

**DEVELOPMENTS IN
JUVENILE DELINQUENCY LAW AND PROCEDURE
(January 2017 to mid-April 2018)**

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PART ONE: *Statutory Changes in 2017 that Affect Juvenile Delinquency Cases*

A. “Raise the Age” Legislation

- (1) *Extension of Family Court Jurisdiction to Age 17 (as of Oct. 1, 2018) and then to Age 18 (as of Oct. 1, 2019)*
 - (a) The definition of “infancy” in P.L. § 30.00(1) has been amended to extend its presumptive exemption of youth from criminal responsibility to the age of 17 (as of Oct. 1, 2018) and then to age 18 (as of Oct. 1, 2019). This presumptive across-the-board exemption from criminal court prosecution is qualified by the longstanding Juvenile Offender Law (as set forth in P.L. § 30.00(2)) and new “raise the age” provisions for “adolescent offenders” (as set forth in P.L. § 30.00(3)).
 - (b) The definition of “juvenile delinquent” in FCA § 301.2(1) has been amended to include 16-year-olds (as of Oct. 1, 2018) and 17-year-olds (as of Oct. 1, 2019) who have been removed to Family Court from criminal court pursuant to either the longstanding Juvenile Offender Law or the “Raise the Age” legislation.
- (2) *Continuing Applicability of the Juvenile Offender (JO) Law:* The longstanding Juvenile Offender Law (which was enacted in 1978) remains in effect and continues to require that juveniles who are 13, 14, or 15, and who are charged with certain enumerated felonies (set forth in P.L. § 10.00(18); P.L. § 30.00(2); and C.P.L. § 1.20(42)) be charged initially in criminal court and that the case remain in criminal court unless it is removed to Family Court (pursuant to C.P.L. §§ 722.20 and 722.22 and C.P.L. art. 725). As a result of the “Raise the Age” legislation, JO cases will be initiated in the new Youth Parts of Superior Court which will be presided over by Family Court judges (C.P.L. § 722.10). A JO case must be removed to Family Court if (i) the District Attorney requests removal and the Youth Part judge determines that this would be in the interest of justice and, for certain felonies, that specified prerequisites are satisfied (C.P.L. § 722.20(4)), or (ii) a felony complaint hearing is held and results in a determination that there is reasonable cause only for an act of juvenile delinquency, not for a JO-eligible felony (C.P.L. § 722.20(3)(b)). (If a felony hearing shows that there is not “reasonable cause to believe that the defendant committed any criminal act,” the felony complaint must be dismissed and the defendant released from custody or bail. C.P.L. § 722.20(3)(c)).

- (3) *“Raise the Age” legislation’s provisions for misdemeanors:* All misdemeanor cases brought against a 16-year-old (as Oct. 1, 2018) or a 17-year-old (as of Oct. 1, 2019) must be brought in Family Court as juvenile delinquency cases. The longstanding Family Court Article 3 provisions for processing, adjustment, detention, pretrial proceedings, fact-finding, disposition, and post-disposition proceedings apply to these cases.
- (4) *“Raise the Age” legislation’s provisions for felonies:*
- (a) 16-year-olds and 17-year-olds who come within the “Raise the Age” legislation (based upon the applicable dates of the legislation) and who are charged with a felony are classified as “adolescent offenders.” See C.P.L. § 1.20(44).
 - (b) Procedures for Determining Whether to Remove an Adolescent Offender’s Felony to Family Court:
 - (i) The determination is made by the Youth Part of Superior Court, which is presided over by a Family Court judge (C.P.L. § 722.10).
 - (ii) An Adolescent Offender’s felony case must be removed to Family Court if the District Attorney requests removal (assuming that the Youth Part judge determines that this would be in the interest of justice and, for certain felonies, that specified prerequisites are satisfied). C.P.L. § 722.21(5).
 - (iii) Cases in which the District Attorney’s Office is not requesting or consenting to removal to Family Court:
 - (A) If an Adolescent Offender is charged with a non-violent felony (*i.e.*, a felony other than non-drug-related Class A felonies; violent felonies as defined in P.L. § 70.02; and J.O. felonies defined in C.P.L. §§ 1.20(42)(subparts (1) and (2)), a presumption in favor of removal to Family Court applies. C.P.L. § 722.23(1)(a). The District Attorney has up to 30 days to file a motion to prevent removal (*id.*), which must be in writing and “contain allegations of sworn fact based upon personal knowledge of the affiant” (C.P.L. § 722.23(1)(b)). The defendant must be given “an opportunity to reply” (C.P.L. § 722.23(1)(c)), and “[e]ither party may request a hearing on the facts,” which “shall be held expeditiously” (*id.*). The court must deny the District Attorney’s motion unless the court finds that “extraordinary

circumstances exist that should prevent the transfer of the action to family court.” C.P.L. § 722.23(1)(d).

- (B) If an Adolescent Offender is charged with a violent felony and thus does not have the benefit of the above-described presumption in favor of removal to Family Court (*i.e.*, Adolescent Offenders who are charged with non-drug-related Class A felonies or violent felonies as defined in P.L. § 70.02;), and the District Attorney is seeking to retain the case in criminal court, the District Attorney must show by a preponderance of the evidence that “(i) the defendant caused significant physical injury to a person other than a participant in the offense; or (ii) the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the penal law in furtherance of such offense; or (iii) the defendant unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the penal law.” C.P.L. § 722.23(2)(c). If the District Attorney fails to meet that burden or if the charges are reduced to a non-violent felony, then a presumption in favor of removal to Family Court applies (as described in the preceding subparagraph).
- (C) In a case that is retained in criminal court and thereafter proceeds to a felony complaint hearing, removal to Family Court is required if the court finds at the hearing that there is reasonable cause only for an act of juvenile delinquency. C.P.L. § 722.21(3)(b). (If a felony complaint hearing shows that there is not “reasonable cause to believe that the defendant committed any criminal act,” the felony complaint must be dismissed and the defendant released from custody or bail, C.P.L. § 722.21(3)(c).)
- (c) For Adolescent Offender felonies removed to Family Court, the longstanding Family Court Article 3 provisions for processing, adjustment, detention, pretrial proceedings, fact-finding, disposition, and post-disposition proceedings apply to these cases, except that, for crimes committed after a youth’s 16th birthday, the possible maximum duration of a restrictive placement for a Designated Felony is up to age 23 (rather than age 21). FCA § 353.5(4)(d).

B. *Amendments of the FCA to Authorize the Prosecution to Use Photographic Identification Evidence at Trial*

- (1) In accordance with a recommendation of the New York State Justice Task Force, the CPL and FCA have been amended to eliminate the longstanding New York rule that the prosecution cannot present testimony at trial about a photographic identification procedure and is limited to testimony about corporeal identification procedures (namely, a show-up or lineup identification). (Under this rule, the defense could still bring up a photo ID at trial (*e.g.*, to attack the reliability of an in-court identification).
- (2) In order to change the existing procedure, the Legislature amended the CPL and FCA provisions governing (a) a complainant's or eyewitness's trial testimony about a prior, out-of-court identification (CPL § 60.30; FCA § 343.4); (b) third-party bolstering by a police officer when a complainant or eyewitness made an out-of-court identification but cannot identify the accused in court as the individual whom s/he previously identified (CPL § 60.25; FCA § 343.3); (c) the statutory list of types of evidence the defense can move to suppress (CPL § 710.20, which is incorporated by reference in FCA § 330.2(1)); and (d) the requirements for prosecutorial notice of identification evidence that the prosecution intends to introduce at trial (CPL § 710.30, which is incorporated by reference in FCA § 330.2(2)).
- (3) The new provisions allow prosecutorial testimony about a photographic identification *only if* the police employed a "blind or blinded procedure." The term "blind or blinded procedure" is defined in the statutes as "one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness." CPL § 60.25(1)(c); FCA § 343.3(1)(c). If the photographic identification procedure was not "blind or blinded," then the case is governed by the pre-2017 procedure in which the prosecution is precluded from presenting testimony about the photographic evidence but the defense can raise it (*e.g.*, when attacking an in-court identification).

C. *Amendment of the FCA to Provide for Electronic Recording of Police Interrogation of a Juvenile*

- (1) In accordance with a New York State Justice Task Force recommendation, the CPL and the FCA have been amended to provide for electronic recording of custodial interrogations. However, the new recording requirements apply only to

the most serious types of felonies: *See* CPL § 60.45(3)(a), incorporated by reference in FCA § 344.2(3).

- (2) The electronic recording must cover not only the statement itself but also “the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual.” CPL § 60.45(3)(a), incorporated by reference in FCA § 344.2(3).
- (3) The statute provides for several exceptions that constitute “good cause” for a police officer’s failure to record the interrogation. *See* CPL 60.45(3)(c), incorporated by reference in FCA § 344.2(3).
- (4) Failure to record in violation of the statute is not a basis for suppression but can be considered as a factor in determining the admissibility of a confession. CPL 60.45(3)(b), incorporated by reference in FCA § 344.2(3)).

PART TWO: Recent Caselaw

[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. Appointment of Counsel and Other Counsel-Related Issues

People v. Smith, 30 N.Y.3d 626, 2017 WL 6454410 (N.Y. Ct. App. Dec. 19, 2017): The trial court violated the defendant’s right to counsel under the federal and state constitutions by granting the prosecution’s motion to take a DNA sample at a time when the defendant was unrepresented (because the court had granted defense counsel’s motion to be relieved due to the defendant’s failure to pay counsel’s fee) and the defendant, when asked by the court whether he would consent to the taking of the DNA sample, said that he wished to consult a lawyer.

People v. Morgan, 149 A.D.3d 1148, 51 N.Y.S.3d 218 (3d Dept. 2017): The defendant’s statement to the trial court that he wished to take the witness stand and testify in his own defense, “coupled with his statements that he and defense counsel had disagreed on the issue, gave rise to one of those rare circumstances in which County Court was required to engage in a direct colloquy with defendant so as to discern whether he had been advised that the decision to testify ultimately belonged to him and whether, at the time that the defense rested, defendant’s failure to testify had been a knowing, voluntary and intelligent waiver of that right.” The trial court’s failure to take this step required reversal of the conviction on the ground that the defendant “was denied his due process right to testify in his own criminal defense.”

II. Respondent's Competency to Proceed

In the Matter of Justin L., 56 Misc.3d 1167, 58 N.Y.S.3d 914 (N.Y. Family Ct., Kings Co. Aug. 15, 2017) (Wan, J.) *and* In the Matter of Justin L., 58 Misc.3d 1220(A), 2018 WL 846759 (N.Y. Family Ct., Kings Co. Feb. 7, 2018) (Wan, J.): In the earlier decision (in August 2017), the court finds under F.C.A. § 322.2(3) that “the respondent is an incapacitated person” and that “there is probable cause to believe that the respondent committed robbery in the second degree,” and the court further “finds that Justin’s best interests will be served with an order committing him to the custody of the Office of Mental Health.” The court explains: “[I]t appears that neither OMH nor OPWDD [Office of People with Developmental Disabilities] is the ideal placement for Justin. The Court is dismayed to hear that neither agency believes that they can provide the services or care that Justin needs, however the Court is constrained by the statute to choose one or the other. . . . Justin is a 14-year-old boy. It is not appropriate for Justin to reside in an OPWDD facility with all adults, or even in a facility with all adults plus one 16-year-old, who may be placed there pursuant to the criminal justice system. Justin has multiple diagnoses, including both developmental disability and mental illness, and OMH is best equipped to provide treatment and services to him.” The court observes that “if the Family Court had the same discretion as the Criminal Court, the Court might have been able to entertain other out-patient treatment options for Justin, even while in the care of an ACS operated placement. However, the statute leaves the court with no discretion.” In the subsequent decision (in August 2018), the court dismisses three pending delinquency petitions on “res judicata grounds as well as in the furtherance of justice.” The court explains that in October 2017, the court granted OMH’s motion under F.C.A. § 322.2(5)(d) to declare that “the respondent will continue to be an incapacitated person for the foreseeable future”; “the Court will have the jurisdiction to enter orders to ensure that Justin receives the appropriate services, which in turn will benefit the community at large”; and “the uncertainty of the pending delinquency petitions serves as a barrier to Justin being accepted into an appropriate placement.”

III. Discovery and Subpoenas

A. Voluntary Disclosure Form

People v. Clay, 147 A.D.3d 1499, 47 N.Y.S.3d 609 (4th Dept. 2017): The trial court should have precluded the identification testimony of a police officer who identified the defendant as the passenger in a car who ran from the vehicle when the police ordered the occupants to exit the vehicle and who was charged with possession of a gun found in the car. The officer identified the defendant from a single photograph shown to him “approximately two hours after the incident.” Rejecting the prosecution’s argument that this was a “confirmatory identification,” the court explains that that category is limited to the “buy-and-bust scenario,” where the “face-to-face contact” is far closer and more intensive than

“here, [where] the officer was standing by the vehicle for approximately three minutes while he was engaged with all of the occupants of the vehicle.”

B. *Rosario*

People v. Farez, 150 A.D.3d 528, 55 N.Y.S.3d 177 (1st Dept. 2017): The conviction is reversed because the trial court denied defense counsel’s *Rosario* request for “police documentation of the arrest of a third party” – an individual of the same race as the defendant (Hispanic) who “had been contemporaneously arrested and separately charged with selling drugs to the same undercover officer at approximately the same time and location.” The Appellate Division explains that defense counsel could have used the documentation to “establish[] a motive to fabricate the evidence due to police confusion between defendant and the third party.”

C. *Brady*

People v. Giuca, 158 A.D.3d 642, ___ N.Y.S.3d ___ (2d Dept. 2018): The court vacates a conviction because (1) the prosecution violated *Brady v. Maryland* by failing to disclose a “tacit understanding” between a prosecution witness and the D.A.’s office that he would be allowed to “remain out of custody despite poor progress in his drug treatment and numerous violations”; and (2) the prosecution violated its obligation to “correct the knowingly false or mistaken material testimony” of the witness.

D. Other Discovery Issues

People v. D’Attore, 151 A.D.3d 548, 58 N.Y.S.3d 300 (1st Dept. 2017): The trial court did not abuse its discretion by “declining to impose any sanction for the inadvertent destruction by the police of three pistols recovered from defendant’s house,” given that (1) “[d]ue to a clerical error, the weapons were mischaracterized as unconnected with any pending case and thus subject to being destroyed,” and (2) “[d]espite proper disclosure by the People, long before the pistols were destroyed, defendant never availed himself of the opportunity to examine or test the firearms, and it was not until the destruction was discovered during trial that defendant moved to dismiss the charges or expressed an interest in performing independent tests.”

E. Subpoenas

People v. Kiah, 156 A.D.3d 1054, 67 N.Y.S.3d 337 (3d Dept. 2017): The trial judge committed reversible error by denying the defense’s motion for “a subpoena duces tecum compelling production of the victim’s mental health treatment

records for in camera review, which [defense counsel] sought as a possible basis for challenging the victim’s credibility.” Although mental health records are, “[i]n general, . . . confidential and will not be discoverable where sought as a fishing expedition searching for some means of attacking the victim’s credibility,” “[a]ccess will be provided . . . where a defendant can demonstrate a good faith basis for believing that the records contain data relevant and material to the determination of guilt or innocence.” In this case, the prosecution had disclosed that the victim “had received treatment for bipolar disorder and depression,” and the Appellate Division explains that “a history of treatment for a diagnosed mental condition is a sufficient basis warranting in camera review of a witness’s mental health records to determine whether they contain relevant and material information bearing on the credibility of the witness that ought to be disclosed to the defendant.”

IV. Suppression Motions: Law and Procedure

A. Summary Denial of *Mapp* or *Dunaway* Motion for Factual Insufficiency

People v. McUllin, 152 A.D.3d 461, 59 N.Y.S.3d 329 (1st Dept. 2017): The trial court erred by summarily denying the *Mapp* motion for factual insufficiency. Although the defendant’s suppression motion merely alleged in a “conclusory” manner that the defendant “was arrested without probable cause at his home . . . , at which time ‘[h]e was not acting in an illegal or suspicious manner,’” this was nonetheless “sufficient to entitle him to a hearing on the legality of his arrest and the admissibility of any evidence derived therefrom” because (1) “at a minimum, defendant has raised a factual dispute concerning the time of his arrest,” and (2) “[f]urther, the People provided defendant with no information at all as to how, by their account, he came to be at the police station in the first place, nor did they disclose the basis on which he first came to the attention of law enforcement in this investigation.”

B. *Mapp* Motions

(1) Standing / Reasonable Expectation of Privacy

People v. Hill, 153 A.D.3d 413, 60 N.Y.S.3d 23 (1st Dept. 2017) (defendant had standing to challenge a police search of his uncle’s “apartment and surrounding curtilage” because defendant “had stayed with his [uncle’s] family ‘on and off’ since he was five years old,” and, “although defendant did not have his own room in the apartment and slept on the couch, he stored all of his clothes in the living room, and received mail at the apartment”).

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

People v. Rose, 155 A.D.3d 1322, 65 N.Y.S.3d 323 (3d Dept. 2017): Although the police had a lawful basis for a Level I “request for information” – based on the defendant’s “walking pretty fast” away from the location of a reportedly stolen vehicle – the officer impermissibly “elevated the encounter to a level two common-law inquiry” by activating the overhead lights on his marked police vehicle and directing defendant to stop.” Although the defendant “disregard[ed] . . . [the officer’s] directive to stop” and “immediately fled,” this did not provide a *Terry* basis for police pursuit of the defendant because “the requisite additional facts supporting criminality were lacking here.”

People v. Gates, 152 A.D.3d 1222, 59 N.Y.S.3d 636 (4th Dept. 2017): When a State Trooper pulled the defendant over for speeding and then asked him about the contents of “several large nylon bags” filling the area behind the driver’s seat, this constituted a Level II common-law inquiry, which was not supported by the requisite founded suspicion of criminality. The defendant’s “evasive and inconsistent answers” to the officer’s questions did not provide a basis for the officer’s continued questioning because they “were themselves induced by a[n] [improper] level two inquiry from the Trooper.”

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

People v. Noble, 154 A.D.3d 883, 63 N.Y.S.3d 401 (2d Dept. 2017): “By reaching into the defendant’s vehicle and turning off the ignition, Officer Murtaugh forcibly stopped the defendant,” and thus the trial court erred in treating this as a Level II encounter rather than a Level III seizure.

People v. Furrs, 149 A.D.3d 1098, 53 N.Y.S.3d 147 (2d Dept. 2017): The police did not have an adequate *Terry* basis to pursue the defendant, who drove through a stop sign, failed to signal a right turn, and then exited his vehicle, adjusted his waistband, and, in response to an officer’s yelling “Police, stop,” fled from the police. None of the things observed by the police “constitute[d] specific circumstances indicative of criminal activity so as to establish the reasonable suspicion that was necessary to lawfully pursue the defendant, even when coupled with the defendant’s flight from the police.”

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

People v. Garvin, 30 N.Y.3d 174, 66 N.Y.S.3d 161 (2017): The Court of

Appeals, with two judges dissenting, declines to overrule (and reaffirms) its longstanding rule that, under the federal constitutional standard, “a warrantless arrest of a suspect in the threshold of a residence is permissible under the Fourth Amendment, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold.” The Court of Appeals declines to consider whether a different rule should apply under the state constitution; the court explains that a state constitutional claim is “unpreserved here because, in the suppression hearing, defendant did not argue that the state constitution provides greater protections than its federal counterpart to defendants subject to warrantless arrests in the home.”

People v. Steinbergin, 2018 WL 1473377 (1st Dept. March 27, 2018): The police officers’ handcuffing of the defendant escalated the *Terry* stop to an arrest requiring probable cause. “Although the use of handcuffs is not dispositive of whether an investigatory detention on reasonable suspicion has been elevated to an arrest, handcuffing is permissible in such a detention only when justified by the circumstances.” In this case, “defendant was not suspected of anything more than a street-level drug sale, the police had no reason to believe that he was armed, dangerous or likely to flee, and there was no indication on the record that defendant offered any resistance before he was handcuffed. That defendant was ‘a little irate’ does not establish dangerousness or resistance that would justify the use of handcuffs during an investigatory stop.”

People v. Hinton, 148 A.D.3d 545, 49 N.Y.S.3d 675 (1st Dept. 2017): The trial court should have suppressed counterfeit money recovered from the defendant’s shoulder bag at the time of his arrest. The search could not be justified as a search incident to arrest because the defendant “was in handcuffs and five police officers were standing close to him,” and “[t]he record contains no testimony or other evidence suggesting that defendant was attempting to access, let alone destroy, the contents of his shoulder bag.”

(5) Automobile Stops and Searches

People v. Bushey, 29 N.Y.3d 158, 53 N.Y.S.3d 604 (2017): The police “may run a license plate number through a government database to check for any outstanding violations or suspensions on the registration of the vehicle,” “even without any suspicion of wrongdoing,” because “the purpose of a license plate is to readily facilitate the identification of the registered owner of the vehicle for the administration of public safety” and therefore “a person has no reasonable expectation of privacy in the

information acquired by the State for this purpose and contained in a law enforcement or DMV database,” and such a database check of a license plate “does not constitute a search.”

People v. White, 2018 WL 1177960 (2d Dept. March 7, 2018): If, “[i]n the context of a traffic stop,” a police officer “asks a private citizen if he or she is in possession of a weapon,” this constitutes a Level II “common law inquiry,” and requires that the officer have a “founded suspicion that criminality is afoot.” In this case, the standard was not satisfied by the defendant’s “acting nervous, shaking his knees and legs up and down, and leaning forward in his seat with his hands in his lap and his arms tightly at his side.” Accordingly, the trial court should have suppressed the defendant’s statement and the physical evidence recovered as a result of the statement.

People v. Solivan, 156 A.D.3d 1434, 68 N.Y.S.3d 253 (4th Dept. 2017): The police officer, who “observed defendant sitting inside a parked vehicle lacking a valid inspection” sticker and also observed a “kitchen knife on the floorboard of the vehicle,” unlawfully frisked the defendant and therefore the marijuana found in the defendant’s pocket had to be suppressed. “[A] mere custodial arrest for a traffic offense will not sustain a contemporaneous search of the person,” and this is certainly true as well for “the lesser offense of a parking violation.” The search could not be “justified as a frisk for officer safety inasmuch as there was no evidence that, after defendant exited the vehicle [where the knife was located], the officer ‘reasonably suspected that defendant was armed and posed a threat to [the officer's] safety.’”

People v. Newson, 155 A.D.3d 768, 64 N.Y.S.3d 248 (2d Dept. 2017): Although the police stop of the defendant’s car was justified by traffic violations, the officer did not have a valid basis for asking the defendant whether there was “anything illegal” on his person or in the vehicle (which required a founded suspicion that criminal activity was afoot) and therefore the defendant’s subsequent consent to the search of the car was invalid and the fruits of that search and also the defendant’s subsequent statements had to be suppressed.

People v. Morris, 153 A.D.3d 729, 60 N.Y.S.3d 322 (2d Dept. 2017): The police unlawfully searched the console of an SUV after stopping it (based on a description of a vehicle involved in a shooting), removing the occupants, frisking and handcuffing them, and holding them for the arrival of eyewitnesses to the shooting. The court explains that the police did not have probable cause at that time to believe that contraband was in the

vehicle and, “[a]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers’ safety has consequently been eliminated.”

People v. Lopez, 149 A.D.3d 1545, 54 N.Y.S.3d 789 (4th Dept. 2017): The police did not have reasonable suspicion to stop the defendant’s car, and therefore the gun recovered from the defendant should have been suppressed. Although the police observed a Hispanic male with tattoos on his neck enter the car, and the police had recently received a 911 call for “shots fired” by a person of that race and gender with tattoos on his neck, the individual who entered the car merely “matched the most general part of the complainant’s description, i.e., an Hispanic male, and he also had tattoos on his neck and arms,” and “[t]he officer could not tell . . . whether the man had the most distinctive feature in that description, i.e., crossed, ‘Asian style’ eyes,” and “the clothing worn by the man did not in any way match the description of the suspect’s clothing provided by the complainant.”

(6) Consent to Search

People v. Freeman, 29 N.Y.3d 926, 50 N.Y.S.3d 30 (2017): In a brief memorandum opinion, the Court of Appeals reverses the Appellate Division and holds that tangible property and statements should have been suppressed based on the lower court dissenting justices’ analysis that the defendant did not voluntarily consent to the entry and search of his house. The dissenting justices below concluded that the defendant’s ostensible consent “merely facilitated what he must have perceived to be the officers’ inevitable entry into his residence.” 141 A.D.3d 1164, 1169, 35 N.Y.S.3d 617, 621 (4th Dept. 2016) (Whalen, P.J., & Troutman, J., dissenting).

C. *Huntley* Motions

People v. Hall, 2018 WL 1629815 (3d Dept. April 5, 2018): When the prosecutor presented, at trial, a redacted version of the recorded police interrogation of the defendant, “containing only the post-*Miranda* portion of the interview,” the defense was entitled to cross-examine the detective “about the substance of the interview that preceded the administration of the *Miranda* warnings,” and the trial court’s foreclosure of this cross-examination violated the accused’s right to present a defense.

People v. Bethea, 2018 WL 1178082 (2d Dept. March 7, 2018): The defendant, who said twice during police questioning “I think I need a lawyer,” thereby

unequivocally invoked his right to counsel, and the officers' failure to comply with that invocation by terminating their questioning required that "the remainder of the defendant's statement after that point, as well as the buccal swab that he provided to the police after that point" be suppressed.

People v. Lewis, 153 A.D.3d 1615, 62 N.Y.S.3d 661 (4th Dept. 2017): The defendant invoked his right to counsel under *Miranda* by responding to the police officer's question "if he would come to the police station to discuss the investigation of the crimes" by saying "he would not go 'without a family member or a lawyer present.'"

People v. Blacks, 153 A.D.3d 720, 61 N.Y.S.3d 66 (2d Dept. 2017): The court rejects the prosecution's argument that *Miranda* warnings were not needed because the police and parole officers – who were in the course of searching the defendant's apartment – did not engage in "interrogation" by asking the defendant for the combination to a safe in the apartment (which the defendant provided, and which led to the seizure of contraband inside the safe). The court explains: "The question – which arose after the parole officers had found counterfeit DVDs, a box filled with daggers, and a .22 caliber revolver-had only one logical purpose: to elicit a response from the defendant disclosing the combination to the safe, which would possibly lead to the discovery of incriminating evidence, and which would link the safe to the defendant." Accordingly, the situation came within the definition of "interrogation" as including "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."

People v. Silvagnoli, 151 A.D.3d 443, 57 N.Y.S.3d 127 (1st Dept. 2017): The police violated the defendant's right to counsel, which had attached in an unrelated pending case. Although ordinarily the right to counsel would not carry over to a new case, it did so here because the interrogating officer referenced the earlier, still-pending case during questioning. "Although the [officer's] reference to the [pending] drug charges on which defendant was represented was brief and flippant, it was not, in context, innocuous or discrete and fairly separable from the homicide investigation [that gave rise to the new arrest and interrogation]."

In the Matter of Raquan W., 55 Misc.3d 636, 47 N.Y.S.3d 659 (N.Y. Fam. Court, Kings Co. 2017) (Pitchal, J.): The court denies suppression of a statement even though the room in which the interrogation took place was not a designated juvenile interrogation room (as required by FCA § 305.2(4)) because the room "met the key requirements of a designated juvenile room" – in that it was "separate and apart from areas used, at that time, by adults; it was an office-like and not jail-like setting; and it was clean, well-lit, and well maintained" – and it "had one benefit that the juvenile room did not: a video recording system," and

thus permitted recording of the interrogation, which “is the favored, modern practice.”

D. *Wade* Motions

People v. Boone, 30 N.Y.3d 521, 69 N.Y.S.3d 215 (2017): The Court adopts a new rule for cases involving cross-racial identifications, explaining that this “new approach” is “demand[ed]” by “the near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race” and also by “the risk of wrongful convictions involving cross-racial identifications.” “[I]n a case in which a witness’s identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness’s identification. The instruction would not be required when there is no dispute about the identity of the perpetrator nor would it be obligatory when no party asks for the charge.” The Court of Appeals explains that the instruction is required in cross-racial, non-confirmatory identification cases, upon request, even if there was no “[e]xpert testimony [at the trial] on the cross-race effect” (since “the absence of expert testimony on cross-racial identification does not preclude the charge”), and even if defense counsel did not “cross-examine[] the People’s witnesses about their identifications” (since, “[a]s with whether to seek expert testimony, cross-examination should be a decision that counsel makes,” and “[i]t is the fact of a cross-racial examination that should be the basis of the court’s charge, not the nature of the questions asked on the [cross] examination”).

People v. Reeves, 152 A.D.3d 1173, 60 N.Y.S.3d 607 (4th Dept. 2017): An undercover officer’s identification of the defendant is suppressed because (1) the prosecution failed to provide the defense in discovery with a photograph used by the undercover for an out-of-court identification and, in response to the defense’s discovery request, “expressly denied the existence of any photographs in the People’s possession”; (2) when the prosecution thereafter attempted to introduce the allegedly non-existent photograph into evidence at the suppression hearing, the prior discovery violation required its exclusion, and thus there was no photograph “before the court, and . . . its absence created a presumption of unreliability in the pretrial identification of defendant by the undercover officer”; and (3) the prosecution “failed to rebut the presumption of unreliability.”

People v. Lombardo, 151 A.D.3d 887, 58 N.Y.S.3d 401 (2d Dept. 2017): The court holds that a 13-year-old eyewitness who had not “participate[d] in a pretrial identification procedure” could make an in-court identification of the defendant without the prosecution’s having to first “establish an independent basis for the admission of her testimony.” The Appellate Division states that “there is no colorable claim of suggestiveness,” and that “[d]efense counsel was able to explore weaknesses of the identification in front of the jury.” (The courts in other jurisdictions have recognized that such first-time in-court identifications are inherently suggestive and require protective procedures to guard against an unreliable identification. *See, e.g., State v. Dickson*, 322 Conn. 410, 141 A.3d 810 (2016).)

V. Other Motions

A. Motions to Dismiss for Legal Insufficiency

In the Matter of Ricki L., 157 A.D.3d 792, 66 N.Y.S.3d 896 (2d Dept. 2018): The petition, which charged unlawful possession of a weapon by a person under 16 pursuant to P.L. § 265.05, was jurisdictionally defective and had to be dismissed because “neither the petition nor the supporting deposition provided sworn, nonhearsay allegations as to the appellant’s age, which is an element of the [charged] crime.”

B. Motion for Severance of Codefendants/Co-respondents

People v. McGuire, 148 A.D.3d 1578, 51 N.Y.S.3d 726 (4th Dept. 2017): The trial court should have severed the defendant’s trial from that of his co-defendants based on irreconcilable trial strategies because “both codefendants denied possessing the gun and testified it was in defendant’s possession” and “the codefendants’ respective attorneys ‘took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor.’”

C. Speedy Trial Motions

People v. Wiggins, 2018 WL 889521 (N.Y. Ct. App. Feb. 15, 2018): The defendant’s state constitutional right to a speedy trial was violated by a delay of more than six years. Although the defendant did not “demonstrate[] any specific impairment to his defense as a result of the extraordinary delay,” the Court of Appeals explains that “[t]he Supreme Court has stated that ‘impairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony “can rarely be shown,”’” and “[t]he courts therefore ‘generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can

prove or, for that matter, identify.” The Court of Appeals also quotes approvingly from U.S. Supreme Court caselaw recognizing that “[i]nordinate delay, wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.” (Note: The Court of Appeals has previously held that the state constitutional right to a speedy trial is “even more compelling in the juvenile context [than in the adult criminal context]” because “a delay in the proceedings may undermine a court’s ability to act in its adjudicative and rehabilitative capacities” and because the “nature of adolescence” may render a delay acutely prejudicial for the juvenile and his or her defense. *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 667, 685 N.Y.S.2d 400, 404 (1999).)

People v. Friday, 2018 WL 1629822 (3d Dept. April 5, 2018): In a case in which the People obtained a three-week adjournment based on the unavailability of a police detective “due to his mandatory involvement in a training program,” the Appellate Division finds that the People failed to exercise due diligence in trying to “make the witness available,” and the court dismisses on speedy trial grounds. The Appellate Division emphasizes that the People “knew that the training was locally offered twice a year and did not set forth any effort on their part to learn whether the witness could switch to another training offering or work around the scheduled training prior to seeking the adjournment.”

D. Double Jeopardy

People v. Wright, 2018 WL 1613725 (2d Dept. April 4, 2018): The defendant’s guilty plea to gun possession in Nassau County gave rise to a double jeopardy bar to his subsequently being convicted in Kings County for gun possession in an armed robbery because it was the same gun and “[t]here was no evidence offered at trial to show that the defendant’s possession of the gun was not continuous.” The possession of the gun had to be treated as “a single offense for which [the defendant] could be prosecuted only once.”

VI. Admissions

People v. Dodson, 30 N.Y.3d 1041, 67 N.Y.S.3d 574 (2017): When the defendant, at sentencing, “asked for a new attorney to advise him on whether to move to withdraw his plea before sentence was imposed,” making “specific allegations regarding counsel’s performance,” “the court had a duty to inquire into defendant’s request for new counsel” and to afford him an “opportunity to decide whether to make a motion to withdraw his guilty plea upon the advice of counsel” rather than conducting merely a minimal inquiry and going ahead with the sentencing.

People v. Wilson, 2018 WL 1441910 (4th Dept. March 23, 2018): The trial court erred in summarily denying a motion to withdraw a guilt plea which was based on the prosecution’s failure to disclose *Brady* evidence prior to the plea. The Appellate Division rejects the prosecution’s “contention that defendant forfeited his right to raise the alleged *Brady* violation by pleading guilty.” The court explains that “it would undermine the prosecutor’s *Brady* obligations if a defendant is deemed to have forfeited his or her right to raise an alleged *Brady* violation by entering a plea without the knowledge that the People possessed exculpatory evidence.”

In the Matter of Kameron VV., 156 A.D.3d 1272, 68 N.Y.S.3d 210 (3d Dept. 2017): The allocution in an admission to a delinquency offense was defective because (1) the judge “merely asked respondent,” who was entering an admission to the “charge of endangering the welfare of a child,” “whether he ‘engaged in conduct that was likely to pose a risk of injury to a child’” and “did not mention any other specific underlying fact forming the basis of the alleged crime”; (2) although advising respondent of “his right to a hearing and his right to remain silent,” did not advise him of “his right to present witnesses on his behalf, his right to confront witnesses and that the presentment agency had to prove beyond a reasonable doubt that he committed the alleged act, which if committed by an adult, would constitute a crime”; and (3) “merely ask[ed] respondent’s mother as to whether respondent’s admission to the charge of endangering the welfare of the child was done with her approval,” which did not “constitute[] a sufficient allocution of respondent’s parent as required by Family Ct § 321.3(1).”

People v. Abdallah, 153 A.D.3d 1424, 61 N.Y.S.3d 618 (2d Dept. 2017): The Appellate Division vacates a guilty plea because defense counsel misadvised the defendant that there was a possibility of preventing the immigration consequence of mandatory deportation.

VII. Fact-Finding Hearing

A. Generally

(1) Judge’s Intervention In Lawyers’ Presentation of Testimony

People v. Estevez, 155 A.D.3d 650, 64 N.Y.S.3d 236 (2d Dept. 2017): Even though the claim was not preserved, the Appellate Division reverses a conviction at a jury trial because the judge’s intervention in witness examinations gave rise to an “appearance, if not the function, of an advocate at the trial.” The judge “effectively took over the direct examination of one of the complaining witnesses at key moments in her testimony where she was describing how the defendant shot the victim Moreover, in its extensive questioning of the defendant, the court repeatedly highlighted apparent inconsistencies in the defendant’s

testimony.”

People v. Robinson, 151 A.D.3d 758, 56 N.Y.S.3d 248 (2d Dept. 2017): The Appellate Division reverses the conviction because the defendant “was deprived of a fair trial by the Supreme Court’s excessive and prejudicial interference with the examination of witnesses” during the jury trial. “For example, the Supreme Court effectively took over the direct examination of a complaining witness while the prosecutor was eliciting details related to whether the witness was stabbed during the physical altercations at issue”; and, “during the defendant’s cross-examination of a complaining witness, the Supreme Court redirected the inquiry and blunted the force of counsel’s attempt to impeach the witness regarding injuries sustained by one of the victims.” Although the prosecution argued on appeal that “the issue is unpreserved . . . because defense counsel did not object to the first instances of interference by the Supreme Court,” the Appellate Division rejects this contention, saying that it is not the kind of error that is ripe for objection “at the first sign of court interference,” and “[t]he record demonstrates that defense counsel timely and appropriately registered his protest to the claimed error” by “objecting to specific questions” and “unequivocally assert[ing] that the court’s extensive questioning of witnesses was intrusive and prejudicial, thus providing an opportunity to correct the error.”

People v. Davis, 147 A.D.3d 1077, 47 N.Y.S.3d 455 (2d Dept. 2017): Even though defense counsel failed to preserve the claim, the Appellate Division reverses the conviction and orders a new trial because “the trial judge [in a jury trial] conducted excessive and prejudicial questioning of trial witnesses” by “elicit[ing] step-by-step details regarding the female security guard’s recovery of the gun from the defendant,” “elicit[ing] details regarding the manager’s observation of the defendant’s gun,” “extensively question[ing] a defense witness as to his observation of events on the night in question,” and “further question[ing] that defense witness as to whether he had made false statements to the police and before the grand jury in connection with a prior robbery conviction.”

(2) Substitution of Judge

People v. Banks, 152 A.D.3d 816, 55 N.Y.S.3d 542 (3d Dept. 2017): A bench trial conviction by a County Court judge is reversed because the judge – who took over the case after a post-trial reassignment of the case to a judge other than the one who had presided over the trial – convicted the defendant based upon a review of the transcripts of the trial. The Appellate Division explains that Judiciary Law § 21 “prohibits a substitute

judge from weighing testimony or making factual and credibility determinations when he or she did not hear the witnesses' testimony firsthand."

(3) Trial in absentia

People v. Atkins, 154 A.D.3d 1064, 63 N.Y.S.3d 532 (3d Dept. 2017): Even though the defendant "waived the right to be present at trial by not appearing after being apprised of the right and the consequences of nonappearance," the trial court nonetheless committed reversible error by conducting the trial in his absence because "[t]he record contains no evidence that any difficulty would result from rescheduling the trial, and there was little chance that an adjournment would cause evidence to be lost or witnesses to disappear because the primary witnesses were law enforcement officers and the evidence included defendant's admission to possession of the firearms that were seized," and furthermore there "was no proof that further efforts to locate defendant would have been futile." Accordingly, "there was no reason not to take the 'simple expedient' of adjourning the trial pending execution of the bench warrant."

People v. Johnson, 154 A.D.3d 777, 62 N.Y.S.3d 455 (2d Dept. 2017): The trial court committed reversible error by proceeding with two witnesses in the defendant's absence without "conduct[ing] a sufficient inquiry as to the circumstances surrounding the defendant's absence" to "establish that the defendant deliberately absented himself from the proceedings and thereby forfeited his right to be present."

B. Evidentiary Issues

(1) Confrontation Clause Issues

People v. Austin, 30 N.Y.3d 98, 64 N.Y.S.3d 650 (2017): The "defendant's Sixth Amendment right to confrontation was violated by the introduction of DNA evidence through the testimony of a witness who had not performed, witnessed or supervised the generation of the DNA profiles." "Although the [testifying] criminalist may have had some level of involvement in OCME's handling of some of the 2009 crime scene swabs, he had no role whatsoever in the testing of defendant's post-accusatory buccal swab" and "[h]is testimony was, therefore, merely 'a conduit for the conclusions of others.'"

People v. Lin, 28 N.Y.3d 701, 49 N.Y.S.3d 353 (2017): In cases involving forensic evidence, "a trained analyst" can provide the requisite

prosecutorial testimony about a forensic test even if s/he was not “the primary analyst” who “personally conducted it,” as long as s/he “supervised, witnessed or observed the testing” – thus being “able to testify [and to be cross-examined] not only about the typical testing protocol, but also about ‘the particular test and testing process’ used in that defendant’s case” – and as long as “none of the nontestifying officer’s hearsay statements were admitted against defendant”).

People v. Vargas, 154 A.D.3d 971, 65 N.Y.S.3d 535 (2d Dept. 2017): The trial court erred by ruling at a *Sirois* hearing that the prosecution had shown, by clear and convincing evidence, that a witness had been made unavailable due to threats sufficiently connected to the defendant and that therefore the witness’s Grand Jury testimony could be admitted at trial. Although the testimony at the *Sirois* hearing showed that the witness had been threatened by the defendant’s alleged accomplice, the prosecution failed to establish that these threats were “made at the initiative or acquiescence of the defendant.” Accordingly, the introduction of the grand jury testimony violated the Confrontation Clause.

(2) Hearsay

People v. Brooks, 2018 WL 1413456 (N.Y. Ct. App. March 22, 2019): “The witness’s testimony as to the [murder] victim’s statement that defendant had previously threatened her constituted double hearsay.” Although the prosecution contended that the statement was not offered for the truth of the matter, the Court of Appeals rejects this contention, explaining that it “is belied by the record.” The Court also observes that “[i]t may be true that evidence that defendant . . . threatened to kill the victim is admissible under a *Molineux* theory, but such evidence must still be in admissible form.” The Court of Appeals explains that no “exceptions to the hearsay rule” applied, and that there is no “blanket hearsay exception providing for use of such statements as ‘background’ in domestic violence prosecutions.”

People v. Vining, 28 N.Y.3d 686, 49 N.Y.S.3d 72 (2017): The trial court did not abuse its discretion in allowing the prosecution to use the “adoptive admission” doctrine to introduce the contents of a recorded conversation between the incarcerated defendant and his ex-girlfriend, in which she “repeatedly accused defendant of breaking her ribs” and he “never denied the allegations, and instead gave non-responsive and evasive answers.” The circumstances satisfied the applicable standard that “[t]o use a defendant’s silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and

understood the assertion, and reasonably would have been expected to deny it.”

People v. Flanagan, 28 N.Y.3d 644, 49 N.Y.S.3d 50 (2017): Addressing issues concerning the co-conspirator exception to the hearsay rule, the Court of Appeals holds that (1) “when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator”; and (2) “statements made after a conspirator’s alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators.” As the Court of Appeals explains, both of these rules are “in line with federal case law.”

People v. Grierson, 154 A.D.3d 1071, 63 N.Y.S.3d 124 (3d Dept. 2017): Although hearsay statements that led the police officers to search for a gun were admissible in this gun possession trial to explain the background of the officers’ discovery of the gun – and thus were not for the “truth of the matter” – the trial court should not have allowed more than “general and cursory testimony” on this subject. “[T]he repetitive and detailed nature of the testimony . . . exceeded the permissible scope of explanatory background information.”

People v. McFarland, 148 A.D.3d 1556, 50 N.Y.S.3d 694 (4th Dept. 2017): The trial court committed reversible error by excluding a hearsay statement “of a third party that it was he, and not defendant, who shot and killed the victim,” which should have been deemed a statement against penal interest. The court explains that, as a general matter, “it is well settled that a ‘less stringent standard [of admissibility] applies, where, as here, the declaration is offered by defendant to exonerate himself rather than by the People, to inculcate him.’”

(3) Other Crimes Evidence

People v. Valentin, 29 N.Y.3d 150, 53 N.Y.S.3d 592 (2017): If the defendant in a drug sale case “asserts an agency defense” at trial, and does so based entirely on the testimony adduced by the prosecution in its case-in-chief, the trial court “may, in its discretion,” apply *Molineux* to allow the prosecution to present evidence in the case-in-chief of the “defendant’s previous drug sale conviction on the issue of the intent to sell the drugs.”

People v. Leonard, 29 N.Y.3d 1, 51 N.Y.S.3d 4 (2017): In the trial of the defendant for “serving alcohol to an underage relative . . . and then

sexually abusing her while she was intoxicated,” the trial judge committed reversible error by granting the prosecution’s *Molineux* motion to introduce testimony by the complainant about “a prior incident in which defendant allegedly sexually assaulted her in a similar manner.” The Court of Appeals explains that (1) the evidence was not admissible under the *Molineux* category of “intent” because “[t]he intent here – sexual gratification – can be inferred from the act”; (2) “[t]o the extent the evidence was admissible to show defendant’s motive in getting the victim drunk, the evidence was highly prejudicial” and the “prejudicial nature of the *Molineux* evidence far outweighed any probative value”; and (3) the “evidence was not necessary background information.”

People v. Robinson, 154 A.D.3d 490, 63 N.Y.S.3d 310 (1st Dept. 2017): The trial court committed reversible error by precluding defense counsel from questioning the arresting detective about “the factual allegations in a pending federal civil lawsuit, in which the detective was a named defendant.” The matters about which counsel sought to cross-examine the detective – that the detective claimed to have found drugs on the plaintiff in the other case but actually this was not true and the detective “nonetheless . . . arrested him” – “were relevant to the detective’s credibility.”

People v. Ridenhour, 153 A.D.3d 942, 60 N.Y.S.3d 449 (2d Dept. 2017): The trial court erred by ruling in the *Sandoval* hearing that, if the defendant elected to testify at trial, the prosecution would be permitted to cross-examine him about a prior incident in which the complainant in the instant trial for a stabbing in the throat had previously been stabbed in the throat. Although the prosecution asserted that they had a good-faith basis for connecting the crimes, “the victim ha[d] never identified his attacker [in the prior incident] and has consistently refused to cooperate with law enforcement officials.” Given these circumstances, “the probative value [of the other crime evidence] was far outweighed by the danger of undue prejudice.” Moreover, “[t]here was a strong likelihood that the uncharged crime would be viewed as evidence of propensity, rather than probative on the issue of credibility.”

(4) E-mails, Texts, and Social Media Evidence

People v. Price, 29 N.Y.3d 472, 58 N.Y.S.3d 259 (2017): The prosecution failed to proffer “a sufficient foundation at trial to authenticate a photograph – purportedly of defendant holding a firearm and money – that was obtained from an internet profile page allegedly belonging to defendant.” The Court of Appeals explains that even if it were to follow

some other jurisdictions by adopting a two-pronged “approach [that] allows for admission of the proffered evidence upon proof that the printout of the web page is an accurate depiction thereof, and that the website is attributable to and controlled by a certain person, often the defendant,” the “evidence presented here of defendant’s connection to the website or the particular profile was exceedingly sparse. . . . For example, notably absent was any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. . . . Thus, even if we were to accept that the photograph could be authenticated through proof that the website on which it was found was attributable to defendant, the People’s proffered authentication evidence failed to actually demonstrate that defendant was aware of – let alone exercised dominion or control over – the profile page in question.”

People v. Franzese, 154 A.D.3d 706, 61 N.Y.S.3d 661 (2d Dept. 2017): The trial court did not err in allowing the prosecution to introduce into evidence a “YouTube video, which showed the defendant making gang signs and taunting and threatening a rival gang member.” “[T]he YouTube video was properly authenticated by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, and by the defendant’s own admissions about the video made in a phone call while he was housed at Rikers Island Detention Center The video was further authenticated by its appearance, contents, substance, internal patterns, and other distinctive characteristics (see Fed Rules Evid rule 901[b][4]).”

People v. Javier, 154 A.D.3d 445, 62 N.Y.S.3d 324 (1st Dept. 2017): The trial court did not err in allowing the prosecution to introduce into evidence a print-out of an e-mail message, into which the testifying witness (an undercover officer) had pasted a text message from the defendant. The e-mail message “was properly authenticated by the officer’s testimony that he copied and pasted the entirety of the text message conversation.” There was no problem with the “best evidence rule” because “the undercover officer adequately explained the unavailability of the original, in that it was his routine practice to erase the original text messages from his phone, particularly since his cell phone automatically deleted text messages once the memory became full.”

(5) Police Officer’s Identification of the Accused in a Surveillance Video

People v. Franzese, 154 A.D.3d 706, 61 N.Y.S.3d 661 (2d Dept. 2017): The trial court did not err in allowing “a police officer to testify that, in her opinion, the defendant was the person depicted in a surveillance video.” Because the officer “knew the defendant from her patrols of the neighborhood and from interacting with him on several occasions,” her testimony “served to aid the jury in making an independent evaluation of the videotape evidence.”

People v. Boyd, 151 A.D.3d 641, 58 N.Y.S.3d 43 (1st Dept. 2017): The trial court did not abuse its discretion by “permitting three officers who were familiar with defendant, but were not eyewitnesses, to give lay opinion testimony, as an aid to the jury’s identification process, that defendant was the man depicted in surveillance videotapes firing a handgun.” The Appellate Division explains that: (1) “[t]he videos were of marginal quality”; (2) the officers were “familiar with defendant and his personal characteristics, most notably a distinctive manner of walking”; (3) the officers’ “narration of the videos” was helpful to the jury “both in identifying him and explaining to the jury the rapid-paced and fleeting images of persons running back and forth in footage drawn from three video cameras depicting three overlapping areas around the scene of the shooting”; and (4) “there was some evidence of a change in defendant’s appearance,” and the officers could testify based on their having known “the defendant before that change of appearance.”

People v. Jackson, 151 A.D.3d 746, 56 N.Y.S.3d 265 (2d Dept. 2017): The trial court did not abuse its discretion by permitting “a police officer who was not a witness to the crime in question . . . to testify that he believed an individual depicted in certain surveillance videos was the defendant.” The Appellate Division explains that “[t]he police officer testified that he knew the defendant from his patrols of the defendant’s neighborhood, and that the defendant changed his appearance after the subject crimes.”

(6) Impeaching One’s Own Witness

People v. Grierson, 154 A.D.3d 1071, 63 N.Y.S.3d 124 (3d Dept. 2017): The trial court “improperly allowed the People to impeach . . . their own witness, with her prior grand jury testimony.” Although the witness at trial denied having made certain statements about which she had testified in the Grand Jury, the “trial testimony did not tend to disprove the People’s position that defendant constructively possessed the gun, nor did it

affirmatively damage their case.” Accordingly, this case did not satisfy the rule that “[a] party may impeach its own witness with a prior contradictory statement when the ‘witness gives testimony upon a material issue or fact which “tends to *disprove* the party’s position or *affirmatively damages* the party’s case.’””

(7) Prior Consistent Statements

People v. Burton, 2018 WL 1414372 (1st Dept. March 22, 2018): The trial court did not err in allowing the prosecution to present prior consistent statements of prosecution witnesses to rebut the defendant’s claim that the witnesses had falsified their accounts after entering into cooperation agreements with the prosecution. “[T]he prior consistent statements predated that particular motive to falsify,” and, even though the witnesses may have had a motive to fabricate even before that time, “there is no requirement that, to be admissible, a prior consistent statement predate all possible motives to falsify.”

(8) Defense’s Right to Present Evidence Indicating that the Crime Was Probably Committed by Someone Else

People v. Montgomery, 158 A.D.3d 204, __ N.Y.S.3d __ (1st Dept. 2018): The “defendant was deprived of due process and the right to present a defense when the trial court precluded him from presenting reverse *Molineux* evidence showing that another person had committed three uncharged robberies similar to the four robberies for which defendant was indicted.”

(9) Demonstrative Evidence – Use of PowerPoint in Summation

People v. Anderson, 29 N.Y.3d 69, 52 N.Y.S.3d 256 (2017) *and* People v. Williams, 29 N.Y.3d 84, 52 N.Y.S.3d 266 (2017): In two decisions issued on the same day, the Court of Appeals clarifies the rules on lawyers’ use of PowerPoint slides in summation to a jury:

- In *People v. Anderson*, the Court of Appeals rejects the argument that “trial exhibits in a PowerPoint presentation may only be displayed to the jury in unaltered, pristine form, and that any written comment or argument superimposed on the slides is improper.” The Court of Appeals explains that “a visual demonstration during summation is evaluated in the same manner as an oral statement. If an attorney can point to an exhibit in the courtroom and verbally make an argument, that exhibit and

argument may also be displayed to the jury, so long as there is a clear delineation between argument and evidence, either on the face of the visual demonstration, in counsel's argument, or in the court's admonitions. . . . PowerPoint slides may properly be used in summation where . . . the added captions or markings are consistent with the trial evidence and the fair inferences to be drawn from that evidence. When the superimposed text is clearly not part of the trial exhibits, and thus could not confuse the jury about what is an exhibit and what is argument or commentary, the added text is not objectionable. The slides, in contrast to the exhibits, are not evidence."

- In *People v. Williams*, the Court of Appeals explains that "the long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation. . . . If counsel is going to superimpose commentary to images of trial exhibits, the annotations must, without question, accurately represent the trial evidence. . . . Moreover, any type of blatant appeal to the jury's emotions or egregious proclamation of a defendant's guilt would plainly be unacceptable."

C. "Missing Evidence" Inference

People v. Viruet, 29 N.Y.3d 527, 59 N.Y.S.3d 294 (2017): The Court of Appeals applies *People v. Handy*, 20 N.Y.3d 663, 966 N.Y.S.2d 351 (2013) to hold that the defense was entitled to an adverse inference because "[s]hortly after a fatal shooting took place [at a nightclub], a law enforcement agent collected video surveillance footage of the crime scene [from the nightclub's surveillance system] but that evidence was lost [by the police] prior to trial." ("The arresting officer, Detective Ragab, who just hours after the shooting viewed and obtained a copy of the video taken from a camera located outside the club's front door, could not locate the video. Detective Ragab explained that he did not vouch for the video pursuant to police department policy because he 'just did not get to it.' Though he attempted to obtain another copy, the club had shut down and he could not locate the owner.") The defense had made a timely request for discovery of the video and, upon learning of its loss, requested an adverse inference. The trial court denied the request for an adverse inference, and the Appellate Division affirmed on the ground that "there was no evidence that the video camera recorded anything relevant to the case, and the evidence suggested otherwise." The Court of Appeals reverses, holding that the defense was entitled to an adverse inference because "[u]nder these circumstances – where defendant acted with due diligence by requesting the evidence in discovery and the lost evidence was video footage of the murder defendant was charged with committing – it cannot be said that the

evidence was not ‘reasonably likely to be of material importance.’” The Court of Appeals rejects the prosecution’s argument “they were not required to preserve the video because, unlike the prison video in *Handy*, it was created by a third party.” The Court of Appeals explains that “[o]nce the police collected the video, the People had an obligation to preserve it.”

D. Insufficiency of the Evidence

(1) “Physical injury”

People v. Garay, 158 A.D.3d 508, __ N.Y.S.3d __ (1st Dept. 2018): The “serious physical injury” element of gang assault in the first degree was not adequately proven. “Although there was testimony that the victim still had some physical effects of the assault at the time of trial, . . . the record before the jury did not show that the injury was such that a reasonable observer would find the victim’s appearance distressing or objectionable” and “[i]t is also undisputed that the victim’s injuries did not impair his general health.”

People v. Fews, 148 A.D.3d 1180, 50 N.Y.S.3d 523 (2d Dept. 2017): The “physical injury” element of assault in the third degree was not adequately supported by evidence that “the complainant sustained a one-half inch laceration on one of her toes, which stopped bleeding before an emergency medical technician arrived at the scene.” The Appellate Division notes that “[n]o evidence was introduced that the injury sustained by the complainant caused her more than trivial pain,” and “[t]he complainant’s vague testimony that she was unable to wear shoes for an unspecified period of time failed to sufficiently demonstrate that the use of her foot was impaired by her injury.”

E. Re-Opening the Trial to Permit Further Testimony After Summations

People v. Owens, 2018 WL 1355270 (4th Dept. March 16, 2018): The trial court’s denial of the defense’s motion to re-open the trial for further testimony after summations violated the defendant’s rights to a fair trial and to present a complete defense. The defense sought to re-open the trial upon seeing a surveillance video which had been admitted in the prosecution’s case-in-chief but had not been played in court until summations. The defense then sought to re-call a prosecution witness to cross-examine her about events shown in the video. The Appellate Division explains that the trial court should have granted this request because (1) the order of proof “‘is not a rigid one’” and “the decision to permit a party to reopen the case, at least prior to its submission to the jury, lies within the

discretion of the trial court”; and (2) “[a]lthough it is undisputed that defense counsel could have, with the exercise of due diligence, viewed the video in its entirety and reviewed it with defendant pursuant to his pretrial requests,” re-opening was required by the “defendant’s constitutional right to present a complete defense and confront his accuser.”

VIII. Sentencing / Disposition

People v. Minemier, 29 N.Y.3d 414, 57 N.Y.S.3d 696 (2017): The trial court “violated CPL § 390.50 and defendant’s due process rights” by “refus[ing] to disclose to the defense certain statements that were reviewed and considered by the court for sentencing purposes.” The Court of Appeals explains that, “to comply with due process, the sentencing ‘court must assure itself that the information upon which it bases the sentence is reliable and accurate’ . . . ‘and that the defendant has an opportunity to respond to the facts upon which the court may base its decision.’” “[I]f a court decides that it is essential to keep confidential any portion of a document that might reveal its source, the court should, at the very least, disclose the nature of the document or redacted portion thereof – to the extent possible without intruding on any necessary confidentiality – and should set forth on the record the basis for such determination. Alternatively, where possible, the court may choose not to rely on the document, and clearly so state on the record.”

In the Matter of Roemaine Q., 154 A.D.3d 427, 60 N.Y.S.3d 812 (1st Dept. 2017): The disposition imposed by the Family Court – which had been an order of placement with ACS for a period of 12 months – is modified by the Appellate Division to probation level three for a period of 18 months, with conditions concerning mental health services and compliance with the IEP. The Appellate Division explains that although it “recognize[s] the seriousness of the underlying offense of unlawful possession of a weapon by a person under 16,” “the weapon here was a BB gun, and . . . the 13-year-old appellant did not use it to commit an act of violence.” The Appellate Division also points out that the Presentment Agency acknowledged at the dispositional hearing that probation level three is “the least restrictive dispositional alternative consistent with appellant’s needs and the community’s need for protection.”

People v. Saraceni, 153 A.D.3d 1559, 61 N.Y.S.3d 748 (4th Dept. 2017): The Appellate Division strikes the probation condition of “abstain[ing] from the use or possession of alcoholic beverages and . . . submit[ting] to appropriate alcohol testing.” The Appellate Division explains that “there was no evidence that defendant was under the influence of alcohol or drugs when he committed the offense or had a history of drug or alcohol abuse.”

In the Matter of Demetrius A., 58 Misc.3d 682, 68 N.Y.S.3d 836 (N.Y. Fam. Ct., Kings Co. 2017) (Deane, J.): In a dispositional hearing in which respondent had consented to placement for a period of 18 months with a 6-month minimum and the “sole contested

issue” was “whether Demetrius will be placed in a non-secure or limited secure CTH [Close to Home] facility,” the court finds that a non-secure facility is the least restrictive alternative because “[t]here is no basis on this record to find that either Demetrius’s rehabilitation or the goal of community protection will be better served by a limited secure facility.” The court explains that “the primary justifications for a court’s choice of limited secure as ‘the least restrictive alternative’ is where a young person would present a risk of leaving the facility without permission . . . or has difficulty managing their behavior in a facility setting,” and “[n]either of these is true of Demetrius.” Although Demetrius had previously been “placed in a non-secure facility and was re-arrested for a felony within 6 months of his release,” the court rejects the argument “that the next step must be placement in a higher level of restriction and security.” The court explains that although “[t]he criminal justice system tends to operate on a graduated sanction approach such as that” in implementing its “primary goal” of “punishment” with “sentencing ranges . . . based on the severity of the crime and the defendant’s prior record,” the “Family Court is mandated by statute to engage in the much more complex process of looking at the background, circumstances and needs of the specific young person in question and to determine which dispositional alternative best addresses those needs, as well as the goal of community safety, in the least restrictive manner possible.” “The fact that a non-secure facility did not result in . . . [the requisite] behavior change the first time around does not mean that it will not the second,” especially since “adolescents often require lessons to be repeated multiple times before they are successfully absorbed given the continuing development of the adolescent brain through the teenage years.”

In the Matter of Kenroy C., 55 Misc.3d 535, 51 N.Y.S.3d 344 (N.Y. Fam. Ct., Kings Co. 2017) (Deane, J.): The court dismisses the petition at disposition because an adjudication of delinquency requires not only “entry of a fact-finding” but also “an additional finding at the dispositional stage, namely that the Respondent ‘requires supervision, treatment or confinement,’” (FCA § 352.1(1)), and “there was insufficient evidence adduced at the dispositional hearing to demonstrate by a preponderance of the evidence that the Respondent was in need of supervision, treatment or confinement.” The court explains that the present offense of reckless endangerment in the second degree for playing with illegal fireworks and causing injury to another was the 15-year-old respondent’s “first contact with the juvenile justice system,” occurred “over 8 months ago,” and, according to the I&R, “was an isolated event”; the I&R shows that “the Respondent receives adequate supervision by his mother,” has “excellent school attendance” and “is passing all of his classes,” and, although he was suspended on one occasion, this too was an isolated event and it was “for a ‘B21’ infraction which relates to a very broad category of in-school ‘disruptive behaviors’”; and “Kenroy has expressed his sincere remorse about this unintended consequence both to the probation officer and in court at the time he made the admission in this case” and “directly to the victim in the letter.” The court denies the complainant’s request for restitution for medical expenses and clothing damage totaling almost \$2,000 because “it would not be consistent with the goals of rehabilitation” given “the limited financial means of the Respondent’s family” and that

“the Respondent is too young to earn the money himself.”

IX. Post-Dispositional Issues

People v. Kislowski, 30 N.Y.3d 1006, 66 N.Y.S.3d 212 (2017): The amended violation of probation petition was facially insufficient in that it failed to “provid[e] probationer with the time, place, and manner of the alleged violation.”