

**DEVELOPMENTS IN  
JUVENILE DELINQUENCY LAW AND PROCEDURE  
(Jan. 2019 - June 2020)**

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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. Discovery**

**A. *Brady* Evidence**

People v. Hemphill, 2020 WL 3453924 (N.Y. Ct. App. June 25, 2020): Defense counsel waived or abandoned a *Brady* claim by failing to lay the requisite foundation for impeaching a prosecution witness with a prior inconsistent statement. Defense counsel had intended to impeach a prosecution witness with her 2007 Grand Jury testimony but mistakenly questioned her instead about 2006 Grand Jury testimony of hers that didn't contain the prior inconsistent statement. When defense counsel sought to call the court reporter from the 2007 Grand Jury to recount the impeaching statement, the trial court offered defense counsel the opportunity "to recall [the prosecution witness], question her about her 2007 testimony, and then call the 2007 court reporter if necessary." "Defense counsel declined this alternative to the request," and the trial court denied defense counsel's request to call the court reporter. The Court of Appeals holds that the trial court acted within its discretion in the way in which it handled this issue.

People v. Rong He, 34 N.Y.3d 956, 112 N.Y.S.3d 1 (2019): The prosecution "failed to fulfill their 'broad obligation' of disclosure under *Brady* by failing to provide defendant with meaningful access" to witnesses whose "statements, if true, would have directly contradicted the People's theory of the case that defendant was the sole perpetrator" and at least "could have allowed defendant to develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense." Instead of providing defense counsel with "direct disclosure of the witnesses' contact information," the prosecution "offered to provide the witnesses with defense counsel's information" so that the witnesses could contact defense counsel if they chose. The Court of Appeals holds that, in the absence of an adequate prosecutorial showing that such "protective measures" were necessary due to the defendant's "present[ing] a risk to the requested witnesses," the "People's refusal to disclose the contact information, or to provide any means for defense counsel to contact the witnesses other than through the prosecution itself, is tantamount to suppression of the requested information" and a *Brady* violation.

People v. Ulett, 33 N.Y.3d 512, 105 N.Y.S.3d 371 (2019): Even though the applicable *Brady* standard was the less protective federal constitutional standard rather than the more protective state constitutional standard (because the defendant did not make a specific *Brady* request), the Court of Appeals nonetheless reverses the conviction on *Brady* grounds due to the prosecution’s failure to provide the defense with “a surveillance video that captured the scene at the time of the shooting, including images of the victim and a key prosecution witness.” The Court of Appeals finds that the withheld evidence was “material” for *Brady* purposes because it “could have been used to impeach the eyewitnesses” and would “have provided [the defense with] leads for additional admissible evidence . . . and avenues for alternative theories for the defense.”

People v. Giuca, 33 N.Y.3d 462, 104 N.Y.S.3d 577 (2019): The Court of Appeals overturns an Appellate Division decision that had found a *Brady* violation due to the prosecution’s failure to disclose information about a prosecution witness that, in the Appellate Division’s view, could have led the jury to find that the witness had a “tacit understanding” with the prosecution that he would receive a benefit for his testimony. The Court of Appeals finds that “there was no agreement with [witness] JA – tacit or otherwise.” The Court of Appeals then goes on to say that “[w]e do recognize, however, that even where there is neither an express nor a tacit agreement, the People have a broader responsibility to disclose favorable information tending to show that a witness had an incentive to testify falsely in order to curry favor with the prosecution on an open criminal case,” and “it could be argued that JA may have perceived that his upcoming testimony at the murder trial was beneficial to his retention in the drug treatment program as he was repeatedly released by the court, without the People’s objection, on his own recognizance despite those violations.” But the Court of Appeals ultimately rejects the *Brady* claim on materiality grounds, finding that even “[a]ssuming the People had an obligation to disclose this information, there is no reasonable possibility that it would have resulted in a different verdict.”

People v. McGhee, 180 A.D.3d 26, 116 N.Y.S.3d 206 (1st Dept. 2019): The prosecution violated *Brady* by “fail[ing] to disclose a witness statement that could have aided the defense in attempting to impeach the only eyewitness to the shooting in question and that could have opened up an additional avenue of investigation.”

## **B. Defense Notice of Intent to Present Psychiatric Evidence**

People v. Morris, 173 A.D.3d 1220, 104 N.Y.S.3d 155 (2d Dept. 2019): The trial court should have exercised its discretion to allow late-filing of the defense’s notice to present psychiatric evidence because “[t]he evidence that the defendant previously had suffered auditory hallucinations had high probative value to

corroborate the defendant's testimony that he entered the home with the intent to aid a woman who was yelling, rather than to damage the house," and "the preclusion of testimony regarding those portions of the defendant's conversation with the responding officer which involved his past auditory hallucinations, and his resultant hospitalization . . . deprived the jury of the full context of the interaction." Given these circumstances, "[a]ny prejudice to the People was substantially outweighed by the defendant's extremely strong interest in presenting the evidence."

### **C. Complainant's Mental Health Records**

People v. Butler, 2020 WL 3260987 (2d Dept. June 17, 2020): The trial court erred in affording the defense only very limited access to "the complainant's confidential mental health records, relating to mental health counseling that the complainant had engaged in approximately a year after she disclosed that, when she was younger, the defendant had raped and sexually abused her." In redacting the records, the court removed "a handwritten notation indicating 'Sexual abuse denied,'" and "a portion of a one-page risk assessment checklist" that "contained an unchecked box entitled 'Sexual abuse (lifetime).'" The defense was entitled to these documents because they could have been "viewed by the jury as exculpatory and materially relevant to the matter."

## **II. Suppression Motions: Law and Procedure**

### **A. *Mapp* Motions**

#### **(1) Standing / Reasonable Expectation of Privacy**

People v. Diaz, 33 N.Y.3d 92, 98 N.Y.S.3d 544 (2019): In a 5-2 decision, the Court of Appeals holds that "a correctional facility's release to prosecutors or law enforcement agencies of recordings of nonprivileged telephone calls made by pretrial detainees, who are notified that their calls will be monitored and recorded" does not violate the 4th Amendment because "detainees, informed of the monitoring and recording of their calls, have no objectively reasonable constitutional expectation of privacy in the content of those calls."

People v. Holmes, 170 A.D.3d 532, 97 N.Y.S.3d 1 (1st Dept. 2019): The trial court improperly found that the "defendant lacked standing because the pistol was recovered from the ground." Standing was sufficiently established by the testimony of the police officers that "the pistol was recovered immediately after it fell from defendant's person."

(2) ***DeBour Levels I and II***

People v. Hill, 33 N.Y.3d 990, 102 N.Y.S.3d 138 (2019): Although the police conducted a lawful Level I inquiry when they asked the defendant – who had “exit[ed] and reenter[ed] a building in a New York City Housing Authority development several times” – whether he lived there or was visiting a friend, “the encounter thereafter rose beyond a level-one request for information” when the police instructed the defendant to “stand right there” while they checked on his claim that he had been visiting a tenant. Because the prosecution relied exclusively on a Level I rationale at the suppression hearing, the Court of Appeals orders suppression of the contraband found on the defendant when the officers arrested him for trespass after determining that the defendant’s story about visiting a tenant was false.

People v. Wallace, 181 A.D.3d 1214, 120 N.Y.S.3d 525 (4th Dept. 2020): Even assuming the officer had a lawful Level I basis for approaching the defendant (who was walking after midnight in a high-crime area while wearing a mask) and asking him why he was wearing a mask (which the defendant answered by saying he was walking his dog), the officer’s subsequent question “what was in a bag, which defendant was apparently holding” – which the defendant answered by saying “it was ‘weed,’” whereupon the officer “frisked defendant and recovered a firearm,” and “[d]efendant thereafter made admissions regarding that weapon” – was an unjustified Level II inquiry and required the suppression of the firearm and the defendant’s statement about the weapon.

People v. Stover, 181 A.D.3d 1061, 120 N.Y.S.3d 650 (3d Dept. 2020): The police conducted an unlawful Level I request for information by approaching the defendant – who was inside his parked car in the parking lot of a private club (known for being a “hot spot” for crimes) at approximately 3 a.m., talking on his cell phone and engaging in a loud, “heated argument” – and asking him “‘what he was doing in the car [and] if everything was okay,’ and request[ing] identification.” The defendant responded by providing his driver’s license and saying that “everything was fine and that ‘he was having an argument with his girlfriend.’” When the police ran the license, they discovered “it had been suspended for an insurance lapse,” and thereupon “arrested defendant, conducted . . . [an] inventory search and discovered . . . [a] gun in the trunk.” The Appellate Division suppresses the gun because the police “had no reason to believe that [the defendant] was anything but a customer with a legitimate reason to be there,” and “[t]he encounter was further invalid because police had no objective, credible reason to extend the initial conversation by running



defendant's driver's license after he responded to their initial inquiry and provided the information they requested.”

**(3) *Terry Pursuit, Stops, and Frisks***

People v. Nazario, 180 A.D.3d 1355, 119 N.Y.S.3d 778 (4th Dept. 2020): A radio dispatch, reporting a burglary in progress and describing the suspect as a male Hispanic and “wearing a dark hooded sweatshirt,” was too “vague [a] description” to support the officer’s “forcible detention of defendant and . . . transport of him to take part in a showup identification.”

People v. Ravenell, 175 A.D.3d 1437, 107 N.Y.S.3d 408 (2d Dept. 2019): The “police lacked reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime, the necessary predicate for [a *Terry*] pursuit,” and therefore the gun discarded by the defendant during the chase had to be suppressed along with a post-arrest statement the defendant made at the police station. “Although clothing worn by the defendant and his companion matched the clothing described by the unidentified witness [who had heard a gunshot], the witness never saw either of the two men fire or possess a gun,” and “[t]here is no evidence in the record that the police saw any weapons or a bulge or outline of a weapon on the defendant which could indicate that he was involved in a crime.” “[C]ontrary to the People’s contention, the manner in which the defendant held his hands while he ran [“he had both his hands in his jacket pocket”] did not give the police reasonable suspicion to pursue”: This was an “innocuous” placement that is “susceptible of an innocent as well as a culpable interpretation.”

People v. Jones, 174 A.D.3d 1532, 105 N.Y.S.3d 252 (4th Dept. 2019): The police did not have adequate suspicion to pursue the defendant, whom they had “observed . . . walking in the general vicinity of the reported gun shots,” and who matched the “vague, generic description of the suspect as a black male, which could have applied to any number of individuals in the area of the large apartment complex with hundreds of residents.” Accordingly, the gun discarded by the defendant during the pursuit had to be suppressed. The Appellate Division rejects the trial court’s finding that “defendant’s act of discarding the handgun was a calculated act not provoked by the unlawful pursuit and was thus attenuated from it.” The Appellate Division explains that, “[c]ontrary to the [trial] court’s determination, there is no basis on this record to conclude that the unlawful pursuit had stopped at the time that defendant discarded the handgun.”

People v. Brown, 172 A.D.3d 41, 98 N.Y.S.3d 185 (1st Dept. 2019): A Level III seizure occurred when the police blocked the defendant’s attempt to leave a bodega and directed him to place his hands on the store counter. The seizure was not justified by an anonymous tip that a person matching the defendant’s description had a gun and drugs in his pocket because “[t]he radio run did not transmit the identity of the caller nor the basis for the caller’s knowledge,” and “[t]he caller provided no ‘predictive information’ to corroborate the tip, nor was it apparent that the caller possessed insider knowledge or was in an excited condition so as to render the tip more reliable.”

People v. Bilal, 170 A.D.3d 83, 96 N.Y.S.3d 1 (1st Dept. 2019): The police pursuit of the defendant was unlawful, and therefore a gun he discarded during the chase had to be suppressed. “While the police may have had an objective credible reason to approach defendant and to request information – based on the information the officers received from the radio report and their observations of defendant and his companion – those circumstances, taken together with defendant’s flight, could not justify the significantly greater intrusion of police pursuit.” “If we were to endorse a police pursuit under the grossly equivocal circumstances here – where the extremely vague, generic description of a ‘black [man in] a black jacket’ is used to justify pursuit of the companion of someone matching that description – this Court would be ignoring an extraordinary interference with a citizen’s right to be left alone.”

**(4) Arrests and Searches Incident to Arrest**

People v. Page, 2020 WL 3084481 (N.Y. Ct. App. June 11, 2020): The trial court improperly relied on *People v. Williams*, 4 N.Y.3d 535, 797 N.Y.S.2d 35 (2005) to suppress evidence resulting from a federal marine interdiction agent’s extra-jurisdictional stop of the defendant’s car for a traffic infraction, after which the agent held the defendant on the scene until the local Police Department arrived, searched the defendant’s vehicle, and arrested him for criminal possession of a weapon. In *Williams*, the Court of Appeals had rejected the prosecution’s attempt to justify a housing authority officer’s seizure outside his geographical jurisdiction by arguing that the officer was entitled to make a citizen’s arrest. The trial court analogized *Williams* to the current case but the Court of Appeals explains that *Williams* drew a distinction between “peace officers” and civilians to prevent peace officers from improperly circumventing their jurisdictional limitations, and this analysis does not apply to federal marine interdiction agents because they are not “peace officers” under New York’s statutory definition of that term.

People v. Chy, 2020 WL 3067295 (2d Dept. June 10, 2020): The trial court should have suppressed the fruits of a police officer's search of a knapsack which the officer removed from the defendant after handcuffing him. "[E]ven a bag within the immediate control or 'grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag.'"

People v. Grimes, 175 A.D.3d 712, 106 N.Y.S.3d 357 (2d Dept. 2019): The police search of the defendant's backpack was unlawful, and the contraband inside it had to be suppressed, because the defendant had already been handcuffed at the time of the search and the bag was already in police custody. Accordingly, the police had no "reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag.'"

People v. Perez, 170 A.D.3d 495, 96 N.Y.S.3d 59 (1st Dept. 2019): The officers' handcuffing of the defendant "was inconsistent with an investigatory detention and elevated the intrusion to an arrest not based on probable cause." This was not a situation in which the officers could have reasonably "concluded that defendant, a suspect in a street drug sale, was armed or dangerous, or likely to resist arrest or flee."

**(5) Probable Cause / Articulable Suspicion Based on Information from Others**

People v. Nettles, 172 A.D.3d 1102, 100 N.Y.S.3d 325, (2d Dept. 2019): The trial court erred by denying a *Darden* hearing. The trial court had applied the *Darden* exception for cases in which the facts personally known to the testifying police officer are sufficient to establish probable cause without the information provided by the confidential informant ("CI"). But the Appellate Division found that "the detective's on-the-scene observations during the two controlled drug buys fell short of probable cause without the information provided to him by the CI": "Although the detective observed the CI enter and exit the building [and had checked to make sure the CI had no contraband before entering the building], the detective was unable to confirm that the CI [who exited the building with crack cocaine] had actually purchased the narcotics from the subject apartment."

**(6) Automobile Stops and Searches**

Kansas v. Glover, 140 S. Ct. 1183 (2020): A police officer does not violate “the Fourth Amendment by initiating an investigative traffic stop after running a vehicle’s license plate and learning that the registered owner has a revoked driver’s license,” assuming that “the officer lacks information negating an inference that the owner is the driver of the vehicle.” “The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of . . . [this] inference.” The Court expressly “emphasize[s] the narrow scope of . . . [its] holding” and explains that “the presence of additional facts might dispel reasonable suspicion. . . . For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not “‘raise a suspicion that the particular individual being stopped is engaged in wrongdoing.’”

People v. Weeks, 182 A.D.3d 539, 122 N.Y.S.3d 347 (2d Dept. 2020): “The People failed to establish the lawfulness of the impoundment of the defendant’s car and subsequent inventory search,” and therefore the fruits of that search should have been suppressed. “Although the officer testified that he impounded the defendant’s vehicle to safeguard the defendant’s property against a potential burglary, the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant’s vehicle was in the interests of public safety or part of the police’s community caretaking function . . . . Moreover, the People failed to present any evidence as to whether the New York City Police Department had a policy regarding impoundment of vehicles, what that policy required, or whether the arresting officer complied with that policy when he impounded the defendant’s vehicle.”

People v. Johnson, 183 A.D.3d 1273, 123 N.Y.S.3d 378 (4th Dept. 2020): The police lacked probable cause to search a car under the “automobile exception” after a traffic stop, even though the defendant acted suspiciously while interacting with the officer during the traffic stop and then fled the vehicle. “Although defendant engaged in ‘furtive and suspicious activity’ and his ‘pattern of behavior, viewed as a whole’ was suspicious . . . , there was no direct nexus between the initial traffic stop for a traffic violation and the search of defendant’s vehicle.”

People v. Williams, 177 A.D.3d 1312, 112 N.Y.S.3d 836 (4th Dept. 2019): An anonymous 911 call that drugs were being sold out of a vehicle did not

provide a basis for the police to block the parked vehicle from driving away. “[T]he officer had, at most, a ‘founded suspicion that criminal activity [was] afoot,’ which permitted him to approach the vehicle and make a common-law inquiry of its occupants.”

People v. Pastore, 175 A.D.3d 1827, 107 N.Y.S.3d 804 (4th Dept. 2019): The “police did not have probable cause to search defendant’s vehicle [under the automobile exception] after they searched him and determined that there was no immediate threat to their safety,” even though the defendant was sitting in his vehicle outside the complainant’s home and admitted that he had previously threatened to shoot the complainant if the complainant ever entered defendant’s property. Probable cause was lacking “inasmuch as defendant was not alleged to have brandished a gun at the scene, there was inconclusive evidence that he actually threatened the complainant at the scene, defendant did not engage in any suspicious or furtive movements, and the officers did not observe any weapons or related contraband in the vehicle or on defendant’s person.”

People v. Espinoza, 174 A.D.3d 1062, 104 N.Y.S.3d 406 (3d Dept. 2019): The Appellate Division affirms the trial court’s suppression of evidence based on (1) the prosecution’s failure to establish that the search of the car was a valid inventory search (in that the prosecution failed to “establish that the policy was sufficiently standardized, that it was reasonable and that the deputy sheriff followed it in this case”; and (2) “[e]ven assuming the existence of a reasonable, standardized procedure, the record supports . . . [the trial court’s] conclusion that the alleged inventory search was a ‘pretext’ to locate incriminating evidence” (since “the deputy sheriff seized defendant’s wallet prior to the alleged inventory search” and found contraband in it, and then conducted the search of the car in the belief that “the vehicle may contain additional contraband.”

People v. Suttles, 171 A.D.3d 1454, 98 N.Y.S.3d 682 (4th Dept. 2019): “[P]olice officers effectively seized the vehicle in which defendant was riding when their two patrol cars entered the parking lot in such a manner as to prevent the vehicle from being driven away.” Because the information known to the police at the time authorized merely a Level II common law inquiry, suppression is ordered.

People v. Floyd, 171 A.D.3d 787, 97 N.Y.S.3d 191 (2d Dept. 2019): The police did not have an adequate *Terry* basis to stop a U-Haul truck based on an anonymous tip of a possible larceny or burglary involving four to five men who were “suspiciously” going into and out of a U-Haul truck. “The characteristics described in the anonymous tip were readily

observable, and the behavior of the individuals described in the tip was consistent with the ordinary use of a U–Haul truck, as the tipster failed to identify what made the behavior suspicious for burglary. . . . Additionally, the tip ‘lacked predictive information’ and was uncorroborated by the officers, as the U–Haul truck was not at the reported location when the officers arrived.”

**(7) Consent to Search**

People v. Hickey, 172 A.D.3d 745, 98 N.Y.S.3d 287 (2d Dept. 2019): “[T]he consent of the defendant’s mother to the police to enter the home to speak with the defendant did not constitute a consent to [an officer’s] search of the living room” after the defendant “darted to the back of the house to the living room[,] . . . reached into his waistband, removed an object [which was subsequently found to be a gun], and tossed it underneath a chair in the living room,” and then “complied with the officers’ requests to come out with his hands up.” The search also could not be justified on plain view grounds because the officer “testified that he did not know what the object was until he moved the chair,” nor under the exigent circumstances exception because “any exigency abated once the defendant was detained.”

**(8) Search Warrant**

People v. Melamed, 178 A.D.3d 1079, 116 N.Y.S.3d 659 (2d Dept. 2019): The search warrant violated the 4th Amendment’s particularity requirement. “[O]ther than a date restriction covering a period of approximately five years, the warrant permitted the OAG to search and seize all computers, hard drives, and computer files stored on other devices, without any guidelines, parameters, or constraints on the type of items to be viewed and seized . . . . Additionally, as to paper documents, the warrant merely identified generic classes of items, effectively permitting the OAG to search and seize virtually all conceivable documents that would be created in the course of operating a business . . . . Moreover, it did so for the two businesses identified as being involved in the suspected offenses, as well as a number of other businesses allegedly operated by the defendant. Significantly, this essentially ‘all documents’ search was not restricted by reference to any particular crime to which the items searched and seized should relate.” “[T]he warrant at issue was precisely the kind of general warrant that the Federal Constitution prohibits.” “As has been observed by federal courts, where the property to be searched is computer files, ‘the particularity requirement assumes even greater importance’ . . . since ‘[t]he potential for privacy violations

occasioned by an unbridled exploratory search’ of such files is ‘enormous.’”

People v. Thompson, 178 A.D.3d 457, 116 N.Y.S.3d 2 (1st Dept. 2019): “The search warrant for defendant’s phones was overbroad . . . [and] failed to satisfy the particularity requirement of both the Fourth Amendment and Article 1, § 12 of New York’s Constitution.” “The information available to the warrant-issuing court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found in all of the ‘locations’ within defendant’s cell phone to which the warrant authorized access . . . or in his emails, the examination of which was authorized without any time restriction.”

People v. Lambey, 176 A.D.3d 1232, 111 N.Y.S.3d 388 (2d Dept. 2019): The trial court erred in summarily denying the defendant’s motion to controvert a search warrant: “Although in moving to controvert the search warrant, defense counsel did not make precise factual averments, he was not required to do so as he did not have access to the search warrant applications at issue.”

**(9) Incredible Police Testimony**

People v. Maiwandi, 170 A.D.3d 750, 95 N.Y.S.3d 361 (2d Dept. 2019): The Appellate Division holds that tangible evidence should have been suppressed because the testifying police officer’s account was so incredible that the prosecution failed to satisfy its burden of production at the suppression hearing. The officer’s claim that he observed the passing of Suboxone between occupants of a car through his rear view mirror “strains credulity” because “common experience dictates that the dashboard of the defendant’s vehicle would have obscured [the officer’s] view of a hand-to-hand transaction between the defendant and the front-seat passenger”).

**B. *Huntley* Motions**

People v. Chapman, 182 A.D.3d 862, 123 N.Y.S.3d 236 (3d Dept. 2020): The trial court violated the rule against prosecutorial use of a defendant’s silence by allowing the prosecution to introduce a video that showed “the police recounting their case against defendant, including reading his texts aloud and being met largely, if not completely, with silence.” “[T]here was a significant risk that the jurors deemed defendant’s failure to answer the police officer’s questions to be an admission of guilt.”

People v. McCabe, 82 A.D.3d 772, 122 N.Y.S.3d 757 (3d Dept. 2020): The defendant's statement was the product of "custodial interrogation," and therefore the lack of *Miranda* warnings required suppression. "[O]nce defendant was handcuffed and placed in the back of . . . [the police] vehicle, he was in custody and, as such, his responses to [the officer's]. . . questions, made prior to the *Miranda* warnings, should have been suppressed." "The People's assertion that a reasonable person in this situation would have believed that he or she was not in police custody and was free to leave at any time begs credulity." The public safety / emergency exception to *Miranda* was inapplicable, even though the victim was convulsing and the officer was awaiting the arrival of emergency services, because "the officer did not immediately ask defendant what happened" and did so only after "defendant was handcuffed and placed in the backseat of the patrol car." At that point, "[t]he incident had been completed, the parties had been identified and medical assistance requested."

People v. Young, 181 A.D.3d 1266, 121 N.Y.S.3d 471 (4th Dept. 2020): "[T]he Pennsylvania State Troopers improperly interrogated defendant about the New York offenses in violation of his indelible right to counsel," which "attached at the time of the preliminary arraignment by virtue of his request for counsel during that proceeding, . . . notwithstanding the fact that the public defender had not yet been assigned."

People v. Harris, 177 A.D.3d 1199, 115 N.Y.S.3d 477 (3d Dept. 2019): Even though the defendant initially waived his *Miranda* rights and "openly and respectfully answered questions" during the first half-hour of the police interrogation, his subsequent statement "'maybe I should get a lawyer. I completely understand what you're saying and I agree with you, but I don't want to f\*\*k myself'" "constituted an unequivocal request for counsel and an exercise of his right to remain silent."

People v. Roman, 175 A.D.3d 1198, 109 N.Y.S.3d 268 (1st Dept. 2019): The defendant "unequivocally invoked his right to counsel" by stating "'I would like to tell you what happened, but I think I want to talk to an attorney.'"

People v. Hernandez, 174 A.D.3d 1352, 105 N.Y.S.3d 763 (4th Dept. 2019): "[D]efendant unequivocally invoked his right to counsel by stating 'I think I will take the lawyer' or 'I think I need a lawyer.'"

People v. Torres, 172 A.D.3d 758, 99 N.Y.S.3d 363 (2d Dept. 2019): The defendant was in "custody" for *Miranda* purposes because he was "handcuffed in the back seat of a police vehicle" as he was "bargaining with [the police] for his freedom by offering to get the wallet if they would remove the handcuffs and release him," and an officer testified at the suppression hearing that "the defendant



was not free to leave the police vehicle.”

People v. Jackson, 171 A.D.3d 1458, 99 N.Y.S.3d 147 (4th Dept. 2019): The defendant unequivocally asserted his right to counsel for *Miranda* purposes by asking the police: ““May I have an attorney please, a lawyer?””

People v. Stephans, 168 A.D.3d 990, 93 N.Y.S.3d 317 (2d Dept. 2019): The Appellate Division overturns the trial judge’s ruling that the defendant’s statement was spontaneous and not the production of “interrogation.” The Appellate Division finds that the police officer “should have known that in telling the defendant that she needed to come to the precinct station house in connection with his investigation into the allegations her husband had made against her, allegations about which she had already been told she would be arrested, placing her in an interview room, and then confronting her with the allegations and the evidence against her, including the existence of the order of protection, he was reasonably likely to elicit from the defendant an incriminating response.”

### **C. *Wade* Motions**

People v. Colsen, 181 A.D.3d 618, 117 N.Y.S.3d 580(2d Dept. 2020): The lineup was suggestive because “[t]he defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description of one of the assailants that the complainant gave to the police,” and “the dreadlocks were distinctive and visible despite the fact that the defendant and the fillers all wore hats.”

People v. Robles, 174 A.D.3d 653, 105 N.Y.S.3d 111 (2d Dept. 2019): The Appellate Division reverses a conviction, despite the defense’s failure to preserve the claim, because the judge allowed the prosecution to elicit from a witness that, although she was unable to identify the defendant during two pretrial identification procedures, she responded to a police question whether there’s any lineup participant she would “lean toward” identifying by picking the defendant based on his jaw. The Appellate Division explains that the statutes concerning a trial witness’s testimony about a prior identification are limited to situations in which the witness actually made an identification at the out-of-court procedure.

People v. Jones, 173 A.D.3d 1062, 102 N.Y.S.3d 265 (2d Dept. 2019): The Appellate Division holds that the trial court should have granted suppression of an identification that resulted from the detective’s showing the complainant a video on a cellphone which, the detective told the complainant, had been “recovered from the scene of the robbery,” The Appellate Division explains that: the showing of the video “was a police-arranged identification procedure, even though the police did not arrange the content of the videos on the phone”; “[b]y showing [the

complainant] the cell phone and telling him that the phone was recovered from the scene of the robbery, the detective suggested that the phone may belong to one of the perpetrators of the robbery”; and “[o]ne of the videos portrayed an individual using a taser on someone else, which was similar to [the complainant’s] description of the circumstances of the robbery.”

People v. Knox, 170 A.D.3d 1648, 96 N.Y.S.3d 811 (4th Dept. 2019): A show-up identification is suppressed as unnecessarily suggestive. Reiterating the general rule that “[s]howup identifications are disfavored, since they are suggestive by their very nature” and therefore must be “‘justified by exigency or temporal and spatial proximity [to the crime],’” the Appellate Division concludes that the police lacked such justification because they had already obtained an identification of the suspect by the complainant prior to the challenged show-up with the eyewitness, and “[t]he People have proffered no reason that a lineup identification procedure would have been unduly burdensome” given that the show-up occurred 90 minutes after the crime, “about five miles from the scene of the crime.” Moreover, the “‘defendant was handcuffed and’ flanked by police” during the show-up.

#### **D. Re-Opening the Suppression Hearing**

People v. Cook, 34 N.Y.3d 412, 121 N.Y.S.3d 187 (2019): The Court of Appeals clarifies the rules for when a trial court judge has “discretion to reopen a suppression hearing” at the prosecution’s request “after the People had rested but before rendering a decision.” The Court had previously held in *People v. Kevin W.*, 22 N.Y.3d 287, 980 N.Y.S.2d 873 (2013) that a trial judge cannot “reopen[ ] a suppression hearing [after rendering a decision] to give the People an opportunity to shore up their evidentiary or legal position absent a showing that they were deprived of a full and fair opportunity to be heard.” The Court of Appeals now makes clear that a trial court judge has discretion to re-open the suppression hearing at the prosecution’s request, prior to rendering a decision, if the court takes “finality concerns” and the “risk of improper tailoring” into account. The Court of Appeals concludes that the trial court’s re-opening of the suppression hearing in the present case did not constitute an abuse of discretion because the judge guarded against “any risk of tailoring” by “allow[ing] defense counsel wide latitude in cross-examining . . . the People’s witnesses,” and there was no “unfair prejudice” to the accused because “[t]he hearing and rehearing occurred over the course of two days” and “the additional witness should not have come as a surprise” to the accused and defense counsel.

People v. Dunbar, 178 A.D.3d 948, 116 N.Y.S.3d 293 (2d Dept. 2019): The trial court should have granted the defendant’s motion to re-open the suppression hearing, which was based on new information disclosed by the prosecutor before a

re-trial, and which “would have affected the earlier suppression determination” and which “could not have been discovered with due diligence by the defendant.” “The additional facts discovered need not necessarily be ‘outcome-determinative or “essential”’; instead, they must be ‘pertinent’ in that they ‘would materially affect or have affected’ the earlier suppression ruling.”

### **III. Other Motions**

#### **A. Motions to Dismiss for Legal Insufficiency**

People v. Wheeler, 34 N.Y.3d 1134, 118 N.Y.S.3d 68 (2020): An information charging Obstructing Governmental Administration in the Second Degree was jurisdictionally defective because, “with regard to the ‘official function’ element of the obstruction charge, the accusatory instrument lacked factual allegations providing defendant with notice of the official function with which he was charged with interfering – namely, a police stop of defendant in his vehicle in order to execute a search warrant . . . Defendant therefore lacked sufficient notice to prepare his defense, rendering the information jurisdictionally defective.”

#### **B. Speedy Trial Motions**

In the Matter of Brandon S., 169 A.D.3d 1047, 92 N.Y.S.3d 903 (2d Dept. 2019): The Appellate Division holds that the respondent failed to preserve his speedy trial claim because he did not specifically move for dismissal of the petition on speedy trial grounds.

In the Matter of Isaiah L., 169 A.D.3d 907, 94 N.Y.S.3d 331 (2d Dept. 2019): The Appellate Division upholds a Family Court order dismissing the petition on state constitutional due process grounds under the *Benjamin L.* doctrine. The Appellate Division (and the trial court) found that the four-month delay (from arrest on 11/7/17 to filing of the petition on 3/9/18) was sufficient to constitute a speedy trial violation – even though, as the Appellate Division specifically acknowledges – “the charges were serious [including attempted first-degree robbery and possession of a weapon in the fourth degree] and Isaiah L. did not demonstrate any actual prejudice to his defense attributable to the delay in filing the petition” – because “DSS failed to establish a legitimate reason for the delay.”

#### **C. Motions for Joinder or Severance**

##### **(1) Joinder or Severance of Counts**

People v. Moore, 181 A.D.3d 719, 122 N.Y.S.3d 42 (2d Dept. 2020): The trial court improperly denied a motion to sever counts by the defendant,

who sought to testify with regard to one robbery but not the other, joined robbery because testifying about the latter would have “expose[d] him[ ] to the ‘risk of serious impeachment’ with the underlying facts of two robberies bearing similarities to . . . [this other] robbery.”

In the Matter of Vance v. Roberts, 176 A.D.3d 492, 113 N.Y.S.3d 71 (1st Dept. 2019): In this Article 78 proceeding by the prosecution, seeking a writ of prohibition, the court rejects the prosecution’s claim that the Supreme Court Youth Part judge lacked the authority to sever two sets of counts in an indictment in order to send the charges relating to an incident on one date to Family Court while retaining the charges relating to an incident on another date in Supreme Court. The Appellate Division holds that “[t]here is no question that the [Youth Part] court had the authority to make the determination as to whether the charges were properly joinable, and, finding that they were not, it had the authority to sever those charges.”

## **(2) Joinder or Severance of Co-Defendants**

People v. Colon, 177 A.D.3d 1086, 113 N.Y.S.3d 389 (3d Dept. 2019): The trial court erred in denying the defendant’s motion for severance of co-defendants based on conflicting defenses. The co-defendant “denied knowledge of the cocaine’s existence in his car and . . . testified that defendant had brought the . . . bag into the car, that he did not know the contents of that bag, that he would not have allowed the bag in his car if he did,” while the defendant “argued – through counsel and without testifying – that he lacked knowledge of the cocaine’s presence in the car and that the cocaine must have belonged to [the co-defendant], given that it was found in [the co-defendant’s] car and that he had a criminal history involving drug possession and distribution.”

## **IV. Admissions**

People v. Holz, 2020 WL 2200365 (N.Y. Ct. App. May 7, 2020): A defendant’s statutory right to appeal an adverse suppression ruling after a guilty plea applies even if the suppression ruling did not relate to the count to which the defendant pleaded guilty as long as the suppression ruling related to “a count that was satisfied” by the guilty plea. The Court of Appeals reaches this conclusion based on statutory construction but explains that the outcome is also supported by the following “policy considerations”: “To conclude that the Appellate Division lacks jurisdiction to review a trial court’s determination on a suppression matter when the evidence in question is not directly related to the count of conviction would insulate erroneous decisions from review and could lead to a proliferation of unreviewable legal errors at the trial level.”

People v. Thiam, 34 N.Y.3d 1040, 115 N.Y.S.3d 745 (2019): “Even if the accusatory instrument properly sets out a lower-grade offense, a defendant’s challenge to a conviction based on the jurisdictional deficiency of a higher-grade crime of a multi-count complaint is not waived by the defendant’s guilty plea.”

In the Matter of Cheryl P., 175 A.D.3d 1298, 109 N.Y.S.3d 310 (2d Dept. 2019): The admission was legally defective because (1) the respondent “appeared telephonically even though there is no provision under article 3 of the Family Court Act authorizing the appearance by telephone of a minor in a juvenile delinquency proceeding”; and (2) “the court failed to obtain an allocution from a parent or a person legally responsible for the appellant with regard to their understanding of any rights the appellant may be waiving as a result of her admission,” and the record does not show that “‘reasonable and substantial effort’ was made to notify the . . . mother or guardian about the . . . proceeding.”

People v. Mohamed, 171 A.D.3d 796, 97 N.Y.S.3d 188 (2d Dept. 2019): The guilty plea is vacated because, even though the court asked defense counsel whether he and his client discussed the potential “immigration consequences” of pleading guilty and counsel stated that the defendant is “here on a Green Card” and assured the court that “[w]e have discussed the immigration consequences,” “the record does not demonstrate either that the Supreme Court mentioned, or that the defendant was otherwise aware of, the possibility of *deportation*.” Although the claim was not adequately preserved below, the Appellate Division reaches it anyway because “the defendant had ‘no practical ability’ to object to the court’s statement or to otherwise tell the court, if he chose, that he would not have pleaded guilty if he had known about the possibility of deportation.”

In the Matter of Richard S., 168 A.D.3d 749, 92 N.Y.S.3d 148 (2d Dept. 2019): The respondent’s admission was defective, and the adjudication therefore had to be vacated, because (1) the respondent’s account of how he obtained money from another youth did not make out the elements of grand larceny in the fourth degree; and (2) the judge failed to engage in the proper allocution with the foster care case planner, who was present and was “a person legally responsible for the appellant’s care.”

## **V. Fact-Finding Hearing**

### **A. Generally**

#### **(1) Right to a Public Trial**

People v. Rivera, 180 A.D.3d 514, 119 N.Y.S.3d 452 (1st Dept. 2020): The trial court committed reversible error by denying the defendant’s request that his “family members be permitted to attend the [undercover] officers’ trial testimony.” “[A]n order of closure that does not make an exception for family members will be considered overbroad, unless the

prosecution can show specific reasons why the family members must be excluded,” and “there was no testimony [at the *Hinton* hearing] that defendant or any member of his family threatened or otherwise posed a threat to either of [the] two testifying undercover officers.” The Appellate Division “reject[s] the People’s argument that the defense was obligated to identify specific family members who might attend the proceedings, in the absence of any request by the prosecutor or the court that it do so, as incompatible with the ‘presumption of openness’ that applies in this context.”

**(2) Trial in absentia**

People v. Taylor, 67 Misc.3d 130(A), 2020 WL 1907848 (Table) (App. Term, 9th & 10th Jud. Dist. 2020): The trial court improperly treated the defendant’s failure to appear for a pretrial suppression hearing as a waiver of the hearing. The Appellate Term explains that “[a]lthough a defendant may forfeit his right to be present [if properly advised in advance of the consequences of failing to appear], he does not as a consequence of his actions waive his right to a hearing or a trial’ . . . . ‘His forfeiture merely allows the court to try him in absentia.’”

People v. Smith, 170 A.D.3d 1339, 94 N.Y.S.3d 418 (3d Dept. 2019): The trial court improperly conducted the trial without the defendant present. Even though the judge gave the defendant the requisite *Parker* warnings, “trial in absentia is not thereby automatically authorized”; “[r]ather, it must also appear from the record that the trial court considered all appropriate factors before proceeding in [the] defendant’s absence, including the possibility that [the] defendant could be located within a reasonable period of time, the difficulty of rescheduling the trial and the chance that evidence will be lost or witnesses will disappear.” In this case, “[n]othing in the record indicates any difficulty in rescheduling the trial, fear that evidence or witnesses would be lost or that further efforts to locate defendant would be futile.”

**(3) Defense Right to an Adjournment**

People v. Bryan, 179 A.D.3d 489, 113 N.Y.S.3d 880 (1st Dept. 2020): “The [trial] court improvidently exercised its discretion in denying the defense an adjournment to the next business day for the purpose of calling an absent witness, whose testimony would undisputedly have been material.”

**(4) Mid-Trial Consultations Between Defense Counsel and the Accused**

People v. Peloso, 176 A.D.3d 1107, 113 N.Y.S.3d 87 (2d Dept. 2019): The trial court “deprived [the defendant] of the right to counsel” and committed reversible error by “instruct[ing] . . . [the defendant] not to discuss his trial testimony with his attorney during a two-day adjournment.”

**(5) Judge’s Improper Intervention in Lawyers’ Presentation of Testimony, or Other Improper Interference**

People v. Towns, 33 N.Y.3d 326, 102 N.Y.S.3d 151 (2019): The trial judge violated the defendant’s right to a fair trial by “negotiat[ing] and enter[ing] into a cooperation agreement with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence.” “[T]he trial court abandoned the role of a neutral arbiter and assumed the function of an interested party, thereby creating a specter of bias that requires reversal.” “The trial court effectively procured a witness in support of the prosecution by inducing the codefendant to testify concerning statements the codefendant made to police – which identified defendant as one of the robbers – in exchange for the promise of a more lenient sentence. Significantly, by tying its assessment of the truthfulness of the codefendant’s testimony to that individual’s prior statements to police, the trial court essentially directed the codefendant on how the codefendant must testify in order to receive the benefit of the bargain.”

People v. Mitchell, 2020 WL 3443126 (2d Dept. June 24, 2020): Although defense counsel failed to preserve the claim for appeal, the Appellate Division exercises its interests-of-justice jurisdiction to reverse the conviction due to the judge’s improper intervention in questioning the complainants in a manner that benefitted the prosecution and prejudiced the defendant: “[A]fter the two complainants, in response to questions by the prosecutor, were unable to positively identify the defendant as the perpetrator of the robbery, the Supreme Court improperly assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of the defendant from each of them.”

**B. Evidentiary Issues**

**(1) Confrontation Clause Issues**

People v. Tsintzelis, 35 N.Y.3d 925, 2020 WL 1355707, 2020 N.Y. Slip

Op. 02026 (N.Y. Ct. App. March 24, 2020): The trial court violated the Confrontation Clause by allowing testimony by a prosecution DNA expert and admission of DNA profiles even though the “testifying analyst[,] who did not participate in the generation of [the] . . . testimonial DNA profile,” had not ““used . . . her independent analysis on the raw data to arrive at . . . her own conclusions.”

People v. Tapia, 33 N.Y.3d 257, 100 N.Y.S.3d 660 (2019): In a 4-3 decision, the majority of the Court of Appeals holds that “a portion of a testifying witness’s prior grand jury testimony was properly admitted as a past recollection recorded to supplement his trial testimony,” and that doing so did not violate the defendant’s 6th Amendment right to confrontation. The prosecution laid the requisite foundation for the past recollection recorded exception to the hearsay rule. Although defense counsel argued that the witness’s “memory failure rendered him unavailable for the purpose of cross-examination within the meaning of the Sixth Amendment,” the Court majority concludes that the 6th Amendment’s Confrontation Clause ““does not bar admission of a statement so long as the declarant is present at trial to defend or explain it”” and can be “cross-examin[ed] before the trier of fact who must assess the credence and weight to be accorded to his testimony as a whole.” The Court majority “note[s] that defendant did not raise, and we therefore do not address, whether admission of Cosgrove’s grand jury testimony violated his right to confrontation under the New York State Constitution.”

People v. Stone, 179 A.D.3d 1287, 117 N.Y.S.3d 364 (3d Dept. 2020): The trial court violated the Confrontation Clause by allowing the prosecution to introduce the co-defendant’s statement which, although redacted, contained ““obvious indications that it was altered to protect the [defendant’s] identity.””

People v. Wakefield, 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019): In a case in which the prosecution relied on DNA analysis by Cybergenetics, a private company, using a software program called TrueAllele, the court rejects the defendant’s argument that “his right to confront witnesses was violated by not having access to TrueAllele’s source code.” The court acknowledges that the report was “testimonial” for Confrontation Clause purposes because the company, although private, was ““acting in the role of assisting the police and prosecutors in developing evidence for use at trial.”” The court, however, finds that the source code is not a declarant, although the court acknowledges that “[t]his is not to say that an artificial intelligence-type system could never be a declarant, nor is there little doubt that the report and likelihood ratios at



issue were derived through distributed cognition between technology and human.” The court finds that the relevant declarant here was the creator of TrueAllele who wrote the underlying source code, and he testified for the prosecution at trial and was subject to cross-examination.

People v. Shelly, 172 A.D.3d 1245, 101 N.Y.S.3d 143 (2d Dept. 2019): At a *Sirois* hearing, the prosecution proved, by clear and convincing evidence, that a prosecution witness’s absence was “due to threats made at the initiative or acquiescence of the defendant,” and thus the prosecution “could introduce an audiotaped statement” by the unavailable witness. At the *Sirois* hearing, the prosecution presented “audiotapes of phone calls from the defendant and another inmate, also allegedly a member of the Blood Stone Villains, while both were incarcerated at Rikers Island, discussing plans to distribute the *Rosario* paperwork [which had been “turned over to the defense with the names of several witnesses inadvertently visible, including that of the subject witness”] to others for the purpose of intimidating witnesses.”

People v. Gonsalves, 170 A.D.3d 886, 94 N.Y.S.3d 626 (2d Dept. 2019): The trial court violated the Confrontation Clause by allowing the investigating detective to “recount[ ] a conversation with an anonymous informant,” who “reportedly was an eyewitness to the crime and identified the defendant by name.” This testimony ““went beyond the permissible bounds of provid[ing] background information as to how and why the police pursued [the] defendant.””

## **(2) Hearsay**

People v. Sabirov, 2020 WL 3260925 (2d Dept. June 17, 2020): The trial court improperly prohibited the defense from supporting an intoxication defense by using the “business records exception” to introduce into evidence: (1) a Desk Appearance Ticket investigation form that contained information from the arresting officer that he believed the defendant to be intoxicated; and (2) an assessment form from the D.A. Office’s Early Case Assessment Bureau (ECAB) that also contained statements from the arresting officer indicating his belief that the defendant was intoxicated, and that was “potentially admissible as a business record of either the Police Department or the District Attorney’s office.”

People v. Thelismond, 180 A.D.3d 1076, 120 N.Y.S.3d 71 (2d Dept. 2020): The trial court committed reversible error by allowing the prosecution to introduce an anonymous 911 call under the excited utterance and present sense impression exceptions to the hearsay rule. The

Appellate Division explains that “the People did not present sufficient facts from which it could be inferred that the anonymous caller personally observed the incident . . . . The anonymous caller merely stated to the 911 operator that ‘[s]omebody just got shot on East 19th and Albemarle’ and that it ‘was a guy with crutches. He started to shoot.’ Nothing in these brief, conclusory statements, which were made at least five minutes after the shooting occurred, suggested that the caller was reporting something that he saw, as opposed to something he was told . . . . Moreover, although there was testimony that the call was made from a payphone located in the vicinity of the shooting, the People did not demonstrate that the payphone was situated outdoors or in a place where the actual site of the shooting would be visible.”

People v. Cook, 173 A.D.3d 633, 104 N.Y.S.3d 105 (1st Dept. 2019): The conviction is reversed because the trial court erroneously denied the defendant’s application under *Chambers v. Mississippi* to present hearsay “testimony that one of the robbery victims, who was unavailable to testify at trial, failed to identify defendant at a lineup.” “Although there were reasons to suspect that this victim may have falsely claimed to be unable to identify anyone in the lineup, the nonidentification plainly bore sufficient ‘indicia of reliability’ under the applicable standard, which ‘hinges upon reliability rather than credibility.’”

People v. Gonsalves, 170 A.D.3d 886, 94 N.Y.S.3d 626 (2d Dept. 2019): The trial court improperly allowed the prosecution to elicit testimony from the complainant that “the defendant’s stepfather came to the barbershop several days after the robbery, to say he was ‘sorry’ for what the defendant had done, to return [the complainant’s] keys, and to offer [the complainant] a replacement cell phone.” The Appellate Division explains that this testimony was impermissible because “[t]here was no showing that the defendant participated in or was in any way connected to his stepfather’s actions.”

People v. Miley, 63 Misc.3d 159(A), 2019 WL 2364376 (Table) (App. Term, 2d, 11th & 13th Jud. Dist. 2019): The trial court committed reversible error by allowing the prosecution to introduce a recording of a 911 call under the present sense impression to the hearsay rule. The exception did not apply because “the call had been made about one hour after the incident, during which time the caller, among other things, filled out a report and related the incident to another party who suggested the caller make the 911 call.”

### (3) Other Crimes Evidence

People v. Conner, \_\_ A.D.3d \_\_, 123 N.Y.S.3d 488 (1st Dept. 2020): “The trial court erred in denying defendant’s request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that this police Sergeant and a police detective arrested the plaintiff without suspicion of criminality and lodged false charges against him . . . . The civil complaint contained allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial.”

People v. Ramirez, 180 A.D.3d 811, 117 N.Y.S.3d 696 (2d Dept. 2020): The trial court erred by allowing the prosecution to introduce evidence in its case-in-chief that “the defendant allegedly resisted arrest six months after the incident in question after violating an order of protection against him held by one of the complainants.” The Appellate Division concludes that this evidence was “not relevant” because the “defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident to be deemed admissible as evidence of consciousness of guilt. Moreover, even assuming *arguendo* that it had been relevant, “[t]he probative value of the evidence that the defendant resisted arrest was far outweighed by the potential prejudice of creating an inference that the defendant may have violent tendencies, as indicated by him flailing and thrashing his arms against a police officer.”

People v. Saxe, 174 A.D.3d 958, 105 N.Y.S.3d 590 (3d Dept. 2019): The trial court committed reversible error by allowing the prosecution to introduce evidence of the defendant’s two alleged prior uncharged sexual offenses. This evidence was not admissible under *Molineux* because “the prior uncharged acts did not bear a sufficient similarity to the incident underlying the charged crimes so as to constitute, as the People argued, a common scheme or plan or demonstrate defendant’s intent or motive.”

People v. Holmes, 170 A.D.3d 532, 97 N.Y.S.3d 1 (1st Dept. 2019): The trial court improperly precluded defense counsel from “cross-examining the only police officer who allegedly saw the pistol falling from his person about allegations raised in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer’s credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him.”

**(4) Reputation Evidence**

People v. Youngs, 175 A.D.3d 1604, 110 N.Y.S.3d 73 (3d Dept. 2019): The trial court committed reversible error by excluding a defense witness who was “prepared to testify that she had known the victim since birth, that they were members of the same large extended family and that many members of the extended family knew the victim,” and that “she was aware of the victim’s bad reputation for truthfulness among the extended family.”

**(5) E-mails, Texts, Social Media, and Other Electronic Evidence**

People v. Pendell, 33 N.Y.3d 972, 100 N.Y.S.3d 612 (2019): The Court of Appeals holds that the lower courts were correct in finding that photographs extracted from the defendant’s cell phone and computers “were sufficiently authenticated through the testimony of the complainant and the law enforcement agents who extracted the photographs.” The Court of Appeals’s summary order does not recite the facts but they are present in the lower court opinion, which explains that (1) “[t]here was . . . explicit testimony from Constance Leege, a special agent with the United States Secret Service, explaining the process that she utilized to extract seven of the photographs from defendant’s cell phone, and testimony from her colleague, Robert Lupe, who performed a forensic analysis of defendant’s computer to extract the remaining photographic image”; (2) “the victim authenticat[ed], as both photographer and subject, the pictures that she took of herself and that she provided to defendant”; and (3) “[a]s for photographs taken by defendant at the hotel, the victim, as subject, confirmed that she was depicted in the photographs, without qualification.”

People v. Watson, 183 A.D.3d 1191, \_\_ N.Y.S.3d \_\_ (3d Dept. 2020): The trial court violated the best evidence rule by allowing the prosecution to introduce a “cell phone video recording of surveillance video that depicted the exterior of the bar,” “observations of the detective who viewed and recorded this cell phone video,” and testimony by the detective “about what he saw on a surveillance video showing the inside of the bar.” Moreover, the prosecution also failed to “call the bar manager or a person who installed the video equipment to authenticate the surveillance video.”

People v. Washington, 179 A.D.3d 522, 116 N.Y.S.3d 263 (1st Dept. 2020): “The [trial] court providently exercised its discretion in admitting a series of text messages exchanged between a person purporting to be defendant’s mother and the victim two days after the crime”: “There was

sufficient authentication, because an extensive chain of circumstantial evidence left no doubt that the texts came from defendant” and it was “highly improbable that anyone other than defendant (including the unapprehended second participant in the crime) sent the texts. In addition, the sender’s phone number was registered to a former female friend of defendant.”

People v. Gunther, 172 A.D.3d 1403, 101 N.Y.S.3d 406 (2d Dept. 2019): “[C]omputer reproductions of bank withdrawal slips were properly admitted into evidence”: “The original withdrawal slips were ‘scanned to store a digital “image” of the hard copy document,’” and “the reproductions of the withdrawal slips were properly authenticated by the testimony of a document review specialist, which included information about the prevention of tampering or degradation.”

People v. Nunez, 63 Misc.3d 150(A), 2019 WL 2113932 (Table) (App. Term, 2d, 11th & 13th Jud. Dist. 2019): The trial court erred in allowing the introduction of 911 recordings without a sufficient foundation. Although the testifying witness – the “tapes and records technician for the New York Police Department” – testified that “she knew that the recordings of the 911 calls were ‘fair and accurate’ recordings of the 911 calls because she had listened to the ‘original’ recordings of the 911 calls that had been emailed to the District Attorney’s Office,” the *voir dire* of the technician revealed that the recordings “had already been extracted from the database and sent to the District Attorney’s Office” and that “the technician never accessed or listened to the calls contained in the police database.” Thus she could not lay the requisite foundation that “the offered recordings were genuine and that they had not been altered or tampered with.”

**(6) Identification of the Accused in a Video by a Police Officer or Other Witness**

People v. Pinkston, 169 A.D.3d 520, 94 N.Y.S.3d 268 (1st Dept. 2019): The trial court did not err in allowing a police officer to identify the defendants as “persons depicted in videotapes,” even though this was not a case in which “defendants had . . . changed their appearance subsequent to having been videotaped.” The Appellate Division explains that “the circumstances suggested that the jury would be less able than the officer to determine whether the defendants were seen in the videotapes, given the poor quality of the surveillance tapes, which showed groups of young men, mostly from a distance,” and “[t]he trial court instructed the jurors that the officer’s testimony concerning the identities of those seen on video was his

opinion and that the ultimate identification determination belonged exclusively to the jury.”

**(7) Defense Cross-examination of Police Officers**

People v. Rouse, 34 N.Y.3d 269, 117 N.Y.S.3d 634 (2019): The trial court violated the defendant’s right to a fair trial by refusing to allow defense counsel to cross-examine police officers about “(a) misstatements that one of the officers made to a federal prosecutor in a different matter, and (b) prior judicial determinations in which each officer was found to have given unreliable testimony.”

People v. Conner, \_\_ A.D.3d \_\_, 123 N.Y.S.3d 488 (1st Dept. 2020): “The trial court erred in denying defendant’s request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that this police Sergeant and a police detective arrested the plaintiff without suspicion of criminality and lodged false charges against him . . . . The civil complaint contained allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial.”

People v. Burgess, 178 A.D.3d 609, 112 N.Y.S.3d 505 (1st Dept. 2019): The defendant was improperly denied the right to adequate cross-examination at both the suppression hearing and the trial because the judge precluded defense cross-examination of “a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested the plaintiff without suspicion of criminality and lodged false charges against him.” “The civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial.”

**(8) Prior Inconsistent Statements**

People v. Butts, 2020 WL 3067297 (2d Dept. June 10, 2020): The trial court violated the defendant’s right to a fair trial by precluding the defense from calling a witness to testify to a prior inconsistent statement by a prosecution witness. Although defense counsel failed to lay the proper foundation during the cross-examination of the prosecution witness, this was because defense counsel “was not aware” of the evidence of the impeaching witness at the time of the cross-examination; “it was only subsequent to the [prosecution witness’s] having completed his testimony that [the impeaching witness] contacted [defense] counsel.” Although the impeaching witness “was present in the courtroom during [the prosecution

witness's] testimony," this was not a sufficient basis for precluding "material and exculpatory evidence," particularly because there was no showing that abrogating the rule on witnesses to allow the defense testimony "would have prejudiced the People."

**(9) Prior Consistent Statements (Bolstering)**

People v. Johnson, 176 A.D.3d 1392, 113 N.Y.S.3d 294 (3d Dept. 2019): The trial court improperly allowed the prosecution to elicit a prior consistent statement from a prosecution witness on redirect after defense counsel impeached the witness with a prior inconsistent statement during cross-examination. The Appellate Division explains that "[p]rior consistent statements . . . may be used to rebut a claim of recent fabrication to the extent that such a statement predated the motive to falsify," but that defense counsel's use of the prior inconsistent statement did not amount to a claim of "recent fabrication" – and, even if one were to assume it did, the statement the prosecution used on redirect "predated [the witness's] motive to testify."

**(10) Parent-Child Privilege**

People v. Stover, 178 A.D.3d 1138, 115 N.Y.S.3d 500 (3d Dept. 2019): Although recognizing that "[a] parent-child privilege may arise 'when a minor, under arrest for a serious crime, seeks the guidance and advice of a parent in the unfriendly environs of a police precinct'" (quoting *People v. Harrell*, 87 A.D.2d 21, 26, 450 N.Y.S.2d 501 (2d Dept. 1982), *aff'd on other grounds*, 59 N.Y.2d 620, 449 N.E.2d 1263 (1983)), the court finds that the privilege was not applicable in this case because the "defendant was 19 years old at the time of the conversation."

**(11) Expert Testimony**

People v. Williams 35 N.Y.3d 24, 2020 WL 1516488, 2020 N.Y. Slip Op. 02123 (N.Y. Ct. App. March 31, 2020): "[T]he trial court should have held a *Frye* hearing . . . with respect to the admissibility of low copy number (LCN) DNA evidence and the results of a statistical analysis conducted using the proprietary forensic statistical tool (FST) developed and controlled by the New York City Office of Chief Medical Examiner (OCME)." "There is no absolute rule as to when a *Frye* hearing should or should not be granted, and courts should be guided by the current state of scientific knowledge and opinion in making such determinations. Indeed, admissibility even after a finding of general acceptance through a *Frye* hearing is not always automatic. Recent questioning of previously

accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been accepted within their relevant scientific communities but recently have come into varying degrees of question . . . . Those points, and the lessons of this case, reinforce the importance of judicial caution in the admission of developing scientific evidence in proceedings that may result in the deprivation or limitation of liberty.”

People v. Churaman, 2020 WL 3443285 (2d Dept. June 24, 2020): The trial court “improvidently exercised its discretion in denying the defendant’s application to permit testimony from his expert witness on the issue of false confessions,” who would have “discuss[ed] characteristics [of the defendant] that heightened his vulnerability to manipulation, and the interrogation conducted by the detectives, such as the techniques that were utilized and the improper participation of the defendant’s mother during the interview.”

**C. “Missing Witness” Inference**

People v. Smith, 33 N.Y.3d 454, 104 N.Y.S.3d 572 (2019): The Court of Appeals clarifies that although the party against whom a missing witness inference is requested can oppose it by showing that the witness’s testimony would have been “cumulative” (and the requesting party can then respond by arguing that the witness would not be cumulative), the party requesting the inference has no burden in the first instance to demonstrate non-cumulativeness as part of its *prima facie* showing in support of the inference. Some Appellate Division decisions had placed this burden on the requesting party, and the Court of Appeals now makes clear that this is improper: “The proponent of the charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative.” In this case, the defendant met his initial burden by showing that the missing witness was the only eyewitness other than the victim, and the prosecution responded by merely making a “conclusory argument” that ““there is absolutely no indication that [the missing witness] would be able to provide anything that wasn’t provided by [the victim].”” The Court of Appeals holds that “the People failed to rebut defendant’s *prima facie* showing of entitlement to the missing witness charge,” and thus the trial court “abused its discretion by declining to give the charge.”

**D. “Missing Evidence” Inference**

People v. Torres, 169 A.D.3d 1068, 94 N.Y.S.3d 173 (2d Dept. 2019): The trial court committed reversible error by denying the defendant’s request for an adverse



inference jury instruction to cover the prosecution's loss or destruction of "duly requested tape recordings and any other police records related to taped interactions between the undercover officer and a witness to the [drug] . . . sale, who was also the defendant's unindicted co-defendant." "Although the prosecutor stated that the missing tapes were unrelated to the sales at issue and were not recorded on the dates of the buys, he concededly never listened to them. Additionally, the officer who relayed the information that the tapes were not recorded on the dates of the buys to the prosecutor did not testify at trial."

#### **E. Variance**

People v. McLean, 170 A.D.3d 1196, 96 N.Y.S.3d 632 (2d Dept. 2019): The trial court committed reversible error by allowing the prosecution to amend the indictment, just as *voir dire* was about to commence, to change the date of the crime from "on or about the 20th day October, 2015," to "on or about October 20, 2015, to October 22, 2015." "The amendment to the indictment changed the theory of the prosecution and prejudiced the defendant" by switching from a prosecutorial theory that the defendant had actual possession of a gun on October 20 (as allegedly witnessed by his girlfriend) to constructive possession of the gun in his apartment on October 22 when the police searched the apartment and recovered the gun. "Defense counsel, in opposing the amendment, asserted that he had relied upon the indictment and the VDF prepared by the District Attorney's Office, giving the date of the offense as October 20, 2015, in preparing for the case, including defense counsel's efforts to prove, through time cards and testimony, that it was impossible for the defendant to have been at his former girlfriend's apartment at the time of the incident on October 20, 2015."

#### **F. Repugnancy of Counts**

People v. Amico, 7 Misc.3d 139(A), 2020 WL 3246346 (App. Term, 9th & 10th Jud. Dist. June 4, 2020): The Appellate Term confirms that a judge in a bench trial, "as trier of the facts as well as the law, [is] available to correct repugnancies in the verdict." The court affirms the trial judge's grant of the defendant's post-trial motion to set aside a verdict of guilty on a reckless assault charge as repugnant to an accompanying verdict of guilty on an intentional assault charge.

### **VI. Sentencing / Disposition**

People v. Anonymous, 34 N.Y.3d 631, 123 N.Y.S.3d 41 (2020): The Court of Appeals reverses a sentence and remands for resentencing because the sentencing judge "imposed on defendant a higher sentence than promised at his plea, based on its finding that the unsealed trial record [in an unrelated case in which the defendant was acquitted] – which the court mistakenly believed it could consider – established defendant's violation of a

pre-sentence condition of his plea.” “A court is without authority to consider for sentencing purposes erroneously unsealed official records of a prior criminal action or proceeding terminated in favor of the defendant. Where violation of the sealing mandate of CPL 160.50 impacts the ultimate sentence, the error warrants appropriate correction.”

In the Matter of Maximo M., 2020 WL 3261027 (2d Dept. June 17, 2020): The Appellate Division vacates a disposition of probation and remands the case for the entry of an ACD because the 10-year-old respondent, who took an admission to sexual abuse in the second degree, had no prior “contact with the court system, . . . took responsibility for his actions and expressed remorse, . . . voluntarily participated in counseling during the pendency of the proceeding, and . . . maintained a strong academic and school attendance record.”

People v. Cutler, 173 A.D.3d 1269, 102 N.Y.S.3d 325 (3d Dept. 2019): The trial court “erred in sentencing defendant in absentia”: Although the trial court had previously advised the defendant, both orally and in writing, that it would sentence him in absentia if he failed to appear for sentencing, the trial court failed to respond to the defendant’s failure to appear by conducting the requisite “‘inquiry into the reason for the absence and . . . whether the defendant could be located within a reasonable period of time.’” The Appellate Division notes that not only did the trial court fail to “make that inquiry” but it “rejected defense counsel’s request for an adjournment to look into the reasons for defendant’s absence.”

In the Matter of Nijuel J., 169 A.D.3d 681, 93 N.Y.S.3d 379 (2d Dept. 2019): The Appellate Division holds that the Family Court “improvidently exercised its discretion” in denying an ACD and imposing a term of probation for 9 months for an adjudication for bringing a firearm to school. The Appellate Division explains that “this proceeding constituted the appellant’s first contact with the court system, he took responsibility for his actions, and the record demonstrates that he learned from his mistakes”; “[d]uring the pendency of the proceeding, the appellant readily complied with the supervision imposed by the court and his father’s supervision in the home, and he garnered praise from the Probation Department and school officials”; and he had a “commendable academic and school attendance record” and “mentor[ed] . . . fellow students at his school.”

## **VII. Post-Dispositional Issues**

People v. Pinnock, 183 A.D.3d 424, 121 N.Y.S.3d 593 (1st Dept. 2020): “[D]efendant’s guilty plea to violation of probation was defective because there was no allocution about whether defendant understood that he was giving up his right to a hearing on the violation.”

In the Matter of Jaquiya F., 179 A.D.3d 525, 114 N.Y.S.3d 230 (1st Dept. 2020): The trial court erred at a violation of probation proceeding by both continuing the original order of disposition (which placed the respondent on probation) and entering a new order of

probation for three months. Under F.C.A. § 360.3(6), the Family Court must either dismiss the violation petition and continue the original order of probation or else revoke the original order and impose “a different disposition.” “Here, the Family Court entered a different disposition despite continuing, and not revoking, the original order of disposition, and [thus] the new adjudication of delinquency and period of probation was not authorized by law.”

In the Matter of Jahsim R., 66 Misc.3d 426, 114 N.Y.S.3d 871 (Fam. Ct., Bronx Co., 2019) (Kelly, J.): The Court grants the respondent’s motion to expunge his DNA profile from the DNA database of the Office of the Chief Medical Examiner. The Court explains that the Family Court has discretion under Executive Law 995-c(9)(b) to grant this relief, and that the Court is doing so based on the “totality of circumstances . . . including the manner in which the DNA sample was obtained [the police “offered [the handcuffed respondent] a water bottle,” and after he “fell asleep,” the “water bottle was then taken by police, vouchered and given to OCME”], the age of the respondent [15 years old] and the charges brought by the Presentment Agency.” The Court rejects the Presentment Agency’s argument “that the Family Court does not have the jurisdiction to order expungement of DNA evidence in possession of the OCME.” The Court explains that the First Department has recognized the availability of this relief for Youthful Offenders, and “[a] juvenile delinquent is not and should not be afforded fewer adjudication protections than a YO or an adult in the equivalent circumstances.”

In the Matter of M.D., 66 Misc.3d 287, 114 N.Y.S.3d 589 (Fam. Ct., Nassau Co., 2019) (Singer, J.): The Court grants the respondent’s motion for post-adjudication sealing of two findings of sexual abuse (arising from two separate incidents). The Court explains that: (1) “the juvenile records sought to be sealed in this case arise from acts of delinquency that the respondent committed nearly five years ago, before he had even turned fourteen years old,” and “[i]t is neither novel nor uncommon to postulate that a thirteen (or fourteen) year old’s biological ability to self-regulate behavior and conduct is vastly underdeveloped compared to that of an adult, even compared to someone who only recently attained the age of majority”; (2) “the respondent has not had any further involvement in the juvenile or criminal justice system in the five years since he committed the delinquent acts”; (3) “the respondent progressed from presenting with oppositional behaviors, aggressive outbursts and sexual behavior problems, to improving every aspect of his life”; and (4) “[t]he presentment agency’s opposition to the respondent’s Motion to Seal is largely premised on the seriousness and concerning nature of the respondent’s delinquency acts” but “FCA § 375.2 specifically permits any respondent to apply for the sealing of records, with the narrow exception of an individual found to have committed a designated felony.”

In the Matter of Emily P., 63 Misc.3d 755, 96 N.Y.S.3d 831 (N.Y. Fam. Ct. 2019) (Goldstein, J.): The court grants the sealing and expungement of a delinquency adjudication of former respondent Emily P., who is “now a thirty-four-year-old

accomplished forensic scientist,” and “about to commence a position with the United States Attorney’s Office.” Observing that “the overriding intent of delinquency proceedings is not to punish, but ‘to intervene and positively impact the lives of troubled young people,’” the court finds this relief appropriate because it “will permit respondent to advance in her career in public service unencumbered by the delinquency adjudication.” Although the Court of Appeals in *In the Matter of Dorothy D.*, 49 N.Y.2d 212, 216, 424 N.Y.S.2d 890 (1980) “stated in dictum that this remedy would not be appropriate under circumstances where there was not ‘complete innocence’ of the respondent,” the Family Court explains that “[t]his dictum . . . has not been consistently followed, and the Second Department in *In the Matter of Ejiro A.*, 268 A.D.2d 428, 701 N.Y.S.2d 622 (2d Dept. 2000) and *In the Matter of Jens P.*, 159 A.D.2d 707, 553 N.Y.S.2d 1012 (2d Dept. 1990) “dismissed the petitions and ordered the court records expunged even though it was clear that the respondents were not completely innocent.”