SUPPRESSION MOTION PRACTICE
IN JUVENILE DELINQUENCY CASES

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I. Introduction: The Potential Benefits of Suppression Motions Practice

Counsel not only should, but must, file every non-frivolous motion that can aid the respondent's defense. *See* NYS BAR ASS'N COMMITTEE ON CHILDREN AND THE LAW, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN JUVENILE DELINQUENCY PROCEEDINGS, Standard C-7 (2009) ("As appropriate, the attorney should move for suppression or preclusion of physical evidence, identification testimony and/or the child's statements ...."). *See, e.g.*, People v. Roots, 210 A.D.3d 1532, 1533, 178 N.Y.S.3d 671, 673 (4th Dept. 2022) ("defense counsel was ineffective by failing to move to suppress evidence against him on the ground that the police unlawfully seized him without reasonable suspicion"); People v. Velez, 138 A.D.3d 1041, 30 N.Y.S.3d 218 (2d Dept. 2016) (defense counsel committed ineffective assistance of counsel by failing to file a *Mapp* motion to challenge a search of a shed in the defendant's yard which exceeded the scope of the warrant); People v. Barber, 124 A.D.3d 1312, 999 N.Y.S.2d 645 (4th Dept. 2015) (defense counsel committed ineffective assistance of counsel by failing to file a *Mapp* motion to suppress a gun seized from defendant's person); People v. Cyrus, 48 A.D.3d 150, 848 N.Y.S.2d 67 (1st Dept. 2007) (defense counsel was ineffective because, *inter alia*, he failed to file *Huntley* motion despite grounds for doing so); People v. Montgomery, 293 A.D.2d 773, 742 N.Y.S.2d 126 (3d Dept. 2002), lv. app. denied, 98 N.Y.2d 699, 747 N.Y.S.2d 418 (2002) (defense counsel was ineffective in failing to file *Mapp*/*Dunaway* motion despite grounds for doing so and no "legitimate strategic or tactical explanation" for failing to do so); People v. Donovan, 184 A.D.2d 654, 585 N.Y.S.2d 70 (2d Dept. 1992) (defense counsel was ineffective because, *inter alia*, he failed to filed to file *Mapp* motion); People v. Miller, N.Y.L.J., 10/8/96, at 30, col. 3 (App. Term, 9th & 10th Jud. Dist.) (defense counsel's failure to challenge an obvious defect in the search warrant constituted ineffective assistance of counsel). See also People v. Langlois, 265 A.D.2d 683, 697 N.Y.S.2d 360 (3d Dept. 1999) (counsel was ineffective in failing to file *Sandoval* motion).

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

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

Another important benefit of suppression hearings is the opportunity to elicit testimony from Presentment Agency witnesses that can be used to impeach the witness at trial. Civilian witnesses frequently make concessions at suppression hearings that they would not make at trial,

either because the prosecutor did not sufficiently prepare the witness for the suppression hearing or because the witness's attention was diverted by the suppression hearing's focus upon an issue that is not directly related to the facts of the offense. Police officers may also make useful concessions about inconsistent statements of the complainant or an eyewitness when such facts help vindicate the police officer's own conduct in searching, seizing, or interrogating the respondent. Even when a prosecution witness does not make any obviously significant concessions at a suppression hearing, the mere fact that the witness has to tell his or her story twice, once at the suppression hearing and again at trial, may result in the witness's changing a material fact and opening himself or herself up to an impeaching cross-examination at trial.

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

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

II. Filing Deadlines

If the respondent is paroled pending the factfinding hearing, F.C.A. § 332.2(1) requires that suppression motions be filed "within thirty days after the conclusion of the initial appearance." If the respondent is detained and the trial is scheduled for a date earlier than the expiration of the thirty-day filing deadline, motions must be filed "before commencement of the fact-finding hearing." F.C.A. § 332.2(1). A detained respondent is entitled to a "hear[ing] and

determin[ation] of pre-trial motions on an expedited basis." F.C.A. § 332.2(4). In remand cases, counsel should ordinarily raise suppression claims by means of an Order to Show Cause rather than a motion, since the Show Cause procedure avoids the procedural requirement that a Notice of Motion "be served at least eight days before the time at which the motion is noticed to be heard." C.P.L.R. § 2214(b).

It is essential that counsel comply with the filing deadlines, since an untimely motion "may be summarily denied." F.C.A. § 332.2(3). See, e.g., People v. Knowles, 112 A.D.2d 321, 491 N.Y.S.2d 770 (2d Dept. 1985), app. denied, 66 N.Y.2d 920, 498 N.Y.S.2d 1035 (1985); In the Matter of TM, 26 Misc.3d 823, 2009 WL 4681262, 2009 N.Y. Slip Op. 29503 (Fam. Ct., Kings Co. Nov. 16, 2009) (Elkins, J.) (precluding *Huntley*/*Wade* motion that was filed after 30-day deadline of FCA § 322.2; respondent's application for extension of time is denied because defense counsel's stated reason for missing the deadline – "'law office failure'" – does not supply good cause for late-filing and "[n]othing in Respondent's motion suggests that the interest of justice will be served by permitting late filing"). See also People v. Flowers, 213 A.D.3d 692, 182 N.Y.S.3d 237 (1st Dept. 2023) (rejecting, as untimely, a *Payton* claim that defense counsel made for the first time at the conclusion of a *Huntley* hearing, that the court should suppress the defendant's statements "based upon the fact the police entered his room and arrested him therein without a warrant"; the Appellate Division affirms the trial court's rejection of the claim as untimely and emphasizes that defense counsel "failed to explain why he did not seek suppression of his statements on this ground prior to the suppression hearing, or why this ground for suppression could not have been raised sooner.").

In cases in which counsel is unable to comply with the deadline for some reason -- such as the prosecution's failure to provide discovery in a timely fashion -- counsel should take steps prior to the expiration of the filing deadline to guard against later preclusion of the motion. This can be accomplished in various ways. The simplest approach is to speak with the prosecutor assigned to the case and obtain his or her consent to the extension of the 30-day deadline for a specified period of time. Cf. People v. Martinez, 111 A.D.2d 30, 488 N.Y.S.2d 706 (1st Dept. 1985) (recognizing that prosecutor can waive procedural requirements governing defendant's filing of motion). Alternatively, in cases in which the impediment to timely filing is the lack of certain information that counsel will later obtain through discovery or investigation, counsel can file the motion within the statutory period on the basis of the facts known to counsel, and state in the motion that it will be supplemented later with the missing information. Yet another alternative is to file a motion with the court seeking extension of the filing deadline and stating the basis for the request.

If counsel misses a filing deadline, s/he should seek the prosecutor's agreement to late-filing the motion. Even in the absence of the prosecutor's consent, late-filing must be permitted if the motion is "based upon grounds of which the respondent could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have [been] raised within the statutory period." F.C.A. § 332.2(3). See, e.g., People v. Perrilla, 240 A.D.2d 313, 660 N.Y.S.2d 113 (1st Dept. 1997) (trial court erred in refusing to expand suppression hearing to

include *Dunaway* claim that omitted from suppression motion partly because defense counsel was misled by inaccurate Voluntary Disclosure Form); In re Anthony S., 162 A.D.2d 325, 557 N.Y.S.2d 11 (1st Dept. 1990) (Family Court abused its discretion by denying leave to late-file suppression motion which attorney for the child was unable to file prior to fact-finding hearing because she was appointed to case only four days before trial and respondent's detention status impeded access to client); People v. Loizides, 123 Misc.2d 334, 473 N.Y.S.2d 916 (Suffolk Co. Ct. 1984) (motion to dismiss indictment could be late-filed because it was based upon facts which counsel first learned at trial through examination of Rosario material); People v. De Ruggiero, 96 Misc.2d 458, 409 N.Y.S.2d 88 (Sup. Ct., Westchester Co. 1978) (same); People v. Frigenti, 91 Misc.2d 139, 141, 397 N.Y.S.2d 313 (Sup. Ct., Kings Co. 1977) (court was obliged to permit late-filing of suppression motion where defense counsel filed timely demand for discovery of facts needed for motion, prosecution failed to comply in a timely manner, and defense counsel filed suppression motion promptly after gaining discovery).

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

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

III. Drafting the Motion

A. General Considerations

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

When drafting suppression motions, counsel generally should present only enough factual information and legal argument to satisfy the requirements for obtaining a suppression hearing and avoid summary dismissal on the pleadings. Excessive detail is of little benefit in winning a motion since in the vast majority of cases, the motion will be won or lost on the basis of the testimony adduced at the hearing and the legal arguments made at the conclusion of the

hearing. Furthermore, extensive detail runs the risk of providing the prosecution with discovery of the defense case and ammunition for impeaching defense witnesses at the motions hearing and at trial.

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

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

(2) Identifying Sources of Factual Allegations

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

But, in identifying the sources of information, counsel faces a central dilemma: Attribution of a fact to a specific defense witness may render the witness subject to impeachment with the motion in the event that s/he denies that fact at the suppression hearing or trial. Compare People v. Newman, 216 A.D.2d 151, 628 N.Y.S.2d 649 (1st Dept. 1995), app. denied, 87 N.Y.2d 849, 638 N.Y.S.2d 608 (1995) (trial court did not err in permitting prosecutor to cross-examine defendant about factual recitation in defense counsel's affirmation in support of suppression motion, which was expressly identified as based on defendant's statements) and People v. Rivera, 58 A.D.2d 147, 396 N.Y.S.2d 26 (1st Dept 1977), aff'd, 45 N.Y.2d 889, 413 N.Y.2d 146 (1978) (trial court did not err in permitting prosecutor to impeach defendant at trial with incriminating statement which defendant made to his attorney and which counsel set forth in affidavit in support of suppression motion) with People v. Jones, 190 A.D.2d 31, 596 N.Y.S.2d 811 (1st Dept. 1993) (prosecutor should not have been allowed to impeach defendant with his attorney's affirmation in support of suppression motion because counsel "specifically stated that his information had been gathered from various sources ... [and] none of the specific events described in the suppression motion could fairly be characterized as either an `admission' or a prior inconsistent statement by defendant") and People v. Raosto, 50 A.D.3d 508, 856 N.Y.S.2d 86 (1st Dept. 2008) (prosecutor should not have been allowed to impeach defendant with "averments by former counsel in motion papers ... [that] were not fairly attributable to defendant, either directly or by inference"). See also People v. Brown, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (trial court properly allowed the prosecutor to impeach the testifying defendant with his lawyer's contrary representations during the *Sandoval* hearing, given that the defendant was the "only source of the information" for counsel's statements, counsel was acting as the defendant's authorized agent in making the statements, and the statements were made in

formal court proceedings, held in defendant's presence, for the purpose of obtaining a favorable pretrial ruling; but impeachment of testifying defendant with withdrawn alibi notice was impermissible because such a use of a withdrawn alibi notice could inhibit a defendant from abandoning a factually inaccurate alibi defense and could impinge upon the defendant's right to testify); People v. Johnson, 46 A.D.3d 276, 278, 847 N.Y.S.2d 74, 76 (1st Dept. 2007) ("the trial court properly permitted the prosecutor to impeach defendant by way of statements made by her attorney at the bail hearing as it is a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony"); People v. Moye, 11 A.D.3d 212, 212, 782 N.Y.S.2d 257, 258 (1st Dept. 2004), lv. app. denied, 4 N.Y.3d 765, 766 (2005) (trial court did not err in permitting the prosecution to impeach the defendant at trial with his defense lawyer's statement at arraignment: defendant "was concededly the source of the information" and defense counsel "was acting as [defendant's] agent" at arraignment in "relaying information supplied by the defendant ... for the purpose of obtaining [a] favorable ruling" on bail).

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

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

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

In the suppression context, the New York Court of Appeals has issued several decisions construing the state constitution to establish a standard that is more protective than the one

adopted by the U.S. Supreme Court. See, e.g., People v. Harris, 77 N.Y.2d at 435-41, 568 N.Y.S.2d at 702-06 (Dunaway motions; rejecting attenuation-of-taint analysis of New York v. Harris, 495 U.S. 14 (1990), and reinstating Court of Appeals' original ruling in Harris case on state constitutional grounds); People v. Torres, 74 N.Y.2d 224, 544 N.Y.S.2d 796 (1989) (Mapp motions; rejecting Michigan v. Long, 463 U.S. 1032 (1983) and adopting more protective standard for search of interior of car during brief detention and frisk of occupants); People v. Griminger, 71 N.Y.2d 635, 529 N.Y.S.2d 55 (1988) (Mapp motions; rejecting standard established in Illinois v. Gates, 462 U.S. 213 (1983) for determining sufficiency of search warrant, in favor of more protective Aguilar-Spinelli standard); People v. Bethea, 67 N.Y.2d 364, 502 N.Y.S.2d 713 (1986) (Huntley motions; rejecting Oregon v. Elstad, 470 U.S. 298 (1985) and preserving traditional cat-out-of-the-bag doctrine in its entirety); People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985) (Mapp motions; rejecting "good faith" exception established in United States v. Leon, 468 U.S. 897 (1984)); People v. Adams, 53 N.Y.2d 241, 440 N.Y.S.2d 902 (1981) (Wade motions; rejecting standard for identification suppression established in Manson v. Braithwaite, 432 U.S. 98 (1977) in favor of traditional suggestiveness analysis of United States v. Wade, 388 U.S. 218 (1967) and Stovall v. Denno, 388 U.S. 293 (1967)). See also People v. Diaz, 81 N.Y.2d 106, 112 n.2, 595 N.Y.S.2d 940, 944-45 n.2 (1993) (Mapp motions; after noting that U.S. Supreme Court had granted certiorari to determine viability of "plain touch" exception in Minnesota v. Dickerson, Court of Appeals rejects exception on state as well as federal constitutional grounds).

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

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

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

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

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

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

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

(iv) The existence of a state constitutional rule that, although not directly bearing upon the issue, justifies divergence from federal law because it allows the state court to conclude that the constitutional context for deciding the issue is different from that which the Supreme

Court confronted when fashioning the federal rule. See, e.g., People v. Harris, 77 N.Y.2d at 439-41, 568 N.Y.S.2d at 704-06 (although state constitutional caselaw on right to counsel had no direct bearing upon case, Court of Appeals concludes that caselaw gave police an additional motivation for evading search-and-seizure rules at issue and therefore justified divergence from U.S. Supreme Court's analysis of search-and-seizure law).

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

(vi) The existence of state caselaw identifying general policies or concerns that justify the court's approaching the constitutional issue at stake in a manner different from that which the U.S. Supreme Court employed. For example, the New York Court of Appeals has stated that in New York, the exclusionary rule does not merely serve the purpose of deterring police misconduct; it also serves the broader purpose of guarding against judicial sanctioning of unlawful police action. Thus, in People v. Bigelow, the Court of Appeals rejected the "good faith" exception of United States v. Leon, because the exception was predicated upon the assumption that the exclusionary rule is solely "intended to deter police misconduct." Bigelow, 66 N.Y.2d at 427, 497 N.Y.S.2d at 637. While the U.S. Supreme Court had carved out a good faith exception on the ground that "no deterrent purpose would be served by excluding ... evidence the police had seized in objective good faith" (id.), the Court of Appeals concluded in Bigelow that a good faith exception is inconsistent with the state exclusionary rule's additional goal of ensuring that no "premium is placed on the illegal police action." Id.

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

B. *Huntley* Motions

The standards for sufficiency of suppression motions in Family Court are identical to those in the Criminal Procedure Law. See F.C.A. § 330.2(1) (specifically incorporating the

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

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

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

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

C. *Wade* Motions

(1) Law and Tactics Generally

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

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

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

(2) Confirmatory Identifications

In drafting Wade motions, counsel must take into account the special rules governing "confirmatory identifications" which may prevent the accused from having a *Wade* hearing and may also obviate the need for prosecutorial notice of an identification in the Voluntary Disclosure Form. The courts have applied the term "confirmatory identification" to two types of situations: identifications by a complainant or eyewitness who was well-acquainted with the suspect before the crime; and identifications by police officers in buy-and-bust cases. See generally People v. Dixon, 85 N.Y.2d at 223-24, 623 N.Y.S.2d at 816. The rules governing each of these situations, and the implications for Wade motions, are discussed in the subsections that follow.

Although the prosecution has sought to expand the term "confirmatory identification" to other situations, the Court of Appeals has rebuffed those attempts. See People v. Boyer, 6 N.Y.3d 427, 431-32, 813 N.Y.S.2d 31, 33-34 (2006) ("so-called 'confirmatory identification' exception" to *Wade* hearings and Voluntary Disclosure Form notice of identification evidence "carries significant consequences and is therefore limited to the scenarios set forth in *People v. Wharton* [buy-and-bust case in which the post-buy identification is promptly made by the undercover officer] and *People v. Rodriguez* [identifying witness and accused are well-known to each other], where there is no risk of misidentification"); People v. Pacquette, 25 N.Y.3d 575, 14 N.Y.S.3d 775 (2015) (rejecting the prosecution's attempt to use the "confirmatory identification" category for a post-buy identification by a detective who, "along with the undercover officer, viewed defendant shortly after the transaction and confirmed that the backup unit arrested the correct person"; the "confirmatory identification" category for buy-and-bust cases is limited to "'a trained undercover officer who observed [the] defendant during the face-to-face drug transaction knowing [the] defendant would shortly be arrested'"; the detective's "surveillance of defendant" in this case "does not constitute" an equivalent "'observation of . . . defendant . . . so clear that the identification could not be mistaken' thereby obviating the risk of undue suggestiveness"); People v. Brown, 86 N.Y.2d 728, 730, 631 N.Y.S.2d 121, 122 (1995) (reversing the Appellate Division's summary denial of a *Wade* motion and holding that, even though "the victim initiated the police chase" and thereafter "pointed out his alleged assailant," a subsequent "show-up" arranged by the police "does not fit into the category of confirmatory identifications that are recognized as exceptions to the general requirement of a *Wade* hearing"). See also People v. Clay, 147 A.D.3d 1499, 47 N.Y.S.3d 609 (4th Dept. 2017) ("confirmatory identification" category for police identifications is limited to the "buy-and-bust scenario" and thus did not apply to a police officer's photographic identification, "approximately two hours after the incident," of the passenger of a car who fled when the officer and his partner ordered the occupants to exit the vehicle, and who was charged with possession of a gun found in the car).

The Court of Appeals has held that C.P.L. § 710.30 does not require that the prosecution give notice of a police officer's showing of a videotape of the crime to an eyewitness who was present during the crime as long as this was merely "a second look (on video) of the

[perpetrator]" and "there was nothing resembling a selection process" of the sort that occurs during a photo array or lineup. People v. Gee, 99 N.Y.2d 158, 753 N.Y.S.2d 19 (2002). Compare People v. Burton, 191 A.D.3d 1311, 140 N.Y.S.3d 640 (4th Dept. 2021) (the trial court should have suppressed a parole officer's identification of the defendant as the shooter in a video of the crime: "[B]y contacting the parole officer and discussing defendant with him prior to showing him the video, the detective engaged in . . . unduly suggestive behavior . . . inasmuch as his comments improperly suggested to the parole officer that the person he was about to view was defendant.").

(a) Previous Relationship Between Eyewitness and Accused

In cases in which the police conduct an identification procedure with a complainant or eyewitness who was previously acquainted with a criminal defendant or juvenile respondent, the accused is entitled to neither 710.30 notice of the procedure nor a Wade hearing if "as a matter of law, the witness is so familiar with the [accused] that there is `little or no risk' that police suggestion could lead to a misidentification." People v. Rodriguez, 79 N.Y.2d 445, 450, 583 N.Y.S.2d 814, 818 (1992). Accord People v. Breland, 83 N.Y.2d 286, 609 N.Y.S.2d 571 (1994). The justification for dispensing with 710.30 notice and a Wade hearing in such cases is that "there is virtually no possibility that the witness could misidentify the [accused]," regardless of "how[] suggestive or unfair the identification procedure might be." People v. Rodriguez, 79 N.Y.2d at 450, 583 N.Y.S.2d at 818.

"The unusual treatment accorded such identifications – no CPL 710.30 notice or Wade hearing is necessary -- requires that the exception be narrowly confined to situations where `"suggestiveness" is not a concern.'" People v. Rodriguez, 79 N.Y.2d at 452, 583 N.Y.S.2d at 818. If there is any question about the applicability of the "confirmatory identification" exception, the trial court must hold a pre-Wade hearing to determine the need for a Wade hearing. See id. at 451, 583 N.Y.S.2d at 818 (trial court should consider "factors such as the number of times ... [the complainant] viewed defendant prior to the crime, the duration and nature of the encounters, the setting, the period of time over which the viewings occurred, the time elapsed between the crime and the previous viewings, and whether the two had any conversations"). See also People v. Carmona, 37 N.Y.3d 1016, 152 N.Y.S.3d 872 (2021) (the trial court "erred in denying defendant's pretrial request for a hearing pursuant to *People v Rodriguez* . . . as the prosecutor here offered only bare assurances that the witness was familiar with defendant"); People v. Alcaraz-Ubiles, 214 A.D.3d 1470, 185 N.Y.S.3d 877 (4th Dept. 2023) (trial court committed reversible error by responding to the mid-trial disclosure of a previously-undisclosed photographic identification procedure by relying on the witness's trial testimony to rule that "the People were not required to give notice because the identification was confirmatory": the trial court should have conducted a mid-trial *Rodriguez* hearing to afford "defense counsel [the opportunity] to flesh out the extent of the relationship between" the witness and the defendant; the Appellate Division remands the case to the trial court for "'a hearing to determine whether the witness knew defendant so well that no amount of police suggestiveness could have tainted the identification.'"). But see People v. Thomas, 190 A.D.3d

591, 136 N.Y.S.3d 726 (1st Dept. 2021) (the trial court did not abuse its discretion in denying the defense's motion for a pre-*Wade* hearing pursuant to People v. Rodriguez because "[d]efendant did not set forth any facts to dispute the People's assertion that he and the identifying witness had a prior relationship familiarity that rendered the photo identification confirmatory," and "[t]herefore, there was no factual issue requiring a hearing"; moreover, the defendant testified in the Grand Jury that "he knew and frequently conversed with the witness").

At a pre-Wade hearing pursuant to Rodriguez, "[t]he People bear the burden ... [to prove their claim] that [the] citizen identification procedure was `merely confirmatory.'" Id. at 452, 583 N.Y.S.2d at 818. See also, e.g., People v. Little, 198 A.D.3d 430, 152 N.Y.S.3d 310 (1st Dept. 2021) (the prosecution, which claimed that the identification was confirmatory, "failed to meet their burden of offering sufficient information, in nonconclusory fashion, . . . to enable the suppression court to independently determine whether a detective's identification was, in fact, confirmatory," and therefore the "defendant was entitled to a *Wade* hearing"); People v. Coleman, 73 A.D.3d 1200, 903 N.Y.S.2d 431 (2d Dept. 2010) (prosecution failed to meet its burden at a *Rodriguez* hearing of "establishing that the defendant was so well known to the complaining witness that he was impervious to police suggestion": Although a detective testified that the identifying witness "viewed the defendant 'every day'" and "provided the police with an alleged nickname of the defendant," the detective also acknowledged that "the complaining witness never spoke to, interacted with, or conversed with the defendant" and "[n]o evidence was offered as to the length of the viewings, the distance at which they took place, the time of day, or the lighting conditions.").

In cases in which a pretrial identification procedure was held but the prosecution claims that the witness was so familiar with the respondent as to obviate the need for a Wade hearing, the prosecution must notify defense counsel of this claim in the Voluntary Disclosure Form. See, e.g., People v. Naranjo, 140 Misc.2d 43, 529 N.Y.S.2d 953 (Sup. Ct., N.Y. Co. 1988). See also People v. Chase, 85 N.Y.2d 493, 626 N.Y.S.2d 721 (1995) (notwithstanding prosecution's claim that statement was spontaneous, a statement notice was required; "[i]t is for the court and not the parties to determine whether a statement is truly voluntary ... [or was prompted by] the functional equivalent of interrogation"). If the respondent disputes the claim of "confirmatory identification," s/he should file a motion requesting that the court hold a Wade hearing or, in the alternative, a pre-Wade hearing to assess the claim of confirmatory identification. See, e.g., People v. Mosley, 136 A.D.2d 500, 523 N.Y.S.2d 820 (1st Dept. 1988) (trial court erred in summarily dismissing Wade motion on the basis of State's representation that the show-up was merely a "confirmatory identification" by an eyewitness who knew the defendant; allegation in the defense motion that defendant did not know the eyewitness raised a material issue of fact necessitating an evidentiary hearing); People v. Carmona, 185 A.D.3d 600, 126 N.Y.S.3d 705 (2d Dept. 2020) (trial court "erred in relying on the People's mere assurances of [the identifying witness's] familiarity [with the accused] in denying the defendant's pretrial request for a *Rodriguez* hearing"). See also People v. Doyle, 134 Misc.2d 338, 341, 510 N.Y.S.2d 987, 989 (Sup. Ct., Kings Co. 1987) (even when an identification procedure "involves parties who had a prior relationship," accused is entitled to Wade hearing if the circumstances of the offense

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

(b) Buy-and-Bust Cases

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

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

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

- There was a significant lapse in time between the crime and the identification procedure. See, e.g., People v. Boyer, 6 N.Y.3d at 432-33, 813 N.Y.S.2d at 34 ("When there is a risk that the quality of the initial observation has eroded over time, we have consistently held that police identifications do not enjoy any exemption from the statutory notice and hearing requirements"). Compare People v. Williams, 85 N.Y.2d 868, 626 N.Y.S.2d 49 (1995) (undercover officer's viewing of the defendant's photograph, two days after the buy-and-bust operation, did not fall within the category of "confirmatory identifications" that are exempt from the requirement of a Wade hearing) and People v. Mato, 83 N.Y.2d at 411, 611 N.Y.S.2d at 94 (defendant entitled to Wade hearing because 3 weeks elapsed between alleged sale and show-up identification) and People v. Gordon, 76 N.Y.2d 595, 599-601, 561 N.Y.S.2d 903, 905-06 (1990) ("the 10-day lapse between the November 27 buy and the December 7 show-up ... heighten[ed] the real danger of calculated or careless misidentification" and defendant therefore was entitled to Wade hearing) and People v. Smith, 203 A.D.2d 495, 610

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

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

- Unlike a typical "buy and bust," the undercover officer did not "observe[]

[respondent] ... [in a] face-to-face drug transaction." People v. Wharton, 74 N.Y.2d 921, 922-23, 550 N.Y.S.2d 260, 261 (1989). Cf. People v. Newball, 76 N.Y.2d 587, 591-92, 561 N.Y.S.2d 898, 901 (1990) (concluding that identification was not "confirmatory" because, inter alia, the officer "observed the person for only a few minutes and from a distance of no closer than 50 feet"). See also People v. Boyer, 6 N.Y.3d at 433, 813 N.Y.S.2d at 34 ("the quality of the officer's initial viewing must be a critical factor in any Wharton-type analysis. The risk of undue suggestiveness is obviated only when the identifying officer's observation of the defendant is so clear that the identification could not be mistaken.").

- The officer's actions or reports (or those of other officers) provide a basis for doubting the reliability of the identification despite the use of a buy-and-bust procedure. See, e.g., People v. Williams, 79 A.D.2d 929, 435 N.Y.S.2d 1 (1st Dept. 1981), appeal dismissed, 53 N.Y.2d 866, 440 N.Y.S.2d 188 (1981) (trial court should have suppressed undercover officer's identification as unreliable because testimony at the Wade hearing showed that the undercover officer initially expressed uncertainty and arresting officer thereafter produced definitive identification by telling undercover officer that buy money was found on defendant); People v. Chillis, 60 A.D.2d 968, 969, 401 N.Y.S.2d 612 (4th Dept. 1978) (trial court erred in denying Wade hearing where undercover officer had amended vague description first recorded in his report to more precisely fit defendant).

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

D. *Mapp* and *Dunaway* Motions

Mapp and Dunaway motions must satisfy both the above-described requirement of "alleg[ing] a ground constituting [a] legal basis for the motion," and the additional requirement of setting forth "sworn allegations of fact [that] ... support the [legal] ground alleged." C.P.L. § 710.60(3)(a)-(b). See generally People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993).

(1) Sufficiency of Legal Basis for Motion

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

(2) Sufficiency of Factual Allegations

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

If a Mapp or Dunaway motion fails to satisfy this standard, the court may -- but is not required to -- deny the motion. The court has discretion to grant a hearing even for an insufficient motion (id. at 429, 604 N.Y.S.2d at 928-29), a result that is particularly appropriate when the prosecution fails to challenge the sufficiency of the motion (id. at 430, 604 N.Y.S.2d at 929; accord People v. Bonilla, 82 N.Y.2d 825, 604 N.Y.S.2d 937 (1993)) or when "the court orders a Huntley or Wade hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses" (People v. Mendoza, 82 N.Y.2d at 429, 604 N.Y.S.2d at 928-29). See also People v. Higgins, 124 A.D.3d 929, 1 N.Y.S.3d 424 (3d Dept. 2015) (even if the factual allegations in the *Mapp*/*Dunaway* motion were insufficient to establish an entitlement to a suppression hearing on these claims, the trial court did not err in granting a hearing anyway given that the prosecution had consented to a *Huntley* hearing "'grounded in the same facts involving the same police witnesses'" and the Court of Appeals has specifically recognized that factual insufficiency of a *Mapp*/*Dunaway* motion "'does not mandate summary denial'" and that a hearing nonetheless may be granted when "[p]rinciples of judicial economy clearly weigh[] in favor" of a joint suppression hearing on all of the claims); People v. Rivera, 42 A.D.3d 160, 836 N.Y.S.2d 148 (1st Dept. 2007) (summary denial procedure "merely permits, but does not mandate summary denial"; "the interest of judicial economy militates in favor of the court's conducting a hearing on the suppression motion in the exercise of its discretion despite a perceived pleading deficiency"); People v. Williams, 58 Misc.3d 1231(A), 2018 WL 1354595, 2018 N.Y. Slip Op. 50333(U) (City Court, Mount Vernon 2018) (granting a *Dunaway* hearing

over the prosecution's objection because the *Huntley* hearing consented to by the prosecution "'is grounded in the same set of facts and involv[es] the same police witnesses'").

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

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

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

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

- The court first gave examples of the two "extreme[s]" of "plainly factual" and "clearly legal" allegations:

  — Example of a "plainly factual" allegation: "`On June 19, 1993, at 3:00 p.m., I was waiting for a bus on the corner of Broadway and 42nd Street when a uniformed police officer approached me stating "people like you don't belong in this neighborhood." She reached into my jacket pocket and removed a one-inch vial of cocaine.'" Id. The Court explained that "[t]hese allegations provide sufficient factual information which, if uncontested by the People, would warrant summary suppression and enable the motion court to make the required findings of fact in support of its decision." Id.

  — Example of "a clearly legal conclusion": "`[O]n June 19, 1993 my Fourth Amendment rights were violated.'" Id. As the court noted, this "pleading does not assert sufficient facts from which a court could conclude that suppression is appropriate." Id.

- With regard to the situations falling between these two extremes, which often involve mixed questions of law and fact, the court gave the following examples of insufficiently factual allegations:

— "An allegation that `I did nothing giving rise to probable cause' is, without more, plainly insufficient because probable cause is a mixed legal-factual issue and the pleading lacks the factual portion of the equation." Id. at 427, 604 N.Y.S.2d at 927. See also id. at 430, 604 N.Y.S.2d at 929 (motion in Martinez case insufficient on its face because defendant asserted in conclusory manner that he was "`acting in a lawful manner'" and "that there was no `reasonable suspicion' that he committed a crime").

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

Compare People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dept. 2009) (trial judge erred in summarily dismissing a *Mapp* motion which adequately set forth a claim under *Payton v. New York*, 445 U.S. 573 (1980) by alleging that the defendant "'was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]'; and that the items of property, 'all items enumerated in the v.d.f.,' were seized illegally at the time of his arrest because 'the police lacked probable cause to go to his apartment and take him into custody'" and "'did not have an arrest warrant'") and People v. Rosario, 264 A.D.2d 369, 693 N.Y.S.2d 152 (1st Dept. 1999), lv. app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614 (2000) (trial judge in buy-and-bust case erred in summarily denying Mapp motion which "alleged that [defendant] was not involved in any suspicious or criminal activity, that he was legitimately in the area of the arrest since he was standing around with friends, that he had not engaged in any drug sales at any time that day and that he did not fit the description of anyone involved in a drug sale at that location") and People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dept. 1999) (trial judge in buy-and-bust case erred in summarily denying Mapp motion, in which "defendant explicitly denied selling or possessing drugs, which this court has frequently deemed sufficient to entitle a defendant to a suppression hearing ... [and] additionally raised a question of fact as to probable cause when he challenged a particular aspect of the arrest, namely the arresting officer's identification of defendant based on the radio transmission") and People v. Campbell, N.Y.L.J., 3/13/95, at 31, col. 3 (App. Term, 9th & 10th Jud. Dist.)

(defendant's allegation that he did not match the description of a robbery suspect presented issue of fact that could only be resolved at a hearing; trial court erred in summarily denying Mapp motion) with People v. Howell, 2 A.D.3d 258, 769 N.Y.S.2d 233 (1st Dept. 2003) (upholding summary denial of defendant's *Mapp* motion in an undercover drug sale case because the motion papers contained only "vague and generalized assertion[s]" – about the defendant's "innocuous behavior at the time of his arrest" and that he "'was never previously observed engaging in any illegal or suspicious activity'"– and neither "den[ied] participation in the underlying drug transaction or .... allege[d] some other basis for suppression," and when "the People submitted an answering affirmation that set forth, in detail, the predicate for defendant's arrest, defendant did not reply") and People v. Davis, 256 A.D.2d 184, 683 N.Y.S.2d 26 (1st Dept. 1998), lv. app. denied, 93 N.Y.2d 968, 695 N.Y.S.2d 54 (1999) (upholding trial judge's summary denial of *Mapp* motion because defendant merely "denied, in conclusory fashion, [the People's claim that he was] selling drugs or acting as a `steerer,'" and motion "did not contest any of the facts creating probable cause to believe that defendant was a participant in the transaction") and In the Matter of Raoul A., 240 A.D.2d 565, 659 N.Y.S.2d 789 (2d Dept. 1997) (trial court properly denied, on the papers, a *Mapp* motion which "mere[ly] alleg[ed] that [Respondent] was not engaging in any conduct that would justify being stopped and searched") and People v. Williams, 228 A.D.2d 268, 644 N.Y.S.2d 194 (1st Dept. 1996) (trial court properly denied Mapp hearing and Dunaway hearing to suppress identification testimony because defendant's motion merely asserted in conclusory terms that the arresting officer did not have "`any reasonably trustworthy information which supported the conclusion that the defendant committed a criminal act'" and that the undercover officer's description was too vague to "`provide for a valid seizure'").

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

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

- The suppression motion "allege[s] that when the police conducted the search, the defendant was merely standing on the street doing nothing wrong." Such an allegation would be sufficient if the case involves a police "pat-down or search [of] [a] citizen[] based on perceived suspicious or unlawful behavior," since the defendant's allegation "that he or she was standing on the street doing nothing wrong when the police approached and searched" would take issue with the officers' assertions that "defendant was acting `suspiciously' or `furtively.'" Id. at 428-29, 604 N.Y.S.2d at 928. Accord People v. Burton, 6 N.Y.3d 584, 590, 815

N.Y.S.2d 7, 11-12 (2006) ("where probable cause for a search is premised on the furtive behavior of a person, we have observed that an accused can 'raise a factual issue simply by alleging that he or she was standing on the street doing nothing wrong when the police approached and searched' and discovered contraband in the process .... A claim of this nature questions whether police action was legally authorized at its inception, and in this situation a hearing is required to determine, as a factual matter, whether the defendant engaged in suspicious or unlawful conduct giving rise to probable cause justifying the search.").

- In contrast, the very same allegation would be insufficient in a buy-and-bust case because the officers' probable cause to arrest the defendant stems from a drug transaction that took place prior to the moment of arrest and the defendant's innocent conduct at the time of arrest is immaterial. People v. Mendoza, 82 N.Y.2d at 428-29, 604 N.Y.S.2d at 928. See id. at 430, 604 N.Y.S.2d at 929 (defendant's assertion in Martinez case that he was "`acting in a lawful manner'" at time of stop was insufficient because charges involved buy-and-bust transaction that occurred earlier); id. at 431, 604 N.Y.S.2d at 930 (George J.'s motion was insufficient because case involved buy-and-bust transaction and motion "merely disclaims involvement in `unlawful activity' at the time of seizure"); People v. Burton, 6 N.Y.3d 584, 589, 815 N.Y.S.2d 7, 11 (2006) ("In a buy-and-bust scenario, probable cause is generally based upon an accused's participation in a narcotics transaction. To raise an issue of fact that necessitates a hearing, a defendant has to 'deny participating in the transaction or suggest some other grounds for suppression' .... In the absence of such a denial, the motion court is left with the People's uncontested averment that the accused participated in the sale or purchase – which is sufficient on its face to provide probable cause justifying an arrest and ensuing search."). See also People v. Garay, 25 N.Y.3d 62, 7 N.Y.S.3d 254 (2015) (trial court acted properly in summarily denying a *Mapp* motion that asserted in general terms that the defendant was not engaged in any criminal conduct at the time the police stopped his car and arrested and searched him. Because the basis for the stop, arrest, and search were defendant's earlier actions in "a drug dealing conspiracy," his "simple denial that he was not engaged in any criminal conduct at the time he was stopped did not raise any issue of fact requiring a hearing."); People v. Vargas, 214 A.D.3d 609, 184 N.Y.S.3d 603 (1st Dept. 2023) (upholding trial court's summary denial of *Mapp* motion which stated merely that the defendant "had not engaged in any observable unlawful behavior when a police officer approached him or in the period before he was arrested" and did not address allegations – which were in the felony complaint and thus the defense was on notice of them – that the defendant

and an "undercover officer had arranged the [drug] sale on the phone beforehand" and that the transaction took place thereafter).

Thus, the central question in applying the second prong of the Mendoza standard is whether the respondent's allegations refuted, or took issue with, the facts upon which the prosecution relies to justify the search or seizure. See, e.g., People v. Jones, 95 N.Y.2d 721, 726, 723 N.Y.S.2d 761, 765 (2001) ("in a buy and bust situation[,] ... [where] a claim of innocent conduct at the time of the arrest is unavailing, ... a defendant ... [can] raise a factual challenge to the legality of the arrest and seizure of evidence in either of two ways[:] ... [(1)] "'deny participating in the transaction *or* [(2)] *suggest some other grounds for suppression*.'") (emphasis in original); id. at 727, 723 N.Y.S.2d at 766 (in buy-and-bust case, "[d]eficiencies in the description furnished to an arrest officer may provide the basis for suppression"). Compare People v. White, 192 A.D.3d 1539, 140 N.Y.S.3d 843 (4th Dept. 2021) (the trial court improperly denied the *Mapp* motion on the papers: Although the prosecution asserted that the police had more information to justify the arrest than was set forth in the defendant's motion, the defendant "specifically disputed" the prosecution's assertion and thereby "raised a factual issue necessitating a hearing") and In the Matter of Elvin G., 12 N.Y.3d 834, 882 N.Y.S.2d 671 (2009) (trial court erred in summarily denying a *Mapp* motion that challenged a school search: Because the suppression motion presented a "different factual scenario" than the Presentment Agency's account of the search – the suppression motion asserted that "the school dean ordered all of the students in the classroom to stand and empty their pockets in an attempt to discover a cell phone or electronic device that had disrupted the class" while [i]n contrast, the presentment agency . . . claim[ed] that the dean had asked the students to put their bookbags on their desks and Elvin had voluntarily removed a knife from his pocket," thus placing the knife "in 'plain view'" – a suppression hearing had to be held to "determine whether a search occurred and, if so, whether it was reasonable as a matter of law under the circumstances of this case.") and People v. Atkinson, 111 A.D.3d 1061, 975 N.Y.S.2d 227 (3d Dept. 2013) (although the trial court acted properly in denying a suppression hearing on the lawfulness of the defendant's arrest (since the arrest was based on an active parole violation warrant) and the search of the defendant's pocket (which was incident to arrest) and the search of the car in which he had been riding (since the stop was based on a traffic violation and the defendant had no standing to contest the search of the car), the trial court improperly denied a suppression hearing on whether the police conducted an unlawful search when they recovered cocaine from the defendant's mouth as a result of tasering him: Defendant's motion papers "raised a factual dispute concerning the use of a taser and whether it might be considered excessive force, giving rise to a potentially unreasonable search and seizure," and therefore "a hearing was required") and People v. Jones, 73 A.D.3d 662, 901 N.Y.S.2d 274 (1st Dept. 2010) (trial court erred in summarily denying a hearing on a *Dunaway* motion that "clearly raised a factual issue as to when and where [defendant] was arrested, or otherwise taken into custody" by asserting that defendant "was arrested on the street approximately eight hours before the lineup took place" and thereby challenging the prosecution's assertion that "defendant was arrested in a police station, immediately after being identified in a lineup") and People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dept. 2009) (trial judge erred in summarily dismissing a *Mapp* motion which adequately set forth a claim

under *Payton v. New York*, 445 U.S. 573 (1980) by alleging that the defendant "'was lawfully inside his apartment at the time of the seizure and [d]id not engage in any activity on the date in question that would give [grounds for his arrest]'; and that the items of property, 'all items enumerated in the v.d.f.,' were seized illegally at the time of his arrest because 'the police lacked probable cause to go to his apartment and take him into custody'" and "'did not have an arrest warrant'"; Appellate Division points out that the prosecution's Answering Affirmation did nothing more than to assert that "'[t]he evidence was lawfully obtained'" and to "'deny all allegations to the contrary,'" and did not present specific facts to establish the constitutionality of the police action by saying, for example, "that the police had a warrant or that defendant was outside in the hallway or at his apartment entrance or that defendant consented to have the police enter and search his apartment") and People v. Joyner, 46 A.D.3d 473, 848 N.Y.S.2d 146 (1st Dept. 2007) (trial court erred in summarily denying a *Mapp* motion in buy-and-bust case in which, although prosecution alleged that the defendant was arrested 5 minutes after the sale to the undercover officer and was promptly identified in a show-up, defendant "denied participation in the transaction alleged in the indictment"and "asserted that he was in the area to visit a friend, that he was approached by a woman who asked to buy drugs, that he refused her overture, and that he walked away") and People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dept. 1999) (trial judge in buy-and-bust case erred in summarily denying Mapp motion, in which "defendant explicitly denied selling or possessing drugs, which this court has frequently deemed sufficient to entitle a defendant to a suppression hearing ... [and] additionally raised a question of fact as to probable cause when he challenged a particular aspect of the arrest, namely the arresting officer's identification of defendant based on the radio transmission") and People v. Marquez, 246 A.D.2d 330, 667 N.Y.S.2d 359 (1st Dept. 1998), *withdrawn after remand*, 249 A.D.2d 1012, 679 N.Y.S.2d 784 (1st Dept. 1998) (withdrawn on stipulation of parties) (trial court erred in summarily denying *Mapp* motion which took issue with prosecution's claimed basis for the search by alleging that defendant did not participate in any narcotics transaction and was merely conversing with others in vicinity of alleged sale) and People v. Ayarde, 220 A.D.2d 519, 632 N.Y.S.2d 174 (2d Dept. 1995) (defendant was entitled to Mapp hearing because his allegations of fact -- that the police "`did not observe the defendant commit a criminal act'" and that he "`was arrested due to his mere presence'" inside a store that was raided by the police -- adequately took issue with the prosecution's theory that the police observed the defendant hand a bag of cocaine to a buyer) and People v. Bailey, 218 A.D.2d 569, 630 N.Y.S.2d 499 (1st Dept. 1995) (trial court erred in denying a Mapp hearing to defendant whose motion alleged that he was not involved in criminal activity at the time and place of his alleged purchase of marijuana and that "`no illegal contraband was in ... a position ... to be seen by a police officer'") and In the Matter of Ashanti L., 205 A.D.2d 539, 613 N.Y.S.2d 45 (2d Dept. 1994) (Family Court erred in summarily denying Mapp motion that took issue with arresting officer's allegations by "expressly den[ying] that [respondent] held a controlled substance in plain view or tried to conceal it, thereby raising an issue of fact as to whether the police had probable cause to arrest him") and People v. Fagan, 203 A.D.2d 933, 611 N.Y.S.2d 389 (4th Dept. 1994) (trial court erred in summarily denying defendant's Mapp motion that took issue with People's contention of drug sale by affirming, "upon information and belief, [that] no `controlled buys' of cocaine took place at the time and place referred to in the warrant application") with People v. Scully, 14

N.Y.3d 861, 903 N.Y.S.2d 302 (2010) (trial court did not err in summarily denying a *Mapp* motion that "alleged that the officer searched [defendant] on the basis of a search warrant that had been issued without probable cause" but did not present "factual allegations to support [the] claim that probable cause was lacking" and thus "failed to raise an issue of fact.") and People v. Mattocks, 12 N.Y.3d 326, 880 N.Y.S.2d 888 (2009) (trial court did not err in summarily denying a *Mapp* motion in this bent-MetroCard-forgery case where the prosecution's allegations made out probable cause to arrest (a "police officer averred that he had observed defendant swipe three people into the subway in exchange for money from the riders") and the defendant's suppression motion, although asserting that the defendant was "merely 'speaking with various neighborhood acquaintances,' . . . never challenged the assertion that he had been selling swipes") and People v. France, 12 N.Y.3d 790, 879 N.Y.S.2d 36 (2009) (trial court did not err in summarily denying a *Mapp* motion that failed to challenge the police officers' bases for the arrest and that could not claim lack of access to the requisite information since "the felony complaint and the voluntary disclosure form" provided defense counsel with "sufficient information . . . concerning the factual predicate for the arrest") and People v. McDowell, 30 A.D.3d 160, 815 N.Y.S.2d 570 (1st Dept. 2006) (trial court did not err in summarily denying *Mapp*/*Dunaway* motion which "failed to raise a factual dispute requiring a hearing" in that "[t]he criminal court complaint and voluntary disclosure form specified that defendant's arrest was based on a robbery that had taken place three days earlier" but suppression motion did nothing more than present "general denial of any criminal activity 'prior to' [defendant's] arrest" without "address[ing] the People's specific allegations" or "assert[ing] . . . any basis for suppression") and People v. Lopez, 5 N.Y.3d 753, 801 N.Y.S.2d 245 (2005) (trial court did not err in summarily denying Mapp/Dunaway motion because defendant's statement, which was included in VDF, "on its face shows probable cause for defendant's arrest, and defendant failed to controvert it in his motion papers") and In the Matter of Fatia I., 21 A.D.3d 961, 800 N.Y.S.2d 764 (2d Dept. 2005) (trial court did not err in summarily reversing *Mapp* motion that did not challenge police assertion that respondent was in possession of knife and that "alleged only, and in conclusory fashion, that the police had no probable cause to believe that she intended to use the knife unlawfully") and People v. Howell, 2 A.D.3d 258, 769 N.Y.S.2d 233 (1st Dept. 2003) (upholding summary denial of defendant's *Mapp* motion in an undercover drug sale case because the motion papers contained only "vague and generalized assertion[s]" – about the defendant's "innocuous behavior at the time of his arrest" and that he "'was never previously observed engaging in any illegal or suspicious activity'"– and neither "den[ied] participation in the underlying drug transaction or .... allege[d] some other basis for suppression," and when "the People submitted an answering affirmation that set forth, in detail, the predicate for defendant's arrest, defendant did not reply") and In the Matter of Joel M., 237 A.D.2d 146, 654 N.Y.S.2d 753 (1st Dept. 1997) (upholding summary denial of *Mapp*/*Dunaway* motion which "failed to deny or to controvert" police officer's allegations that he observed Respondent repeatedly exchanging small objects for U.S. currency) and People v. Chavous, 204 A.D.2d 475, 611 N.Y.S.2d 903 (2d Dept. 1994), app. denied, 83 N.Y.2d 1002, 616 N.Y.S.2d 484 (1994) (affirming summary denial of suppression motion that alleged in conclusory fashion that "[t]he arresting officers did not observe the defendant commit any criminal act nor did they have any reasonably trustworthy information which supported the conclusion that the defendant had committed a criminal act," thereby failing to take issue with

"the People's "contention that the defendant was arrested because he was sitting in a stolen vehicle and because he could not produce a driver's license, the vehicle's registration card, or the name of the vehicle's owner") and People v. Omaro, 201 A.D.2d 324, 607 N.Y.S.2d 44 (1st Dept. 1994) (affirming summary denial of Mapp motion that failed to take issue with People's contention that "search [was justified] on an abandonment theory" by "plead[ing] facts supporting any expectation of privacy").

A necessary corollary of Mendoza's second prong is that the prosecution must disclose the facts upon which it intends to rely to justify the search or seizure, for without such a disclosure, the respondent is not in a position to argue for a hearing and the court is not in a position to apply the second prong of Mendoza to assess the sufficiency of the respondent's motion. See People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant's factual allegations, although brief, were sufficient to require a hearing "in light of the minimal information available to the defendant at the time of the motion" and in light of prosecution's failure to set forth specific facts in its "largely conclusory" responding papers); People v. Lambey, 176 A.D.3d 1232, 111 N.Y.S.3d 388 (2d Dept. 2019) (trial court should not have summarily denied 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"); People v. Rosario, 264 A.D.2d 369, 369, 693 N.Y.S.2d 152, 153 (1st Dept. 1999), lv. app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614 (2000) (defendant was entitled to Mapp hearing, given that defendant "alleged that he was not involved in any suspicious or criminal activity ... [and] that he had not engaged in any drug sales at any time that day and that he did not fit the description of anyone involved in a drug sale at that location" and "[t]he People's opposition to a suppression hearing failed to allege what description the arresting officer received and whether defendant fit such description ... [and] [t]he People alleged no facts supporting the lawfulness of the defendant's arrest"); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dept. 1994), app. denied, 84 N.Y.2d 873, 618 N.Y.S.2d 18 (1994) (notwithstanding vagueness of motion allegations that "`defendant Vasquez was placed under arrest without probable cause'" in that he "`was not engaged in any illegal activity at the time of his arrest,'" trial court erred in summarily denying Mapp/Dunaway motion because the "basis for the arrest was not self-evident and there had been absolutely no disclosure by the People as to the grounds upon which the arresting officers premised the seizure"; "where the claimed predicate for seizure is not self-evident, and the People fail to make even minimal disclosure with respect thereto, the only fair inference is that the legality of the seizure is, at the very least, questionable").

(c) Third prong (information available to defendant)

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

Bryant, 8 N.Y.3d 530, 838 N.Y.S.2d 7 (2007) (trial court erred in summarily denying a *Mapp*/*Dunaway* motion: "defendant's lack of access to information precluded more specific factual allegations"; "[t]he People could not both refuse to disclose the [information] ... and insist that defendant's averments in his pleadings were insufficient to obtain a *Mapp*/*Dunaway* hearing"); People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995) (defendant's factual allegations, although brief, were sufficient to require a hearing "in light of the minimal information available to the defendant at the time of the motion" and in light of prosecution's failure to set forth specific facts in its "largely conclusory" responding papers); People v. Esperanza, 203 A.D.3d 124, 160 N.Y.S.3d 47 (1st Dept. 2022) (the trial court improperly denied the *Mapp*/*Dunaway* motion on the papers: Significant "circumstances surrounding the drug sale and arrest of defendant were only expounded at trial and were not available to defendant at the time the motion to suppress was made."); People v. Fleming, 201 A.D.3d 552, 160 N.Y.S.3d 45 (1st Dept. 2022) (the trial court improperly denied the *Mapp* motion on the papers: Although "defendant's allegations did not contradict the People's allegations regarding the facts of the drug transaction itself," the "motion challenged the constitutional adequacy of 'any transmitted description on which the seizing officers relied in detaining and arresting the defendant.'" "[T]he absence of factual allegations regarding the content of a transmission from the undercover to the arresting officer did not render defendant's motion deficient" because "the People in this case did not disclose 'by either voluntary discovery or otherwise, ... the description radioed by the purchasing officer to the arresting officer'" and "a defendant cannot be expected 'to allege facts about which he had no knowledge.'"); People v. Flanders, 187 A.D.3d 483, 130 N.Y.S.3d 287 (1st Dept. 2020) (the trial court erred by summarily denying the defendant "a hearing on the factual issue of whether or not the store security guards involved in his detention were licensed to exercise police powers, or acting as agents of the police": "Contrary to the People's contention, at the time of his initial motion, defendant did not have access to any information that could have aided him in further investigation of the security guards' licensing status"); 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 "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"); People v. Chamlee, 120 A.D.3d 417, 991 N.Y.S.2d 313 (1st Dept. 2014) ("it was incumbent upon the motion court to conduct a hearing," and trial court's summary denial of *Mapp* motion was improper, given that "the information proffered by the People to support the forcible entry was conclusory and defendant did not have access to available information"); People v. Wynn, 117 A.D.3d 487, 985 N.Y.S.2d 77 (1st Dept. 2014) (although defendant's *Mapp*/*Dunaway* motion was "conclusory," trial court nonetheless should have granted a suppression hearing because prosecution failed to provide defense counsel with "any explanation for defendant's arrest" and thus the facts were not reasonably knowable by defense counsel: "Although the People provided defendant with extensive information about the facts of

the crime and the proof to be offered at trial, they provided no information whatsoever, at any stage of the proceedings, about how defendant came to be a suspect, and the basis for her arrest, made hours after the crime at a different location," and "[t]he People never explained, even by implication, whether defendant met a description, was named by a witness familiar with her, or was connected to the crime in some other way"; moreover, "the People's response to defendant's motion was still silent as to the basis for connecting defendant to the crime."); People v. Acosta, 66 A.D.3d 792, 887 N.Y.S.2d 187 (2d Dept. 2009) (trial court erred in summarily denying a *Mapp* motion that challenged a search and seizure by store security guards: although the search may have been a private search exempt from constitutional requirements, the motion alleged that the store security guards were "'peace officers ... or persons acting as agents of the police,'" and this allegation sufficed to trigger a right to a suppression hearing on the issue, particularly because "a guard's licensing status is not something a defendant could be expected to know and is, therefore, not something a defendant could be expected to allege with particularity"); People v. Mabeus, 47 A.D.3d 1073, 850 N.Y.S.2d 664 (3d Dept. 2008) (trial court erred in summarily denying a *Mapp* motion that, *inter alia*, challenged the reliability of a confidential informant (whose information was the basis for police tracking of the defendant's vehicle with a GPS system), given that "defendant had limited access to information, particularly with respect to the confidential informant"); People v. Rivera, 42 A.D.3d 160, 836 N.Y.S.2d 148 (1st Dept. 2007) (trial court erred in summarily denying a *Mapp* motion: "[i]t is now firmly established that it is unreasonable to construe the Criminal Procedure Law as requiring precise factual averments from the defendant where the defendant does not have access to or awareness of the facts necessary to support suppression"); People v. McNair, 28 A.D.3d 800, 811 N.Y.S.2d 819 (3d Dept. 2006) (trial court erred in summarily denying Dunaway motion that was "somewhat vague due to the fact that defendant did not yet have access to the transcribed 911 call" which defense had requested in demand to produce and which prosecution had not yet produced by time that motion was due); People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76, 77 (1st Dept. 1999) ("While a defendant is required to raise a factual issue in order to obtain a suppression hearing (CPL 710.60(3)(b)), he need not prove his entire case in the motion papers. The adequacy of the factual allegations must be considered in the context of defendant's case and his accessibility to information at the time of the motion."); People v. Bennett, 240 A.D.2d 292, 659 N.Y.S.2d 260 (1st Dept. 1997) (defendant's minimal Mapp motion, which merely denied that defendant engaged in a drug transaction with undercover officer, was sufficient to require hearing, "[g]iven the paucity of information that was available to the defendant at the time of the motion"); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dept. 1994), app. denied, 84 N.Y.2d 873, 618 N.Y.S.2d 18 (1994). See also People v. Sneed, 199 A.D.3d 90, 153 N.Y.S.3d 464 (1st Dept. 2021) (the defendant was "entitled to a hearing on the purely factual issue of whether or not the security guard involved in his detention was licensed to exercise police powers, or acting as an agent of the police"; although the prosecution argued that defense counsel "had access to information that would have permitted him to investigate the security guard's private employment status and therefore make more specific factual allegations," the court rejects this argument because the Voluntary Disclosure Form only stated the date, time, and location of the arrest and did not give the name of the security guard or provide other information that could have "helped defendant further investigate whether the security guard was a private or state actor

status"). Cf. People v. Long, 8 N.Y.3d 1014, 839 N.Y.S.2d 441 (2007) (trial court "properly denied defendant's motion for a *Mapp*/*Dunaway* hearing in light of defendant's failure to raise a factual dispute as to reasonable suspicion for her detention and subsequent arrest," given that "defendant had ample access to relevant information regarding the factual predicate for her arrest, including access to the People's 'write-up' of her conduct which the court read to her and her counsel at arraignment" and yet nonetheless "failed to specifically challenge the identified informant's basis of knowledge in her suppression motion"); People v. Boateng, 209 A.D.3d 448, 174 N.Y.S.3d 837 (Mem) (1st Dept. 2022) (trial court did not abuse its discretion in summarily denying a *Mapp* hearing on the ground that the defense "'failed to allege facts supporting a finding that the store employee [a security guard] was a state actor,'" given that "[t]he felony complaint and voluntary disclosure form 'disclosed sufficient information about the guard,' including his name, the 'name and location of the store, and the precise date and hour at which the guard encountered defendant, to have enabled defendant to subpoena records and ascertain the guard's status'"); People v. Harris, 199 A.D.3d 497, 158 N.Y.S.3d 34 (1st Dept. 2021) (the trial court did not abuse its discretion in summarily denying a *Mapp* motion consisting of "bare-boned allegations that [the defendant] was engaged in lawful behavior at all times and that his arrest was unsupported by probable cause"; defense counsel's assertion that "he lacked the necessary information to make a more detailed motion is unavailing" because "[a]t the time of his motion, defendant had been apprised, by way of the felony complaint and voluntary disclosure form," with "specific information about the predicate for his arrest.").

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

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

allegation that the radioed description was perhaps too generalized, and thus would not have excluded others at the scene, defendant should have submitted facts as to the presence and general description of such other persons in the vicinity at the time of the arrest." Id. at 729, 723 N.Y.S.2d at 767. Similarly, in holding in People v. Duval, 36 N.Y.3d 384, 391, 141 N.Y.S.3d 439, 442 (2021) that "the motion court did not abuse its discretion in denying suppression without a hearing because the factual allegations and records that Mr. Duval offered did not sufficiently support the legal basis for suppression asserted in his motion papers," the Court of Appeals emphasized that the defendant "had ready access to information" relevant to the motion's challenge to the validity of the search warrant. The suppression motion asserted that although the search warrant described the location to be searched as "a single residence without separate units," it actually was a "multi-unit dwelling" and therefore the warrant's failure to "identify any individual unit within the house" violated "'constitutional requirements of particularity with respect to the description of the place to be searched.'" Id. at 388, 141 N.Y.S.3d at 440. The Court of Appeals acknowledged that "Mr. Duval lacked access to . . . materials that were before the warrant court" about "the inside of the building," but the Court stressed that the defendant "had ready access to information about the actual conditions of the premises at the time of the search" and yet "failed to provide it in support of his suppression motion." *Id*. at 391, 141 N.Y.S.3d at 443. See id. at 391-92, 141 N.Y.S.3d at 443 (describing factual information available to the defense that could have been provided).

(3) Alleging Sufficient Facts to Establish Standing

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

Accordingly, in cases in which the respondent's standing to raise a search and seizure claim is in question, the Mapp motion must allege facts showing that the respondent had the privacy interest necessary to challenge the police conduct. See People v. Burton, 6 N.Y.3d 584, 587, 815 N.Y.S.2d 7, 10 (2006) ("There is no legal basis for suppression and, hence, no need for a hearing, unless the accused alleges facts that, if true, demonstrate standing to challenge the search or seizure"). See also People v. Ibarguen, 37 N.Y.3d 1107, 157 N.Y.S.3d 252 (2021) (the "suppression court did not abuse its discretion by summarily denying a *Mapp* motion that "'failed to sufficiently allege standing to challenge the search of the subject premises"). But see People v. Bonilla, 211 A.D.3d 614, 180 N.Y.S.3d 162 (1st Dept2022) ("the [trial] court should not have denied defendant's motion to controvert the search warrant sua sponte due to lack of standing. Where a defendant seeks to suppress evidence on the grounds that it was obtained by means of an illegal search, they 'must allege standing to challenge the search and, *if the allegation is disputed*, must establish standing' . . . Here, the People never disputed that defendant had standing to challenge the search warrant. Therefore, the court should not have denied the motion 'based on a ground not raised by the People.'"). Compare People v. Carter, 86 N.Y.2d 721, 723, 631 N.Y.S.2d 116, 117 (1995) (affirming summary denial of Mapp motion

because "[d]efendant made no assertion of standing to challenge the search of the vehicle in his omnibus motion or thereafter, even though the People consistently contested defendant's standing throughout the proceedings") and People v. Gomez, 67 N.Y.2d 843, 844, 501 N.Y.S.2d 650, 651 (1986) (affirming summary denial of motion challenging police seizure of property from defendant's apartment because the motion failed to allege "present possessory interest in the apartment" or other facts supporting "an expectation of privacy in the area searched") and People v. Ruffin, 191 A.D.3d 1174, 143 N.Y.S.3d 134 (3d Dept. 2021) (affirming summary denial of *Mapp* motion challenging a police search of a duffel bag found "on the steps outside of the apartment complex" in an area that the defendant had recently been in: the suppression motion "did not allege any facts supporting a reasonable expectation of privacy in the duffel bag, which was partially open when it was found and located in a common area") and People v. Browning, 253 A.D.2d 888, 678 N.Y.S.2d 332 (2d Dept. 1998) (upholding summary denial of *Mapp* motion because defendant failed to allege any expectation of privacy in crate on which he was seated (and which was searched) and, in any event, could not reasonably have claimed such an expectation in such a crate in a public area) with People v. Martin, 135 A.D.2d 355, 521 N.Y.S.2d 416 (1st Dept. 1987) (motion papers adequately established taxicab passenger's standing to challenge weapon seized from floor of cab) and People v. Madera, 125 A.D.2d 238, 509 N.Y.S.2d 36 (1st Dept. 1986) (motion papers adequately established automobile passenger's standing to challenge police stop of car) and with People v. Valentin, 27 Misc.3d 19, 898 N.Y.S.2d 755 (N.Y. Sup. Ct., App. Term, 2d, 11th & 13th Dist. Feb. 8, 2010) (prosecution waived challenge to defendant's standing by "orally consent[ing] to a *Mapp* hearing without the necessity of a written motion and "fail[ing] thereafter to raise said issue on any of the adjourned dates of the [suppression] hearing"). But cf. People v. Hunter, 17 N.Y.3d 725, 926 N.Y.S.2d 401 (2011) ("the People must timely object to a defendant's failure to prove standing in order to preserve that issue for appellate review": in order to "'bring the claim to the trial court's attention'" and alert defense counsel to "the need to develop a record for appeal," the "People are required to alert the suppression court if they believe that the defendant has failed to meet his burden to establish standing"); People v. Ingram, 18 N.Y.3d 948, 944 N.Y.S.2d 470 (2012) (in criminal cases, "CPL § 470.15(1) precludes the Appellate Division from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court," and, "[i]n an appeal from an Appellate Division affirmance, CPL § 470.35(1) grants [Court of Appeals] no broader review power than that possessed by the Appellate Division"); People v. Concepcion, 17 N.Y.3d 192, 929 N.Y.S.2d 541 (2011) (Appellate Division erred in affirming trial court's denial of suppression (which was based on inevitable discovery) on alternative legal basis on which trial judge had not ruled (consent to the search): "CPL 470.15(1) bars [Appellate Division] from affirming a judgment, sentence or order on a ground not decided adversely to the appellant by the trial court, and CPL 470.35(1) grants [Court of Appeals] no broader review powers in this regard"); People v. Sylvester, 129 A.D.3d 1666, 12 N.Y.S.3d 469 (4th Dept. 2015) ("The People failed to preserve for our review their contention that defendant Sylvester lacked standing to contest the legality of the search of the vehicle" because "[t]he People's challenge to defendant Sylvester's standing, made after the proof at the suppression hearing was closed, was untimely"); People v. Cole, 128 A.D.3d 521, 9 N.Y.S.3d 253 (1st Dept. 2015) (declining to review prosecution's argument on defendant's lack of standing because "the People did not raise this

specific claim in their post-hearing argument and submissions before the motion court, nor did the court reach this issue" and "[t]hus, the People's argument is unpreserved and we decline to reach it in the interest of justice").

Until the Court of Appeals's decision in 2006 in People v. Burton, 6 N.Y.3d 584, 815 N.Y.S.2d 7 (2006), some lower courts required defendants in criminal cases and juvenile respondents in delinquency proceedings to expressly assert a possessory interest in contraband in order to acquire standing (thereby making a concession that could prove fatal at trial) and would not permit the accused to obtain standing by relying on police reports claiming that the contraband was on the accused's person or that s/he discarded the item (which could provide the basis for a claim that the act of alleged "abandonment" was in response to an unlawful police action or statement). In Burton, the Court of Appeals definitively rejected this view and held that the accused is "not required to personally admit possession of the contraband in order to comply with the factual pleading requirement of CPL 710.60" and can "meet his evidentiary burden by supplementing the averments made in his motion to dismiss with the police officer's statement that the drugs were recovered from defendant's person." *Id*. at 589, 815 N.Y.S.2d at 11. *See also id*. at 586, 815 N.Y.S.2d at 9 ("the statements in defendant's motion papers that he was stopped and searched by the police without legal justification, and that the police claimed to have discovered drugs on defendant during the search, were sufficient to satisfy the factual allegation requirement of CPL 710.60(1) and thereby establish standing to seek suppression"); *id*. at 588, 815 N.Y.S.2d at 10 (prosecution's argument that "because defendant did not specifically admit or acknowledge that he possessed the drugs, there were insufficient 'sworn allegations of fact' to assert standing to challenge the legality of the police conduct and summary denial of his motion was therefore permitted under CPL 710.60(3)(b)" is "inconsistent with the language of CPL 710.60 and our precedent"); *id*. at 589 n.2, 815 N.Y.S.2d at 11 n.2 (disapproving People v. Brown, 256 A.D.2d 42, 682 N.Y.S.2d 32 (1st Dept. 1998), lv. denied, 93 N.Y.2d 871 (1999), "[t]o the extent ... *Brown* ... indicates that, notwithstanding the People's factual allegations, a defendant charged with possessing contraband on his person must admit that he did, in fact, possess the seized item in order to have standing to seek suppression"). *Accord* People v. Samuel, 42 A.D.3d 551, 839 N.Y.S.2d 806 (2d Dept. 2007) (trial judge erred in summarily denying a *Mapp* motion for lack of standing: notwithstanding defendant's having claimed that the gun was not his and that it was "recovered in a public place," the defendant was entitled to rely on an arresting officer's Grand Jury testimony that "the defendant had a gun in his pocket and threw it away after the officer approached him in the street"); People v. Johnson, 42 A.D.3d 341, 839 N.Y.S.2d 741 (1st Dept. 2008) (trial judge erred in summarily denying the *Mapp* motion as a result of the defendant's grand jury testimony denying that he had possession of the gun at the time of his arrest: under *Burton*, the defendant was entitled to rely on the police claim that the gun was seized from his waistband area).

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

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

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

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

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

- *Searches of the person*: An individual always has standing to contest a search of his or her person. See, e.g., People v. Burton, 6 N.Y.3d 584, 588, 815 N.Y.S.2d 7, 10 (2006) ("individuals possess a legitimate expectation of privacy with regard to their persons"; "defendant undeniably had 'a reasonable expectation of freedom from governmental intrusion' ... in the place searched by the police – the pocket of his pants" and "also subjectively manifested such an expectation since anything concealed in the pocket was in his sole possession and hidden from public view"); People v. Hibbler, 111 A.D.2d 67, 489 N.Y.S.2d 191 (1st Dept.), appeal denied, 65 N.Y.2d 981 (1985). See also People v. Jose, 239 A.D.2d 172, 173, 657 N.Y.S.2d 631, 632 (1st Dept. 1997).

- *Searches of premises*: The courts have recognized that an individual clearly has standing to challenge:

  — A search of his or her own home. See, e.g., United States v. Karo, 468 U.S. 705, 714 (1984); People v. Mercado, 68 N.Y.2d 874, 876, 508 N.Y.S.2d 419, 421 (1986), cert. denied, 479 U.S. 1095 (1987).

  — A search of a residence in which s/he regularly stays. See, e.g., People v. Edwards, 124 A.D.3d 988, 1 N.Y.S.3d 523 (3d Dept. 2015) (defendant had standing to "contest the propriety of the warrantless entry into the apartment" because he was "a frequent guest" of the tenant's); In the

Matter of George R., 226 A.D.2d 645, 641 N.Y.S.2d 376 (2d Dept. 1996) (respondent had standing to contest the search of a room in his grandmother's apartment, even though he did not live there, because he "was a regular overnight guest at her apartment and .. both slept in and kept possessions in the room where the weapon was recovered"). But cf. People v. Leach, 21 N.Y.3d 969, 971 N.Y.S.2d 234 (2013) (there was sufficient "record support for the lower courts' findings" that the defendant "had no reasonable expectation of privacy in [and therefore lacked standing to context the search of] the guest bedroom of his grandmother's apartment," even though the "defendant resided in his grandmother's apartment," because there was "record support for a finding that defendant's grandmother did not want defendant to have unfettered access to all areas of the apartment": "She told the hearing court that defendant had his own bedroom and she reserved the extra or guest bedroom solely for use by other grandchildren when they came to visit," and "[t]he record was silent as to whether defendant had ever used that bedroom for any purpose").

— A friend's home in which the respondent was "[s]taying overnight" as a "houseguest." See Minnesota v. Olsen, 495 U.S. 91 (1990); People v. Chandler, 153 Misc.2d 332, 581 N.Y.S.2d 530 (Sup. Ct., Queens Co. 1991). Cf. People v. Wesley, 73 N.Y.2d 351, 353-54, 540 N.Y.S.2d 757, 758, 764 (1989) (defendant, who tried to refute his connection to drugs found in his girlfriend's house by testifying that he "never stayed at [the] house, that he kept no clothes or other personal property there except for a few stored papers ... [and] was merely a visitor, albeit a daily one," is found to lack standing to challenge the search; "[h]ad he asserted a similar interest in the premises to that of his girlfriend, the result might well have been otherwise"); People v. Hornedo, 303 A.D.2d 602, 759 N.Y.S.2d 84 (2d Dept. 2003) (defendant failed to establish a reasonable expectation of privacy in his mother's apartment, given the extensive and compelling evidence that defendant lived elsewhere with his girlfriend and given the trial court's finding that the defendant's testimony about living in his mother's apartment could not be credited). But cf. People v. Hernandez, 218 A.D.2d 167, 639 N.Y.S.2d 423 (2d Dept. 1996) (defendant, who had escaped from work-release program, could claim no objectively reasonable expectation of privacy in brother's apartment, where defendant was being harbored as fugitive).

— Arguably, virtually every "social guest" who has been invited into a dwelling by the owner or a resident has standing to challenge a search of that dwelling if the guest was present at the time of the search. See Minnesota v. Carter, 525 U.S. 83, 109 n.2 (1998) (Ginsburg, J., dissenting)

(emphasizing that the inescapable conclusion that emerges by comparing the majority, concurring, and dissenting opinions in the case is "that five Members of the Court would place under the Fourth Amendment's shield, at least, `almost all social guests'"). Defendants who seek to claim standing as mere "social guests" will have to expressly invoke the Supreme Court's 1998 decision in Carter, because there is prior New York State caselaw that takes a much more restrictive view of social guests' standing rights. See, e.g., People v. Ortiz, 83 N.Y.2d 840, 611 N.Y.S.2d 500 (1994) (defendant lacked standing to challenge warrantless entry of girlfriend's apartment because he was merely "a casual visitor" with, at best, "relatively tenuous ties to the apartment"); People v. Christian, 248 A.D.2d 960, 670 N.Y.S.2d 957 (4th Dept. 1998), app. denied, 91 N.Y.2d 1006, 676 N.Y.S.2d 134 (1998) (defendant lacked standing to challenge search of apartment because he was merely "a recent and occasional visitor"); People v. Mercica, 170 A.D.2d 181, 565 N.Y.S.2d 85 (1st Dept. 1991), app. denied, 77 N.Y.2d 964, 570 N.Y.S.2d 498 (1991) (defendant lacked standing because "he admitted to residing elsewhere and was merely an invitee in the apartment"). See also People v. Ibarguen, 37 N.Y.3d 1107, 1114-15, 157 N.Y.S.3d 252, 257 (2021) (Wilson, J., dissenting) ("The Supreme Court's . . . cases touching on the privacy interest of house guests have left many questions unanswered. . . . The . . . gaps on the spectrum have not been clarified in the years after [*Minnesota v.*] *Olson* and [*Minnesota v.*] *Carter*, although since then numerous states have confronted the question of social guest privacy (*see e.g. State v. Talkington*, 301 Kan. 453, 345 P.3d 258, 276–77 (2015); *State v. Missouri*, 361 S.C. 107, 114, 603 S.E.2d 594 (S.C. 2004); *Morton v. United States*, 734 A.2d 178, 182 (D.C. 1999) ['social guests of the host generally have a legitimate expectation of privacy']). In New York, few cases addressing the issue since . . . *Carter* have reached our Court").

— A search of a public area in which individuals can reasonably expect privacy, such as a public restroom stall (People v. Mercado, 68 N.Y.2d 874, 876, 508 N.Y.S.2d 419, 421 (1986), cert. denied, 479 U.S. 1095 (1987); People v. Vinson, 161 A.D.3d 493, 77 N.Y.S.3d 26 (1st Dept. 2018)).

— A search of any premises from which contraband was seized if the respondent is charged with possession pursuant to one of the statutory presumptions of constructive possession (P.L. §§ 220.25, 265.15). See People v. Wesley, 73 N.Y.2d 351, 361, 540 N.Y.S.2d 757, 763 (1989).

• *Stops and searches of automobiles*:

— *Stops*: When the police stop a moving automobile (whether a private vehicle or a taxicab), the legality of the stop can be challenged by not only the driver but also any passenger who was riding in the vehicle. See Brendlin v. California, 127 S. Ct. 2400, 2403, 2407 (2007) ("When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop."; "A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver"); People v. Millan, 69 N.Y.2d 514, 520 & n.6, 508 N.E.2d 903, 906 & n.6, 516 N.Y.S.2d 168, 171 & n.6 (1987).

— *Searches*: An individual can challenge a police search of an automobile if:

- The automobile belongs to the respondent's family or one or his or her friends and the respondent is driving it with the owner's permission. See, e.g., People v. Lewis, 217 A.D.2d 591, 629 N.Y.S.2d 455 (2d Dept. 1995) (defendant, who was driving his uncle's car with permission, had standing to challenge police officers' search of locked briefcase which was lying on the back seat and which, according to the defendant, belonged to his uncle); People v. Gonzalez, 115 A.D.2d 73, 74, 499 N.Y.S.2d 400, 403 (1st Dept. 1986), aff'd, 68 N.Y.2d 950, 510 N.Y.S.2d 86 (1986). See also People v. Chazbani, 144 A.D.3d 836, 40 N.Y.S.3d 513 (2d Dept. 2016) (there was sufficient proof of the defendant's standing to challenge a search of a minivan, given that "[t]he police officer testified at the suppression hearing that the defendant himself asserted that he owned the minivan" and "no contrary proof was presented."); People v. Bulvard, 213 A.D.2d 263, 624 N.Y.S.2d 23 (1st Dept. 1995) (defendant, who was seated by himself in passenger seat of double-parked car and had possession of car keys, had requisite privacy interest in the car to challenge its seizure and search of trunk).

- The respondent rented the car from a car rental agency or, even if s/he "is not listed on the rental agreement," is the driver of the car ("since there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it – perhaps the renter is drowsy or inebriated and the two think it safer for the friend to drive them to their destination"). Byrd v. United States, 138 S. Ct. 1518 (2018).

- The respondent is charged with constructive possession of contraband found in the car pursuant to a statutory presumption.

See People v. Burton, 6 N.Y.3d 584, 591 n.3, 815 N.Y.S.2d 7, 12 n.3 (2006) ("'[i]n cases where a defendant is charged with possession of a gun based on the statutory presumption found in Penal Law section 265.15(3), which attributes possession of a gun to the passengers in an automobile simply by virtue of their presence in the car where the gun is found,' ... [w]e have held that a defendant in such a case 'has a right to challenge the legality of the search regardless of whether he or she is otherwise able to assert a cognizable Fourth Amendment interest'"); People v. Millan, 69 N.Y.2d at 519, 516 N.Y.S.2d at 170. See also, e.g., People v. Lawrence, 192 A.D.3d 1686, 145 N.Y.S.3d 269 (4th Dept. 2021) ("defendant has standing as a passenger of the vehicle to challenge its search by virtue of the People's reliance on the statutory automobile presumption."); In the Matter of Terrell W., 301 A.D.2d 536, 753 N.Y.S.2d 529 (2d Dept. 2003) (respondent had standing to challenge seizure and search of knapsack found in parked car in which he had been seated – which resulted in the officers' recovery of a handgun in the knapsack – because "the weapon possession charges were based solely on the statutory presumption which attributes possession of a handgun found in a car to the occupants of the car"); People v. Hwi Jin An, 253 A.D.2d 657, 679 N.Y.S.2d 94 (1st Dept. 1998), lv. app. denied, 92 N.Y.2d 949, 681 N.Y.S.2d 480 (1998). Cf. People v. Wesley, 73 N.Y.2d at 361, 540 N.Y.S.2d at 763.

- The respondent was a lawful occupant of the vehicle at the time of the search and the seizure of the contraband resulted from a police officer's search of an area of the vehicle in which the respondent had a "legitimate expectation of privacy." See Rakas v. Illinois, 439 U.S. 128, 150 n.17 (1978). The Court of Appeals has reserved the question whether "a passenger in a [taxi]cab would have ... a right of privacy in the passenger compartment." People v. Millan, 69 N.Y.2d at 520 n.5, 516 N.Y.S.2d at 171 n.5. Counsel can argue that the passenger's temporary contractual occupancy of the passenger compartment and his or her right to exclude others from the compartment during that occupancy generate the requisite privacy interest. See Rios v. United States, 364 U.S. 253, 262 n.6 (1960) (implicitly recognizing that an "occupied taxicab" is comparable to an occupied "hotel room," and commenting that "[a] passenger's ... let[ting] a package drop to the floor of the taxicab in which he is riding can hardly be said to have `abandoned' it").

— But if the police obtain a license plate number lawfully (*i.e.*, not by means

of an unlawful stop or search), the police can run the 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. Bushey, 29 N.Y.3d 158, 160, 163, 53 N.Y.S.3d 604, 605, 607 (2017).

- *Search or seizure of an object that belonged to the respondent but was not on his or her person at the time*: "[A] possessory interest in the goods seized" does not necessarily confer standing to challenge its search or seizure. People v. Ramirez-Portoreal, 88 N.Y.2d 99, 108-09, 643 N.Y.S.2d 502, 507-08 (1996). The accused must show that s/he "had a legitimate expectation of privacy in the place or item that was searched." Id. at 109, 643 N.Y.S.2d at 508. In the following situations, the courts found that an individual had standing to challenge a search or seizure of an object that belonged to him or her even though it was recovered from a public place:

  - An individual who boards a bus and places a closed bag or piece of luggage in the luggage rack has the requisite privacy interest to contest its search or seizure even if the individual "seated himself at a distance from the bag." People v. Ramirez-Portoreal, 88 N.Y.2d at 111-12, 643 N.Y.S.2d at 509.

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

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

IV. Return on the Motion

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

If the prosecutor fails to respond to the motion, counsel can request that the court treat the motion as conceded and grant the relief requested in the motion. See People v. Gruden, 42 N.Y.2d 214, 397 N.Y.S.2d 704 (1977) (construing the C.P.L. as authorizing the judge to summarily grant a speedy trial motion when the prosecution fails to submit a response "show[ing] that there is a factual dispute which must be resolved at a hearing" (id. at 217, 397 N.Y.S.2d at 706) and indicating that "[t]he same standard applies [to] ... motions to suppress ... [and] nearly every pretrial and posttrial motion made in a criminal action" (id. at 216, 397 N.Y.S.2d at 705)); People v. Thurmond, 242 A.D.2d 310, 661 N.Y.S.2d 48 (2d Dept. 1997), app. denied, 90 N.Y.2d 1014, 666 N.Y.S.2d 109 (1997) (trial judge properly "deemed the factual allegations made by the defendant in his motion to be true" on the ground that "the People had twice failed to honor the trial court's directives to furnish an answer to the defendant's omnibus motion"); People v. Alston, 126 A.D.2d 731, 731, 511 N.Y.S.2d 133, 134 (2d Dept. 1987), app. denied, 69 N.Y.2d 876, 515 N.Y.S.2d 1093 (1987) (since "[t]he defendant's moving papers contained sworn allegations of all the facts essential to support ... her motion ..., the People conceded these allegations of fact by totally failing to respond to them ... [and] [t]hus, the court was required to summarily grant ... the defendant's motion"); People v. Gonzalez, 116 A.D.2d 735, 736, 497 N.Y.S.2d 778, 779 (2d Dept. 1986) ("By failing to contest the allegations made by defendant in his motion, the People conceded [the factual allegations] ... and the motion should have been summarily granted"). See also People v. Ciaccio, 47 N.Y.2d 431, 418 N.Y.S.2d 371 (1979) (prosecution's failure to respond to post-trial motion to set aside a verdict was an implicit concession justifying summary granting of the motion: "[t]he People did not dispute any of the[] facts [in the motion], and although they have not expressly conceded them, they have impliedly done so by failing even to allege their untruthfulness.... Under these circumstances we hold that it is proper for a court to grant the defendant's motion without the necessity of holding a hearing."); People v. Jordan, 149 Misc.2d 332, 333 & n.1, 564 N.Y.S.2d 658, 659 & n.1 (Sup. Ct., N.Y. Co. 1990) (because prosecution failed to respond to and contest allegations in defendant's motion to dismiss charging paper on grounds of excessive delay, "the facts asserted by the defendant are deemed conceded" and "defendant's motion is decided on default"). Cf. In the Matter of Tierees O., 307 A.D.2d 1037, 763 N.Y.S.2d 768 (2d Dept. 2003), lv. app. denied, 1 N.Y.3d 502 (2003) (trial court's denial of attorney for child's request for summary granting of suppression motion is upheld on appeal because "the Presentment Agency's answering affidavit sufficiently refuted the allegations in [the] motion to suppress"). But cf. People v. Weaver, 49 N.Y.2d 1012, 1013-14, 429 N.Y.S.2d 399, 400 (1980) (treating the remedy of summary granting of the motion as limited to those cases in which the prosecution wholly fails to controvert the allegations in the motion, and holding that the prosecution's bare-bones written response supplemented by oral allegations were sufficient to preclude summary granting of the motion); People v. Lomax, 50 N.Y.2d 351, 357-58, 428 N.Y.S.2d 937, 939-40 (1980) (prosecution's failure to controvert motion does not mandate summary granting of motion if "the allegations in [the] moving papers did not spell out a legal basis for relief"); People v. Dean, 45 N.Y.2d 651, 656, 412 N.Y.S.2d 353, 356 (1978) (prosecution's oral contesting of the motion is sufficient, at least where the defense motion failed "to show any ground constituting legal basis for the motion"); People v. Ventura-Almonte, 78 A.D.3d 524, 911 N.Y.S.2d 53 (1st Dept. 2010)

(prosecution's response "'submitt[ing] that such evidence was lawfully obtained and den[ying] all allegations to the contrary'" was "sufficient to meet their burden of 'refus[ing] to concede the truth of facts alleged by defendant'" and thus defense was not entitled to summary granting of suppression motion).

The remedy of summary granting of the motion is available even when the prosecution orally consents to holding an evidentiary hearing on the motion, since such a prosecutorial response does not suffice to controvert the allegations in the defense motion. See People v. Gruden, 42 N.Y.2d at 215, 397 N.Y.S.2d at 705 (treating the prosecution's "consent[] to a hearing" as a failure to "dispute the facts alleged in the defendants' motion papers"); In the Matter of T.J.O., 13 Misc.3d 401, 821 N.Y.S.2d 830 (Family Ct., Rockland Co. 2006) (*Huntley* motion is summarily granted on the pleadings because the Presentment Agency responded to the motion by "stat[ing] merely that they consent to a hearing," which, "[u]nder the case law [discussed at length in the opinion] . . ., is insufficient to defeat the motion and require a hearing"). Cf. In the Matter of Mark A., 250 A.D.2d 765, 765, 673 N.Y.S.2d 177, 178 (2d Dept. 1998) ("The [Presentment Agency's] contention that the hearing court erred in entertaining the respondent's oral motion is without merit, because, by failing to object to the hearing, the petitioner waived its right to a written motion.").

Since most judges will be reluctant to employ the remedy of summary granting of the motion and will usually give the prosecutor at least one more chance to answer the motion, counsel must make a strategic judgment as to whether to even seek the remedy. If the prosecution has offered to orally consent to a hearing, counsel must conduct a cost-benefit analysis that weighs the chances of the judge's granting the motion summarily against the risk that if the judge gives the prosecutor another chance to respond and if the prosecutor then responds by opposing the convening of a hearing, the judge will thereupon summarily deny the motion without a hearing. The critical factor in this cost-benefit analysis is the track record of the judge presiding over the case: If the judge has previously summarily granted such motions and if the motion is a strong one that will surely generate a hearing even in the face of prosecutorial opposition, counsel should forge ahead with a request for summary granting of the motion. If, on the other hand, the judge has previously shown a reluctance to impose such a sanction, and there is any risk of losing the opportunity for a hearing, counsel should forego asking for the sanction and simply accept the prosecutor's consent to the hearing. Once the prosecutor consents to the hearing, the judge cannot deny the respondent a hearing even though the motion is deficient in that it fails to allege law or facts adequately; the prosecutor's consent to the convening of a hearing "waive[s] compliance with the formal requirements of the statute." People v. Martinez, 111 A.D.2d 30, 31, 488 N.Y.S.2d 706, 707 (1st Dept. 1985).

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

B. Arguing for a Hearing

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

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

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

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

V. Procedural Aspects of the Suppression Hearing

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

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

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

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

(1) Right to *Rosario* Material

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

Unlike the Rosario requirements for a Family Court trial, this provision does not necessitate disclosure at the commencement of the suppression hearing; rather, the prosecution can turn over the material "at the conclusion of the direct examination of each of its witnesses." F.C.A. § 331.4(3). Nonetheless, counsel should ask the prosecutor at the commencement of the hearing to turn over all of the material immediately in order to avoid delay during the hearing. Cf. People v. Sorbo, 170 Misc.2d 390, 649 N.Y.S.2d 318 (Sup. Ct., N.Y. Co. 1996) (ordering

prosecution to provide pretrial disclosure of statements that defendant made to private party because "[d]elayed disclosure creates a substantial risk of unnecessary continuances and adjournments [and] [t]he People have advanced no policy arguments against disclosure"). If the prosecutor refuses, and if the judge later resists counsel's mid-hearing attempt to take the time to read the Rosario material carefully, counsel can inform the judge that the delay is attributable to the prosecutor since s/he refused to cooperate with counsel's attempt to avoid such a mid-hearing delay.

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

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

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

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

F.C.A. § 331.4(3)(a) imposes upon defense counsel the same obligation of providing the prosecution with Rosario statements of defense witnesses at the conclusion of each witness's

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

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

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

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

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

The caselaw makes clear that the respondent has an absolute right to waive his or her presence at a Wade hearing (see, e.g., People v. Hubener, 133 A.D.2d 233, 518 N.Y.S.2d 849 (2d Dept. 1987); People v. Townsend, 129 A.D.2d 657, 514 N.Y.S.2d 129 (2d Dept. 1987), app. denied, 70 N.Y.2d 718 (1987); People v. Huggler, 50 A.D.2d at 473-74, 378 N.Y.S.2d at 496-97) or any other type of pretrial hearing (see, e.g., People v. Lyde, 104 A.D.2d 957, 480 N.Y.S.2d 734 (2d Dept. 1984); People v. James, 100 A.D.2d 552, 473 N.Y.S.2d 252 (2d Dept. 1984); In the Matter of Elijah W., 13 Misc.3d 382, 822 N.Y.S.2d 412 (Fam. Ct., Bronx Co. 2006)). Moreover, the respondent may assert that waiver with respect to specific portions of the hearing (such as the prosecution witnesses' testimony) and attend the remainder of the hearing. See People v. Hubener, 133 A.D.2d at 234, 518 N.Y.S.2d at 850 ("it was error for the court to deny the defendant's request to be present for the police witness's testimony and the defendant's further request to waive his presence during the identifying witnesses' testimony at the Wade hearing. A criminal defendant has a constitutional and statutory right to be present or to waive his presence during pretrial suppression hearings .... Moreover, the defendant has a right to be present during those parts of a pretrial hearing that he chooses and may waive his right to be present at other times.").

Prior to the suppression hearing, counsel should advise the client of the need for absenting himself or herself from the hearing to avoid a suggestive confrontation with the

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

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

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

C.P.L. § 710.60(4) specifically authorizes introduction of hearsay evidence at a suppression hearing. Nonetheless, as the next two subsections show, defense counsel may be able to object to hearsay in certain limited circumstances. Moreover, as shown in subsection V(C)(3), defense counsel may be able to argue that the prosecution's hearsay-based presentation at the suppression hearing was so conclusory and/or so lacking in essential details that the prosecution failed to satisfy its burden of production or proof.

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

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

A respondent's right to confrontation under the federal and state constitutions requires that a hearsay statement be excluded if the statement does not bear adequate "`indicia of reliability.'" Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); see also Kentucky v. Stincer, 482 U.S. 730, 737-38 (1987); Lee v. Illinois, 476 U.S. 530, 542-45 (1986). Even though the C.P.L. generally authorizes the use of hearsay at suppression hearings, a particular hearsay statement may be so unreliable that its exclusion is mandated by the paramount constitutional right to

confrontation. Cf. Barber v. Page, 390 U.S. 719 (1968) (notwithstanding that the challenged statement was admissible under a standard hearsay exception, its introduction violated the Confrontation Clause). Accordingly, in a suppression hearing, if counsel can show that the out-of-court declarant's bias or lack of knowledge renders the hearsay statement unreliable, it must be excluded. See, e.g., United States v. Matlock, 415 U.S. 164, 176-77 (1974) (in holding that the hearsay statement at issue could be introduced at a suppression hearing, the Court emphasizes that the out-of-court declarant "harbored no hostility or bias against respondent that might call her statements into question" and that the hearsay statements "were also corroborated by other evidence received at the suppression hearing" and bore "indicia of reliability"). The need for exclusion is particularly great when the prosecution relies on a hearsay statement by an out-of-court declarant whom the prosecution will not call as a witness at the hearing and who therefore will not be subject to cross-examination. See id. at 177 (since the out-of-court declarant testified at the suppression hearing and "was available for cross-examination, ... the risk of prejudice, if there was any, from the use of hearsay was reduced").

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

(2) Challenging Multiple Hearsay

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

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

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

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

In some cases in which the prosecution relies on a police officer whose information about the case comes from another officer or a civilian witness, the testifying officer may be unable to give details that are essential for resolution of the claim that is being litigated. In such cases, it may be possible to argue at the conclusion at the hearing that the witness's testimony is insufficient to satisfy the prosecution's burden or production or proof. See, e.g., People v. Ortiz, 90 N.Y.2d 533, 664 N.Y.S.2d 243 (1997) (prosecution failed to meet its burden of production at the *Wade* hearing because the officer who testified at the hearing did not observe the show-up identification of the defendant by two other police officers: the Court of Appeals explains that it is not sufficient for the prosecution merely to establish, as it did in this case, that "the showup

was conducted in close geographic and temporal proximity to the crime"; "[t]he People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate that the procedure was not unduly suggestive"); People v. Eastman, 32 A.D.3d 965, 821 N.Y.S.2d 263 (2d Dept. 2006) (prosecution failed to satisfy its burden of production at a *Mapp* hearing by presenting a police officer who arrested the defendant at the direction of a detective but who did not testify about the other officer's basis for believing that the defendant had committed a crime: although the "fellow officer rule" allows an officer to make "a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer ... in possession of information sufficient to constitute probable cause for the arrest," the "prosecution bears the burden [at a suppression hearing] of establishing that the officer imparting the information had probable cause to act"); People v. Moses, 32 A.D.3d 866, 823 N.Y.S.2d 409 (2d Dept. 2006) (prosecution's burden of production at a *Mapp* or *Dunaway* hearing to come "forward with evidence to demonstrate the legality of the police conduct in the first instance" was not satisfied by the testimony of a police officer who transported the complainant to the location of the show-up but was not involved in the stop of the defendant, could not testify to the circumstances of the stop, and offered nothing more than a "vague and equivocal hearsay" account of a statement made by the arresting officer which "was inadequate to demonstrate" the validity of the arresting officers' actions in stopping and detaining the defendant and transporting him to the location of the show-up). See also People v. Watkins, 213 A.D.3d 467, 183 N.Y.S.3d 85 (1st Dept. 2023) (suppressing a post-arrest statement because the prosecution failed to satisfy its burden of production at the suppression hearing to justify the arrest: A detective testified at the hearing that he took "a statement from a codefendant in the robbery who implicated defendant, ostensibly prompting the arrest of defendant" by other police officers, but the prosecution failed to present any "direct evidence that the statement implicating defendant was communicated to the officers arresting him"; as a result, the prosecution's evidence "was insufficient to permit the inference that information constituting probable cause was transmitted by the detective to the officers effectuating the arrest of defendant, as required to meet the People's prima facie burden of establishing the legality of the challenged police conduct and shift the burden of persuasion to defendant").

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

Putting on a defense case at a suppression hearing is a very risky proposition if the witnesses whom counsel would call at the suppression hearing are also essential witnesses for the defense at trial. To the extent that a defense witness (including the respondent) testifies differently at trial than s/he did at the suppression hearing, the prosecution is apparently free to impeach the witness with his or her prior inconsistent statements at the suppression hearing. Cf. Harris v. New York, 401 U.S. 222 (1971). The only limitation upon the prosecution's use of suppression hearing testimony at trial is that the prosecutor cannot introduce the suppression hearing testimony of a defense witness in the Presentment Agency's case-in-chief. See Simmons v. United States, 390 U.S. 377 (1968) (barring such introduction of accused's suppression

hearing testimony in prosecution's case-in-chief at trial); People v. Ayala, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990) (witness's suppression hearing testimony is not admissible at trial under hearsay exception for sworn testimony by unavailable witness who was subject of cross-examination by opposing side at prior hearing); In re Jaquan A., 45 A.D.3d 305, 306, 846 N.Y.S.2d 88, 89 (1st Dept. 2007) (applying, to the delinquency context, the rule of People v. Ayala, that a lawyer cannot introduce, at trial, a witness's suppression hearing testimony over the objection of opposing counsel).

The risk of impeachment at trial can often be minimized by curtailing the scope of the witness's testimony at the suppression hearing. If, for example, a defense witness who was present at the scene of the crime only testifies to her observation of the unlawful police arrest and interrogation of the respondent, the prosecution will be unable to use her suppression hearing testimony to impeach her at trial when she testifies that the respondent did not commit the crime. Of course, even when the defense limits a witness's direct examination at the suppression hearing in this manner, the prosecutor may attempt to cross-examine the witness at the suppression hearing about the facts of the offense, so as to create impeachment material for use at trial. In such situations, defense counsel can object to the cross-examination about the circumstances of the offense as beyond the scope of direct examination. See, e.g., People v. Lacy, 25 A.D.2d 788, 788, 270 N.Y.S.2d 1014, 1015-16 (3d Dept. 1966) (at a Huntley hearing, "the defendant may take the stand and testify as to his request for counsel at the time of the arrest and as to all facts relevant to ... the alleged confession and waiver and by so testifying, the defendant does not subject himself `to cross-examination on the merits'"); People v. Blackwell, 128 Misc.2d 599, 490 N.Y.S.2d 457 (Sup. Ct., N.Y. Co. 1985) (when defendant's direct examination at Huntley hearing is limited to the circumstances of the interrogation, prosecutor is barred from cross-examining about the crime since this would be beyond the scope of direct; this same reasoning "would seem to apply to other types of pretrial suppression hearings as well" (id. at 603, 490 N.Y.S.2d at 462)). But cf. People v. Garland, 155 A.D.3d 527, 527, 65 N.Y.S.3d 167, 169 (1st Dept. 2017) (at the Huntley hearing, the prosecution was able to "cross-examine defendant on the substance of the written statement, as defendant opened the door to the inquiry by testifying on direct examination that the detective interrogating him had rejected his initial statement and coerced him into writing the subsequent inculpatory statement.").

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

from calling the witness at trial.

E. The Concluding Argument

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

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

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

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

If the court denies a defense request to continue the concluding argument (whether for the purpose of additional research or acquisition of a transcript) and, after argument, denies the suppression motion, counsel should thereafter obtain the missing information by doing the additional research or examining the transcript. If the new information provides an argument that counsel did not previously make, counsel should file a motion for reconsideration. Such a pleading can be filed as a motion seeking the court's exercise of its "continuing jurisdiction to reconsider its prior intermediate determinations" (People v. Wheeler, 32 A.D.3d 1107, 822 N.Y.S.2d 160 (3d Dept. 2006)) or as a motion pursuant to F.C.A. § 355.1(1)(b) (with the new

information serving as "a substantial change of circumstances" warranting a modification of the previous order denying suppression) or as a motion seeking the judge's exercise of his or her inherent discretion to reconsider a ruling in the interest of justice (cf. In the Matter of Carmen R., 123 Misc.2d 238, 473 N.Y.S.2d 312, 315 (Family Ct., St. Lawrence Co. 1984)).

(2) Using Burdens of Production and Persuasion

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

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

(a) *Huntley* Motions

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

While the foregoing doctrine is commonly framed in terms of the voluntariness of a statement, it necessarily extends beyond due process claims of involuntariness and encompasses all doctrinal bases for challenging the constitutionality of a statement, including Miranda violations and violations of the right to counsel. Under New York law, the definition of "involuntary statement" for purposes of a suppression motion includes any statement obtained from the accused "in violation of such rights as the defendant may derive from the constitution of this state or of the United States." C.P.L. § 60.45(2)(b)(ii); F.C.A. § 344.2(2)(b)(ii); see People v. Graham, 55 N.Y.2d 144, 447 N.Y.S.2d 918 (1982). Accordingly, the prosecution's burden of proving "voluntariness" necessitates that the prosecution prove beyond a reasonable doubt that the police complied with Miranda requirements (see, e.g., People v. Baggett, 57 A.D.3d 1093, 868 N.Y.S.2d 423 (3d Dept. 2008); People v. Haverman, 119 Misc.2d 980, 982, 464 N.Y.S.2d 981, 982 (Sup. Ct., Queens Co., 1983); see also People v. Campbell, 81 A.D.2d 300, 309, 440 N.Y.S.2d 336, 341 (2d Dept. 1981)), and also that the police complied with federal and state constitutional requirements for honoring the right to counsel (see, e.g., People v. Barnes, 84 A.D.2d 501, 443 N.Y.S.2d 68 (1st Dept. 1981)). Finally, because Family Court Act § 344.2(2)(b)(iii) expands the definition of an "involuntary" statement to encompass statements taken in violation of the statutory protections established in F.C.A. § 305.2 (the requirements of

parental notification, parental presence during interrogation, parental receipt of Miranda warnings, and use of a special room for interrogation), the prosecution also must prove beyond a reasonable doubt that the police complied with these statutory requirements.

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

(b) *Wade* Motions

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

For due process claims of suggestiveness, the defendant has the burden to show suggestiveness by a preponderance of the evidence. However, "[w]hile the defendant bears the ultimate burden of proving that a showup procedure is unduly suggestive and subject to suppression, the burden is on the People first to produce evidence validating the admission of such evidence.... Initially, the People must demonstrate that the showup was reasonable under the circumstances.... The People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate the procedure was not unduly suggestive." People v. Ortiz, 90 N.Y.2d 533, 536, 664 N.Y.S.2d 243 (1997); In the Matter of Andrew S., 104 A.D.3d 693, 960 N.Y.S.2d 478 (2d Dept. 2013) (prosecution "failed to meet its initial burden of establishing the reasonableness of the identification procedure and the lack of any suggestiveness of that procedure" because prosecution's evidence "contained inconsistencies as to, *inter alia*, the number of individuals present in a group of persons from which the complainant identified the alleged perpetrator, whether the complainant viewed one or two groups of individuals, and whether the police prompted the complainant to make an identification"); People v. Coleman, 73 A.D.3d 1200, 903 N.Y.S.2d 431 (2d Dept. 2010) (prosecution failed to satisfy its threshold burden of going forward at the suggestiveness prong of the *Wade* hearing by presenting the testimony of a detective who conducted the second of two photographic identification procedures but "did not conduct, and was not present during the prior photographic array identification procedure," and "could not answer any questions as to what, if anything, was said before or during the identification procedure, or provide any details as to the attendant circumstances").

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

When challenging a show-up on due process suggestiveness grounds, counsel can argue

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

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

In Wade hearings challenging a photo array, police (or prosecutorial) failure to preserve the photo array or some other suitable "record of what was viewed . . . gives rise to a rebuttable presumption that the array was unduly suggestive. The obligation to preserve is not diminished by the type of system used. Computer screen or mugshots book, the People's obligation is the same." People v. Holley, 26 N.Y.3d 514, 25 N.Y.S.3d 40 (2015). The failure to photograph (or preserve a photograph of) a lineup constitutes substantial evidence that the lineup was not fairly conducted. See People v. Anthony, 109 Misc.2d 433, 440 N.Y.S.2d 149 (Sup. Ct., N.Y. Co. 1980).

(c) *Mapp* Motions

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

In on-the-street encounters between the police and a civilian, the prosecution bears the burden of establishing the lawfulness of the police action in making a "request for information" or engaging in a "common law inquiry," effecting a Terry stop, or making an arrest. See, e.g., People v. Watkins, 213 A.D.3d 467, 183 N.Y.S.3d 85 (1st Dept. 2023) (suppressing a post-arrest statement because the prosecution failed to satisfy its burden of production at the suppression hearing to justify the arrest: A detective testified at the hearing that he took "a statement from a codefendant in the robbery who implicated defendant, ostensibly prompting the arrest of defendant" by other police officers, but the prosecution failed to present any "direct evidence that the statement implicating defendant was communicated to the officers arresting him"; as a result, the prosecution's evidence "was insufficient to permit the inference that information constituting probable cause was transmitted by the detective to the officers effectuating the arrest of defendant, as required to meet the People's prima facie burden of establishing the legality of the challenged police conduct and shift the burden of persuasion to defendant"); People v. Eastman, 32 A.D.3d 965, 821 N.Y.S.2d 263 (2d Dept. 2006) (prosecution failed to satisfy its burden of production at a *Mapp* hearing by presenting a police officer who arrested the defendant at the direction of a detective but who did not testify about the other officer's basis for believing that the defendant had committed a crime: Although the "fellow officer rule" allows an officer to make "a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer ... in possession of information sufficient to constitute probable cause for the arrest," the "prosecution bears the burden [at a suppression hearing] of establishing that the officer imparting the information had probable cause to act."); People v. Moses, 32 A.D.3d 866, 823 N.Y.S.2d 409 (2d Dept. 2006) (identification is suppressed on *Dunaway* grounds because "prosecution failed to satisfy its burden [at *Dunaway*/*Wade* hearing] by "present[ing] evidence to establish that the defendant was lawfully stopped and detained before the complainant made her identification": arresting officer testified merely that "he received a radio communication regarding a robbery in progress and responded to the complainant's location," spoke with the complainant, and then responded to "second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection" by driving "complainant to that location," where "complainant identified the defendant as the man who broke into her home"; "prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection" and "original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant").

When, as is generally the case in Family Court, a search of a constitutionally protected

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

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

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

involuntary, rather than consensual"). See also People v. Gonzalez, 39 N.Y.2d at 129, 383 N.Y.S.2d at 220 (in light of the youth of the defendants, who were "under 20 years of age," and their "limited prior contacts with the police," the "ineluctable inference ... is that the consents could not be ... the product of a free and unconstrained choice").

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

(d) *Dunaway* Motions

The prosecution's burden at a Dunaway hearing would appear to be identical to its burden at a Mapp hearing: The prosecution bears the burden of going forward to justify the police conduct. See, e.g., People v. Dodt, 61 N.Y.2d 408, 415, 474 N.Y.S.2d 441, 445 (1984) (a "pretrial motion to suppress [an] ... identification as the fruit of an unlawful arrest cast[s] the burden on the prosecution to come forward with evidence establishing probable cause for the arrest.... The analysis required of a hearing Judge faced with deciding whether the People have met their burden is largely the same as that used by a magistrate in passing on an application for an arrest or search warrant."); People v. Bouton, 50 N.Y.2d 130, 135, 428 N.Y.S.2d 218, 220 (1980) (motion to suppress statements as the fruit of an unlawful arrest "casts upon the prosecution the burden of coming forward with evidence that the arrest met the probable cause standard"); People v. Moses, 32 A.D.3d 866, 823 N.Y.S.2d 409 (2d Dept. 2006) (identification is suppressed on Dunaway grounds because "prosecution failed to satisfy its burden [at Dunaway/*Wade* hearing] by "present[ing] evidence to establish that the defendant was lawfully stopped and detained before the complainant made her identification": arresting officer testified merely that "he received a radio communication regarding a robbery in progress and responded to the complainant's location," spoke with the complainant, and then responded to "second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection" by driving "complainant to that location," where "complainant identified the defendant as the man who broke into her home"; "prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection" and "original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant").

With respect to Dunaway challenges to a statement, counsel can argue that the prosecution not only bears the burden of going forward but also bears the ultimate burden of

proving the constitutionality of the police conduct beyond a reasonable doubt. As explained in Part V(E)(2)(a) the rigorous prosecutorial burden of beyond-a-reasonable-doubt applies to all motions to suppress a statement as "involuntary," and New York law defines an "involuntary statement" as any statement obtained from the accused "in violation of such rights as the defendant may derive from the constitution of this state or of the United States." C.P.L. § 60.45. Since a statement taken during a period of unconstitutional detention (i.e., a statement taken in violation of Dunaway) is a statement taken in violation of the accused's constitutional rights, it must be deemed an "involuntary" statement for purposes of New York law. Accordingly, the prosecution must prove beyond a reasonable doubt that the police complied with Dunaway in the course of taking the statement.

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

In People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971), the Court of Appeals acknowledged that "[s]ome police officers ... may be tempted to tamper with the truth" at a suppression hearing in order to justify their conduct, and thus, with a police officer, as with any other witness, "there is always the possibility that a witness will perjure himself." Id. at 368, 321 N.Y.S.2d at 889. The court in Berrios urged trial judges to pay strict attention "to the basic credibility problem which is always presented," id. at 369, 321 N.Y.S.2d at 890, and established a general procedure that: "Where the Judge at the suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress." Id.

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

for a gun in his waistband).

"In evaluating [police] testimony, [the judge] should not discard common sense and common knowledge.... `The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case.'" People v. Garafolo, 44 A.D.2d at 88, 353 N.Y.S.2d at 502-03. See, e.g., People v. Harris, 192 A.D.3d 151, 138 N.Y.S.3d 593 (1st Dept. 2020) ("the testimony given by each of the People's witnesses was, at times, 'implausible and contrived' . . . . Most egregious was Sergeant Ruiz's testimony that he could read the numbers on the card on the center console and see a stack of cards inside an envelope inside the defendant's pocket, all while standing outside of Richards' vehicle. This testimony, on its face, was 'so improbable as to be unworthy of belief'); People v. Maiwandi, 170 A.D.3d 750, 95 N.Y.S.3d 361 (2d Dept. 2019) (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"); People v. Rutledge, 21 A.D.3d 1125, 804 N.Y.S.2d 321 (2d Dept. 2005) (officer's "testimony that he could discern, based upon the 'dim[ness]' and long duration of the 'glow' of the item being smoked, that it was a marijuana cigarette and not a tobacco cigarette, was incredible as a matter of law, and tailored to overcome constitutional objections"); People v. Carmona, 233 A.D.2d 142, 649 N.Y.S.2d 432 (1st Dept. 1996) (rejecting, as incredible, officer's claim that he was able to see crack vial, which was two inches in length, at dusk through binoculars from observation point at least 200 feet above street); People v. Lewis, 195 A.D.2d 523, 524, 600 N.Y.S.2d 272, 273 (2d Dept. 1993), app. denied, 82 N.Y.2d 893, 610 N.Y.S.2d 165 (1993) ("[I]t is unbelievable that the officer was able to observe, in the middle of the night as the vehicles passed in an intersection, that the defendant appeared to be under the legal driving age.... Even assuming, arguendo, that the officer was capable of making such an observation, it makes no sense that he would follow the defendant for about 20 blocks before stopping his vehicle."); People v. Lastorino, 185 A.D.2d 284, 285, 586 N.Y.S.2d 26, 27 (2d Dept. 1992) (rejecting, as incredible, police officer's testimony "that the defendant, who was aware he was under surveillance for at least several minutes, exited his vehicle and left the driver's door open and a loaded gun visible on the seat, virtually inviting the police to discover the gun"); In the Matter of Carl W., 174 A.D.2d 678, 571 N.Y.S.2d 536 (2d Dept. 1991) (officer's testimony that fleeing suspect "`threw himself on the floor' during the ensuing chase is ... implausible under the circumstances"); People v. Void, 170 A.D.2d 239, 241, 567 N.Y.S.2d 216, 217 (1st Dept. 1991) (rejecting, as incredible, police officer's testimony "that the defendant consented to a police search of the apartment, where a substantial amount of cocaine was stored in plain view in the kitchen sink -- a location where the drugs could be readily discovered"); People v. Guzman, 116 A.D.2d 528, 530-31, 497 N.Y.S.2d 675, 678 (1st Dept. 1986) (officer's testimony "that he feared defendant was armed and dangerous ... is belied by the fact that he did not communicate his observation to his sergeant, crossed in front of defendant's potential line of fire, and did not direct the defendant to freeze"); People v. Addison, 116 A.D.2d at 474, 496 N.Y.S.2d at 744

("we find it incredible that defendant, in the face of such a show of force, would ... reach for his waistband as the arresting officer approached"); People v. Quinones, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 197 (1st Dept. 1978) (police officer's testimony that "he did not have his weapon drawn when he approached the building nor ... did the other officers" was inherently incredible in light of testimony that the police had received a radio run reporting armed suspects); People v. Salzman, N.Y.L.J., 10/18/99, at 29, col. 2 (App. Term, 9th & 10th Jud. Dist.) (court rejects, as incredible, officer's testimony that defendant exited automobile with open cigarette box protruding from shirt pocket and that envelopes with white powder were readily visible inside open cigarette box; officer's "testimony would require the finding that defendant was a `moron'").

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

- Inconsistencies between the police officer's present testimony and his or her previous statements in police reports or prior testimony. See, e.g., In the Matter of Robert D., 69 A.D.3d 714, 892 N.Y.S.2d 523 (2d Dept. 2010) (police officer's *Mapp* hearing testimony is found on appeal to have been incredible as a matter of law, notwithstanding trial judge's findings that officer "'was a credible witness'" and "'very forthright,'" because officer's answer on cross-examination that he "saw the drugs prior to the arrest" was "inconsistent with his supporting deposition" – in which the officer said that he observed the respondent place "'a cannister-like object in his pocket'" that was found, after arrest, to contain crack cocaine – and "[it] is impossible for . . . both to be true, and the presentment agency failed to put forth a satisfactory explanation for that contradiction"); In the Matter of Bernice J., 248 A.D.2d 538, 670 N.Y.S.2d 207 (2d Dept. 1998) (rejecting trial judge's finding crediting testimony of police officer whose "`patently tailored'" testimony was "contradicted by the remainder of the record, including other police testimony and documents"); People v. Miret-Gonzalez, 159 A.D.2d 647, 552 N.Y.S.2d 958 (2d Dept. 1990), app. denied, 76 N.Y.2d 739, 558 N.Y.S.2d 901 (1990) (court finds police officer's testimony incredible, in part because officer's account of car stop and search was contradicted by his incident report); People v. Lebron, 184 A.D.2d 784, 785-87, 585 N.Y.S.2d 498, 550-02 (2d Dept. 1992) (officer's testimony contradicted by statements and omissions in prior police reports); People v. Addison, 116 A.D.2d at 473, 496 N.Y.S.2d at 743 (officer's testimony regarding the description provided by civilian was undermined by the fact that "[t]he arresting officer had made no notation, either in his memo book or any police report, of any conversation with civilians or of having received a description from them," and had also omitted any mention of the civilians in his grand jury testimony).

- Inconsistencies between the testimony or statements of different police officers. See, e.g., People v. Austin, 203 A.D.3d 732, 162 N.Y.S.3d 487 (2d Dept. 2022)

(Suppression should have been granted because contradictions between the officers' versions of the events undermined their credibility "to such an extent that 'it is unclear exactly what happened'" and therefore "the People have not met their initial burden of demonstrating that the police acted lawfully." "[T]he officers' versions of events sharply conflicted with each other as to where the defendant was sitting in the minivan, and what he was doing, when the officers arrived at the minivan's front windows," and the officers' "accounts both could not have been true, since both officers acknowledged that they approached the minivan simultaneously and reached the front seats at the same time." "[T]hese sorts of 'multiple choice questions are neither desirable nor acceptable, and the factfinder should refuse to select a credible version based upon guesswork.'"); People v. Rhames, 196 A.D.3d 510, 149 N.Y.S.3d 550 (2d Dept. 2021) (suppression should have been granted because "although the Supreme Court credited both of the officers with respect to their interactions with the defendant, their versions of the incident conflicted with each other on key points and could not be simultaneously true"; """multiple choice questions are neither desirable nor acceptable," and the factfinder should refuse to "select a credible version based upon guesswork"""); People v. Harris, 192 A.D.3d 151, 138 N.Y.S.3d 593 (1st Dept. 2020) ("although the Supreme Court credited both of the People's witnesses, their versions of the incident conflicted with each other and could not both be simultaneously true."); People v. Bezares, 103 A.D.2d 717, 717, 478 N.Y.S.2d 16, 17 (1st Dept. 1984) ("the testimony of the arresting officer was, at a minimum, not supported by the testimony of his fellow police officer who was with him throughout, and indeed to some extent, was contradicted by that testimony").

- Inconsistencies between the officer's account and objective evidence. See, e.g., People v. Harris, 192 A.D.3d 151, 138 N.Y.S.3d 593 (1st Dept. 2020) ("important aspects of the testimony of the People's witnesses, . . . were unsupported by contemporaneous police records"); People v. Nunez, 126 A.D.2d 576, 576, 510 N.Y.S.2d 694, 695 (2d Dept. 1987) (officer's account of "radio run reporting a past robbery upon which he stopped the defendant and his companion was contradicted, in substantial part, by a Sprint report").

- Contradictory testimony by a credible defense witness. See, e.g., People v. Torres, 54 Misc.3d 1220(A), 2017 WL 740983, 2017 N.Y. Slip Op. 50246(U) (N.Y. County Court, Monroe Co., Jan. 15, 2017) (rejecting the police officer's testimony that he observed that the defendant's "vehicle's taillights were not working" and stopped the car for that reason, and instead crediting the "directly contradict[ory] ... testimony of the defendant's girlfriend," who "testified with no obvious contradiction, nervousness or hesitation").

Finally, in arguing that a police officer's testimony should be deemed incredible, counsel

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

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

In ruling on the suppression motion, the court "must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." C.P.L. § 710.60(6). See People v. Bonilla, 82 N.Y.2d 825, 827-28, 604 N.Y.S.2d 937, 938 (1993) ("the motion court's decision denying the motion without explanation ... transgresses CPL 710.60(6)"); People v. Harris, 175 A.D.3d 1555, 1557, 109 N.Y.S.3d 362, 364 (2d Dept. 2019) (trial court's "decision and order denying suppression of physical evidence and the defendant's statements to law enforcement officials without explanation transgresses CPL 710.60 (6) and 'effectively precludes informed appellate review'").. An oral ruling is appealable; a written opinion is not a prerequisite for appeal. People v. Gates, 31 N.Y.3d 1028, 75 N.Y.S.3d 468 (2018).

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

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

Counsel may need to ask the court to amplify its conclusions of law if the trial court failed to address a suppression claim that counsel may seek to raise on appeal and if counsel did not previously preserve the claim by explicitly raising it in the suppression motion and/or arguing it at the suppression hearing. See People v. Graham, 25 N.Y.3d 994, 10 N.Y.S.3d 172 (2015) (denying review of a suppression claim because it was not adequately preserved by trial counsel: "while a general objection – such as that contained in defendant's omnibus motion – is sufficient to preserve an issue for our review when the trial court 'expressly decided the question raised on appeal,'" the trial court in this case did not "expressly decide[] the issue that defendant raises on this appeal" and counsel "did not make this argument in his motion papers to the trial court or at the suppression hearing").

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

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

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

Most often, the need to re-open the suppression hearing arises because the prosecutor or a prosecutorial witness divulges at trial some fact that reveals a previously undisclosed reason for suppressing the evidence, or because defense counsel receives a Rosario document at trial that contains such a fact. See, e.g., People v. Delamota, 18 N.Y.3d 107, 936 N.Y.S.2d 614 (2011) (trial court erred in denying defense counsel's mid-trial motion to re-open the Wade hearing pursuant to CPL § 710.40(4) when it emerged at trial that the victim's son, who served as the translator for his father during a police photo array, knew the defendant); People v. Dunbar, 178 A.D.3d 948, 116 N.Y.S.3d 293 (2d Dept. 2019) (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, 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."); People v. Velez, 39 A.D.3d 38, 829 N.Y.S.2d 209 (2d Dept. 2007) (trial court erred in refusing to re-open the suppression hearing when the evidence at trial established facts contrary to the testimony of the police officers at the suppression hearing; trial court's suppression ruling is overturned and the case is remanded for a new suppression hearing before a different trial judge because "the same police officers who testified at the first hearing are likely to be called as witnesses at the new hearing, and because the credibility of those officers was, and again will be, in issue"); People v. Clark, 29 A.D.3d 918, 815 N.Y.S.2d 278 (2d Dept. 2006) (trial court erred in denying defendant's mid-trial motion to re-open pretrial suppression hearing on previously un-raised *Dunaway* claim to suppress tangible evidence and statements, which was prompted by trial testimony by police officer that defendant was not free to leave when police seized tangible evidence and took statements); People v. Boyd, 256 A.D.2d 350, 683 N.Y.S.2d 271 (2d Dept. 1998) (trial court should have permitted defense to re-open Huntley hearing at trial based upon Rosario material indicating that defendant may have been in custody for Miranda purposes earlier than arresting officer had claimed at Huntley hearing); People v. Thornton, 222 A.D.2d 537, 634 N.Y.S.2d 757 (2d Dept. 1995) (trial court should have granted a mid-trial defense request for a Wade hearing when the complainant testified that he had seen the

defendant "`a couple of times before'" and not, as the prosecution had asserted prior to trial, 50-100 times before); People v. Kuberka, 215 A.D.2d 592, 626 N.Y.S.2d 855 (2d Dept. 1995) (defendant, whose pretrial Mapp motion was denied on basis of prosecutor's representation that evidence was seized pursuant to search warrant, was entitled to mid-trial Mapp hearing when trial testimony revealed that evidence was recovered before search warrant was obtained); People v. Figliolo, 207 A.D.2d 679, 616 N.Y.S.2d 367 (1st Dept. 1994) (defendant, whose Dunaway motion to suppress statement was denied because prosecution asserted that defendant was not arrested until after he made statement, was entitled to mid-trial Dunaway hearing when officer testified at trial that arrest preceded statement). See also People v. Peart, 198 A.D.2d 528, 605 N.Y.S.2d 924 (2d Dept. 1993) (trial court erred in denying defendant's renewed application for Mapp hearing, which was based on facts that emerged at Wade hearing). Cf. People v. Clark, 88 N.Y.2d 552, 647 N.Y.S.2d 479 (1996) (although Grand Jury transcript that defense counsel received at trial showed that complainant's Grand Jury testimony about identification procedure differed from arresting officer's account at Wade hearing, trial court did not abuse discretion in denying mid-trial re-opening of Wade hearing since newly discovered facts were not sufficiently "`pertinent to the issue of official suggestiveness ... that they would materially affect or have affected the earlier *Wade* determination").

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

If the prosecution requests the re-opening of a suppression hearing to call another witness or otherwise present additional evidence, the prosecution ordinarily must show that a "procedural flaw" or some other factor deprived the prosecution of "a full and fair opportunity to be heard." See, e.g., People v. Kevin W., 22 N.Y.3d 287, 980 N.Y.S.2d 873 (2013) (a trial judge cannot "reopen[ ] a suppression hearing [after rendering judgment] 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"; because "nothing about the initial hearing [in this case] robbed the People of a full and fair opportunity to justify the stop and seizure," the trial judge acted improperly by re-opening the suppression hearing to allow the prosecution to present the testimony of a second police officer); People v. Nunez, 190 A.D.3d 565, 139 N.Y.S.3d 210 (1st Dept. 2021) (the trial judge acted improperly in re-opening the suppression hearing to allow the prosecution to call a witness whom it had not called at the previously-concluded suppression hearing and thereby overcome an evidentiary problem that became apparent to the prosecutor shortly before trial; the Appellate Division explains that "[t]he prosecution had a full and fair opportunity to present" the witness at the suppression hearing "but chose not to," and that "[t]his is not a case in which the omission of evidence at the initial hearing resulted from 'a flaw in the proceeding.'"). But cf. People v. Cook, 34 N.Y.3d 412, 121 N.Y.S.3d 187 (2019) (a trial court has "discretion to reopen a suppression hearing" at the prosecution's request "after the People had rested but before rendering a decision" as long as the court takes "finality concerns" and the "risk of improper tailoring" into account; the trial court in this case did not abuse its discretion by re-opening the suppression hearing at the prosecution's request before rendering judgment

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).

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

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

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

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

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

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

The Family Court Act, like the C.P.L., expressly preserves the respondent's right to appeal the denial of a suppression motion even after an admission. See § 330.2(6) (patterned after C.P.L. § 710.70). See also, e.g., People v. Di Raffaele, 55 N.Y.2d 234, 239-40, 448 N.Y.S.2d 448, 450 (1982). The 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 accused pleaded guilty as long as the suppression ruling related to "a count that was satisfied" by the guilty plea. People v. Holz, 35 N.Y.3d 55, 57, 125 N.Y.S.3d 49, 50 (2020).

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

The statutorily-authorized appellate remedy does not apply when an admission is taken in the midst of a suppression hearing or at a point prior to the court's issuance of its ruling, since there would not be an "order finally denying" the motion. See People v. Fernandez, 67 N.Y.2d 686, 688, 499 N.Y.S.2d 919, 920 (1986). See also In re Billy R., 54 A.D.3d 607, 607, 863 N.Y.S.2d 671, 672 (1st Dept. 2008) (suppression issue was not preserved for appeal because admission was entered after court had ruled on other suppression issues but before court had ruled on issue in question; "[i]n this situation, the court's failure to make a ruling is not deemed a denial"); People v. Harris, 143 A.D.3d 911, 38 N.Y.S.3d 919 (2d Dept. 2016) (defendant forfeited right to appellate review of *Wade* claim because "the hearing court never ruled on that branch of the defendant's omnibus motion . . . and the omission was never brought to the hearing court's attention prior to the defendant's election to enter a plea of guilty").

The remedy also does not extend to motions on procedural issues that are ancillary to a ruling on the merits of the suppression motion. See, e.g., People v. Taylor, 65 N.Y.2d 1, 6-7, 489 N.Y.S.2d 152, 155-56 (1985) (guilty plea waives right to appeal denial of motion to preclude statement or identification testimony for inadequacy of 710.30 notice); People v. Petgen, 55 N.Y.2d 529, 450 N.Y.S.2d 299 (1982) (by pleading guilty, defendant waived right to appeal trial court's order denying leave to late-file suppression motion); In the Matter of Angel V., 79 A.D.3d 1137, 913 N.Y.S.2d 572 (2d Dept. 2010) (by making an admission, the respondent "forfeited appellate review" of "his right to challenge the Family Court's denial, as untimely, of that branch of his omnibus motion which was to suppress his statements to law enforcement officials"); People v. Varon, 168 A.D.2d 349, 562 N.Y.S.2d 673 (1st Dept. 1990) (trial court's order denying discovery of affidavit supporting search warrant could not be appealed after entry of guilty plea).

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

v. Callahan, 80 N.Y.2d 273, 280, 590 N.Y.S.2d 46, 50 (1992)). The validity of the waiver can be reviewed on appeal, as can any other challenges to the procedures for taking the admission. See id.

In cases in which an appeal of a suppression hearing takes place after a guilty plea and the appellate court concludes that the suppression ruling was improper, "the harmless error doctrine generally cannot be used to uphold a guilty plea that is entered after the improper denial of a suppression motion," except where "there is no 'reasonable possibility that the error contributed to the plea'" as demonstrated by "the defendant['s] [having] articulate[d] a reason for it that is independent of the incorrect pre-plea court ruling ... or an appellate court is satisfied that the decision to accept responsibility 'was not influenced' by the error." People v. Wells, 21 N.Y.3d 716, 977 N.Y.S.2d 712 (2013).

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

In cases in which a suppression motion is held and the case thereafter proceeds to trial (either because the motion was denied or because the prosecution had enough evidence to proceed to trial despite an order of suppression), defense counsel will often wish to adjourn the trial in order to obtain a transcript of the suppression hearing for use in impeaching prosecution witnesses who testified at the hearing. In In the Matter of Eric W., 68 N.Y.2d 633, 505 N.Y.S.2d 60 (1986), the Court of Appeals held that such requests for an adjournment for the purpose of obtaining a suppression hearing transcript generally are addressed to the discretion of the trial court. See id. at 636, 505 N.Y.S.2d at 61. The analysis in Eric W. suggests, however, that there may be some circumstances in which a respondent can assert a due process right to adjourn the trial for the purpose of obtaining a suppression hearing transcript.

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

The extremely fact-specific holding of Eric W. suggests the circumstances in which

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

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

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

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

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

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

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

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

If the judge rejects the request for the adjournment and if, at trial, a prosecution witness denies an inconsistency in his or her suppression hearing testimony, counsel should renew the request for the transcript. If the court once again denies the request, counsel should ask that the court reporter read back the relevant portion of the prior testimony. A failure on counsel's part

to make use of the read-back remedy may be viewed later as proof that the denial of the transcript was not prejudicial to the respondent's defense at trial. See, e.g., In the Matter of David K., 126 Misc.2d at 1064, 485 N.Y.S.2d at 184.

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

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

When the prosecution pursues such an interlocutory appeal, a respondent who has been detained pending trial must be "released pending such appeal unless the court, upon conducting a hearing, enters an order continuing detention." F.C.A. § 330.2(9). Even when the trial judge conducts such a hearing, a respondent should not be detained, except in the rarest of cases. "Since the presentment agency may appeal an order granting suppression only if it simultaneously files a statement that the suppression has in effect destroyed the case, ... it is unlikely that in most cases sufficient cause remains to justify continued confinement." Practice Commentary to F.C.A. § 330.2. Cf. People v. Surretsky, 67 Misc.2d 966, 968, 325 N.Y.S.2d 31, 34 (Sup. Ct., N.Y. Co. 1971) ("[w]here possible, a defendant should not be compelled to serve a prison sentence where there is any [possibility that the defendant will prevail on appeal].... It is unnecessary to emphasize the obvious that success on appeal is no recompense to one who has served all or part of his sentence.").

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

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

VII. Suppression-Related Issues That May Arise At Trial

A. Admissibility of Suppression Hearing Testimony at Trial

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

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

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

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

"Upon granting a motion to suppress evidence, the court must order that the evidence in question be excluded." F.C.A. § 330.2(5). The prosecution cannot use or refer (either directly or indirectly) to any suppressed evidence in its case-in-chief at trial. See, e.g., People v. Ricco, 56 N.Y.2d 320, 323, 342, 452 N.Y.S.2d 340, 342 (1982). Depending upon the basis for suppression, however, the prosecutor may be able to use suppressed statements "to impeach the credibility of a [respondent] who chooses to take the stand to testify in contradiction of the contents of the flawed statements." Id. This is true with respect to statements suppressed on Miranda grounds (Harris v. New York, 401 U.S. 222 (1971); People v. Wilson, 28 N.Y.3d 67, 69, 72, 41 N.Y.S.2d 466, 466-67, 468-69 (2016); People v. Washington, 51 N.Y.2d 214, 433 N.Y.S.2d 745 (1980)), or right-to-counsel grounds (see Kansas v. Ventris, 129 S. Ct. 1841 (2009)). Suppressed statements are not available for use in impeachment if the basis for suppression was a violation of the due process doctrine of involuntariness (see Mincey v. Arizona, 437 U.S. 385, 398, 402 (1978); People v. Wilson, 28 N.Y.3d at 72, 41 N.Y.S.2d at 468-69; People v. Washington, 51 N.Y.2d at 320, 433 N.Y.S.2d at 747), or the Fifth Amendment's protections against compelled testimony (see New Jersey v. Portash, 440 U.S. 450, 458-59 (1979)).

Counsel can argue that statements suppressed as the fruits of a violation of F.C.A. § 305.2's special procedures for interrogating juveniles should not be available to the prosecution for impeachment purposes. There are essentially two independent doctrinal bases for exempting a suppressed statement from the Harris doctrine (which permits the use of suppressed statements for impeachment): (i) if, in addition to being suppressed, "the trustworthiness of the evidence [fails to] satisf[y] legal standards," Harris v. New York, 401 U.S. at 224; or (ii) if, as in the due process involuntariness context, the police method of "`extract[ing] ... [the statement] offend[s]' [the applicable legal standards]" (People v. Washington, 51 N.Y.2d at 220, 433 N.Y.S.2d at 747, quoting Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)) in that "the behavior of the State's law enforcement officials was such as to overbear [the accused's] will to resist and bring about confessions not freely self-determined" (Rogers v. Richmond, 365 U.S. at 544). Under either of these criteria, a statement suppressed for violation of F.C.A. § 305.2 should be deemed unavailable for impeachment purposes. The failure to follow the procedures the Legislature deemed essential for interrogation of a child renders the resulting statement "untrustworthy," in the sense that it may well be "the product of adolescent fantasy, fright, or despair." In re Gault, 387 U.S. 1, 45 (1967). And when the police subvert the procedures designed to provide young people with the guidance and support of an "adult relative ... [who can] give[] [the respondent] the protection which his own immaturity could not" (Gallegos v. Colorado, 370 U.S. 49, 54 (1962)), the police are acting in a manner that, by intention or effect, will "overbear [the accused's] will to resist and bring about confessions not freely self-determined" (Rogers v. Richmond, 365 U.S. at 544).

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

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

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

Similarly, the New York courts have held that even when the judge "has already denied a [Wade] motion to suppress and determined that the pretrial [identification] procedure was not constitutionally defective," the accused is nonetheless entitled at trial "to attempt to establish that the pretrial procedure was itself so suggestive as to create a reasonable doubt regarding the accuracy of that identification and of any subsequent in-court identification." People v. Ruffino, 110 A.D.2d 198, 203, 494 N.Y.S.2d 8, 12 (2d Dept. 1985). Accord People v. Aponte, 204 A.D.3d 1031, 167 N.Y.S.3d 154 (2d Dept. 2022) (applying *Ruffino*); People v. Catricone, 198 A.D.2d 765, 766, 604 N.Y.S.2d 365, 366 (4th Dept. 1993) ("At trial a defendant may attempt to establish that a pretrial identification procedure was so suggestive as to create a reasonable doubt regarding the subsequent lineup and in-court identifications.").

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

hearing by requiring that the testimony at the Huntley hearing be repeated at the fact-finding hearing." Id. at 181, 492 N.Y.S.2d at 901.

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

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

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

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

It is only with respect to Mapp issues that the judge may be able to limit the respondent's right to present testimony at trial regarding issues resolved in the pretrial suppression hearing. A police officer's failure to obtain a warrant for a search or seizure will not ordinarily be relevant

to the issues at trial. However, defense counsel can invoke Crane v. Kentucky at trial to bring out facts previously elicited at a Mapp hearing whenever the police officer's credibility is at issue in the trial and defense counsel wishes to cross-examine the officer about the search or seizure for the purpose of impeaching the officer's credibility. Thus, for example, where the respondent is charged with possession of contraband and the police officer testifies to the possession, the defense is entitled to attack the officer's credibility by cross-examining about suspicious aspects of the officer's version of the facts surrounding the search or seizure.