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MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Speedy Trial

Gary Solomon
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SPEEDY TRIAL

By: Gary Solomon

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If a case is not adjusted, probation must notify the presentment agency within forty-

eight hours or the next court day, whichever occurs later. FCA §308.1(10). There is no statutory time period within which the presentment agency must file a petition after the case has been referred for prosecution.

Although post-filing speedy trial deadlines make a Sixth Amendment speedy trial violation unlikely [see People v. Taranovich, 37 N.Y.2d 442, 373 N.Y.S.2d 79 (1975); Matter of Khamari P., 179 A.D.3d 697 (2d Dept. 2020), lv denied 35 N.Y.3d 907 (under circumstances, including adjournments to which defense counsel consented, approximately 8-month delay between filing of petition and commencement of fact-finding hearing did not violate constitution); Matter of Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (1st Dept. 1979)], a constitutional due process claim can be raised if there is an undue delay *before* filing. See Matter of Benjamin L., 92 N.Y.2d 660, 685 N.Y.S.2d 400 (1999) (Taranovich balancing test must be applied while keeping in mind special characteristics of juveniles and juvenile proceedings); Matter of Isaiah L., 169 A.D.3d 907 (2d Dept. 2019) (dismissal order upheld where arrested took place November 7, 2017 and petition was filed March 9, 2018; while charges were serious - included attempted first degree robbery and criminal possession of weapon - and respondent did not demonstrate prejudice, presentment agency failed to establish legitimate reason for delay); In re Kalah O., 154 A.D.3d 615 (1st Dept. 2017), lv denied 31 N.Y.3d 901 (no speedy trial violation where presentment agency provided sufficient explanation for delay of less than 10 months and respondent failed to demonstrate prejudice); Matter of Gordon B., 83 A.D.3d 1164, 920 N.Y.S.2d 798 (3d Dept. 2011) (no speedy trial violation where respondent's cousins alleged that, during late July or early August 2009, respondent engaged in anal sexual conduct with them by forcible compulsion, respondent was arrested in August 2009, Probation Department referred matter to presentment agency in September 2009, and presentment agency filed petition in March 2010; family court found "good faith miscommunication between the [victim's] parents . . . and the prosecuting attorney" regarding whether prosecutor was waiting for parents to obtain medical records, and court also considered serious nature of charges, fact that respondent was just 12 years old at time of alleged incidents, and fact that if respondent committed the alleged acts, he may have special mental or emotional needs and rehabilitation would be required); Matter of

Richard JJ., 66 A.D.3d 1152, 888 N.Y.S.2d 627 (3rd Dept. 2009) (constitutional violation found where police interviewed respondents and took statements from them and then arrested them on October 1, 2007; Probation Department referred matter to prosecutor later in October 2007; and prosecutor did not file petitions until April 21, 2008; while prosecutor alleged that delay was attributable to need to obtain additional documents from police and to consult with District Attorney's office, documents were not required to file petition, and although case may have been complex, prosecutor offered no explanation for waiting several months to contact District Attorney's office for assistance or why petitions were not filed until several months after contacting that office); In re Alfred R., 52 A.D.3d 323, 861 N.Y.S.2d 283 (1st Dept. 2008), lv denied, 11 N.Y.3d 706 (no constitutional speedy trial violation where presentment agency provided sufficient excuse for delay in filing and respondent was not prejudiced; facts from JRP appellate brief - upon arrest on rape charges on July 6, 2006, respondent admitted having sexual intercourse with complainant, who was pregnant, but presentment agency decided not to file until baby was born and DNA testing could establish that respondent was father, and did not file until more than 9 months after baby was born); In re Louis P., 304 A.D.2d 501, 757 N.Y.S.2d 740 (1st Dept. 2003) (no violation where presentment agency provided reasonable excuse for 7 ½-month delay and no prejudice shown); In re Kelvin R., 298 A.D.2d 183, 748 N.Y.S.2d 46 (1st Dept. 2002) (no violation where presentment agency delayed for 7 months while making efforts to secure affidavit from non-English speaking victim); In re Jamie D., 293 A.D.2d 278, 739 N.Y.S.2d 816 (1st Dept. 2002) (petition dismissed where presentment agency was given opportunity to but failed to explain extensive delay - almost 6 months, according to JRD brief on appeal); Matter of K.C.T., (Fam. Ct., Nassau Co., 2019) (hearing ordered to determine reason for delay and any prejudice to defense where presentment agency filed 7 months after arrest and 15 months after police first interviewed complainant; court notes that initial delay before arrest is relevant, that if sex crime charges are proven it is likely respondent has mental and/or emotional needs requiring rehabilitation and additional services, that court requires more information regarding presentment agency's blanket statement that police attempted to apprehend respondent multiple times and alleged fourteen attempts to obtain cooperation

from complainant's parents to have her videotaped statement reduced to writing, and that respondent has raised troublesome allegations about complainant changing details of incident during 15-month delay and concerns that complainant's memory will only worsen); Matter of Clive C., 16 Misc.3d 791, 842 N.Y.S.2d 303 (Fam. Ct., N.Y. Co., 2007) (no constitutional violation found where 2007 petition alleged 1999 sex crimes against respondent's step-brother; court notes that complainant's mother first became aware of alleged abuse five years after it allegedly occurred and her plan for mediation and therapy was understandable given family dynamics and decision not to allow respondent and complainant to be alone together, and that respondent has made no showing of specific prejudice and complainant's account is detailed as to time, place and sequence of events); Matter of J.R., 6 Misc.3d 1006(A), 800 N.Y.S.2d 348 (Fam. Ct., Nassau Co. 2005) (no speedy trial violation where presentment agency delayed about 6 weeks before filing); Matter of Christine B., 5 Misc.3d 1026(A), 799 N.Y.S.2d 159 (Fam. Ct., Queens Co.) (dismissal denied where petition charged incidents committed over period of almost 15 months, but, inter alia, victim's mother was trying to resolve matter with respondent's mother); Matter of Hershel L., 182 Misc.2d 507, 698 N.Y.S.2d 842 (Fam. Ct., Orange Co., 1999) (dismissal ordered where presentment agency filed charges more than 5 months after receiving case, volume of agency's work did not justify delay, and agency did not consider charges important enough to preclude probation for respondent in other cases); Matter of Manon, 131 Misc.2d 749, 501 N.Y.S.2d 591 (Fam. Ct., Delaware Co., 1986) (due process violation found where presentment agency delayed filing petition for 39 weeks); Matter of Anthony P., 104 Misc.2d 1024, 430 N.Y.S.2d 479 (Fam. Ct., N.Y. Co., 1980); see also People v. Wiggins, 31 N.Y.3d 1 (2018) (court dismisses where more than six-year delay resulted from People's attempt to get co-defendant to testify under cooperation agreement and from three trials that did not result in conviction of co-defendant on top count of murder, court notes that People do not have unfettered discretion to indefinitely pursue evidence that would strengthen case; that extraordinary delay not in itself decisive but demands close scrutiny of other factors, especially reason for delay; and that defendant suffered presumptive prejudice since excessive delay compromises reliability of trial in ways that neither party can prove or even identify and

may disrupt defendant's life in various ways); People v. Decker, 13 N.Y.3d 12, 884 N.Y.S.2d 662 (2009) (no dismissal where People decided to defer prosecution for several reasons, including witnesses' fear of testifying and desire to conduct further investigation given condition of witnesses and lack of physical evidence against defendant; subsequent decision to bring charges was not abuse of "the significant amount of discretion that the People must of necessity have"); People v. Montague, 130 A.D.3d 1100 (3d Dept. 2015) (United States Attorney and state District Attorney were coordinate arms of state in criminal law enforcement field and delay occasioned by one was chargeable to both; crimes were serious, but it should not be assumed that all serious offenses require slow and careful preparation that justifies extended delay).

In support of such a claim, the child's attorney should point out that criminal defendants have a statutory speedy trial right which attaches on the date the defendant appears in response to a desk appearance ticket. See People v. Stirrup, 91 N.Y.2d 434, 671 N.Y.S.2d 433 (1998).

II. Speedy Initial Appearance

If the respondent is detained, the initial appearance must occur within seventy-two hours after the petition is filed or on the next court day, whichever is sooner. If the respondent is released, the initial appearance must occur "as soon as practicable and, absent good cause shown, within ten days after a petition is filed." If a warrant has been issued, the period during which the warrant is outstanding is excluded from the ten-day calculation if the respondent's location cannot be determined by the exercise of due diligence, or, if the respondent's location is known, his or her presence cannot not be obtained by the exercise of due diligence. FCA §320.2(1). The remedy for an untimely initial appearance is dismissal, but the petition may be refiled. See Matter of Robert O., 87 N.Y.2d 9, 637 N.Y.S.2d 329 (1995). And, when the second petition is filed the 10-day period within which an initial appearance must occur begins to run on the filing date of the second petition. See In re Steven S., 238 A.D.2d 226, 657 N.Y.S.2d 10 (1st Dept. 1997)

It appears that a motion to dismiss is timely if it is made within the 30-day limit prescribed in FCA §332.2. See Matter of Atthis D., 205 A.D.2d 263, 618 N.Y.S.2d 904

(1st Dept. 1994); but see Matter of Daniel B., 129 A.D.3d 1152 (3d Dept. 2015) (where initial appearance was attempted within 10 days of filing but respondent failed to appear and may not have been served with petition, his counsel did appear and offered no opposition to court's suggestion that it reissue process and adjourn initial appearance, and respondent appeared on adjourned date five days later and failed to object to timeliness of initial appearance and waived right to speedy trial, respondent could not complain of belated initial appearance); Matter of Kevin G., 159 Misc.2d 288, 604 N.Y.S.2d 669 (Fam. Ct., Queens Co., 1993) (failure to raise speedy initial appearance claim at initial appearance constituted waiver).

When co-respondents have different initial appearance dates, the 60 days begin running for each respondent on the date of his/her own initial appearance, not on the date of the first initial appearance. Matter of Andre P., 11 A.D.3d 617, 783 N.Y.S.2d 639 (2d Dept. 2004).

III. Post-Filing Delay When Respondent Is Released

A. The 60-Day Rule - "If the respondent is not in detention the fact-finding hearing shall commence not more than [60] days after the conclusion of the initial appearance ...." FCA §340.1(2).

1. Conclusion Of Initial Appearance - Ordinarily, the initial appearance concludes when counsel is assigned and a trial date is set. So that counsel can appear, the court may adjourn the initial appearance for 72 hours or until the next court day, whichever is sooner. FCA §320.2(3). When a longer adjournment is ordered, it can be argued that the 60 days start running on the date the initial appearance should have been completed.

2. Removal Cases - "For the purposes of this section, in any case where a proceeding has been removed to the family court pursuant to an order issued pursuant to [CPL §725.05], the date specified in such order for the defendant's appearance in the family court shall constitute the date of the initial appearance." FCA §340.1(3).

This rule was designed for juvenile offender cases, in which the criminal court

papers go directly to the courtroom for an initial appearance, and there is no pre-filing adjustment process (see FCA §308.1[13]) or presentment agency discretion to delay or decline prosecution. If, because of administrative error, a juvenile offender case appears before a judge for the first time after the date specified in the removal order, we are free to argue that the speedy trial clock started running on the day the case should have appeared on the calendar. This could affect the date by which a probable cause hearing must be held or the fact-finding hearing must commence. In addition, removal cases are not excused from the requirement in FCA §320.2(3) that the initial appearance be completed no later than one court day after its commencement.

By its terms, §340.1(3) applies to adolescent offender removals. However, in cases in which the respondent is not in detention post-removal, application of §340.1(3) could be challenged since the case will go first to probation, and then to the presentment agency if there is no adjustment. In other words, although the first appearance "in the family court" always involves a judge in juvenile offender removals and in adolescent offender removals when the respondent is in detention, that is not going to be the practice in adolescent offender removals when the respondent is not detained. In those cases, application of §340.1(3) arguably makes no sense, and the speedy trial clock should start as it usually does when a petition is filed and there is a formal initial appearance.

There is a contrary argument to be made. First, the language in §340.1(3) is plain, and the Legislature has created no other means of calculating speedy trial deadlines when an adolescent offender case is removed. Moreover, application of §340.1(3) will not lead to unfairness or confusion when a case is delayed by the adjustment process. In Matter of Aaron J., 80 N.Y.2d 402 (1992), the Court of Appeals held that the speedy trial clock is tolled when the court refers a case back to probation for post-filing adjustment pursuant to FCA §320.6(3). And, there is no inherent unfairness in starting the clock immediately after probation refers a case to the presentment agency, particularly given the fact that the DA's office was able to file an accusatory instrument in criminal court and the presentment agency already knows about the case. Application of §340.1(3) will not affect deadlines - e.g., for discovery or motion practice - that are calculated from the date when the formal initial appearance before a judge concludes.

3. Effect Of Court-Ordered Probation Adjustment - Speedy trial time does not run while a case is with the probation department after the court has referred the matter for adjustment pursuant to FCA §320.6(3). Matter of Aaron J., 80 N.Y.2d 402.

B. Adjournments - On motion by the respondent or the presentment agency, or on its own motion, the court may, for good cause shown, adjourn the case for not more than 30 days. See Matter of Joseph O., 305 A.D.2d 743, 760 N.Y.S.2d 241 (3rd Dept. 2003) (adjournments of excessive length constituted speedy trial violation); Matter of Gregory C., 202 A.D.2d 273, 608 N.Y.S.2d 655 (1st Dept. 1994).

1. Adjournments Within 60-Day Limit - If, on the trial date, the court adjourns the case to a date that is within the 60-day limit, good cause is not required. See Matter of Saul H., 234 A.D.2d 223, 651 N.Y.S.2d 517 (1st Dept. 1996) (in any event, court could have commenced hearing rather than order dismissal); Matter of James T., 220 A.D.2d 352, 633 N.Y.S.2d 279 (1st Dept. 1995); Matter of Bryant J., 195 A.D.2d 463, 600 N.Y.S.2d 128 (2d Dept. 1993). See also Matter of David P., 106 A.D.3d 745 (2d Dept. 2013) (court erred in dismissing petition on “day 60” due to absence of complainant where complainant’s father had stated to prosecutor that he had “mixed up the court dates” and sent complainant to school, and that complainant could appear that afternoon); Matter of Tierra H., 83 A.D.3d 837, 920 N.Y.S.2d 428 (2d Dept. 2011) (order dismissing petition reversed where matter was scheduled for 11:30 a.m. on “day 60," and court dismissed petition at 12:13 p.m. after prosecutor informed court she had just spoken to complainant's father, who indicated that complainant was going to wrong address, and that she had given complainant's father correct address and he indicated he would promptly contact complainant); Matter of Sheldon M., 48 A.D.3d 814, 853 N.Y.S.2d 139 (2d Dept. 2008) (family court erred in dismissing petitions 30 minutes after scheduled time of 10:00 a.m. because complainant had not appeared, but prosecutor had spoken to complainant's mother the night before and been assured he would appear, and he did appear at 11:00 a.m., having been delayed in transit); Matter of Iola C., 262 A.D.2d 558, 692 N.Y.S.2d 418 (2d Dept. 1999) (court did not need good cause to adjourn the case until the afternoon on the 60th day when the complainant failed to appear in the morning due to a miscommunication and could have appeared shortly after noon).

2. Good Cause Finding On Record - The court must state the reason for any adjournment on the record. FCA §340.1(5); Matter of Frank C., 70 N.Y.2d 408, 522 N.Y.S.2d 89 (1987). Thus, even if good cause could have been demonstrated, and indeed is demonstrated after-the-fact when the respondent moves to dismiss, the case is subject to dismissal if good cause does not appear on the record prior to the 60th day. However, as long as the grounds for the adjournment appear on the record, the court is not required to utter the words "good cause." See Matter of Jamar A., 86 N.Y.2d 387, 633 N.Y.S.2d 265 (1995).

3. What Is Good Cause? - Good cause was not found when there were excessive delays related to assignment of counsel, Matter of Ronald D., 215 A.D.2d 757, 627 N.Y.S.2d 434 (2d Dept. 1995), when the presentment agency attorney was engaged in another trial, Matter of James H., 193 A.D.2d 384, 597 N.Y.S.2d 53 (1st Dept. 1993), when the presentment agency attorney was unavailable due to a pre-planned training program, In re Manuel R., 271 A.D.2d 242, 707 N.Y.S.2d 34 (1st Dept. 2000), when the court and the parties were engaged in "settlement discussions," Matter of Michelle BB., 186 A.D.2d 856, 588 N.Y.S.2d 55 (3rd Dept. 1992), and when an institutional custodian failed to produce the child because of a shortage of personnel. Matter of Detrece H., 164 A.D.2d 306, 563 N.Y.S.2d 797 (1st Dept. 1990) (DFY's failure to produce respondent did not constitute good cause); but see In re David W., 241 A.D.2d 388, 660 N.Y.S.2d 419 (1st Dept. 1997) (special circumstances found where respondent could not be produced by authorities from distant location due to severe weather conditions); Matter of Jamal D., 232 A.D.2d 203, 648 N.Y.S.2d 23 (1st Dept. 1996) (good cause found where presentment agency did all it could to have Department of Social Services produce respondent from foster care).

Good cause also does not exist when a witness is absent due to a vacation or other professional or personal plans of which the presentment agency had or should have had adequate notice, or the presentment agency fails to present adequate details. Compare Matter of Dashaun W., 266 A.D.2d 465, 698 N.Y.S.2d 700 (2d Dept. 1999) (good cause where, 2 days before hearing, prosecutor learned that officer was on vacation); Matter of Leonard G., 209 A.D.2d 263, 618 N.Y.S.2d 348 (1st Dept. 1994)

(good cause where complainant's mother, who had been reliable in past, called and said she would bring complainant after he registered for school, but they did not appear) and Matter of Michael M., 201 A.D.2d 288, 607 N.Y.S.2d 277 (1st Dept. 1994) (good cause where presentment agency learned of witness' vacation 2 days before trial) with In re Julius P., 26 A.D.3d 151, 809 N.Y.S.2d 27 (1st Dept. 2006) (no good cause where presentment agency made bare claim that one officer was on “special assignment” and the other officer was on a regular day off); Matter of Rogelio H., 307 A.D.2d 294, 763 N.Y.S.2d 754 (2d Dept. 2003) (no good cause where (according to facts as they appear in child’s attorney’s brief on appeal) prosecutor, who had notified detective 12 days earlier of the court date, received no report from the detective and did not learn until the previous court day that detective was on vacation); In re Darius P., 269 A.D.2d 140, 703 N.Y.S.2d 8 (1st Dept. 1999) (prosecutor’s unsupported claim that it was officers’ regular day off was not good cause) and Matter of Snap, 125 Misc.2d 314, 479 N.Y.S.2d 332 (Fam. Ct. Queens Co., 1984) (officer on vacation). See also People v. Harrison, 171 A.D.3d 1481 (4th Dept. 2019) (People charged with delay where witness was on pre-paid vacation); People v. Ricart, 153 A.D.3d 421 (1st Dept. 2017) (People failed to exercise due diligence where prosecutor learned of witness’s vacation before witness had bought ticket, and witness indicated willingness to work with prosecutor in scheduling vacation, but no one tried to contact witness until after he had left on vacation); People v. Onikosi, 140 A.D.3d 516 (1st Dept. 2016), lv denied 28 N.Y.3d 1074 (where police witness who was member of Army Reserve was serving on active duty overseas and then was being treated for injury received in Iraq, People exercised due diligence by checking on and providing information regarding officer’s status); People v. Gonzalez, 184 Misc.2d 719, 711 N.Y.S.2d 697 (Sup. Ct., N.Y. Co., 2000) (“it is rather doubtful that a witness’ being out of touch with the prosecutor constitutes unavailability within the meaning of the statute”).

Good cause was found where the child’s attorney requested time for discovery and motion practice, Matter of Willie E., 88 N.Y.2d 205, 644 N.Y.S.2d 130 (1996); cf. Matter of Dora P., 68 A.D.2d 719, 418 N.Y.S.2d 597 (1st Dept. 1979) (court excludes period motion to dismiss was pending), where the judge unexpectedly was ill, Matter of Andre C., 249 A.D.2d 386, 671 N.Y.S.2d 122 (2d Dept. 1998), lv denied 93 N.Y.2d 810, 694

N.Y.S.2d 632 (1999), where the elderly complainant was ill and there was inclement weather, In re Angel N., 33 A.D.3d 391, 822 N.Y.S.2d 75 (1st Dept. 2006), where the complainant did not appear because of his mother's misunderstanding of the trial date despite being subpoenaed about one month in advance and contacted again a few days before trial date by prosecutor, Matter of Jallah J., 127 A.D.3d 972 (2d Dept. 2015), where the complainant did not appear because of a mistaken belief that he would lose his job if he missed work, Matter of Paul N., 244 A.D.2d 490, 664 N.Y.S.2d 130 (2d Dept. 1997), lv denied 91 N.Y.2d 809, 670 N.Y.S.2d 403 (1998), where the complainant moved and had to be located, In re Paublo C., 246 A.D.2d 352, 667 N.Y.S.2d 713 (1st Dept. 1998), where the complainant had appeared on a prior date, and the presentment agency had subpoenaed her and called her home and parents' place of work, Matter of Barbara S., 253 A.D.2d 825, 677 N.Y.S.2d 507 (2d Dept. 1998), where the complainant may have failed to receive the subpoena, forgotten to come to court or misunderstood the subpoena's directive, Matter of James T., supra, 220 A.D.2d 352, where the Wade hearing could not be completed because of, inter alia, an evidentiary application made by respondent's counsel, Matter of William A., 219 A.D.2d 494, 631 N.Y.S.2d 314 (1st Dept. 1995), where the court needed time to prepare its decision after a Mapp hearing, Matter of Levar A., 200 A.D.2d 443, 607 N.Y.S.2d 238 (1st Dept. 1994), where the prosecutor became ill on the Friday before the Monday trial date, Matter of Umar C., 205 A.D.2d 770, 614 N.Y.S.2d 38 (2d Dept. 1994), and where a case which was expected to be settled suddenly returned to trial posture. Matter of Rodney R., 236 A.D.2d 228, 653 N.Y.S.2d 23 (1st Dept. 1997).

Since the Family Court Act evinces a preference for a single fact-finding hearing, good cause may be found where one respondent is ready to proceed but another is not. See Matter of Davonte B., 44 A.D.3d 763, 844 N.Y.S.2d 68 (2d Dept. 2007) (where respondent failed to demonstrate good cause to sever case from that of co-respondent, court properly adjourned fact-finding hearing for 30 days to secure appearance of co-respondent); In re Michael S., 261 A.D.2d 343, 690 N.Y.S.2d 426 (1st Dept. 1999), lv denied 94 N.Y.2d 752, 700 N.Y.S.2d 425 (court properly adjourned case 7 days beyond deadline because of co-counsel's vacation where there was no basis for severance); In

re Robert S., 259 A.D.2d 339, 687 N.Y.S.2d 26 (1st Dept. 1999) (good cause where there were ongoing pretrial proceedings involving co-respondent); see also People v. Sutton, 227 P.3d 437 (Cal. 2010) (one defense counsel's engagement in another trial was good cause supporting delay beyond statutory speedy trial deadline of defendant's and co-defendant's joint trial); People v. Nowell, 62 Misc.3d 1221(A) (Sup. Ct., N.Y. Co.,2019) (unreasonable delay caused by co-defendant's effort to obtain favorable plea offer and her consent to adjournments, while defendant repeatedly proclaimed desire for expeditious trial).

When seeking an adjournment, the child's attorney should be prepared to show that a good faith effort was made to be ready for trial. See Matter of Snap, supra, 125 Misc.2d 314. Cf. Matter of Carlos T., 187 A.D.2d 38, 593 N.Y.S.2d 180 (1st Dept. 1993) (since substitute attorney was willing to proceed, prior requests for adjournment due to assigned attorney's illness "ultimately proved -- once the threshold of the statutory deadline was crossed -- to be spurious").

C. Successive Adjournments - "Successive motions to adjourn a fact-finding hearing shall not be granted in the absence of a showing, on the record, of special circumstances ...." FCA §340.1(6). Such adjournments cannot be for more than thirty days. Matter of Gregory C., supra, 202 A.D.2d 273.

1. Adjournments Within 90 Days - The statutory rule authorizing a 30-day good cause adjournment permits a delay in trial until the 90th day. Nevertheless, once a case has been adjourned beyond the 60-day limit, any further adjournment, even to a date within the 90-day period, requires special circumstances. Matter of Nakia L., 81 N.Y.2d 898, 597 N.Y.S.2d 638 (1993).

2. Adjournments Requested By Different Parties - In Matter of Nakia L., supra, 81 N.Y.2d 898, the Court of Appeals held that an adjournment is "successive" even if it follows an adjournment obtained by the other side. But a prior request for an adjournment by the opposing party may be relevant to the special circumstances determination. Compare Matter of Orlando G., 113 A.D.3d 766 (2d Dept. 2014) (special circumstances found where respondent's mother failed to appear and guardian ad litem was appointed, and guardian ad litem's scheduling conflicts prevented him from being

present on first adjourned date) with In re Tashaba D., 24 A.D.3d 148, 805 N.Y.S.2d 336 (1st Dept. 2005) (pre-deadline delay "is an issue to be considered generally," but is not material to post-deadline good cause determination).

3. Special Circumstances Finding On Record - Special circumstances must be established on the record before the adjournment. FCA §340.1(5); Matter of Frank C., supra, 70 N.Y.2d 408. But see Matter of Jamar A., supra, 86 N.Y.2d 387 (court need not utter the words "special circumstances" if grounds for adjournment appear on record).

4. What Are Special Circumstances? - Special circumstances "shall not include calendar congestion or the status of the court's docket or backlog." FCA §340.1(6). See Matter of Juan V., 160 A.D.2d 303, 553 N.Y.S.2d 397 (1st Dept. 1990) (no special circumstances where judge was unable to schedule case prior to his vacation due to heavy calendar); see also People v. Superior Court, _P.3d_, 2023 WL 4444079 (Cal. Ct. App., 4th Dist., 2023) (dismissal justified where COVID-related backlog had been resolved by time case was dismissed and court was in period of chronic, pre-COVID congestion and delay caused by lack of judges); People v. Engram, 240 P.3d 237 (Cal. 2010) (unavailability of judge or courtroom due to chronic shortage of resources not adequate grounds for delay).

Special circumstances were not found where the presentment agency had no explanation for the complainant's absence, Matter of Nakia L., supra, 81 N.Y.2d 898, where the court needed additional time to render a written decision on a suppression motion, Matter of Erick B., 200 A.D.2d 447, 607 N.Y.S.2d 7 (1st Dept. 1994), where the complainant was unable to appear due to an out-of-state vacation, Matter of David C., 189 A.D.2d 553, 592 N.Y.S.2d 25 (1st Dept. 1993) (court notes that presentment agency failed to diligently attempt to secure presence of complainant prior to his departure), where there was a re-assignment of the case to a new prosecutor, an unverified allegation that a witness was ill, and missing Rosario material, Matter of Vincent M., 125 A.D.2d 60, 512 N.Y.S.2d 54 (1st Dept. 1987), aff'd 70 N.Y.2d 793, 522 N.Y.S.2d 107, where the presentment agency mistakenly believed that the case involved another complainant, Matter of Malik O., 158 Misc.2d 272, 598 N.Y.S.2d 688 (Fam. Ct. Kings Co., 1993), where

the complainant forgot to appear, Matter of Rodney M., 130 Misc.2d 928, 498 N.Y.S.2d 272 (Fam. Ct. Richmond Co., 1986), and where the complainant was out of the country with his family, the District Attorney's office "rotated" a new ADA to handle the case, and hurricane Gloria struck. Matter of Steven C., 129 Misc.2d 946, 494 N.Y.S.2d 658 (Fam. Ct. N.Y. Co., 1985). See also People v. Friday, 160 A.D.3d 1052 (3d Dept. 2018) (time not excluded where People did not exercise due diligence in ascertaining whether detective could appear despite scheduled mandatory training program); People v. Jenkins, 58 Misc.3d 150(A) (App. Term, 2d Dept., 2018) (People charged with period when arresting officer allegedly was out sick but People failed to show that officer's testimony would be material and address defendant's argument that officer's partner could have provided necessary testimony); People v. Aquino, 189 Misc.2d 572, 734 N.Y.S.2d 371 (Crim. Ct., N.Y. Co., 2001) (5-day period during which officers were allegedly unavailable due to World Trade Center attack not excluded from speedy trial computation where officers were not material witnesses and People failed to indicate when officers would be available).

Special circumstances were found where the respondent unexpectedly appeared while a warrant was outstanding and the court set a new trial date to accommodate counsel and unavailable witnesses, Matter of Jamar A., supra, 86 N.Y.2d 387, where an officer was already on vacation when respondent was returned on a warrant and detained, Matter of Jay R., 259 A.D.2d 436, 688 N.Y.S.2d 127 (1st Dept. 1999), where the judge was unavailable due to an unanticipated illness), Matter of Andre C., supra, 249 A.D.2d 386, where a prosecution witness was ill, In re David R., 3 A.D.3d 348, 769 N.Y.S.2d 893 (1st Dept. 2004), lv denied 2 N.Y.3d 703, 778 N.Y.S.2d 462; Matter of Irene B., 244 A.D.2d 226, 664 N.Y.S.2d 42 (1st Dept. 1997), lv denied 93 N.Y.2d 810, 694 N.Y.S.2d 632 (1999), where the complainant's brother had died, In re David R., 3 A.D.3d 348, where the presentment agency was trying to extradite respondent from Philadelphia and a superseding petition was filed when respondent was returned on a warrant, Matter of Garrett T., 224 A.D.2d 308, 638 N.Y.S.2d 39 (1st Dept. 1996), where the complainant, who had appeared on time on 2 occasions, had to leave, and respondent arrived late on 2 occasions, Matter of Shameeka W., 300 A.D.2d 594, 755 N.Y.S.2d 82 (2d Dept. 2002),

where there was a prior history of defense requests for adjournments that gave the complainant's grandmother reason to assume the matter would be adjourned again and to send the complainant to school), Matter of Jamel C., 302 A.D.2d 457, 755 N.Y.S.2d 97 (2d Dept. 2003), where counsel for the respondent, In re David R., 3 A.D.3d 348, or a co-respondent, Matter of Christiana R. H., 90 A.D.3d 926 (2d Dept. 2011) (court notes preference for single fact-finding hearing), was ill, and where there was documentation establishing that one officer was out of the state on annual leave and the other was ill, and respondent's counsel had used "questionable" tactics in obtaining prior adjournments. Matter of Carlos T., supra, 187 A.D.2d 38. When it is the child's attorney who is asking for the adjournment, it would be wise to "come forward with [a] cogent reason" rather than rely upon a general and vague assertion that additional time is needed for preparation. See Matter of Steven R., 182 A.D.2d 356, 357, 582 N.Y.S.2d 117 (1st Dept. 1992), lv denied 80 N.Y.2d 754, 587 N.Y.S.2d 906 (since respondent had already received one adjournment to locate witnesses, additional adjournment was properly denied).

D. "Commencement" Of Trial

1. Prosecutorial Readiness - Appellate Division decisions hold that the speedy trial statute has been complied with as long as the trial "commences" within applicable time limits. See In re Alizia McK., 25 A.D.3d 429, 808 N.Y.S.2d 657 (1st Dept. 2006) (post-commencement delays not improper where hearing was "long and complicated"; respondent objected only to 2-week adjournment to accommodate prosecutor's wedding and honeymoon, and court properly declined to require appearance of new prosecutor who would have been unfamiliar with case); In re David R., 3 A.D.3d 348, 769 N.Y.S.2d 893 (1st Dept. 2004), lv denied 2 N.Y.3d 703, 778 N.Y.S.2d 462; Matter of George T., 290 A.D.2d 396, 736 N.Y.S.2d 673 (1st Dept. 2002), rev'd 99 N.Y.2d 307, 756 N.Y.S.2d 103 (2003) (First Department notes: "However, we take a dim view of the court's taking of evidence for only a short period of time, especially when dealing with a juvenile who is incarcerated. We are aware of the huge number of cases in Family Court and appreciate the difficulties attendant thereto but find there is no excuse for the taking of testimony for five minutes or half an hour at a time and then continuously adjourning

the case"; in reversing based on pre-trial delay, the Court of Appeals also criticized the "piecemeal" nature of the proceedings); Matter of Ango H., 286 A.D.2d 500, 729 N.Y.S.2d 631 (2d Dept. 2001); Matter of Stephen H., 251 A.D.2d 664, 676 N.Y.S.2d 187 (2d Dept. 1998); Matter of Delila M., 238 A.D.2d 342, 656 N.Y.S.2d 306 (2d Dept. 1997) (all essential witnesses need not be present at commencement of trial); Matter of Malik Y., 231 A.D.2d 731, 647 N.Y.S.2d 859 (2d Dept. 1996), lv denied 89 N.Y.2d 817, 659 N.Y.S.2d 857 (1997) (no good cause for adjournment where court could have commenced Wade hearing with a witness who was present); Matter of Raymond B., 160 A.D.2d 936, 554 N.Y.S.2d 661 (2d Dept. 1990). See also In re David G., 249 A.D.2d 50, 673 N.Y.S.2d 59 (1st Dept. 1998) (court erred in dismissing case at 11:20 a.m. in absence of prosecutor where complainant was due at 12:00 and prosecutor was ready to proceed at 11:30); Matter of Lawrence C., 152 A.D.2d 693, 543 N.Y.S.2d 750 (2d Dept. 1989) (court erred when it dismissed petition after presentment agency indicated readiness to proceed at 5:10 p.m. on 90th day).

The speedy trial statute is violated when the court fails to commence trial before the speedy trial deadline because a key prosecution witness is unavailable, but the court could have timely commenced trial with another witness. Matter of Ronald T., 23 A.D.3d 567, 807 N.Y.S.2d 601 (2d Dept. 2005).

The Court of Appeals has not ruled on the question of whether commencing trial by merely asking a witness a few questions or offering a document into evidence constitutes a constructive violation of the statute. In a related context, the Court of Appeals held in People v. Sibblies, 22 N.Y.3d 1174 (2014) that the time period between an off-calendar declaration of readiness and the People's statement of unreadiness at the next court appearance may not be excluded from the speedy trial period unless unreadiness is caused by an exceptional fact or circumstance.

There are reasons to think the Court of Appeals would not follow the Appellate Division decisions regarding the perfunctory commencement of trial. There are a number of reasons to think that court might take a different view, and thus defense attorneys should consider seeking leave.

FCA §340.1(4) provides that whenever the court "adjourns" a fact-finding hearing,

specified time limits must be observed. Section 340.1(4) makes no distinction between pre-trial and mid-trial adjournments, nor is there any other indication in the speedy trial statute that § 340.1(4) applies to some adjournments, but not to others.

Clear evidence of the Legislature's understanding of the term "adjourn" can be found in FCA §325.1, which governs the timing of a probable cause hearing. Subdivision two of §325.1 provides that the "hearing shall be held within three days following the initial appearance or within four days following the filing of a petition, whichever occurs sooner," and subdivision three provides that "the court may adjourn the hearing for no more than an additional three court days." However, §325.2(4) provides that the hearing "should be completed at one session. In the interest of justice however, it may be *adjourned* by the court, but no adjournment may be for more than one court day" (emphasis added). In other words, §325.2(4), which permits a one-day delay after the commencement of the probable cause hearing, refers to that delay as an "adjournment." There is no reason to think the term means something else in §340.1(4) in the absence of a clearly expressed legislative intent.

Indeed, why would the Legislature, having created an extremely strict speedy trial rule in juvenile delinquency proceedings, fail to address delays after the commencement of the fact-finding hearing? Obviously, it would be patently unfair to provide full protection under the statute to respondents whose fact-finding hearings have not commenced, while exposing to additional and possibly lengthy periods of detention those respondents whose hearings have perfunctorily been "commenced" with a few questions on direct examination.

In Schall v. Martin, 467 U.S. 253 (1984), in which the Supreme Court upheld the constitutionality of preventive detention under New York's Family Court Act, the Court appears to have assumed that the statutory speedy trial limits apply after commencement of the fact-finding hearing. The Court noted:

> Thus, the maximum possible detention under 320.5(3)(b) of a youth accused of a serious crime, assuming a 3-day extension of the factfinding hearing for good cause shown, is 17 days. The maximum detention for less serious crimes, again assuming a 3-day extension for good cause shown, is six days. These time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from

> improper influences pending the speedy disposition of his case (emphasis supplied).

467 U.S. at 270.

The Court of Appeals has used the terms "adjournment" when referring to mid-trial delay. See, e.g., People v. Almonor, 93 N.Y.2d 571, 579 (1999); People v. Singleton, 41 N.Y.2d 402, 405 (1977). The definitions of "adjournment" and "continuance" in Black's Law Dictionary are virtually indistinguishable. An "adjournment" is "a putting off of a court session or other meeting or assembly until a later time," while a "continuance" is "[t]he adjournment or postponement of a trial or other proceeding to a future date."

Because of this risk of unfairness, other courts have interpreted speedy trial statutes in a manner which precludes even overburdened judges from attempting to evade speedy trial requirements by "commencing" trial and then quickly ordering an adjournment. In Rhinehart v. Municipal Court, 35 Cal.3d 772 (1984), the Supreme Court of California found a speedy trial violation where the court impaneled a jury on the speedy trial deadline to avoid a dismissal, and then adjourned the case six days. After noting that the speedy trial statute provides that the accused is entitled to dismissal if he is "brought to trial" beyond the specified time, the Supreme Court held that an accused is "brought to trial" "when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion. The court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn" (emphasis added). 35 Cal.3d at 780. This approach "discourages trial courts from merely paying lip service to the legislative mandate. . . ." 35 Cal.3d at 779. Moreover, the speedy trial statute "would be rendered a nullity if, under the guise of bringing an accused to trial, a court were permitted to impanel a jury and subsequently delay the case without good cause." 35 Cal.3d at 784. The court "was not available or ready to try the case to conclusion," "was involved in another trial which took precedence," and "interrupted [that] trial. . . to conduct jury selection." 35 Cal.3d at 780-781. See also People v. Hajjaj, 50 Cal.4th 1184 (2010) (relying on Rhinehart); Stroud v. Superior Court, 23 Cal.4th 952, 969 (2000) ("postponements or interruptions arising from. . . chronic or routine court congestion caused by improper court administration or by the

state's failure to provide the judges and facilities necessary to meet the foreseeable caseload, is no excuse for infringing an individual defendant's rights to expeditious treatment").

Federal appeals courts have reached similar results in cases involving 18 U.S.C § 3161(c)(1), which requires that trial be "commenced" within seventy days after the filing date of the indictment or arraignment, whichever is later. For example, in United States v. Crane, 776 F.2d 600 (6th Cir. 1985), the court concluded that trial did not "commence" for speedy trial purposes when a Magistrate began voir dire, and then adjourned the trial for thirteen days. See also United States v. Fox, 788 F.2d 905 (2d Cir. 1986).

However, regardless of whether the speedy trial statute applies after the commencement of trial, the court retains the authority to determine in its discretion that the respondent's *or the presentment agency's* request for an adjournment should be denied, and then conclude the trial and dismiss the petition if there is insufficient evidence in the record. See, e.g., Matter of Hynes v. George, 76 N.Y.2d 500, 561 N.Y.S.2d 538 (1990) (upholding trial court's power to deny People's request for adjournment, proceed to trial, and dismiss on prima facie grounds even though prosecution's "time to prepare their case under CPL §30.30 had not yet lapsed"; "a trial court is not 'obligated to grant every adjournment requested by a prosecutor simply because statutory or constitutional time limitations have not expired'"); People v. Gumbs, 42 Misc.3d 149(A) (App. Term, 2d Dept., 2014), lv denied 23 N.Y.3d 1037 (court properly dismissed charges after commencement of trial where police witness was on vacation and out of the country and People failed to submit proof); People v. Valentin, 27 Misc.3d 19, 898 N.Y.S.2d 755 (App. Term, 2d, 11th & 13th Jud. Dist., 2010), lv denied 15 N.Y.3d 758 (no abuse of discretion in denial of People's request for fifth adjournment, and resulting suppression order and dismissal of case, where People offered no explanation for one failure of officer to appear and explanations for officer's two other absences (dates corresponded to officer's "regular day off" and attendance at promotion ceremony), which showed lack of diligence in selecting adjournment dates, and although court had declared next adjournment "final" as to prosecution, People asserted only that officer had been assigned to "election detail"); People v. Edwards, 3 A.D.3d 504, 771 N.Y.S.2d 145 (2d Dept. 2004), lv denied

2 N.Y.3d 762 (defense request for continuance to secure testimony of officer who inspected crime scene was properly denied); Grotto v. Herbert, 316 F.3d 198 (2d Cir. 2003) (habeas petitioner was not denied due process where trial court refused to allow him to present additional evidence after he rested, since it was not clear that the witnesses could provide admissible evidence, and, with respect to the first proposed witness, no explanation was offered as to why the witness was not called earlier); People v. Moutinho, 146 A.D.2d 650, 536 N.Y.S.2d 549 (2d Dept. 1989), lv denied 73 N.Y.2d 980, 540 N.Y.S.2d 1014 (one-week adjournment properly denied where defense counsel had already received an adjournment to subpoena the witness, and delayed the adjournment request until 2 days after the witness failed to appear in response to subpoena); People v. Green, 140 A.D.2d 370, 527 N.Y.S.2d 856 (2d Dept. 1988), lv denied 73 N.Y.2d 977, 540 N.Y.S.2d 1011 (1989) (adjournment properly denied where defendant had "more than sufficient time to serve the witnesses with subpoenas"); People v. Daniels, 128 A.D.2d 631, 513 N.Y.S.2d 29 (2d Dept. 1987), lv denied 70 N.Y.2d 645, 518 N.Y.S.2d 1037 (1987) (adjournment properly denied where defendant had more than one week during trial to subpoena officer and an even greater period of time prior to trial); People v. Africk, 107 A.D.2d 700, 484 N.Y.S.2d 55 (2d Dept. 1985) (continuance properly denied where defendant had already had one-week continuance to obtain a different witness). And, the presentment agency will not be able to appeal such a dismissal order. See FCA §§ 365.1, 365.2.

Before concluding the case, the court would have to strike the testimony of any prosecution witness who has not been fully cross-examined. People v. Cole, 43 N.Y. 508 (1871); People v. Chan, 110 A.D.2d 158, 493 N.Y.S.2d 778 (2d Dept. 1985), lv denied 66 N.Y.2d 920, 498 N.Y.S.2d 1035; Diocese of Buffalo v. McCarthy, 91 A.D.2d 213 (4th Dept. 1983).

In a juvenile delinquency proceeding, the trial ordinarily "commences" when the first witness is sworn. Cf. CPL §40.30(1)(b). But see In re Jaquan A., 45 A.D.3d 305, 846 N.Y.S.2d 88 (1st Dept. 2007), lv denied, 10 N.Y.3d 707 (fact-finding hearing commenced even though court made erroneous decision to admit evidence; court also notes that detective was available to testify and thus presentment agency was in position to

commence hearing with testimony); Matter of Richard S., 195 Misc.2d 752, 761 N.Y.S.2d 779 (Fam. Ct., Queens Co., 2003) (hearing “commenced” with unsworn testimony of complainant). Consequently, whenever the prosecution is not "ready" for trial because of missing witnesses, but can "commence" the trial by calling one witness, some judges will swear the witness, and, sometimes without even taking testimony concerning the charges, adjourn the case. In Matter of Frank C., supra, 70 N.Y.2d 408, the Court of Appeals noted that, unlike CPL §30.30, the more protective FCA speedy trial rules do not focus on the timing of a prosecutor's statement of readiness. At the same time, it can be said that the court should not do an "end run" around speedy trial requirements by swearing a witness despite the prosecutor's failure to provide an adequate explanation for the absence of necessary witnesses, or at least provide fact-based assurances that the missing witnesses will be available in the immediate future. Cf. People v. Kendzia, 64 N.Y.2d 331, 486 N.Y.S.2d 888 (1985) (People must make explicit statement of readiness, and, in fact, be presently ready to proceed).

The commencement of a suppression hearing does not constitute the commencement of “trial”; thus, the speedy trial statute continues to apply. See Matter of George T., supra, 99 N.Y.2d 307 (although good cause existed when suppression hearing commenced, delays caused by, inter alia, court’s decision to compel testimony of additional witness resulted in speedy trial violation); In re Kaliek G., 137 A.D.3d 570 (1st Dept. 2016) (dismissal order reversed where, on day 90, court allotted only two hours to complete suppression hearing, hold independent source hearing if needed, and commence fact-finding hearing, and, after ordering suppression, failed to find special circumstances and adjourn matter to following morning; court would not allow independent source hearing to proceed at 4:00 p.m. when complainant was available and presentment agency was ready to proceed; and, on previous date, defense counsel needed to cut proceedings short due to hearings in other parts); In re Isaac A., 117 A.D.3d 573 (1st Dept. 2014) (petition properly dismissed where presentment agency’s inability to complete suppression hearing within time limit resulted from inadequate preparation and lack of reasonable measures to insure readiness); Matter of Jabare B., 93 A.D.3d 719 (2d Dept. 2012) (speedy trial violation where respondent was detained while suppression

hearing lasted approximately seven weeks, only two witnesses testified in a piecemeal fashion during eight court dates, and, although one eleven-day adjournment was caused by vacation scheduled by defense counsel, respondent repeatedly objected to adjournments, several of which were due to court congestion); Matter of William A., 219 A.D.2d 494, 631 N.Y.S.2d 314 (1st Dept. 1995) (Wade hearing could not be completed because of, inter alia, evidentiary application made by respondent's counsel); Matter of Levar A., 200 A.D.2d 443, 607 N.Y.S.2d 238 (1st Dept. 1994) (court needed time to prepare decision after Mapp hearing); Matter of James H., 193 A.D.2d 384, 597 N.Y.S.2d 53 (1st Dept. 1993) (while concluding that absence of presentment agency attorney due to engagement in other case was not good cause, court notes that even if presentment agency had been ready, only a suppression hearing was before the court).

Finally, unusually extensive delays post-commencement could violate the respondent's Sixth Amendment speedy trial right. Cf. Betterman v. Montana, 136 S.Ct. 1609 (2016) (Sixth Amendment speedy trial guarantee applies from time of arrest or formal accusation and throughout trial, but detaches upon conviction and does not apply at sentencing stage).

2. Absence Of Rosario Material - Pursuant to CPL §240.45(1)(a) [see FCA §331.4(1)(a)], the prosecution must turn over its witnesses' prior statements ("Rosario material") before any testimony is taken. In People v. Anderson, 66 N.Y.2d 529, 498 N.Y.S.2d 119 (1989), the Court of Appeals held that the People may properly be considered "ready" for purposes of CPL §30.30 despite the absence of Rosario or other discovery material. The court noted that a failure to turn over Rosario material in a timely fashion may result in the imposition of sanctions pursuant to CPL §240.70. However, dismissal is not required unless the defendant's general speedy trial rights (see CPL §30.20) would not be adequately protected by a preclusion order or a short continuance for production of the missing material.

Similarly, it might be argued that, when the absence of Rosario material is not justified by good cause or special circumstances, the court need not dismiss the case, but may commence a delinquency hearing and then make necessary and appropriate orders remedying the Rosario violation. See Matter of Rodney D., 28 A.D.3d 661, 812

N.Y.S.2d 380 (2d Dept. 2006), lv denied 7 N.Y.3d 750 (absence of Rosario material did not prevent commencement of trial); In re Robert S., 259 A.D.2d 339, 687 N.Y.S.2d 26 (1st Dept. 1999) (court commenced hearing and offered to permit complainant to be recalled upon production of 911 tape); Matter of Shawn L., 234 A.D.2d 197, 651 N.Y.S.2d 496 (1st Dept. 1996) (court erred in denying presentment agency a 2-hour continuance so officer could obtain memo book). If the material is produced late, the court could allow the respondent to conduct further questioning of witnesses, and, if the respondent could not demonstrate prejudice, the court's action would be sustainable on appeal. See People v. Ranghelle, 69 N.Y.2d 56, 511 N.Y.S.2d 580 (1987); People v. Forrest, 163 A.D.2d 213, 558 N.Y.S.2d 60 (1st Dept. 1990), aff'd 78 N.Y.2d 886, 473 N.Y.S.2d 458 (1991).

On the other hand, since a suppression hearing must be concluded before the fact-finding hearing can commence [FCA §330.2(3)], a suppression hearing delay occasioned by a prosecutor's failure to provide Rosario material or other discovery may not be permissible. See Matter of Travis Mc., 64 A.D.3d 781, 882 N.Y.S.2d 662 (2d Dept. 2009) (petition dismissed where Presentment Agency failed to order copy of 911 tape and have it available for suppression hearing).

3. Mistrials

The commencement of the first trial does not satisfy the speedy trial statute when a mistrial is later declared; as before trial commenced, the deadline is measured from the date of the initial appearance. Matter of Ronald T., supra, 23 A.D.3d 567 (relevant facts do not appear in Second Department's decision, but can be found in JRD brief).

E. Superseding Petitions - The 60-day speedy trial period runs from the date of the initial appearance in the first proceeding when a new petition has replaced one that was dismissed because of an untimely initial appearance, Matter of Willie E., supra, 88 N.Y.2d 205 (without such a rule, policy favoring speedy determinations would be subject to abuse), or because the petition was jurisdictionally defective. Matter of Willie E., supra; Matter of Tommy C., 182 A.D.2d 312, 588 N.Y.S.2d 916 (2d Dept. 1992); Matter of Shannon FF., 189 A.D.2d 420, 596 N.Y.S.2d 219 (3rd Dept. 1993). Presumably, under Willie E., the same rule applies when an amended petition has been filed. Matter of Gabriel R., 208 A.D.2d 984, 617 N.Y.S.2d 541 (3rd Dept. 1994).

Arguably, periods of time which were excluded from speedy trial calculations in the first proceeding because of a defense waiver are also excluded in the subsequent proceeding. See People v. Sinistaj, 67 N.Y.2d 236, 501 N.Y.S.2d 793 (1986). However, it has been held that the accused cannot give binding consent to delays in the refiling of an accusatory instrument. People v. Ruparelia, 187 Misc.2d 704, 723 N.Y.S.2d 843 (Poughkeepsie City Ct., 2001).

F. Waiver Of Speedy Trial Rights - Just as a clear objection suffices in other contexts, an objection to an adjournment on the ground that no good cause/special circumstances have been shown should preserve the issue for appeal. However, a motion to dismiss also should be made. Matter of Brandon S., 169 A.D.3d 1047 (2d Dept. 2019) (respondent failed to preserve claim because he did not move to dismiss in family court); In re Traekwon I., 152 A.D.3d 431 (1st Dept. 2017) (speedy trial claim unpreserved where no motion was made to dismiss petition on that ground). caused

The respondent certainly waives compliance with speedy trial rules by requesting, or expressly consenting to, an adjournment. See Matter of Willie E., supra (child's attorney's request for time for discovery and motions arguably was good cause, or constituted a waiver); People v. Lewins, 151 A.D.3d 575 (1st Dept. 2017) (where, in course of plea negotiations, prosecutor asked defense counsel to waive 30.30 from arraignment date, counsel's response, "I'd be inclined to waive from today, but if you insist on [arraignment date] that's acceptable," constituted waiver of entire period even though prosecutor never responded and said "I insist"); Matter of Ryan LL., 119 A.D.3d 994 (3d Dept. 2014), lv denied 25 N.Y.3d 904 (counsel's requests to file motions which would delay fact-finding hearing beyond deadline resulted in waiver); Matter of Joseph CC., 234 A.D.2d 852, 651 N.Y.S.2d 697 (3rd Dept. 1996); Matter of Hiram D., 189 A.D.2d 730, 592 N.Y.S.2d 739 (1st Dept. 1993); Matter of Raymond B., supra, 160 A.D.2d 936 (counsel for detained respondent agreed to 5-day adjournment after probable cause hearing). See also People v. Smith, 82 N.Y.2d 676, 601 N.Y.S.2d 466 (1993) (extension of adjournment because defense counsel was unavailable on date requested by People was not on consent); People v. Rivas, 78 A.D.3d 739, 909 N.Y.S.2d 766 (2d Dept. 2010) (court is obligated to grant adjournment on consent only when satisfied that postponement is in

interest of justice, taking into account public interest in prompt dispositions of charges); People v. Baumann, 38 A.D.3d 452, 834 N.Y.S.2d 28 (1st Dept. 2007), lv denied 9 N.Y.3d 840 (defendant consented to adjournment where People announced they were not ready, but defense counsel also indicated a lack of readiness); People v. Matthews, 227 A.D.2d 313, 642 N.Y.S.2d 682 (1st Dept. 1996) (additional delay caused by defense counsel's expressed preference for a later date was excludable); People v. Battaglia, 187 A.D.2d 808, 589 N.Y.S.2d 694 (3rd Dept. 1992) (since defendant could not be produced prior to deadline, counsel's agreement to appear on next date did not constitute waiver).

The events giving rise to a waiver must appear on the record. Cf. Matter of Sherman WW., 198 A.D.2d 549, 603 N.Y.S.2d 203 (3rd Dept. 1993).

However, the United States Supreme Court has held that the federal speedy trial statute does not permit a blanket, prospective waiver of all speedy trial protection. Zedner v. United States, 547 U.S. 489, 126 S.Ct. 1976 (2006).

Another type of waiver occurs when the respondent agrees that the next court date will constitute a particular numbered day for speedy trial purposes. See, e.g., Matter of Moenysha W., 3 Misc.3d 842, 775 N.Y.S.2d 463 (Fam. Ct., Queens Co., 2004).

In criminal cases, defense counsel's silence and even participation in the selection of a new date does not constitute consent and make the delay excludable for CPL §30.30 purposes. People v. Barden, 27 N.Y.3d 550 (2016) (when People request adjournment to specific date and defense counsel is unavailable and requests later date, but court is unavailable on later date and even longer adjournment results, defendant does not consent to portion of delay attributable to court congestion; indication that date proposed by court is convenient - e.g., ambiguous comment such as "that should be fine" - does not constitute clear consent and likely signals nothing more than counsel's availability on proposed date); People v. Dickinson, 18 N.Y.3d 835 (2011) (defendant did not waive rights under CPL §30.30 by participating in plea negotiations for several months; mere silence is not a waiver); People v. Liotta, 79 N.Y.2d 841, 580 N.Y.S.2d 184 (1992) (consent must be clearly indicated).

There have been some mixed signals in juvenile delinquency cases, but the clearest holdings, including those that distinguish between a failure to preserve, and

consent, suggest that silence is not a waiver. Compare In re Traekwon I., 152 A.D.3d 431 (court finds no preservation in absence of motion to dismiss, and notes that, in any event, there was consent); Matter of Yarras F., 5 A.D.3d 481, 772 N.Y.S.2d 563 (2d Dept. 2004), lv denied 3 N.Y.3d 606 (same as Traekwon I.); Matter of Joseph O., 305 A.D.2d 743, 760 N.Y.S.2d 241 (3rd Dept. 2003) (respondent made no "outright" waiver); Matter of Jamar A., 207 A.D.2d 251, 615 N.Y.S.2d 34 (1st Dept. 1994), rev'd on other grounds 86 N.Y.2d 387, 633 N.Y.S.2d 265 (1995) (no waiver where child's attorney merely said "thank you" after court selected date) and Matter of Michelle BB., supra, 186 A.D.2d at 857 (child's attorney "never specifically agreed" to date) with Matter of Din C., 240 A.D.2d 341, 659 N.Y.S.2d 759 (1st Dept. 1997) (child's attorney's silence found to be waiver; note that these facts do not appear in First Department's opinion) and Matter of Walter P., 203 A.D.2d 213, 612 N.Y.S.2d 856 (1st Dept. 1994), lv denied 84 N.Y.2d 807, 621 N.Y.S.2d 516 (minutes, which reflected absence of objection, were sufficiently clear to permit conclusion that there was consent). Thus, the most prudent course preservation-wise is to lodge an objection (and, when appropriate, move to dismiss) when an adjournment arguably would violate speedy trial rules and the court has not made an adequate record. On the other hand, if it is patently clear that good cause/special circumstances can be shown, counsel could make a strategic decision to remain silent rather than remind the court to make a record and try to raise the issue on appeal.

The consequences of a consent or requested adjournment or an express waiver of speedy trial rights will be affected by the language used by counsel, and the surrounding circumstances. For instance, if the court or prosecutor suggest an adjournment from a date prior to the speedy trial deadline to a date beyond it, defense counsel might expressly limit any consent or waiver to the period extending beyond the deadline. See Matter of Bernard T., 92 N.Y.2d 738, 686 N.Y.S.2d 338 (1999) (respondent's detention remained lawful on date beyond 3-day deadline because he waived the extra time, but presentment agency would have been required to commence fact-finding hearing that day if respondent was to remain in detention).

A failure to specify what time period is covered by the consent or waiver will result in exclusion of the entire period of the consented-to adjournment from speedy trial time

calculations. Compare Matter of Erika UU., 192 A.D.3d 1367 (3d Dept. 2021) (speedy trial rights violated where waiver was expressly limited to time necessary to complete diagnostic evaluation, and, after court directed that respondent be transferred to secure facility, waiver expired and court did not timely commence hearing) with Matter of Curnelle T., 17 A.D.3d 472, 792 N.Y.S.2d 344 (2d Dept. 2005) (where respondent waived speedy trial and agreed to nearly 2-month adjournment on 43rd day, next court date was 44th day); Matter of Diogenes V., 245 A.D.2d 42, 664 N.Y.S.2d 794 (1st Dept. 1997) and Matter of Jesse QQ., 243 A.D.2d 788, 662 N.Y.S.2d 851 (3rd Dept. 1997), lv denied 91 N.Y.2d 804, 668 N.Y.S.2d 559 (although arraignment took place on January 2, 1996 and trial commenced on May 6, 1996, respondent effectively waived his right to a speedy trial at arraignment).

A waiver must be knowing and voluntary. See In re Kenny U., 297 A.D.2d 573, 747 N.Y.S.2d 166 (1st Dept. 2002) (waiver invalid where respondent consented to adjournment beyond speedy trial limits because he was in non-secure detention, and court refused to permit withdrawal of waiver after changing remand status to secure). Thus, a waiver which follows some misrepresentation by the presentment agency regarding their readiness to proceed should not be effective. See People v. Alfonso, 174 Misc.2d 76, 663 N.Y.S.2d 465 (Crim. Ct., Kings Co., 1997).

Arguably, the court is not bound to accept a waiver. People v. Hauptner, 49 Misc.3d 1209(A) (Crim. Ct., N.Y. Co., 2015) (although parties agreed to exclude period, court rejected waiver because it did not permit consent adjournments; parties' private agreements to adjourn cases are not binding upon court for speedy trial purposes).

G. Effect Of Bench Warrant

1. Background - Prior to 1990, when the respondent failed to appear for trial, and a bench warrant was issued, the case would not re-appear on the court calendar, except perhaps for periodic warrant reports, until the warrant was executed. Then, relying upon the strict holding in Matter of Frank C., supra, 70 N.Y.2d 408 that adjournments must be justified on the record, the First Department held in Matter of Randy K. that, after a bench warrant is issued, the case must re-appear on the court calendar every 30 days so that a finding of special circumstances may be made on the record. In Matter of Randy

K., 77 N.Y.2d 398, 568 N.Y.S.2d 562 (1991), aff'g 160 A.D.2d 338, 554 N.Y.S.2d 100 (1st Dept. 1990), the Court of Appeals affirmed.

After several years of controversy stirred by the Court of Appeals' ruling, Randy K. was legislatively overruled in 1994. Pursuant to FCA §312.2(2), after issuing a warrant the court must adjourn the case for no more than 30 days for a report "on the efforts made to secure the respondent's appearance in court." The court may order an appearance by the person legally responsible for the respondent's care, or, if that person is not available, a person with whom the respondent resides. After receiving the initial report, the court may, for good cause, order further reports and additional appearances by the parent or other custodian. After receiving any report, the court must make written findings of fact as to the efforts made to secure the respondent's appearance in court up to the date of the report.

2. The Due Diligence Requirement

a. Generally - Under FCA §340.1(7):

> ... computation of the time within which such hearing must take place shall exclude the period extending from the date of issuance of the bench warrant for respondent's arrest because of his or her failure to appear to the date the respondent subsequently appears in court pursuant to a bench warrant or appears voluntarily; provided, however, no period of time may be excluded hereunder unless the respondent's location cannot be determined by the exercise of due diligence or, if the respondent's location is known, his or her presence in court cannot be obtained by the exercise of due diligence. In determining whether due diligence has been exercised, the court shall consider, among other factors, the report presented to the court pursuant to subdivision two of section 312.2 of this article.

The 10-day speedy initial appearance rule in FCA §320.2(1) was amended in an identical manner. See generally Matters of E.F., S.L. and J.R., 162 Misc.2d 597, 617 N.Y.S.2d 268 (Fam. Ct. N.Y. Co., 1994) (court discusses speedy trial rights generally, and describes efforts made by authorities in 3 separate cases).

Although the statute seems to contemplate that the "due diligence" issue will be litigated after the respondent is returned to court, there is nothing in the law that expressly

precludes the child's attorney from appearing at a warrant report, arguing that the period of time between the issuance of the warrant and the initial warrant report, or between warrant reports, is not excludable because of the absence of diligent efforts, and then moving for dismissal. In any event, even if a speedy trial claim may not be raised until the respondent appears, the attorney should try to be present in court for any warrant reports, since the information acquired will be helpful in evaluating the merits of a speedy trial claim after the respondent appears.

Particularly when the warrant was outstanding for a lengthy period, the due diligence requirement raises complex legal and factual issues. Lengthy delays may have to be broken down into discrete periods of time so that determinations concerning excludable time can be made. For instance, the authorities may have made concerted efforts during a lengthy period viewed as a whole, yet failed to promptly expend efforts after the warrant was issued. In such a case, the initial portion of the delay would not be excludable. Compare People v. Luperon, 85 N.Y.2d 71, 623 N.Y.S.2d 735 (1995) (69-day delay in assignment of case to officer not excludable where People failed to prove it was reasonable administrative delay); Matter of Yusef B., 268 A.D.2d 429, 702 N.Y.S.2d 314 (2d Dept. 2000) (presentment agency failed to prove that 21 days constituted reasonable administrative delay where prosecutor merely ascertained that warrant had been entered in computer system and been given a number; criminal cases cited by presentment agency involved prosecutorial readiness statute, not the stricter Family Court Act requirements) and Matter of Julian A., 175 Misc.2d 306, 667 N.Y.S.2d 881 (Fam. Ct., N.Y. Co., 1997) (31-day period during which no one visited respondent's home not excludable) with People v. Torres, 218 A.D.2d 757, 631 N.Y.S.2d 44 (2d Dept. 1995), rev'd on other grounds 88 N.Y.2d 928, 646 N.Y.S.2d 790 (1996) (20 days excluded as reasonable administrative delay, but 73 additional days not excludable solely because officer was investigating about 50 warrants); People v. Reid, 214 A.D.2d 396, 625 N.Y.S.2d 171 (1st Dept. 1995) (35-day delay in assignment to officer excluded as reasonable period of administrative processing) and People v. Davis, 205 A.D.2d 697, 613 N.Y.S.2d 668 (2d Dept. 1994) (court excludes portion of administrative delay in receipt of warrant by Warrant Squad). Only a careful examination of the extent and timing of efforts made by

the authorities will yield the necessary facts. And, it is important to note that due diligence must be exercised by law enforcement authorities collectively, not just by the presentment agency. See, e.g., People v. Fuggazzatto, 96 A.D.2d 538, 540, 464 N.Y.S.2d 847, 850 (2d Dept. 1983), order modified 62 N.Y.2d 862, 477 N.Y.S.2d 619 (1984) (any delay after warrant was received by Central Warrant Squad is chargeable to the People, "for it is the District Attorney's responsibility to be cognizant of the progress of a particular case" [citation omitted]). Thus, if the police or members of a warrant squad do not make adequate efforts to locate the respondent, it will not matter that the presentment agency promptly and repeatedly provided information to law enforcement personnel and encouraged them to take action.

b. Adequacy Of Efforts To Determine Respondent's Location - Since the "due diligence" requirement in FCA §340.1(7) is modeled after the requirement in the former CPL §30.30(4)(c) -- due diligence is no longer required under the CPL when a bench warrant is outstanding -- case law under §30.30, as well as case law under FCA §340.1(7), should guide judges in delinquency cases. FCA §303.1(2).

Due diligence has not been exercised when the authorities do not check out a home address that appeared in paperwork available to them. See, e.g., In re Anthony R., 262 A.D.2d 25, 690 N.Y.S.2d 586 (1st Dept. 1999), lv denied 93 N.Y.2d 818, 697 N.Y.S.2d 565; Matter of Satori R., 202 A.D.2d 432, 608 N.Y.S.2d 530 (2d Dept. 1994) (presentment agency failed to dispute respondent's claim that he resided at the address in the petition while the warrant was outstanding); People v. Quiles, 176 A.D.2d 164, 574 N.Y.S.2d 188 (1st Dept. 1991) (criminal history check would have revealed address other than one provided by defendant in connection with his arrest); People v. Taylor, 139 A.D.2d 543, 544, 526 N.Y.S.2d 624, 625 (2d Dept. 1988) (warrant officers obtained 2 incorrect addresses "from the very papers which also bore the defendant's correct address").

After learning that the respondent has moved from a last known address, the authorities must make further efforts. In addition to the respondent's school, known locations frequented by the respondent or at which information could presumably be obtained should be visited. In addition, the authorities should run checks with governmental authorities, such as the Post Office, the telephone company, or public

assistance providers.

Compare People v. Devino, 110 A.D.3d 1146 (3d Dept. 2013) (no due diligence shown where defendant alleged that he had moved and leased apartment at specified address, and that he registered address with various public and private entities and provided supporting documentation, while People alleged that law enforcement made unspecified efforts to locate defendant); People v. Devore, 65 A.D.3d 695, 885 N.Y.S.2d 497 (2d Dept. 2009) (police visited defendant's primary address and spoke to neighbor who indicated that defendant had moved, and visited possible address for defendant's girlfriend where they left business card, but defendant testified that he had been living with grandmother for six years and proffered letters he received at that address from numerous governmental agencies and private companies, and although warrant squad was aware of defendant's Social Security number, it never checked with Social Security Administration, Department of Motor Vehicles, Department of Taxation and Finance, or any other agency to obtain current address for defendant; "Checking with the relevant governmental agencies for the defendant's address is recognized as a reasonable element of such an investigation," and "[s]uch efforts are particularly necessary where, as here, the initial investigation resulted in information that the defendant had moved from his known address"); Matter of Michael C., 262 A.D.2d 318, 690 N.Y.S.2d 460 (2d Dept. 1999), lv denied 93 N.Y.2d 818, 697 N.Y.S.2d 566 (after learning from respondent's sister that she knew his location but would not provide it, presentment agency did not exhaust known leads, and respondent was quickly located when a detective subpoenaed the sister's phone records); In re Anthony R., supra, 262 A.D.2d 25 (no one visited respondent at school); People v. Torres, supra, 218 A.D.2d 757 (officer merely made daily computer checks to see if warrant was still active); People v. Orse, 118 A.D.2d 816, 500 N.Y.S.2d 173 (2d Dept. 1986) (after letter was returned with the stamp, "Returned to Sender, Address Not Known," People made no further efforts to locate defendant, who alleged that he had moved and was residing "openly and notoriously" at a new address) and People v. Peterson, 115 A.D.2d 497, 496 N.Y.S.2d 231 (2d Dept. 1985) (addresses of defendant's mother and children were known but no surveillance was conducted at either address and no effort was made to contact mother or leave word with her, no effort was

made to contact Post Office, telephone company or other utilities, the Social Security Administration, or any other governmental agency, and defendant lived and worked in the area and received public assistance)

with People v. Minwalkulet, 198 A.D.3d 1290 (4th Dept. 2021), lv denied 37 N.Y.3d 1147 (although People would have learned defendant's location more quickly if they had performed more frequent searches of certain law enforcement database, defendant had been on run for 14 years, and police are not obliged to search indefinitely as long as they exhaust all reasonable investigative leads); People v. Maldonado, 210 A.D.2d 259, 619 N.Y.S.2d 730 (2d Dept. 1994) (warrant squad contacted defendant's sister and checked with DMV and Human Resources Administration); People v. Walker, 133 A.D.2d 2, 518 N.Y.S.2d 392 (1st Dept. 1987) (officer left card with female with whom defendant had lived, and checked DMV and Probation records; although officer failed to visit woman who had posted bail for defendant or contact defendant's aunt or foster parents, "[s]imilar routine efforts have been held ... to pass muster, even if they fall short of `those of a police officer remorselessly and relentlessly tracking down a violation of the law'" [citations omitted]); People v. Walters, 127 A.D.2d 870, 511 N.Y.S.2d 957 (2d Dept. 1987) (police canvassed defendant's last known address and left message with superintendent and spoke to other person, sent for past arrest reports, and checked with Post Office) and People v. Manley, 63 A.D.2d 988, 406 N.Y.S.2d 108 (2d Dept. 1978) (efforts, including interviews with letter carrier and neighbors at defendant's last known address, were sufficient).

Once the authorities have made diligent efforts to locate the respondent during the period immediately after issuance of the warrant, and have "thoroughly exhaust[ed] all leads," due diligence has been exercised; the authorities need not search for the respondent indefinitely. See People v. Garrett, 171 A.D.2d 153, 156, 575 N.Y.S.2d 93, 95 (2d Dept. 1991), lv denied 79 N.Y.2d 827, 580 N.Y.S.2d 207 (police visited defendant's last known address, questioned relatives and neighbors, and made other efforts).

c. Adequacy Of Efforts To Obtain Respondent's Presence In Court When Location Is Known

When the respondent has been arrested on other charges and remanded, and is,

therefore, "in the system," the authorities are deemed to have knowledge of the respondent's whereabouts and are responsible for making efforts to have the respondent produced in court. See People v. Lesley, 232 A.D.2d 259, 649 N.Y.S.2d 6 (1st Dept. 1996), appeal dism'd 89 N.Y.2d 954, 655 N.Y.S.2d 881 (State Division of Parole's knowledge that defendant was in custody must be imputed to People); People v. Davis, supra, 205 A.D.2d 697 (People are deemed to have known that defendant was incarcerated); People v. Wojciechowski, 143 A.D.2d 164, 531 N.Y.S.2d 613 (2d Dept. 1988) (no due diligence where face of writ of habeas corpus named wrong jail, and officer failed to read attached petition, which contained correct jail); People v. Ruggiano, 135 A.D.2d 588, 521 N.Y.S.2d 803 (2d Dept. 1987) (People failed to exercise due diligence in obtaining incarcerated defendant's return from Florida where more than 5 months passed before they first discussed return of defendant with Federal authorities in Florida); People v. Billups, 105 A.D.2d 795, 481 N.Y.S.2d 430 (2d Dept. 1984) (lodging of detainer by Westchester authorities and subsequent telephonic requests for defendant's production from Queens were not sufficient where People failed to use available statutory procedures); Matter of Lydell J., 154 Misc.2d 94, 583 N.Y.S.2d 1007 (Fam. Ct. Kings Co., 1992) (presentment agency failed to exercise due diligence in securing appearance of one incarcerated respondent who was in New York, and another who was in Connecticut but could have been returned to New York under the Interstate Compact on Juveniles).

d. Bail Jumping - The respondent cannot be charged with bail jumping after failing to appear. Matter of Natasha C., 80 N.Y.2d 678, 593 N.Y.S.2d 986 (1993).

e. Post-Return-On-Warrant Delay - The presentment agency is entitled to a reasonable period, within the statutory guidelines, to prepare for trial after a warrant has been executed. See People v. Munden, 276 A.D.2d 297, 714 N.Y.S.2d 23 (1st Dept. 2000).

IV. Post-Filing Delay When Respondent Is On Remand

A. A, B and C Felonies - "If the respondent is in detention and the highest count in the petition charges the commission of a class A, B or C felony, the fact-finding hearing

shall commence not more than [14] days after the conclusion of the initial appearance ...." FCA §340.1(1). This rule, and the 3-day rule cited below, apply when the respondent is remanded not at the initial appearance, but on some later date after the respondent is returned on a warrant or violates a condition of parole. In re Martin R., 268 A.D.2d 277, 700 N.Y.S.2d 712 (1st Dept. 2000), lv denied 94 N.Y.2d 937, 708 N.Y.S.2d 352; Matter of Kerry V.M., 267 A.D.2d 1035, 701 N.Y.S.2d 584 (4th Dept. 1999).

B. Other Cases - If the highest count is less than a C felony, the hearing must commence within 3 days. FCA §340.1(1). It appears that weekends and holidays are included in the 3-day (and 14-day) computation. See General Construction Law §20; People ex rel. Barna v. Malcolm, 85 A.D.2d 313, 448 N.Y.S.2d 176 (1st Dept. 1982), appeal dism'd 57 N.Y.2d 675 (interpreting CPL §180.80); People ex rel. Vrod v. Schall, 142 Misc.2d 968, 539 N.Y.S.2d 262 (Sup. Ct. Bronx Co., 1989) (interpreting FCA §325.1[1]). However, if the 3-day (or 14-day) period ends on a weekend or holiday, it appears that the respondent may be held until the next court day. GCL §25-a; People v. Mandela, 142 A.D.3d 81 (3d Dept. 2016), lv denied 28 N.Y.3d 1029 (GCL §25-a applies when last day of six-month period specified by CPL §30.30(1)(a) falls on Saturday, Sunday or legal holiday); Matter of Kerry V.M., supra, 267 A.D.2d 1035; see Matter of D.P., 17 Misc.3d 1106(A), 851 N.Y.S.2d 57 (Fam. Ct., Nassau Co., 2007) (under General Construction Law §20, date petition filed is not counted, and, under General Construction Law §25-a(1), if tenth day falls on Saturday, Sunday or public holiday the deadline extends to next business day); People v. Powell, 179 Misc.2d 1047, 690 N.Y.S.2d 826 (App. Term, 2d Dept., 1999). Although, in the pre-petition detention context, GCA §25-a(1) does not apply [Matter of Kevin M., 85 A.D.3d 920, 925 N.Y.S.2d 194 (2d Dept. 2011)], relying on Kevin M. in the post-filing speedy trial context is problematic because part of the court's rationale in Kevin M. was that FCA Article Three expressly allows for adjournments in other contexts. Nevertheless, particularly when detention is ordered on a Wednesday, the child's attorney should cite Kevin M. in support of an argument that that the case must be heard before the weekend.

C. Adjournments - On motion of the presentment agency or on its own motion, the court may, for good cause shown, adjourn a case for not more than 3 days past the

3 or 14-day limit. FCA §340.1(4)(a). See Matter of Joseph O., 305 A.D.2d 743, 760 N.Y.S.2d 241 (3rd Dept. 2003) (adjournments of excessive length constituted speedy trial violation); In re Jesus M., 255 A.D.2d 220, 680 N.Y.S.2d 234 (1st Dept.) (good cause for one-day adjournment where presentment agency learned on 14th day after initial appearance that pretrial motion had been made by co-respondent); In re Oldalys O., 243 A.D.2d 288, 663 N.Y.S.2d 29 (1st Dept. 1997), aff'd 92 N.Y.2d 738, 686 N.Y.S.2d 338 (1999) (good cause found where there was unanticipated and unavoidable confusion in notification of police witnesses); Matter of Sherrie B., 191 A.D.2d 492, 594 N.Y.S.2d 331 (2d Dept. 1993) (one-day adjournment to determine relevancy of document requested by respondent was proper).

On motion by the respondent, the court may adjourn the case for up to 30 days for good cause shown. FCA §340.1(4)(b). See Matter of Hiram D., supra, 189 A.D.2d 730 (counsel "requested" adjournment when he asked court to put case on for another date).

If "there is probable cause to believe the respondent committed a homicide or a crime which resulted in a person being incapacitated from attending court, the court may adjourn the hearing for a reasonable length of time" on its own or the presentment agency's motion. FCA §340.1(4)(a). See, e.g., Matter of Neron C., 223 A.D.2d 409, 636 N.Y.S.2d 773 (1st Dept. 1996), lv denied 88 N.Y.2d 804, 646 N.Y.S.2d 984 (no violation where trial was held approximately 2 months after initial appearance). Successive adjournments may be granted upon a showing of special circumstances. FCA §340.1(6).

Adjournments within speedy trial limits do not require good cause. See Matter of Andre C., supra, 249 A.D.2d 386.

D. Remedy For Violation - The Court of Appeals has held that, if the respondent is released on the last day of the permissible remand period because the presentment agency is not ready and there is no good cause for an adjournment, there is no speedy trial violation and the 60-day speedy trial requirement is activated. Matter of Bernard T., 92 N.Y.2d 738, 686 N.Y.S.2d 338 (1999).

If the respondent wishes to challenge the legality of continued detention after an adjournment on the ground that the required good cause or special circumstances were not established, the possible remedies are a writ of habeas corpus, or an appeal by

permission. If it is ultimately determined that the respondent was illegally detained, the appropriate remedy is dismissal. Matter of Jamel P., supra, 207 A.D.2d 298; Matter of Russell M., 146 A.D.2d 629, 536 N.Y.S.2d 535 (2d Dept. 1989).

E. Delays After Hearing Commences - Family Court Act §340.1 does not contain any time limits within which a hearing must be completed (but see earlier discussion in connection with delays when respondent is not in detention). Therefore, lengthy delays can be challenged as an abuse of discretion, but not under §340.1. See Matter of Sharnell J., 237 A.D.2d 290, 653 N.Y.S.2d 703 (2d Dept. 1997) (no abuse of discretion where trial concluded 17 days after it commenced); Matter of Raymond B., supra, 160 A.D.2d 936 (where trial commenced on October 18, adjournment to October 24 was not unreasonable).

However, regardless of whether the speedy trial statute applies after the commencement of trial, the court retains the authority to determine in its discretion that the respondent's *or the presentment agency's* request for an adjournment should be denied, and then conclude the trial and dismiss the petition if there is insufficient evidence in the record (see cases cited in connection with delays when respondent is not in detention). And, the presentment agency will not be able to appeal such a dismissal order. See FCA §§ 365.1, 365.2.

The respondent has the right to a timely verdict. See, e.g., People v. Najd Aljonubi, (App. Term, 2d Dept., 9th & 10th Jud. Dist., 2020) (using either date of written decision - 98-day delay - or date defendant was served with decision - 133 days - delay was unreasonable).

F. Habeas Relief

A juvenile who is being detained in violation of his speedy trial rights may seek his release in the Supreme Court in a habeas proceeding. See People ex rel. Chakwin v. Warden, 63 N.Y.2d 120, N.Y.S.2d (1984).

V. Motion Practice

A. Oral Motions - Ordinarily, any "pre-trial motion" described in FCA §332.1 must be made in writing upon notice to the other side in accordance with the CPLR. See FCA §332.2. However, although the definition of "pre-trial motion" includes a speedy trial motion brought pursuant to FCA §310.2, that section makes no reference to §340.1, and codifies a general speedy trial right derived from the federal Constitution. See Sobie, Practice Commentary, FCA §310.2. In addition, although "pre-trial motions" must be filed within 30 days after the conclusion of the initial appearance [FCA §332.2(1)], a speedy trial motion brought pursuant to §340.1 can never be brought within that time. Thus, it is clear that speedy trial motions are not governed by FCA §332.2. Indeed, it is appropriate to make an oral motion at the moment when the judge is deciding whether or not to adjourn a case beyond speedy trial limits. Although the court might ask for a written motion, oral argument concerning the existence of good cause or special circumstances should ordinarily be adequate.

However, when a case is adjourned from a date within the 60-day limit to a date after it, a speedy trial claim does not mature until after the 60th day. Under those circumstances, the child's attorney might wait until after the 60th day to make a motion, and, in that event, should do so in writing. See People v. Ortiz-Hernandez, 22 Misc.3d 1107(A), 2009 WL 81346 (Crim. Ct., N.Y. Co., 2009) (where defendant filed motion to dismiss on day of trial, People were not required to submit written response; court noted that case had relatively simple procedural history, court's records were clear, there was no factual dispute as to what occurred on each adjourned date, and both parties had ample opportunity to argue the uncomplicated motion).

B. Adequacy Of Motion Papers

1. Generally - Since the court is obligated to justify delays past 60 days on the record, a motion alleging unexplained delays beyond statutory limits should not be

summarily denied on the ground that it fails to establish the absence of good cause or special circumstances. Cf. People v. Santos, 68 N.Y.2d 859, 508 N.Y.S.2d 411 (1986). However, if grounds for an adjournment appear on the record, the child's attorney should challenge the adequacy of those grounds in the motion papers.

By failing to raise the issue in Family Court, the presentment agency waives any claim that the respondent's motion papers are inadequate. See People v. Betancourt, 217 A.D.2d 462, 629 N.Y.S.2d 423 (1st Dept. 1995), lv denied 87 N.Y.2d 844, 638 N.Y.S.2d 602.

With respect to whether a failure to timely submit response papers can result in a default, compare People v. Clark, 24 Misc.3d 1220(A), 2009 WL 2138810 (County Ct., Essex Co., 2009) (where defendant showed existence of unexcused delay greater than six months, and People failed to submit papers in opposition and thus conceded allegations of fact; court was required by statute to dismiss) and People v. Barrett, 22 Misc.3d 1134(A), 2009 WL 656277 (Essex County Ct., 2009) (dismissal ordered where defendant alleged unexcused delay in excess of statutory maximum, and People made general reference to alleged adjournment requests by defendant but failed to specify dates or time periods purportedly chargeable to defendant or attach copies of records evidencing adjournments; because People raised no factual issues, court had no choice but to dismiss) with People v. Lora, 177 A.D.3d 518 (1st Dept. 2019), appeal dism'd 35 N.Y.3d 956 (3-judge majority concludes that court erred in refusing to accept People's opposition papers filed on decision date some 15 days after due date, and to reconsider decision to grant defendant's statutory speedy trial motion as unopposed, where this appeared to be isolated lapse; dismissal of numerous weapons possession charges without determination of motion on the merits was unduly harsh; less drastic remedies, including charging People for delay, were available; and delay would not have prejudiced defendant, who was not incarcerated on these charges); People v. Thurston, 9 Misc.3d 136(A), 808 N.Y.S.2d 920 (App. Term, 9th & 10th Jud. Dist., 2005) (court had no authority to grant speedy trial motion on ground that People did not submit papers). See also People v. Bowman, 65 Misc.3d 126 (App. Term, 1st Dept., 2019), lv denied 34 N.Y.3d 1157 (motion properly denied where it was dated, served and made returnable on date case was scheduled for hearing and trial, and thus was not was not made on reasonable

notice to People); People v. Wigfall, 58 Misc.3d 126(A) (App. Term, 1st Dept., 2017) (no error in denial of motion without hearing where defendant failed to refute People's representations regarding officer's unavailability for medical reasons and did not request hearing to challenge representations); People v. Ponce, 34 Misc.3d 1209(A) (County Ct., Sullivan Co., 2012) (motion to dismiss indictment granted where People's opposing papers were served and filed after return date and People did not request extension of time until after return date and after untimely papers were rejected).

2. Bench Warrant Cases - In criminal cases under CPL §30.30, a motion to dismiss is sufficient if it alleges a period of unexcused delay that exceeds statutory limits. It is the People's burden to counter with factual allegations that would, if true, establish time exclusions sufficient to defeat the motion. A dismissal motion may be summarily granted if the People fail to raise a factual dispute concerning excludable time. See People v. Santos, supra, 68 N.Y.2d 859.

Thus, in a case in which there were delays while a bench warrant was outstanding, it appears that the respondent need only submit motion papers establishing that statutory time limits have been exceeded, and is not required to make any factual allegations establishing the absence of due diligence. See People v. Davis, 184 A.D.2d 575, 584 N.Y.S.2d 638 (2d Dept. 1992).

When the respondent alleges unexcused delay and the presentment agency counters with allegations that create a factual dispute, a hearing must be held. If the allegations in the presentment agency's motion papers appear to establish due diligence - presumably, the presentment agency will routinely allude to findings of fact already made by the court - the child's attorney should counter the allegations in some way or risk summary denial of the motion. It might be necessary in some cases to allege, for instance, that the respondent was living continuously at the address appearing in the petition, or that the respondent could easily have been found at school. See People v. Santos, supra, 68 N.Y.2d 859; People v. Wilson, 188 A.D.2d 671, 591 N.Y.S.2d 513 (2d Dept. 1993) (summary denial improper where People provided no factual support for alleged exclusions); People v. Walters, supra, 127 A.D.2d 870 (motion summarily denied where People alleged that police canvassed defendant's last known address, spoke to building superintendent, left message with another person, sent for defendant's past arrest reports

and checked with Post Office); People v. Bing, 61 Misc.3d 1201(A) (City Ct. of Mount Vernon, 2018) (hearing must he held unless People conclusively refute motion by presenting unquestionable documentary proof); see also Matter of Mark D., 250 A.D.2d 678, 672 N.Y.S.2d 891 (2d Dept. 1998) (court erred in dismissing petition on speedy initial appearance grounds without affording presentment agency short adjournment so that it could present witnesses on due diligence issue).

At the hearing, the presentment agency has the burden to show that due diligence was exercised. See People v. Bolden, 81 N.Y.2d 146, 597 N.Y.S.2d 270 (1993).

Obviously, in the absence of statutory or constitutional requirements, the procedures governing the due diligence hearing are largely a matter of judicial discretion. It is not unusual in criminal proceedings for the parties to call witnesses and conduct full cross-examination. In any event, although there appears to be no case law preventing a judge from deciding the matter upon the submission of motion papers and supporting affidavits and documents, it can be argued that the "hearing" required by the case law should ordinarily include live testimony.

VI. Speedy Trial Strategy

A violation of the speedy trial statute provides the ultimate benefit -- dismissal of the petition with prejudice -- even though the available proof of guilt is overwhelming. Yet, the strict time limits in the statute cut both ways; particularly when the respondent is in detention, the statute may not allow the child's attorney sufficient time to prepare. Moreover, delay can be advantageous to the defense, for it provides more time for preparation, allows the respondent to obtain treatment and take other self-improvement measures that increase the likelihood of a favorable disposition, and may result in the loss of crucial evidence by the prosecution. Thus, the right to a speedy trial, embraced unequivocally as soon as it has been violated, also can be waived for strategic advantage. But these defense strategies are well known to the judge and prosecutor, and they too will think strategically about delay. To navigate in this environment, the child's attorney must develop not only a thorough knowledge of statutory speedy trial rules, but also an understanding of when delays are, and are not, likely to result in some benefit to the respondent.

There is no need to advertise at the initial appearance the child's attorney's doubts about being ready to proceed by the speedy trial deadline. The court's failure, without good cause, to timely commence trial will result in the respondent release from detention; thus, the attorney usually should force the presentment agency to produce witnesses before asking for more time. For instance, since weekends are included in the calculation, a Friday remand in a misdemeanor case will require the presentment agency to be ready to proceed by the following Monday, which is not a simple task. If the judge, looking to avoid a speedy trial problem, asks whether the attorney will be ready by Monday, the attorney should indicate, "I will do the best I can, judge," and remind the judge that even if the he/she is not ready, the respondent will be entitled to a probable cause hearing, and so the presentment agency must be ready with witnesses by Monday in any event.

Given the strict time limits, it is the rare case in which the child's attorney cannot articulate a good faith basis for an adjournment on the first trial date, but the attorney's strategy must be tailored to the circumstances. First, the attorney must ascertain whether the presentment agency is ready, and, if it is not, determine the reason and prepare to argue that there is no good cause. If the presentment agency is ready, the attorney must ask for an adjournment if a pretrial motion, such as one seeking suppression, or pretrial preparation of any other kind, is absolutely necessary. In other instances, the attorney should consider whether added preparation time would make any real difference, and, if it would not, consider proceeding in the hope that the presentment agency has in haste prepared a sloppy case that would only get stronger over time. In weighing the options, the attorney should evaluate the actual potential for a speedy trial dismissal in the future if an adjournment is obtained; when only police witnesses are involved -- civilian complainants and witnesses are more likely to lose interest and choose not to appear -- it is likely that no strategic advantage is being forfeited by going to trial.

If going to trial immediately does not provide any advantage -- it will be the rare instance when it does -- the child's attorney should not rush preparation and proceed merely because the respondent is in detention. Usually the respondent will receive credit for time spent in detention if the judge orders placement at disposition. And, from a strategic point of view, if the attorney obtains a "good cause" adjournment the respondent could be released on the next court date if the presentment agency is not ready and

cannot show "special circumstances." Because the respondent and parent are likely to be displeased by any delay, the attorney should explain his/her reasons for requesting an adjournment.

When the respondent is not in detention and delays are not inherently difficult for the juvenile to bear, the child's attorney has more of a free hand in negotiating adjournments. But lengthy delay can be a double-edged sword. The passage of time between the act of delinquency and the dispositional hearing, accompanied by a record of improved behavior, makes it easier for the attorney to argue that the respondent is unlikely to engage in further misconduct should he/she receive a favorable disposition. But those respondents who attend school will lose time to court appearances. Parents will miss time from work, and their jobs may be placed at risk. Ongoing stress generated by the unresolved charges may adversely affect the respondent's emotional health. The lack of immediate sanctions for the delinquent behavior or any meaningful court supervision might increase the likelihood of recidivism.

Accordingly, the child's attorney, while keeping in mind the predilections of the client and the life circumstances of his/her family, must determine in each case whether the advantages of delay outweigh the disadvantages. And, when a strategy of delay is chosen, the attorney should make sure that any necessary social services are provided so that the respondent does not use the time to dig a deeper hole.

Because granting the defense a pretrial adjournment risks dismissal if the presentment agency is not ready the next time, the presentment agency or the judge may attempt to exact from the child's attorney a price, in the form of a waiver, before agreeing to an adjournment. If, for example, an adjournment is requested on the fiftieth day after the initial appearance, an open-ended "waiver" would cause the next court date to be deemed the fiftieth day as well; that day, the presentment agency would be able to obtain an adjournment of up to ten days without even showing good cause. Before agreeing to such a waiver, the attorney must consider the presentment agency's and the judge's likely response to a refusal to waive. If there is a compelling reason why the trial should not begin, and the attorney believes that the particular judge involved will back down rather risk a violation of the respondent's right to the effective assistance of counsel, a refusal to waive may be appropriate.

However, under present law the speedy trial statute ceases to apply, and a relatively loose abuse of discretion standard governs, as soon as the trial "commences" with any testimony by a witness. If the judge is likely to take that route, a waiver becomes more attractive, even when it is the prosecutor or the judge, rather than the child's attorney, who is seeking an adjournment because of a scheduling problem.

The child's attorney should also bargain for a waiver with the most advantageous terms. When an open-ended waiver that includes the entire period of the adjournment -- under the case law, this results whenever the attorney utters the words, "yes, we waive speedy trial" -- would leave the presentment agency protected against dismissal if it is not ready the next time, the attorney should suggest that the next court date be deemed to fall on the speedy trial deadline, and preserve the potential for dismissal if the presentment agency is not ready. For instance, if the case appears in court on the 45th day, and the attorney needs an adjournment until the 75th day, the attorney should attempt to have the next date deemed to be the 60th day, rather than the 45th day, for speedy trial purposes. Otherwise, the prosecution will not have to show good cause to get an adjournment on the next date. Similarly, while a request for a waiver when the prosecution requests an adjournment ordinarily should be rejected, an attorney who is concerned that the trial will be commenced if he/she refuses to waive, and prefers the adjournment, could offer to waive only the discrete time period beyond the statutory deadline.

Rather than abandon speedy trial concerns after the commencement of trial, the child's attorney should remain alert to the new opportunities presented. The presentment agency and the judge take certain risks when they commence trial with a witness's brief testimony and then cease to worry about delays. The witness might be annoyed at having to return and testify on at least two separate days, and choose not to return. Other witnesses may be lost. Double jeopardy protections have been activated, and so any problem that necessitates a mistrial might also preclude further prosecution. And, while the abuse of discretion standard governing post-commencement adjournments provides little protection when the judge's busy calendar is the problem, the standard governing adjournments requested by the presentment agency is friendlier. The court may properly deny the prosecution an adjournment when no adequate excuse is proffered, and force

the prosecution to rest with the evidence presented to that point; thus, the very practice that helps prosecutors and judges achieve technical compliance with the speedy trial statute can result in dismissal when the direct testimony of a necessary witness must be stricken because the witness has failed to return, or when a crucial witness fails to appear at all. And, unlike a pre-commencement speedy trial dismissal, which can be appealed by the presentment agency, a post-commencement dismissal cannot be appealed, a fact the child's attorney should ensure the judge keeps in mind.

In addition, the judge may take the entire direct testimony of the first witness before adjourning the case. This is ideal for the child's attorney, who, rather than being forced to cross-examine the witness on the spot, has an opportunity to order a transcript of the testimony, conduct further investigation, deliberate while under no pressure, and then cross-examine. Thus, if the attorney knows that the judge is likely to deny a request for an adjournment and commence trial, and is likely to do no more than take a witness's direct testimony, it may be unwise for the attorney to trumpet too loudly his/her lack of preparedness lest the judge decide to take only a few minutes of testimony, leaving the attorney with no statutory speedy trial issue, and no discovery.

VII. Post-Appeal Delay

The statute does not address delays in the commencement of trial after a case is remitted for further proceedings by an appellate court. Assuming, *arguendo*, that the statute still applies and the clock starts running again [but see State v. Hull, 853 N.E.2d 706 (Ohio, 2006) (statute does not apply post-appeal)], the child's attorney should argue that the time starts running on the day the appellate court's order is issued. Cf. People v. Wells, 24 N.Y.3d 971 (2014) (People cannot delay retrial for duration of adjournment in trial court after leave to appeal has been denied). See also In re Jermaine J., 6 A.D.3d 87, 775 N.Y.S.2d 287 (1st Dept. 2004) (no due process violation where appeal was decided more than two years after disposition).