Under the three-pronged standard established by the Court of Appeals in People v. Mendoza, 82 N.Y.2d 415, 604 N.Y.S.2d 922 (1993), the "sufficiency of defendant's factual allegations [in a Mapp or Dunaway motion] should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." Id. at 426, 604 N.Y.S.2d at 926. See also People v. Lopez, 5 N.Y.3d 753, 801 N.Y.S.2d 245 (2005); People v. Jones, 95 N.Y.2d 721, 725-26, 723 N.Y.S.2d 761, 765 (2001).

If a Mapp or Dunaway motion fails to satisfy this standard, the court may -- but is not required to -- deny the motion. The court has discretion to grant a hearing even for an insufficient motion (id. at 429, 604 N.Y.S.2d at 928-29), a result that is particularly appropriate when the prosecution fails to challenge the sufficiency of the motion (id. at 430, 604 N.Y.S.2d at 929; accord People v. Bonilla, 82 N.Y.2d 825, 604 N.Y.S.2d 937 (1993)) or when "the court orders a Huntley or Wade hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses" (People v. Mendoza, 82 N.Y.2d at 429, 604 N.Y.S.2d at 928-29). See also People v. Rivera, 42 A.D.3d 160, 836 N.Y.S.2d 148 (1st Dept. 2007) (summary denial procedure "merely permits, but does not mandate summary denial"; "the interest of judicial economy militates in favor of the court's conducting a hearing on the suppression motion in the exercise of its discretion despite a perceived pleading deficiency").

In some cases, a factually insufficient motion should be summarily granted rather than summarily denied. These are cases in which there is "no dispute [between the parties] as to the underlying facts, but only as to application of the law to the facts," and in which the court determines that the applicable law requires suppression. Id. at 427, 604 N.Y.S.2d at 927. See, e.g., People v. Cardona, N.Y.L.J., 6/24/94, at 27, col. 4 (Sup. Ct., Bronx Co.).

(a) First prong (facial sufficiency of the motion papers)

If the “assertions in defendant’s motion papers are ... `merely legal conclusions” and are not “factual,” the papers are deficient on their face because they fail to “raise a factual dispute on a material point” requiring a hearing for its resolution. People v. Mendoza, 82 N.Y.2d at 426, 604 N.Y.S.2d at 926.

The Court of Appeals has acknowledged that it is often difficult to assess whether “assertions in [a] defendant’s motion are factual or `merely legal conclusions.” Id. at 426, 604 N.Y.S.2d at 926. In Mendoza, the Court of Appeals gave the following examples to assist the lower courts in making this assessment:

- The court first gave examples of the two “extreme[s]” of “plainly factual” and “clearly legal” allegations:
 - Example of a “plainly factual” allegation: “On June 19, 1993, at 3:00 p.m., I was waiting for a bus on the corner of Broadway and 42nd Street when a uniformed police officer approached me stating “people like you don’t belong in this neighborhood.” She reached into my jacket pocket and removed a one-inch vial of cocaine.” Id. The Court explained that “[t]hese allegations provide sufficient factual information which, if uncontested by the People, would warrant summary suppression and enable the motion court to make the required findings of fact in support of its decision.” Id.
 - Example of “a clearly legal conclusion”: “[O]n June 19, 1993 my Fourth Amendment rights were violated.” Id. As the court noted, this “pleading does not assert sufficient facts from which a court could conclude that suppression is appropriate.” Id.
- With regard to the situations falling between these two extremes, which often involve mixed questions of law and fact, the court gave the following examples of insufficiently factual allegations:
 - “An allegation that `I did nothing giving rise to probable cause’ is, without more, plainly insufficient because probable cause is a mixed legal-factual issue and the pleading lacks the factual portion of the equation.” Id. at 427, 604 N.Y.S.2d at 927. See also id. at 430, 604 N.Y.S.2d at 929 (motion in Martinez case insufficient on its face because defendant asserted in conclusory manner that he was “`acting in a lawful manner” and “that there was no `reasonable suspicion’ that he committed a crime”).
 - “[T]he marijuana was found within the “curtilage” of the house, not in an

“open field” but “hidden in enclosed areas.”” Id. at 427, 604 N.Y.S.2d at 927. As the court explained, this allegation is so close to the line separating factual and legal allegations that the court itself was divided on the propriety of summary dismissal of such a motion in People v. Reynolds, 712 N.Y.2d 552, 528 N.Y.S.2d 15 (1988). Yet, as the Reynolds majority concluded, the allegation must be viewed as “legal” rather than “factual” because the term “curtilage” is itself a legal conclusion. “Merely alleging that an item is within the curtilage is not informative unless the factual basis for the claim is provided, for example: ‘the marijuana was growing 25 feet from my front door and was surrounded by a white picket fence.’ Only then can a court decide whether there is a factual basis for suppression.... [I]t is incumbent upon the pleader, where possible, to provide objective facts from which the court can make independent factual determinations.” Id. at 427, 604 N.Y.S.2d at 927.

Compare People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dept. 2009) (trial judge erred in summarily dismissing a Mapp motion which adequately set forth a claim under Payton v. New York, 445 U.S. 573 (1980) by alleging that the defendant “‘was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]’; and that the items of property, ‘all items enumerated in the v.d.f.,’ were seized illegally at the time of his arrest because ‘the police lacked probable cause to go to his apartment and take him into custody’” and “‘did not have an arrest warrant’”) and People v. Rosario, 264 A.D.2d 369, 693 N.Y.S.2d 152 (1st Dept. 1999), lv. app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614 (2000) (trial judge in buy-and-bust case erred in summarily denying Mapp motion which “alleged that [defendant] was not involved in any suspicious or criminal activity, that he was legitimately in the area of the arrest since he was standing around with friends, that he had not engaged in any drug sales at any time that day and that he did not fit the description of anyone involved in a drug sale at that location”) and People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dept. 1999) (trial judge in buy-and-bust case erred in summarily denying Mapp motion, in which “defendant explicitly denied selling or possessing drugs, which this court has frequently deemed sufficient to entitle a defendant to a suppression hearing ... [and] additionally raised a question of fact as to probable cause when he challenged a particular aspect of the arrest, namely the arresting officer’s identification of defendant based on the radio transmission”) and People v. Campbell, N.Y.L.J., 3/13/95, at 31, col. 3 (App. Term, 9th & 10th Jud. Dist.) (defendant’s allegation that he did not match the description of a robbery suspect presented issue of fact that could only be resolved at a hearing; trial court erred in summarily denying Mapp motion) with People v. Howell, 2 A.D.3d 358, 769 N.Y.S.2d 233 (1st Dept. 2003) (upholding summary denial of defendant’s Mapp motion in an undercover drug sale case because the motion papers contained only “vague and generalized assertion[s]” – about the defendant’s “innocuous behavior at the time of his arrest” and that he “‘was never previously observed engaging in any illegal or suspicious activity’” – and neither “den[ie]d participation in the underlying drug transaction or allege[d] some other basis for suppression,” and when “the People submitted an answering affirmation that set forth, in detail, the predicate for defendant’s arrest, defendant did

not reply”) and People v. Davis, 256 A.D.2d 184, 683 N.Y.S.2d 26 (1st Dept. 1998), lv. app. denied, 93 N.Y.2d 968, 695 N.Y.S.2d 54 (1999) (upholding trial judge’s summary denial of Mapp motion because defendant merely “denied, in conclusory fashion, [the People’s claim that he was] selling drugs or acting as a `steerer,” and motion “did not contest any of the facts creating probable cause to believe that defendant was a participant in the transaction”) and In the Matter of Raoul A., 240 A.D.2d 565, 659 N.Y.S.2d 789 (2d Dept. 1997) (trial court properly denied, on the papers, a Mapp motion which “mere[ly] alleg[ed] that [Respondent] was not engaging in any conduct that would justify being stopped and searched”) and People v. Williams, 228 A.D.2d 268, 644 N.Y.S.2d 194 (1st Dept. 1996) (trial court properly denied Mapp hearing and Dunaway hearing to suppress identification testimony because defendant’s motion merely asserted in conclusory terms that the arresting officer did not have “any reasonably trustworthy information which supported the conclusion that the defendant committed a criminal act” and that the undercover officer’s description was too vague to “provide for a valid seizure”).

(b) Second prong (factual context of the motion)

In People v. Mendoza, the Court of Appeals explained that the assessment of the factual sufficiency of a Mapp or Dunaway motion must take into account the nature of the charges because the factual context of a criminal case may render a “facially sufficient” motion “inadequate” or, conversely, convert “seemingly barebones allegations” into a pleading “sufficient to require a hearing.” Mendoza, 82 N.Y.2d at 427, 604 N.Y.S.2d at 927. “The identical pleading may be factually sufficient in one context but not the other.” Id. at 428, 604 N.Y.S.2d at 928. To clarify this principle, the Court in Mendoza gave the following examples of reading defendants’ motions in context:

- The suppression motion “allege[s] that when the police conducted the search, the defendant was merely standing on the street doing nothing wrong.” Such an allegation would be sufficient if the case involves a police “pat-down or search [of] [a] citizen[] based on perceived suspicious or unlawful behavior,” since the defendant’s allegation “that he or she was standing on the street doing nothing wrong when the police approached and searched” would take issue with the officers’ assertions that “defendant was acting `suspiciously’ or `furtively.” Id. at 428-29, 604 N.Y.S.2d at 928. Accord People v. Burton, 6 N.Y.3d 584, 590, 815 N.Y.S.2d 7, 11-12 (2006) (“where probable cause for a search is premised on the furtive behavior of a person, we have observed that an accused can ‘raise a factual issue simply by alleging that he or she was standing on the street doing nothing wrong when the police approached and searched’ and discovered contraband in the process A claim of this nature questions whether police action was legally authorized at its inception, and in this situation a hearing is required to determine, as a factual matter, whether the defendant engaged in suspicious or unlawful conduct giving rise to probable cause justifying the search.”).

- In contrast, the very same allegation would be insufficient in a buy-and-bust case because the officers' probable cause to arrest the defendant stems from a drug transaction that took place prior to the moment of arrest and the defendant's innocent conduct at the time of arrest is immaterial. People v. Mendoza, 82 N.Y.2d at 428-29, 604 N.Y.S.2d at 928. See also id. at 430, 604 N.Y.S.2d at 929 (defendant's assertion in Martinez case that he was "acting in a lawful manner" at time of stop was insufficient because charges involved buy-and-bust transaction that occurred earlier); id. at 431, 604 N.Y.S.2d at 930 (George J.'s motion was insufficient because case involved buy-and-bust transaction and motion "merely disclaims involvement in 'unlawful activity' at the time of seizure"); People v. Burton, 6 N.Y.3d 584, 589, 815 N.Y.S.2d 7, 11 (2006) ("In a buy-and-bust scenario, probable cause is generally based upon an accused's participation in a narcotics transaction. To raise an issue of fact that necessitates a hearing, a defendant has to 'deny participating in the transaction or suggest some other grounds for suppression' In the absence of such a denial, the motion court is left with the People's uncontested averment that the accused participated in the sale or purchase – which is sufficient on its face to provide probable cause justifying an arrest and ensuing search.").

Thus, the central question in applying the second prong of the Mendoza standard is whether the respondent's allegations refuted, or took issue with, the facts upon which the prosecution relies to justify the search or seizure. See, e.g., People v. Jones, 95 N.Y.2d 721, 726, 723 N.Y.S.2d 761, 765 (2001) ("in a buy and bust situation[,] ... [where] a claim of innocent conduct at the time of the arrest is unavailing, ... a defendant ... [can] raise a factual challenge to the legality of the arrest and seizure of evidence in either of two ways[:] ... [(1)] "deny participating in the transaction or [(2)] suggest some other grounds for suppression.") (emphasis in original); id. at 727, 723 N.Y.S.2d at 766 (in buy-and-bust case, "[d]eficiencies in the description furnished to an arrest officer may provide the basis for suppression"). Compare In the Matter of Elvin G., 12 N.Y.3d 834, 882 N.Y.S.2d 671 (2009) (trial court erred in summarily denying a Mapp motion that challenged a school search: Because the suppression motion presented a "different factual scenario" than the Presentment Agency's account of the search – the suppression motion asserted that "the school dean ordered all of the students in the classroom to stand and empty their pockets in an attempt to discover a cell phone or electronic device that had disrupted the class" while [i]n contrast, the presentment agency . . . claim[ed] that the dean had asked the students to put their bookbags on their desks and Elvin had voluntarily removed a knife from his pocket," thus placing the knife "in 'plain view'" – a suppression hearing had to be held to "determine whether a search occurred and, if so, whether it was reasonable as a matter of law under the circumstances of this case.") and People v. Jones, 73 A.D.3d 662, 901 N.Y.S.2d 274 (1st Dept. 2010) (trial court erred in summarily denying a Dunaway motion that "clearly raised a factual issue as to when and where [defendant] was arrested, or otherwise taken into custody" by asserting that defendant "was arrested on the street approximately eight hours

before the lineup took place” and thereby challenging the prosecution’s assertion that “defendant was arrested in a police station, immediately after being identified in a lineup”) and People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dept. 2009) (trial judge erred in summarily dismissing a Mapp motion which adequately set forth a claim under Payton v. New York, 445 U.S. 573 (1980) by alleging that the defendant ““was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]”; and that the items of property, ‘all items enumerated in the v.d.f.,’ were seized illegally at the time of his arrest because ‘the police lacked probable cause to go to his apartment and take him into custody’” and ““did not have an arrest warrant’”; Appellate Division points out that the prosecution’s Answering Affirmation did nothing more than to assert that ““[t]he evidence was lawfully obtained’” and to ““deny all allegations to the contrary,’” and did not present specific facts to establish the constitutionality of the police action by saying, for example, “that the police had a warrant or that defendant was outside in the hallway or at his apartment entrance or that defendant consented to have the police enter and search his apartment”) and People v. Joyner, 46 A.D.3d 473, 848 N.Y.S.2d 146 (1st Dept. 2007) (trial court erred in summarily denying a Mapp motion in buy-and-bust case in which, although prosecution alleged that the defendant was arrested 5 minutes after the sale to the undercover officer and was promptly identified in a show-up, defendant “denied participation in the transaction alleged in the indictment” and “asserted that he was in the area to visit a friend, that he was approached by a woman who asked to buy drugs, that he refused her overture, and that he walked away”) and People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dept. 1999) (trial judge in buy-and-bust case erred in summarily denying Mapp motion, in which “defendant explicitly denied selling or possessing drugs, which this court has frequently deemed sufficient to entitle a defendant to a suppression hearing ... [and] additionally raised a question of fact as to probable cause when he challenged a particular aspect of the arrest, namely the arresting officer’s identification of defendant based on the radio transmission”) and People v. Marquez, 246 A.D.2d 330, 667 N.Y.S.2d 359 (1st Dept. 1998), *withdrawn after remand*, 249 A.D.2d 1012, 679 N.Y.S.2d 784 (1st Dept. 1998) (withdrawn on stipulation of parties) (trial court erred in summarily denying Mapp motion which took issue with prosecution’s claimed basis for the search by alleging that defendant did not participate in any narcotics transaction and was merely conversing with others in vicinity of alleged sale) and People v. Ayarde, 246 A.D.2d 330, 632 N.Y.S.2d 174 (2d Dept. 1995) (defendant was entitled to Mapp hearing because his allegations of fact -- that the police ““did not observe the defendant commit a criminal act’” and that he ““was arrested due to his mere presence’” inside a store that was raided by the police -- adequately took issue with the prosecution’s theory that the police observed the defendant hand a bag of cocaine to a buyer) and People v. Bailey, 218 A.D.2d 569, 630 N.Y.S.2d 499 (1st Dept. 1995) (trial court erred in denying a Mapp hearing to defendant whose motion alleged that he was not involved in criminal activity at the time and place of his alleged purchase of marijuana and that ““no illegal contraband was in ... a position ... to be seen by a police officer’”) and In the Matter of Ashanti L., 205 A.D.2d 539, 613 N.Y.S.2d 45 (2d Dept. 1994) (Family Court erred in summarily denying Mapp motion that took issue with arresting officer’s allegations by “expressly den[ying] that [respondent] held a controlled substance in plain view or tried to conceal it, thereby raising an issue of fact as to whether the police had probable cause to arrest him”) and People v. Fagan, 203

A.D.2d 933, 611 N.Y.S.2d 389 (4th Dept. 1994) (trial court erred in summarily denying defendant's Mapp motion that took issue with People's contention of drug sale by affirming, "upon information and belief, [that] no `controlled buys' of cocaine took place at the time and place referred to in the warrant application") with People v. Scully, 14 N.Y.3d 861, 903 N.Y.S.2d 302 (2010) (trial court did not err in summarily denying a Mapp motion that "alleged that the officer searched [defendant] on the basis of a search warrant that had been issued without probable cause" but did not present "factual allegations to support [the] claim that probable cause was lacking" and thus "failed to raise an issue of fact.") and People v. Mattocks, 12 N.Y.3d 326, 880 N.Y.S.2d 888 (2009) (trial court did not err in summarily denying a Mapp motion in this bent-MetroCard-forgery case where the prosecution's allegations made out probable cause to arrest (a "police officer averred that he had observed defendant swipe three people into the subway in exchange for money from the riders") and the defendant's suppression motion, although asserting that the defendant was "merely 'speaking with various neighborhood acquaintances,' . . . never challenged the assertion that he had been selling swipes") and People v. France, 12 N.Y.3d 790, 879 N.Y.S.2d 36 (2009) (trial court did not err in summarily denying a Mapp motion that failed to challenge the police officers' bases for the arrest and that could not claim lack of access to the requisite information since "the felony complaint and the voluntary disclosure form" provided defense counsel with "sufficient information . . . concerning the factual predicate for the arrest") and People v. McDowell, 30 A.D.3d 160, 815 N.Y.S.2d 570 (1st Dept. 2006) (trial court did not err in summarily denying Mapp/Dunaway motion which "failed to raise a factual dispute requiring a hearing" in that "[t]he criminal court complaint and voluntary disclosure form specified that defendant's arrest was based on a robbery that had taken place three days earlier" but suppression motion did nothing more than present "general denial of any criminal activity 'prior to' [defendant's] arrest" without "address[ing] the People's specific allegations" or "assert[ing] . . . any basis for suppression") and People v. Lopez, 5 N.Y.3d 753, 801 N.Y.S.2d 245 (2005) (trial court did not err in summarily denying Mapp/Dunaway motion because defendant's statement, which was included in VDF, "on its face shows probable cause for defendant's arrest, and defendant failed to controvert it in his motion papers") and In the Matter of Fatia I., 21 A.D.3d 961, 800 N.Y.S.2d 764 (2d Dept. 2005) (trial court did not err in summarily reversing Mapp motion that did not challenge police assertion that respondent was in possession of knife and that "alleged only, and in conclusory fashion, that the police had no probable cause to believe that she intended to use the knife unlawfully") and People v. Howell, 2 A.D.3d 358, 769 N.Y.S.2d 233 (1st Dept. 2003) (upholding summary denial of defendant's Mapp motion in an undercover drug sale case because the motion papers contained only "vague and generalized assertion[s]" – about the defendant's "innocuous behavior at the time of his arrest" and that he "was never previously observed engaging in any illegal or suspicious activity" – and neither "den[ie]d participation in the underlying drug transaction or allege[d] some other basis for suppression," and when "the People submitted an answering affirmation that set forth, in detail, the predicate for defendant's arrest, defendant did not reply") and In the Matter of Joel M., 237 A.D.2d 146, 654 N.Y.S.2d 753 (1st Dept. 1997) (upholding summary denial of Mapp/Dunaway motion which "failed to deny or to controvert" police officer's allegations that he observed Respondent repeatedly exchanging small objects for U.S. currency) and People v. Chavous, 204 A.D.2d 475, 611 N.Y.S.2d 903 (2d Dept. 1994), app. denied, 83

N.Y.2d 1002, 616 N.Y.S.2d 484 (1994) (affirming summary denial of suppression motion that alleged in conclusory fashion that “[t]he arresting officers did not observe the defendant commit any criminal act nor did they have any reasonably trustworthy information which supported the conclusion that the defendant had committed a criminal act,” thereby failing to take issue with “the People’s “contention that the defendant was arrested because he was sitting in a stolen vehicle and because he could not produce a driver’s license, the vehicle’s registration card, or the name of the vehicle’s owner”) and People v. Omaro, 201 A.D.2d 324, 607 N.Y.S.2d 44 (1st Dept. 1994) (affirming summary denial of Mapp motion that failed to take issue with People’s contention that “search [was justified] on an abandonment theory” by “plead[ing] facts supporting any expectation of privacy”).

A necessary corollary of Mendoza’s second prong is that the prosecution must disclose the facts upon which it intends to rely to justify the search or seizure, for without such a disclosure, the respondent is not in a position to argue for a hearing and the court is not in a position to apply the second prong of Mendoza to assess the sufficiency of the respondent’s motion. See People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant’s factual allegations, although brief, were sufficient to require a hearing “in light of the minimal information available to the defendant at the time of the motion” and in light of prosecution’s failure to set forth specific facts in its “largely conclusory” responding papers); People v. Rosario, 264 A.D.2d 369, 369, 693 N.Y.S.2d 152, 153 (1st Dept. 1999), lv. app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614 (2000) (defendant was entitled to Mapp hearing, given that defendant “alleged that he was not involved in any suspicious or criminal activity ... [and] that he had not engaged in any drug sales at any time that day and that he did not fit the description of anyone involved in a drug sale at that location” and “[t]he People’s opposition to a suppression hearing failed to allege what description the arresting officer received and whether defendant fit such description ... [and] [t]he People alleged no facts supporting the lawfulness of the defendant’s arrest”); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dept. 1994), app. denied, 84 N.Y.2d 873, 618 N.Y.S.2d 18 (1994) (notwithstanding vagueness of motion allegations that ““defendant Vasquez was placed under arrest without probable cause”” in that he ““was not engaged in any illegal activity at the time of his arrest,”” trial court erred in summarily denying Mapp/Dunaway motion because the “basis for the arrest was not self-evident and there had been absolutely no disclosure by the People as to the grounds upon which the arresting officers premised the seizure”; “where the claimed predicate for seizure is not self-evident, and the People fail to make even minimal disclosure with respect thereto, the only fair inference is that the legality of the seizure is, at the very least, questionable”).

(c) Third prong (information available to defendant)

The assessment of the sufficiency of the motion also must take into account “the information available to the defendant” at the time of the drafting of the motion. People v. Mendoza, 82 N.Y.2d at 428-29, 604 N.Y.S.2d at 928. If the “facts necessary to support suppression” are in the possession of the police and not reasonably available to the defendant, the court should excuse a motion’s lack of precision or sparseness of facts. Id. See also People v.

Bryant, 8 N.Y.3d 530, 838 N.Y.S.2d 7 (2007) (trial court erred in summarily denying a *Mapp/Dunaway* motion: “defendant’s lack of access to information precluded more specific factual allegations”; “[t]he People could not both refuse to disclose the [information] ... and insist that defendant’s averments in his pleadings were insufficient to obtain a *Mapp/Dunaway* hearing”); People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant’s factual allegations, although brief, were sufficient to require a hearing “in light of the minimal information available to the defendant at the time of the motion” and in light of prosecution’s failure to set forth specific facts in its “largely conclusory” responding papers); People v. Acosta, 66 A.D.3d 792, 887 N.Y.S.2d 187 (2d Dept. 2009) (trial court erred in summarily denying a *Mapp* motion that challenged a search and seizure by store security guards: although the search may have been a private search exempt from constitutional requirements, the motion alleged that the store security guards were “‘peace officers ... or persons acting as agents of the police,’” and this allegation sufficed to trigger a right to a suppression hearing on the issue, particularly because “a guard’s licensing status is not something a defendant could be expected to know and is, therefore, not something a defendant could be expected to allege with particularity”); People v. Mabeus, 47 A.D.3d 1073, 850 N.Y.S.2d 664 (3d Dept. 2008) (trial court erred in summarily denying a *Mapp* motion that, *inter alia*, challenged the reliability of a confidential informant (whose information was the basis for police tracking of the defendant’s vehicle with a GPS system), given that “defendant had limited access to information, particularly with respect to the confidential informant”); People v. Rivera, 42 A.D.3d 160, 836 N.Y.S.2d 148 (1st Dept. 2007) (trial court erred in summarily denying a *Mapp* motion: “[i]t is now firmly established that it is unreasonable to construe the Criminal Procedure Law as requiring precise factual averments from the defendant where the defendant does not have access to or awareness of the facts necessary to support suppression”); People v. McNair, 28 A.D.3d 800, 811 N.Y.S.2d 819 (3d Dept. 2006) (trial court erred in summarily denying *Dunaway* motion that was “somewhat vague due to the fact that defendant did not yet have access to the transcribed 911 call” which defense had requested in demand to produce and which prosecution had not yet produced by time that motion was due); People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76, 77 (1st Dept. 1999) (“While a defendant is required to raise a factual issue in order to obtain a suppression hearing (CPL 710.60(3)(b)), he need not prove his entire case in the motion papers. The adequacy of the factual allegations must be considered in the context of defendant’s case and his accessibility to information at the time of the motion.”); People v. Bennett, 240 A.D.2d 292, 659 N.Y.S.2d 260 (1st Dept. 1997) (defendant’s minimal *Mapp* motion, which merely denied that defendant engaged in a drug transaction with undercover officer, was sufficient to require hearing, “[g]iven the paucity of information that was available to the defendant at the time of the motion”); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dept. 1994), *app. denied*, 84 N.Y.2d 873, 618 N.Y.S.2d 18 (1994). *Cf.* People v. Long, 8 N.Y.3d 1014, 839 N.Y.S.2d 441 (2007) (trial court “properly denied defendant’s motion for a *Mapp/Dunaway* hearing in light of defendant’s failure to raise a factual dispute as to reasonable suspicion for her detention and subsequent arrest,” given that “defendant had ample access to relevant information regarding the factual predicate for her arrest, including access to the People’s ‘write-up’ of her conduct which the court read to her and her counsel at arraignment” and yet nonetheless “failed to specifically challenge the identified informant’s basis of knowledge in her suppression motion”).

Thus, for example, in Mendoza, the court excused the motion's lack of precision because "defendant's lack of access to information precluded more specific factual allegations." Id. at 433, 604 N.Y.S.2d at 931. On the central issue of whether the store security guard who arrested and searched the defendant was acting solely as a private citizen or as a peace officer (or under the direction of a peace officer), the "defendant could [not] be expected to know" the "guard's licensing status" or to "allege [it] with particularity." Id. at 434, 604 N.Y.S.2d at 931. Thus, a broadly framed (and possibly "speculative") allegation that the guard was "either a licensed peace officer or working under the supervision of a licensed police officer" was sufficient to necessitate a hearing notwithstanding the prosecutor's assertion that the guard was acting in a purely private capacity. Id. "The People's denial of defendant's allegation did nothing more than place in issue a fact to be resolved at the hearing." Id.

Even in situations in which the respondent does not have access to the facts central to the suppression claim, however, s/he must allege whatever facts are in his or her possession. Thus, for example, in People v. Jones, 95 N.Y.2d 721, 723 N.Y.S.2d 761 (2001), the Court of Appeals agreed that the prosecution's failure to disclose the identification radioed by the undercover officer to the arresting officer excused the defendant's failure to plead any facts about the description itself to support his claim of the vagueness of the description *but* the Court nonetheless found the motion to be insufficient because the defendant failed "to supply the motion court with ... relevant facts he did possess for the court's consideration on the suppression motion once the People disclosed the communicated description.... [I]t was obviously within his ability to provide a description of his own appearance at the time of the arrest.... Similarly with respect to his allegation that the radioed description was perhaps too generalized, and thus would not have excluded others at the scene, defendant should have submitted facts as to the presence and general description of such other persons in the vicinity at the time of the arrest." Id. at 729, 723 N.Y.S.2d at 767.

(3) Alleging Sufficient Facts to Establish Standing

"A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched." People v. Ramirez-Portoreal, 88 N.Y.2d 99, 108, 643 N.Y.S.2d 502, 506 (1996). See also Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).

Accordingly, in cases in which the respondent's standing to raise a search and seizure claim is in question, the Mapp motion must allege facts showing that the respondent had the privacy interest necessary to challenge the police conduct. See People v. Burton, 6 N.Y.3d 584, 587, 815 N.Y.S.2d 7, 10 (2006) ("There is no legal basis for suppression and, hence, no need for a hearing, unless the accused alleges facts that, if true, demonstrate standing to challenge the search or seizure"). Compare People v. Carter, 86 N.Y.2d 721, 723, 631 N.Y.S.2d 116, 117 (1995) (affirming summary denial of Mapp motion because "[d]efendant made no assertion of standing to challenge the search of the vehicle in his omnibus motion or thereafter, even though the People consistently contested defendant's standing throughout the proceedings") and People

v. Gomez, 67 N.Y.2d 843, 844, 501 N.Y.S.2d 650, 651 (1986) (affirming summary denial of motion challenging police seizure of property from defendant's apartment because the motion failed to allege "present possessory interest in the apartment" or other facts supporting "an expectation of privacy in the area searched") and People v. Browning, 253 A.D.2d 888, 678 N.Y.S.2d 332 (2d Dept. 1998) (upholding summary denial of *Mapp* motion because defendant failed to allege any expectation of privacy in crate on which he was seated (and which was searched) and, in any event, could not reasonably have claimed such an expectation in such a crate in a public area) with People v. Martin, 135 A.D.2d 355, 521 N.Y.S.2d 416 (1st Dept. 1987) (motion papers adequately established taxicab passenger's standing to challenge weapon seized from floor of cab) and People v. Madera, 125 A.D.2d 238, 509 N.Y.S.2d 36 (1st Dept. 1986) (motion papers adequately established automobile passenger's standing to challenge police stop of car) and with People v. Valentin, 27 Misc.3d 19, 898 N.Y.S.2d 755 (N.Y. Sup. Ct., App. Term, 2d, 11th & 13th Dist. Feb. 8, 2010) (prosecution waived challenge to defendant's standing by "orally consent[ing] to a *Mapp* hearing without the necessity of a written motion and "fail[ing] thereafter to raise said issue on any of the adjourned dates of the [suppression] hearing"). See also People v. Hunter, 17 N.Y.3d 725, 926 N.Y.S.2d 401 (2011) ("the People must timely object to a defendant's failure to prove standing in order to preserve that issue for appellate review": in order to "'bring the claim to the trial court's attention'" and alert defense counsel to "the need to develop a record for appeal," the "People are required to alert the suppression court if they believe that the defendant has failed to meet his burden to establish standing"); People v. Ingram, 18 N.Y.3d 948, 944 N.Y.S.2d 470 (2012) (in criminal cases, "CPL § 470.15(1) precludes the Appellate Division from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court," and, "[i]n an appeal from an Appellate Division affirmance, CPL § 470.35(1) grants [Court of Appeals] no broader review power than that possessed by the Appellate Division"); People v. Concepcion, 17 N.Y.3d 192, 929 N.Y.S.2d 541 (2011) (Appellate Division erred in affirming trial court's denial of suppression (which was based on inevitable discovery) on alternative legal basis on which trial judge had not ruled (consent to the search): "CPL 470.15(1) bars [Appellate Division] from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court, and CPL 470.35(1) grants [Court of Appeals] no broader review powers in this regard").

Until the Court of Appeals's decision in 2006 in People v. Burton, 6 N.Y.3d 584, 815 N.Y.S.2d 7 (2006), some lower courts required defendants in criminal cases and juvenile respondents in delinquency proceedings to expressly assert a possessory interest in contraband in order to acquire standing (thereby making a concession that could prove fatal at trial) and would not permit the accused to obtain standing by relying on police reports claiming that the contraband was on the accused's person or that s/he discarded the item (which could provide the basis for a claim that the act of alleged "abandonment" was in response to an unlawful police action or statement). In Burton, the Court of Appeals definitively rejected this view and held that the accused is "not required to personally admit possession of the contraband in order to comply with the factual pleading requirement of CPL 710.60" and can "meet his evidentiary burden by supplementing the averments made in his motion to dismiss with the police officer's statement that the drugs were recovered from defendant's person." *Id.* at 589, 815 N.Y.S.2d at 11. See

also id. at 586, 815 N.Y.S.2d at 9 (“the statements in defendant’s motion papers that he was stopped and searched by the police without legal justification, and that the police claimed to have discovered drugs on defendant during the search, were sufficient to satisfy the factual allegation requirement of CPL 710.60(1) and thereby establish standing to seek suppression”); *id.* at 588, 815 N.Y.S.2d at 10 (prosecution’s argument that “because defendant did not specifically admit or acknowledge that he possessed the drugs, there were insufficient ‘sworn allegations of fact’ to assert standing to challenge the legality of the police conduct and summary denial of his motion was therefore permitted under CPL 710.60(3)(b)” is “inconsistent with the language of CPL 710.60 and our precedent”); *id.* at 589 n.2, 815 N.Y.S.2d at 11 n.2 (disapproving People v. Brown, 256 A.D.2d 42, 682 N.Y.S.2d 32 (1st Dept. 1998), lv. denied, 93 N.Y.2d 871 (1999), “[t]o the extent ... *Brown* ... indicates that, notwithstanding the People’s factual allegations, a defendant charged with possessing contraband on his person must admit that he did, in fact, possess the seized item in order to have standing to seek suppression”). *Accord* People v. Samuel, 42 A.D.3d 551, 839 N.Y.S.2d 806 (2d Dept. 2007) (trial judge erred in summarily denying a *Mapp* motion for lack of standing: notwithstanding defendant’s having claimed that the gun was not his and that it was “recovered in a public place,” the defendant was entitled to rely on an arresting officer’s Grand Jury testimony that “the defendant had a gun in his pocket and threw it away after the officer approached him in the street”); People v. Johnson, 42 A.D.3d 341, 839 N.Y.S.2d 741 (1st Dept. 2008) (trial judge erred in summarily denying the *Mapp* motion as a result of the defendant’s grand jury testimony denying that he had possession of the gun at the time of his arrest: under *Burton*, the defendant was entitled to rely on the police claim that the gun was seized from his waistband area).

In cases in which standing is an issue, counsel should not only allege standing in the suppression motion but should also elicit testimony at the *Mapp* hearing to establish that the respondent has standing. *See* People v. Rodriguez, 69 N.Y.2d 159, 163, 513 N.Y.S.2d 75, 78 (1987); People v. Gonzalez, 68 N.Y.2d 950, 951, 510 N.Y.S.2d 86, 87 (1986).

The test of standing is a two-pronged inquiry that examines whether

defendant has manifested an expectation of privacy that society recognizes as reasonable. Thus, the test has two components. The first is a subjective component --did *defendant* exhibit an expectation of privacy in the place or item searched, that is, did he seek to preserve something as private. The second component is objective -- does society generally recognize defendant’s expectation of privacy as *reasonable*, that is, is his expectation of privacy justifiable under the circumstances.

People v. Ramirez-Portoreal, 88 N.Y.2d at 108, 643 N.Y.S.2d at 507 (citations omitted). *Accord* People v. Burton, 6 N.Y.3d 584, 587-88, 815 N.Y.S.2d 7, 10 (2006) (“Standing exists where a defendant was aggrieved by a search of a place or object in which he or she had a legitimate expectation of privacy This burden is satisfied if the accused subjectively manifested an expectation of privacy with respect to the location or item searched that society recognizes to be

objectively reasonable under the circumstances”).

The courts have held that criminal defendants and juvenile respondents have standing to challenge a search or seizure in the following situations:

- *Searches of the person*: An individual always has standing to contest a search of his or her person. See, e.g., People v. Burton, 6 N.Y.3d 584, 588, 815 N.Y.S.2d 7, 10 (2006) (“individuals possess a legitimate expectation of privacy with regard to their persons”; “defendant undeniably had ‘a reasonable expectation of freedom from governmental intrusion’ ... in the place searched by the police – the pocket of his pants” and “also subjectively manifested such an expectation since anything concealed in the pocket was in his sole possession and hidden from public view”); People v. Hibbler, 111 A.D.2d 67, 489 N.Y.S.2d 191 (1st Dept.), appeal denied, 65 N.Y.2d 981 (1985). See also People v. Jose, 239 A.D.2d 172, 173, 657 N.Y.S.2d 631, 632 (1st Dept. 1997).
- *Searches of premises*: The courts have recognized that an individual clearly has standing to challenge:
 - A search of his or her own home. See, e.g., United States v. Karo, 468 U.S. 705, 714 (1984); People v. Mercado, 68 N.Y.2d 874, 876, 508 N.Y.S.2d 419, 421 (1986), cert. denied, 479 U.S. 1095 (1987).
 - A search of a residence in which s/he regularly stays. See, e.g., In the Matter of George R., 226 A.D.2d 645, 641 N.Y.S.2d 376 (2d Dept. 1996) (respondent had standing to contest the search of a room in his grandmother’s apartment, even though he did not live there, because he “was a regular overnight guest at her apartment and .. both slept in and kept possessions in the room where the weapon was recovered”).
 - A friend’s home in which the respondent was “[s]taying overnight” as a “houseguest.” See Minnesota v. Olsen, 495 U.S. 91 (1990); People v. Chandler, 153 Misc.2d 332, 581 N.Y.S.2d 530 (Sup. Ct., Queens Co. 1991). Cf. People v. Wesley, 73 N.Y.2d 351, 353-54, 540 N.Y.S.2d 757, 758, 764 (1989) (defendant, who tried to refute his connection to drugs found in his girlfriend’s house by testifying that he “never stayed at [the] house, that he kept no clothes or other personal property there except for a few stored papers ... [and] was merely a visitor, albeit a daily one,” is found to lack standing to challenge the search; “[h]ad he asserted a similar interest in the premises to that of his girlfriend, the result might well have been otherwise”); People v. Hornedo, 303 A.D.2d 602, 759 N.Y.S.2d 84 (2d Dept. 2003) (defendant failed to establish a reasonable expectation of privacy in his mother’s apartment, given the extensive and compelling

evidence that defendant lived elsewhere with his girlfriend and given the trial court's finding that the defendant's testimony about living in his mother's apartment could not be credited). But cf. People v. Hernandez, 218 A.D.2d 167, 639 N.Y.S.2d 423 (2d Dept. 1996) (defendant, who had escaped from work-release program, could claim no objectively reasonable expectation of privacy in brother's apartment, where defendant was being harbored as fugitive).

- Arguably, virtually every “social guest” who has been invited into a dwelling by the owner or a resident has standing to challenge a search of that dwelling if the guest was present at the time of the search. See Minnesota v. Carter, 525 U.S. 83, 109 n.2 (1998) (Ginsburg, J., dissenting) (emphasizing that the inescapable conclusion that emerges by comparing the majority, concurring, and dissenting opinions in the case is “that five Members of the Court would place under the Fourth Amendment’s shield, at least, `almost all social guests”). Defendants who seek to claim standing as mere “social guests” will have to expressly invoke the Supreme Court’s 1998 decision in Carter, because there is prior New York State caselaw that takes a much more restrictive view of social guests’ standing rights. See, e.g., People v. Ortiz, 83 N.Y.2d 840, 611 N.Y.S.2d 500 (1994) (defendant lacked standing to challenge warrantless entry of girlfriend’s apartment because he was merely “a casual visitor” with, at best, “relatively tenuous ties to the apartment”); People v. Christian, 248 A.D.2d 960, 670 N.Y.S.2d 957 (4th Dept. 1998), app. denied, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998) (defendant lacked standing to challenge search of apartment because he was merely “a recent and occasional visitor”); People v. Mercica, 170 A.D.2d 181, 565 N.Y.S.2d 85 (1st Dept. 1991), app. denied, 77 N.Y.2d 964, 570 N.Y.S.2d 498 (1991) (defendant lacked standing because “he admitted to residing elsewhere and was merely an invitee in the apartment”).
- A search of a public area in which individuals can reasonably expect privacy, such as a public restroom stall (People v. Mercado, 68 N.Y.2d 874, 876, 508 N.Y.S.2d 419, 421 (1986), cert. denied, 479 U.S. 1095 (1987)).
- A search of any premises from which contraband was seized if the respondent is charged with possession pursuant to one of the statutory presumptions of constructive possession (P.L. §§ 220.25, 265.15). See People v. Wesley, 73 N.Y.2d 351, 361, 540 N.Y.S.2d 757, 763 (1989).

- *Stops and searches of automobiles:*
 - *Stops:* When the police stop a moving automobile (whether a private vehicle or a taxicab), the legality of the stop can be challenged by not only the driver but also any passenger who was riding in the vehicle. See Brendlin v. California, 127 S. Ct. 2400, 2403, 2407 (2007) (“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.”; “A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver”); People v. Millan, 69 N.Y.2d 514, 520 & n.6, 508 N.E.2d 903, 906 & n.6, 516 N.Y.S.2d 168, 171 & n.6 (1987).
 - *Searches:* An individual can challenge a police search of an automobile if:
 - The automobile belongs to the respondent’s family or one or his or her friends and the respondent is driving it with the owner’s permission. See, e.g., People v. Lewis, 217 A.D.2d 591, 629 N.Y.S.2d 455 (2d Dept. 1995) (defendant, who was driving his uncle’s car with permission, had standing to challenge police officers’ search of locked briefcase which was lying on the back seat and which, according to the defendant, belonged to his uncle); People v. Gonzalez, 115 A.D.2d 73, 74, 499 N.Y.S.2d 400, 403 (1st Dept. 1986), aff’d, 68 N.Y.2d 950, 510 N.Y.S.2d 86 (1986). See also People v. Bulvard, 213 A.D.2d 263, 624 N.Y.S.2d 23 (1st Dept. 1995) (defendant, who was seated by himself in passenger seat of double-parked car and had possession of car keys, had requisite privacy interest in the car to challenge its seizure and search of trunk).
 - The respondent is charged with constructive possession of contraband found in the car pursuant to a statutory presumption. See People v. Burton, 6 N.Y.3d 584, 591 n.3, 815 N.Y.S.2d 7, 12 n.3 (2006) (“[i]n cases where a defendant is charged with possession of a gun based on the statutory presumption found in Penal Law section 265.15(3), which attributes possession of a gun to the passengers in an automobile simply by virtue of their presence in the car where the gun is found,’ ... [w]e have held that a defendant in such a case ‘has a right to challenge the legality of the search regardless of whether he or she is otherwise able to assert a cognizable Fourth Amendment interest’”); People v. Millan, 69 N.Y.2d at 519, 516 N.Y.S.2d at 170. See also, e.g., In the Matter of Terrell W., 301 A.D.2d 536, 753 N.Y.S.2d 529 (2d

Dept. 2003) (respondent had standing to challenge seizure and search of knapsack found in parked car in which he had been seated – which resulted in the officers’ recovery of a handgun in the knapsack – because “the weapon possession charges were based solely on the statutory presumption which attributes possession of a handgun found in a car to the occupants of the car”); People v. Hwi Jin An, 253 A.D.2d 657, 679 N.Y.S.2d 94 (1st Dept. 1998), lv. app. denied, 92 N.Y.2d 949, 681 N.Y.S.2d 480 (1998). Cf. People v. Wesley, 73 N.Y.2d at 361, 540 N.Y.S.2d at 763.

- The respondent was a lawful occupant of the vehicle at the time of the search and the seizure of the contraband resulted from a police officer’s search of an area of the vehicle in which the respondent had a “legitimate expectation of privacy.” See Rakas v. Illinois, 439 U.S. 128, 150 n.17 (1978). The Court of Appeals has reserved the question whether “a passenger in a [taxi]cab would have ... a right of privacy in the passenger compartment.” People v. Millan, 69 N.Y.2d at 520 n.5, 516 N.Y.S.2d at 171 n.5. Counsel can argue that the passenger’s temporary contractual occupancy of the passenger compartment and his or her right to exclude others from the compartment during that occupancy generate the requisite privacy interest. See Rios v. United States, 364 U.S. 253, 262 n.6 (1960) (implicitly recognizing that an “occupied taxicab” is comparable to an occupied “hotel room,” and commenting that “[a] passenger’s ... let[ting] a package drop to the floor of the taxicab in which he is riding can hardly be said to have ‘abandoned’ it”).
- *Search or seizure of an object that belonged to the respondent but was not on his or her person at the time:* “[A] possessory interest in the goods seized” does not necessarily confer standing to challenge its search or seizure. People v. Ramirez-Portoreal, 88 N.Y.2d 99, 108-09, 643 N.Y.S.2d 502, 507-08 (1996). The accused must show that s/he “had a legitimate expectation of privacy in the place or item that was searched.” Id. at 109, 643 N.Y.S.2d at 508. In the following situations, the courts found that an individual had standing to challenge a search or seizure of an object that belonged to him or her even though it was recovered from a public place:
 - An individual who boards a bus and places a closed bag or piece of luggage in the luggage rack has the requisite privacy interest to contest its search or seizure even if the individual “seated himself at a distance from the bag.” People v. Ramirez-Portoreal, 88 N.Y.2d at 111-12, 643 N.Y.S.2d at 509.

- An individual who places a sealed box or package into the mail or a private delivery service has standing to challenge a governmental interception and search of the item. See United States v. Jacobsen, 466 U.S. 109, 120 & nn.17-18 (1984).

In cases in which the prosecution claims that the respondent abandoned an object by discarding it in a public place, the respondent's satisfactory showing of standing casts upon the prosecution the "burden to demonstrate that [respondent's] action in discarding the property searched, if that is the fact, was a voluntary and intentional act constituting a waiver of the legitimate expectation of privacy." People v. Ramirez-Portoreal, 88 N.Y.2d at 108, 643 N.Y.S.2d at 507.

IV. Return on the Motion

A. Remedies to Seek if the Prosecutor Fails to Respond to the Motion

If the prosecutor fails to respond to the motion, counsel can request that the court treat the motion as conceded and grant the relief requested in the motion. See People v. Gruden, 42 N.Y.2d 214, 397 N.Y.S.2d 704 (1977) (construing the C.P.L. as authorizing the judge to summarily grant a speedy trial motion when the prosecution fails to submit a response "show[ing] that there is a factual dispute which must be resolved at a hearing" (*id.* at 217, 397 N.Y.S.2d at 706) and indicating that "[t]he same standard applies [to] ... motions to suppress ... [and] nearly every pretrial and posttrial motion made in a criminal action" (*id.* at 216, 397 N.Y.S.2d at 705)); People v. Thurmond, 242 A.D.2d 310, 661 N.Y.S.2d 48 (2d Dept. 1997), app. denied, 90 N.Y.2d 1014, 666 N.Y.S.2d 109 (1997) (trial judge properly "deemed the factual allegations made by the defendant in his motion to be true" on the ground that "the People had twice failed to honor the trial court's directives to furnish an answer to the defendant's omnibus motion"); People v. Alston, 126 A.D.2d 731, 731, 511 N.Y.S.2d 133, 134 (2d Dept. 1987), app. denied, 69 N.Y.2d 876, 515 N.Y.S.2d 1093 (1987) (since "[t]he defendant's moving papers contained sworn allegations of all the facts essential to support ... her motion ..., the People conceded these allegations of fact by totally failing to respond to them ... [and] [t]hus, the court was required to summarily grant ... the defendant's motion"); People v. Gonzalez, 116 A.D.2d 735, 736, 497 N.Y.S.2d 778, 779 (2d Dept. 1986) ("By failing to contest the allegations made by defendant in his motion, the People conceded [the factual allegations] ... and the motion should have been summarily granted"). See also People v. Ciaccio, 47 N.Y.2d 431, 418 N.Y.S.2d 371 (1979) (prosecution's failure to respond to post-trial motion to set aside a verdict was an implicit concession justifying summary granting of the motion: "[t]he People did not dispute any of the[] facts [in the motion], and although they have not expressly conceded them, they have impliedly done so by failing even to allege their untruthfulness.... Under these circumstances we hold that it is proper for a court to grant the defendant's motion without the necessity of holding a hearing."); People v. Jordan, 149 Misc.2d 332, 333 & n.1, 564 N.Y.S.2d 658, 659 & n.1 (Sup. Ct., N.Y. Co. 1990) (because prosecution failed to respond to and contest allegations in defendant's motion to dismiss charging paper on grounds of excessive delay, "the facts asserted by the defendant are

deemed conceded” and “defendant’s motion is decided on default”). Cf. In the Matter of Tieres O., 307 A.D.2d 1037, 763 N.Y.S.2d 768 (2d Dept. 2003), lv. app. denied, 1 N.Y.3d 502 (2003) (trial court’s denial of attorney for child’s request for summary granting of suppression motion is upheld on appeal because “the Presentment Agency’s answering affidavit sufficiently refuted the allegations in [the] motion to suppress”). But cf. People v. Weaver, 49 N.Y.2d 1012, 1013-14, 429 N.Y.S.2d 399, 400 (1980) (treating the remedy of summary granting of the motion as limited to those cases in which the prosecution wholly fails to controvert the allegations in the motion, and holding that the prosecution’s bare-bones written response supplemented by oral allegations were sufficient to preclude summary granting of the motion); People v. Lomax, 50 N.Y.2d 351, 357-58, 428 N.Y.S.2d 937, 939-40 (1980) (prosecution’s failure to controvert motion does not mandate summary granting of motion if “the allegations in [the] moving papers did not spell out a legal basis for relief”); People v. Dean, 45 N.Y.2d 651, 656, 412 N.Y.S.2d 353, 356 (1978) (prosecution’s oral contesting of the motion is sufficient, at least where the defense motion failed “to show any ground constituting legal basis for the motion”); People v. Ventura-Almonte, 78 A.D.3d 524, 911 N.Y.S.2d 53 (1st Dept. 2010) (prosecution’s response ““submitt[ing] that such evidence was lawfully obtained and den[ying] all allegations to the contrary”” was “sufficient to meet their burden of ‘refus[ing] to concede the truth of facts alleged by defendant’” and thus defense was not entitled to summary granting of suppression motion).

The remedy of summary granting of the motion is available even when the prosecution orally consents to holding an evidentiary hearing on the motion, since such a prosecutorial response does not suffice to controvert the allegations in the defense motion. See People v. Gruden, 42 N.Y.2d at 215, 397 N.Y.S.2d at 705 (treating the prosecution’s “consent[] to a hearing” as a failure to “dispute the facts alleged in the defendants’ motion papers”); In the Matter of T.J.O., 13 Misc.2d 401, 821 N.Y.S.2d 830 (Family Ct., Rockland Co. 2006) (Huntley motion is summarily granted on the pleadings because the Presentment Agency responded to the motion by “stat[ing] merely that they consent to a hearing,” which, “[u]nder the case law [discussed at length in the opinion] . . . , is insufficient to defeat the motion and require a hearing”). Cf. In the Matter of Mark A., 250 A.D.2d 765, 765, 673 N.Y.S.2d 177, 178 (2d Dept. 1998) (“The [Presentment Agency’s] contention that the hearing court erred in entertaining the respondent’s oral motion is without merit, because, by failing to object to the hearing, the petitioner waived its right to a written motion.”).

Since most judges will be reluctant to employ the remedy of summary granting of the motion and will usually give the prosecutor at least one more chance to answer the motion, counsel must make a strategic judgment as to whether to even seek the remedy. If the prosecution has offered to orally consent to a hearing, counsel must conduct a cost-benefit analysis that weighs the chances of the judge’s granting the motion summarily against the risk that if the judge gives the prosecutor another chance to respond and if the prosecutor then responds by opposing the convening of a hearing, the judge will thereupon summarily deny the motion without a hearing. The critical factor in this cost-benefit analysis is the track record of the judge presiding over the case: If the judge has previously summarily granted such motions and if the motion is a strong one that will surely generate a hearing even in the face of

prosecutorial opposition, counsel should forge ahead with a request for summary granting of the motion. If, on the other hand, the judge has previously shown a reluctance to impose such a sanction, and there is any risk of losing the opportunity for a hearing, counsel should forego asking for the sanction and simply accept the prosecutor's consent to the hearing. Once the prosecutor consents to the hearing, the judge cannot deny the respondent a hearing even though the motion is deficient in that it fails to allege law or facts adequately; the prosecutor's consent to the convening of a hearing "waive[s] compliance with the formal requirements of the statute." People v. Martinez, 111 A.D.2d 30, 31, 488 N.Y.S.2d 706, 707 (1st Dept. 1985).

Counsel need not engage in such a cost-benefit analysis if the prosecution is unwilling to consent to a hearing. In such cases, there are no adverse consequences that could result from counsel's seeking summary granting of the motion, and counsel therefore ordinarily should seek that remedy.

B. Arguing for a Hearing

Generally, the prosecution opposes a hearing on either of two grounds: that the suppression motion's legal or factual bases are insufficient; or that the prosecutor's conflicting version of the facts is sufficient to justify summary denial of the motion.

Parts III(B)-(D) supra discuss the standards for legal and factual sufficiency of Huntley, Wade, Mapp, and Dunaway motions and provide the arguments for addressing the first of these situations.

In situations in which prosecutors assert that their conflicting version of the facts requires summary denial of the motion, defense counsel should respond by pointing out that the conflict between the defense's and prosecution's versions of the facts actually demonstrates the need for a hearing since such a factual dispute can only be resolved through a hearing. See, e.g., People v. Mosley, 136 A.D.2d 500, 523 N.Y.S.2d 820 (1st Dept. 1988) (trial court erred in summarily denying Wade motion on the basis of the prosecutor's representation that the identification was a "confirmatory identification" by a witness who knew the accused; since defendant claimed that he did not know the witness, there was a factual dispute requiring a hearing); People v. Soriano, 134 A.D.2d 186, 520 N.Y.S.2d 774 (1st Dept. 1987) (where Mapp motion alleged that police had seized challenged property from the defendant, and prosecutor responded by claiming that the property had actually been seized from a building vestibule where the defendant had no privacy expectation, there was a factual dispute which required a hearing and trial court could not summarily deny the motion); People v. Ramos, 130 A.D.2d 439, 440-41, 515 N.Y.S.2d 472, 473 (1st Dept. 1987) (trial court erred in summarily denying Mapp motion on the basis of prosecutor's facts supporting the police action in stopping the defendant; dispute between defense claim of an unjustified Terry stop and prosecutor's facts "create[d] a factual issue, which required a hearing"); People v. Patterson, 129 A.D.2d 527, 528, 514 N.Y.S.2d 378, 379 (1st Dept. 1987) (where Mapp motion claimed that the police had unlawfully stopped the car in which defendant was a passenger, and prosecution asserted that there had been no stop and that

the vehicle actually was stationary, the prosecution's allegations "simply created a factual dispute which could only be resolved at a hearing").

Counsel also can rely on deficiencies in the prosecutor's written response to the motion in asserting a right to a hearing. If "[t]he prosecutor's response to the motion was most conclusory, consisting of a general denial of the ... [respondent's] factual allegations [with] ... no basis ... offered for summary denial of the motion to suppress ..., a hearing should [be] ... held." People v. Martinez, 111 A.D.2d 30, 31, 488 N.Y.S.2d 706, 707 (1st Dept. 1985). If the prosecutor's written response challenges only some portions of the motion, the prosecution has waived any technical defects in the unchallenged portions. See People v. Martin, 135 A.D.2d 355, 521 N.Y.S.2d 416 (1st Dept. 1987).

V. Procedural Aspects of the Suppression Hearing

A. Defense Response if Prosecutor Is Not Ready to Proceed at the Hearing

If, on the day of the suppression hearing, the prosecution is not ready to proceed because a witness failed to appear, counsel should request that the judge declare the motion conceded and summarily grant the relief requested in the motion. The caselaw makes clear that if the prosecutor is unable to adequately show due diligence and good faith in ensuring the witness's presence, the proper remedy is for the court to treat the motion as conceded. See, e.g., People v. Goggans, 123 A.D.2d 643, 506 N.Y.S.2d 908 (2d Dept. 1986), app. dismissed, 69 N.Y.2d 1000, 517 N.Y.S.2d 1032 (1987) (trial court acted properly in treating suppression motions as conceded and summarily granting the motions "on the ground that the People's witnesses did not appear in court on dates scheduled for pretrial hearings ... [and] [t]he People failed to demonstrate that they had exercised 'some diligence and good faith' in endeavoring to have the witnesses in court" (id. at 643, 506 N.Y.S.2d at 909); it was not sufficient for prosecutor to "represent[] that one [unavailable police officer] was 'testifying in federal court' without indicating in what case he was appearing or when he might be available" or to state that "another [officer] was 'out due to emergency leave on a family matter' without substantiating this in any way" or to state "that the other officer was 'on vacation'" (id.)); cf. People v. Brown, 78 A.D.2d 861, 861, 432 N.Y.S.2d 630, 631 (2d Dept. 1980) (trial court erred in summarily granting motion on the basis of the unavailability of a prosecution witness because "the prosecutor demonstrated both good faith and exemplary diligence in attempting to secure the witness").

Judges usually will be disinclined to summarily grant a suppression motion on the first hearing date at which the prosecutor is not ready to proceed. However, it is still worth making the request on the first hearing date since it makes the best record for a subsequent motion if the prosecution is again unprepared. Moreover, moving for summary granting of the motion on the first occasion may lead the judge to mark the next hearing date as "final" against the prosecution.

B. Procedural Matters To Raise At the Commencement of the Hearing

(1) Right to Rosario Material

F.C.A. § 331.4(3)(a) makes clear that Rosario applies to suppression hearings. This provision requires that the prosecution turn over to respondent's counsel "any written or recorded statement, including any testimony before a grand jury, made by ... [a] witness [whom the prosecution calls at the suppression hearing] ... which relates to the subject matter of the witness's testimony."

Unlike the Rosario requirements for a Family Court trial, this provision does not necessitate disclosure at the commencement of the suppression hearing; rather, the prosecution can turn over the material "at the conclusion of the direct examination of each of its witnesses." F.C.A. § 331.4(3). Nonetheless, counsel should ask the prosecutor at the commencement of the hearing to turn over all of the material immediately in order to avoid delay during the hearing. Cf. People v. Sorbo, 170 Misc.2d 390, 649 N.Y.S.2d 318 (Sup. Ct., N.Y. Co. 1996) (ordering prosecution to provide pretrial disclosure of statements that defendant made to private party because "[d]elayed disclosure creates a substantial risk of unnecessary continuances and adjournments [and] [t]he People have advanced no policy arguments against disclosure"). If the prosecutor refuses, and if the judge later resists counsel's mid-hearing attempt to take the time to read the Rosario material carefully, counsel can inform the judge that the delay is attributable to the prosecutor since s/he refused to cooperate with counsel's attempt to avoid such a mid-hearing delay.

The scope of Rosario disclosure at a suppression hearing may be narrower than disclosure at trial since the only statements that need to be turned over are those "which relate[] to the subject matter of the witness's testimony" at the suppression hearing. F.C.A. § 331.4(3)(a). See People v. Dennis, N.Y.L.J., 11/1/99, at 23, col. 5 (1st Dept.) (memo book notes, which Detective used to refresh his recollection during Wade hearing testimony, were Rosario material that defense was entitled to receive; "the notes obviously related to the subject matter of the officer's testimony [because] ... [o]therwise, there would have been no need for the officer to refer to the notes to refresh his recollection of the identification procedures").

If the prosecutor informs the court that there is Rosario material relating to a witness but that it need not be disclosed because it does not relate to the subject matter of the hearing, counsel should ask that the court review the material in camera to independently determine the need for disclosure. Cf. In the Matter of George V., 100 A.D.2d 594, 595, 473 N.Y.S.2d 541, 542 (2d Dept. 1984) (when respondent's counsel asserts Rosario rights at trial and Presentment Agency refuses to turn over certain material, "[t]he court should inspect the [material] ... in camera and relinquish to [respondent's counsel] any material found not to be cumulative or irrelevant"); see also In the Matter of Rodney B., 69 N.Y.2d 687, 689, 512 N.Y.S.2d 17, 19 (1986).

If any material is exempted from disclosure and counsel thereafter obtains that material at trial, counsel should carefully review it with an eye to requesting re-opening of the suppression hearing on the ground that the material should have been disclosed and that counsel's cross-examination at the hearing was therefore improperly curtailed. See People v. Banch, 80 N.Y.2d 610, 617-19, 593 N.Y.S.2d 491, 495-96 (1992); People v. Ortega, 241 A.D.2d 369, 659 N.Y.S.2d 883 (1st Dept. 1997) (judge's refusal to re-open Wade "independent source" hearing when prosecutor turned over Rosario material after completion of hearing resulted in what was functionally a "complete deprivation" of defense's opportunity to use *Rosario* material and required reversal of conviction). See also Part VII(B) *infra*.

When cross-examining prosecution witnesses at the suppression hearing, counsel should question each witness about the statements that s/he gave to the police or other law enforcement officials, so that counsel can determine whether any of these statements were withheld.

F.C.A. § 331.4(3)(a) imposes upon defense counsel the same obligation of providing the prosecution with Rosario statements of defense witnesses at the conclusion of each witness's direct examination. Of course, this requirement, like the one applicable to the prosecution, requires disclosure only of statements "which relate[] to the subject matter of the witness's testimony." At a suppression hearing, as at trial, the defense is not obliged to disclose statements made by the respondent. See F.C.A. § 331.4(3)(a).

(2) Waiver of the Respondent's Presence at a *Wade* Hearing

In a Wade hearing, it is crucial that the respondent waive his or her presence during the testimony of the complainant and any eyewitness(es). As the court observed in People v. Huggler, 50 A.D.2d 471, 474, 378 N.Y.S.2d 493, 497 (3d Dept. 1976),

The purpose of such a hearing is to determine whether the identification testimony which the People plan to introduce is based upon an illegal confrontation or whether it is based upon a proper and independent source.... As pointed out by defendant, the Wade hearing itself may be highly suggestive and the presence of the defendant, easily recognizable in the courtroom, may serve to buttress a prior show-up or lineup. By the time of the trial, the witness may very well have picked out the defendant on not one, but two highly suggestive occasions.

These considerations militate for a waiver not only at a Wade hearing but also at any type of suppression hearing at which there will be testimony by a witness who will later identify the respondent at trial (except where the witness and respondent are well-known to each other and identification is not an issue).

The caselaw makes clear that the respondent has an absolute right to waive his or her presence at a Wade hearing (see, e.g., People v. Hubener, 133 A.D.2d 233, 518 N.Y.S.2d 849 (2d Dept. 1987); People v. Townsend, 129 A.D.2d 657, 514 N.Y.S.2d 129 (2d Dept. 1987), *app.*

denied, 70 N.Y.2d 718 (1987); People v. Huggler, 50 A.D.2d at 473-74, 378 N.Y.S.2d at 496-97) or any other type of pretrial hearing (see, e.g., People v. Lyde, 104 A.D.2d 957, 480 N.Y.S.2d 734 (2d Dept. 1984); People v. James, 100 A.D.2d 552, 473 N.Y.S.2d 252 (2d Dept. 1984); In the Matter of Elijah W., 13 Misc.3d 382, 822 N.Y.S.2d 412 (Fam. Ct., Bronx Co. 2006)). Moreover, the respondent may assert that waiver with respect to specific portions of the hearing (such as the prosecution witnesses' testimony) and attend the remainder of the hearing. See People v. Hubener, 133 A.D.2d at 234, 518 N.Y.S.2d at 850 ("it was error for the court to deny the defendant's request to be present for the police witness's testimony and the defendant's further request to waive his presence during the identifying witnesses' testimony at the Wade hearing. A criminal defendant has a constitutional and statutory right to be present or to waive his presence during pretrial suppression hearings Moreover, the defendant has a right to be present during those parts of a pretrial hearing that he chooses and may waive his right to be present at other times.").

Prior to the suppression hearing, counsel should advise the client of the need for absenting himself or herself from the hearing to avoid a suggestive confrontation with the complainant and/or eyewitness(es). Counsel should explain to the client that s/he has an absolute right to attend the hearing, and then explain the strategic considerations which militate for the respondent's waiving that right. Counsel should tell the client that counsel will certainly arrange for the client to be present during those parts of the proceeding that would not involve a face-to-face encounter with the complainant and eyewitness(es) -- i.e., the defense case and the concluding arguments on the motion. Counsel also should explain to the client that his or her parent can be present throughout the hearing, so that s/he can join with counsel in recounting to the client afterwards the substance of the prosecution witnesses' testimony. After thus ensuring that the respondent understands his or her right to be present and the effects of a waiver, counsel should determine whether the client agrees to the waiver.

Assuming that the client does agree, counsel should inform the court of that waiver before the suppression hearing commences and before the Presentment Agency brings in the first prosecutorial witness. Some judges may insist that the respondent make an express waiver in court, and/or that the parent join in the waiver. If the respondent wishes to waive his or her presence only during the complainant's and/or eyewitnesses' testimony, counsel should inform the court of that fact and explain that precautions will need to be taken to ensure that the respondent does not encounter the prosecution witnesses in court or in the hallways of the courthouse.

C. Hearsay Issues: When Prosecutorial Hearsay Evidence Can Be Challenged At a Suppression Hearing

C.P.L. § 710.60(4) specifically authorizes introduction of hearsay evidence at a suppression hearing. Nonetheless, as the next two subsections show, defense counsel may be able to object to hearsay in certain limited circumstances. Moreover, as shown in subsection V(C)(3), defense counsel may be able to argue that the prosecution's hearsay-based presentation

at the suppression hearing was so conclusory and/or so lacking in essential details that the prosecution failed to satisfy its burden of production or proof.

(1) Challenging Hearsay Evidence by Showing that the Out-of-court Declarant is Biased or Lacked Personal Knowledge

A hearsay objection may be made at a suppression hearing if counsel can make a particularized showing that the out-of-court declarant is biased or lacked personal knowledge of the information contained in the statement.

A respondent's right to confrontation under the federal and state constitutions requires that a hearsay statement be excluded if the statement does not bear adequate "indicia of reliability." Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); see also Kentucky v. Stincer, 482 U.S. 730, 737-38 (1987); Lee v. Illinois, 476 U.S. 530, 542-45 (1986). Even though the C.P.L. generally authorizes the use of hearsay at suppression hearings, a particular hearsay statement may be so unreliable that its exclusion is mandated by the paramount constitutional right to confrontation. Cf. Barber v. Page, 390 U.S. 719 (1968) (notwithstanding that the challenged statement was admissible under a standard hearsay exception, its introduction violated the Confrontation Clause). Accordingly, in a suppression hearing, if counsel can show that the out-of-court declarant's bias or lack of knowledge renders the hearsay statement unreliable, it must be excluded. See, e.g., United States v. Matlock, 415 U.S. 164, 176-77 (1974) (in holding that the hearsay statement at issue could be introduced at a suppression hearing, the Court emphasizes that the out-of-court declarant "harbored no hostility or bias against respondent that might call her statements into question" and that the hearsay statements "were also corroborated by other evidence received at the suppression hearing" and bore "indicia of reliability"). The need for exclusion is particularly great when the prosecution relies on a hearsay statement by an out-of-court declarant whom the prosecution will not call as a witness at the hearing and who therefore will not be subject to cross-examination. See *id.* at 177 (since the out-of-court declarant testified at the suppression hearing and "was available for cross-examination, ... the risk of prejudice, if there was any, from the use of hearsay was reduced").

A hearsay statement by an out-of-court declarant who is biased against the respondent or who lacks personal knowledge of the information contained in the statement is also excludable as "irrelevant" because "its probative value is outweighed by the danger that its admission would ... create substantial danger of prejudice to [the respondent]." People v. Davis, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977). A statement by an out-of-court declarant who is biased or who lacks personal knowledge of the information contained in the statement has almost minimal probative value. Its introduction causes substantial prejudice to the respondent in that it "unduly restrict[s] the [respondent's] opportunity to test the validity of the [prosecution's] case through the medium of cross-examination" (People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 963 (1979)) and permits the resolution of the respondent's motion to turn upon unreliable evidence.

(2) Challenging Multiple Hearsay

Whenever the prosecution seeks to introduce a statement that is “multiple hearsay” -- a statement which was not made to the testifying witness directly but rather was made to a third party who repeated that statement to the testifying witness -- counsel should object to the introduction of the statement as violative of the respondent’s constitutional right to confrontation. In a suppression hearing, as at trial, the court may not “unduly restrict the [respondent’s] opportunity to test the validity of the [prosecution’s] case through the medium of cross-examination.” People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 963 (1979). Multiple hearsay, by its very nature, is “incapable of verification or cross-examination” (People v. Pugh, 107 A.D.2d 521, 534, 487 N.Y.S.2d 415, 425 (4th Dept. 1985), appeal denied, 65 N.Y.2d 985, 494 N.Y.S.2d 1055 (1985)), because the non-testifying witness did not speak directly to the declarant and therefore cannot answer questions about the declarant’s level of certainty, demeanor, scope of knowledge, or possible biases. As the Fifth Circuit U.S. Court of Appeals observed in People v. Daniels, 572 F.2d 535, 539 (5th Cir. 1978),

[t]he admission of double level hearsay ... creates far greater obstacles to the accused’s right to confront the witnesses against him than the admission of single level hearsay. When a witness’ testimony constitutes single level hearsay, the defense attorney can cross-examine that witness concerning the reliability and good faith of the source of the evidence against the defendant. When a witness’ testimony constitutes double level hearsay, even this safeguard is unavailable.

This argument against introduction of multiple hearsay is particularly strong when the suppression claim at issue necessitates some assessment of the out-of-court declarant’s reliability or demeanor. Thus, for example, in a Mapp hearing on an Aguilar-Spinelli claim, counsel can argue that the determination of the informant’s “veracity” and “basis of knowledge” require testimony by an officer who personally spoke with the informant. See, e.g., People v. Mingo, 117 A.D.2d 353, 502 N.Y.S.2d 558 (4th Dept. 1986), app. denied, 68 N.Y.2d 772, 773, 506 N.Y.S.2d 1056, 1058 (1986) (prosecution failed to satisfy Aguilar-Spinelli standards of reliability and basis of knowledge when it presented solely the arresting officer, who learned of the informant’s tip from another officer: the testifying officer never spoke directly to the informants and therefore “had no way of knowing the basis of the informants’ knowledge” (id. at 356, 502 N.Y.S.2d at 560)). See also People v. Ketcham, 93 N.Y.2d 416, 421, 690 N.Y.S.2d 874, 878 (1999) (although the general rule is that “[t]he prosecution may satisfy its burden even with ‘double hearsay,’ or ‘hearsay-upon-hearsay,’ so long as both prongs of Aguilar-Spinelli are met at every link in the hearsay chain” – which occurred in the Ketcham case because the testifying witness was the arresting officer, who acted on the basis of the undercover officer’s information, relayed to him by the the “ghost” officer – multiple hearsay would not suffice if “there is no evidence indicating how the informant obtained the information passed from one officer to another, [since then] there is nothing by which to measure the trustworthiness of the information,” and illustrating the latter principle by citing People v. Parris, 83 N.Y.2d 342, 350, 610 N.Y.S.2d 464, 469 (1994), where the “police officer’s conclusory characterization of

informant as an ‘eyewitness’ did not satisfy basis of knowledge requirement where there was no further evidence indicating how the informant obtained description of the suspected burglar”).

(3) Arguing that the Prosecution’s Hearsay-Based Presentation at the Suppression Hearing Fails to Satisfy the Prosecution’s Burden of Production or Proof

In some cases in which the prosecution relies on a police officer whose information about the case comes from another officer or a civilian witness, the testifying officer may be unable to give details that are essential for resolution of the claim that is being litigated. In such cases, it may be possible to argue at the conclusion at the hearing that the witness’s testimony is insufficient to satisfy the prosecution’s burden of production or proof. See, e.g., People v. Ortiz, 90 N.Y.2d 533, 664 N.Y.S.2d 243 (1997) (prosecution failed to meet its burden of production at the *Wade* hearing because the officer who testified at the hearing did not observe the show-up identification of the defendant by two other police officers: the Court of Appeals explains that it is not sufficient for the prosecution merely to establish, as it did in this case, that “the showup was conducted in close geographic and temporal proximity to the crime”; “[t]he People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate that the procedure was not unduly suggestive”); People v. Eastman, 32 A.D.3d 965, 821 N.Y.S.2d 263 (2d Dept. 2006) (prosecution failed to satisfy its burden of production at a *Mapp* hearing by presenting a police officer who arrested the defendant at the direction of a detective but who did not testify about the other officer’s basis for believing that the defendant had committed a crime: although the “fellow officer rule” allows an officer to make “a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer ... in possession of information sufficient to constitute probable cause for the arrest,” the “prosecution bears the burden [at a suppression hearing] of establishing that the officer imparting the information had probable cause to act”); People v. Moses, 32 A.D.3d 866, 823 N.Y.S.2d 409 (2d Dept. 2006) (prosecution’s burden of production at a *Mapp* or *Dunaway* hearing to come “forward with evidence to demonstrate the legality of the police conduct in the first instance” was not satisfied by the testimony of a police officer who transported the complainant to the location of the show-up but was not involved in the stop of the defendant, could not testify to the circumstances of the stop, and offered nothing more than a “vague and equivocal hearsay” account of a statement made by the arresting officer which “was inadequate to demonstrate” the validity of the arresting officers’ actions in stopping and detaining the defendant and transporting him to the location of the show-up).

D. The Defense Case: Deciding Whether to Call Defense Witnesses; Limiting the Scope of Prosecutorial Cross-Examination

Putting on a defense case at a suppression hearing is a very risky proposition if the witnesses whom counsel would call at the suppression hearing are also essential witnesses for the defense at trial. To the extent that a defense witness (including the respondent) testifies

differently at trial than s/he did at the suppression hearing, the prosecution is apparently free to impeach the witness with his or her prior inconsistent statements at the suppression hearing. Cf. Harris v. New York, 401 U.S. 222 (1971). The only limitation upon the prosecution's use of suppression hearing testimony at trial is that the prosecutor cannot introduce the suppression hearing testimony of a defense witness in the Presentment Agency's case-in-chief. See Simmons v. United States, 390 U.S. 377 (1968) (barring such introduction of accused's suppression hearing testimony in prosecution's case-in-chief at trial); People v. Ayala, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990) (witness's suppression hearing testimony is not admissible at trial under hearsay exception for sworn testimony by unavailable witness who was subject of cross-examination by opposing side at prior hearing); In re Jaquan A., 45 A.D.3d 305, 306, 846 N.Y.S.2d 88, 89 (1st Dept. 2007) (applying, to the delinquency context, the rule of People v. Ayala, that a lawyer cannot introduce, at trial, a witness's suppression hearing testimony over the objection of opposing counsel).

The risk of impeachment at trial can often be minimized by curtailing the scope of the witness's testimony at the suppression hearing. If, for example, a defense witness who was present at the scene of the crime only testifies to her observation of the unlawful police arrest and interrogation of the respondent, the prosecution will be unable to use her suppression hearing testimony to impeach her at trial when she testifies that the respondent did not commit the crime. Of course, even when the defense limits a witness's direct examination at the suppression hearing in this manner, the prosecutor may attempt to cross-examine the witness at the suppression hearing about the facts of the offense, so as to create impeachment material for use at trial. In such situations, defense counsel can object to the cross-examination about the circumstances of the offense as beyond the scope of direct examination. See, e.g., People v. Lacy, 25 A.D.2d 788, 788, 270 N.Y.S.2d 1014, 1015-16 (3d Dept. 1966) (at a Huntley hearing, "the defendant may take the stand and testify as to his request for counsel at the time of the arrest and as to all facts relevant to ... the alleged confession and waiver and by so testifying, the defendant does not subject himself to cross-examination on the merits"); People v. Blackwell, 128 Misc.2d 599, 490 N.Y.S.2d 457 (Sup. Ct., N.Y. Co. 1985) (when defendant's direct examination at Huntley hearing is limited to the circumstances of the interrogation, prosecutor is barred from cross-examining about the crime since this would be beyond the scope of direct; this same reasoning "would seem to apply to other types of pretrial suppression hearings as well" (id. at 603, 490 N.Y.S.2d at 462)).

If the defense witness's suppression hearing testimony cannot be limited in such a way as to minimize the risk of impeachment at trial (see, e.g., id. at 601-03, 490 N.Y.S.2d at 461-62), then counsel must engage in a cost-benefit analysis to decide whether to put the witness on the stand at the suppression hearing. The risk of impeachment and the damage that such impeachment would inflict upon the defense at trial must be weighed against the importance of the witness's testimony in winning the suppression hearing. If the suppression hearing can be won without the witness or if the suppression claim is so weak that a victory is highly unlikely even if the witness testifies, then counsel should reserve the witness until trial. Conversely, if there is a strong suppression claim which depends on the witness, and particularly if the

respondent has a strong chance of prevailing at trial even without the witness testifying at trial, counsel should certainly call the witness at the suppression hearing and, if necessary, refrain from calling the witness at trial.

E. The Concluding Argument

(1) Adjourning the Argument In Order To Do Additional Research Or To Obtain a Transcript To Use In Argument

At the conclusion of a suppression hearing, the judge ordinarily will expect counsel to argue the motion immediately. Generally, counsel should accede in this procedure: If counsel has adequately researched the issues in preparation for the hearing, counsel will usually be prepared to argue the motion.

However, in cases in which the evidence that emerged at the hearing presents new issues which counsel did not anticipate, counsel will need to research those issues prior to arguing the motion. In such situations, counsel should ask for a brief adjournment to research the new issues. Counsel should explain, if necessary, that these were issues that counsel could not have anticipated and therefore could not have researched prior to the hearing. If the court resists, counsel can argue that without the needed information, counsel is unable to provide the respondent with effective assistance of counsel. Cf. Herring v. New York, 422 U.S. 853 (1975) (New York statute that empowered the judge in a bench trial to dispense with closing argument violated the Sixth Amendment requirement of effectiveness of counsel by depriving the defendant of the “right to be heard [through counsel] in summation of the evidence” (id. at 864)).

There may also be cases in which counsel needs a transcript of the suppression hearing in order to argue effectively, because an issue turns on the precise wording used by a witness and counsel was not able to take accurate notes of that testimony. Judges are ordinarily resistant to defense requests for an adjournment of the legal argument (and, as a consequence the trial as well), for the purpose of acquiring a transcript. Counsel should, whenever possible, attempt to resolve the dilemma informally by consulting the court reporter during a recess and asking him or her to read to counsel the relevant passage of the testimony. If this remedy does not suffice and counsel needs the transcript, then counsel will have to seek an adjournment. If the court is not willing to exercise its discretion in favor of granting the adjournment, counsel will need to make a particularized showing of prejudice as a predicate to asserting a due process right to an adjournment. See Part VI(B) infra.

If the court denies a defense request to continue the concluding argument (whether for the purpose of additional research or acquisition of a transcript) and, after argument, denies the suppression motion, counsel should thereafter obtain the missing information by doing the additional research or examining the transcript. If the new information provides an argument that counsel did not previously make, counsel should file a motion for reconsideration. Such a pleading can be filed as a motion seeking the court’s exercise of its “continuing jurisdiction to

reconsider its prior intermediate determinations” (People v. Wheeler, 32 A.D.3d 1107, 822 N.Y.S.2d 160 (3d Dept. 2006)) or as a motion pursuant to F.C.A. § 355.1(1)(b) (with the new information serving as “a substantial change of circumstances” warranting a modification of the previous order denying suppression) or as a motion seeking the judge’s exercise of his or her inherent discretion to reconsider a ruling in the interest of justice (cf. In the Matter of Carmen R., 123 Misc.2d 238, 473 N.Y.S.2d 312, 315 (Family Ct., St. Lawrence Co. 1984)).

(2) Using Burdens of Production and Persuasion

In the legal argument at the conclusion of a suppression hearing, counsel should make active use of burdens of production and persuasion. For any issue on which the prosecution bears a burden, counsel should argue that the prosecution’s failure to sustain its burden requires that the motion be granted.

The allocation of burdens varies with the type of suppression motion and the type of issue raised.

(a) Huntley Motions

As the Court of Appeals has repeatedly stated, “[w]hen a defendant properly challenges statements made by him that the People intend to offer at trial, it is, of course, the People’s burden to establish beyond a reasonable doubt, that such statements were voluntarily made.” People v. Witherspoon, 66 N.Y.2d 973, 974, 498 N.Y.S.2d 789, 790 (1985). Accord In the Matter of Jimmy D., 15 N.Y.3d 417, 424, 912 N.Y.S.2d 537, 542 (2010); People v. Anderson, 42 N.Y.2d 35, 39, 396 N.Y.S.2d 625, 627 (1977); People v. Huntley, 15 N.Y.2d 72, 78, 255 N.Y.S.2d 838, 843-44 (1965); People v. Zayas, 88 A.D.3d 918, 931 N.Y.S.2d 109, 111 (2d Dept. 2011).

While the foregoing doctrine is commonly framed in terms of the voluntariness of a statement, it necessarily extends beyond due process claims of involuntariness and encompasses all doctrinal bases for challenging the constitutionality of a statement, including Miranda violations and violations of the right to counsel. Under New York law, the definition of “involuntary statement” for purposes of a suppression motion includes any statement obtained from the accused “in violation of such rights as the defendant may derive from the constitution of this state or of the United States.” C.P.L. § 60.45(2)(b)(ii); F.C.A. § 344.2(2)(b)(ii); see People v. Graham, 55 N.Y.2d 144, 447 N.Y.S.2d 918 (1982). Accordingly, the prosecution’s burden of proving “voluntariness” necessitates that the prosecution prove beyond a reasonable doubt that the police complied with Miranda requirements (see, e.g., People v. Baggett, 57 A.D.3d 1093, 868 N.Y.S.2d 423 (3d Dept. 2008); People v. Haverman, 119 Misc.2d 980, 982, 464 N.Y.S.2d 981, 982 (Sup. Ct., Queens Co., 1983); see also People v. Campbell, 81 A.D.2d 300, 309, 440 N.Y.S.2d 336, 341 (2d Dept. 1981)), and also that the police complied with federal and state constitutional requirements for honoring the right to counsel (see, e.g., People v. Barnes, 84 A.D.2d 501, 443 N.Y.S.2d 68 (1st Dept. 1981)). Finally, because Family Court Act §

344.2(2)(b)(iii) expands the definition of an “involuntary” statement to encompass statements taken in violation of the statutory protections established in F.C.A. § 305.2 (the requirements of parental notification, parental presence during interrogation, parental receipt of Miranda warnings, and use of a special room for interrogation), the prosecution also must prove beyond a reasonable doubt that the police complied with these statutory requirements.

When litigating the validity of a waiver of the right to counsel, defense counsel should emphasize that a “particularly heavy burden ... rests on the State, in the case of a juvenile charged as a delinquent, to show that there has been a genuine waiver by the juvenile of his or her right to counsel.” In the Matter of Karen XX, 85 A.D.2d 773, 774, 445 N.Y.S.2d 283, 284 (3d Dept. 1981); cf. In the Matter of Lawrence S., 29 N.Y.2d 206, 208, 325 N.Y.S.2d 921, 923 (1971).

(b) Wade Motions

The prosecution’s burden in a Wade hearing depends upon the nature of the suppression claim.

For due process claims of suggestiveness, the defendant has the burden to show suggestiveness by a preponderance of the evidence. However, “[w]hile the defendant bears the ultimate burden of proving that a showup procedure is unduly suggestive and subject to suppression, the burden is on the People first to produce evidence validating the admission of such evidence.... Initially, the People must demonstrate that the showup was reasonable under the circumstances.... The People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate the procedure was not unduly suggestive.” People v. Ortiz, 90 N.Y.2d 533, 536, 664 N.Y.S.2d 243 (1997); People v. Coleman, 73 A.D.3d 1200, 903 N.Y.S.2d 431 (2d Dept. 2010) (prosecution failed to satisfy its threshold burden of going forward at the suggestiveness prong of the Wade hearing by presenting the testimony of a detective who conducted the second of two photographic identification procedures but “did not conduct, and was not present during the prior photographic array identification procedure,” and “could not answer any questions as to what, if anything, was said before or during the identification procedure, or provide any details as to the attendant circumstances”).

If the prosecution satisfies its burden of production and the defense satisfies its ultimate burden of proof on the issue of suggestiveness, then the burden shifts to the prosecution to prove by clear and convincing evidence that there is an independent source for an in-court identification. See, e.g., People v. Rahming, 26 N.Y.2d 411, 311 N.Y.S.2d 456 (1970).

When challenging a show-up on due process suggestiveness grounds, counsel can argue that the prosecution bears the burden of proving that the circumstances justified the police use of the inherently suggestive show-up procedure instead of the preferred and less suggestive lineup procedure. See People v. Delgado, 124 Misc.2d 1040, 1041-43, 478 N.Y.S.2d 575, 577 (Sup. Ct., N.Y. Co. 1984) (reviewing the relevant caselaw).

When the claim is that the police, in conducting a lineup, violated the respondent's right to counsel, the prosecution bears the burden of showing that the police complied with constitutionally mandated procedures for arranging the presence of counsel at a lineup. See People v. Blake, 35 N.Y.2d 331, 340, 361 N.Y.S.2d 881, 891 (1974). For lineups that take place after "formal commencement" of adversarial proceedings, the respondent has an unwaivable right to have counsel present, and "a lineup conducted 'without notice to and in the absence of his counsel' will be held to violate that right." People v. Hawkins, 55 N.Y.2d 474, 487, 450 N.Y.S.2d 159, 166 (1982). "Even before the commencement of formal proceedings, ... the right to counsel at an investigatory lineup will attach" if (a) "counsel has actually entered the matter under investigation" or (b) "a defendant in custody, already represented by counsel on an unrelated case, invokes the right by requesting his or her attorney" or, in a juvenile offender or juvenile delinquency case, the parent has "unequivocally" "invoke[d] the right to counsel on the child's behalf." People v. Mitchell, 2 N.Y.3d 272, 273-74, 778 N.Y.S.2d 427, 428-29 (2004). In such cases in which the right to counsel has attached even though formal proceedings have not yet commenced, "the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear." *Id.* A failure to satisfy these requirements mandates suppression unless the Presentment Agency can justify the police actions by showing that "suspend[ing] the lineup in anticipation of the arrival of counsel ... would [have] cause[d] unreasonable delay[,] ... would [have] result[ed] in significant inconvenience to the witnesses or would [have] undermine[d] the substantial advantages of a prompt identification confrontation" (People v. Hawkins, 55 N.Y.2d at 487, 450 N.Y.S.2d at 166). or by proving by clear and convincing evidence that there is an independent source for an in-court identification (People v. Burwell, 26 N.Y.2d 331, 336, 310 N.Y.S.2d 308, 311 (1970)). Once a violation of the right to counsel has been shown, the prosecution bears the burden of proving by clear and convincing evidence that there is an independent source for an in-court identification. See, e.g., People v. Burwell, 26 N.Y.2d 331, 336, 310 N.Y.S.2d 308, 311 (1970).

In Wade hearings challenging a lineup or photo array, police (or prosecutorial) failure to preserve photographic evidence gives rise to inferences favorable to the defense. The failure to preserve a photo array gives rise to an inference that the array was suggestive. See People v. Johnson, 106 A.D.2d 469, 482 N.Y.S.2d 563 (2d Dept. 1984); People v. Archer, 155 Misc.2d 601, 589 N.Y.S.2d 987 (Sup. Ct., Bronx Co. 1992). The failure to photograph (or preserve a photograph of) a lineup constitutes substantial evidence that the lineup was not fairly conducted. See People v. Anthony, 109 Misc.2d 433, 440 N.Y.S.2d 149 (Sup. Ct., N.Y. Co. 1980).

(c) Mapp Motions

The respondent bears the burden of establishing that s/he has "standing" to challenge the search or seizure, in that s/he had the requisite privacy interest in the area searched or the item seized. People v. Ramirez-Portoreal, 88 N.Y.2d 99, 108, 643 N.Y.S.2d 502, 506 (1996). For discussion of procedural requirements for establishing standing and situations that have been deemed to confer standing, see Part III(D)(3) supra.

In on-the-street encounters between the police and a civilian, the prosecution bears the burden of establishing the lawfulness of the police action in making a “request for information” or engaging in a “common law inquiry,” effecting a Terry stop, or making an arrest. See, e.g., People v. Eastman, 32 A.D.3d 965, 821 N.Y.S.2d 263 (2d Dept. 2006) (prosecution failed to satisfy its burden of production at a *Mapp* hearing by presenting a police officer who arrested the defendant at the direction of a detective but who did not testify about the other officer’s basis for believing that the defendant had committed a crime: Although the “fellow officer rule” allows an officer to make “a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer ... in possession of information sufficient to constitute probable cause for the arrest,” the “prosecution bears the burden [at a suppression hearing] of establishing that the officer imparting the information had probable cause to act.”); People v. Moses, 28 A.D.3d 584, 816 N.Y.S.2d 96 (2d Dept. 2006) (identification is suppressed on *Dunaway* grounds because “prosecution failed to satisfy its burden [at *Dunaway/Wade* hearing] by “present[ing] evidence to establish that the defendant was lawfully stopped and detained before the complainant made her identification”: arresting officer testified merely that “he received a radio communication regarding a robbery in progress and responded to the complainant’s location,” spoke with the complainant, and then responded to “second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection” by driving “complainant to that location,” where “complainant identified the defendant as the man who broke into her home”; “prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection” and “original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant”).

When, as is generally the case in Family Court, a search of a constitutionally protected area was warrantless, the prosecution bears the burden of proving that the police conduct is justified by one of the exceptions to the warrant requirement. “Because a warrantless intrusion by a government official is presumptively unreasonable, it is the People’s burden in the first instance to establish justification.” People v. Pettinato, 69 N.Y.2d 653, 654, 511 N.Y.S.2d 828, 828 (1986). In order to justify a warrantless search or seizure, the prosecution must show that the police conduct fell within one of the “few specifically established and well-delineated exceptions” to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967); see, e.g., Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984). It is only after the prosecution has satisfied this burden that a residual burden reverts to the respondent to prove the illegality of the police actions (People v. Pettinato, 69 N.Y.2d at 654, 511 N.Y.S.2d at 828) by a preponderance of the evidence (People v. Vasquez, 134 Misc.2d 855, 857, 512 N.Y.S.2d 982, 983 (Sup. Ct., Kings Co., 1987); People v. Dougall, 126 Misc.2d 125, 126, 481 N.Y.S.2d 278, 278 (Sup. Ct., N.Y. Co. 1984)).

The Court of Appeals has indicated that the prosecution must satisfy a particularly high burden in order to justify a warrantless search of an individual’s home because “our

Constitutions accord special protection to a person's expectation of privacy in his own home." People v. Knapp, 52 N.Y.2d 689, 694, 439 N.Y.S.2d 871, 874 (1981). In such instances, the prosecution bears "the burden of proving the existence of ... exceptional circumstances" that are "sufficient[]" to justify encroachment upon the "special protections" shielding the home. Id. "All the more is this so when there is ample opportunity to obtain a warrant." Id.

A particularly rigorous standard also applies when the prosecution seeks to justify a warrantless search or seizure under the consent exception to the warrant requirement. "It has been consistently held that when the People rely on consent to justify an otherwise unlawful police intrusion, they bear the 'heavy burden' of establishing that such consent was freely and voluntarily given." People v. Zimmerman, 101 A.D.2d 294, 295, 475 N.Y.S.2d 127, 128 (2d Dept. 1984). See, e.g., People v. Gonzalez, 39 N.Y.2d 122, 128, 383 N.Y.S.2d 215, 219 (1976); People v. Kuhn, 33 N.Y.2d 203, 208, 351 N.Y.S.2d 649, 652 (1973). The Second Department has defined this standard as requiring that the prosecution "prove consent by 'clear and positive' evidence." People v. Zimmerman, 101 A.D.2d at 295, 475 N.Y.S.2d at 128. Counsel can argue that the prosecution's heavy burden of proving consent is even greater when the individual who purportedly consented is a juvenile. See In re Daijah D., 86 A.D.3d 521, 927 N.Y.S.2d 342 (1st Dept. 2011) (Presentment Agency "failed to sustain their heavy burden of establishing" that 14-year-old youth's "consent to a search of her purse was voluntary," given that, *inter alia*, "[a]ppellant is 14 years old, and no evidence was presented at the suppression hearing to demonstrate that she had prior experience with the law" and no evidence was presented that "appellant was told that she did not have to consent"); In the Matter of Mark A., 145 Misc.2d 955, 960-61, 549 N.Y.S.2d 325, 329 (Fam. Ct., N.Y. Co. 1989) (finding that respondent's consent to search was not voluntary because, *inter alia*, "respondent is a 15 year old youth"); In the Matter of Kenneth C., 125 Misc.2d 227, 252, 479 N.Y.S.2d 396, 412 (Family Ct., Kings Co. 1984) (in gauging whether juvenile "consented and voluntarily accompanied the police to the station house," court applies general rule that prosecution's heavy burden when proving consent must be amplified by the "substantial" "probability ... that the juvenile's transport was involuntary, rather than consensual"). See also People v. Gonzalez, 39 N.Y.2d at 129, 383 N.Y.S.2d at 220 (in light of the youth of the defendants, who were "under 20 years of age," and their "limited prior contacts with the police," the "ineluctable inference ... is that the consents could not be ... the product of a free and unconstrained choice").

When a search or seizure was conducted pursuant to a warrant, the prosecution bears the initial burden of showing that the warrant was valid. People v. Berrios, 28 N.Y.2d 361, 368, 321 N.Y.S.2d 884, 889 (1971). Presumably, this showing must include proof of the validity of the execution of the warrant. When a warrant is challenged on the basis of the accuracy and credibility of the allegations in the application for the warrant, the respondent bears the burden of proving by a preponderance of the evidence that "the facts stated by the affiant were falsely represented." People v. Ingram, 79 A.D.2d 1088, 1088, 435 N.Y.S.2d 826, 827 (4th Dept. 1981); People v. Williams, 119 A.D.2d 606, 500 N.Y.S.2d 778 (2d Dept. 1986), app. denied, 68 N.Y.2d 761, 506 N.Y.S.2d 1049 (1986).

(d) Dunaway Motions

The prosecution's burden at a Dunaway hearing would appear to be identical to its burden at a Mapp hearing: The prosecution bears the burden of going forward to justify the police conduct. See, e.g., People v. Dodt, 61 N.Y.2d 408, 415, 474 N.Y.S.2d 441, 445 (1984) (a "pretrial motion to suppress [an] ... identification as the fruit of an unlawful arrest cast[s] the burden on the prosecution to come forward with evidence establishing probable cause for the arrest.... The analysis required of a hearing Judge faced with deciding whether the People have met their burden is largely the same as that used by a magistrate in passing on an application for an arrest or search warrant."); People v. Bouton, 50 N.Y.2d 130, 135, 428 N.Y.S.2d 218, 220 (1980) (motion to suppress statements as the fruit of an unlawful arrest "casts upon the prosecution the burden of coming forward with evidence that the arrest met the probable cause standard"); People v. Moses, 28 A.D.3d 584, 816 N.Y.S.2d 96 (2d Dept. 2006) (identification is suppressed on Dunaway grounds because "prosecution failed to satisfy its burden [at Dunaway/Wade hearing] by "present[ing] evidence to establish that the defendant was lawfully stopped and detained before the complainant made her identification": arresting officer testified merely that "he received a radio communication regarding a robbery in progress and responded to the complainant's location," spoke with the complainant, and then responded to "second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection" by driving "complainant to that location," where "complainant identified the defendant as the man who broke into her home"; "prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection" and "original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant").

With respect to Dunaway challenges to a statement, counsel can argue that the prosecution not only bears the burden of going forward but also bears the ultimate burden of proving the constitutionality of the police conduct beyond a reasonable doubt. As explained in Part V(E)(2)(a) the rigorous prosecutorial burden of beyond-a-reasonable-doubt applies to all motions to suppress a statement as "involuntary," and New York law defines an "involuntary statement" as any statement obtained from the accused "in violation of such rights as the defendant may derive from the constitution of this state or of the United States." C.P.L. § 60.45. Since a statement taken during a period of unconstitutional detention (i.e., a statement taken in violation of Dunaway) is a statement taken in violation of the accused's constitutional rights, it must be deemed an "involuntary" statement for purposes of New York law. Accordingly, the prosecution must prove beyond a reasonable doubt that the police complied with Dunaway in the course of taking the statement.

(3) Arguing that the Judge Should Find that the Testimony of a Police Officer Was Incredible

In People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971), the Court of Appeals

acknowledged that “[s]ome police officers ... may be tempted to tamper with the truth” at a suppression hearing in order to justify their conduct, and thus, with a police officer, as with any other witness, “there is always the possibility that a witness will perjure himself.” Id. at 368, 321 N.Y.S.2d at 889. The court in Berrios urged trial judges to pay strict attention “to the basic credibility problem which is always presented,” id. at 369, 321 N.Y.S.2d at 890, and established a general procedure that: “Where the Judge at the suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress.” Id.

In applying the procedure established in Berrios for carefully scrutinizing the testimony of a police officer, the courts have recognized that police testimony is inherently untrustworthy when it “has all appearances of having been patently tailored to nullify constitutional objections.” People v. Garafolo, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500, 502 (2d Dept. 1974) (finding incredible a police officer’s testimony that he observed contraband in plain view inside a paper bag and a gun under the seat of a car). See also, e.g., In the Matter of Bernice J., 248 A.D.2d 538, 670 N.Y.S.2d 207 (2d Dept. 1998) (rejecting trial judge’s finding crediting testimony of police officer whose “patently tailored” testimony was “contradicted by the remainder of the record, including other police testimony and documents”); People v. Miller, 121 A.D.2d 335, 337, 504 N.Y.S.2d 407, 409 (1st Dept. 1986), app. denied, 68 N.Y.2d 815, 507 N.Y.S.2d 1033 (1986) (police officers’ convenient misremembering of description of suspect that was broadcast in radio run such that they had a Terry basis for frisking defendant “appears to have been patently tailored in an effort to nullify constitutional safeguards”); People v. Ocasio, 119 A.D.2d 21, 28, 505 N.Y.S.2d 127, 132 (1st Dept. 1986) (rejecting police officer’s claim that there was danger justifying a Terry frisk when car driver, in response to officer’s question regarding a nondescript bag protruding from under the seat, pushed bag further underneath seat); People v. Addison, 116 A.D.2d 472, 474, 496 N.Y.S.2d 742, 744 (1st Dept. 1986) (rejecting, as incredible, police testimony that the defendant, although surrounded by police officers, reached for a gun in his waistband).

“In evaluating [police] testimony, [the judge] should not discard common sense and common knowledge.... `The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.” People v. Garafolo, 44 A.D.2d at 88, 353 N.Y.S.2d at 502-03. See, e.g., People v. Rutledge, 21 A.D.3d 1125, 804 N.Y.S.2d 321 (2d Dept. 2005) (officer’s “testimony that he could discern, based upon the ‘dim[ness]’ and long duration of the ‘glow’ of the item being smoked, that it was a marijuana cigarette and not a tobacco cigarette, was incredible as a matter of law, and tailored to overcome constitutional objections”); People v. Carmona, 233 A.D.2d 142, 649 N.Y.S.2d 432 (1st Dept. 1996) (rejecting, as incredible, officer’s claim that he was able to see crack vial, which was two inches in length, at dusk through binoculars from observation point at least 200 feet above street); People v. Lewis, 195 A.D.2d 523, 524, 600 N.Y.S.2d 272, 273 (2d Dept. 1993), app.

denied, 82 N.Y.2d 893, 610 N.Y.S.2d 165 (1993) (“[I]t is unbelievable that the officer was able to observe, in the middle of the night as the vehicles passed in an intersection, that the defendant appeared to be under the legal driving age.... Even assuming, arguendo, that the officer was capable of making such an observation, it makes no sense that he would follow the defendant for about 20 blocks before stopping his vehicle.”); People v. Lastorino, 185 A.D.2d 284, 285, 586 N.Y.S.2d 26, 27 (2d Dept. 1992) (rejecting, as incredible, police officer’s testimony “that the defendant, who was aware he was under surveillance for at least several minutes, exited his vehicle and left the driver’s door open and a loaded gun visible on the seat, virtually inviting the police to discover the gun”); In the Matter of Carl W., 174 A.D.2d 678, 571 N.Y.S.2d 536 (2d Dept. 1991) (officer’s testimony that fleeing suspect “‘threw himself on the floor’ during the ensuing chase is ... implausible under the circumstances”); People v. Void, 170 A.D.2d 239, 241, 567 N.Y.S.2d 216, 217 (1st Dept. 1991) (rejecting, as incredible, police officer’s testimony “that the defendant consented to a police search of the apartment, where a substantial amount of cocaine was stored in plain view in the kitchen sink -- a location where the drugs could be readily discovered”); People v. Guzman, 116 A.D.2d 528, 530-31, 497 N.Y.S.2d 675, 678 (1st Dept. 1986) (officer’s testimony “that he feared defendant was armed and dangerous ... is belied by the fact that he did not communicate his observation to his sergeant, crossed in front of defendant’s potential line of fire, and did not direct the defendant to freeze”); People v. Addison, 116 A.D.2d at 474, 496 N.Y.S.2d at 744 (“we find it incredible that defendant, in the face of such a show of force, would ... reach for his waistband as the arresting officer approached”); People v. Quinones, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 197 (1st Dept. 1978) (police officer’s testimony that “he did not have his weapon drawn when he approached the building nor ... did the other officers” was inherently incredible in light of testimony that the police had received a radio run reporting armed suspects); People v. Salzman, N.Y.L.J., 10/18/99, at 29, col. 2 (App. Term, 9th & 10th Jud. Dist.) (court rejects, as incredible, officer’s testimony that defendant exited automobile with open cigarette box protruding from shirt pocket and that envelopes with white powder were readily visible inside open cigarette box; officer’s “testimony would require the finding that defendant was a ‘moron’”).

An argument that the court should find police testimony to be incredible can also be based upon:

- Inconsistencies between the police officer’s present testimony and his or her previous statements in police reports or prior testimony. See, e.g., In the Matter of Robert D., 69 A.D.3d 714, 892 N.Y.S.2d 523 (2d Dept. 2010) (police officer’s *Mapp* hearing testimony is found on appeal to have been incredible as a matter of law, notwithstanding trial judge’s findings that officer “‘was a credible witness” and “‘very forthright,”” because officer’s answer on cross-examination that he “‘saw the drugs prior to the arrest” was “‘inconsistent with his supporting deposition” – in which the officer said that he observed the respondent place “‘a cannister-like object in his pocket” that was found, after arrest, to contain crack cocaine – and “[it] is impossible for . . . both to be true, and the presentment agency failed to put forth a satisfactory explanation for that contradiction”); In the

Matter of Bernice J., 248 A.D.2d 538, 670 N.Y.S.2d 207 (2d Dept. 1998) (rejecting trial judge’s finding crediting testimony of police officer whose “patently tailored” testimony was “contradicted by the remainder of the record, including other police testimony and documents”); People v. Miret-Gonzalez, 159 A.D.2d 647, 552 N.Y.S.2d 958 (2d Dept. 1990), app. denied, 76 N.Y.2d 739, 558 N.Y.S.2d 901 (1990) (court finds police officer’s testimony incredible, in part because officer’s account of car stop and search was contradicted by his incident report); People v. Lebron, 184 A.D.2d 784, 785-87, 585 N.Y.S.2d 498, 550-02 (2d Dept. 1992) (officer’s testimony contradicted by statements and omissions in prior police reports); People v. Addison, 116 A.D.2d at 473, 496 N.Y.S.2d at 743 (officer’s testimony regarding the description provided by civilian was undermined by the fact that “[t]he arresting officer had made no notation, either in his memo book or any police report, of any conversation with civilians or of having received a description from them,” and had also omitted any mention of the civilians in his grand jury testimony).

- Inconsistencies between the testimony or statements of different police officers. See, e.g., People v. Bezares, 103 A.D.2d 717, 717, 478 N.Y.S.2d 16, 17 (1st Dept. 1984) (“the testimony of the arresting officer was, at a minimum, not supported by the testimony of his fellow police officer who was with him throughout, and indeed to some extent, was contradicted by that testimony”).
- Inconsistencies between the officer’s account and objective evidence. See, e.g., People v. Nunez, 126 A.D.2d 576, 576, 510 N.Y.S.2d 694, 695 (2d Dept. 1987) (officer’s account of “radio run reporting a past robbery upon which he stopped the defendant and his companion was contradicted, in substantial part, by a Sprint report”).

Finally, in arguing that a police officer’s testimony should be deemed incredible, counsel can point to suspicious aspects of the police officer’s “demeanor [and] his mode of telling his story.” People v. Perry, 128 Misc.2d 430, 432, 488 N.Y.S.2d 977, 979 (Sup.Ct., N.Y. Co. 1985). See also People v. Carmona, 233 A.D.2d 142, 649 N.Y.S.2d 432 (1st Dept. 1996) (in opinion rejecting officer’s testimony as incredible, appellate court refers disparagingly to the officer’s testimony “that he approached the defendant merely to exercise a common law right of inquiry” as a “well-rehearsed claim”).

F. The Court’s Ruling on the Motion: Protecting the Appellate Record

In ruling on the suppression motion, the court “must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.” C.P.L. § 710.60(6). See People v. Bonilla, 82 N.Y.2d 825, 827-28, 604 N.Y.S.2d 937, 938 (1993) (“the motion court’s decision denying the motion without explanation ... transgresses CPL 710.60(6)”).

The judge cannot delay ruling on the motion until after s/he has heard the evidence at trial. See F.C.A. § 330.2(3) (“[w]hen a motion to suppress evidence is made before the commencement of the fact-finding hearing, the fact-finding hearing shall not be held until the determination of the motion”).

In some cases, after the court has announced its findings of fact and ruling, counsel will need to ask the court to clarify or amplify particular findings so that there is an adequate record for appeal. This will most often arise when counsel has won the suppression motion. Since the prosecution can interlocutorily appeal an order granting a suppression motion, see F.C.A. § 330.2(9), counsel must take steps to ensure that the record thoroughly supports the judge’s ruling. If the judge’s findings of fact are ambiguous or the judge has omitted a factual finding that helps to justify suppression, counsel should request that the court modify the findings of fact.

If the respondent has lost the suppression hearing, counsel should ordinarily refrain from asking for clarification or supplementation of the court’s findings of fact. Since the judge has denied the motion, s/he may respond to a request for clarification by strengthening the findings of fact and insulating the ruling from appellate reversal. Thus, counsel is usually well-advised to leave the ambiguities in the record and hope that the appellate court will view those ambiguities in a manner that is favorable to the defense. The exception to this general rule is where counsel is certain that the court relied on erroneous legal reasoning or an insupportable finding of fact and a request for clarification could only have the beneficial effect of exposing the court’s error.

G. Motion for Re-Opening the Hearing or Renewal or Reargument of the Suppression Motion

(1) Motion for Renewal Under the F.C.A.

F.C.A. § 330.2(4) provides for re-opening a suppression hearing, after denial of the motion, on the basis of newly discovered evidence. The statute imposes different standards, depending upon whether the request to re-open is made prior to trial or mid-trial. If made prior to trial, the respondent must show that the new “pertinent facts ... could not have been discovered by the respondent with reasonable diligence before determination of the motion.” Id. If made after the trial has commenced, the request to re-open must be based upon “facts [which] were discovered during the fact-finding hearing.” Id.

Most often, the need to re-open the suppression hearing arises because a prosecutorial witness divulges at trial some fact that reveals a previously undisclosed reason for suppressing the evidence, or because defense counsel receives a Rosario document at trial that contains such a fact. See, e.g., People v. Delamota, 18 N.Y.3d 107, 936 N.Y.S.2d 614 (2011) (trial court erred in denying defense counsel’s mid-trial motion to re-open the Wade hearing pursuant to CPL § 710.40(4) when it emerged at trial that the victim’s son, who served as the translator for his father during a police photo array, knew the defendant); People v. Velez, 39 A.D.3d 38, 829 N.Y.S.2d 209 (2d Dept. 2007) (trial court erred in refusing to re-open the suppression hearing

when the evidence at trial established facts contrary to the testimony of the police officers at the suppression hearing; trial court's suppression ruling is overturned and the case is remanded for a new suppression hearing before a different trial judge because "the same police officers who testified at the first hearing are likely to be called as witnesses at the new hearing, and because the credibility of those officers was, and again will be, in issue"); People v. Clark, 29 A.D.3d 918, 815 N.Y.S.2d 278 (2d Dept. 2006) (trial court erred in denying defendant's mid-trial motion to re-open pretrial suppression hearing on previously un-raised *Dunaway* claim to suppress tangible evidence and statements, which was prompted by trial testimony by police officer that defendant was not free to leave when police seized tangible evidence and took statements); People v. Boyd, 256 A.D.2d 350, 683 N.Y.S.2d 271 (2d Dept. 1998) (trial court should have permitted defense to re-open *Huntley* hearing at trial based upon *Rosario* material indicating that defendant may have been in custody for *Miranda* purposes earlier than arresting officer had claimed at *Huntley* hearing); People v. Thornton, 222 A.D.2d 537, 634 N.Y.S.2d 757 (2d Dept. 1995) (trial court should have granted a mid-trial defense request for a *Wade* hearing when the complainant testified that he had seen the defendant "a couple of times before" and not, as the prosecution had asserted prior to trial, 50-100 times before); People v. Kuberka, 215 A.D.2d 592, 626 N.Y.S.2d 855 (2d Dept. 1995) (defendant, whose pretrial *Mapp* motion was denied on basis of prosecutor's representation that evidence was seized pursuant to search warrant, was entitled to mid-trial *Mapp* hearing when trial testimony revealed that evidence was recovered before search warrant was obtained); People v. Figliolo, 207 A.D.2d 679, 616 N.Y.S.2d 367 (1st Dept. 1994) (defendant, whose *Dunaway* motion to suppress statement was denied because prosecution asserted that defendant was not arrested until after he made statement, was entitled to mid-trial *Dunaway* hearing when officer testified at trial that arrest preceded statement). See also People v. Peart, 198 A.D.2d 528, 605 N.Y.S.2d 924 (2d Dept. 1993) (trial court erred in denying defendant's renewed application for *Mapp* hearing, which was based on facts that emerged at *Wade* hearing). Cf. People v. Clark, 88 N.Y.2d 522, 647 N.Y.S.2d 479 (1996) (although Grand Jury transcript that defense counsel received at trial showed that complainant's Grand Jury testimony about identification procedure differed from arresting officer's account at *Wade* hearing, trial court did not abuse discretion in denying mid-trial re-opening of *Wade* hearing since newly discovered facts were not sufficiently "pertinent to the issue of official suggestiveness ... that they would materially affect or have affected the earlier *Wade* determination"). Compare People v. Kevin W., 91 A.D.3d 676, 935 N.Y.S.2d 660 (2d Dept. 2012) (trial court erred in responding to the prosecution's motion to re-argue the suppression ruling by re-opening the suppression hearing and allowing the prosecution to present the testimony of a second police officer: "[T]he People were given every opportunity to present their evidence at the original hearing and there is no basis to justify their being provided with a second bite of the apple.").

If the fact revealed by the prosecution witness at trial is that there was a statement, identification procedure, or tangible evidence that the prosecution failed to disclose, counsel should move for preclusion for failure to comply with F.C.A. § 330.2(2).

(2) Motion for Renewal or Reargument Under the C.P.L.R.

In addition to the F.C.A.'s provision for re-opening a suppression hearing based on newly discovered evidence, defense counsel can respond to an adverse ruling on a suppression motion by invoking the C.P.L.R.'s provisions for renewal or reargument of a motion. See In the Matter of Christopher M., N.Y.L.J., 1/22/02, at 24, col. 2 (Fam. Ct., Kings Co.) (Hepner, J.) (C.P.L.R. § 2221 remedies for renewal or reargument of motion are available in delinquency proceedings because “[j]uvenile delinquency proceedings ‘under Article 3 of the Family Court are essentially civil in nature although they have been described as ‘quasi-criminal’.”).

Counsel can move for leave to reargue under CPLR § 2221(d) “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, [which] ... shall not include any matters of fact not offered on the prior motion.” Id., § 2221(d)(2). The motion “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.” Id., § 2221(d)(3).

Counsel can move for leave to renew under CPLR § 2221(e) “based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” Id., § 2221(e)(2). Such a motion “shall contain reasonable justification for the failure to present such facts on the prior motion.” Id., § 2221(e)(3). The first of the two alternative predicates for renewal under § 2221(e) – “new facts not offered on the prior motion that would change the prior determination” – seems to overlap with F.C.A. § 330.2(4)'s basis for renewal of a suppression motion but the C.P.L.R. provision appears to be somewhat broader.

VI. Issues That May Arise During the Time Period Between the Suppression Hearing and Trial

A. Entering an Admission After Denial of a Suppression Motion: Preservation of the Right to Appeal

The Family Court Act, like the C.P.L., expressly preserves the respondent's right to appeal the denial of a suppression motion even after an admission. See § 330.2(6) (patterned after C.P.L. § 710.70). See also, e.g., People v. DiRaffaele, 55 N.Y.2d 234, 239-40, 448 N.Y.S.2d 448, 450 (1982).

This appellate remedy applies only to “order[s] finally denying a motion to suppress evidence.” F.C.A. § 330.2. As the courts implicitly have recognized, the remedy therefore applies not only to orders at the conclusion of a suppression hearing but also summary denials of a suppression motion on the pleadings for legal or factual insufficiency. See People v. Mendoza, 82 N.Y.2d 415, 422, 425, 604 N.Y.S.2d 922, 924, 926 (1993) (consolidated appeal of summary denials of suppression motions in four cases, three of which involved guilty pleas after summary denial of motion).

The statutorily-authorized appellate remedy does not apply when an admission is taken in the midst of a suppression hearing or at a point prior to the court's issuance of its ruling, since there would not be an "order finally denying" the motion. See People v. Martinez, 67 N.Y.2d 686, 688, 499 N.Y.S.2d 919, 920 (1986). See also In re Billy R., 54 A.D.3d 607, 607, 863 N.Y.S.2d 671, 672 (1st Dept. 2008) (suppression issue was not preserved for appeal because admission was entered after court had ruled on other suppression issues and before court had ruled on issue in question; "[i]n this situation, the court's failure to make a ruling is not deemed a denial"). The remedy also does not extend to motions on procedural issues that are ancillary to a ruling on the merits of the suppression motion. See, e.g., People v. Taylor, 65 N.Y.2d 1, 6-7, 489 N.Y.S.2d 152, 155-56 (1985) (guilty plea waives right to appeal denial of motion to preclude statement or identification testimony for inadequacy of 710.30 notice); People v. Petgen, 55 N.Y.2d 529, 450 N.Y.S.2d 299 (1982) (by pleading guilty, defendant waived right to appeal trial court's order denying leave to late-file suppression motion); In the Matter of Angel V., 79 A.D.3d 1137, 913 N.Y.S.2d 572 (2d Dept. 2010) (by making an admission, the respondent "forfeited appellate review" of "his right to challenge the Family Court's denial, as untimely, of that branch of his omnibus motion which was to suppress his statements to law enforcement officials"); People v. Varon, 168 A.D.2d 349, 562 N.Y.S.2d 673 (1st Dept. 1990) (trial court's order denying discovery of affidavit supporting search warrant could not be appealed after entry of guilty plea).

The Family Court Act permits a respondent to waive the statutory remedy as part of an admission. See F.C.A. § 330.2(6) (statutory right to post-admission appeal of suppression ruling is inapplicable when "the respondent, upon an admission, expressly waives his right to appeal"). See also People v. Seaberg, 74 N.Y.2d 1, 543 N.Y.S.2d 968 (1989) (upholding the practice of bargaining away the right to appeal in exchange for a guilty plea). However, before accepting an admission involving such a waiver of the statutory appellate remedy, the trial court must obtain an "express[] waiver" from the respondent (F.C.A. § 330.2(6)) and must ensure that the waiver is "knowingly, intelligently and voluntarily made," taking into account "the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused" (People v. Callahan, 80 N.Y.2d 273, 280, 590 N.Y.S.2d 46, 50 (1992)). The validity of the waiver can be reviewed on appeal, as can any other challenges to the procedures for taking the admission. See id.

B. Adjourning a Trial for the Purpose of Obtaining a Transcript of the Suppression Hearing

In cases in which a suppression motion is held and the case thereafter proceeds to trial (either because the motion was denied or because the prosecution had enough evidence to proceed to trial despite an order of suppression), defense counsel will often wish to adjourn the trial in order to obtain a transcript of the suppression hearing for use in impeaching prosecution witnesses who testified at the hearing. In In the Matter of Eric W., 68 N.Y.2d 633, 505 N.Y.S.2d 60 (1986), the Court of Appeals held that such requests for an adjournment for the purpose of obtaining a suppression hearing transcript generally are addressed to the discretion of the trial

court. See *id.* at 636, 505 N.Y.S.2d at 61. The analysis in *Eric W.* suggests, however, that there may be some circumstances in which a respondent can assert a due process right to adjourn the trial for the purpose of obtaining a suppression hearing transcript.

The specific holding of *Eric W.* is that a trial judge does not abuse his or her discretion by denying a defense request for an adjournment for the purpose of obtaining a suppression hearing transcript when, as in *Eric W.*, (i) “[t]he complainants, appellants, witnesses, attorneys and Judges [are] present in court and able to proceed without delay” (*id.* at 636, 505 N.Y.S.2d at 62); (ii) the pretrial proceedings were “brief” (*id.*), a characterization which was applied in *Eric W.* to suppression hearings that were “well under an hour in length” (*id.* at 635, 505 N.Y.S.2d at 61); (iii) the fact-finding hearing will also be “brief” (*id.* at 636, 505 N.Y.S.2d at 62), such as the fact-finding hearings in *Eric W.*, which “last[ed] no longer than two hours” (*id.* at 635, 505 N.Y.S.2d at 61); (iv) the fact-finding hearing is taking place immediately after the suppression hearing (see *id.*); (v) the fact-finding hearing will involve “the same witnesses, counsel and Judge” as the suppression hearing (*id.* at 636, 505 N.Y.S.2d at 62); (vi) defense counsel, in making the request for the adjournment, failed to “claim that there [will be] any prejudice in proceeding from the brief pretrial proceedings to the brief fact-finding hearing[.]” (*id.*); and (vii) the presentment agency also does not have a transcript to use at trial (*id.*).

The extremely fact-specific holding of *Eric W.* suggests the circumstances in which counsel can assert a due process right to adjourn the trial for the purpose of obtaining a transcript of the suppression hearing. First, counsel can insist upon the transcript if the suppression hearing was not “brief.” The brevity of the suppression hearing in *Eric W.* allowed the court to assume that the attorney for the child would necessarily remember everything said at the hearing and therefore would not need a transcript. If the suppression hearing was lengthy and particularly if it involved a complex fact pattern, counsel can assert that his or her inability to recollect all of the testimony of the prosecution witnesses prevents counsel from effectively cross-examining and impeaching those witnesses without a transcript. Moreover, when the suppression hearing was lengthy, counsel can assert that the alternative procedure of the court reporter’s reading back portions of the testimony would involve such delays between questions that counsel would be unable to conduct a forceful and meaningful cross-examination.

If the suppression hearing does not immediately follow the trial as it did in *Eric W.*, counsel can argue that the hiatus renders a transcript necessary. Because there was no lapse in time between the brief pretrial hearing and the trial in *Eric W.*, the court could reasonably assume that defense counsel would remember all of the pretrial hearing testimony. When there is a hiatus, counsel can argue that a transcript is necessary to guard against the constitutionally unacceptable risk of counsel’s forgetting portions of the pretrial testimony and therefore being unable to meaningfully cross-examine a prosecution witness. See, e.g., *In the Matter of David K.*, 126 Misc.2d 1063, 1064, 485 N.Y.S.2d 183, 184 (Fam. Ct., Bronx Co. 1985) (“[c]learly, when there is a hiatus between the time of the preliminary hearing and the time of trial, ... the necessity of obtaining the minutes of the preliminary hearing is crucial and obvious for purposes of effective cross examination”).

A change of the attorney for the child between the suppression hearing and the trial also distinguishes Eric W. and arguably gives rise to an entitlement to adjourn the trial for the purpose of obtaining a suppression hearing transcript. If the attorney for the child who will be handling the trial is not the attorney who litigated the suppression hearing, trial counsel must read the transcript in order to know what was said at the pretrial hearing. Since impeachment with prior inconsistent statements is a fundamental part of cross-examination (as the courts have repeatedly recognized in Rosario cases), an attorney who is unaware of a witness's prior inconsistent statements at the suppression hearing is unable to conduct a meaningful cross-examination at trial.

If the judge who will preside at trial is not the judge who heard the suppression hearing, counsel can insist that a transcript be prepared so that the trial judge can read it prior to trial. An important element in the court's reasoning in Eric W. was that the judge presiding over the trial had heard all of the evidence at the suppression hearing and would inevitably have remembered it at trial since there was no lapse of time between the pretrial hearing and trial. Accordingly, "when the fact finder will not be the same judge who presided at the preliminary hearing, but rather a different judge ..., the necessity of obtaining the minutes of the preliminary hearing is crucial and obvious for purposes of effective cross examination." In the Matter of David K., 126 Misc.2d at 1064, 485 N.Y.S.2d at 184.

In any case in which counsel can make a particularized showing that s/he would be prejudiced by the denial of the transcript, Eric W. does not apply. The court's reasoning in Eric W. was based in large part upon the fact that "[n]either appellant claim[ed] that there was any prejudice." Eric W., 68 N.Y.2d at 626, 505 N.Y.S.2d at 62.

If the prosecution has a transcript of the suppression hearing but the attorney for the child does not, counsel is entitled to an adjournment to obtain the transcript. In Eric W., the court explicitly noted that it was not reaching the question of whether such an inequality between prosecution and defense violates due process because "the presentment agency itself did not have" the transcripts. Eric W., 68 N.Y.2d at 636-37, 505 N.Y.S.2d at 62. Counsel can argue that when the prosecutor possesses a transcript but the attorney for the child does not, such an inequality is inconsistent with federal and state constitutional due process guarantees, which require a "balance of forces between the accused and his accuser" and prohibit the State from furnishing "nonreciprocal benefits to the [prosecution] ... when the lack of reciprocity interferes with the [accused's] ability to obtain a fair trial." Wardius v. Oregon, 412 U.S. 470, 474-75 & n.6 (1973).

In concluding that the trial judges in Eric W. did not abuse their discretion in denying defense requests for adjournments, the court stressed that all of the "witnesses [and] attorneys ... were present in court and able to proceed without delay." 68 N.Y.2d at 636, 505 N.Y.S.2d at 62. Of course, Eric W. does not affect the respondent's due process right to an adjournment for the purpose of obtaining a defense witness whom counsel was unable to bring to court despite reasonable efforts. When the unavailability of a witness or some other factor that prevents

counsel from going forward might not otherwise be sufficient to justify an adjournment, counsel can argue that the combination of that factor and the need for a transcript creates a due process right to an adjournment.

In Eric W., the Court of Appeals also indicated that a request for an adjournment of trial for the purpose of obtaining a suppression hearing transcript must be made prior to the conclusion of the suppression hearing. See Eric W., 68 N.Y.2d at 636, 505 N.Y.S.2d at 61. The most logical time for asserting the need for the transcript would be after the judge has issued a ruling denying the motion since, in all but the rarest case, a ruling granting the motion will obviate the need for a trial and result in dismissal of the Petition, a favorable plea, or a prosecutorial appeal. But, since an appellate court could view the judge's ruling as terminating the suppression hearing, and since counsel must make the request prior to termination of the hearing, the safest course is for counsel to state at the conclusion of his or her argument on the motion that in the event that the court denies the motion, counsel will be seeking an adjournment of the trial for the purpose of obtaining the transcript.

If the judge rejects the request for the adjournment and if, at trial, a prosecution witness denies an inconsistency in his or her suppression hearing testimony, counsel should renew the request for the transcript. If the court once again denies the request, counsel should ask that the court reporter read back the relevant portion of the prior testimony. A failure on counsel's part to make use of the read-back remedy may be viewed later as proof that the denial of the transcript was not prejudicial to the respondent's defense at trial. See, e.g., In the Matter of David K., 126 Misc.2d at 1064, 485 N.Y.S.2d at 184.

C. Cases in Which a Suppression Motion is Granted: Impact of Prosecutorial Appeal on the Respondent's Detention Status

The prosecution can seek an interlocutory appeal of an order granting suppression if the prosecution files with the Appellate Division a statement averring that "the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the presentment agency either: (a) insufficient as a matter of law; or (b) so weak in its entirety that any reasonable possibility of proving the allegations contained in the petition has been effectively destroyed." F.C.A. § 330.2(9).

When the prosecution pursues such an interlocutory appeal, a respondent who has been detained pending trial must be "released pending such appeal unless the court, upon conducting a hearing, enters an order continuing detention." F.C.A. § 330.2(9). Even when the trial judge conducts such a hearing, a respondent should not be detained, except in the rarest of cases. "Since the presentment agency may appeal an order granting suppression only if it simultaneously files a statement that the suppression has in effect destroyed the case, ... it is unlikely that in most cases sufficient cause remains to justify continued confinement." Practice Commentary to F.C.A. § 330.2. Cf. People v. Surretsky, 67 Misc.2d 966, 968, 325 N.Y.S.2d 31, 34 (Sup. Ct., N.Y. Co. 1971) ("[w]here possible, a defendant should not be compelled to serve a

prison sentence where there is any [possibility that the defendant will prevail on appeal].... It is unnecessary to emphasize the obvious that success on appeal is no recompense to one who has served all or part of his sentence.”).

If the prosecutor seeks detention, counsel should argue that the prosecutor must make a four-fold showing in order to justify detention pending appeal: (i) that the ordinary pre-trial standards of detention contained in F.C.A. § 320.5(3) are satisfied; (ii) in accordance with F.C.A. § 330.2(9), that the presentment agency cannot sustain its burden at trial without the suppressed evidence; (iii) that there is a likelihood that the suppression order will be reversed on appeal (cf. C.P.L. § 510.30(2)(b)); and (iv) that special circumstances exist which compel continued detention for a protracted period despite the prosecution’s concession that it cannot prove the respondent’s guilt without the suppressed evidence.

If the trial judge grants the prosecution’s request for continued detention, counsel should immediately seek a stay of the detention order from the Appellate Division. F.C.A. § 330.2(9) specifically provides that “[a]n order continuing detention ... may be stayed by the appropriate appellate division.”

VII. Suppression-Related Issues That May Arise At Trial

A. Admissibility of Suppression Hearing Testimony at Trial

In People v. Ayala, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990), the Court of Appeals made clear that the prosecution cannot introduce suppression hearing testimony at trial over the defendant’s objection. There has always been a prohibition against the prosecution’s introducing a defendant’s suppression hearing testimony at trial in the prosecution’s case-in-chief at trial. See Simmons v. United States, 390 U.S. 377 (1968). The Court of Appeals’s decision in Ayala established that the prosecution cannot introduce a police officer’s or other prosecution witness’s suppression hearing testimony in the case-in-chief at trial over the defendant’s objection. As the Court of Appeals explained, such “prior testimony,” which is self-evidently “hearsay” if offered for the truth, would be admissible only if it satisfies CPL § 670.10’s provisions for “[u]se in a criminal proceeding of testimony given in a previous proceeding,” and “[i]t is undisputed” that a suppression hearing “is not literally within any of the three categories of prior proceedings delineated in the statute.” Ayala, 75 N.Y.2d at 428, 554 N.Y.S.2d at 428. (Even if the statute *had* included suppression hearings, the U.S. Supreme Court’s decision in Crawford v. Washington, 541 U.S. 36 (2004) – which was decided long after Ayala and therefore did not factor into the Court of Appeals’s analysis in Ayala – would prevent the prosecution from introducing the suppression testimony of a now-unavailable witness at trial over the defendant’s objection unless the defendant had had a full opportunity at the suppression hearing to cross-examine the witness on all matters relevant to the trial (see Crawford, 541 U.S. at 68), which will rarely, if ever be the case.)

The Ayala decision’s reasoning applies to Family Court delinquency proceedings because

F.C.A. § 370.1(2) provides that “[a]rticle six hundred seventy . . . of the criminal procedure law concerning . . . the use of testimony given in a previous proceeding . . . shall apply to proceedings under this article.” See In re Jaquan A., 45 A.D.3d 305, 306, 846 N.Y.S.2d 88, 89 (1st Dept. 2007) (“We agree with appellant that under CPL 670.10(1), which is applicable to juvenile delinquency proceedings pursuant to Family Court Act § 370.1(2), the suppression hearing testimony of Detective Smith was not admissible at the fact-finding hearing (*see generally* People v. Ayala, 75 N.Y.2d 422, 428-430, 554 N.Y.S.2d 412, 553 N.E.2d 960 [1990]). We agree as well that the presentment agency did not lay any foundation at the fact-finding hearing for the admission of the two documents [which had previously been introduced by Presentment Agency at suppression hearing]; nor were they admissible at the fact-finding hearing merely because they were received into evidence at the *Huntley* hearing.”).

As explained earlier, suppression hearing testimony *can* be used by either party to impeach an opposing witness at trial and to show that the witness’s trial testimony is inconsistent with testimony that the witness gave at the suppression hearing. See Part V(D) *supra*. Such use of suppression hearing testimony for impeachment purposes would not run afoul of the hearsay rule because it would not be offered for “the truth of the matter” (merely to show that the witness said something different on a prior occasion) and thus, by definition, would not be “hearsay.”

B. Prosecutor’s Use of Suppressed Statement To Impeach Respondent at Trial

“Upon granting a motion to suppress evidence, the court must order that the evidence in question be excluded.” F.C.A. § 330.2(5). The prosecution cannot use or refer (either directly or indirectly) to any suppressed evidence in its case-in-chief at trial. See, e.g., People v. Ricco, 56 N.Y.2d 320, 323, 342, 452 N.Y.S.2d 340, 342 (1982). Depending upon the basis for suppression, however, the prosecutor may be able to use suppressed statements “to impeach the credibility of a [respondent] who chooses to take the stand to testify in contradiction of the contents of the flawed statements.” *Id.* This is true with respect to statements suppressed on Miranda grounds (Harris v. New York, 401 U.S. 222 (1971); People v. Washington, 51 N.Y.2d 214, 433 N.Y.S.2d 745 (1980)), or right-to-counsel grounds (see Kansas v. Ventris, 129 S. Ct. 1841 (2009)). Suppressed statements are not available for use in impeachment if the basis for suppression was a violation of the due process doctrine of involuntariness (see Mincey v. Arizona, 437 U.S. 385, 398, 402 (1978); People v. Washington, 51 N.Y.2d at 320, 433 N.Y.S.2d at 747), or the Fifth Amendment’s protections against compelled testimony (see New Jersey v. Portash, 440 U.S. 450, 458-59 (1979)).

Counsel can argue that statements suppressed as the fruits of a violation of F.C.A. § 305.2’s special procedures for interrogating juveniles should not be available to the prosecution for impeachment purposes. There are essentially two independent doctrinal bases for exempting a suppressed statement from the Harris doctrine (which permits the use of suppressed statements for impeachment): (i) if, in addition to being suppressed, “the trustworthiness of the evidence [fails to] satisf[y] legal standards,” Harris v. New York, 401 U.S. at 224; or (ii) if, as in the due process involuntariness context, the police method of “extract[ing] ... [the statement] offend[s]’

[the applicable legal standards]” (People v. Washington, 51 N.Y.2d at 220, 433 N.Y.S.2d at 747, quoting Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)) in that “the behavior of the State’s law enforcement officials was such as to overbear [the accused’s] will to resist and bring about confessions not freely self-determined” (Rogers v. Richmond, 365 U.S. at 544). Under either of these criteria, a statement suppressed for violation of F.C.A. § 305.2 should be deemed unavailable for impeachment purposes. The failure to follow the procedures the Legislature deemed essential for interrogation of a child renders the resulting statement “untrustworthy,” in the sense that it may well be “the product of adolescent fantasy, fright, or despair.” In re Gault, 387 U.S. 1, 45 (1967). And when the police subvert the procedures designed to provide young people with the guidance and support of an “adult relative ... [who can] give[] [the respondent] the protection which his own immaturity could not” (Gallegos v. Colorado, 370 U.S. 49, 54 (1962)), the police are acting in a manner that, by intention or effect, will “overbear [the accused’s] will to resist and bring about confessions not freely self-determined” (Rogers v. Richmond, 365 U.S. at 544).

C. Defense Right to Present Testimony At Trial Concerning the Police Procedures That Resulted in a Confession, Identification or Seizure Notwithstanding Prior Denial of Suppression Motion

In a case in which a suppression motion is denied pretrial, defense counsel may wish to present testimony at trial concerning the police procedures that resulted in a confession, identification, or seizure of tangible evidence. For example, as in Crane v. Kentucky, 476 U.S. 683 (1986), even though the judge concluded at the Huntley hearing that the police conduct was not so egregious as to render the statement involuntary, defense counsel may wish to present evidence at trial of “the physical and psychological environment that yielded the confession [in order to] ... answer[] the one question every rational [judge] needs answered: If the [accused] is innocent, why did he previously admit his guilt?” Id. at 689.

In Crane v. Kentucky, the U.S. Supreme Court held that even after denial of a pretrial motion to suppress statements, the accused’s constitutional right to “a meaningful opportunity to present a complete defense” (id. at 690) requires that the accused be allowed to present evidence at trial to show that his or her confession should be disbelieved because it was induced by the police. Accord People v. Pagan, 211 A.D.2d 532, 534, 622 N.Y.S.2d 9, 11 (1st Dept. 1995), app. denied, 85 N.Y.2d 978, 629 N.Y.S.2d 738 (1995) (“In addition to his pre-trial Huntley rights, a defendant has the ‘traditional prerogative’ to contest an incriminating statement’s ‘reliability during the course of the trial’” (citing Crane v. Kentucky, supra)). But cf. People v. Andrade, 87 A.D.3d 160, 161, 927 N.Y.S.2d 648, 650 (1st Dept. 2011) (“By raising a challenge at trial to the voluntariness of his inculpatory statements, defendant opened the door to the introduction of the evidence the police had placed before him to elicit those statements.”).

Similarly, the New York courts have held that even when the judge “has already denied a [Wade] motion to suppress and determined that the pretrial [identification] procedure was not constitutionally defective,” the accused is nonetheless entitled at trial “to attempt to establish that

the pretrial procedure was itself so suggestive as to create a reasonable doubt regarding the accuracy of that identification and of any subsequent in-court identification.” People v. Ruffino, 110 A.D.2d 198, 203, 494 N.Y.S.2d 8, 12 (2d Dept. 1985). Accord People v. Catricone, 198 A.D.2d 765, 766, 604 N.Y.S.2d 365, 366 (4th Dept. 1993) (“At trial a defendant may attempt to establish that a pretrial identification procedure was so suggestive as to create a reasonable doubt regarding the subsequent lineup and in-court identifications.”).

It is important to recognize that this right to litigate issues related to statements and identifications at trial is not a right to relitigate the constitutional issues determined at a pretrial hearing. In In the Matter of Edward H., 129 Misc.2d 180, 492 N.Y.S.2d 900 (Family Ct., Bronx Co., 1985), aff’d, 129 A.D.2d 1017, 514 N.Y.S.2d 897 (1st Dept. 1987), the respondents argued that the Family Court Act should be construed as incorporating the C.P.L. provision that allows adult criminal defendants to relitigate a previously denied Huntley motion at trial (C.P.L. § 710.70(3)). The court in Edward H. concluded, as a matter of statutory analysis, that the F.C.A. should not be construed in this manner and that, in the absence of any “constitutional ... authority requir[ing] two trials on the same issue before the same judge” (id. at 183, 492 N.Y.S.2d at 903), a respondent does not have the right “to relitigate the same issues determined at the preliminary hearing by requiring that the testimony at the Huntley hearing be repeated at the fact-finding hearing.” Id. at 181, 492 N.Y.S.2d at 901.

While Edward H. prevents the respondent from re-presenting the pretrial testimony at trial for the purpose of seeking a new ruling on the constitutional issues already decided at the pretrial hearing, the Edward H. decision does not -- and cannot -- impair the respondent’s constitutional right under Crane v. Kentucky to present such testimony at trial for the very different purpose of raising a reasonable doubt. The practical implications of this distinction are evident when one considers a case in which the respondent questions a prosecution witness at trial regarding the police procedures that resulted in the respondent’s statement or identification, and the prosecutor objects on relevancy grounds and argues that the question is relevant only to the pretrial issues which have already been decided. If defense counsel responds that s/he is not attempting to relitigate the constitutional issues resolved at the pretrial hearing but rather is asking the question for the very different purpose of explaining away the statement or identification and raising a reasonable doubt, then Crane v. Kentucky provides an absolute constitutional entitlement to ask the question.

In addition to the above-described cross-examination scenario, these issues also may arise in the defense case at trial. In a case in which the prosecutor does not call the relevant police officer as a witness in the Presentment Agency’s case-in-chief, the respondent is entitled under Crane v. Kentucky to call the officer as a witness in the defense case and question him or her about the procedures that resulted in the statement or identification. (When calling a police officer as a defense witness, counsel should always request that the court designate the witness a “hostile witness” and permit counsel to ask leading questions. Cf. People v. Walker, 125 A.D.2d 732, 510 N.Y.S.2d 203 (2d Dept. 1986); People v. Collins, 33 A.D.2d 844, 305 N.Y.S.2d 893 (3d Dept. 1969).)

The Crane v. Kentucky right to present a defense encompasses not only trial evidence designed to show that a statement was involuntary but also all other violations of constitutionally or statutorily mandated police procedures that might explain why an innocent person would confess. Thus, for example, the police officers' failure to adequately explain Miranda rights to the respondent or their failure to arrange for the presence of respondent's parent may have contributed to the respondent's mistaken belief that the wisest course of action was to cooperate with the authorities even if that meant acquiescing in police demands that the respondent confess to a crime which s/he did not commit.

The right to present evidence at trial of the unreliability of an identification would necessarily encompass any flaw in the identification procedure that raises doubts about the accuracy of the result.

It is only with respect to Mapp issues that the judge may be able to limit the respondent's right to present testimony at trial regarding issues resolved in the pretrial suppression hearing. A police officer's failure to obtain a warrant for a search or seizure will not ordinarily be relevant to the issues at trial. However, defense counsel can invoke Crane v. Kentucky at trial to bring out facts previously elicited at a Mapp hearing whenever the police officer's credibility is at issue in the trial and defense counsel wishes to cross-examine the officer about the search or seizure for the purpose of impeaching the officer's credibility. Thus, for example, where the respondent is charged with possession of contraband and the police officer testifies to the possession, the defense is entitled to attack the officer's credibility by cross-examining him or her regarding suspicious aspects of the officer's version of the facts surrounding the search or seizure.